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The Legal Feasibility under Korean Law of United States Takeover Defenses

I. Introduction

Generally speaking, hostile takeovers can perform the function of distributing economic resources efficiently. This efficiency is created through improvements in corporate governance and the monitoring of management. However, the efficacy of hostile takeover should not be generalized but rather should be examined on a case-by-case basis as the purposes and conducts of hostile takeovers are numerous. In some cases, hostile takeovers may be contrary to the interests of the target company and/or its shareholders.

In Korea, given the high level of foreign investment in Korean companies in recent years and the recent development of laws to promote local private equity funds, the possibility of hostile takeovers of Korean companies and the concern surrounding unfair hostile takeovers is growing. It is for these reasons this paper discusses the principle that hostile takeovers should be balanced with fair and appropriate defensive measures so as to protect the interests of shareholders from unjust hostile takeovers.

In the United States, various defensive tactics against hostile takeovers have developed and been used by the target company's management. However, the focus of Korean law has been on the promotion of hostile takeovers, while research into fair defensive measures remains underdeveloped. While some defensive tactics used in the United States were adopted and used in Korea, some have not. Although the lesser number of defensive tactics in Korea may partially result from the country's short history of hostile takeovers, it is believed that the main reason is due to the differences between Korean and U.S. law.

This paper will identify the reasons why some defensive tactics are not used in Korea. My research will focus on the legal feasibility of and the obstacles to defensive tactics under Korean law. Furthermore, after examining the standards for review of takeover defenses in the United States and Korea, the paper will propose an amendment to Korean corporate law for the improvement of hostile takeover defenses.

In summary, (i) the poison pill is not legally feasible under Korean law as the equity securities or rights that Korean corporations can issue are restrictive and the payment method for a dividend is restricted only to cash and shares; (ii) the supermajority provision and fair price provision are not consistent with the Korean regulatory framework for a merger as a cash-out merger is not permitted under Korean law; (iii) the purchase by a target company of its own shares as a takeover defense is not as useful as in the United States because such purchase is strictly restricted in Korea; (iv) the dual class recapitalization is not legally feasible under current Korean law due to the one share/one vote rule; (v) the sale of the crown jewel as a takeover defense may not be as useful as in the United States because such sale requires a supermajority resolution of shareholders and is subject to the appraisal rights provided for under the Korean Commercial Code (the "KCC"); and (vi) the issuances of new equity securities as a takeover defense have become less useful due to (x) the restriction on issuances of equity-linked notes in circumstances of where there is a battle over managerial power and (y) the new requirement under the KCC that new equity securities be issued only to achieve the managerial objectives of the company.

On the other hand, the standards for review of defensive tactics in Korea are no less strict than that of the United States. Given the restrictive takeover defenses and the strict standards for review thereof, it is very difficult to say that hostile takeover is well balanced with defensive tactics in Korea and it would seem inadvisable to emphasize only encouraging the market for corporate control.

Therefore, this paper asserts that any unreasonable legal restrictions on defensive measures should be lifted. Specifically, the following could be considered: (i) removing the restriction on the issuance of equity-linked notes in the circumstance of a fight over managerial power, (ii) widening the types of the securities that Korean companies may issue, (iii) expanding the payment methods for a dividend, (iv) relaxing the one share/one vote rule and (v) reconsidering the mandatory supermajority provisions.

It is believed that this paper may provide a source of discussion for the creation of an environment in which offensive measures and defensive tactics are balanced. Such a balance could promote fair hostile takeovers and at the same time protect the interests of shareholders from unfair hostile takeovers through appropriate defensive tactics.

II. The Feasibility under Korean Law of Particular Takeover Defenses Used in the United States

There are many takeover defensive devices, too many to enumerate all the different kinds in this paper.[1] This paper focuses on only the particular defenses that may cause

[1] With respect to various defensive devices, Herbert S. Wander and Alain G LeCoaue, "Boardroom Jitters : Corporate Control Transactions and Today's Business Judgment Rule", 42 Bus. Law. 29 (Nov. 1986), pp44-63 ; Martin Lipton and Andrew R. Brownstein, "Takeover Responses and Directors' Responsibilities- An update", 40 Bus. Law. 1403 (Aug 1985), pp1414-1425

different legal implications from a Korean law perspective.

1. <u>Poison Pill</u>

(1) Concept of the Poison Pill

The poison pill, which is also known as a shareholder rights plan, is the most significant defensive tactic used in the United States. The poison pill is commonly defined as a takeover defense that is intended to force bidders to seek board approval before acquiring more than a specified percentage of a target company's stock, by causing substantial dilution to the bidder if it exceeds the relevant threshold without the board's prior approval.[2] The poison pills have a variety of provisions. In general, the target company's existing shareholders are given certain rights (the "Rights") to obtain securities at a substantial discount when some triggering event occurs. The purchase of a certain percentage of the target company's shares by an outsider is a common triggering event.[3]

The poison pill includes a "flip-in" feature designed to deter creeping

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[2] Meredith M. Brown, Ralph C. Ferrara, Paul S. Bird & Gary W. Kubek, "Takeovers: A Strategic Guide to Mergers and Acquisitions". *Aspen Law & Business* (2001), Glossary xlvii

[3] Arthur R. Pinto & Douglas M. Branson, "Understanding Corporate Law" *LexisNexis* (1999), pp313-314.

accumulations of a company's share. If triggered, the flip-in feature would give shareholders, other than the holder triggering the flip-in, the Rights to purchase shares of the 'target company' at a discount to market price. The poison pill also has a "flip-over" feature that provides shareholders protection against a freeze-out. The flip-over feature would give shareholders the Rights to purchase shares of the 'acquiring company' at a discount in the event of freeze-out merger.[4]

The reason why the Rights are permitted in the United States is because there is no restriction on the securities and rights related to equity that a corporation can issue and on the payment method for a dividend.[5] Therefore, a corporation in the United States can grant the Rights having a variety of terms and conditions as a dividend to shareholders.

(2) Feasibility of Poison Pill under Korean Law

Unlike in the United States, a Korean corporation can issue only the securities stipulated under the KCC and the Korean Securities Exchange Act (the "KSEA"). Under the KCC and the KSEA, the issuance of bare warrants (i.e. preemptive right) to

[4] Arthur Fleischer, Jr. & Alexander R. Sussman, "Takeover Defense", *Aspen Law & Business (5th edition)*, pp5_6~5_7.
[5] *See the Del. General Corporation Law Article 151, 157 and 170.*

subscribe new shares is not permitted.[6] With regard to the payment method for a dividend, only the cash and share dividends are permissible. Furthermore, the dividend distribution is subject to a resolution of shareholders.[7]

Therefore, under Korean law, the only method available as the Right would be the convertible and redeemable preferred shares.[8] However, in the case of convertible and redeemable shares, the conditions of conversion, the period within which the conversion may be demanded, the number and particulars as to shares to be issued in consequence of the conversion, and the price, time and method of the redemption of shares and the number of redeemable shares must expressly be specified in the company's articles of incorporation.[9] Furthermore, such conditions for conversion as a triggering event for the exercise of the Rights may be invalid as such conditions may be considered too uncertain.[10] Further, redemption of such shares can be made only with distributable profit.[11] It is for these reasons the poison pill is not legally feasible under Korean law.

2. Shark Repellent focusing on Supermajority Provision and Fair Price

[6] Under the KCC, only the bonds with warrants can be issued. *See the KCC Article 516-2.*

[7] *See the KCC Article 462 and 462-2*

[8] *See the KCC Article 345 and 346*

[9] *See the KCC Article 345 (ii) and 346 (i)*

[10] Lee Won Gun & Lee Ki Su, "A Study on Hostile M&A and the Defensive Strategy against it" Journal of Social Science Research Vol. 5 (1998), p103

[11] *See the KCC Article 345 (i)*

<u>Provision</u>

(1) Concept of Shark Repellants

Shark repellants are charter and bylaw provisions that are designed to discourage unwanted takeovers. The provisions may provide for supermajority votes, fair price guarantees, or a variety of other limitations on the company's ability to engage in business combinations with other entities.

The supermajority vote provision requires a vote greater than a simple majority of shareholders to approve mergers. Another type of shark repellant, commonly known as a "fair price provision", requires supermajority approval for a merger with an acquiring shareholder unless the price paid to minority shareholders in the merger equals or exceeds the highest price paid by the acquirer in acquiring the target company's shares before the merger.[12]

Often a tender offer represents only the first step in a plan for the complete acquisition of the target. The second step is commonly a merger in which any remaining minority shareholders are frozen out of the new subsidiary, the so-called freeze-out merger. Both the supermajority provision and fair price provision are

[12] Meredith M. Brown, *op. cit.,* p490-491

intended to make the freeze-out merger more difficult.[13] As shareholders are paid off in cash in a freeze-out merger, this kind of merger is also called a "cash-out merger".

(2) Feasibility of Shark Repellents under Korean Law

As noted above, a supermajority provision and a fair price provision are intended to make a cash-out merger difficult. However, since cash-out mergers are not permitted under Korean law, fair price provision is not consistent with the Korean legal framework for mergers.[14]

Furthermore, the KCC itself require a supermajority vote for approval of merger (i.e. the affirmative vote representing two-thirds of the voting shares present at the shareholder meeting and one-third of the total issued and outstanding voting shares).[15] Accordingly, a supermajority provision or a fair price provision as a defensive tactic in Korea is relatively less useful than in the United States.

3. Purchase by the Target of Its Own Shares

[13] Ronal J. Gilson & Bernard S. Black, "The Law and Finance of Corporate Acquisitions" 2nd (1995), p737-738

[14] It is interpreted that the use of cash as consideration in mergers is permitted only for adjustment of broken-lot stocks in mergers.

[15] *See the KCC Article 434*

(1) Practice in the United States

As there is no explicit legal restriction on the purchase by a company of its own shares in the United States, a target company often defends against an unwanted takeover attempt by buying its own shares from its shareholders through a tender offer, in privately negotiated transactions, or in the open market. A repurchase may afford greater value to the target company's shareholders and may absorb some shares that might otherwise be tendered to a hostile bidder. If the repurchase takes the form of an exchange offer, in which the target company issues debt or other securities for outstanding common stock, the new securities may also contain covenants making a leveraged acquisition by a bidder more difficult.[16]

(2) Feasibility of a target company's purchase of its own shares under Korean Law

Unlike in the United States, a company's purchase of its own shares is strictly restricted in Korea. Under the KCC and the KSEA, a company may not acquire its own shares except in limited circumstances, such as a reduction in capital, provided

[16] Meredith M. Brown, *op. cit.,* p574

however that, a listed company may acquire its own shares only through purchases on the Korea Exchange (being the Korean public securities exchange) or through a tender-offer, subject to certain procedural requirements.[17] Furthermore, the aggregate purchase price for its own shares may not exceed the total amount available for distribution of dividends at the end of the preceding fiscal year. Accordingly, in Korea, the purchase of its own shares as a takeover defense has limited use when compared to the United States.

4. Dual Class Recapitalization

(1) Concept of Dual Class Recapitalization

Another defense that has been used by a number of companies in the United States is the restructuring of shareholders' voting rights to concentrate voting power in friendly parties. This tactic generally takes one of two forms: the company either creates two classes of common stock with disparate voting rights or issues a new class of super-voting preferred stock. The first approach, dual-class common stock, is accomplished by a charter amendment and thus is useful only as part of the company's advance

[17] *See the KCC Article 341, the KSEA Article 189-2*

planning. Once a hostile acquirer has appeared and the target must react quickly, the use of a blank check preferred stock[18] to create new issuance of super-voting preferred stock is usually favorable as this method does not require shareholders' approval.[19]

(2) ***Feasibility of Dual Class Recapitalization under Korean Law***

While U.S. corporate law recognizes disparate voting rights,[20] the KCC adopts the one share/one vote rule by stipulating that a shareholder shall have one vote for each share.[21] Therefore, dual class recapitalization is not legally feasible under current Korean law until such time as the KCC abolishes the one share/one vote rule.

5. <u>Sale of Crown Jewel</u>

(1) Concept of Sale of Crown Jewel

The sale of the crown jewel is a defensive tactic to diminish the attractiveness of the target company by selling a valuable part of it to a third party in circumstances of a hostile takeover. Sale of the crown jewel is made through an asset transfer, business

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[18] Blank check preferred stock is a preferred stock issuable in series, the terms of which can be fixed by the directors without a shareholder vote.
[19] Meredith M. Brown, *op. cit.,* pp552-566, Ronald J. Gilson, *op. cit.,* p748-751
[20] *See the Del. General Corporation Law Article 151 (a)*
[21] *See the KCC Article 369 (1)*

transfer or spin-off of an important division of the company.[22]

In most states in the United States, a company may at any meeting of its board of directors sell, lease, or exchange its property and assets without the prior approval of its shareholders to the extent that the assets are not all or substantially all of its assets.[23] Furthermore, the sale of assets is not subject to the appraisal rights of shareholders.[24]

(2) Feasibility of the Sale of Crown Jewel under Korean Law

In contrast to the United States, in Korea the sale of the crown jewel requires supermajority resolution of shareholders and is subject to appraisal rights.[25] Accordingly, the sale of the crown jewel as a takeover defense is not be as useful in Korea as it is in the United States.

6. <u>Issuance of new shares or equity-linked notes to a third party</u>

[22] Kim Ju Ryong, "A study on the defensive measures against the hostile M&A and its legality", *Chungnam National University (2002)*, pp49-50
[23] In case of sale of all or substantially all of assets, majority approval of shareholders is required. *See the Del. General Corporation Law Article 271*
[24] *See the Del. General Corporation Law Article 262 (b)*
[25] *See the KCC Article 374, 374-2, 530-3 (2) and 530-11 (2)*

(1) Concept of Issuance of New Equity Securities

If a target company wishes to defend a hostile takeover in order to remain independent, the target might consider issuing new shares or equity-linked notes to a friendly third party. Whenever a company issue new shares to a third party, it dilutes the equity of all present shareholders, including that of any holder seeking to take control of the issuer. Moreover, the issuance of a block of shares to a single person or entity that supports the company's management may make a potential acquiror less inclined to commence a tender offer or proxy fight.[26]

(2) Feasibility of the Issuance of New Equity Securities under Korean Law

The issuance of new share or equity-linked notes[27] was the most popular defensive tactics in Korea because, as noted above, the other tactics are not legally feasible or not as useful. Under the KCC, although in principle each shareholder shall be entitled to the allotment of new shares in proportion to the number of shares which he holds, a company may make an allotment of new shares to persons other than the shareholders

[26] Meredith M. Brown, *op. cit.,* p552; Ronald J. Gilson, *op. cit.,* pp638-639
[27] Under the KCC, only convertible notes and bonds with warrants are permitted as a form of equity-linked notes.

so long as such is provided for in the articles of incorporation.[28] Accordingly, most of the companies in Korea have traditionally provided for in their articles of incorporation an exclusion of the preemptive rights of shareholders and abused such provisions to fend off hostile takeover attempts.

However, such practice was subject to criticism and therefore restrictions were made. At first, new regulations were enacted in 1997 to stipulate that in case of listed companies, (i) the issuance of convertible bonds or bonds with warrants by way of private placement is prohibited where there was a fight over management[29] and (ii) the acts, which may change the number of voting shares, such as issuance of new shares are prohibited during a tender offer period[30]. Second, the KCC was amended in 2001 to require that the new shares, convertible bonds or bonds with warrants be issued to persons other than existing shareholders solely for the purpose of achieving managerial objectives such as improving financial status or introducing new technology.[31] Accordingly, the issuances of new shares or equity-linked notes as a takeover defense are not as useful as in the past.

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28 *See the KCC Article 418, 513 and 516-2*
29 *See the Regulation on Securities Issuance and Disclosure Article 60 and 63*
30 *See the old KSEA Article 23 (4),* which was deleted in 2005.
31 *See the KCC Article 418 (2)*

III. Standards for Review of Takeover Defenses

1. Standards in United States

Although the board in the United States has numerous defensive options to take against hostile takeover attempts as noted above, the actions of the board in the context of a hostile takeover may be subject to enhanced scrutiny which was developed through the Delaware Court Case.

Board actions are generally protected by the business judgment rule. Pursuant to this rule, a party challenging directorial action must demonstrate fraud, bad faith, or gross negligence.[32] However, in 1985, the Delaware Supreme Court in *Unocal Corp v. Mesa Petroleum Co.*[33] adopted an objective enhanced scrutiny standard to review defensive measures implemented in anticipation of or in response to takeover threat. In *Unocal*, the Court recognized that the ordinary business judgment rule was too lenient in a circumstance of hostile takeover because there is the "ominipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders". Accordingly, to have defensive tactics upheld under

[32] Robert A. Ragazzo, "The Legitimacy of Takeover Deffense In the '90s", *DePaul L. Rev.* (1992), pp692-693.
[33] 493 A.2d 946 (Del. 1985).

Unocal, the target's board must prove that it has "reasonable grounds for believing that a danger to corporate policy and effectiveness exist and that such tactics are reasonable in relation to the threat posed". The board actions shall not be entitled to the protection of the business judgment rule unless the board is able to satisfy both elements of this additional test.[34]

Furthermore, if a majority of the directors have an actual conflict of interest in approving a transaction, the entire fairness review, which requires the courts to determine whether the decision is entirely fair to the shareholders, is applicable.[35] It is also applicable to a corporate transaction such a merger that involves a controlling shareholder.[36] In analyzing a transaction under the entire fairness standard, the Delaware courts look at both the procedural fairness and the fairness of the price.

In the United States, takeover defensive tactics are being controlled through such enhanced tests. Accordingly, the fact that the board has a variety of defensive options shall not lead to the abuse thereof and shall not break the balance between the hostile takeover attempts and defenses.

2. **Standards in Korea**

[34] Meredith M. Brown, *op. cit.,* pp426-439; Rober A. Ragazzo, *op. cit.,* pp692-696.
[35] Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1893).
[36] Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997).

Although the standards for reviewing takeover defensive tactics have not been established yet in Korea, some lower courts have implied a certain standard for reviewing defensive tactics. The lower court's rulings have usually related to the issuance of equity securities. These tendencies were resulted from the fact that defensive tactics in Korea were concentrated on the issuance of equity securities due to the infeasibility or lack of utility of other defensive tactics as mentioned. In particular, as the KCC requires the promotion of the managerial objectives of the company for the issuance of equity securities, the court's ruling has focused on the meaning of the managerial objectives required under the KCC.

Generally speaking, the lower courts were of the view that the issuance of equity securities in response to hostile takeover attempts for the purpose of fending off such takeover attempts was not for managerial objectives.[37] However, in connection with the attempt by Kumgang Korea Chemical Co ("Kumgang") to takeover Hyundai Elevator Co, the virtual holding company of the Hyundai Group, a district court implied that the issuance of equity securities for defensive purposes could, in special circumstances, be considered as being for a managerial purpose.[38]

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[37] Seoul High Court 98Na4608 (06/23/2000)
[38] Suwon District Court 2003KaHap369 (12/12/2003)

In response to the hostile takeover attempt by Kumgang, Hyundai Elevator announced that it would issue ten million new shares, which would have resulted in dilution of Kumgang's ownership.[39] Kumgang filed suit to stop the issuance of the new shares. The district court ruled in favor of Kumgang that the issuance of new shares to thwart the takeover did not satisfy the requirement under the KCC that the issuance of new shares must be to achieve the managerial objectives of the company. However, in its ruling, the court stated that the requirement for achieving the managerial objectives of the company to issue new shares could be satisfied on two conditions. The first condition would be that it is beneficial to the interest of the company and shareholders or the interest of society to maintain the controlling power of current controlling shareholder or current management. Secondly, such action must be taken in compliance with reasonable and due process (e.g. asking the opinions of minority shareholders and seeking neutral experts' advice). The court also ruled that it was incumbent of the board to prove whether these conditions were met.

Given the various rulings of the lower courts, the position of the Korean courts may be interpreted to be no less strict than that of the U.S. courts. In addition to infeasibility of most takeover defensive measures, this strict position of the courts

[39] Kumgang accumulated control of a 20% stake in Hyundai Elevator through direct acquisitions and acquisitions through a number of mutual funds and a private investment trust fund.

reinforces the restrictive nature of the takeover defensive measures available to Korean companies.

IV. A Proposal for Improvement of Hostile Takeover Defenses in Korea

As noted above, the takeover defensive measures themselves are very restrictive under Korean law compared to the United States. Nevertheless, the standards for review of defensive tactics in Korea jurisdiction are no less strict than that of the United States where the board has numerous defensive options against hostile takeover attempts. Accordingly, it is very difficult to hold that hostile takeovers are well balanced with defensive tactics in Korea. Currently under Korean law, Korean companies will have difficulty in implementing appropriate defensive methods even against unfair hostile takeover attempts. In such circumstances, it is inadvisable to emphasize encouraging the market for corporate control.[40] The efforts to encourage the market for corporate control should keep pace with the efforts to improve defensive tactics.

[40] With regard to the recommendation for encouraging the market for corporate control in Korea, see "Corporate Governance in Korea at the Millennium: Enhancing International Competitiveness", *Journal of Corporation Law,* Spring 2001.

The most serious problem under Korean law is that many defensive measures are blocked from the outset regardless of whether or not the defensive measures serve the interests of shareholders on a case-by-case basis. In the United States, the corporate law is flexible affording the board of company numerous defensive options against hostile takeover, provided that such actions are subject to enhanced scrutiny as previously discussed. On the contrary, despite the fact that the Korean courts are applying equivalent or stronger standards for reviewing takeover defenses than the U.S. courts, Korean law itself is so rigid that it makes it very difficult for the board of the target company to take appropriate defensive tactics even against an unfair hostile takeover.

Such trends under Korean law are based on the mistrust of managers. The managers of Korean companies have traditionally had a tendency to serve the interests of controlling shareholders, not the interests of general shareholders. Furthermore, judicial review of the actions of managers has been under-developed. This mistrust and lack of judicial review have lead to a rigid corporate law and shareholders' direct intervention to management. However, during and after the financial crisis of 1997-1998, the corporate governance of Korea companies has improved and the market for corporate control has been encouraged. Furthermore, judicial review of corporate actions has intensified and non-governmental organizations are playing an active role of monitoring management. Given that the circumstances have changed, even while the law has not, there are less compelling reasons to continue adhering to the rigid law.

Accordingly, any unreasonable legal restrictions on defensive measures should be lifted. Specifically, the following recommendations could be considered. However, it has to be also noted that reasonable standards for review of takeover defensive tactics should be established in order to protect against abuse of takeover defenses, which might result from the removal of legal restrictions on defensive measures. In respect to these standards, it would be worthwhile referring to the *Unocal* test and entire fairness test developed in the United States.

(i) Article 60 and 63 of the Regulation on Securities Issuance and Disclosure, which prohibit the issuance of convertible bonds or bonds with warrants by way of private placement in circumstances where there is a battle over managerial power, should be deleted.[41] To prohibit such issuances without examining whether such issuances are beneficial to the interest of shareholders is too excessive. Without such provisions, individual issuances of equity securities under the circumstances of fight over managerial power can be controlled and

[41] Doo-Sik Kim, "Comparative Study and Proposals for Improvement of Hostile Takeover Disciplines", *Korea Listed Companies Association* V.50 (2004), p50.

monitored by the requirement under the KCC that the issuance of new equity securities achieve the managerial objectives of the company. In this regard, it is noted and welcomed that the restriction on issuance of new equity securities during the tender offer period was recently deleted.[42]

(ii) The KCC, which restricts the types of securities companies can issue, should be amended to give more flexibility to companies in the types of corporate securities that may be issued. It could not only serve to promote defensive tactics but also improve a companies' ability to raise corporate funds. In this regard, it would be worthwhile referring to Article 151 "Classes and Serious of Stock; Rights, etc.", Article 152 "Issuance of Stock, Lawful Consideration; Fully Paid Stock", Article 153 "Consideration for Stock" and Article 157 "Rights and Option Respecting Stock" of the Delaware General Corporation Law.

(iii) The current KCC, which permits only cash dividends and share dividends, prevent a company from using dividend policy as a defensive strategy. Therefore, payment methods for a dividend should be expanded to include notes, debenture, options or other obligation of the corporation. In this regard, it would be worthwhile referring to Article 170 "Dividends; Payments; Wasting

[42] *See footnote 30.* With regard to recent changes to takeover rules of Korea, *See* Woong Soon Song, Tong Gun Lee and Robert Young, "Foreign bidders welcome Korean takeover changes", *IFLR* (March 2005).

Asset Corporations" of the Delaware General Corporation Law.

(iv) Consideration should be given to relaxing the one share/one vote rule. It would not be advisable to entirely abolish the one share/one vote rule as this is the basic underlying structure to the Korean corporate law. However, it would be worth considering further whether to adopt disparate voting rights in the case of venture or medium or small-sized enterprises, in which the need to raise fund for in its initial stages is huge and the entrepreneurial ability of its founder is important. Multiple voting rights would enable the founder to concentrate on the management of such companies without having the fear of losing control.[43]

(v) The mandatory supermajority provisions in the KCC, which require supermajority voting for a certain corporate action such as a sale of material asset, should be reconsidered. The provisions that were adopted to protect the interest of minority shareholders rather deprive the board of flexibility for corporate actions. Furthermore, such provisions could serve as a means to rationalize the interest of the controlling shareholders by evading judicial review thereof on the grounds that shareholders have rectified the relevant action. To the extent the judicial review of corporate action continues, the necessity to

[43] Doo-Sik Kim, *op. cit.,* pp51-53.

adhere to the mandatory supermajority provisions diminishes.

V. Conclusion

Many of takeover defensive devices in the United States are not legally feasible or not as useful in Korea due to the difference between Korean and U.S. law. Accordingly, the takeover defensive measures that a Korean company may employ are very restrictive under Korean law. Further, the standards for review of defensive tactics in Korea jurisdiction are quite strict. Thus, Korean companies have difficulty in finding appropriate defensive methods even against unfair hostile takeover attempts.

Under these circumstances, it would seem inadvisable to focus only on encouraging the market for corporate control. Hostile takeovers should be balanced with appropriate and fair defensive measures in order that the market for corporate control may perform the function of distributing economic resources efficiently.

To balance hostile takeovers with defensive tactics in Korea, any unreasonable legal restrictions on defensive measures should be lifted. Specifically, the following could be considered: (i) removing the restriction on the issuance of equity-linked notes in the circumstance of a fight over managerial power, (ii) widening the types of the securities that Korean companies may issue, (iii) expanding the payment methods for a dividend, (iv) relaxing the one share/one vote rule and (v) reconsidering the mandatory supermajority provisions.

However, these proposals may cause significant legal problems in other legal areas. Although these will be left open for the present purposes, future research ought to explore the implication of such legal conflicts.