[M&A] - Chang-Hyun Song / Byung-Tae Kim

Unsuccessful M&As – Is it possible to recover your performance bond?

Recently, there has been an increase in legal disputes arising in the course of M&A transactions, with respect to the forfeiture of the bid bond (or performance bond) put up by preferred bidders who have been ultimately unable to perform their obligations as an aftermath to the global financial crisis and economic slowdown. Generally, in an M&A where the purchaser is selected through a bidding process, the bidder selected by the seller as the potential purchaser (i.e., the “preferred bidder”) will initially pay a certain percentage of the purchase price to the seller as a bid bond and enter into a memorandum of understanding (“MOU”). Thereafter, the preferred bidder will conduct due diligence of the target company and subsequently, execute the definitive agreements to complete the M&A. The bid bond is required to secure the preferred bidders’ good faith negotiations and performance of obligations. Usually, (i) in the event the M&A transaction is completed, the bid bond will be applied towards payment of the purchase price and (ii) in the event the M&A is discontinued due to a reason not attributable to the preferred bidder, the bid bond will be returned to the preferred bidder. However, M&A transactions may not close for several reasons such as the preferred bidder’s withdrawal of its intention to acquire the target company, request for unreasonable change of the acquisition terms or failure to execute the definitive agreements until the scheduled date. To prevent such circumstances, the MOU between the purchaser and the seller usually contains a clause stating that, in such

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circumstances, the purchaser will forfeit the bid bond and the preferred bidder cannot raise any objections against the seller.

In relation to the legal disputes regarding the forfeiture of the bid bond in accordance with such clause of a MOU, the main issue is whether the amount of bid bond should be reduced. If the legal nature of the bid bond is viewed as expected compensation for damages arising from the failure of one party to perform its obligations, the amount may be reduced by the court (please refer to Article 398(2) of the Civil Act). However, if the bid bond is viewed as a punitive measure used to indirectly coerce the performance of a private transaction between two equal parties, it is difficult for the amount of bid bond to be reduced unless it is against the principles of good morals and social order or mandatory provisions of law. Recently, the Supreme Court has held that the forfeiture of a performance bond equivalent to approximately 5% of the purchase price of the proposed M&A is legitimate (Supreme Court Decision No. 2006DA18969 dated Feb. 14, 2008).

Notwithstanding, the amount of bid bond that can be forfeited in an M&A transaction or even the scope of compensation of damage arising from default of the contracting parties cannot be judged under uniform standards, and must be determined on a case by case basis. Court precedents permit the waiver of certain performance obligations when a substantial change which was unpredictable at the time of entering into the contract occurs and such change is related to the objective circumstances constituting the basis of the contract (and not a change to the subjective circumstance of a party). Recent disputes involving bid bonds in the course of M&As challenge the legitimacy of the forfeiture of bid bonds based on procedural defects (such as the purchaser’s inability to conduct detailed due diligence due to the lack of seller’s cooperation or the discovery of a substantial change in the net asset value upon due diligence) or material change of the assets or business of the target company. Further, in a recent case where the potential purchaser claims damages due to the seller’s breach of its covenant to exclusively negotiate with such potential purchaser under the MOU, the trial court held that the seller was liable for the penalty amount set forth in the MOU in addition to the legal and due diligence expenses incurred by the potential purchaser during the M&A process but subsequently, the appeals court held that the amount of damages to be paid by the seller shall be limited to the amount set forth in the MOU. Accordingly, in a lawsuit or arbitration claiming damages due to the non-performance of obligations or suspension of a transaction, it is necessary for the parties to argue and prove, to the maximum extent possible, the objective facts which are legally meaningful.

In order to prevent the occurrence of such legal disputes or reinforce a party’s rights in an M&A transaction, it is worthwhile for the relevant party to engage legal professionals during the course of negotiations to fully understand the legal significance of the terms and conditions of the MOU or M&A agreements and ensure that terms favorable to such party (for instance, for the buyer, the ability to terminate the contract in the event of any uncontrollable change in economic situations such as a sudden fluctuation of economy or stock plunge or a provision mandating the seller to cooperate in the course of due diligence and performance of other obligations) are appropriately reflected in the relevant agreements.
Amendments and Cases

[Finance] - Byoung Seon Choe

Amendment made to the Financial Holding Companies Act (FHC Act) and the Enforcement Decree of the FHC Act

On July 22, 2009, the National Assembly passed a new bill changing the maximum share ownership in a financial holding company by an industrial conglomerate from the current 4% to 9%.

The purpose of this new bill is to bolster development in both non-banking financial industries - including insurance/financial investments - and banking industries by establishing principles in line with worldwide common business practices, e.g., that a financial holding company without a subsidiary bank, i.e., a non-banking holding company, can have control over a non-financial company. However, there is a five-year grace period (with two-year optional extension) for various restrictions under the new bill. These restrictions include, among others, a minimum share ownership requirement for subsidiaries under the FHC Act applicable in the case of a banking holding company’s conversion to a non-banking holding company, and the prohibition against insurance companies controlling non-financial companies.

In connection therewith, according to the proposed amendments to the Banking Act and the Enforcement Decree of the FHC Act, which came into force on October 10, 2009, if a non-financial company acquires the shares of a bank in excess of 4% of the total number of shares issued by such bank and also participates in the management of the bank by way of appointment of officers, etc., a prior approval of the Financial Services Commission must be obtained. In addition, a non-financial company should acquire the shares of bank with its own funds (and not with loans) and such amount must not exceed its total capital amount.

Furthermore, the new bill abolished the restriction limiting investments by a financial holding company into its subsidiaries by its own capital, therefore permitting a financial holding company to make capital contribution to its subsidiaries through commercial loans. As a result, it is expected that a market for leveraged buyouts for banks may emerge. Further, privatization of government-owned bank holding companies will expand the investment market and such expansion may accelerate sales of shares of some banks of which the government is presently a major shareholder.

Presently, as most major commercial banks (including Kookmin Bank, Woori Bank, Hana Bank, and Standard Chartered First Bank) have already been converted into financial holding companies, this new bill may help Korea’s financial industry to compete on the global stage through relevant measures such as extending the scope of permissible concurrent offices among financial subsidiaries and business entrustment, etc.

In addition, overseas joint investments between a holding company and its subsidiary and the assumption of control by a second-tier subsidiary over its overseas third-tier subsidiary have been permitted. We expect that such permission may well induce some of the financial holding companies to engage more aggressively in overseas expansion.

Since circular shareholding and cross shareholding among related companies, which have been used by founding families to ensure their control over Korean conglomerates (i.e., chaebol), will be prohibited to some extent, the ownership and management structure is expected to be...
made more transparent and simple. Also, more integrated financial supervision will be possible through regulating capital adequacy of a holding company and its subsidiaries under a consolidated standard, executing inspection and supervision as such of the guideline for management, and requiring public disclosure of business reports. According to the amendment to the Enforcement Decree, after the acquisition, the shareholder will be subject to strict scrutiny, such as eligibility review of major shareholder, restrictions on credit extension or other transactions with the bank and the Financial Supervisory Service’s on-site inspection in case of any suspicious unlawful transaction.

Such amendment to the Enforcement Decree came into force from October 10, 2009.

Generally speaking, easing restrictions invites opportunities for investments and businesses. We hope to see growing interests by investors in the Korean financial industry.

The High Court Decision involves a hostile takeover situation where the potential acquirer tried to purchase the shares of the target company (the “Target Company”) held by the employees of the Target Company. As a prevention measure, the defendant, who was the representative director of the Target Company and its controlling shareholder (the “Defendant”), caused a subsidiary of the Target Company (the “First Subsidiary”) to make a loan (the “Loan”) to the subsidiary of the First Subsidiary (the “Second Subsidiary”), enabling the Second Subsidiary to purchase shares of the Target Company from the relevant employees of the Target Company. The issue at hand was whether (i) the act of extending a loan to an affiliate in order to preserve or defend the Defendant’s management control of the Target Company, without any measure to secure the borrower’s obligations under the Loan and (ii) the act of causing a subsidiary to provide collateral in favour of the parent company, without due consideration, for the purpose of facilitating the parent company’s funding efforts, constitute a crime of breach of fiduciary duty. In the trial court, the Defendant was found criminally liable for the breach of fiduciary duty. However, in the appeal filed with the Seoul High Court, in which Shin & Kim represented the Defendant, the Defendant was acquitted of both allegations.

The significance of the High Court Decision is that it was the first judicial decision to ever (i) confirm that a defensive measure against a hostile takeover attempt is permitted if certain requirements are met by such defensive measure, and (ii) recognize the legitimacy of a defensive measure against a hostile takeover attempt on the grounds that such requirements were met (also from the viewpoint of breach of the duty of care as a prudent manager).

Whether defensive measures against hostile takeover attempts should be permitted has been a controversial issue for quite some time.
In the United States, the so-called ‘Unocal Standards’ have been applied. Under the Unocal Standards, a defensive measure against a hostile takeover has been recognized as a justifiable defensive measure if the board of directors proves that (i) there are reasonable grounds for believing that the hostile takeover attempt poses a threat to the corporate policy and efficiency, and (ii) such defensive measure is reasonable in relation to the threat posed by the hostile takeover attempt. In other words, it is a modification of the business judgment rule (under which, based on the assumption that the management’s decision-making should be respected, a person who wishes to challenge the management’s decision is required to provide evidence of the wrongdoing of the directors) in a hostile takeover context whereby the management has the burden of proof to show the legitimacy of the defensive measure taken against a hostile takeover attempt.

In the past, the prevailing court precedents in Korea dealing with this issue held that ‘an act whose main purpose is to preserve or defend management control’ is invalid and applied a so-called ‘Main Purpose Rule’ to determine the legitimacy of defensive measures. However, such ‘Main Purpose Rule’ approach adopted by court precedents was criticized as failing to address the legitimacy of the specific defensive measures and making it difficult for defensive measures themselves to be recognized. Please note that in the past, the legitimacy of a defensive measure taken by the board of directors of a company against a hostile takeover attempt was assessed in consideration of (i) whether the issuance of new shares or disposal of treasury shares to counter such hostile takeover attempt was valid or (ii) whether the shareholders’ voting rights in connection therewith should be recognized. The High Court Decision is the first case dealing with the legitimacy of defensive measures in the context of breach of the directors’ duty of care as a prudent manager.

However, in a recent court case involving defensive measures taken with respect to Hyundai Elevator, the court held that even an act whose main purpose was to defend management control could be recognized as a legitimate defensive measure if certain requirements were met. Further, in a case involving Dong-Ah Pharmaceuticals, the court held that the potential acquirer had the burden of proving that the act in question was indeed to preserve or defend management control and if such burden of proof is met, the company must prove the legitimacy of such defensive measure, appearing to adopt the Unocal Standards of the United States. Nevertheless, these lower court cases did not go as far as to establish the ‘requirements for the legality of defensive measures.’

In contrast, the High Court Decision held that “a defensive measure can be deemed legitimate if (i) appropriate means of defense are used to protect the management control against a threat to the corporate values, including the target company’s short-term and strategic long-term values in effect at the time of such defensive measure (i.e., reasonableness of the purpose and means) and (ii) there are no defects in the procedures for the adoption and exercise of such means of defense, such as the resolutions of the board of directors and the general meeting of shareholders (procedural requirements).” The High Court Decision went further to state that, assuming evidence showing the possibility that the potential acquirer could put an end to the existence of, or extinguish, the business group to which the Target Company belonged to, “since it has been proved that the Loan was made for the purpose of protecting the corporate values and that there were no procedural defects, the extension of the Loan is recognized as a legitimate defensive measure and therefore, does not constitute a breach of the directors’ fiduciary duty.” In sum, the significance of the High Court Decision lies in the fact that it re-confirmed the possibility that defensive measures against hostile takeover attempts could be permitted, and recognized the legitimacy of such defensive acts from the viewpoint of the duty of care as
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a prudent manager, and, most importantly, in that it is the first court precedent in Korea to have ever gone so far as to establish the ‘requirements that constitute a legitimate defensive measure.’

Also, the High Court Decision has significant implications in that it provides new and stricter criteria for interpretation of the requirements for a crime of breach of fiduciary duty.

The High Court Decision raised the issue that “the current approach which assents to the crime of breach of fiduciary duty under criminal law as long as a person is found liable for civil liability for a breach of his or her civil obligations, such as the duty of care as a prudent manager or fiduciary duty, without further inquiry, must be reconsidered.” The High Court Decision added, “It is necessary to take a more prudent approach in a case where a person should be deemed to have criminal liability based simply on the dangerous or risky nature of his or her act even if such person cannot be deemed to have civil liability because no property damage has actually occurred.” By ruling as above, the High Court Decision warns against the discouragement of economic activities that may occur if the scope of a crime of breach of fiduciary duty is broadly recognized in the context of the ‘risk of occurrence of property damage.’

From the above viewpoint, the High Court Decision includes some noteworthy details, as described below:

First, in determining whether a transaction between affiliated companies belonging to the same business group was conducted on an arms-length basis, the High Court Decision held that “consideration should be given to not only the formal elements, such as cash flows and asset values, which are noticeable and can be objectively measured, but also tangible and intangible values which reflect various circumstances such as, among others, the shareholding status between the affiliated companies concerned, business practice, level of association or relationship between such affiliated companies, the continuance of transactions in the future between them, and the terms of the contracts between them” and further stated that “if the transactions concerned are understood as a means of co-existence of such affiliated companies and cannot be deemed to have negative effects on each relevant company from a long-term perspective, it is unreasonable to penalize such transactions as a crime of breach of fiduciary duty.” This is in contrast with court precedents of the past, which held that support provided by a company for its affiliate belonging to the same group was deemed to constitute a crime of breach of fiduciary duty from a formal viewpoint, even if such support was intended to serve the interests of the group as a whole. Thus, the High Court Decision is a momentous decision in that it takes an approach that is closer to the reality of corporate decision-making which takes the big picture into consideration.

Second, with respect to the concept of property damage, which is required for an act to constitute a crime of breach of fiduciary duty, the High Court Decision stated that, “a decrease in property value means that a risk or danger inherent in specific transactions materializes in reality, causing a damage to the economic value, but it does not mean mere negative effects that may indirectly occur incidentally to such transactions (such as increase in the proportion of risky assets to safe assets, or a decrease in credit rating)” and held that “property value cannot be deemed to have decreased simply due to the fact that cash, a safe asset, was transformed into bonds, a risky asset, or that a decline in creditworthiness has occurred because of a decrease in cash assets.” This could be viewed as a deviation from the past Supreme Court precedent which held that decreased liquidity was damage per se, and it remains to be seen how the Supreme Court will determine this case.
Third, property damage, which is required generally for an act to constitute a crime of breach of fiduciary duty, is interpreted to include cases where an act created a risk that property damage might occur. In connection therewith, the High Court Decision stated that “the risk of occurrence of damage should be narrowly interpreted to ensure that such risk constitutes property damage only when such risk is so near to the result of the infringement of the legal rights as to be deemed to be equivalent to the result of infringement” and held that, “no punishable risk can be deemed to have occurred merely when (i) there is a general or abstract risk of occurrence of damage arising from the debtor’s loss of ability to pay his debts or (ii) there was insufficient collateral to ensure the recovery of such claims.” Also, the High Court Decision held that the existence of risk should be determined based on the ‘time of commission of an act’, but added that it does not exclude ex post facto judgment and stated that “in the event the act in question did not result in an infringement of another person’s legal rights, the person who committed such act cannot be prosecuted unless the prosecutor can prove that the infringement of rights did not occur only due to such person’s artificial or abnormal involvement or occurrence of luck or other coincidence during the course of such act and the result thereof and that without such artificial circumstances or coincidence, the act committed by such person would have resulted in an infringement of the legal rights concerned.” Such holding is in contrast with many court precedents of the past, where a person (even though there was no serious review of whether such person caused damage to a company) was easily deemed to have committed a crime of breach of fiduciary duty on the ground that the person, being a dangerous criminal, was ‘at risk of causing damage.’ It remains to be seen how the Supreme Court, or any other courts handling other cases, will determine or interpret this case.

As noted above, the High Court Decision is a landmark decision in that it has proposed the criteria for determining legitimate defensive measures against hostile takeover attempts and that it takes a different and more stringent view than past court precedents in interpreting the specific requirements that constitute the crime of breach of fiduciary duty. Although the High Court Decision was a decision rendered with respect to actions taken in the special context of a hostile takeover situation, the High Court Decision proposes new criteria that could be generally applied to determine whether a crime of breach of fiduciary duty has been committed. It will be interesting to see what position the Supreme Court will take in connection with the interpretations contained in the High Court Decision.

[Media Contents] - Sang-Hyeok Im

Introduction to the new the Media Law

In order to prepare for the new era of media-related contents and to support the media industry with domestic and foreign capital, the so-called “Media Law” (a term which includes the Newspaper Act, the Broadcasting Act and the Internet Multimedia Broadcasting Business Act) was passed on July 22, 2009 by the National Assembly of Korea. The Media Law will come into force three months after its promulgation. The new Media Law includes the following changes:

1. a single entity may own up to 40% in the capital of a terrestrial broadcaster, general cable program provider (“general PP”) and news-only cable program provider (“news PP”);
2. ownership of up to 10% in the capital of a terrestrial broadcaster, and 30% in general PPs and news PPs, respectively, by conglomerates, newspapers,
news reporting companies;
3. ownership of up to 20% in a general PP, and 10% in a news PP, respectively, by a foreign entity;
4. cross-ownership and management of terrestrial broadcasting and system operators;
5. limitation of 30% market share by a single broadcaster; and
6. removal of pre-censorship process for broadcasting advertising.

Of these changes, the most notable change under the Media Law is that conglomerates and newspapers will be able to own stakes of terrestrial broadcasting companies, general PP and news PP. The Media Law also allows foreign companies to own stakes of terrestrial broadcasters, general PP and news PP. In other words, conglomerates, newspapers and foreign companies are no longer barred from entering into the broadcasting industry. With these changes, it is expected that the Media Law will alter the landscape of the Korean broadcasting industry.

In addition, the Korea Communications Commission has already announced plans to allow the establishment of 1 or 2 additional general PP and news PP this year or next year. General PP and news PP are subject to the “must carry rule”, which places requirements on cable and satellite providers to include certain categories of channels. With these planned additions, Korean companies are showing great interest in the application and approval schedule of the new, lucrative cable network.

Considering that global media corporations such as News Corporation are trying to maximize their profits via cross border M&A deals, the number of M&A’s among media companies or cross-industry M&A’s is expected to increase. Such M&A deals involve complex regulatory requirements as well as approvals of the Korea Communications Commission. As a result, Korean regulatory issues and filing requirements should be clearly understood from the planning stage especially where foreign companies are involved.

[Media Contents] - Sang-Hyeok Im / Do-Hyun Kim
Examinations of Online Game Contents in China

The Ministry of Culture of the People’s Republic of China (the “Ministry”) recently issued a notice relating to the standardization of approval procedures for imported online game contents (the “Notice”) that has attracted much attention from those within the game industry. The Notice, which supplements the existing “notice on approval of online game contents (2004),” contains the following key aspects:

1. Any online game content may not be opened for user registration or allowed registration through customer terminal programs before it is approved by the Ministry.
2. Technical tests should be conducted by way of issuance of activation codes with a certain set limit, and the number of test users may not exceed 20,000. Further, no fees or other forms of consideration can be received from users and no advertisements may be placed.
3. When an existing service provider is changed, the existing import approval number (authorization) will automatically expire, and a new service provider is required to apply for re-approval with the Ministry.
4. Any change to the actual contents of a game, or any upgrade of the existing version of a game, is subject to re-approval of the Ministry.
In connection with the foregoing, the Notice leaves the following problems unresolved:

First, according to the Notice, upon expiry of a contract with a Chinese service provider, a foreign game company must apply for re-approval even if there is no change to the actual game contents. Consequently, if, for reasons due to the foregoing, the procedure for approval is delayed, the provision of the service may have to be suspended. Hence, the Notice has been criticized for being extremely unfair in that it puts Chinese service providers in an advantageous position in terms of signing or renewing a contract and such circumstances may even open the possibility for an existing service provider to request renewing the contract, with the stipulation that there will be no payment of royalties.

Second, unclear provisions in the Notice regarding modification of game contents or upgraded versions are causing disputes as to their interpretation. There can be no doubt that any upgrade of the game itself should be subject to re-approval. However, the Notice is unclear as to whether an original game is subject to re-approval if its expansion pack is released. If the original game must also be re-approved, it would create a significant burden on game companies. In this connection, there are many disputes in China about Blizzard’s release of Wrath of the Lich King, the expansion pack of World of Warcraft.

Korean game companies, whether they have established a business presence in China or are planning to do so, need to enter into negotiations for renewing their contracts mindful of the change of service providers upon the expiration of contract period and consequent period of re-approval for game contents. In addition, they need to keep updated with the related laws and regulations and the trends of the regulatory authorities in China to be successful in the ever-changing Chinese game market.

[China] - Byoung Seon Choe / Do-Hyun Kim

China has eased regulations on overseas direct investments by domestic companies

On July 15, 2009, the Chinese State Administration of Foreign Exchange (“SAFE”) promulgated the Regulations on Foreign Exchange Management of Outbound Direct Investment by Domestic Institutions (the “Regulations”), which came into effect from August 1, 2009. The Regulations are aimed at promoting outbound investments of domestic enterprises and individuals. Nine earlier regulations relating to outbound direct investment have been abolished by the promulgation and implementation of the Regulations.

According to SAFE, the main goal of the Regulations is to reduce the costs of outbound direct investments by simplifying the foreign exchange management process, thereby encouraging domestic companies to go overseas. With these measures, SAFE expects that domestic companies may reduce the costs of outbound direct investments at opportune times, and that, as a result, the effectiveness of such investments are enhanced and balance is added to international payments.

The key to the Regulations is simply to manage the procedures for foreign exchange. The main contents of the Regulations include the following:

1. With respect to the source of outbound investment, the existing pre-approval system is replaced by an ex post facto registration system.
2. The Regulations broaden the funding sources which domestic companies may utilize or avail themselves of to make outbound direct investments. These include: using foreign exchange owned by...
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Chinese investors, domestic foreign exchange loans, foreign exchange purchased using the investors’ own Renminbi (RMB); in-kind assets; intangible assets; and profits from outbound direct investments which the investor has retained overseas.

3. A domestic institution may provide its directly-invested overseas subsidiaries with commercial loans or security.

4. With respect to the remittance of investment funds by a domestic institution to its directly invested offshore subsidiary, a SAFE examination is replaced by a registration system.

The Regulations are in line with the so-called “Going Abroad” Strategy strongly enforced by the Chinese government. Recently, Chinese Premier Wen Jiabao reiterated his desire to expand such strategy by stating that, “We must drive the Going Abroad Strategy forward and will combine the management of our foreign exchange reserves with the “going abroad” of our companies.” With simplified approval procedures for overseas direct investments, it is expected that large corporations already having investments overseas will increase their outbound investment, and that small and medium-sized companies reluctant to make outbound investments due to procedural complexities will become active in their overseas investment.

[Russia] - Hyun Sik Shin / Youngok Kim

Noteworthy tips about investment and establishment of a company in the Russian Far East and Siberian regions

While the Far Eastern and Siberian regions of Russia (the “Regions”) take up over 60% of the entire Russian territory, the population of these regions only accounts for 11.3% of Russia population. In addition to the small population, the Regions have long been isolated from European Russia due to their geographic location far from Moscow, the center of Russian politics.

However, the Regions are ready to open a new chapter in their history. In addition to the selection of Vladivostok as the host city of the APEC Summit in 2012, the Regions have benefited from the support of the former Russian President Vladimir Putin, who championed the idea of regional balance in development as a new development strategy for Russia; in November 2007, with former President Putin’s support, the “2013 Federal Program on Economic and Social Development of the Far East and Trans-baikal Regions was adopted.

Nevertheless, obstacles to the Regions’ development remain. Despite the abundance of natural resources (such as petroleum and natural gas), the Regions have not been able to attract foreign investors due to various problems, including outdated infrastructure, decreasing population and isolation from the domestic market. Further, the Regions are widely viewed as the most corrupt area within the Russian Federation.

Moreover, while the laws of the Russian Federation are applicable to the Regions, there may be a conflict between the laws of each subject of the Russian Federation in
certain special areas. Since the Putin administration, there is a greater possibility for such conflict because the power of the local authorities regarding various permits, licenses, taxation, tariff and quota has become blurred as a result of the diminished legislative power of the subjects of the Russian Federation under the Constitution of the Russian Federation (See Article 72 of the Russian Federation Constitution). Further, additional problems such as delay in acquiring permits and licenses due to the bureaucratic red tape are always possible, and the local authorities’ bureaucratic red tape may be more severe than when dealing with the central government.

Given this climate, a Korean company must be cognizant of the particular procedural requirements and potential obstacles that may present an impediment to the establishment of any business presence in the Regions. Specifically, Korean companies investing in the Regions are required to open a temporary account and deposit 50 percent of the share capital of the subsidiary they want to incorporate prior to the registration of incorporation. Upon completion of this registration, a company must transfer such deposit to the principal account. In connection with this registration, one of the most frequent issues facing Korean companies is that in the event that a Korean national without a work permit tries to become the general director of a newly incorporated company, the company may be restricted from opening bank accounts. Such restriction on bank transactions may be temporarily solved by hiring a Russian national or a Korean national with a work permit in Russia as management director, whose service for the newly incorporated company will be limited to banking and accounting affairs.

For the acquisition of work permits for employees (including the general director) of a newly incorporated company, the Russian government provides quarterly quota application periods to secure a certain annual level of foreign workforce under the Federal Law “On the Legal Status of Foreign Citizens in the Russian Federation.” If the newly incorporated company is established after the expiry of a quarterly quota application period, the company cannot in principle apply for any work permits; however, the filing of application for work permit may still be made for a general director. In certain cases, an exception may also be available for a foreign employee whose application for work permit is filed with the state immigration office. For such cases, further consultation with a law firm is advised. It normally takes about 2 to 4 months to obtain a work permit.

For Korean companies looking to engage in construction projects, a construction permit is required to operate a construction business in the Regions. In the past, the federal government issued construction permits which expired in 5 years. However, the procedure to receive such permit changed since the end of last year, when regional self-regulated organizations (“SROs”) started issuing construction permits instead of the federal government. Now, in order to acquire a construction permit from an SRO, a developer must first join an SRO before being able to receive a construction permit to operate a construction business in the Regions. Though the requirements for joining an SRO are easy for existing holders of construction permit, they can be difficult for a newly incorporated company.

Notwithstanding the foregoing, with respect to the formation of SRO’s, the Far East region has fallen behind the Siberian region. In the Far East region, there are ongoing discussions for establishing regulations on the issuance of construction permits. As of August 2009, there was only one SRO in operation. However, because more SRO’s are expected to be established before the end of this year, a Korean construction company looking to newly incorporate in the Far East region should consider joining an SRO later when such requirements are likely to become easier.
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The foregoing illustrates that for a successful investment in the Regions, Korean companies looking to establish a business presence in the Regions must carefully review matters necessary to manage risks such as characteristics of legal system, problems in related regulations, and amendments to applicable existing laws and regulations before deciding to advance into the Regions.

[Litigation General] - Sung-Deok Nam

Notable Litigation General Cases

No private ownership of tidal land

The land and the sea are classified based on the high tide level, where the tidal land refers to the land between the extremes of normal high and low tides, which is covered by high tide but exposed at low tide, pursuant to the Public Water Management Act. The Supreme Court ruled that if a land was enveloped by the sea and became a tidal land, and could not be restored to its original condition, such land would not be subject to private ownership. (Supreme Court Decision No. 2007DA64303 on Aug. 20, 2009)

Case that Recognizes Completion of Second Acquisitive Prescription by Occupation of Real Property

The Supreme Court has maintained the position that if a land owner intends to argue the completion of the new second acquisitive prescription on the basis of time (i.e., change of land ownership), the holder must be the same and the owner must not have changed during the new period of prescription. Recently, however, the Supreme Court changed its position, stating that if the holder in the register changes during the second acquisitive prescription period, the person who completes the acquisitive prescription may argue the prescription with the owner in the register at the time of completion of the second acquisitive prescription. (Supreme Court Decision No. 2007DA15172 on Jul. 16, 2009)

Scope of Compensation if Posts Were Not Delivered Due to Default of Post Office

The Supreme Court has held that where a letter containing the details of a transaction with a third person was not delivered due to the fault of the post office, no claims for damages (whether arising from the establishment, performance or default of the transaction) can be made, unless there was a specific circumstance whereby the postman knew or ought to have known the contents of the delivery. In the event the contents-certified mail or the registered mail was not duly delivered as a result of negligence or gross negligence on part of the postman, consolation money can be claimed. (Supreme Court Decision No. 2006DA81325 on Jul. 23, 2009)

Electric Vehicles Deemed to be Automobiles under the Automobile Management Act

The Automobile Management Act defines an “automobile” as a device manufactured for transportation on land, by a motor or a device manufactured for transportation on land by the towed vehicle. The Supreme Court has held that, unless there are extenuating circumstances to the contrary, an electric vehicle powered by electrical energy charged from an electrical source falls under the definition of “automobile”, whereby the vehicle is “a device manufactured for transporting on land by a motor”, as set forth by the Automobile Management Act. (Supreme Court Decision No. 2008DO8034 on Aug. 20, 2009)
“One Big Bow after Three Steps” as Demonstration Method Is Not Contrary to Social Rules

In relation to the place, shape, description, method, results, etc. of demonstrations, the Supreme Court has held that a demonstration march, whereby the demonstrators march with one big bow after having taken three steps, is not a violation of the social rule, as any such disruptions that result from such maneuvers are considered acceptable within the reasonable scope required to achieve the purpose of demonstration (Supreme Court Decision No. 2009DO840 on Jul. 23, 2009)

[Antitrust] - Yong-Sung Lee

Notable Antitrust Cases

Scope of Compensation Arising from Damages to a Business Partner in Breach of the Fair Trade Act

The Supreme Court has held that in circumstances where a large discount store requires a supplier to dispatch an assistant employee to their store, the large discount store shall be liable for any damages that the supplier may have incurred, due to the large discount store abusing its dominant position in the business relationship. Such abuse would be in violation of the Civil Act. This violation is separate and in addition to the violation of the Fair Trade Act, where corrective measures or a surcharge payment may be levied against the store. The Supreme Court has held that the scope of compensation would be the total costs spent as a result of the abuse (i.e., the difference between the total costs incurred and the cost had such abuse not occurred), including the personnel costs incurred by the supplier to dispatch the employee. (Supreme Court Decision No. 2008DA40526 on Jul. 23, 2009)

[Corporate] - Byung-Il Im

Notable Corporate Cases

Meaning of “Gains from Breach” Set Forth in Article 207-2 and Article 214 of the Former Stock Exchange Act

“Gains from Breach” set forth in Article 207-2 and Article 214 of the Former Stock Exchange Act means the gains arising from the transactions related to the breach, with such gains having a causal relationship to the risk arising from such breach. The Supreme Court has held that the gains (which have a causal relationship) can be determined by calculating the difference between the total expenses and the total income from the trade related to the breach. (Supreme Court Decision No. 2009DO1374 on Jul. 9, 2009)

[Construction] - Yong-Sung Lee / Jae Doo Shim / Si Young Jang

Notable Construction Cases

If an employee takes, for his private benefit, a property received in breach of duty, the employee cannot be punished based on a breach of the Basic Act on Construction Industry

The Supreme Court has held that any interest in properties or assets that are acquired by a customer, contractor,
A subcontractor or interested party in relation to a building contract or construction as a result of a breach of duty by such persons may be charged and punished under Articles 38-2 and 95-2 of the Basic Act on Construction Industry. However, any employees or workers that are not defined as a customer, contractor, subcontractor or interested party, and commit the same act shall not be charged and be liable under Articles 38-2 and 95-2 of the Basic Act on Construction Industry. The Supreme Court further held that the rule of “double punishment” (which provides for sanctions against the individual and his employer) did not apply to cases where employees or other workers intentionally breached their duty for personal gains (Supreme Court Decision No. 2009DO988 on May 28, 2009).

Supreme Court Ruling on Statute of Limitations to substitute a Claim for Compensation for a Warranty Service

The Supreme Court has recently held that the statute of limitations for bringing a claim for damage compensation as a substitute for warranty is ten (10) years from the date on which the completed apartment is delivered. If an apartment resident council files a lawsuit without having first been assigned with rights to claim for damage compensation from individual apartment unit owners, such filing will have been made without proper authority. However, in such case, the lawsuit filing by the apartment resident council will not invalidate the statute of limitations to claim for damage compensation in substitute of receiving warranty services. That is, the Supreme Court has held that, unless individual apartment unit owners have separately exercised their rights to claim for damage compensation prior to the ten-year limitation period, the rights to claim for damage compensation will be deemed to have been exercised by the apartment resident council at the time the council submitted the request for the assigned claim or the application for the change of causes for the assigned claim, or related documents after having been assigned with claim rights from individual unit owners (Ruled on May 28, 2009: Judgment 2008Da86232).

Therefore, in cases where (i) the resident council files a lawsuit for damage compensation for the warranty services being provided or to be provided in the future after the statute of limitations has expired or (ii) the council has been assigned with rights for such claim from unit owners and notified such assignment to the business entity (while also submitting the documents requesting for the assigned claim or for the change of causes for such claim) after limitations period, despite the fact that the initial lawsuit filing took place within limitations period, it can be argued that the ten-year limitation period has expired.

Consensus-based Supreme Court Judgment

In Judgment 2007Da2428 decided on September 17, 2009, the Supreme Court held that the management and disposition plan under the Urban & Living Environment Improvement Act is an administrative plan with binding effect and also a separate administrative decision made by an apartment resident council for reconstruction. Therefore, in its view, the lawsuit filed against the council, which is an administrative body, to invalidate the resolution made in the general meeting of the apartment resident council for reconstruction, should be regarded as a lawsuit between related parties under the Administrative Procedure Act. It was also mentioned that after the management and disposition plan was approved and announced to the public, the cancellation or invalidation of the plan could be sought in the form of appeal, but it is not allowed to file a lawsuit against the validity of only a part of the decision made in the general meeting of the resident council unless there are special reasons. (This is
related to Supreme Court Judgment 2004Da13694 dated July 22, 2004 which ruled that the lawsuit to invalidate the decision of the general meeting of the resident council about the management and disposition plan of the council should be viewed as a civil lawsuit, and therefore cancellation or invalidation of the resolution even after its approval or announcement could be sought. This judgment and other similar Supreme Court judgments were consolidated into the consensus-based judgment.)

[Insolvency & Corporate Restructuring]  - Byung-Il Im

Notable Insolvency & Corporate Restructuring Cases

Meaning of “Concealment of Property” in Fraud and Bankruptcy Crime

“Concealment of property” in the context of certain fraud and bankruptcy crime pursuant to Article 366(1) of the former Bankruptcy Act means an act of making the discovery of property impossible or difficult, making the location of property unclear or the possessive relation unclear. However, the Supreme Court held that the act of a debtor who submitted a list of properties passively without faithfully describing the conditions of the property in the filing of the bankruptcy process to the court could not be considered as “concealment of property” in the above-mentioned crime. (Supreme Court Decision No. 2009DO4008 on Jul. 9, 2009)

[Intellectual Property Rights] - Yong-Sung Lee

Notable Intellectual Property Rights Cases

FAQ Column Could Be Seen as Advertising

“Advertising” under Article 2(2) of the Act on Fairness on Display and Advertising means “an act of an undertaking to publicize or suggest certain matters on products through media including a periodical”. The Supreme Court ruled that in light of the fact that the column of FAQs (frequently asked questions) must be published on the website which consumers may access, and that FAQs
are not the individual responses to the questions made by consumers but are published in a form of questions and responses by selecting information the undertaking wants to make public in advance to consumers, such FAQs may fall under the definition of “advertising” under the Act, since the undertaking published them to suggest certain matters and to make it widely public to consumers. (Supreme Court Decision No. 2009DU843 on May 28, 2009)

**Trade Secret which is the subject matter of the Crime for “Wrongful Use of Trade Secret” is not presumed to have been improperly acquired**

The Supreme Court held that a trade secret which is involved in the subject matter of the crime for “wrongful use of a trade secret” is not presumed to have been “obtained by illicit means such as theft, deceit, or threat” as prescribed in Subparagraph A of Paragraph 3 of Article 2 of the Unfair Competition Prevention and Trade Secret Protection Act since Article 18(2) of such Act only prescribes for the punishment of an act to “acquire and use a useful trade secret for obtaining unfair profits or inflicting damage to a company” and sets forth no special limitations on the means and methods of obtaining a trade secret. (Supreme Court Decision No. 2006DO7916 on Jul. 9, 2009)
[Seminar]

Presentation for Judicial Trainees

Shin & Kim twice held presentations for judicial trainees in August. The judicial trainees were introduced to the firm and its services. Each presentation, attended by about 40 judicial trainees, included an introduction of the roles and duties of the law firm’s lawyers, a promotional video and a tour of the offices. The trainees also had a chance to talk over lunch with Shin & Kim lawyers.

[News]


Introducing antitrust cases including Coca-Cola’s acquisition of Huiyuan.

The Chinese Anti-Monopoly Law, which came into effect on August 1, 2008, has attracted much attention from many companies around the world.

> Chinese Anti-Monopoly Law

China’s recent promulgation of the Anti-Monopoly Law has attracted the attention of many companies around the world, including companies that have no presence in China, because China’s Anti-Monopoly Law not only applies to business transactions in China but also to offshore transactions if they affect the Chinese market.

At this opportune time, Do-Hyun Kim, an attorney at Shin & Kim, has published a book titled “Chinese Anti-Monopoly Law” which provides well-organized commentaries to the recently enacted law.

The book provides a comprehensive overview of the Chinese antitrust law, from the legislative process prior to establishment to the general principles and legal liabilities under the law itself. In particular, the book provides a detailed explanation of the procedure of M&A transactions, provides examples of cases where investment or management of a company in China can trigger antitrust review and explains the consequences of any violations to the Anti-Monopoly Law. With this emphasis on foreign investment and M&A, the book’s sub-title is “The Advance of Global Companies into the Chinese Market and M&A.”

Further, the book is enjoying popularity among readers as it introduces several cases where China’s Anti-trust Law was applied including the proposed acquisition of Huiyuan by Coca-Cola, which was rejected by the Chinese Ministry of Commerce.

Mr. Kim emphasizes, “The effect of the enforcement of China’s Anti-Monopoly Law on foreign companies is not wholly negative, and as long we clearly understand and properly heed the law, we have a good opportunity to consolidate our position in the Chinese market by competing with domestic companies on a level playing field in their market.”

Mr. Kim is a graduate of the College of Law, Seoul National University and served as a prosecutor at the Busan District Prosecutors’ Office since passing the Judicial Examination. Mr. Kim also undertook research at the Beijing University of Chemical Technology in 1998 and studied at the East China University of Political Science and Law in 2007. Since 2009, Mr. Kim is a member of the China Practice Group of Shin & Kim.
[News]

[Money Today] 100% Confident in Winning Hyundai Oilbank Case

[Elite in Financial Legal Affairs] Attorney Beom-Su Kim, a Partner of Shin & Kim

The cross-border dispute between the largest and second largest shareholders of Hyundai Oilbank which has lasted for one and a half years will come to a close by the end of September 2009 at the earliest. The largest shareholder, International Petroleum Investment Company (IPIC), plans to resume the sell-off of its shareholding in Hyundai Oilbank after the decision of the arbitrators is announced.

Already, behind-the-scenes preparatory work is underway for a take-over of the refinery as potential buyers await the final ruling of the ICC International Court of Arbitration in Singapore.

This arbitration case is not only drawing the attention of M&A players, but also legal practitioners. International arbitration is a relatively new practice area for Korean law firms and currently the two market leaders, Shin & Kim and Bae, Kim & Lee, are dominating this niche market. This also means that they are representing opposite sides of the aforementioned case, and therefore, the outcome of this dispute could have negative effect on the law firm that loses. Thus, both firms have much at stake in this dispute.

Top lawyers from both sides are engaged in this dispute. The defendants (Hanocal Holding, a subsidiary of IPIC, and IPIC) are legally represented by Beom-Su Kim, 47, a partner of Shin & Kim.

When asked about the possibility of winning the case, Mr. Kim said he was “100% confident” that his client would prevail. He stated that the defendants had not breached the shareholders agreement and Hyundai Oilbank failed to accept a deemed offer given by the defendants. He also stated that the defendant submitted ample evidence to prove this.

Notwithstanding the Hyundai Oilbank case, he is one of the rising stars in the legal community. He is a recognized expert in cross-border M&As and international arbitration which is expected to be a new market for legal services. Therefore it is no coincidence that he is representing IPIC in the Hyundai Oilbank case.

His distinguished career dates back to 1999 when Doo-Sik Kim, Managing Partner of Shin & Kim, successfully concluded the IPIC deal to purchase Hyundai Oilbank shares. In early 2000, Beom-Su Kim was involved in IPIC’s additional purchase of Hyundai Oilbank shares and in 2007 he participated in the sale of Hyundai Oilbank shares, building his track record in this field.

He worked as a judge for 9 years and studied in the United States for four years from 1997. For two years beginning in 2007, he served as the executive director of international relations for the Korean Bar Association where he honed his global sensitivity.

It was Korea’s trade dispute with the European Union that advanced him into prominence in the legal community almost overnight. In 1999, the EU filed a complaint against Korea with the WTO arguing that in the course of restructuring the shipbuilding industry, the Korean government gave illegal subsidies to the detriment of EU shipbuilders.

Shin & Kim advised the Korean government and after five years of a protracted legal battle, the Korean government...
prevailed in March 2005. This was an unprecedented milestone. If the Korean government had lost the case, it was expected that the Korean government and local shipbuilders would be required to pay some 6 trillion Won in fines.

This success was a turning point for Shin & Kim, where it established itself as a pillar in the legal market for international arbitration. Until then Kim & Chang and Bae, Kim & Lee had maintained an unbreakable hold in this area.

Attorney Kim said, “The days of competing only amongst Korean lawyers are gone. As with other areas of law, Korean lawyers are increasingly facing the irreversible trend of competing with foreign counterparts. I’m honored to have had the chance to represent the Korean government.”

International arbitration offers much cross-border opportunities. That is why law firms view it as a blue ocean. Shin & Kim’s relationship with IPIC has led to their being selected to represent IPIC in this dispute. Mr. Kim is also advising on a number of other trade related matters, such as Kookmin Bank (KB)’s takeover of a Kazakh bank, several cross-border deals and an international dispute worth 1 trillion Won.

Despite this relatively untapped market for Korean law firms, trained resources are insufficient and awareness is still low. In countries such as Japan and China, companies prefer using local law firms to represent them in legal disputes, but Korean companies favor using foreign law firms. This may be because the Korean legal market has not matured yet with such a short history, but now that trend is changing.

“Except for English language capability, Korean lawyers are as competent as their foreign counterparts. Applying their global mindsets, their approach in handling deals is already world-class. Their communication skills are improving as well. Without a doubt, international legal disputes involving local companies will increase in the months and years to come, and at the end of the day it will be Korean attorneys that will be able to provide the decisive assistance Korean companies need. In this regard, although clients may use foreign law firms, it is necessary for them to use a local law firm to control the handling of the dispute.”

[New Members]
Dong-Seong Myung, former head of the High Prosecutors’ Office, joins Shin & Kim

We are pleased to announce that Dong-Seong Myung, former president of the Legal Research & Training Institute and former head of the High Prosecutors’ Office, has joined the firm.

Mr. Myung, born in Gangjin, Jeollanam-do, passed the 20th Judicial Examination in 1978, and since then he has served in key posts including the Chief Prosecutor of the 3rd Special Investigation Department of the Seoul Central Prosecutors’ Office, Chief Prosecutor of the Central Investigation Department of the Supreme Prosecutors’ Office, Head of Seoul Eastern Branch of Seoul District Prosecutors’ Office, Head of Gwangju High Prosecutors’ Office, Head of Seoul Central District Prosecutors’ Office, and President of the Legal Research & Training Institute.

- Born in Gangjin, Jeollanam-do (age 56, 20th Judicial Examination)
Jong-Chae Jung joins Shin & Kim

We are pleased to announce that Jong-Chae Jung has joined the firm. Mr. Jung’s main areas of practice include tax, fair trade, general corporate affairs and litigation.

After passing the Higher Civil Service Examination, Mr. Jung served at the Investigation Bureau of the Seoul Regional Tax Office as a deputy director, the Tax Collection Division of the National Tax Service, and the Tax Service Division of the Jeju Tax Office. He has dealt with fair trade cases involving cartel, business combination and abuse of market dominant positions, as well as tax cases including tax litigation, tax investigations, international taxation, and work to amend tax laws, regulations and rules.
The content and opinions expressed within SHIN & KIM’s regular newsletter are provided for general informational purposes only and should not be considered as rendering of legal advice for any specific matter.