RECENT AMENDMENTS TO THE KOREAN COMMERCIAL CODE

Will the comprehensive amendments turn out be ground-breaking as widely anticipated?

On March 11st, 2011, the Korean National Assembly passed a bill to amend the Korean Commercial Code ("KCC"). The amendments, representing the most extensive revisions to the KCC since it was enacted in 1962, contain far-reaching and significant changes in various aspects of company law encompassing incorporation, corporate governance, corporate finance and M&A. For instance, the amended KCC:

- introduces two new forms of business entity (equivalent or similar to limited partnership and limited liability company);
- generally permits share buy-backs;
- allows more flexibility in dividend payment by (i) giving the board of directors the authority to approve annual audited financial statements and declare dividends and (ii) permitting in-kind dividends as well as cash and stock dividends;
- requires certain listed companies to adopt internal compliance regulations and appoint a compliance officer;
- eliminates the ceiling on the aggregate outstanding principal amount of bonds issuable by a company (i.e., four times the company's net asset value) and allows unlisted companies to issue exchangeable bonds, participating bonds, derivative-linked bonds, as well as convertible bonds and bonds with warrants; and
- allows a company to use legal reserves exceeding 150 percent of its paid-in capital.

The amendments will take effect on April 15, 2012.

We discuss below some of the major changes that the amended KCC will bring about.

Introduction of Squeeze-Out (Compulsory Acquisition)

The amended KCC introduces a "squeeze-out" (compulsory acquisition) right. The squeeze-out right permits a controlling shareholder holding 95 percent or more of shares in a company to require minority shareholders to sell their shares to the controlling shareholder at a fair price.

The following conditions should be satisfied for a squeeze-out: (i) the squeeze-out is necessary to accomplish the company's business purpose; (ii) the squeeze-out is approved in advance at a shareholders' meeting; and (iii) the minority shareholders' shares are appraised by a certified appraiser and the details of the squeeze-out are (A) disclosed in the shareholders' meeting notice and (B) explained by the controlling shareholder at the shareholders' meeting. There are ambiguities in the squeeze-out provisions of the amended KCC. Particularly, it is not clear what circumstances would be viewed as accomplishing a company's business purpose. In our view, if it could be proven that a company incurs too much cost due to a minority shareholder or a minority shareholder abuses his shareholder rights, thereby making it difficult to manage or operate the company, a squeeze-out would be considered necessary to achieve the company's business purpose.

In addition to the squeeze-out, the amended KCC permits a cash-out merger or triangular merger, in which the merger consideration is paid in cash or in the form of shares of the parent company. Such mergers could effectively remove the shareholders of the absorbed company.

Alongside the squeeze-out right, the amended KCC grants minority shareholders a sell-out right allowing minority shareholders to require the controlling shareholder at any time to buy out their shares at a fair price.

Increased Flexibility in Share Issuance

The amended KCC gives companies more flexibility in the issuance of new shares. Among other things, under the amended KCC:

- a company will have a choice between no par or par value shares (while under the current KCC, all shares must have a par value);
- a share subscriber, with the consent of the issuing company, may set off his share subscription price against any claim that he has against the company, and accordingly, debt-to-equity swap will be allowed (while under the current KCC, it is widely accepted that debt-to-equity swap is permitted only in a corporate work-out or other insolvency proceedings); and
- an in-kind contribution will no longer require a court's investigation, provided that (i) the value of the contributed assets does not exceed the less of one-fifth of the paid-in capital amount and an amount to be prescribed by the implementing regulations under the KCC or (ii) the contributed assets are securities listed on a securities exchange.

Added Diversity in Types of Stock

In order to (i) boost efficiency in raising capital for companies and (ii) give investors more choices in investment instruments, the amended KCC permits a company to issue much more diverse types of stock, including, for example:

- common shares without voting rights;
- shares redeemable with assets other than cash;
- shares with special features, e.g., voting right exercisable only for a merger or election of directors; and
- shares redeemable or convertible at the election of the issuer and/or the holder.

Mitigation or Exemption of Directors' Liability

The amended KCC permits a company to exempt a director from liability to the company for amounts in excess of six times (three times for an outside director) his remuneration for the immediately preceding year, provided that the company's articles of incorporation provide for such exemption. Under the current KCC, a director may be released from liability to the company only with unanimous consent of the shareholders.

The mitigation or exemption under the amended KCC will not be granted, however, in case a director (i) caused losses to the company intentionally or by gross negligence or (ii) violated any of the KCC provisions prohibiting a director's self-dealing transaction, conflict-of-interest transaction or appropriation of a corporate opportunity.

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