Introduction of Squeeze-Out

The amended Korean Commercial Code ("KCC"), which will take effect on April 15, 2012, introduces a "squeeze-out" right. The squeeze-out right permits a controlling shareholder holding 95% or more of shares in a Korean company to require minority shareholders to sell their shares to the controlling shareholder at a fair price, provided that the following conditions are satisfied:

1. the squeeze-out is necessary to accomplish the company's business purpose;
2. the squeeze-out is approved in advance at a shareholders' meeting; and
3. the minority shareholders' shares are appraised by a certified appraiser and the outcome of such appraisal (together with the purpose and other details of the squeeze-out) is (A) disclosed in the notice sent to the shareholders to convene the shareholders' meeting and (B) explained by the controlling shareholder at the shareholders' meeting.

There are ambiguities in the squeeze-out provisions of the amended KCC. Particularly, with respect to the first condition set out above, it is not clear what circumstances would be viewed as accomplishing a company's business purpose. In our view, a controlling shareholder's intention to remove the minority shareholders would not, in and of itself, be considered as a sufficient ground to satisfy the first condition. If, however, it could be proven that a company incurs too much cost due to a minority shareholder(s) or a minority shareholder(s) abuses his or her shareholder rights, thereby making it difficult to manage or operate the company, then we believe that a squeeze-out would be considered necessary to achieve the company's business purpose.

Disputes would arise in connection with the meaning and application of the squeeze-out provisions. Among other things, we expect that claims would be made by minority shareholders as to whether (a) a squeeze-out is justifiable to achieve the company's business purpose, (b) the squeeze-out procedure prescribed by the KCC has been duly followed, and (c) a fair price has been paid. Particularly, the appraisal of unlisted company shares would complicate the situation further, as the parties may find it difficult to agree on the method of appraisal or dispute the outcome of an appraisal.

In case of listed companies, controlling shareholders may elect to take the squeeze-out route after purchasing shares on the open market or acquiring shares through a tender offer and delisting the shares from the stock exchange.

In addition to the squeeze-out, the amended KCC provides for "cash-out merger." In a cash-out merger, the surviving company in a merger may opt to pay cash in consideration for the shares of the company being absorbed, in effect removing the shareholders of the company being absorbed. A controlling shareholder who wishes to acquire full control could use the cash-out merger as an alternative to the squeeze-out.

One notable aspect is that alongside the squeeze-out right, the amended KCC grants minority shareholders a sell-out right allowing minority shareholders to require the controlling shareholder at any time to buy out their shares. The sell-out right provides minority shareholders with an opportunity to exit their investment by selling their shares to the controlling shareholder at a relatively high price compared to prices to be paid by third parties. From the perspective of controlling shareholders, the sell-out right may prove burdensome or cumbersome, since minority shareholders are permitted to exercise the sell-out right separately and, accordingly, controlling shareholders may have to go through multiple buy-out processes.

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