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NEWSLETTER

[Insolvency& Corporate Restructuring] - Attorneys Young-Ku Lee, Byung Joo Lee and Hyo Jong Choi

The scope of debt-extinguishing effect from a debt-for-equity swap performed according to a set-off agreement during work-out procedures (The Korean Supreme Court 2008Da97218 En Banc Decision on September 15, 2010)

The scope of debt extinguishment when a debt-for-equity swap is effected through the mechanism of set-off agreement during corporate work-out procedure (The Korean Supreme Court 2008Da97218 En Banc Decision on September 16, 2010)

1) Introduction

Companies facing financial distress and undergoing a corporate work-out procedure under the Corporate Restructuring Promotion Act or a rehabilitation procedure under the Debtor Rehabilitation and Bankruptcy Act widely use debt-for-equity swaps (which allow cancellation of the creditor's certain claims in exchange for new shares issued by the debtor company) as part of their debt restructuring or rehabilitation plans because debt-for-equity swaps are advantageous to both the debtor company and the creditor. For the creditor, it is clearly better to acquire equity in the debtor company that is convertible into cash in future than to have its claims written off through liquidation of the debtor's assets. For the debtor, a debt-for-equity swap does not require an immediate outflow of cash, and the

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gains from the cancellation of debt are not immediately added to the taxable income, thus allowing deferment of corporate income tax, while it also moves the debt under the debt account to the capital account on the balance sheet, thereby having an effect of financial restructuring.

A debt-for-equity swap is usually made according to the debt restructuring plan/rehabilitation plan which specifies the parties' intent that a certain debt amount (for example ₩5,000) will be cancelled per new share issued by the debtor to the creditor. While the amount of debt cancelled through such debt-for-equity swap is clear for the creditor and the debtor, there has been a heated debate on the issue whether the creditor's claims against other vicarious obligors who are jointly and severally liable with the debtor (for example, the guarantor, joint and several debtor, indivisible debtor, etc.) and who are not directly subject to the debt restructuring plan/rehabilitation plan (the "vicarious debtors") should be also deemed as extinguished, and if extinguished, to what extent other vicarious obligors' debts are extinguished. While the Korean Supreme Court has taken a clear stance on this issue regarding the rehabilitation procedure (as will be further discussed below), there had been no precedent on this issue regarding the work-out procedure until the Korean Supreme Court issued its en banc decision in this case, determining the scope of extinguishing debts of other vicarious debtors. The relevant facts, issues, and analysis of the Korean Supreme Court's decision can be summarized as follows.

2) Summary of Facts

1. 1995 – 1997: Commitment of unlawful acts, including fraudulent accounting for Company A, according to the instruction of the Defendant, the then representative director of Company A.
2. 1996 – 1997: the Plaintiff's purchase of Commercial Papers (CPs) issued by Company A
3. November 12, 1998: Commencement of a work-out program of Company A because of liquidity shortage
4. March 29, 1999: Execution of debt-for-equity swap under a corporate workout agreement

As a result of unlawful acts and defaults on the CPs, Company A and the Defendant (the person liable to pay for damages) were "joint and several obligors" with respect to obligations to pay money to the Plaintiff. Company A, however, cancelled its debt to the Plaintiff through a debt-for-equity swap at KRW 5,000 per share, which was carried out in accordance with Company A's corporate workout plan.

3) Major Issues

1. Can a debt-for-equity swap carried out as part of a corporate workout plan be seen as a set-off agreement?
2. Does the set-off effect extend to all other "joint and several debtors"(the issue of absolute effect)?
3. If the set-off has the absolute effect, how can the scope of such absolute effect be defined?

4) Judgment by the Korean Supreme Court (Majority opinion of the En Banc Court)

1. When the two parties enter into a set-off agreement to extinguish the claims of the same kind of subject to the extent of the amount mutually owing to each other, such set-off agreement has the effect of extinguishing each claim to the amount set in the agreement. This legal principle applies to a case where a debt-for-equity swap is carried out as part of corporate workout plan by the debtor company and the creditor financial institution pursuant to a set-off agreement, in which the debtor company agreed to issue new shares to the creditor financial

institution in exchange for the creditor financial institution extinguishing the debtor company's existing obligation to the amount of the creditor's obligation for acquiring the new shares. Such debt-for-equity swap should not be seen as a repayment of debt in the amount of market value of the shares with the remaining amount of the debt being exempt.

2. .Even when any one of the joint and several obligors uses a counter-claim he holds against this creditor to set off its obligation, the creditor's claim is equally satisfied as if the debtor has made payment, payment in substitutes, or deposit, and thus, the effect of set-off toward extinguishing obligation extends to all other joint and several obligors to the extent of the amount of claims set off with the counter claims. This legal principle also applies when any one of the obligors enters into a set-off agreement with the creditor. Moreover, this legal principle applies regardless of whether the creditor, at the time of entering into such set-off agreement, knew the existence of other joint and several obligors.

5) Analysis

(1) Can a debt-for-equity swap carried out as part of a corporate workout plan be seen as an off-set agreement?

Prior to this case, there was no clear decision made by the Korean Supreme Court on this issue and there were conflicting views such as interpreting a debt-for-equity swap as a form of payment in substitute (Seoul High Court Jan. 18, 2002, Sentence 2001Na43039Decision), payment in kind, or a set off agreement. In this case, the Korean Supreme Court found the debt-for-equity swap as a set-off agreement between the parties based on its finding of facts that the term such as 'set off' and 'set off agreement' were included in the Subscription Confirmation Agreement and Debt-for-Equity Swap Agreement made by Company A when it issued new shares to the Plaintiff. It remains uncertain, however, whether the Korean Supreme Court's decision in this case can be generally applied to deem other debt-for-equity swaps as a set-off agreement.

On the other hand, Justice Young-Cheol Shin provided a dissenting opinion, arguing that interpreting the debt-for-equity swap in this case as a set-off agreement would cause unpredicted damage on the part of the creditor, and when considering the parties' intent at the time of making a debt-for-equity swap, it is reasonable to interpret the debt-for-equity swap as payment in substitutes for the debt in the amount of market value of the issued shares with the remaining debt amount being exempt (The legal interpretation of this view will be explained later).

(2) Does the set-off effect extend to other "joint and several debtors" (the issue of absolute effect)?

Prior to this case, the Korean Supreme Court did not acknowledge the absolute effect of a set-off for a relationship of vicarious joint and several liability while it acknowledged the absolute effect of other acts such as repayment that satisfy claims between joint and several obligors (The Korean Supreme Court Decision: 2005 Da 75002, decided on March 27, 2008, etc.). Although there were some theories among academics supporting the Korean Supreme Court's such position, the prevalent theories have been that absolute effect of a set-off should be acknowledged since a set-off ultimately satisfies the creditor's claims and it may result in unfair double satisfaction of a claim for the creditor..

In this case, however, the Korean Supreme Court took a different position and acknowledged the absolute effect of a set-off among joint and several obligors despite dissenting opinions by Justices Hong-Hoon Lee and Soo-An Jeon that the absolute effect of set-off, where all the claims of a creditor/tort victim are extinguished by a set-off made by one of the joint tortfeasors, will undermine protection of the creditor to recover incurred loss.

(3) If the set-off has the absolute effect, what is the scope of such effect?

The market value for shares issued by a company undergoing corporate work-out or rehabilitation procedures is often far below the issue price (i.e. KRW 5,000). Given such circumstance, it is clear between the principal debtor and the creditor that the debt is extinguished in the amount stated in the debt restructuring/rehabilitation plan. The amount of debt extinguished by the debt-for-equity swap is not so clear, however, for other joint and several obligors such as the guarantor or joint and several obligors for whom the extent of extinguished debt is not determined in the debt restructuring/rehabilitation plan {An interpretation that acknowledges debt to be extinguished in the amount of the issue price (full extinguishment theory) would be favorable to joint and several obligors, whereas an interpretation that does not acknowledge extinguishment of debt at all (no extinguishment theory) would be unfavorable to joint and several obligors}.

There has been discussions on this issue for the rehabilitation process (especially, in light of the interpretation of Article 250, Section 2 of the Debtor Rehabilitation and Bankruptcy Act, which provides that a rehabilitation plan does not affect the rights of the creditor against joint obligors including the guarantor). The Korean Supreme Court took a clear position that the extent of debt repaid by debt-for-equity swap is confined to the amount of the market value of the shares issued as of the effective date of such issuance (so-called the market value extinguishment theory) as a compromise between the full extinguishment theory and no extinguishment theory considering the balance between the rights of the creditor and the joint and several obligors (The Korean Supreme Court Decision: 2001 Da 64073, decided Aug. 22, 2003, etc.).

On the other hand, there had been no clear decision or any serious discussions on this issue with respect to the work-out procedure until this case where the Plaintiff as a creditor argued that the Korean Supreme Court's decision in the rehabilitation case should apply to joint obligors in this case so that the extent of claims extinguished by the set-off should be confined to the amount of the market value of shares issued (and the Plaintiff as the creditor still has the claim against the Defendant, who is a joint obligor, in the amount of the original claims subtracted by such market value). Justice Young-Cheol Shin also presented a similar dissenting opinion in this case, although he concluded that a debt-for-equity swap cannot be seen as a set-off agreement but rather as payment in substitutes in the amount of the market value of the shares with the remaining debt being exempt. His opinion took into account both the absolute effect of repayment and the relative effect of debt being exempt.

However, the majority opinion of the Korean Supreme Court in this case did not accept the Plaintiff's argument since there is no legal ground to confine the extent of the absolute effect from a set-off and there is no explicit provision in the Corporate Restructuring Promotion Act corresponding to a provision that a rehabilitation plan does not affect the rights of the creditor against joint obligors. The majority opinion held instead that, so long as a debt-for-equity swap is seen as a set-off agreement, the effect of debt repayment made by the debt-for-equity swap extends to the debt of the Defendant as a joint obligor to the extent of the entire amount of issue price. As a result, the claims of the Plaintiff as the creditor against the Defendant, who is the representative director of Company A, has been lost by such set-off by Company A, and the Plaintiff was found to only have claims to acquire the shares issued by Company A according to the debt-for-equity swap.

[Environment, Climate Changes]

- Attorneys Hyun Ah Kim, Su Yong Jung and Jae Wook Ryu

Preliminary Announcement of Greenhouse Gas Emission Trading Bill

In connection with implementation of a greenhouse gas cap and trade system (the "Cap and Trade System" or "emissions trading"), a market-based approach to achieve Korea's greenhouse gas emission reduction goals, the Prime Minister's Office made a preliminary announcement of the Greenhouse Gas Emission Trading Bill (the "Bill"). The Bill has been open for public opinions until December 7, 2010. If the Bill is passed as planned, it will have profound and far-reaching impacts on the industries of Korea.

According to the Bill, the government will designate enterprises whose past volumes of emissions exceeded a certain level as enterprises subject to the Cap and Trade System (the "participating enterprises") and will allocate the limit or cap on the amount of emissions on such participating enterprises in the form of tradable emission permits according to its allocation plan. If the actual volume of emissions discharged by such participating enterprise exceeds its emission permits, a surcharge will be imposed in proportion to the amount exceeding the permits. The participating enterprises, however, can purchase emission permits at the emissions trading market, and if such participating enterprise's actual volume of emissions is smaller than its permits, such enterprise can trade its surplus permits in the relevant market.

1. Relations between Transition of the Legislation and the Target Management System

The Kyoto Protocol that sets forth the goal of reducing greenhouse gases of advanced countries was adopted at the third session of Conference of Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) in December 1997 in Kyoto, Japan. The salient feature of the Kyoto Protocol is to allow several flexible mechanisms, such as emission trading(Cap and Trade System), the clean development mechanism (CDM) and joint implementation (JI), which are so-called Kyoto Mechanisms, to meet the nations' mandatory limits on greenhouse gas emissions. Particularly, the Cap and Trade System has led the development of the carbon market by the EU, the nations subject to mandatory limits on greenhouse gas emissions.

Korea signed the Framework Convention on Climate Change in 1993, but Korea was not included as one of the nations subject to mandatory limits on greenhouse gas emissions under the Kyoto Protocol. According to the Bali Road Map adopted at the thirteenth session of COP to the UNFCCC held in Indonesia in 2007, a new greenhouse gas emission reducing system (so-called Post Kyoto Protocol) after the Kyoto Protocol was expected to be adopted in the fifteenth session of COP to the UNFCCC in Copenhagen in December 2009, but the conference only made a motion to "take note of the Copenhagen Accord" which is not considered to be legally binding. However, since then, the international negotiations on the Post Kyoto Protocol are in progress and it is highly possible that Korea be included as one of the nations subject to mandatory limits on greenhouse gas emissions.

Korea set the mid-term target of reducing greenhouse gas emissions to the level equivalent to 4% below the 2005 level by 2020 at the Cabinet meeting on November 17, 2009 and promulgated the Framework Act on Low Carbon, Green Growth to promote green growth including the reduction of greenhouse gases (the "Framework Act") on January 13, 2010, which is currently in force. According to the Framework Act, Korea shall basically establish the system to manage targets for the reduction of greenhouse gas emission and energy consumption (the "Target Management System") and may optionally implement the Cap and Trade System. The Target Management System is a system that sets targets for the reduction of greenhouse gases and energy for each entity that emits greenhouse gases or consumes energy (the "controlled entity"), assess the performance of such controlled entity, and actively prepare measures necessary for accomplishing such targets such as ordering the controlled entity to make improvements in case it fails to meet targets or imposing surcharges on the controlled entity in violation of its order. The Target Management System is the regulation using the conventional "command and control" method, and thus, there has been an issue that enforcing this Target Management System may conflict with the Cap and Trade System which uses the market functions. Currently, according to the Bill, a participating entity with emission permit is defined as one of the controlled entities under the Target Management System, but such participating entity would not be subject to the Target Management System. Also, according to the documents of the Committee on Green Growth, approximately 70% of the energy target controlled entities are expected to be subject to the Cap and Trade System. Article 3 of the Addenda of the Bill has the transitional provision that a person who receives the target under the Target Management System shall be deemed to be allotted with the emission permit equivalent to such target. However, more specific provisions are required to define and clarify the relations between two systems.

Currently, for the enforcement of the Target Management System in 2012, the Government has completed its designation of total 470 controlled entities which shall be under the Target Management System, including 374 in the fields of industry and development (under the Ministry of Knowledge Economy), 23 in the field of wastes (under the Ministry of Environment), 46 in the fields of construction and transport (under the Ministry of Land, Transport and Maritime Affairs) and 27 in the fields of agriculture, stockbreeding and foods (under the Ministry of Maritime Affairs and Fisheries).

In addition, the Ministry of Environment preliminarily announced the enactment of the "Operational Guidelines on Target Management" in large volume setting forth the detailed standards for establishing targets and monitoring, reporting and verification (MRV) of greenhouse gas emission and energy consumption with respect to its controlled entities designated on November 12, 2010.

2. Contents of the Cap and Trade System

Under the Cap and Trade System, the Government would establish a plan for allocating the national emission permits for each phase of five-year term (the "phase") to achieve the goal for reducing the greenhouse gas emissions and would designates entities to allocate emission permits before the start of each Phase (again, hereinafter referred to as "participating entities"). The participating entities are the entities whose six main greenhouse gases exceed the base amount prescribed by the Presidential Decree among the energy target controlled entities or the companies which intend to voluntarily participate in the Cap and Trade System.

After receiving and reviewing the applications for emission permits from participating entities, the Government will allocate the total emission permits for the phase and the emission permits for each performance year (from January 1 to December 31) within the phase. With respect to the allotment of the emission permits, 90% of the total permits will be allotted free of charge during the first phase (from January 1, 2013 to December 31, 2015) and the percentage of free allotment for the second phase (from January 1, 2016 to December 31, 2020) will be set forth by the Presidential Degree based on the assessment of the result from the first phase. From the third phase (after January 1, 2021), all the emission permits will be allotted with charges in a form of bidding.

Participating entities shall submit to the Government the emission permits corresponding to their respective greenhouse gas emissions per performance year. If a participating entity discharges the greenhouse gas in excess of its emission permits for the relevant performance year, such entity shall purchase the emission permit(s) from any other individuals or legal entities through the emission trading and submit it to the Government. A participating entity which possesses more emission permits compared to its emission of the greenhouse gas may sell any surplus emission permit to other individuals and legal entities. The entity which possesses more emission permits may be approved to carry over the surplus emission permits for the following performance year within the phase (carryover of emission permit), and an entity, which is not expected to submit the emission permit equivalent to its emission at the end of the performance year, may be approved to borrow the emission permit for the different performance year during the phase and submit such emission permit for the current performance year (borrowing of emission permit).

The aforementioned emission permits may be traded at the emission permit markets of the nations subject to mandatory limits on greenhouse gas emissions under the UNFCCC and the Kyoto Protocol or the emission permit market of the countries with which Korea enters into the collateral agreements. Moreover, if a participating entity voluntarily enforces the reduction of the greenhouse gas emission in Korea or foreign countries where the Cap and Trade System is not applied, the Government may recognize such act as the submission of the emission permit (offset of emission permit), and the reduced amount of greenhouse gas emission before the Cap and Trade System takes effect may be also recognized as early reduction of emission and taken into account at the time of allotting emission permits (recognition of performance of early reduction of emission).

If the emission permit submitted by a participating entity fails to reach its greenhouse gas emission, a penalty surcharge up to five times of the average market value of the emission permit within the scope of KRW 1 million per ton of CO2 of shortage shall be charged on such entity and the penalty surcharge up to KRW 50 million shall be imposed on a person who fails to submit the emission permit.

3. Prospect and Challenges

With respect to the implementation of the Cap and Trade System, considering that Australia and Japan, which are subject to mandatory limits on greenhouse gas emissions, have rather eased their regulation of greenhouse gas, it has been argued in Korea that the excessive regulation of greenhouse gas should be relaxed. In particular, the strong resistance is expected from energy consumption companies in the industries of petro-chemistry, iron and steel, cement, paper-making, etc. which will suffer from sharp increase of the costs due to the enforcement of the Cap and Trade System. Because the Target Management System and the Cap and Trade System, which are currently effective, overlap in several aspects, and thus, it is necessary to define the relations between the two systems and minimize any redundant regulations in order to minimize the burden of such industries. Because establishing the target for reducing green gas emission and energy consumption (allotment of emission permit) and the monitoring, reporting and verification (MRV) play the most important roles in both the Target Management System and the Cap and Trade System, the active participation and preparation of countermeasures as well as the interest of the concerned industries are required for the Cap and Trade System as well as for the enactment of the Operational Guidelines on Target Management by the Ministry of Environment.

[Pharmaceutical, Medical and Health Care]

- Attorneys Lin Kim

Criteria to determine the unlawful act of minimum resale-price maintenance and the calculation of penalty surcharge on the act of unfair customer-attraction in the pharmaceutical industry

I. Significance of the Korean Supreme Court Decision: 2009 Du 9543, decided on Nov. 25, 2010

The Korea Fair Trade Commission ("KFTC") issued an order of correction and imposed penalty surcharges against Pharmaceutical Company A on the grounds that Pharmaceutical Company A engaged in acts of unfair customer-attraction and resale-price maintenance in violation of the Monopoly Regulation and Fair Trade Act ("MRFTA"), and Pharmaceutical Company A raised an objection to such order and penalty surcharges by the court. The Korean Supreme Court made a significant ruling in this case regarding (i) the criteria for determining the unlawful act of resale-price maintenance, and (ii) for calculating penalty surcharges on the act of unfair customer-attraction.

II. Criteria for the unlawful act of resale-price maintenance

1. Conflicts of interests around price regulation on insured medical and pharmaceutical products

The government reimburses the payments for medical and pharmaceutical products subject to health insurance ("insured medical and pharmaceutical products") based on the actual price a treatment institution paid, and the price is controlled by the 'Actual Transaction Price Reimbursement System' under which the maximum limit of the insurance benefit reimbursed is set. As of October 1, 2010, the 'Market-based Actual Transaction Price Reimbursement System' has been implemented which adds to the 'Actual Transaction Price Reimbursement System' a provision providing that if a treatment institution buys an insured medical and pharmaceutical product at a price lower than the maximum price set by the government, 70% of the difference between the price the institution paid and the maximum price set by the government should be reimbursed to the institution and the relevant patient as incentives. Based on such system, the government has strived to reduce the maximum price for reimbursement of insured medical and pharmaceutical products by investigating the prices of medical and pharmaceutical products actually traded and to ultimately stabilize the health-insurance finance.

Meanwhile, pharmaceutical companies hope to maintain the currently recognized maximum price for insured medical and pharmaceutical products as long as possible without reduction since such reduction means a decrease in their profits. In this respect, the interests of pharmaceutical companies conflict with the interests of the government.

Pharmaceutical companies occasionally include a provision prohibiting the sale of medical and pharmaceutical products at the benchmark price (a price very close to the maximum price) or below when entering into a wholesale agreement on insured medical and pharmaceutical products with their counterpart wholesaler. The Korean Supreme Court's aforesaid decision dealt with an issue whether such act by pharmaceutical companies should be considered as the act of resale-price maintenance.

2. Significance of the act of resale-price maintenance and judgment about illegality

The act of resale-price maintenance means an "act by which an enterprise compels, in trading the goods or services, a counterpart enterprise or an enterprise by next stage of transaction to sell them only at the price fixed in advance, or transacts under any agreement or binding conditions thereon for such purpose" (Article 2, Item 6 of the MRFTA). Such act, as an agreement placing price limits in a vertical relationship between a manufacturer/a service-provider and an enterprise of next stage of transaction such as an agency, a distributor, etc., should be distinguished from an agreement in a horizontal relationship between competitive enterprisers. For this reason, the act of resale-price maintenance is also called as 'an act of vertical price restraints'.

Regarding such act of resale-price maintenance, Article 29, Section 1 of the MRFTA provides that "no enterpriser shall engage in a resale price maintenance." and only provides in the proviso thereof that "this shall not apply to the case where there exist justifiable reasons in terms of the maximum price maintenance preventing the transactions of commodities or services in excess of specified prices." Because of such provision structure, the KFTC or the court needs to examine whether there are justifiable reasons for the "maximum price maintenance." However, questions have been raised about whether the above provision should be interpreted as allowing the "minimum price maintenance" without need to examine the existence of justifiable reasons thereof.

Regarding this issue, the Korean Supreme Court made it clear in this case that the minimum price maintenance may also be allowed as an exception only if there exist justifiable reasons in light of the legislative purpose of the MRFTA and the prohibition of resale-price maintenance/ Furthermore, the Korean Supreme Court ruled that "the judgment about whether there exist justifiable reasons should be based on the comprehensive review of (1) whether there is active competition among brands in a relevant market, (2) whether such act facilitates competition among distributors for services other than prices for consumers, (3) whether such act diversifies consumers' options on products, (4) whether such act allows a new enterpriser to have easy access to the relevant product market by securing a distribution network, and the burden of proving the foregoing factors should lie with the enterpriser in light of the intent of the relevant provisions." (The Korean Supreme Court Decision: 2009 Du 9543, decided on Nov. 25, 2010).

3. Whether there exists any justification for the minimum resale-price maintenance by pharmaceutical companies to wholesalers of medical and pharmaceutical products

In this case, Pharmaceutical Company A argued that its act is justified because (1) wholesalers' act of supplying under-the-table margins in relation to the bidding for contracts with national and public hospitals is highly likely to disrupt the order in distribution, and (2) Pharmaceutical Company A's act is to prevent such act of wholesalers in (3) from causing a reduction in insurance payments when such act is detected by health authorities, and (4) price-competition cannot exist in the pharmaceutical industry due to its special nature as demonstrated by the Actual Transaction Price Reimbursement System, etc.

In response, the Korean Supreme Court made it clear that the minimum price maintenance by pharmaceutical companies to wholesalers is unlawful by holding that there was no justification for Pharmaceutical Company A's act because such act led to the maintenance of resale prices at a level very close to the health insurance price (maximum insured amount) by wholesalers, and such maintenance, in turn, resulted in preventing a reduction in insurance payments through competition, thereby causing final consumers to bear such financial burdens.

III. Criteria for the calculation of penalty surcharges imposed on an act of unreasonable customer inducement

1. Lower court's conflicting rulings

The KFTC calculates penalty surcharges on an act of unfair transaction based on the relevant sales of the relevant products sold or purchased by an enterprise in violation during the period of violation (Article 24-2 of the MRFTA, Article 61, Section 1, [Annexure 2], Item 2, Paragraph A, 4.A. of the Enforcement Decree of the MRFTA).

Regarding the calculation of the "relevant sales" which serve as a basis for the calculation of penalty surcharge imposed on the act of offering under-the-table margins by pharmaceutical companies, that is, the act of unfair customer-attraction, there are two conflicting precedents of the Seoul High Court. The one is (i) a precedent in which the Seoul High Court ruled that such calculation of penalty surcharge should be based on the sales to all business partners in transaction of all prescription medical and pharmaceutical products related to unfair customer-attraction (Seoul High Court 2008 Nu 2462 Decision on Nov. 5, 2008). The other is (ii) a precedent in which the Seoul High Court ruled that it is unlawful to deem all sales of medical and pharmaceutical products subject to the act of support by unfair customer-attraction as the relevant sales because medical and pharmaceutical products related to the sales to hospitals and clinics, which are not direct counterparties of the act of support, should not be included in the range of the relevant products (Seoul High Court 2008 Nu 2790 Decision on Nov. 20, 2008). Given a significant difference in the amount of penalty surcharge depending on which of the two precedents is adopted, there has been a close attention on the decision of the Korean Supreme Court.

2. The Korean Supreme Court's criteria

In this case, the Korean Supreme Court made its final decision on such conflicting rulings of the lower court by holding that "after comprehensively examining the following: (1) whether it is safe to conclude the plaintiff established and implemented nationwide promotional plans for each medical and pharmaceutical product at the headquarters level based on the subject, contents, amount, period, duration, relevance, etc. of such promotional plans and an act of providing benefits is actually committed, (2) whether it is safe to view the act of providing benefits as part of the acts of executing the promotional plans in that such act of providing benefits is an offering of economic benefits for the purpose of promoting the sales of medical and pharmaceutical products even when specific subjects of the act of offering benefits are different from each other, (3) whether and to what extent costs for providing benefits will be passed to product prices, (4) how difficult it is to detect promotional plans and the act of providing benefits, and (5) what the transaction practices are like at the time when the act of legal violation was committed, if the act of providing benefits that have been specifically verified can be seen as an act of executing promotional plans established at the headquarters level with respect to all business partners of the plaintiff, it is then reasonable to consider the sales of the plaintiff's medical and pharmaceutical products to all of its business partners as the sales of the relevant products affected by the act of violation, and thus, as the relevant sales."

The decision by the Korean Supreme Court was made in consideration of the fact that the offering of under-the-table margins to certain hospitals and clinics for the promotion of sales of certain medical and pharmaceutical products is highly likely to be passed to the prices of such products supplied to other hospitals and clinics if there is support at the headquarters level. Therefore, it can be also interpreted that if there is no such likelihood, only the sales to certain partners at issue should be considered for the calculation of penalty surcharge.

3. Influence of the Korean Supreme Court's decision

The Korean Supreme Court in this case is expected to influence the KFTC's investigation into the supply of under-the-table margins by pharmaceutical companies in the future. Therefore, when an act of supplying under-the-table margins is at issue, the KFTC is expected to also investigate in the future whether such act is an individual act by a sales representative aiming to enhance its performance or an act as part of promotional plans at the headquarters level.

IV. Importance of the code of fair-competition policy and implementation of the dual-punishment system

The Korean Supreme Court's decision in this case is also meaningful as it confirmed that the code of fair-competition policy established by the Korea Pharmaceutical Manufacturers Association (or the Korean Research-based Pharmaceutical Industry Association) on the transaction of insured medical and pharmaceutical products should serve as an important standard for judging whether under-the-table margins provided by a pharmaceutical company constitutes an act of "unfair" customer-attraction.

Meanwhile, the dual-punishment system has been implemented from Nov. 28, 1010, which penalizes the 'provision' and 'receipt' of money, goods, convenience, labor, entertainment and other economic benefits between pharmaceutical companies and hospitals/clinics (Article 47, Section 2 of the Pharmaceutical Affairs Act, Article 23-2, Section 1 of the Medical Service Act). The Ministry of Health & Welfare officially announced on Dec. 13, 2010, the Enforcement Rules of the Pharmaceutical Affairs Act and the Medical Service Act setting forth the details on the categories of economic benefits of which the provision or receipt is allowed, which include the provision of samples, support for an academic seminar, support for a clinical test, a presentation on the explanation about products, a discount of costs according to the terms and conditions of payment, an investigation after a release on the market, and others (refer to Schedule 5-2 of the Enforcement Rules of the Pharmaceutical Affairs Act and Schedule 2-3 of the Medical Service Act). Thus, to determine whether an act constitutes unfair or excessive support in relation to the act of unfair customer-attraction, Schedule 5-2 of the Enforcement Rules of the Pharmaceutical Affairs Act can serve as an important standard, together with the code of fair-competition policy.

[Insurance] - Attorneys Se Ryul Hong, Choon Cho, Soo-Hyun Yi and Michael Chang

Key details on the amendment of the Enforcement Decree of the Insurance Business Act enforced on Jan. 24, 2011

The Enforcement Decree of the Insurance Business Act, which was amended according to the legislative intent of the Insurance Business Act as amended on July 23, 2010, has become effective since Jan. 24, 2011, after its preliminary announcement by the Financial Services Commission.

The following are important details on the amendment to the Enforcement Decree of the Insurance Business Act.

1. Duty to explain at the time of soliciting the insurance contracts

The pre-amendment Insurance Business Act failed to provide for the duty to explain at the time of soliciting insurance products. The Insurance Business Act as amended, however, imposes on an insurance company or an insurance solicitor the duty to explain about insurance premiums/benefits for each special arrangement under main contract, security risks, the payment period of insurance premiums, the insurance period, restrictions on the payment of insurance benefits, matters concerning withdrawal of insurance subscription, the effects of the violation of the notice obligation, matters concerning refunds, etc. at the time of soliciting general insurance-policy holders. An insurance company and insurance solicitor should obtain the confirmation from a general insurance-policy holder via signing, affixation of name and seal, recording, etc. that the above-mentioned matters have been explained and understood.

Such duty to explain at the time of solicitation for insurance contracts corresponds with the duty to explain at the time of solicitation for financial investment products under the Financial Investment Services and Capital Markets Act (FSCMA), and thus, should apply only to a case of selling insurance to a general insurance-policy holder and not to a professional insurance-policy holder.

A penalty surcharge may be imposed on the insurance company or solicitor which violated its duty to explain under the Insurance Business Act up to 20% of the income from the relevant insurance contract.

2. Application of the principle of suitability

While the pre-amendment Insurance Business Act did not apply the principle of suitability to solicitation for insurance contracts, the Insurance Business Act, as amended, applies such principle and imposes on the insurance company and insurance solicitor the duty to solicit suitable product to the solicited by considering the monthly income, the portion of insurance premiums in the monthly income, the expected period of maintaining the insurance contract, the history of purchasing other variable-insurance product or collective investment securities, etc. An insurance company, etc. should also identify the age, financial status and subscription purpose of the solicited through interviews or inquiries, and obtain the confirmation of the same through signing, affixation of name and seal, recording, etc.

The principle of suitability applicable to solicitation for insurance contracts corresponds with the principle of suitability applicable to solicitation for financial investment products under the FSCMA, and thus, deemed to be limited to a sale of variable insurance to a general insurance-policy holder and not to a professional insurance-policy holder such as a financial institution and a stock-listed corporation.

3. Duty to verify double insurance contracts

While the Commercial Act imposes on the insurance-policy holder a duty to notify the insurance company of the matters concerning double insurance, the amended Insurance Business Act imposes on the insurance company, etc. which engages in solicitation for a medical reimbursement insurance contract a duty to verify, with the consent of the solicited, whether the solicited has executed another insurance contract on the same risk. In other words, if the solicited is registered as the insured of another medical reimbursement insurance contract on the same risk, the soliciting insurance company should explain to the solicited the details of the pro rata sharing of insurance benefits by and among the relevant insurance companies, and obtain the confirmation of understanding of the same from the insurance-policy holder/the solicited via signing, affixation of name and seal, recording, etc.

In addition, the insurance company which has executed a medical reimbursement insurance contract should, with consent of the insurance-policy holder, provide to the insurance association information on the matters concerning the identity of the insurance-policy holder and the details on the contract including the insured amount by the next day following the execution date. Then, the insurance association should operate the "Medical Reimbursement Insurance Contract Information Check System" based on such information provided to allow an individual insurance company to verify double insurance.

4. Tightening of regulations on false and exaggerated advertisements

The Insurance Business Act as amended provides the matters that must be included or prohibited in the advertisement of an insurance product by an insurance company, etc. for the purpose of protecting the insurance-policy holder.

Matters that must be included in the advertisement are "recommendations for the reading of product manuals and policies before the signing of the contract", "the possibility of the loss of principal in relation to variable insurance", "the names of the insurance company and the insurance product", "key details on protection", and "examples of insurance premiums/benefits", and those prohibited are "an act of causing misunderstanding that insurance benefits may be received unconditionally by omitting or failing to fully inform the conditions, restrictions and exemptions, etc. on the payment of insurance benefits, "an act of advertising the combined amount of two or more different insurance benefits for different causes as the insurance benefits to be paid", and "an act of advertising insurance by a host of a home-shopping program who is not eligible as insurance solicitor".

A penalty surcharge may be imposed on the insurance company in violation of the above provision up to 20% of the income of the relevant insurance contract.

5. Permission of the transaction of credit-linked notes

While the pre-amendment Insurance Business Act, in principle, prohibited an act of an insurance company guaranteeing other person's liabilities unless permitted as an exception under the Insurance Business Act, etc., the amended Enforcement Decree of the Insurance Business Act provides an exception permitting an insurance company's purchase of "derivative-linked securities based on an agreement that a person who intends to transfer credit risk shall pay money, etc. for such transfer to a person who acquires such risk by transfer, and the person who acquires credit risk by transfer shall compensate for loss incurred from a credit event to the person who transfers credit risk".

Accordingly, an insurance company may invest in various credit-linked notes, which means the regulations on asset-management by insurance companies have been relaxed.

[Antitrust] - Attorneys Young Chul Yim and Chang-Young Cho, U.S. Attorney Jooyoung Park, and Attorney Daeyong Baek

The KFTC amends the review standard on the so-called 'business funneling'

On Dec. 22, 2010, in amending the Guidelines for Assessing Unreasonable Supports (the "Guidelines") (the amendment effective as of January 1, 2011), the Korea Fair Trade Commission (the "KFTC") delineated the review standard on the unreasonable support through mass-scale dealing (the "Business Funneling"). The details of the amendment are set forth below.

1. The Guidelines added to the definition of an act of support "an act or omission of providing excessive economic benefits by the supporting entity to the supported entity through a transaction of a considerable size."

2. The Guidelines also added the following provisions concerning specific criteria for determining an act of support.

(1) A considerable size shall be "determined based on the comprehensive examination of the structure and nature of the market to which the supported entity belongs, the economic status of the supported entity at the time of the act of support, competitiveness of other competing enterprises, etc."

(2) Whether an act of support of a considerable size has been made may be determined based on the examination of the following.

- Despite the existence of cost-reduction effects due to economy of scale or the nature of the object of the transaction, whether such cost-reduction effects disproportionately fall on the supported entity
- Whether the business risk of the supported entity is eliminated because the transaction volume between the supporting entity and the supported entity is large enough to secure a minimum transaction size required for the commencement or maintenance of the supported entity's business, etc.

(3) In addition, when determining the act of support as above, any justifications for the act concerned should be also examined, such as whether effects of cost-reduction, quality-improvement or increase in efficiency on the supported party have been the result of the intrinsic nature of the transaction with the supported party.

The Guidelines as the examination guidelines for the KFTC are expected to serve as references for the enterprises for an act of unfair support resulted from a transaction of a considerable size. However, one caveat is that the existence of a transaction of a considerable size alone cannot be the basis to constitute an act of unfair support. As stated in the Guidelines above, it is also possible that effects of an increase in efficiency such as cost-reduction and quality-improvement can be by-products of a transaction between affiliates due to the intrinsic nature of such transaction. The KFTC also does not view that an act of a transaction of a considerable size itself constitutes an act of unfair support.

In connection with the above, the elements of an act of unfair support through a transaction of a considerable size have been specified in the KFTC's ruling on Company A that an act constitutes unfair support under the MRFTA only when it meets the three requirements of (i) "a transaction of a considerable size", (ii) a transaction "under much more favorable conditions" than a normal price level, and (iii) the acknowledgement of "the provision of excessive economic benefits" to the supported entity and the existence of "concerns about the undermining of fair trade." In this case, Company A's act of concluding most of its advertising contracts with its affiliates was determined not to constitute an act of unfair support because of lack of evidence showing 'a transaction under favorable conditions' than a normal price level.

In the administrative proceedings of this case, the Seoul High Court also made a judgment on the basis that an act that falls under "a transaction of a considerable size" as well as "a transaction under highly favorable conditions" would constitute "an act of supporting an affiliated person or another company by providing excessive economic benefits through a provision or a transaction in a considerable size."

As such, in principle, according to the rulings of Seoul High Court and the KFTC that a transaction of a considerable size would be deemed as an act of unfair support under the MRFTA if it fulfills all of three following requirements: (i) that the act of support is a transaction of a considerable size; (ii) the act of support is a considerably favorable condition (compared to the ordinary price or ordinary transaction conditions); and (iii) the act of support may threaten to impair a fair transaction in the market to which the supported entity belongs to.

[Constitution]

- Attorneys Byung-Il Im and Jae Min Jeon

Unconstitutionality Ruling on the "Minerva" Law and Its Implications on Corporate Activities

When the global financial crisis took place in July 2008, an internet commentator known by his screen name "Minerva" became a hottest topic of conversation. He posted his commentary on an online discussion board called the "Agora" Economic Forum at the portal site of Daum where he commented that financial institutions were prohibited from buying additional dollars because the nation's foreign exchange reserves had already been depleted. His commentary soon spread widely across the population in the context of the then imminently critical economic conditions.

The prosecutors indicted "Minerva" alleging that the acts of preparing and posting such writing online breached the Framework Act on Telecommunications (the "Act"); however, the court of first instance acquitted him on the ground that the acts were not accompanied by the purpose of injuring the public interest. Moreover, on December 28, 2010, the very provision within the Act alleged to have been violated by "Minerva" (i.e., the provision that stipulates penalty for a fraudulent communication perpetrated via electronic communications network for the purpose of harming the public interest) was declared "unconstitutional" by the Constitutional Court of Korea and, therefore, the provision was retroactively invalidated. Also, the prosecution's appeal of the court of first instance's judgment was withdrawn on December 30, 2010, only two days after the Constitutional Court's declaration of the relevant legal provision's unconstitutionality. Consequently, the court of first instance's judgment of not guilty has become confirmed as final.

The main reason the Constitutional Court of Korea decided that the abovementioned provision of the Act was unconstitutional was that the concept of "public interest" in the phrase "in order to harm the public interest" was overly lacking in specificity to allow for a determination of what communications committed for what purposes are prohibited. As regards the types of conducts on which the freedom of expression may be restricted or criminal punishment may be imposed, the elements of violations must be clearly delineated so as to allow every person to predict what the legal prohibitions are and what the punishments will be for perpetrating them. The rationale underlying the holding of the Constitutional Court of Korea was that the lack of specificity and the resulting lack of legal clarity at issue should not become justification on which to restrict the people's freedom of expression.

Even in the corporate environment, there is constant tension between free economic and financial activities or creative activities for pursuing profits, on one hand, and a variety of laws and regulations intending to control such activities from the perspective of the public interest or the administrative acts of a supervisory authority, on the other hand. Under the given circumstances, companies constantly try to interpret relevant laws and regulations to determine their applicability to their actions and contemplate ways of avoiding the applications of such laws and regulations to their actions. Depending on the given circumstances, companies may consider directly contesting the regulatory measures of administrative agencies through the judicial process.

Among the series of possible response measures that may be taken by companies, the one that, to the present point, has not drawn much interest and yet can be the most powerful response measure that can potentially invalidate the relevant law or regulation itself is to have the relevant law or regulation reviewed as to its constitutionality via constitutional litigation.'

Eleven laws that used to provide for "dual liability" (i.e., punishing not only the perpetrating director/employee but also the company as well) were all ruled unconstitutional by the Constitutional Court of Korea on October 28, 2010. This shows how powerful a constitutional lawsuit potentially can be.

A constitutional appeal has recently been pending for a review of a clause in the old Act on the Protection etc. for Dispatched Workers under which a continued employment of a dispatched worker for longer than 2 years automatically resulted in a "deemed employment." This may be an interesting case keep an eye on.

[Litigation Cases]

- Attorneys Byung-Il Im and Sung-Deok Nam

Civil Precedents

If a tax authority invokes its own authority to cancel a prior imposition of tax in the middle of a subsequent objection proceeding, such cancellation decision becomes irreversible.

(The Korean Supreme Court Decision: 2009 Du 1020, decided on September 30, 2010)

The Korean Supreme Court ruled that when taxation authorities acknowledge that the reasons for objecting to taxation have been acceptable and take necessary measures accordingly in the process for raising an objection to taxation, such measures cannot be reversed for the same matter without a special cause and prior taxation cannot be imposed again in light of the purposes of the objection-raising system and other laws and regulations acknowledging relevant corrective measures. Therefore as long as taxation authorities acknowledge that the cause for raising an appeal is acceptable in the appeals process and cancel taxation by an authority, the reversal of such decision for cancellation and the re-imposition of prior taxation without a special cause may not be permitted.

After a transfer of shares that are in registered form, the transaction party entitled to request the company to record the transfer is the purchaser

(The Korean Supreme Court Decision: 2009 Da 89665, decided on October 14, 2010)

The Korean Supreme Court ruled that since the right to request a transfer of the name is a right by which a person who acquires registered stocks may request that the company state his name and address along with other information in connection with such registered stocks in the shareholders' registry, only that person who acquired registered stocks may exercise that right. Furthermore, such legal principle should be applied not only to cases in which registered stocks are transferred by the delivery of stock certificates but also to cases in which registered stocks are transferred by the expression of intents between the transferor and the transferee in the context where stock certificates have not been issued until after the lapse of six months from the incorporation of the company.

Whether a person who committed an intentional tort by taking advantage of the victim's carelessness may argue for comparative negligence

(The Korean Supreme Court Decision: 2010 Da 48561, decided on October 14, 2010)

The Korean Supreme Court ruled that while it is true that a person who committed an intentional tort by taking advantage of the victim's carelessness cannot argue for comparative negligence, such does not justify a legal interpretation that, in the context involving a group of tortfeasors where only some, but not all, of such tortfeasors committed intentional tort by taking advantage of the victim's carelessness, the rest of the tortfeasors who did not so take advantage of the victim's carelessness cannot argue for comparative negligence. In addition, in some cases, comparative negligence or the limitation on responsibility based on the principle of fairness can be claimed for even an intentional illegal act. The Korean Supreme Court had ruled that a claim for a reduction in responsibility by a person who intentionally committed an illegal act to exploit a victim's negligence on the grounds of the victim's negligence cannot be permitted because acknowledging such a limitation on the offender's responsibility in a case where the offender's intentional illegal act is the taking of another's property results in the offender profiting from an illegal act which would be against the ideals of fairness or the principle of good faith. However, if the illegal act does not result in the offender profiting from his illegal activity, he may be able to argue for a limitation on his responsibility.

Requirements for deferring redemption of beneficiary certificates (= Existence of the cause for deferment of redemption)

(The Korean Supreme Court Decision: 2008 Da 13043, decided on October 14, 2010)

The Korean Supreme Court ruled that with regards to deferring the redemption of beneficiary certificates in securities-investment trusts, proactive measures for deferment of redemption such as the disclosure or the announcement of deferment of redemption for all beneficiaries are not necessary. If a reason to defer redemption is acknowledged under the terms and conditions of an investment trust, the refusal of an individual beneficiary's claim for a redemption by itself would constitute deferment of redemption.

A provincial governor may not permit a transport business falling under the category of the "express intercity" bus transport business by authorizing a change in the business plan of a "direct intercity" bus transport business.

(The Korean Supreme Court Decision: 2010 Du 4179, decided on November 11, 2010)

The Korean Supreme Court ruled that a provincial governor's granting of a license for a "direct intercity" bus transport business to a transport company under his jurisdiction and then authorizing a change in such company's business plan such that it can run a transport business which should fall under the category of "express intercity" bus transport business constitutes a legal violation exceeding a provincial governor's authorized powers. The Court reasoned that licensing of an "express intercity" bus transport business (with characteristics such as transport distances of 100 km or more and transportation being over national expressways for 60% of the time or more) is reserved for the Minister of Land, Transport and Maritime Affairs and the provincial governor can only license "direct intercity" bus transport businesses (with characteristics such as transport distances of around 50 km and stops at each leg of the transportation).

Degree of the duty of care owed by a bank selling beneficiary certificates when it solicits the purchase of beneficiary certificates

(The Korean Supreme Court Decision: 2008 Da 52369, decided on November 11, 2010)

In a case in which the defendant bank only explained that loss of principal might occur at maturity while failing to also explain that loss of principal might occur at the time of early redemption, the Korean Supreme Court accepted that the defendant bank should be held accountable for an illegal act due to violation of its duty of care to protect customers. However, as for additional losses suffered by the clients after they learned of the risk that they could lose the principal in the case of early redemption, the Court refused to find that such additional losses were imputable to the bank's violation of the duty of care.

Administrative authorities' rejecting or refusing to accept a construction report is an object of appeals lawsuit.

(The Korean Supreme Court Decision: 2008 Du 167, decided on November 18, 2010 Unanimous Ruling)

The Korean Supreme Court ruled that the principle of law-governed administration dictates that, in the case where a construction report is rejected by an administrative agency, the parties should be able to test the lawfulness of such rejection in a timely manner so as to eliminate any legal uncertainty before proceeding onto the construction activity and also find a fundamental solution at an early stage to potential disputes that could arise from the buildings and demolitions of illegal constructions, and therefore an administrative agency's rejection or refusal to accept a construction report is an object of an appeals lawsuit.

Whether a financial institution's employee's obligation to compensate his employer for losses is triggered in the event he extends loans in violation of the institution's internal rules is considered and the resulting calculation of such damages.

(The Korean Supreme Court Decision: 2007 Da 10627, decided on November 25, 2010)

The Korean Supreme Court ruled that in the event an employee of a financial institution extends loans in violation of the institution's internal rules regarding its loan business and the institution sells such loan receivables via methods such as open competitive bidding to recover overdue receivables quickly, extenuating circumstances may limit the employee's liability to compensate for the company's losses. Thus, the loss suffered by the financial institution due to such loans in violation of the internal rules should be determined as the amount of loan receivables not recovered by their sale price unless there are special circumstances. Special circumstances include situations where (i) method and timing of selling the loan receivables chosen by the financial institution only harms the employee while bringing no certain benefits for the financial institution, and provided the amount recovered through the exercise of the obligatory right or the security right by the purchaser of the loan receivables considerably exceeds the sale price of the receivables, or (ii) where the appropriateness of how to calculate the sale price may be disputed as a method of selling the receivables concerned along with other receivables is employed.

In the event an approval order is made for the establishment of a housing redevelopment union and then an approval order for a change in the establishment of the union is made, whether the original approval order for establishment of the union is absorbed into the approval order for change.

(The Korean Supreme Court Decision: 2009 Du 4555, decided on December 9, 2010)

The Korean Supreme Court ruled that in the event an approval order for a change in the establishment of a housing redevelopment union is made on the grounds that the rights of a union member was transferred due to reasons such as a sale of buildings including land or the number of consenters was changed following the submission of additional consents, such approval order for the change is limited to an acceptance of a report on a change in trivial matters. Therefore the original approval order for the establishment of the union (which is an order granting a right) should not be absorbed into the approval order for the change.

In the event of a division of a company or a spin-off, the scope of joint and several liabilities that are taken on by a newly incorporated company and the existing company

(The Korean Supreme Court Decision: 2010 Da 71660, decided on December 23, 2010)

The Korean Supreme Court ruled that pursuant to Article 530-9, Section 1 of the Commercial Act, liabilities of an incorporated company before a split-off or spin-off that a newly incorporated company and the existing company following such a split-off or spin-off jointly and severally take over as against the company's creditors include both the liabilities which arose before the effects of split-off or spin-off which have not yet matured as of the transaction date and those which had not arisen before the spin-off or split-off but where a legal relationship as a foundation for the constitution of such liabilities had been already established.

Whether a transfer of title concerning real estate from a father to his child was interpreted as a donation

(The Korean Supreme Court Decision: 2007 Da 22859, decided on December 23, 2010)

The Korean Supreme Court ruled that transferring title over their property to their children should not immediately be considered a donation as it is common for parents to hand over their lifetime property to their children while maintaining rights to the management and disposal of such property with the child's cooperation or consent. Instead, when parents continue to exercise rights to management and disposal over their property even after transferring title to their children, it should be interpreted as a title trust.

[Litigation Cases] - Attorneys Yong-Sung Lee

Criminal Precedents

As Article 233 of the Criminal Procedure Act that stipulates the 'principle of the indivisibility of a complaint' cannot be applied to the Korea Fair Trade Commission's (the "KFTC") exclusive referral right, it is impossible to prosecute a company not referred for prosecution by the KFTC.

(The Korean Supreme Court Decision: 2008 Do 4762, decided on September 30, 2010 Violation of the Monopoly Regulation and Fair Trade Act)

Although the Monopoly Regulation and Fair Trade Act (hereinafter referred to as the "Act") specifies conditions for prosecution in Article 71, Section 1 of the Act which provides that, 'Any offence as prescribed in Article 66, Section 1, Item 9 shall be prosecuted by a public action only after a complaint is filed by the Korea Fair Trade Commission', Article 233 of the Criminal Procedure Act only provides the principle of subjective indivisibility of a complaint concerning an offence subject to prosecution upon a complaint while it does not provide for the principle of subjective indivisibility of a complaint to apply to an accusation. Furthermore, the Act does not apply Article 233 of the Criminal Procedure Act.

Therefore, if Article 233 of the Criminal Procedure Act were to apply to the accusations of the Korea Fair Trade Commission by analogy, such application would expand the scope of criminal punishment, especially for offenders against whom the Korea Fair Trade Commission has not made an accusation. Such an interpretation would constitute an analogical interpretation of a stipulation in criminal laws unfavorable to the defendant and such application cannot be permitted as it is against the principle of "nulla poena sine lege".

Respondents' violation of a cease and desist order pursuant to a provisional disposition does not constitute , the crime of invalidating an official mark.

(2010 Do 3364 Decision on Sept. 30, 2010 Rendering null and void symbol of official secrecy)

Regarding the crime of invalidating an official mark under Article 140, Paragraph 1 of the Criminal Act, if the executor only announces that the court has handed down a cease and desist order pursuant to a provisional disposition against the respondent but fails to undertake specific acts of execution such as the attachment of seals or taking property under his possession, a mere violation of the cease and desist order pursuant to the provisional disposition by the respondent does not constitute the crime of invalidating an official mark which requires an act which reduces the effectiveness of official mark

In the event that a payment guarantee prohibited by law is issued by the representative director of a mutual savings bank, such a payment guarantee is invalid. Therefore, the crime of the breach of trust concerning mutual savings banks is not constituted.

(2010 Do 6490 Decision on Sept. 30, 2010 Violation of the Act on the Aggravated Punishment, etc. of Specific Economic Crimes (Breach of Trust), etc.)

As Article 18.2, Subparagraph 4 of the Mutual Savings Bank Act that prohibits an act of guaranteeing debts or providing securities is an effective provision and an act of the representative director, etc. of a mutual savings bank in violation of the provision is invalid, unless special circumstances such as the mutual savings bank bearing the liability of customers or the corporation for acts in violation of the Civil Act, the crime of the breach of trust is not established.

When an order of license and permission is made based on an application to administrative authorities, if such an order is made despite an inadequate examination of a public official in charge, the crime of the obstruction of the performance of official duties by fraudulent means is not established.

(2008 Do 9590 Decision on Oct. 28, 2010 Obstruction of the performance of official duties by fraudulent means)

Administrative authorities carry out examinations and make decisions on licenses and permits on the premise that the representations made in the applications may not be consistent with the facts. If administrative authorities have granted licenses or permits in response to applications without ascertaining the facts and simply trusting false representations in submitted applications or false explanatory data, such licenses or permits were obtained due to inadequate examination by the administrative authorities and the fraudulent means of the applicant cannot be deemed as the main cause thereof. Therefore, the crime of obstruction the performance of official duties by fraudulent means is not established in such situations.

In the event proceedings on the merits began due to a decision on a motion for facts which were not subject of a motion, such a wrong decision cannot be disputed in the proceedings on the merits.

(2009 Do 3563 Decision on Nov. 25, 2010 Breach of trust)

Even if a court, in violation of Article 262, Paragraph 2, Subparagraph 2 of the Criminal Procedure Act, makes a decision in a motion regarding facts which are not the object of the motion, and proceedings on the merits are initiated based on such a decision, the court's error cannot be disputed in the proceedings on the merits unless there are other special circumstances.

1. The 'profit gained by an act in violation' provided in Article 207.2 and 214 of the former Securities and Exchange Act includes that of an accomplice, and the prosecutor bears responsibility for presentation of evidence. 2. A person who effectively owns a company's stock has an obligation to report the status of holdings and changes thereto when holding large amounts of such stocks.

(2009 Do 6411 Decision on Dec. 9, 2010 Violation of the former Securities and Exchange Act)

1. The 'profit gained by an act of violation' provided in Article 207.2 and 214 of the former Securities and Exchange Act means a profit of which the causal relationship with the risk arising from the act in violation is acknowledged and includes any profit attributed to an accomplice. The prosecution bears the burden of presentation for evidence thereof.

2. A person who effectively owns stock in a company in his accounts has an obligation to report the status of his holdings and changes thereto when holding large amounts of such stock and regardless of the name of ownership thereof.

An act of arbitrarily withdrawing and spending money remitted and deposited in error constitutes the crime of embezzlement even if there is no special relationship of transactions between the remitter and the remitted.

2009 Do 891 Decision on Dec. 9, 2010 Embezzlement (Name of the acknowledged crime: Embezzlement of lost articles)

In the event money is remitted and deposited in a deposit account in error, it should be viewed that a relationship of custody is established between the depositor and the recipient under the principle of good faith. Therefore, an act of arbitrarily withdrawing and spending money remitted and deposited in a bank account under an individual name in error constitutes the crime of embezzlement. The same is also applied to a case in which there is no special relationship of transactions between the remitter and the recipient.

[Recent Major Achievements]

Winning of a lawsuit in a claim for cancellation case including corrective measures related to multi-level sales, etc.

Failing to register as a multi-level sales business, Company C sold cosmetics under a system in which (1) a sales representative of Company C recruits another person as a sales representative, and such other sales representative recruits another person as a sales representative again, and (2) Company C makes payments such as team commissions and mentor bonuses to a sales representative based on his sales results and those of subsequently recruited representatives. The Fair Trade Commission issued an order of corrective measures to Company C, the client, for the suspension of multi-level sales under Article 13, Paragraph 1 and Article 42, Paragraphs 1 and 2 of the Door-to-Door Sales Act on the grounds that Company C's sales system of Company C constituted multi-level sales as provided by Article 2, Subparagraph 5 of the Door-to-Door Sales Act.

Shin & Kim, representing Company C, argued that its sales activities do not constitute an act of multi-level sales under the Door-to-Door Sales Act based on the fact that Company C's sales representatives had registered as sales representative without purchasing the products of Company C as consumers. The Fair Trade Commission argued that Company C's sales activities constituted an act of multi-level sales because a person who purchases goods from a multi-level sales business to become a multi-level sales representative also falls under the category of consumers under the Enforcement Decree of the Fair Trade Act. Shin & Kim convinced the court that the clause in the Enforcement Decree of the Fair Trade Act about the concept of a consumer, which had been cited by the Fair Trade Commission as a basis for its argument, should not be considered in determining whether Company C had been engaged multi-level sales in light of the purpose of such clause. The court ruled accepted Shin & Kim's argument and Company C won the lawsuit. This case is highly significant in terms of defining the scope of application of the Door-to-Door Sales Act on multi-level sales Given that it is a new case in which the court, without many precedents on the concept of multi-level sales under the Door-to-Door Sales Act, ruled that a defendant's act does not constitute an act of multi-level sales.

* Attorney Jung-Won Park, Myeong Ho Choi, Lin Kim and Hyung-Soo Kim

A senseless attempt at recovering the land of ancestors was brought to a halt.

Shin & Kim put an end to a senseless claim, based only on a forest-land investigation letter drawn up during the era of Japanese occupation, for the recovery of ancestors' land and seeking the cancellation of registration of ownership preservation.

The forest land at issue is an area which the defendants' father lawfully purchased from the plaintiffs' ancestors around 1943 during the era of Japanese occupation. The defendants' father had cultivated Korean pine forests and gathered pine nuts thereon. Also, he moved the graves of his ancestors to the forest land. The defendants have since inherited the forest land and continued to gather pine nuts. For about seven decades, the defendants have exercised their ownership over the land without trouble. However, a letter of forest-land investigation drawn up around 1934 contained a statement that the plaintiff's ancestors had the forest land assessed. The plaintiffs who discovered this statement filed a claim, based on the document above, for the cancellation of the registration of ownership preservation which was made under the defendants' names.

The Supreme Court maintained that a person under whose name the forest land was assessed according to the forest-land investigation letter had lawfully acquired real estate, and the registration of ownership preservation contradicting such statement constituted an invalid cause. Because it is difficult to establish facts regarding lawful succession of right in the event that documentary evidence of the transfer of ownership including the register is lost and the plaintiffs filed this claim to exploit such difficulty.

Shin & Kim argued that the completion of possession and acquisition by prescription based on the fact that the defendants' father and the defendants themselves have possessed the forest land at issue for seventy years by cultivating Korean pine forests and gathering pine nuts therein. The court accepted the argument and dismissed all of the plaintiffs' claims.

Recently, the children of people under whose names land was assessed have filed lawsuits for the cancellation of register under a senseless drive to recover the land of ancestors. In fact, most of these children did not even know that the lands had been assessed, and brokers who inspected related letters of the forest-land investigation are involved to tempt such children into filing claims. This case is meaningful as it rejected such an unjustified claim according to the legal principles of acquisition by prescription.

* Attorneys Jun-Seung Lee, Min-Kyung Kim, and Sung-Deok Nam

The issuance of new shares by contribution in kind was ruled invalid.

Contribution in kind for defending managerial rights is illegal in violation of stockholders' preemptive right to new stocks.

Even though there is a ruling by the Supreme Court suggesting that the preemptive right of stockholders to the issuance of new stocks is not applied to the issuance of new shares by contribution in kind, Shin & Kim successfully elicited a ruling that the issuance of new shares for contributions in kind is invalid on the grounds that such issuance is in violation of stockholders' preemptive rights to new stock. This ruling is expected to serve as a key precedent sending a clear warning to acts of the surreptitious issuance of new stocks for contributions in kind for the purpose of defending managerial rights.

In a situation wherein a number of Group A affiliates became insolvent or were put under court receivership due to Group A's deterioration in business management and liquidity crisis, from around December 2008, Company C, the largest stockholder of Company B (which was an affiliate of Group A), began the process of selling its shares and Group A was faced with the risk of losing its control rights in Company B to a third party.

The management of Company B then issued new stocks in a greater number than the total number of existing stocks then outstanding by secretly receiving contributions of bonds from other friendly Group A affiliates while completely excluding Company C (the creditor of the above company), and contributions of land reclaimed from public waters (reclamation rate: 46.83%) from Company D, another friendly affiliate of Group A. As a result, the Company C's status in Company B as its largest-stockholder was reduced to a minority-stockholder status while Company D which was not even a stockholder of Company B before became Company B's largest stockholder holding 41.15% of its total shares. That is, the governance structure of Company B was changed.

Company C, which later learned of this, filed a suit seeking to invalidate the issuance of new stocks for contribution in kind as above on the grounds that such issuance of new stocks infringed on its preemptive rights in violation of Article 418, Paragraph 2 of the Commercial Act because the issuance was made for the purpose of maintaining Group A's control rights to Company B, not for meeting the company's own managerial needs.

In the lawsuit, defendant Company B argued that the issuance of new stocks in this case did not constitute a violation of the stockholder's preemptive rights as such issuance was made by contributions in kind and based its argument on the 88 Nu 8889 Decision by the Supreme Court on Mar. 14, 1989 which stated that "the stockholder's preemptive right to new stocks is not applied to the issuance of new stocks by contributions in kind."

However, Shin & Kim, representing the plaintiff, argued that the Supreme Court's decision above was an inappropriate decision to be cited in a case in which the issuance of new stocks is suspected as an act performed for the purpose of defending control rights. We distinguished the decision above as it was a case regarding whether donation tax can be imposed on one stockholder of a company who acquired all the new shares of the company by contributions in kind when the company's other shareholders waived their preemptive right with such waivers deemed as donations of new shares to the shareholder who made in-kind contribution. We emphasized that it is highly likely that the management of a company exploits contribution in kind as a tool to defend its control rights if the stockholder's preemptive rights are not applied to the issuance of new stocks for contributions in kind. Thus, we argued, the requirement for justification for the purpose of excluding stockholder's preemptive rightsArticle 418, Paragraph 2 of the Commercial Act should not apply. The court accepted the plaintiff's arguments and ruled that the requirement for justification under Article 418, Paragraph 2 of the Commercial Act should also be applied to the issuance of new stocks for contributions in kind and rejected the defendant's arguments which cited the Supreme Court's decision as above.

* Attorney Byung Joo Lee, Hui-Young Cho, Hyo Jong Choi, and Seong-Hyuk Kim

A depositor who suddenly went broke was helped.

A case in which a bank's responsibility was acknowledged even when the identity of the password of the personal seal impression was confirmed

An individual ("Depositor") holding deposits of about KRW 500 million with a local Nonghyup chapter found out one day that nearly the full amount of the balance of his deposits had been withdrawn when he tried to enter into a deposit transaction. The surprised Depositor requested that the police investigate the case, and the police discovered that a middle-aged woman who was a complete stranger to the Depositor (the "Criminal") had fabricated the passbook of the Depositor (The fabricated passbook only had the same heading as that of an authentic passbook while the records therein were false and a magnetic tape with which no information could be retrieved was attached thereto) and then visited a branch of Nonghyup to re-record the magnetic tape, re-issue the passbook, and finally to withdraw most of the Depositor's deposits at another branch.

Shin & Kim represented the Depositor who went broke all of a sudden and proceeded with a suit combining (i) a claim for the return of deposits against the local Nonghyup chapter, (ii) a claim against the other party to the deposit agreement, and (iii) a claim for damages (user's liability) for an illegal act against Nonghyup which re-recorded the magnetic tape, re-issued the passbook, and authorized the withdrawal of deposits.

The defendant local Nonghyup chapter argued that the obligation for the return of deposits had been validly extinguished through the payment to the quasi-possessor of receivables given that the Criminal had presented a genuine personal impression seal and password. They also argued that there had been no negligence as it had performed its duties concerning deposits in full compliance with its deposit policy.

Shin & Kim researched the legal principles and cases concerning deposit transactions, made a request by commission for the delivery of documents containing criminal records of the Criminal, performed fact-finding procedures for commercial banks, and sought clarification regarding the process of deposit transactions. Then, the court pronounced a ruling that there had been negligence in both 1) the trustee's performance of duties without checking whether the customer was the principle or whether there was an agency relationship, and 2) a bank clerk's performance of duties in which the fact that information in the passbook presented by the customer was starkly different from actual information on the deposit account appearing on the computer screen was overlooked even when there were very suspicious circumstances. Therefore the defendant local Nonghyup chapter was ordered to return the full amount of the original deposits of the Depositor to the Depositor and the court rejected their arguments against repayment to the quasi-possessor when the sameness of the personal impression seal and the password were confirmed. As a result, the claim against the defendant Nonghyup was dismissed as there was no damage to the Depositor because the Depositor held all the original deposit receivables even though the defendant Nonghyup's negligence was recognized.

In other words, the ruling above accepted practically all of the plaintiff Depositor's claims, and Shin & Kim accomplished a brilliant feat of both relieving an individual of underserved hardship and winning a ruling of legal significance that confirms the obligations of due care and held by financial institutions when handling deposit processes.

* Attorney Deok Gu Lee and So-Youn Kim

Investors in a Lehman Brothers fund win a class-action suit.

The investors who suffered losses in their investments in "Woori 2 Star Derivative Fund," an equity linked fund (the "Fund"), when Lehman Brothers Holdings Inc., a holding company in the United States ("Lehman Brothers"), went bankrupt, filed a lawsuit against Hana Bank who served as trustee company seeking the return of their investment money. Shin & Kim successfully represented Hana Bank in intense legal disputes and the court rendered a decision confirming the trial court's decision that dismissed the investors' claims.

In the present case, the investors asserted that it was a breach of contract for Woori Asset Management Co., Ltd., an asset management company ("Woori") to change the transaction counterpart from 'BNP Paribas' to 'Lehman Brothers' the credit rating of which was two grades lower than the former, without the investors' authorization, based on the fact that the transaction counterpart of the OTC derivatives was named 'BNP Paribas' in the Fund prospectus (the "Prospectus"). In addition, the investors argued that Hana Bank breached their fiduciary duty by following the asset management instruction from Woori requiring it to change the transaction counterparty, though Hana Bank, as a trustee company, who runs the business of managing and keeping the investment trust property in custody, had the obligation to request withdrawal, change or correct any asset management instructions if such instructions were in violation of the relevant prospectus, the terms and conditions of the trust, or laws and regulations.

As regards the legal nature of the Prospectus, the Seoul Central District Court held that "statements contained in a prospectus are not automatically incorporated into an investment trust agreement; rather, whether such statements can be binding as separate agreements shall be determined by considering the specific contents thereof, the motive behind inclusion of such statement, and the true intention of the parties in accordance with logic and experience." The court further held that, "although the transaction counterpart of the OTC derivatives was named 'BNP Paribas' in the initial prospectus, it cannot be deemed that the investors entered into the investment trust agreement with an intention of making the transaction counterpart as an important element of such agreement, and accordingly, the changing of the transaction counterparty to 'Lehman Brothers' in the prospectus with the consent of Hana Bank as trustee company is legitimate." In addition, the court found that "the obligation of a trustee company to oversee with respect elements such as the asset management instructions shall be limited to the matters listed in the Act (Article 132 of the Act) and the relevant criteria for judgment shall also be limited to the laws and regulations listed in the Act, the terms and conditions of the trust, and a duly amended prospectus." With such a ruling, the court fully accepted Shin & Kim's argument that Hana Bank's performance of management instructions from an asset management company does not constitute a breach of fiduciary duty.

The present case is meaningful in that: (i) it reaffirms the position of the court that any description of the relevant fund contained solely in the prospectus and not in the terms and conditions of the trust shall not automatically have a binding effect on the parties to an investment trust agreement; and (ii) it specifically presents the position of the court as regards "the content and scope of a trustee company's fiduciary duty" in connection with an indirect investment trust agreement.

* Attorney Se Ryul Hong, Yong Ho Kim, Youngkon Song, Ju Hyun Kim and Hyun-Jeong Kang

[News]

[Case & Winner] Hynix is cleared of suspicion of price-fixing in D-RAM semiconductor. - Comparison of the international spot-price and the average supply-price 'convinces' the court.

D-RAM semiconductors make up an industrial sector in which domestic companies are in fierce competition against multinational companies. In the nature of the semiconductor business, the price of a new semiconductor product continues to decline as time goes by. In addition, even accumulated inventories of semiconductors may become useless instantly once computer specifications are upgraded. This is why semiconductor companies view a 'sale upon production' as the ideal option. However, the reality is not ideal in most cases.

Other competitors also consider 'sale upon production' as ideal, and there are so many new variables arising constantly to affect supply and demand. Therefore, it is inevitable for each company to conduct real-time monitoring of its competitors' prices and reflect those prices in its own pricing system.

In this case, such a company may come under suspicion of price-fixing by the judiciary and the competition authorities of a country. Hynix is one of those companies which actually came under suspicion of price-fixing. Since June 2002, the U.S. Department of Justice ("DOJ") investigated whether there had been price-fixing among D-RAM manufacturers which had been engaged in the sales of D-RAM products to U.S. companies such as IBM and Dell. During the investigation process, the DOJ suspected manufacturers of engaging in price-fixing for semiconductors they had delivered to such U.S. companies, and imposed sanctions on the manufacturers after examining each of them. Negotiations between the DOJ and the manufacturers continued, and the case finally concluded with the imposition of fines and a plea agreement with related executives and employees. Samsung Electronics and Hynix were included amongst the sanctioned manufacturers. While Samsung Electronics agreed to pay USD 300 million in criminal fines, Hynix was ordered to pay USD 185 million. At the time, Micron, a U.S. company, was not imposed any criminal fine by the DOJ on the grounds that it was a rank-1 voluntary reporter.

Why did the Korean Fair Trade Commission launch an investigation?

Worse yet, the case were not closed completely. The Korean Fair Trade Commission (KFTC) began examining whether the U.S. DOJ's action would influence the Korean industries. The examination was actually caused by Company A. Based on Micron's precedent, Company A made a voluntary report to the KFTC on the grounds of price-fixing in the U.S.

To its chagrin, Hynix also made a voluntary report to the KFTC in light of the law providing that a rank-2 voluntary report leads to a 50%-reduction in fines. Normally, when such a report is received, the KFTC starts an investigation into whether there really was price-fixing. This is how the KFTC launched its price-fixing investigation following the U.S. DOJ.

Desperately, the staff at Hynix's Strategic Planning Office sought Shin & Kim's assistance. Hynix's Trading Team staff including the current Hynix President Oh-Cheol Kwon, who served as managing director in the Strategic Planning Office at the time, argued that Hynix would not acknowledge price-fixing even though the semiconductor company made a rank-2 voluntary report. Shin & Kim's antitrust team made a cautious approach given that if the fact of price-fixing was not established, the imposition of fines itself would be invalidated regardless of rank and whether a voluntary report had been made or not.

"After a close examination of relevant data, I found many points in the U.S. DOJ's investigation process and its decision to impose fines difficult to understand. As the case was quite different from a normal international cartel case, it was difficult to determine whether there actually had been price-fixing, and there were also various circumstances which suggested price-fixing could have not existed in the D-RAM market and Hynix was not involved in a price-fixing deal even if there had been one. So, Hynix vehemently denied suspicions against it during the DOJ's investigation process. But there were a range of difficulties for Hynix at that time including the company's financial hardship, the U.S. jury's negative mindset to Hynix and enormous costs from prolonged litigation. This is why Hynix had to resort to negotiations with the DOJ to close the case. Hynix was arguing it was not engaged in any price-fixing during the process the KFTC's investigation as well. But the company had to make a rank-2 voluntary report as another domestic company had made a rank-1 voluntary report. This is what I found."(Attorney Chang-Young Cho)

What is the rationale behind refutation to the KFTC's argument?

Hynix's argument explained by Attorney Cho was not completely unconvincing. At the time, the rational for refuting the KFTC's argument was more important than any other factors. The basis for the KFTC's argument that 'there is also a likelihood of a price-fixing deal among domestic semiconductor manufacturers' could be summarized as the 'one price in one market principle (There is one price in one market.)'. That is, if there is a price-fixing deal in the U.S., such price-fixing will influence the price in the Korean market.

Hynix and Shin & Kim's antitrust team maintained that such a rationale was unreasonable. As the rank-1 voluntary reporting domestic company would not dispute the argument of the KFTC's investigation officer, Shin & Kim, which tried to clear Hynix of its suspicion, and Hynix itself faced another difficulty. Hynix was deprived of the 50%-reduction in fines imposed on it as the company consistently disputed the suspicion of price-fixing. That amounted to about KRW 9.2 billion. If the fines had been actually imposed, the total fines could reach around KRW 18.5 billion.

However, Shin & Kim's antitrust team and Hynix agreed to do their best to reveal the truth about the case even giving up the company's voluntary-reporter status.

"Specifically speaking, the KFTC was arguing 'the delivery price of semiconductors to large companies in the U.S. has a direct bearing on the international price, which, in turn, is linked to the D-RAM price distributed in the domestic market.' We focused on emphasizing that such a relationship was not established. Key U.S. companies in demand of D-RAM products concluded a long-term contract and set a single price. This is a kind of delivery contract among individual companies. But there exist other semiconductor markets, too. For example, there also is a spot market distributed in a large wholesale market. The KFTC focused on a price set when a delivery contract is made between individual companies. It argued a contract made for a large volume would result in a price lower than that in the spot market influencing the price in the spot market again. However, our statistical data on price trends indicated otherwise." (Attorney Daeyong Baek)

Shin & Kim's antitrust team secured data from price-investigation agencies in the international spot market such as the D-RAM Exchange. Then, it compared the price in the spot market with the average price of semiconductors delivered (OEM) by major manufactures, including Hynix, to large companies.

The results of such comparison contradicted the KFTC's argument that a lower delivery price would result in a drop in the price in the spot market. In fact, according to a trend in the price of 128-MB SD-RAM products, the delivery price thereof as of Nov. 8, 2000 was around USD 11 while the price in the spot market as of the same date was only USD 8. By Nov. 28, 2000, such difference became even wider. While the delivery price rose to USD 12, the spot-market price further dropped to the USD 6-range.

Then, a miracle happened. The general assembly of the KFTC closely examined the case of suspicious price-fixing in D-RAM and concluded the deliberation process with a decision not to impose fines on the grounds that there was no evidence of influence by the U.S. price-fixing on the Korean market.

Attorney Chang-Young Cho remarked, "It is a good example demonstrating the KFTC's expertise and rationality even when another domestic company continuously failed to dispute the KFTC's investigation."

[Reporter Su-Ho Park suhoz@mk.co.kr]

[SHIN&KIM NEWS]

'IHCF Academy in 2010'- Attorney Yong Won Choi

Attorney Yong Won Choi of Shin & Kim attended the 2010 IHCF Academy on Nov. 20, 2010, and gave a presentation on "Recent Legal Climate in China and Matters to be Considered in Investment in China (mainly on examples)".

Attorney Yong Won Choi, currently serving as Chief Representative of Shin & Kim's Beijing Office, is performing duties related to Chinese affairs on investments and M&A deals between Korean and China, etc., and has given a presentation on the Chinese legal system and relevant examples, etc. at the "Seminar on How Companies can Use Chinese Legal System in relation to M&A of Chinese Company" that Shin & Kim jointly held with the Federation of Korean Industries in 2008.

Participants in the 2010 IHCF Academy opined that Attorney Choi had successfully offered practical legal information required for business-management to corporate staff in charge of Chinese affairs based on his extensive work experience in China.

<Event Overview >

- Title: 2010 IHCF Academy
- Date: 2010. 11. 20.
- Venue: Intercontinental Seoul Coex
- Organizer: In-house Counsel Forum of Korea

Autumn Seminar of the Korean Competition Law Association- Attorney Tak-Kyun Hong

Attorney Tak-Kyun Hong at Shin & Kim gave a presentation under the title of "Issue of Substantiation of Unfair Collaborative Act- Typology of Indirect Evidence" at the 2010 Autumn Seminar of the Korean Competition Law Association held on Nov. 5, 2010. Specifically, Attorney Hong gave a presentation on the results of research on domestic and overseas examples or documents about the necessity for the typology of various types of evidence needed for substantiating unfair collaborative acts through indirect evidence, sharp distinctions of the evidential value of each type of evidence, etc., and participants and panelists at the seminar had heated discussions on such topics. An issue of how much indirect evidence is needed to substantiate an unfair collaborative act is important not only to executive authorities including the Fair Trade Commission, the prosecution and the court, but also to companies under investigation of unfair collaborative acts. In this vein, Attorney Hong's presentation as above is expected to lead to more discussions on the recognition of unfair collaborative acts, and to the formation and application of rigorous and general standards on the recognition.

'The 10th Fi-TICK Tax Seminar' – Accountant In-Hwa Chung and Attorney Jong Chae Jung

Accountant In-Hwa Chung and Attorney Jong Chae Jung at Shin & Kim participated as panelists in the second session of the 'The 10th Fi-TICK Tax Seminar' held on Oct. 28 and 29 of 2010.

Shin & Kim's attorneys and accountants have participated as presenters at the seminar above every year. The seminar is meaningful as an opportunity for more than 100 domestic and overseas tax experts and corporate staff to give presentations on recent tax trends and issues and exchange opinions with each other.

Accountant In-Hwa Chung is performing tax-advisory service duties, tax investigation, and tax litigation related to domestic and overseas investments and M&A deals, restructuring, real-estate, financial transactions, etc. at Shin & Kim's Tax Division, and has received a commendation from the Minister of Commerce, Industry and Energy in 2005 for his contribution to the business of supporting the attraction of foreign direct investment.

Attorney Jong Chae Jung is mainly in charge of duties of taxation, fair trade, etc., and has actively published theses on related topics and participated in association activities while performing his duties based on his work experience at tax authorities such as the Seoul Regional Tax Office.

- Recent Tax Changes Impacting the Financial Services Industry
- Dialogue with Korean Tax and Customs Authorities – Towards Mutual Understanding and Cooperation
- Taxpayer's Wish List to Improving the Korean Tax System

<Event Overview>

- Title: Korea Tax Conference - The 10th Fi-Tick Tax Seminar 2010
- Date: From Oct. 28, 2010 to Oct. 29, 2010
- Venue: The Ritz-Carlton, Seoul
- Organizer: The American Chamber of Commerce in Korea (AMCHAM), The European Union Chamber of Commerce in Korea (EUCCK)
- Sponsor: Eight domestic major law firms and

accounting firms including Shin & Kim.

Recruitment of Attorney Young-Min Kil and Jihye Shin

Shin & Kim recruited Attorneys Young-Min Kil and Jihye Shin. Attorney Kil (33th entrant to the Judicial Research & Training Institute) has served as army judicial officer and has worked for Jipyong & Jisung, and is mainly in charge of duties of legal advice to financial matters, asset-management-related affairs and securities and financial matters related to IPOs, syndicated loans, etc. Attorney Shin (36th entrant to the Judicial Research & Training Institute) has worked for Lee & Ko and the Korea Deposit Insurance Corporation, and is mainly in charge of duties in the sectors of intellectual-property rights, media content, broadcasting and communications, entertainment/sports, etc.

Recruitment of U.S. Attorney Jeannie Y. Jeong and Kelly J. Lee

Shin & Kim recruited U.S. Attorneys Jeannie Y. Jeong and Kelly J. Lee. Attorney Jeong is mainly in charge of advisory work related to M&A, offshore investments, and joint investment, as well as general corporate and fair trade-related advisory services. Attorney Jeong has worked for Hong Kong Baker & McKenzie, and graduated from the University of California, San Diego, U.S. (B.A.) and the University of California, Hastings College of Law, U.S. (J.D.). Attorney Lee graduated from the Boston University School of Law, U.S. and has worked for KT Corporation as an in-house attorney. Attorney Lee is mainly in charge of duties on international joint investment, M&A, and general corporate legal affairs.

Recruitment of Accountant Min-Hyuk Kim

Shin & Kim recruited Accountant Min-Hyuk Kim. Accountant Kim began working as certified public accountant at Samil PricewaterhouseCoopers, and has performed duties of accounting audit, general consulting, etc. Accountant Kim, currently serving as Shin & Kim's certified public accountant, is mainly in charge of duties on business valuation, business process outsourcing, accounting audit, etc.

200 in-house lawyers and businessmen, Attorney Sinseob and Law and Law School of Seoul National University.

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