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SOUTH KOREA
Special Report

South Korean companies gather speed in their hunt for outbound opportunities

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A new frontier?

Armed with substantial cash and vast experience, Korean companies are venturing abroad like never before. As the country experiences a surge in outbound merger and acquisition activity, *Shin & Kim* lawyers Seong Hoon Yi and Brandon Ryu question whether it is evidence of a new turning point in the Korean M&A market.

Few would dispute that the Asian Financial Crisis in 1997-1998 marked a turning point in the Korean M&A market. Korea, which had previously been rarely exposed to M&A, witnessed foreign investors come in droves to buy out or invest in undervalued Korean companies hit hard by the financial crisis. Not only did strategic investors acquire Korean companies at bargain prices, but world-renowned private equity funds – such as the Carlyle Group and Newbridge Capital – and other financial investors also jumped on the bandwagon to seize infrequent upside opportunities. Many foreign investors made handsome profits, some of them more than doubling returns on their Korean investments, while others lost money or got embroiled in legal battles causing some raised eyebrows in Korea.

The saga of foreign investment is still ongoing in Korea. A great number of foreign investors retain equity stakes in Korean companies, and even though many have left with a smile or frown, their legacy still lingers. On balance, Korean companies as well as Korea as a whole benefited from the foreign investment surge. Above all, foreign investors played an important role in Korea's recovery from the financial crisis. In addition, the corporate governance of Korean companies, particularly Korean conglomerates (chaebols), has improved considerably due in large part to foreign investors' supervision and shareholder activism, and the improved corporate governance in turn boosted Korean companies' stock prices.

Korea has recently been witnessing a new era emerging from within. While foreign investor interest in Korean companies has dwindled partly because of the drastically increased value of companies and assets (and, as argued by some, due to anti-foreign investment sentiment shown in disputes involving foreign private equity funds), Korean companies, having accumulated substantial cash and vast experience over the years, are increasingly active in reaching out beyond the country's borders to acquire or invest in companies in various countries around the world, as evidenced by the following notable transactions:

- In September 2010, state-run oil company Korea National Oil Corp (KNOC) acquired control over Dana Petroleum Plc in a hostile takeover valued at approximately US$2.9 billion. KNOC's takeover of Dana marks the first hostile takeover of a foreign company by a Korean company, and shows that Korean companies are not afraid of turning aggressive to take over attractive foreign companies.
- In September 2010, leading global chemicals company Hanwha Chemical Corporation (Hanwha) acquired shares in Solarfun Power Holdings Co Ltd (Solarfun), a NASDAQ-listed vertically integrated Chinese manufacturer of silicon ingots, wafers and photovoltaic cells and modules. As a result of the transaction, which was

valued at approximately US$370 million, Hanwha became Solarfun's largest shareholder, owning 49.99 percent of its outstanding shares and holding a 49.99 percent voting interest in the company.

- In February 2010, KP Chemical Corporation (KP Chemical) acquired all the operational assets of Artnius UK Limited (AUK), a UK company in administration (reorganisation proceedings), including both the PTA and PET manufacturing facilities. KP Chemical also assumed the employment of the remaining AUK workforce. This transaction is notable in that it marks the first time a Korean company has acquired assets or business of a UK distressed company. As the transaction was structured as an asset transfer, complicated legal issues arose in relation to, among other things, successor liabilities such as liabilities associated with employees and environment. European Commission competition clearance (merger control review) was obtained for the transaction in the form of a derogation.
- In 2009, leading retail business operator Lotte Shopping acquired Times Ltd, a Chinese supermarket and discount store operator listed on the Hong Kong stock exchange, for approximately US$630 million. This transaction, which represented the largest acquisition ever of a Chinese company by a Korean company, was carried out through a tender offer (voluntary general offer) for 100 percent of the shares of Times. Following the successful tender offer, Times was delisted from the Hong Kong stock exchange and the remaining minority shareholders were eventually squeezed out. Merger control review clearance was obtained in China.
- In 2009, Doosan Heavy Industries & Construction, a large Korean heavy industry company, acquired Skoda Power, a Czech power plant equipment producer.

In light of the relatively small size of the domestic economy and the recent saturation in numerous industries, this new trend of outbound M&A seems natural and hardly unexpected. And many people, including the co-authors of this article, believe that this new trend marks another huge turning point in Korean M&A history.

To provide brief guidance at this turning point, this article touches upon some of the matters and issues that the authors found important or worth attending to while advising Korean companies as legal counsel on their outbound M&A transactions.

Cultural differences

Despite the tremendous cultural convergence around the globe, culture still varies widely from nation to nation and people to people. Culture matters not just in negotiations, but in the entire process of a transaction or project, including the post-merger integration. Accordingly, it is no exaggeration to say that the success of many M&As hinges on integrating two or more organisations culturally, or at least narrowing the cultural gap as much as much possible. Considering the importance of the culture factor, companies involved in M&A will be well-advised to invest a great deal of time and effort in creating a plan for successful cultural integration and implementing such plan. Particularly, it would be impossible to overemphasise the importance of understanding delicate cultural differences

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Furthermore, although not cultural differences, differences in laws and practice can sometimes perplex even the most experienced practitioners. The meaning and scope of the same legal terms, such as indemnification, fiduciary duty and fair disclosure, vary from one jurisdiction to another.

Advisors' involvement

Financial and legal advisors with sufficient knowledge and experience can play a pivotal role in cross-border M&A transactions, and their advice and assistance would be worth every penny in many transactions. Therefore, the earlier their involvement, the more likely the success of a transaction will be.

In selecting an advisor, clients need to take into consideration the candidates' experience and track record in the relevant industry and country/geographical region, as well as their reputation and fees. It would also be advisable to find out in advance the composition of the deal team, including the experience of the person who will actually lead the advisory team.

Due diligence

Due diligence is essential in evaluating and mitigating the risk of an investment. A due diligence review can also help to carry out post-merger integration effectively and efficiently.

In cross-border M&A due diligence investigations, the challenge is to allocate tasks and work properly among the client and its advisors. It is often difficult to determine the exact work scope of the local advisors, and a good rule of thumb is that it is desirable to defer to local advisors on matters and issues related to the local market and regulatory regime, even if other advisors generally have more experience and knowledge. Otherwise, important local aspects or issues may be overlooked or immaterial local elements overemphasised. Of course, the client and other advisors would have to review the local advisors' due diligence investigations thoroughly and share views and thoughts to add value based on their experiences in other jurisdictions.

Regulatory approvals

A Korean company's acquisition or investment outside of Korea is likely to be subject to various governmental approvals. The requirements of such approvals will vary considerably depending on the nature, size, structure etc of a transaction, the parties involved, and the businesses conducted by the parties.

Approvals in Korea

In general, Korean companies involved in an outbound M&A transaction are required to obtain approvals and clearances from Korean governmental authorities, including, among others, exchange control/foreign direct investment approval and merger control review (antitrust) clearance. Korean companies, particularly those listed on the Korean stock exchange, also have to pay attention to determine whether a transaction would trigger a public disclosure requirement.

Approvals outside of Korea

An outbound M&A transaction may require governmental approvals in multiple jurisdictions. Below are the most commonly triggered approval/clearance requirements:


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Seong Hoon Yi and Brandon Ryu, ***Shin & Kim***

- Foreign investment approvals;
- Exchange control approvals;
- Merger control review clearances; and
- Tax filings and clearances.

Most countries impose foreign ownership restrictions on sensitive industries or business sectors – such as aviation, banking, telecommunications, public utilities, railways, shipping, mass media, and liquor producers – thereby restricting or prohibiting a foreigner from acquiring an equity stake in excess of a certain percentage point. Moreover, some countries have enacted laws prescribing restrictions on foreign investment in the interest of national security. Under such laws, in general, a governmental body conducts national security reviews of transactions to decide whether to block them on the ground of national security concerns.

Most jurisdictions now have some form of merger control. For example, in August 2008, China introduced a new merger control regime which supersedes earlier basic merger review provisions first introduced in March 2003. During the last two years, the antitrust authority – the Antimonopoly Bureau of the Ministry of Commerce (MOFCOM) – reportedly blocked one transaction and imposed conditions in some other cases.

Merger control review grows in importance as more and more companies conduct business globally. Generally, if certain financial thresholds (such as turnover or revenue) are crossed in a jurisdiction, a pre-closing merger control review filing is required to be made in that jurisdiction and the parties may not proceed with the closing without having obtained clearance from the antitrust authority. In this regard, it is worth noting that merger control review filing would have to be undertaken even for foreign-to-foreign M&A transactions. Accordingly, it is advisable to collect financial information in all relevant jurisdictions at as early a stage as possible in order to decide in which jurisdictions merger control review filing is required. Otherwise, pre-closing merger control review clearances may turn out to be a stumbling block to the closing of the transaction.

In a transaction involving a target company listed on a stock exchange, an additional or different set of securities laws and regulations applies to the transaction. Firstly, various public disclosure requirements would be triggered, including a reporting requirement for a substantial shareholding (such as the Schedule 13D filing obligation under US securities law). Secondly, acquiring a certain percentage or higher shares in a listed company may trigger a mandatory tender offer requirement. Hong Kong law, for example, requires the bidder to make a mandatory offer if a person or two or more persons acting in concert acquire 30 percent or more of voting rights. Tender offers are strictly regulated by the pertinent securities and listing rules.

Companies that are to acquire a listed company would be well-advised to consider in advance whether they want to delist the target company's shares from the stock exchange and squeeze out the remaining minority shareholders after a tender offer. Some jurisdictions provide a legitimate mechanism to squeeze out minority shareholders.

Deal structure

Transactions are usually structured in one of two ways: the acquirer may either purchase shares of the target company from a shareholder(s), or purchase assets directly from the target company. In order to save transaction costs, parties to a transaction need to decide as early as possible a deal structure that best fits their needs under the particular circumstances.

In an asset deal, the acquirer could purchase only the assets and liabilities that it chooses. However, in many jurisdictions, the purchaser of all or substantially all of the assets constituting a business would be obligated to assume the employment of all the employees related to the business. An acquirer may also not be able to avoid certain successor liabilities, such as environmental, product and tax liabilities. Another downside of an asset or business deal is its complexity: transferring title to each asset would require cumbersome work, including registration and recording. Furthermore, governmental permits and licenses may not be transferable, so the acquirer would have to obtain such permits and licenses separately.

A share transfer, on the other hand, would be a relatively simple form of transaction: the acquirer only purchases shares in the target company and all assets and liabilities stay with the target company. In a transaction structured as a share transfer, discovering liabilities of the target company would be a very important part of the due diligence exercise and discovered liabilities should be properly reflected or addressed in the relevant provisions (such as representations and warranties) of the share purchase agreement.

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