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KIM & CHANG | A Quarterly Update of Legal Developments in Korea | December 2013

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CORPORATE

By Jong Koo Park (jkpark@kimchang.com), Wan Suk Kim (wansuk.kim@kimchang.com)

Accounting System Reformation Plan and Expansion of External Audit for Limited Liability Company *(Yuhan Heosa)*

On October 28, 2013, the Financial Services Commission (the "FSC") announced an accounting system reformation plan related to the amendment to the Act on External Audit of Stock Companies (the "Plan") aiming primarily at improving transparency of limited companies (*yuhan heosa*) and non-listed large company's accounting system.

Below are the major features of the Plan.

- Just like joint stock companies (*jusik heosa*), limited companies (*yuhan heosa*) under the Korea Commercial Code will be required to be audited by an external auditor and apply the GAAP (or otherwise choose to be governed by the International Financial Reporting Standards (IFRS)).

- Non-listed large companies with total assets of KRW 1 trillion or more must (i) be audited by an external accounting firm, (ii) retain an external auditor for at least 3 consecutive years, (iii) submit the financial statements to the auditor and simultaneously to the Securities and Futures Commission, and (iv) be subject to supervision by the Financial Supervisory Service on their accounting and bookkeeping.

- The minimum thresholds that companies need to satisfy to be subject to mandatory external audit will be adjusted upward as follows.

Current Provisions	Proposed Amendment
KRW 10 billion of total assets or higher	KRW 12 billion of total assets or higher
KRW 7 billion of total assets higher and KRW 7 billion of total liabilities or higher	KRW 10 billion of total assets or higher and KRW 10 billion of total liabilities or higher
KRW 7 billion of total assets or higher and total of 300 employees or more	KRW 10 billion of total assets or higher and total of 300 employees or more
Stock-listed companies or any companies to be stock-listed companies during the following business year	Same

The FSC will hold a public hearing on the Plan to collect the opinions of various industry participants in November 2013, pre-announce the proposed amendment in December 2013, and submit it to the National Assembly in March 2014. The effective date of the Plan will be determined based on the grace period and when the National Assembly will adopt the Plan.

Supreme Court Decision on PEF

In a lawsuit involving a Cayman limited partnership ("Cayman LP") that invested in a Korean company through a chain of holding companies, the Supreme Court of Korea recently held that the Cayman LP itself (as opposed to limited partners thereof) should be deemed as beneficial owner of the capital gains resulting from the sale of the shares in the Korean company.

The purchaser of the shares in the Korean company (the Plaintiff of this case) initially did not withhold any tax on the capital gains when it bought the shares from a Labuan company below the Cayman LP, relying on the Korea-Malaysia Tax Treaty. In a subsequent tax audit, tax auditors disregarded the Labuan company and all the above level entities (including the Cayman LP) as beneficial owners of the capital gains. Information on the tax residency of the limited partners of the Cayman LP was submitted to the tax auditors and certain limited partners which are residents of countries having tax treaties with Korea were excluded from taxation on such capital gains. However, the other limited partners from countries having no such tax treaty or whose treaty with Korea do not exempt capital gains from Korean income tax were subject to capital gains tax, which was assessed on the purchaser of the shares in the form of withholding tax. Under the relevant share purchase agreement, the purchaser could not seek reimbursement of the tax from the seller of the shares and thus, appealed the tax assessment.

The Supreme Court's decision is based on following grounds:

- An association, foundation or any other organization that is a for-profit organization which distributes Korean source income to its members should be treated as a taxpayer subject to corporate income tax if it can be treated as a foreign corporation pursuant to the Corporate Income Tax Law.

- Whether an organization can be treated as a foreign corporation pursuant to the Corporate Income Tax Law is based on whether an organization can be viewed as an entity with rights and obligations separate from its members from a Korean private law perspective considering the laws of the country in which the organization was established and the characteristics of the organization.

- Based on the fact that the Cayman LP (i) was established for distributing profits from a joint business; (ii) is composed of a general partner with unlimited liabilities and limited partners with limited liabilities; and (iii) participated in management of the Korean company as a controlling shareholder to increase the corporate value by appointing friendly individuals as directors, it should be considered that the Cayman LP was established with a distinct business objective. As such, the Cayman LP cannot be viewed as a for-profit organization not having any substantive ability to control or manage the shares of the Korean company.

- The Supreme Court went on to hold that the High Court should have determined whether the Cayman LP should be treated as a taxpayer subject to corporate income tax or whether the limited partners of the Cayman LP should be treated as a taxpayer subject to personal income tax. (The Supreme Court's decision is read to mean that the Cayman LP should be treated as a foreign corporation.)

Based on this decision, the case was remanded to the High Court for retry.

The Supreme Court's decision is not final since it ordered the case to be retried at the High Court. Nonetheless, this case is noteworthy because the Supreme Court further clarified its previous position indirectly provided in other recent Supreme Court, that a Cayman LP itself should be treated as beneficial owner of the capital gains and as a foreign corporation. In particular, this decision appears to have a greater significance because, unlike in previous Supreme Court cases, the taxpayer had already revealed information on the tax residency of the limited partners and the tax authorities had already applied the tax treaty based on such residency fo the limited partners in the Cayman LP.

Recent Korean Supreme Court Case Involving an LBO

Recently, the Supreme Court of Korea (the "Supreme Court") rendered a judgment involving the issue of fiduciary duty under Korean criminal law in a case where cash is upstreamed from the target to a special purpose company via capital reduction and/or dividend.

The following methods are commonly used in connection with the financing of a leverage buyout ("LBO"): (i) the target company's assets are provided as collateral for the acquirer's acquisition financing (asset-backed type), (ii) the acquiring company and the target company are merged post-acquisition so that the target company's assets can be used as security for the acquisition financing (merger type) or (iii) the target company's assets are distributed to the acquirer through capital reduction, dividend-out, or share buyback so that they can be used to repay the acquisition financing (capital reduction / dividend type). While LBOs have been utilized in Korea since the early-2000s, the Supreme Court decision in 2006 that an asset-backed type LBO could result in a breach of fiduciary duty triggering criminal liabilities under Korean criminal law has led to many debates on the legitimacy / risks of an LBO transaction in Korea.

Related to this matter, the Supreme Court recently held that it was not unlawful for the acquirer to utilize a special purpose company to finance an LBO, and post-closing, to upstream cash from the target to the special purpose company via capital reduction and dividend-out of the target company in order to repay the acquisition financing. In this case, the Supreme Court reasoned that (i) even though the target company's asset was reduced due to capital reduction and dividend-out, such an undertaking was the shareholder(s)' due exercise of their rights granted under the law; (ii) given the size / scale of the operating profits and assets of the target company at the time of capital reduction, it could not be said that the creditors of the target company suffered losses from minor flaw in the capital reduction process; and (iii) considering the per share capital reduction amount and the target's distributable retained earnings at the time, it could not be said that capital reduction and dividend-out resulted in damages to the target company.

This decision is the first Supreme Court decision where a capital reduction / dividend type LBO was squarely at issue and the directors were found not guilty of a breach of their fiduciary duty. However, it is worth noting the Supreme Court's statement that this decision should not be interpreted to legitimizing LBOs in its entirety as a case / facts-specific decision should be made, and that this case only relates to capital reduction / dividend type LBO and therefore, different decisions may be made for asset-backed or merger type LBOs.

Amendment to the Enforcement Decree of the Capital Markets Act and the Financial Investment Services

On August 29, 2013, a number of notable amendments to the Enforcement Decree of the Financial Investment Services and Capital Markets Act (the "Amendments") have been promulgated as follows.

- **Investment by Private Equity Funds ("PEF"):** Under the Amendments, PEFs may invest in mezzanine bonds, including convertible bonds ("CB") and bonds with warrants ("BW") that would (i) account for 10% or more of the total number of outstanding voting stocks through the exercise of CB and/or BW; or (ii) enable the PEF to have de facto control over major management matters based on an investment agreement or through the right to appoint and dismiss officers.

- **PEF's Reporting Obligations:** PEF will now be subject to reporting obligations when taking out loans, issuing guarantees or investing in derivatives.

- **PEF's Requirement to Register General Partners ("GPs"):** To qualify for GP registration, a GP must be an entity with (i) an equity capital of KRW 100 million or more; (ii) officers meeting certain qualification standards; (iii) at least one investment professional; and (iv) adequate internal control system to monitor, evaluate and prevent conflicts of interest.

- **No Involvement of Limited Partners ("LP(s)"):** LPs cannot exert any influence over GP's decisions with respect to: (i) selection of a target company or establishment/selection of SPC; (ii) determination of purchase price, timing and purchase method of equity securities in a target or an SPC; or (iii) exercise of voting right to equity securities comprised as assets of the PEF or SPC.

- **Increased Autonomy in Calculating Merger Value:** Listed corporations' merger value can be set within the scope of 10% above or below the arithmetic mean of the closing share price of the most recent month, week and immediately preceding day. In case of non-listed companies, the merger value does not need to reflect a comparative value.

ANTITRUST & COMPETITION

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Summary of the Enforcement Decree of the Franchise Law

As a follow up to the 2013 revision of the Fair Franchise Transactions Act ("FFTA") which came into effect on August 13, 2013, the Korean Fair Trade Commission ("KFTC") issued its proposal on October 10, 2013 to revise the Presidential Decree to the FFTA ("Proposal"). The following describes the key features of the Proposal.

FFTA	Proposal
Franchisors (i) who do not qualify as a small- and medium-sized enterprise or (ii) whose number of franchises exceeds the threshold number provided in the Presidential Decree must provide a range of anticipated sales revenue in writing when entering into a franchise agreement.	• **Franchisors required to provide a range of anticipated sales revenue:** Franchisors with at least 100 franchisees. • **Anticipated sales revenue:** Anticipated sales from a franchised unit, which the prospective franchisee will be operating for a 1-year period from opening, must be stated in terms of a range with minimum and maximum sales figures, where the maximum sales figure must not exceed 130% of the minimum sales figure.
A franchisor may not compel the remodeling of a franchised-unit without just cause.	• **Just cause:** If (i) the franchised unit has objectively deteriorated; or (ii) a defect in sanitation or safety substantially interferes with maintaining a uniform brand image or normal business operations.
A franchisor must share the cost of remodeling for the categories designated under the Presidential Decree. The specific amount of cost to be shared shall be determined pursuant to the ratio provided under the Presidential Decree (maximum of 40% of the cost).	• **Cost sharing categories:** Cost of remodeling directly related to the brand image or value, such as changing a sign or interior design. • **Rate of sharing:** Franchisor must share 40% of the cost if the remodeling is incidental to relocation or expansion of the franchised unit and 20% of the cost for other remodeling.
A franchisor is required to specify the franchise territory when executing a franchise agreement with a prospective franchisee and must refrain from opening a directly-operated or franchised unit engaging in the same industry as a franchisee within that territory.	• **Exception:** Franchise territory may be rearranged if necessitated by a physical change in the territory, change in the purchasing power in the territory, or a change in consumer demand.
A franchisee whose sales from late-night business hours falls significantly lower than the cost of conducting the late-night business for a certain period may request the franchisor to reduce the late-night business operations requirement.	• **Late-night business hours:** From 1:00 a.m. through 7:00 a.m. • **"Certain period":** The previous 6 months

FFTA	Proposal
A franchisor may not impose excessive penalties against the franchisee	• **Factors in considering excessiveness of a penalty:** (i) purpose and substance of the franchise agreement; (ii) actual damages suffered; (iii) whether or not there is a cause attributable to the franchisee and the degree of fault; and (iv) customary practice in the relevant industry.

The public notice period for the Proposal is 40 days (from October 10 until November 20, 2013). After the notice period, the Proposal will be reviewed by the Regulatory Reform Committee, the Ministry of Government Legislation and the President, before coming into effect.

LITIGATION

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Public Institutions to Be Less Restrictive in Applying Disqualification Criteria on Contractors

Recently, the Korean Supreme Court rendered an important decision regarding the criteria for disqualifying contractors in bid participations under the "Act on the Management of Public Institutions" (the "Public Institutions Act") and the "Act on Contracts To Which the State is a Party" (the "State Contract Act"). As their names indicate, the Public Institutions Act applies to public institutions in which the Korean government has full or partial stake while the State Contract Act regulates contracts between private parties and the Government of Korea.

The Supreme Court noted that contractor disqualification criteria in the Public Institutions Act are generally less strict than that under the State Contract Act. While the Public Institutions Act provides that a public institution may disqualify bid participants in cases if "it is clearly foreseeable that there will be harm to fair competition or proper performance of a contract," the State Contract Act allows disqualification where there is merely a "risk" of such harm. Moreover, while disqualification under the Public Institutions Act, it is mandatory under the State Contract Act.

Nevertheless, because the relevant provisions in the Enforcement Decree of the Public Institutions Act is similar to those in the State Contract Act, in practice, the disqualification criteria under the Public Institutions Act have been applied in the same restrictive manner as under the State Contract Act.

The Supreme Court found this practice unacceptable reasoning that the Enforcement Decree under the Public Institutions Act had exceeded the scope of delegation of the Public Institutions Act, thereby ruling the Enforcement Decree to be invalid. The Supreme Court clarified that where the Public Institutions Act applies, the disqualification criteria may be imposed only where "it is clearly foreseeable that there will be harm to fair competition or proper performance of a contract" and concluded that in the case at issue, the harm was not "clearly foreseeable."

Kim & Chang successfully represented the contractor in the case. The decision is significant in that it points to existing practices of certain Korean public institutions and aims at correct problematic application of the standards under the Public Institutions Act. Public institutions will now need to refrain from restricting otherwise qualified bidders from participating in projects based on broad application of the notion of "risk of harm" to fair competition or performance.

SECURITIES

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Amendments to the Enforcement Decree of the FSCMA and the Regulations on Financial Investment Business

The amended Financial Investment Services and Capital Markets Act (the "FSCMA") was promulgated on May 28, 2013 and took effect as of August 29, 2013. As a follow-up measure, the Enforcement Decree of the FSCMA and the Regulations on Financial Investment Business were also amended. The following is a summary of the amendments.

- **Investment Bank:** In order for a securities company to qualify as an investment bank that can conduct corporate lending and other new businesses, it must have a minimum equity capital of KRW 3 trillion and satisfy other requirements. Additionally, in principle, its corporate lending must be limited to 100% of its equity capital.

- **Alternative Trading System (the "ATS"):** The amendment sets forth certain approval requirements for establishing an ATS, and also provides price determination mechanisms, such as specific standards for competitive bidding and best execution rules. Additionally, the amendment prohibits certain risky instruments from being traded through the ATS.

- **Multiple Exchanges:** The amendment abolishes a single statutory exchange system so now it is possible for multiple exchanges to co-exist. In order to establish a new exchange, one must satisfy certain approval conditions, undergo regulatory approval procedures, and comply with a "Chinese Wall" requirement aimed at preventing conflicts of interest, etc.

- **Regulation of Funds:** The amendment permits an investment advisor to advise on or discretionary investment manager to manage real estates and real estate-related rights which go beyond the previous scope of manageable assets based on financial investment products. Investment advisors and discretionary investment managers can also receive performance-based compensation in limited situations, subject to certain conditions. Separately, small-sized funds can be merged through a simplified corporate process by being exempt from the requirement to obtain an approval at their general investors' meetings, etc.

- **Reporting Obligation for Holding Listed Derivatives:** One must file a report for holding large volumes of listed derivatives if the concerned listed derivatives are based on KOSPI 200. This reporting obligation is triggered when an investor holds 10,000 or more outstanding contracts based on KOSPI 200, irrespective of whether the contracts are for capital gains or hedging purposes. After filing the initial report, the filer must submit an update report if there is a change of 2,000 or more contracts.

- **Regulation of Credit Rating Company:** Credit rating companies will now be regulated by the FSCMA instead of the Act on Usage and Protection of Credit Information. Accordingly, the amendment introduces various matters concerning the approval or operation of a credit rating company.

BANKING

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Strengthening IT Security of Electronic Financial Transactions

On September 17, 2013, the Financial Services Commission (the "FSC") proposed amendments to the Supervisory Regulations of Electronic Financial Transactions (the "Amendment") which includes the amendment details of the Electronic Financial Transactions Act (the "EFTA"), the Enforcement Decree to the EFTA and the implementation details for a comprehensive plan for strengthening IT security of electronic financial transactions which was announced by the FSC in July 2013.

Public opinions regarding the Amendment have been monitored until October 12, 2013, and the Amendment became effective as of December 3, 2013.

The details of the Amendment are as follows:

Vulnerability Analysis/Assessment

- If a financial company has more than 2 trillion won in total assets and at least 300 employees, Chief Information Security Officer (CISO) shall establish a self-evaluation department or outsource the analysis/assessment function and perform annual vulnerability analysis/assessment on the company's IT systems.
- If a financial company has less than 2 trillion won in total assets and fewer than 300 employees, the list of analysis/evaluation items may be reduced and there is no duty to establish a self-evaluation department.

  * A financial company that does not perform the vulnerability analysis/assessment is subject to a fine of up to KRW 20,000,000.

Information Protection Committee

- A financial company shall establish an information protection committee which deliberates/decides on important information protection matters such as the plan for information technology sector* in accordance with Article 21(4) of the EFTA, the vulnerability analysis/assessment, and employees who violate IT security related rules.

  * A financial company that does not submit the plan for information technology sector is subject to a fine of up to KRW 10,000,000.

Promoting the Comprehensive Plan (the "Plan") for Strengthening IT Security of Electronic Financial Transactions

- **Duty to Separate Financial IT Networks:** Any IT centers for financial companies must separate its internal IT network from outside networks such as the Internet.

- **Stricter Access Control over Information Processing System:** Authentication in addition to ID/PW must be required for manager/operator of information processing system.

Streamlining Plan for Monetary Sanctions

On September 5, 2013, the Financial Services Commission (the "FSC") proposed new amendments (the "Amendment") to the Regulations of Supervision and Sanctions for Financial Institutions.

The details of the Amendment are as follows:

- **Modifying Standards for Imposing Fines Rate:** The basis for imposing administrative fines rate to be amended from the amount related to the applicable violation to the maximum statutory amount (the amount related to the applicable violation multiplied by the maximum statutory administrative fines rate).

- **Allowing Application of Separate Standards for Imposing Fines:** Separate standards may apply if different enforcement decrees or supervisory regulations have different standards.

- **Establishing Mitigation/Exemption Grounds for Fines:** The Amendment includes clauses that mitigate or exempt the penalty imposed based on the intention behind or results of the violation.

- **Modifying Base Amount for Imposing Fines:** If financial business-related laws or subordinate enforcement decrees provide a fine amount for certain types of violations, such amount may be applied when calculating the fine amounts.

- **Modifying Weighted Rate and Mitigation Grounds of Imposing Fines:** For repeated violations, the aggravated fine rate is modified from 10% to 20%. In order to prevent the total fine amount from being excessive, the grounds for mitigation have been expanded.

- **Modifying Exemption Grounds for Fines:** The Amendment elaborated the existing exemption grounds and added new grounds for exemption in case of violations with justifiable cause such as mistake of law.

INSURANCE

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Changes in the Operating Expenses System for Savings-Related Insurance Products, Including Pension Insurance

On September 17, 2013, the Financial Services Commission (the "FSC") issued a notice of proposed amendments to Korea's insurance supervisory regulations to change the operating expenses system of savings-related insurance products (the "Proposed Regulatory Change"). The Proposed Regulatory Change is a follow-up measure regarding plans announced by the FSC on August 6, 2013 to vitalize private pension insurance products in Korea. If promulgated, the Proposed Regulatory Change could result in an increase in maintenance costs related to the sales of savings-related insurance products, such as pension insurance.

The details of the Proposed Regulatory Change are as follows:

- **Expansion of Installation Payment Ratio for Commissions:** The percentage of commission which can be paid in installments after the sale of savings-related insurance products shall be gradually increased

Classification	Current	Year 2014	Year 2015	Year 2016
General Channel	30%	40%	50%	
Life Annuity*	25%	25%	35%	45%
Bancassurance Channel	30%	60%	70%	
Cyber-Mall Channel	30%	80%	100%	

* There will be a one-year enforcement grace period for life annuities, as the sales of such products require more effort.

- **Differences in Costs for Sales of Insurance Products:** Compared to the general channel, the costs for selling insurance products through bancassurance and cyber-mall channels shall be lowered by 60% in 2014 and 50% in 2015, respectively.

The FSC expects the Proposed Regulatory Change will increase consumer benefits by increasing refunds payable upon insurance contract terminations.

Consolidated Risk-Based Capital ("RBC") System to Be Implemented for Insurance Companies

On August 12, 2013, the Financial Supervisory Service (the "FSS") announced its plan for an RBC system which will consolidate the RBC of an insurer's subsidiaries (the "Consolidated RBC").

Background

The International Association of Insurance Supervisors (the "IAIS") requires the capital adequacy of insurers to be evaluated on a consolidated basis and not on an individual basis. As a result, the FSS has introduced the Consolidated RBC system in accordance with the IAIS.

Comparison between the Current System and the Consolidated RBC

The current RBC system does not reflect the subsidiary's risk in the RBC ratio as it calculates the RBC ratio based on the parent insurance company's RBC amount of risk and capital. The Consolidated RBC system, however, should reflect the entire group's risk and capital of the insurer because it will calculate the RBC ratio based on the consolidated financial statements that include its subsidiary's assets, liabilities and equity.

Impact on the Insurers

As of March 2013, the Consolidated RBC ratio is 303.3%, which is 4.4% lower than the current RBC ratio (307.8%).

Benefits

The FSS announced that the Consolidated RBC system will (i) prevent a subsidiary's default due to investing in high risk assets from transferring to the parent company since a subsidiary's risk is reflected in the parent company's RBC ratio, and (ii) enhance reliability and international integrity of Korea's RBC system that meets international standards pursuant to the IAIS.

Recent Court Ruling: Post Office Insurance Agent Not an "Employee"

On June 17, 2013, the Supreme Court of Korea (the "Court") held that a post office insurance agent is not an "employee" and is, therefore, not eligible for severance pay in connection with a lawsuit filed by a post office insurance agent that solicited insurance related products.

The Court held that a post office insurance agent cannot be deemed an "employee" under the Labor Standards Act of Korea for the following reasons: (i) a post office insurance agent is only subject to termination under the applicable agency agreement and is not subject to any disciplinary regulations, (ii) a post office insurance agent's work is not subject to the applicable agency agreement with regards to soliciting potential customers, geographical scope for solicitation or solicitation methods, but instead is able to act in accordance with his or her own discretion, and (iii) the compensation of a post office insurance agent is entirely performance-based, without any base or fixed salary.

The above ruling is notable because the Court appears to have taken a step in the opposite direction from the Court's recent trend to broadly interpret the scope of "employees," to include workers providing services pursuant to agent/sub-contract agreements.

However, we note that in an agency type agreement, there is always a possibility that a superior-subordinate relationship will exist. Therefore, the above ruling should not be interpreted to mean that a post office insurance agent will never be deemed an "employee." Accordingly, parties must be cautious as to how an agency agreements is drafted and how work is actually performed by the agent.

REAL ESTATE

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Amendment to Commercial Lease Protection Act

Effective as of August 13, 2013, the Commercial Lease Protection Act (the "CLPA") has been amended to grant all commercial lessees the right to demand renewal of its lease up to a maximum aggregate term of 5 years (the "Statutory Renewal Right").

Prior to the recent amendments to the CLPA (the "Amendments"), the CLPA did not apply to large commercial lessees (i.e., commercial lessees who had paid a security deposit greater than KRW 300 million in case of the Seoul Metropolitan area). Under the Amendments, however, all commercial lessees, regardless of their size, are entitled to the Statutory Renewal Right; provided, that at the time of the lease renewal, the lessor and the lessee each have the right to request an adjustment to the rent and security deposit amount based on the then prevailing conditions, including market rental rates, taxes and assessments applicable to commercial properties.

Prior to the Amendments, the demolition or re-construction of a commercial building constituted a valid basis for a lessor to refuse a renewal demand from a lessee. Under the Amendments, however, a demolition or re-construction constitutes a valid basis to refuse a renewal demand only if such demolition or re-construction (i) is necessary to prevent safety-related accidents or is undertaken pursuant to other applicable laws or (ii) was notified to the lessee at the time the original lease agreement was executed.

Finally, the Amendments also make it easier for commercial lessees obtain financing by allowing financial institutions that receive a security interest in a commercial lessee's right to reclaim the security deposit at the end of the lease term to also succeed to the lessee's priority in the security deposit.

Amendments to the National Land Planning and Utilization Act

Amendments to the National Land Planning and Utilization Act (the "NLPUA") were promulgated on July 16, 2013 and will become effective as of January 17, 2014.

Under the current NLPUA, a district units plan proposed by local governmental authorities must be approved by the head of the related provincial government, which often meant that a significant amount of time and expense were required to adopt or amend any district units plan. For example, if the district units designation or the plan adopted for such district units needed to be changed in connection with a large-scale real estate development project, such as the relocation of factories or the construction of office buildings, the developer was required to obtain the additional consent of the head of the provincial government, even after reaching an agreement with the local governmental authorities on matters regarding local residential environment, aesthetics and infrastructure.

Under the amendments to the NLPUA (the "Amendments"), district units plans proposed by local governmental authorities will be deemed final without any further authorization required. By streamlining the administrative process required for adopting a district units plan, the Amendments will decrease bureaucratic inefficiencies and likely shorten the length of real estate development projects by 3 to 6 months.

LABOR & EMPLOYMENT

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Supreme Court Defines the Scope of Ordinary Wage

Ordinary wage, the standard in assessing compensation for overtime, nighttime and holiday work and unused annual leaves, refers to any money paid *regularly, uniformly and on a fixed basis.* On December 18, 2013, the Supreme Court rendered two full bench decisions on the scope of ordinary wage. Kim & Chang represented the Defendant-Appellant Kabul Autotech in both cases, in which the Supreme Court vacated the judgment of the lower courts in favor of the Defendant-Appellant and remanded the cases.

Traditionally, many Korean companies have been implementing "fixed bonus" schemes whereby certain money is paid regularly but at intervals exceeding a one-month period. The Supreme Court held that such fixed bonus should be included in the calculation of ordinary wage, regardless of payment terms (i.e., even if it is paid at intervals exceeding a one-month period).

However, the Supreme Court further held that employers may be exempt from liabilities for unpaid compensation (e.g., overtime, nighttime and holiday work and unused annual leaves) that otherwise should have been paid, if (i) labor and management have entered into agreements (express, implied or customary practice) under good faith to exclude fixed bonus from ordinary wage based on such agreements of which the overall wage increase rates or other compensation/ benefits terms have been determined and (ii) holding the employers liable for such unpaid compensation would result in "unexpected new financial burden which would cause serious business difficulties for the company or threaten continued existence of the company."

With regard to other various allowances, the Supreme Court held that if an allowance is paid only to those employees who are employed at the date of payment (and not to those employees who have departed prior thereto), such allowance should not be included in the calculation of ordinary wage because it does not satisfy the "on a fixed basis" element.

In light of these Supreme Court decisions, companies will need to analyze risks on past obligations and, if necessary, reform the current compensation and benefits schemes to reduce future additional cost obligations.

Ministry of Employment and Labor Revises Its Manual for Administering Paid Time Off

On July 9, 2013, the Ministry of Employment and Labor revised its Manual for Administering Paid Time Off.

Under the revised Manual, (i) the work for which paid time off applies has been revised to "work voluntarily determined by the labor side and management side to the extent permitted by the labor union law, including maintenance and management of a union which constitutes the joint interests of the labor side and the management side within a workplace," giving latitude to expand the scope of work that qualifies for paid time off; (ii) an employee may now qualify for paid time off for being dispatched to work at an upper level union; (iii) activities related to preparations for a strike are included within the scope of paid time off; and (iv) the date to determine the number of union members has been revised to "a date agreed to by the employer, such as the date of execution of the collective bargaining agreement or the execution date of an agreement related to paid time off."

The Manual became effective as of July 1st and all administrative interpretations conflicting with the Manual have been repealed as of that date. However, if there is a collective bargaining agreement currently in effect, the Manual will apply only upon the expiry of that agreement.

TAX

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Proposed Tax Law Changes for Year 2014

On August 8, 2013, the Ministry of Strategy and Finance ("MOSF") announced a list of proposed tax law amendments, most of which will take effect as of January 1, 2014 if enacted into law. The main currently proposed amendments are summarized below, but may be subject to change during the National Assembly's legislative review later this year.

<u>Elimination of Tax Exemption on Dividends from a Qualifying Foreign Invested Enterprise</u>

Under the current tax law, dividends from a foreign invested enterprise that receive foreign investment tax exemption are not subject to domestic withholding tax. However, under the proposed tax law amendment, such withholding tax exemption will no longer be available to dividends paid out by foreign invested enterprise, even if the foreign invested enterprise received foreign investment tax exemption.

<u>Elimination of Tax Exemption on Foreign Investment by Companies in Non-Tax Treaty Countries</u>

Under the current tax law, the following entities do not receiving any tax exemption on foreign investment into Korea: (i) an overseas entity in which a Korean individual has a shareholding of 10% or more or (ii) an overseas entity that has borrowed 10% or more of its debt from a foreign invested enterprise in Korea or Korean individual or company.

In addition to the above, the proposed tax law eliminates tax exemption on any investment made by a foreign entity located in a jurisdiction that does not have a tax treaty (including Bilateral Investment Treaty and Agreement for Exchange of Tax Information) with Korea, effective for tax exemption application made on or after January 1, 2015.

VAT by Proxy on Comprehensive Business Transfer

Comprehensive business transfer, as defined under the tax law, is currently not subject to Value Added Tax ("VAT"). However, according to the proposed tax amendment, the purchaser of the assets in a comprehensive business transfer may elect to pay VAT by "proxy" (i.e., on behalf of the transferor) on the proceeds paid in the comprehensive business transfer and receive a corresponding VAT credit.

Expanded Reporting Requirements of Foreign Subsidiaries

Under the proposed amendments, foreign subsidiaries doing business outside Korea that are required to submit their financial information will be expanded from companies in which the parent company holds 50% or more equity interest to companies in which the Korean parent holds 10% or more equity interest. Currently, companies that fail to comply with this reporting obligation may be subject to an administrative fine of up to KRW 10 million. The proposed tax law amendment also seeks to further strengthen the rules by imposing administrative fine to taxpayers who do not submit information on their foreign subsidiaries when filing their corporate income tax returns.

Limitations to Applying the 18.7% Flat Tax Rate

Under the proposed amendments, the 18.7% flat income tax rate (including local income tax) on earned income of foreign workers will apply only during the first 5 years of their employment in Korea. In addition, certain foreign workers who exercise control (either directly or indirectly) over the management of the Korean employing entity, will be excluded from the application of the flat tax rate.

ENVIRONMENT

By Yoon Jeong Lee (yjlee@kimchang.com), Jeong Hwan Park (jeonghwan.park@kimchang.com)

Update on K-REACH and CCA

As noted in our previous issue, the Act on Registration, Evaluation, Authorization and Restriction of Chemical Substances (K-REACH) and Chemicals Control Act (CCA) were recently enacted. Below are some of the key updates on K-REACH and CCA.

Update on Future Plans Concerning K-REACH and CCA

Recently, various articles have been published on the impact of K-REACH. According to these reports, the enforcement of K-REACH would curtail research activities and raise trade secret leak concerns, as well as costing the industry up to KRW 112 million per chemical substance in order to comply. The president of the Federation of Korean Industries also announced at a recent meeting that K-REACH could become an obstacle to investment and job creation, while the American Chamber of Commerce in Korea (AMCHAM) sent a letter to the Ministry of Trade, Industry and Energy, and the Ministry of Environment (MOE) voicing their concerns about K-REACH.

In order to address the above concerns, the MOE has taken the position that the industry members' and other stakeholders' views will be broadly considered and reflected during the legislative process for the lower statutes governing the implementation of K-REACH. To prepare the bills for the lower statutes of K-REACH and CCA, both set to take effect on January 1, 2015, the MOE is planning to form "Consultative Bodies for the Safe Control of Chemicals" for each legislation where the relevant Ministries, the industry, private organizations, and specialists will participate and discuss the relevant issues under each legislation.

Following such discussions, the MOE expects to complete the first draft of the lower statutes to K-REACH by the end of this year. It also anticipates that enactment procedures such as the holding of public hearings will take place in the third quarter of 2014, followed by the promulgation of the laws possibly in the third quarter.

Discussions Concerning 'Lower Volume Exemption' under K-REACH

Among the various concerns regarding K-REACH, the industry is particularly interested in eliminating the 'low volume exemption' with respect to K-REACH. A 'low volume exemption' refers to an exemption from the reporting/registration requirements under K-REACH permitted only when a small volume of a chemical substance is manufactured, imported or sold.

Companies must report and register the use and volume of a chemical substance to the Minister of Environment prior to its manufacture or importation under K-REACH. In the initial K-REACH bill introduced to the National Assembly in September 2012, the reporting requirement for both preexisting and new chemical substances only applied to cases where the manufactured or imported volume was at least one ton annually.

However, as there was a growing consensus for stricter regulations of chemical substances due to several high profile accidents involving various chemical substances, a new bill was proposed by the National Assembly in April 2013 removing the "one ton or more" qualification with respect to new chemical substances. The promulgated act requires all new chemical substances and preexisting chemical substances whose annual volume equals one or more tons to be reported.

According to media coverage, both multinational and domestic companies that produce semi-conductors, automobiles, smartphones, etc. would consider moving their R&D centers to overseas if the low volume exemption is eliminated. As this Act also requires the seller to impose the duty to report on the sellers, the fate of the low volume exemption may have effects throughout the relevant industries.

As the presidential and ministerial decrees of this Act have not yet been specified, the issue regarding low volume exemption clause for new chemical substances, is expected to continue generating much debate. Therefore, it is crucial to understand the impact that K-REACH and the elimination of the low volume exemption would have on your company, and to state your views as needed throughout the legislative process.

INTERNATIONAL ARBITRATION & CROSS-BORDER LITIGATION

By Byung-Chol (BC) Yoon (bcyoon@kimchang.com), Byung-Woo Im (bwim@kimchang.com), Harold Hyunshik Noh (hyunshik.noh@kimchang.com)

Increase in the Use of Emergency Arbitrator to Resolve International Disputes and Its Impact

In international arbitration, cases arise where one party fraudulently transfers or conceals assets during the time period between the commencement of arbitration and the constitution of the Arbitral Tribunal, which may take several months. Such tactics may limit the effectiveness of international arbitration. Consequently, major arbitral institutions are adopting an Emergency Arbitrator Procedure, through which Emergency Interim Relief can be obtained prior to the appointment of the arbitrator or tribunal.

Recently, the use of Emergency Arbitrator Procedures has been increasing, and the scope of the interim relief sought is also expanding from the freezing of assets to so-called anti-suit injunctions, which prohibit the pursuit of legal action in other jurisdictions. For example, Kim & Chang represented a foreign party in a recent SIAC arbitration where the Emergency Arbitrator rendered an interim award ordering the counter-party to withdraw its application for a preliminary injunction, which was pending before the Korean court.

In that case, a dispute arose between a Korean shipyard and a foreign buyer over a shipbuilding contract. The shipyard was concerned that the buyer would call upon the on-demand guarantee issued by the shipyard's financing bank in favour of the buyer, and the yard consequently filed an application for preliminary injunction before the Korean court, seeking to restrain the payment. The buyer filed an application with SIAC for the appointment of an Emergency Arbitrator, seeking emergency interim relief for barring the preliminary injunction action. SIAC promptly appointed the Emergency Arbitrator, and the Emergency Arbitrator rendered an interim award ordering the shipyard to withdraw the application for preliminary injunction in only a 3 weeks' time, following the exchange of submissions between the parties and a one day hearing.

SIAC has handled about 30 cases involving Emergency Arbitrators since the adoption of the Emergency Arbitrator Procedure in its 2010 Revised Arbitration Rules. Other major arbitral institutions appear to have similar measures as well. The Emergency Arbitrator Procedure can have an impact on the parties' rights and obligations, which may even disallow parties from seeking relief through domestic court proceedings. Therefore, if a party enters into an arbitration agreement referring to Arbitration Rules that provide for an Emergency Arbitrator Procedure, and a dispute arises, it is advisable for the party to consult with its legal advisors to review the feasibility, benefits and risks of the Emergency Arbitrator Procedure during the early stages of the dispute.

INTELLECTUAL PROPERTY

By Jay (Young-June) Yang (yjyang@kimchang.com), Kwi Yeon Song (kwiyeon.song@kimchang.com)

Amendments to the Unfair Competition Law

In Korea, the Unfair Competition Prevention and Trade Secret Protection Act ("UCPA") protects intellectual property rights by preventing unfair methods of competition and the misappropriation of other's trade secrets. Recent amendments have been made to the UCPA that identify additional types of unfair competitive acts and reward those who apprise the authorities of such behavior. These amendments were promulgated on July 30, 2013 and will become effective on January 31, 2014.

General "Catch-All" Provision

Article 2(1) of the UCPA defines the types of activities that are "acts of unfair competition." Currently, the UCPA lists 9 specific unlawful activities that constitute a potential unfair competition claim. As a result, other unlawful activities that may be considered unfair competition but do not fall within Article 2(1) remain unregulated under the UCPA despite their negative impact on fair business practices.

The recent amendment has added a 10th anticompetitive act under Article 2(1)(x); "an act of infringing another's right to profit by using that person's achievement, etc., which is the result of considerable effort and investment, for one's business through a method that contravenes fair commercial trade practice or competition order." The goal of this general provision is to provide parties with appropriate means against third parties that commit new types of unfair competition. All civil remedies generally available under the UCPA, including injunctive relief and damages, are also available for this new claim except for criminal sanctions.

Proof of Original

A system has been implemented to make it easier for a holder of a trade secret to prove that an electronic document containing the trade secret is the original (Articles 9(2) through 9(7)). This new system entails having the electronic fingerprint identifier which is unique to each electronic document registered with an organization responsible for certifying originals. Thereafter, if necessary during the course of litigation, the organization will certify whether a particular electronic document is the original by checking the electronic fingerprint identifier. This new system will lessen the burden on plaintiffs who need to prove their possession of a trade secret during the course of litigation.

Reward System

Monetary incentives for reporting unfair competitive acts have also been added to the UCPA. The Commissioner of the Korean Intellectual Property Office may reward a person that reports a party that is causing confusion by using a sign identical/similar to another person's registered trademark.

Comment

These new amendments to the UCPA are in recognition of the new types of unfair competition acts that are becoming more prevalent in the marketplace due to the advancement of technology and that monetary incentives may be needed to effectively prevent unfair competition. We anticipate that greater protection will be afforded to those that hold rights to trademarks famous in Korea or trade secrets.

No Infringement Found for Licensee that Exceeded the Scope of Its Exclusive License When Limitations on the Scope Was Not Recorded

Due to a Korean Supreme Court decision issued earlier this year, patent owners must exercise greater caution when recording an exclusive license with the Korean Intellectual Property Office ("KIPO").

According to Article 101(1)(ii) of the Korean Patent Act, an exclusive license is effective only when recorded with KIPO. This also includes the transfer, modification, expiration and disposal restrictions of the exclusive license, which must be recorded to be legally effective.

In the above Supreme Court case, the licensor had identified certain limitations on the scope of the exclusive license in an executed license agreement. However, these limitations were omitted from the recordation of the exclusive license with KIPO. The exclusive licensee then worked the patented invention beyond the scope that was agreed upon by the parties within the contract, and as a result, criminal sanctions were imposed.

The Supreme Court referred to Article 101(1) and held that restrictions on an exclusive license had no legal effect if they are not recorded. As such, setting aside the patent owner's ability to seek contractual claims for the licensee's breach of the license agreement, the Court found that there was no patent infringement in this instance because the limitation on the scope of the exclusive license was not recorded with KIPO, and thus should not be given any legal effect.

This decision is meaningful because it has solidified the importance of recording an exclusive license in Korea. Furthermore, this decision serves as a warning to all patentees that any limitations on the scope of exclusive license must also be recorded. Otherwise, the patentee may not be able to exercise infringement claims despite a licensee's use of the patented invention beyond the scope of the agreement, and therefore, would have to solely rely on the contractual claims.

Trademark Use Recognized Despite Partial Use of an English and Korean Combination Word Mark

The Korean Supreme Court recently rendered a unanimous decision which expanded the scope of trademark use when defending cancellation actions based on non-use (Case No. 2012 Hu 2463, decided on September 26, 2013).

According to the Korean Trademark Act ("TMA"), the owner of a trademark has a duty to use its trademark. In other words, unless there was a justifiable reason, a trademark registration may be cancelled if the registrant or its licensee does not use a mark identical to the registered trademark on any one of its designated goods within 3 years of the cancellation petition filing date (TMA Article 73(1)(iii)). Once the registration is cancelled, the registrant is also prohibited from applying for a similar/identical mark for a certain period (TMA Article 73(7)(v)).

In the past, the Supreme Court viewed the scope of "a mark identical to the registered trademark" quite narrowly in cancellation actions of trademarks based on non-use. For instance, if the subject registration was comprised of an English word and its Korean transliteration, the court held that there was no use of the trademark if the registrant only used the English word portion without the Korean transliteration portion, or vice versa.

However, the Supreme Court has overruled this existing precedent in its recent decision. In this case, the registrant had registered the mark 

, but only used the English word portion, 

. Nonetheless, the Court held in favor of the registrant recognizing that there was no cause for cancellation based on non-use. The Court reasoned that in cases of English and Korean combination word marks, trademark use may be acknowledged even if only the English word mark (or Korean transliteration) is used as long as ordinary consumers and traders would pronounce the mark in an identical manner and perceive the used portion as basically the same mark due to common business practices.

It is evident by this recent decision that the Supreme Court has taken into consideration current business practices, such as the Korean consumer's increased exposure to the English language, the characteristic of the product and marketplace, as well as the increasing use of trademarks modified from their registered forms. Therefore, this case is meaningful because the Court has moved away from its mechanical analysis of whether the used mark is identical to the registered mark, and placing more importance on how the trademark is actually being used in the marketplace.

BROADCASTING & TELECOMMUNICATION

By Dong Shik Choi (dschoi@kimchang.com), Jung Un Lee (jungun.lee@kimchang.com)

Restrictions on the Location-Based Business Sector Relaxed

The Korea Communications Commission (the "KCC") proposed an amendment to the Act on the Protection and Use of Location Information (the "Location Information Act") on September 24, 2013. The amendment purports to relax restrictions on various regulations that relate to location information while protecting privacy in order to revitalize the location information industry.

While the current Location Information Act does not take into account the nature of the location information and requires (i) businesses that collect location information and provide them to location-based service providers to obtain permission and (ii) businesses that provide services based on location information to file a report as location-based service providers, the amendment purports to waive these requirements on businesses that do not collect any "personal location information".

Moreover, while the current Location Information Act requires location-based service providers to notify its user of (i) the recipient, (ii) time of provision, and (iii) purpose each time it provides the user's location information to a third party, such notification will not be required under the amendment if the user voluntarily requests such information to be disclosed.

On the other hand, the amendment expands the power of the KCC by granting the authority to (i) request information, (ii) examine such information, and (iii) issue corrective orders. The proposed amendment is expected to be submitted to the National Assembly in December, after review by the Ministry of Government Legislation. If the amendments are adopted and passed at the National Assembly, it will facilitate businesses that have not collected personal location information to enter the market.

Obligation to Indicate Grade of EMF on Wireless Devices

The Ministry of Science, ICT and Future Planning (the "MSIP") announced a notification regarding the criteria for grading electromagnetic field ("EMF"), the objects subject to the indication of EMG grade, and the method of such indication on August 1, 2013. The notification is based on Article 47 Paragraph 2 of the Radio Wave Act and will become effective on August 1, 2014.

In accordance with the notification, manufacturers or importers of mobile wireless devices (e.g., mobile phones) must indicate the grade of specific absorption rate ("SAR") or measurement of SAR on the product body (e.g., by using film stickers), product package, user manual, information menu in the device or on a separate notice.

In addition, base stations, mobile stations and radio stations must also indicate the grade of EMF so that the public can be easily identify such as on the fence, barbed wire, or pertinent radio equipment.

Violation of this indication obligation may result in an administrative fine of up to KRW 3,000,000 to a manufacturer or importer. Further, in the event the MSIP learns that the EMF emitted by a wireless device exceeds the permissible safety standard, it can test or investigate the pertinent device and upon confirmation of the violation, request for the manufacturer/ importer/ reseller/ renter of the wireless device to take necessary measures such as removing/ demolishing/ destroying or suspending the production/import/sale/use of the devices at issue.

Companies should confirm whether the mobile wireless devices it manufactures or imports, or the stations it has installed, are subject to such notification obligations and take the necessary measures.

Restrictions on Foreign Investments in Facilities-Based Telecommunications Service Providers Relaxed

The amendment to the Telecommunications Business Act (the "Act") became effective on August 13, 2013. The amendment to the Act relaxed the restrictions on indirect foreign investments in facilities-based telecommunications service providers ("FSPs").

Previously, the Act restricted direct foreign investments by limiting a foreign government or foreign investor's shareholding in Korean FSPs to 49%, as well as indirect investments by treating the shareholding of a domestic entity as "foreign" shareholding if the largest shareholder is a foreign government or a foreign individual and holds more than 15% of the total outstanding shares.

The amendment to the Act allows a domestic entity in which a US or EU government or citizen is the largest shareholder and holds more than 15% of the total outstanding shares to acquire shares of a domestic FSP without limitation.

However, for certain FSPs that meet certain conditions, the Act now requires investors or concerned FSPs to go through a public interest review by the Ministry of Science, ICT and Future Planning if it acquires more than 15% of the total issued shares of the applicable FSPs, or if there are certain changes such as a change in the largest shareholder or in the shareholder that has actual management control. This review requirement also applies to domestic entities acquiring shares of FSPs in an indirect manner through the aforementioned exception.

Despite the public interest regulatory review requirement, the amendment is significant because it broadens the opportunities for US and EU individuals or legal entities to invest in domestic facilities-based telecommunications service businesses.

SELECTED REPRESENTATIONS

CVCI acquires GNS BHC Co., Ltd.

On June 28, 2013, Citi Venture Capital International (CVCI), a PEF and an affiliate of Citi Group, acquired 100% equity stake in BHC Co., Ltd., the fourth-largest chicken franchiser in Korea, from its former shareholders, Genesis Group and a financial investor NH-Kolon Green 1st Private Equity Fund.

Kim & Chang represented CVCI in all aspects of the transaction from the structuring and legal due diligence to the preparation/negotiation of sales and financing agreements, filing for governmental approvals and permits as well as all closing matters.

Hanjin Group establishes Hanjin KAL through a horizontal spin-off

On August 1, 2013, Hanjin Group newly established Hanjin KAL through a horizontal spin-off of Korean Airlines Co., Ltd., converting it into a holding company system, and thereby making the Group's corporate governance system more transparent and specializing each business division.

Kim & Chang represented Hanjin Group in all aspects of the transaction, including structuring the transaction, conducting legal due diligence on the target companies, preparing relevant documents such as a spin-off plan, acquiring governmental approvals and permits, and advising on closing matters.

Vogo Fund acquires Samyang Optic

On 19 Aug 2013, Vogo Fund, a private equity fund based in Korea, successfully completed the acquisition of 100 % of common shares of Samyang Optics for an aggregate purchase price of KRW 68 billion from SY Corporation. Samyang Optics is the one of the largest interchangeable camera lens manufacturers in Korea. The seller established a "new-co" through vertical spin-off of the optical lens business of Samyang Optics for the transaction and the surviving company changed its name to SY Corporation after spin-off.

Kim & Chang represented Vogo Fund in all aspects of the transaction, including structuring the transaction, conducting legal due diligence, advising on regulatory matters, acquisition financing and negotiating and drafting the transaction documents.

Baring Private Equity Asia acquires Logen Inc.

On July 31, 2013, Baring Private Equity Asia ("Baring PE") acquired 100% shares in Logen Inc., a package delivery company in Korea.

Kim & Chang represented Baring PE in all aspects of the transaction, including structuring the transaction, conducting legal due diligence on the target company, advising on regulatory matters and acquisition financing, negotiating and drafting the transaction documents, and advising on closing matters.

KIKO products are not unfair products

Recently, the Supreme Court rendered an en banc decision on the KIKO case ending a seemingly endless dispute over the last 5 years.

The Supreme Court recognized the fairness and the suitability for currency hedging of structured currency derivative products in various forms, also called as KIKO products. In particular, the Court ruled that so far as the profits made by financial institutions are inherent in derivative products and the margin is reasonable, the products cannot be deemed as unfair. In addition, the Court ruled that, just because the value of the purchased option by a financial institution is bigger than the value of the purchased option by a customer on account of the profits made by the financial institution, the financial institutions is not obligated to notify the customer of the value of each option or its own profit.

The Supreme Court also provided a standard on the suitability principle and financial institution's obligation to explain and disclose to the customer in OTC derivative transactions. (i) A financial institution bears liability for damage compensation only if it proactively recommended a transaction which led to an excessive volume of risk in light of the purpose of the transaction and the customer's assets, in violation of the suitability principle, unless the customer insisted on the execution of the transaction while being sufficiently aware of the transactional risks, in which case the customer bears the responsibility under the principle of caveat emptor. (ii) While financial institutions must explain matters such as the structure, contents and risks associated with a product but not matters such as the financial-engineering structure and principle of the product, value of options, minus market value of KIKO products, profits of the banks, worst case scenario, early termination, etc.

Most of the commercial banks in Korea were defendants in the KIKO case, who were represented by Kim & Chang. We successfully defended their interest through testimonies of five expert witnesses, numerous court representations on the suitability principle and obligation to explain, as well as the financial engineering issues raised by the companies. This Supreme Court ruling has put an end to a dispute on the fairness of various currency option products, including KIKO products, and has turned down the assertion of plaintiffs that banks are subject to a strict level of suitability principle and obligation to explain when treating OTC derivative products.

Seoul High Court reverses KFTC's order on unfair collusion case involving life insurance products

There have been numerous administrative proceedings seeking the cancellation of the Korea Fair Trade Commission ("KFTC")'s order against 16 life insurance providers on December 15, 2011. KFTC issued a corrective order and administrative fines based on unfair collusive acts. Recently, the Seoul High Court partially reversed the KFTC's order, holding that it could not find an agreement among the insurance providers to align the expected interest rate and the official interest rate.

The KFTC had argued that the insurance providers exchanged non-public information regarding expected interest rates, etc., and determined its own interest rates based on such information. The insurance providers had, therefore, entered into an agreement to engage in a price-fixing scheme.

The Seoul High Court found that:

- To constitute unfair collusive acts under the Monopoly Regulation and Fair Trade Law ("MRFTL"), the fact that a company merely exchanged price information with another company is not sufficient; rather, there must be an agreement to take action, such as jointly determining price.

- Life insurance providers determine interest rates by taking into account not only the exchanged information, but also other factors. The final expected interest rate, etc. did not display a certain type of external agreement.

- It is difficult to conclude that the life insurance providers had an "agreement to jointly determine the expected interest rate, etc." solely from the fact that the insurance providers had determined their interest rates based on exchanged information.

These findings indicate that the Seoul High Court accepted the life insurance providers' argument that there was no agreement among the insurance providers to jointly determine the interest rates, but rather, the insurance providers were merely engaged in information exchange activities. Although this case remains under review by the Supreme Court, this decision is likely to be a reference point for many other civil claims for damages filed by consumers against life insurance providers.

Kim & Chang represented several life insurance providers in this decision and successfully argued against the KFTC's position, and obtained a favorable judgment on behalf of the insurance providers.

MBK Partners acquires ING Life Insurance Korea Ltd.

On August 26, 2013, MBK Partners ("MBK"), a private equity fund, entered into a share purchase agreement with ING Group to acquire ING Life Insurance Korea Ltd. ("ING Life Insurance"), making ING Life Insurance a wholly-owned subsidiary of MBK (the "MBK Acquisition").

In the MBK Acquisition, Kim & Chang provided comprehensive legal services including, but not limited to, legal due diligence, drafting, reviewing and negotiating the share purchase agreement.

Samsung C&T forward sells Mapo Shilla Hotel

On July 30, 2013, Samsung C&T Corporation ("Samsung C&T") entered into a forward sale agreement pursuant to which Samsung C&T agreed to sell, upon completion, a business hotel which Samsung C&T is currently constructing at Dohwa-dong, Mapo-gu, Seoul. The construction of the hotel is expected to be completed during the second half of 2015. The plan is to operate it as a business hotel by Hotel Shilla Co., Ltd. under a 15 year lease agreement.

Kim & Chang's extensive experience with business hotel development and forward sale agreements played a critical role in the success of the overall transaction. Kim & Chang provided comprehensive, yet practical, legal advice to Samsung C&T, including locating a suitable forward purchaser for the hotel and advising on the negotiation and execution of the lease agreement with Hotel Shilla Co., Ltd. and the forward sale agreement with the purchaser.

GE sells a portfolio of office buildings

On July 4, 2013, GE Real Estate Co., Ltd. sold a portfolio of office buildings, which included the Trees Building located at Nonhyeon-dong, Gangnam-gu, Seoul, the Top Building located at Yatap-dong, Bundang-gu, Gyeonggi-do, the Suhyoung Building located at Soonae-dong, Sungnam-si, Gyeonggi-do and the Hosoo Building located at Joong-gu, Daegu-si, to a newly established real estate fund.

Kim & Chang provided comprehensive legal advice to GE Real Estate Co., Ltd. throughout all phases of the portfolio sale transaction, including the negotiation and execution of the sale and purchase agreement.

Fame of COSTCO mark for large discount stores recognized in Korea

Price Costco International Inc. ("Costco") operates large discount wholesale stores all over the world, and is the owner of registrations for the marks COSTCO WHOLESALE and COSTCO WHOLESALE, etc. in Korea. Kim & Chang recently represented Costco in a successful preliminary injunction action to enjoin third parties' use of marks similar to COSTCO within Korea.

Respondents had applied for the mark COSTOP, and other similar marks (collectively "Subject Marks"), in anticipation of starting a large discount warehouse store, similar to Costco's, in Korea. Costco then filed a preliminary injunction action against the respondents arguing that respondents' intended use of the Subject Marks amounted to trademark infringement and an act of unfair competition in violation of the unfair competition laws.

Costco submitted extensive evidence establishing customer recognition of its COSTCO related marks within Korea, and strongly argued the bad faith intent of the respondents. As a result, the Seoul Central District Court held in favor of Costco and issued a preliminary injunction. However, the District Court specified that only the mark COSTCO WHOLESALE was widely recognized within Korea and somewhat limited the scope of the injunction. Costco appealed this decision to the High Court requesting that the injunction be expanded to include other services and other marks belonging to the respondents.

The High Court finally held that both the COSTCO WHOLESALE and COSTCO WHOLESALE marks are well-known in Korea in connection with the operation of large discount stores, and also expanded the scope of the injunction to include more marks which the respondents were expected to use (Seoul High Court Case No. 2012La1491, decided on April 23, 2013).

This is a promising case for foreign companies doing business in Korea, as the court issued an injunction based on the opponent's bad faith intent. Rather than focusing on the fact that the compared marks had different pronunciations, the court recognized that the overall composition and color scheme of the COSTOP mark was similar to Costco's and was created with a bad faith intent to free ride off Costco's goodwill.

Joint venture between KT and the Government of Rwanda

This past June, KT entered into an agreement to form a joint venture with the government of the Republic of Rwanda under a public private partnership model; that is a business model that creates synergy by combining the tangible/ intangible assets of a government, such as commercial rights or network infrastructure, with the tangible/ intangible assets such as capital or project implementation capabilities that a company provides. The newly established joint venture was granted a 25-year exclusive right to use frequency and is planning to engage in the construction and management of LTE networks.

In addition, KT has also executed an agreement with the government of Rwanda to establish a joint venture to provide system integration and information technology services this past September.

Kim & Chang provided comprehensive legal services in connection with the transaction, including review of the deal structure, assessment of the local regulations, legal due diligence, preparation of relevant agreements including the shareholders agreement, negotiations with the Rwanda government, global merger filing, and preparation for closing.

This transaction is meaningful in that it is the first public private partnership model joint venture between a Korean telecommunications company and a foreign government.

FIRM NEWS

AWARDS & RANKINGS

Tier 1 in all practice areas – IFLR 1000 (2014 edition)

Kim & Chang was named as a top-tier law firm for all practice areas surveyed for the 10th successive year, according to the recent edition of IFLR1000, a Euromoney publication.

IFLR1000 mentioned Kim & Chang as "South Korea's premier law firm that is virtually unrivalled in terms of size and reputation."

In addition, 7 lawyers at our firm were selected as leading lawyers in each practice area and 2 lawyers as rising stars.

The details are as below:

<u>Firm Rankings</u>
- Banking & Finance
- Capital Markets
- Competition
- M&A
- Restructuring & Insolvency

<u>Leading Lawyers</u>
Kye Sung Chung, Kyung Taek Jung, Soo Man Park, Jin Yeong Chung, Jong Koo Park, Hi Sun Yoon, Chang Hyeon Ko

<u>Rising Star</u>
Chul Man Kim, Myoung Jae Chung

Korea Firm of the Year – China Law & Practice Awards 2013

Kim & Chang was recognized as 'Korea Firm of the Year' at China Law & Practice Awards 2013, hosted by China Law & Practice, an affiliate of Euromoney, and Kim & Chang has been recognized as 'Korea Firm of the Year' for three years in a row.

China Law & Practice Awards selects deals of the year and outstanding firms based on interviews and independent research over a period of four months. Mr. Seong Ho Suh of Kim & Chang attended the ceremony which was held at Sofitel Hotel, Bejing, China on 12 September.

Korea Law Firm of the Year – ALB Korea Law Awards 2013

ALB (Asian Legal Business), an Asian legal media affiliated with Thomson Reuters held ALB Korea Law Awards 2013 at Grand Hyatt Seoul on November 14, 2013.

ALB announced winners in the categories including best law firms, in-house counsels, innovative managing partner, and influential deals selected based on its own independent research and outside experts' voting results.

Kim & Chang received the highest number of awards, and it was named in the following eight categories including 'Korea Law Firm of the Year.'

<u>Firm Categories – Only winner</u>
- Korea Law Firm of the Year
- Deal Law Firm of the Year
- Banking and Financial Services Law Firm of the Year
- Dispute Resolution Law Firm of the Year
- IP Law Firm of the Year
- Managing Partner of the Year: Kye Sung Chung

<u>Deal Categories – Co-winner</u>
- Debt Market Deal of the Year: Doosan Infracore Co's Senior Capital Securities Offering
- Equity Market Deal of the Year: Acquisition of Equity Shares of ArcelorMittal Mining, Canada

Korea Law Firm of the Year – The Macallan ALB Hong Kong Law Awards 2013

Kim & Chang was selected as 'The Korea Law Firm of the Year' at the Macallan ALB Hong Kong Law Awards 2013, surveyed and announced by ALB (Asian Legal Business), a renowned legal publication in Asia owned by Thomson Reuters.

Mr. Alex Yang of Kim & Chang attended the ceremony on behalf of the firm, which was held at Conrad hotel, Hong Kong on September 6, 2013.

The Macallan ALB Hong Kong Law Awards select leading law firms and in-house legal teams in Hong Kong and other countries (Korea, Taiwan and China) based on excellence and outstanding achievements as well as top deals and deal makers of the past twelve months.

Recognized as one of world's top 10 pro bono firms – Who's Who Legal Pro Bono Survey 2013

Kim & Chang was recognized as one of the top 10 pro bono leading law firms in the world according to Who's Who Legal Pro Bono Survey 2013, published by Who's Who Legal, an international legal media. Kim & Chang is the only Asian firm to be selected.

Who's Who Legal mentioned Kim & Chang as "particularly forward thinking when it comes to the delivery of its pro bono services." Also, for the reason Kim & Chang has chosen among world's top 10 pro bono law firms, Who's Who Legal said "…in 2013 the firm launched 'Kim & Chang Committee for Social Contribution' to help encourage participation. The firm identified targets including performing two to three new pro bono projects each month."

Activities

8th Annual Asset Management Seminar in Singapore

8th Annual Asset Management Seminar, organized by Euromoney, was held in Singapore, on September 6, 2013.

Messrs. Pil Kook Lee and Joon Ho Lee of Kim & Chang gave a presentation on 'Summary of Korean Regulatory Regime on Cross-Border Investment Management'. Also, many questions regarding the Korean market and regulatory regime were raised by investment managers who were interested in pension fund during the presentation.

Other speakers presented on the current status of the investment management industry and the related regulations in the EU, China, Japan, India, Singapore, Taiwan, Hong Kong, Australia and Malaysia.

ECCK (European Chamber of Commerce in Korea) Taxation Conference 2013

The ECCK Taxation Conference 2013, hosted by the ECCK (European Chamber of Commerce in Korea), was held at Lotte Hotel, Seoul, on September 24, 2013. Over 40 people attended the conference, including top executives from Merck, Mercedes-Benz, Solvay, and many other leading European companies.

Messrs. Jeremy Everett and Hoon Lee and Ms. Tae Yeon Nam of Kim & Chang participated as speakers and provided an overview of 2014 tax law amendments affecting European companies in Korea and a review of the recent tax audit environment and implications.

International Conference on Advancement of Arbitral System and Revitalization of Arbitration

On September 25, 2013, 'International Conference on the Advancement of the Arbitral System and Revitalization of Arbitration' organized by the Ministry of Justice, the Korean Commercial Arbitration Board (KCAB) and the Korean Council for International Arbitration (KOCIA) was held at the KCCI.

At this conference, many practitioners in international arbitration practice attended to discuss the current status and effects of arbitration act amendments of various countries, choice of a venue in international arbitrations and the role and status of arbitration institutions in arbitration law.

Mr. Byung-Chol Yoon and Dr. Eun Young Park of Kim & Chang were invited as speakers for the event, at which Mr. Yoon gave a presentation on 'Korea Arbitration Act Revision Committee Presentation' in the first session, and Dr. Park, on 'LCIA and Its Role and Status under Arbitration Laws' in the third session.

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