Newsletter

KIM & CHANG | A Quarterly Update of Legal Developments in Korea | August 2014, Issue 3

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Recognized as innovative law firm - Financial Times Asia-Pacific Innovative Lawyers Awards & Report 2014
Recognized as best law firm for asset management - AsianInvestor Korea Fund Awards 2014
Named No. 1 M&A advisor in Korea - Mergermarket M&A League Tables of Legal Advisors H1 2014

CORPORATE

By Jong Koo Park (jkpark@kimchang.com) and Teo Kim (teo.kim@kimchang.com)

Proposed Amendments to the Financial Investment Services and Capital Markets Act

On Thursday, April 24, 2014, the Financial Services Commission ("FSC") announced proposed amendments ("Amendments") to the Financial Investment Services and Capital Markets Act ("FSCMA"). The Amendments have been prepared as subsequent measures to the "Plan to Reform Private Equity Funds ("PEF") Policies" and "M&A Invigoration Plan" announced by FSC on December 4, 2013 and March 6, 2014, respectively. We provide below a summary of the important aspects of the Amendments regarding PEFs:

Four PEF Categories Will change to "Management Participation Type Private Collective Investment Vehicle"

The Amendments combine and simplify the regulatory framework by reducing the four private fund categories of General Private Funds, Hedge Funds, PEFs, and Corporate Restructuring PEFs to two categories of "Specialized Investment Type Private Collective Investment Vehicle" and "Management Participation Type Private Collective Investment Vehicle" (PEFs will be classified under this category).

The Current Pre-Registration System will Change to a Post-Reporting System

The Amendments require PEFs to register with the Financial Supervisory Service ("FSS") within two weeks of their establishment. Prior to the Amendments, PEFs were required to register before their establishment.

Allocation / Management of PEF's Funds and Assets

The Amendments permit PEFs to allocate up to 30% of their net assets in securities without any management participation purpose. Prior to the Amendments, PEFs could allocate only up to 5% of their assets in securities without any management participation purpose.

Restrictions on Transactions with Related Parties

The Amendments restrict transactions with related parties as follows:

- Other than transactions involving certain exceptions (e.g., transaction on a securities exchange), PEFs may not engage in related party transactions (the detailed scope of related parties will be set forth in the Presidential Decree of the FSCMA) and

- PEFs may not acquire securities issued by (i) an affiliate of a General Partner ("GP") or (ii) an affiliate of a Limited Partner ("LP") that has de facto control over the PEF that exceed a certain threshold amount (which will be determined by the Presidential Decree of the FSCMA).

Finally, although not included in the Amendments, the FSC may contemplate further amendments to the Presidential Decree of the FSCMA, including:

- Permitting PEFs to utilize a business transfer transaction structure rather than limiting the transaction structure strictly to the purchase of equity securities;

- Permitting an SPC established by a PEF to provide collateral with respect to the debt the SPC has assumed; and

- Permitting PEFs to invest in real estate assets that relate to a target company in which the relevant PEF has invested.

ANTITRUST & COMPETITION

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KFTC's Announcement of a Draft Bill to Korean Competition Law

On June 19, 2014, the Korea Fair Trade Commission ("KFTC") announced that it identified 15 regulations in the Monopoly Regulation and Fair Trade Law ("FTL") that it plans to amend so that Korean competition law is more consistent with the current market situation and global trends. On July 17, 2014, the KFTC announced a draft bill to implement 11 out of 15 identified regulations by amending the FTL and its subordinate regulations. The KFTC's stated plan is to consider the opinions of interested parties submitted during the legislative announcement period from July 18 to August 27.

We provide below a summary of the major proposed amendments.

Summary of Amendments to FTL

- **Respondent's Rights and Investigation Procedure**

  In order to strengthen the respondent's rights and to assure fairness and transparency of the KFTC investigation and enforcement procedure, the KFTC plans to amend the FTL to directly provide for the following respondent's rights and clarification of the KFTC's investigation procedure.

Categories	Change	Note
Respondent's Rights	Respondent's right to submit opinions and right to testify during investigation	New
	Notification to respondent of commencement of investigation	New
	Provision to respondent ofthe KFTC examiner's report	Move from KFTC notification to FTL
Respondent's Rights	Respondent's right to submit opinions, rights to testify and right to request photocopies of submitted materials	Move from KFTC notification to FTL
	Interested parties' right to request photocopies of submitted materials after the KFTC's issuance of decision	New
Investigation Procedure	Establishment of the legal basis for the KFTC to initiate an investigation upon filing of a complaint with the KFTC	New
	Delegation to the Enforcement Decree of the FTL of the determination of the investigation commencement date (starting point for the statute of limitations)	Move from KFTC notification to FTL
	Establishment of the KFTC examiners' legal status and obligations	Move from KFTC notification to FTL
	Clarification of the Commissioners' authority to initiate the hearing process	New
	Establishment of legal grounds for the hearing preparation procedure, evidence inspection, and default decisions	Move from KFTC notification to FTL

- **Exemptions from Merger Review**

  The following mergers that are unlikely to raise anti-competitiveness concerns would be exempt from the merger filing obligation under the amendments to the FTL:

  - Interlocking directorship if the number of interlocking directors is less than 1/3 of the total number of directors on the board;

  - Mergers and business transfers between affiliates of a small company (a company is a "small" company if the consolidated total asset or annual sales revenue is less than KRW 2 trillion);

  - Share acquisitions, incorporation of a new company, or appointment of interlocking directors by a company whose only business is investment or investment in a specific industry; and

  - For private equity funds, pre-acquisition establishment of entities.

- **Minimum Resale Price Maintenance**

  The current FTL's language deems minimum resale price maintenance to be a per se violation of the FTL. However, minimum resale price maintenance can also have efficiency-enhancing effects by promoting non-price competition, such as competition on services. The Korean Supreme Court also held that the rule of reason test should apply to the minimum resale price maintenance by balancing the anti-competitive effects arising from the restraint on intra-brand competition with the pro-competitive effects arising from the promotion of inter-brand competition. The amendments to the FTL clarify that the rule of reason test will apply in circumstances such as when the benefits to customer welfare are greater than the anticompetitive effect to allow the minimum resale price maintenance.

- **Extraterritorial Jurisdiction**

  Article 2-2 of the current FTL provides for the extraterritorial jurisdiction of the KFTC if an act taking place outside Korea has an effect on the Korean market. However, due to the ambiguity of "an effect on the Korean market", there are concerns that the extraterritorial jurisdiction would apply too widely. The proposed amendment to the FTL clarifies this ambiguity by limiting the effect on the Korean market as "direct, significant and reasonably foreseeable".

Future Focus of the Amendments

- **Price Abuse by a Market Dominant Company**

  The current Enforcement Decree of the FTL prohibits a market dominant enterprise from engaging in price abuse. Price abuse is defined as an act of determining, maintaining, or changing unreasonably the price/cost of goods or services relative to changes in the supply and demand or in supply cost.

  The KFTC plans to remove the "supply cost" element from the determination of price abuse since (i) it is practically impossible to determine how much of a price change is due to the business's market dominance, and (ii) other countries generally do not find issues with high price alone. This plan is expected to be included in a bill to amend the FTL Enforcement Decree in the first half of 2015.

- **Joint R&D and Technological Cooperation**

  Under the current FTL, the KFTC reserves the right to review joint R&D and technological cooperation arrangements between competitors as a form of soft-core cartel. However, such review may stifle joint R&D and technological cooperation efforts that can lead to innovation in the market. As such, the KFTC plans to create a safe harbor for joint R&D and technological cooperation involving parties that meet certain market shares. This plan is expected to be included in an amendment to the guidelines for review of improper concerted acts in the second half of 2014.

KFTC's Notification on Specific Types of Abuse of Superior Bargaining Position Against Distributors

On May, 12, 2014, the Korea Fair Trade Commission ("KFTC") announced the promulgation of the Notification on Specific Types of Abuse of Superior Bargaining Position in Continuous Resale Transactions ("Notification") pursuant to Article 23 of the Monopoly Regulation and Fair Trade Law ("FTL"). According to the KFTC, the Notification is intended to help suppliers better understand which of their business practices may constitute an abuse of superior bargaining position, a type of unfair trade practice prohibited under the FTL.

Below is a summary of the types of abuse of superior bargaining position that are identified as being problematic under the Notification.

Unfairly Forced Sales

- Unilateral supplying un-wanted or un-ordered goods
- Imposing mandatory purchase requirement for goods with imminent expiration date, new products, unpopular products, or obsolete goods

Unfairly Forced Economic Favors

- Shifting the cost of promotional activities or labor cost without prior agreement with distributors
- Forcing distributors to dispatch employees for suppliers
- Forcing distributors to donate funds for supplier's business

Unfairly Forced Sales Target

- Imposing disadvantages, such as early termination of distributorship, suspension of supply, or withholding monetary payments owed to the distributors for the sole reason of failing to meet the sales target

Unfairly Unfavorable Treatment

- Unilaterally changing the transaction terms during the transaction period by adding unfair terms
- Prohibiting damage claims in the event of termination
- Setting forth unfair compensation standards for equipment provided by suppliers in the event of termination
- Forcing the interpretation of supplier over a disputed clause in the agreement
- Unfairly shifting the cost of return or refusing the return of defective goods
- Unfair reduction or suspension of sales promotion fund
- Unfairly treating the distributor as a retaliation for filing a complaint or report to the KFTC

Unfair Interference with Business Operation

- Forcing distributors to participate in supplier's promotional activities
- Requesting appointment, dismissal, or change of employment of distributor's personnel or sales staff
- Demanding disclosure of trade secrets
- Unilaterally designating the business counterparties, business hours, sales territory, etc.

Refusal or Avoidance of Order Records of Distributor

- Refusing or avoiding to provide distributor's order records without a justifiable reason

Court Decision on Collusion Case Regarding Compensation for Commission Rate Tied to Personal Life Insurance Products

Following the Korea Fair Trade Commission ("KFTC")'s correction order and imposition of administrative fines on December 15, 2011 against 16 life insurance companies for their engagement in unfair concerted action (cartel), consumers that purchased the insurance policies (the "Complainants") brought a number of civil actions against these 16 life insurance companies. On April 25, 2014, and on June 27, 2014, the Seoul Central District Court issued judgments on a number of these civil cases in favor of the life insurance companies on grounds that the aforementioned life insurance companies had not been conclusively found to have engaged in unfair concerted action.

The Complainants had argued that the life insurance companies had colluded to reduce their expected interest rates and official interest rates below the competitive interest rates. The Complainants argued that such unfair concerted actions violated the Monopoly Regulation and Fair Trade Law ("FTL"), and demanded compensation for the losses from additional insurance charges with regard to fixed-rate insurance policies and for the losses from reduced refunds and insurance amounts due to underreported preparation fund regarding floating-rate insurances.

The Seoul Central District Court specifically found that it was difficult to conclude from the evidence provided by the Complainants that the life insurance companies had engaged in an unfair concerted action. The Seoul Central District Court gave significant weight to the separate decision by the Seoul High Court in the administrative appeal action by the life insurance companies; in that decision, the Seoul High Court reversed the KFTC's correction order and imposition of administrative fines, agreeing that the life insurance companies had not fixed prices regarding expected and publicly announced official interest rates.

Furthermore, on July 24, 2014, the Supreme Court affirmed Seoul High Court's decision to dismiss the KFTC's correction order and imposition of administrative fines.

Kim & Chang represented some of the life insurance businesses in both the administrative and civil cases and contributed in receiving a judgment in favor of our clients.

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The Real Name Act Amended to Penalize Persons Who Borrow or Lend Names for Illegal Financial Transactions

On May 28, 2014, the National Assembly passed an amendment to the Act Concerning Financial Transactions by Real Name and Protection of Confidentiality ("Real Name Act"). The Real Name Act prohibits conducting illegal financial transactions by using a name borrowed from another person ("Borrowed Name Transactions"). The Real Name Act already stipulates a ground for imposing an administrative fine on employees of financial institutions involved in Borrowed Name Transactions, but it does not provide any penalty for those persons who lend or borrow names for Borrowed Name Transactions. The amendment now penalizes persons for lending or borrowing names in Borrowed Name Transactions. The amendment will take effect on November 29, 2014. Based on the amendment, Borrowed Name Transactions may result in not only criminal or administrative penalties, but also other civil disadvantages. The following summarizes major points of the amendment.

- **Prohibition against Conducting, Arranging or Brokering Borrowed Name Transactions, and Criminal Punishment for Violators:** The amendment prohibits Borrowed Name Transactions conducted to conceal illegally obtained wealth, to launder money, to supply funds used for posing public threats, to avoid foreclosure on properties, or to perpetrate any other illegal act. The amendment also prohibits employees of financial institutions from arranging or brokering Borrowed Name Transactions. Based on the amendment, persons violating any such prohibition can be subject to imprisonment of up to 5 years or a criminal fine of up to 50 million Korean Won. Additionally, the amendment raises the maximum amount of administrative fine, which can be imposed on employees of financial institutions for violating the Real Name Act, to 30 million Korean Won from 5 million Korean Won.

- **Presumption of Ownership of Financial Assets by Title Holders:** Under the amendment, financial assets held in the name of a given person shall be presumed to be actually owned by that person. According to a Supreme Court case, a beneficial owner, rather than a title owner, can be regarded as the actual owner of financial assets. However, by presuming that the title owner is the actual owner of the financial assets held under his/her name, the amendment make it more difficult for the beneficial owner to claim title on financial assets held in the name of their title owner.

- **Duty to Explain by a Financial Institution:** The amendment requires a financial institution to explain the prohibition of Borrowed Name Transactions to its customers.

- **New Administrative Sanctions Against Financial Institutions:** The amendment provides a new ground for imposing an administrative sanction on a financial institution if its employee violates the Real Name Act.

BANKING

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Regulations Enacted to Lessen FATCA Compliance Burdens on Financial Institutions

On June 18, 2014 at the 11th regular meeting of the Financial Services Commission ("FSC"), the FSC enacted implementation regulations (the "Regulations") relating to the Korea-US intergovernmental agreement ("IGA") on the Foreign Account Tax Compliance Act ("FATCA"). The Regulations aim to provide clear guidance regarding the implementation of and compliance with the FATCA so as to alleviate burdens on financial institutions and their customers. The Regulations went into effect on July 1, 2014.

Key contents of the Regulations are as follows.

Overview of FATCA

- The FATCA was enacted on March 18, 2010 and aims to allow the US government to procure information on US citizens' financial activities overseas. Final regulations relating to the FATCA were announced on January 17, 2013.
  - The FATCA requires non-US financial institutions to execute an agreement with the U.S. Internal Revenue Service ("IRS") by the end of June 2014 and starting July 1, 2014, to screen accounts for those held by US citizens, report information relating to those accounts, and withhold taxes from those accounts.
  - Any financial institution that is found to be non-compliant will be subject to a withholding tax of 30% on US-source income (interest, dividends, etc.).
- Korea executed an IGA regarding the FATCA on March 17, 2014. Under the IGA, each nation's financial institutions must report relevant account information to the other nation's tax authority. The information sharing will start September 2015 and take place every September thereafter.
- Further details of the IGA as contained in a Ministry of Strategy and Finance press release dated March 19, 2014 are as follows:

Categories		US → Korea	Korea → US
Accounts Covered	**Individual Accounts**	• Deposit account with annual, interest of USD 10 or more • Other financial accounts relating to US-source income	• Financial accounts in excess of USD 50,000
	Corporate Accounts	• Financial accounts relating to US-source income	• Financial accounts in excess of USD 250,000
Reported Information		• Interest, dividends, other income	• Interest, dividends, other income, account balance
Reporting Responsibility		• Banks, financial investment firms, insurance companies, etc.	
Timing		• Every September starting September 2015 (data shared will be current as of end of previous calendar year)	

Scope of Application

- Financial institutions – Savings institutions such as banks, savings banks and mutual finance institutions; entrustment institutions such as securities firms; funds; insurance companies; etc. (scope of reporting obligation reduced for banks, cooperatives, etc. whose total assets as shown on their balance sheet are less than USD 175 million and that meet certain other requirements)

- Financial accounts – Bank account, trust account, fund account, insurance contract (if cash surrender value is more than USD 50,000), pension contract, etc. (reporting obligation exempted for certain special tax treatment products (annuity accounts, worker's asset building accounts, long-term house-purchasing accounts, etc.) for which annual contribution is limited)

Process

- Financial institution reviews its accounts data and checks for accounts owned by US citizens.

- The consolidated balance of all accounts opened with the financial institution and held under the name of the same individual or entity is summed up (but only to the extent calculable using the institution's computing system).

- For accounts held by US citizens, certain account information (name, account number, balance, total interest, etc.) is transferred to the Korea National Tax Service ("NTS") once a year.

- Group accounts opened between July 1, 2014 and December 31, 2014 will receive a grace period until the end of June 2016.

※ **Screening and Reporting Periods per Account Category**

Account Category			Period for Verifying Owner's US Citizenship	Balance Subject to Report	Deadline for Report to NTS[2]
New Accounts		Accounts opened after July 1, 2014	Upon opening of account	Balance as of end of 2014[3] (and of each year thereafter)	By end of July 2015[3] (and of each July thereafter)
Existing Accounts	**High Value Personal Accounts**	Accounts whose balance as of end of June 2014 was in excess of USD 1 million	By end of June 2015	Balance as of end of 2014[3] (and of each year thereafter)	By end of July 2015[3] (and of each July thereafter)
	Low Value Personal Accounts	Accounts whose balance as of end of June 2014 was over USD 50,000[1] but lower than or equal to USD 1 million	By end of June 2016	Balance as of end of 2015[4] (and of each year thereafter)	By end of July 2016[4] (and of each July thereafter)
	Group Accounts	Accounts whose balance as of June 2014 was in excess of USD 250,000			

Notes:

1) In case of insurance or pension contracts, in excess of USD 250,000.

2) Information sharing between NTS and IRS to take place September 2015 and every September thereafter.

3) If account owner's US citizenship is verified during 2014.

4) If account owner's US citizenship is verified during 2015.

INSURANCE

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Amendments to the Presidential Decree of the Insurance Business Act and Insurance Business Supervisory Regulations

On April 15, 2014, certain amendments to the Presidential Decree of the Insurance Business Act and Insurance Business Supervisory Regulations (the "Amendments") were promulgated. We provide you with a description of some of the more noteworthy changes under the Amendments.

Protection of Insurance Consumers

- The obligation to check duplicate insurance subscriptions when soliciting medical insurance has been expanded to include subscriptions for group insurance.

- Records of evidentiary documents, such as signatures and telemarketing recordings, must be kept and maintained when changing insurance policies.

- The regulations on tying loans and insurance products sales (which currently prohibits the sale of insurance products of which monthly premium exceeds 1% of the loan amount to a borrower during a one month period prior to and after providing the loan) have been expanded to prohibit insurance products sales to related parties of a small and medium-sized borrowers, which include officers and employees of the borrower and their family members.

Reinforcement of Insurance Advertisement and Telemarketing-Related Regulations

- For audio-visual advertising, the volume and speed of the speech informing policyholders of disadvantageous terms, such as coverage exclusions, limits of insurance payment, etc., are required to be identical to the volume and speed of speech as read in the main advertisement, and such advertisement must be posted on the Internet homepage of the insurer.

- For telemarketing, insurers and insurance solicitors must (i) inform policyholders of how to access voice recordings after execution of insurance contracts; (ii) inform policyholders of their consumer rights in case of mis-selling (i.e., cancellation of contract, etc.), and (iii) discontinue the conversation with a customer if the customer expresses no desire to continue the call or to subscribe to insurance.

- Insurers are required to perform quality assurance for at least 20% of the number of insurance contracts solicited through telemarketing per month to confirm whether sales were made in accordance with standard scripts (this obligation is currently provided in the Best Practices for Telemarketing).

Reinforcement of Personal Information Protection

- The Korea Insurance Development Institute ("KIDI") will allow policyholders to (i) access their own insurance-related personal information maintained by KIDI and status of information sharing to third parties via the KIDI website and (ii) to request KIDI to refrain from processing his/her personal information by KIDI and insurers (the so-called "Do Not Call" service, which is currently provided only to auto insurance customers and policyholders).

Deregulation of Asset Management

- The prior approval by the FSC requiring establishment of an overseas subsidiary for the purpose of investing in overseas real property has been replaced with a prior report to the FSC.

Other Amendments

- Reinsurance assets reserved in Korea are now recognized as assets to be held by a domestic branch of a foreign insurance company in Korea.

- Specific levels of administrative fines have been set for each type of offense under the IBA.

The Amendments have taken effect as of the promulgation date except for the following amendments, which will be effective six months after the date of promulgation: (i) obligation to check duplicate subscriptions for group insurance, (ii) obligation to keep and maintain records of evidentiary documents in case of changing an insurance policy, (iii) requirement regarding the volume and speed of speech for audio-visual advertising, and (iv) reinforcement of personal information protections (the so-called "Do Not Call" service).

Measures to Reduce Mis-Selling of Insurance Products

In order to accommodate various opinions from academia and businesses with regards to possible measures to reduce the mis-selling of insurance products, the Financial Supervisory Service ("FSS") held a seminar on January 21, 2014 in collaboration with the Korea Life Insurance Association and the General Insurance Association of Korea. Also, on April 10, 2014, the FSS announced its plans to enforce the resolution plan to reduce the mis-selling of insurance products based on the main points discussed at the seminar.

Implementation of the Solicitation Information Reference System Targeted to Insurance Solicitors

- In order to systematically manage insurance solicitors who are highly likely to engage in mis-selling and violate solicitation rules, the FSS will implement a system that shares information on insurance solicitors including, but not limited to, details of legal/regulatory violations, details of sanctions, and number of insurance contracts terminated and/or cancelled.

Preparation of an Evaluation Indicator for Insurance Solicitors

- The FSS will prepare an objective evaluation indicator for insurance solicitors by utilizing the data collected through the Solicitation Information Reference System.

- The FSS will utilize the evaluation indicator for appointing of insurance solicitors, managing solicitation organizations and internal controls.

Activation of an Audience Regime of Consumer Opinions of Insurers

- The FSS will invite insurance consumers to actively participate in the development of insurance products and advertisement reviews to prevent potential consumer complaints.

Prevention of Unfair Solicitation of Variable Life Insurance Products

- The FSS aims to prevent unfair solicitations by improving the application of the appropriateness principle for soliciting variable life insurance products.

- The FSS will operate an Unfair Solicitation Report Center (tentative) to root out unfair and illegal solicitations of variable life insurance products.

Prevention of Possible Mis-Selling for Non-Face-to-Face Solicitations

- The FSS will inspect cybermalls (establishment of requirements, advertisements for insurance products, compliance of explanatory obligations, etc.) operated by insurers and insurance agencies, and will prepare a guidance plan.

- The FSS will develop a plan to improve identifying inadequacies within product explanatory scripts used for telemarketing businesses.

Compliance Audits on Prevention of Mis-Selling

- Different solicitation qualifications will apply based on the complexity of the insurance products – insurance companies must enhance insurance solicitors' understanding of and expertise in insurance products by differentiating solicitation qualifications by preparing an internal qualification regime.

- Unscheduled audits in operation training - insurers' voluntary unscheduled audits on solicitation organizations to enhance the effectiveness of training.

- Linking retention ratios of solicitation organizations to performance evaluation - utilize insurance solicitors' retention ratio as a Key Performance Indicators.

- Improve call script for monitoring sales of insurance products ("Happy Call") - improve the script to facilitate meaningful monitoring on selling processes.

- Self-monitoring of random purchases of variable life insurance products - insurers' voluntary monitoring of random purchases of variable life insurance products and reflecting the results of such monitoring into Key Performance Indicators.

Supreme Court Decision on Judgment Standards for Insurance Products

Recently the Supreme Court rendered a decision that emergency medical assistance services ("Services") which are provided by International SOS Korea ("International SOS") is not an insurance product as defined in the Insurance Business Act ("IBA").

The evacuation and repatriation services as part of the Services are to transport members to medical institutions in other regions or repatriate members to their home countries when members who are dispatched overseas are in a severe medical condition ("Evacuation and Repatriation Services").

First, the Supreme Court explained the general standards of insurance products as below:

"*Considering that the essence of insurance is to eliminate or mitigate economic risks that can be caused by contingencies, the "purpose of covering risks" as a core element of an insurance product provided by the IBA shall not be easily recognized simply because losses are compensated by the provision of economically valuable benefits, and a determination should be made according to whether such purpose of covering such economic risks is the principal business objectives for which the operation of an insurance business is at issue.*"

Also, the Supreme Court ruled that the Services cannot be viewed as an insurance product because the principal purpose of the Company's Evacuation and Repatriation services is not to compensate for monetary losses, but to provide evacuation and repatriation services when members dispatched overseas are in a severe medical condition. The Supreme Court based its ruling on the following reasons:

- Evacuation and Repatriation services are not basic compensation for costs that are incurred by transporting a member to a hospital or repatriating a member to the member's home country, but is a provision of comprehensive and professional services, including assessing medical conditions as to which regional hospital a member is to be transported when in a severe medical condition, decision-making on available evacuation methods, and rendering practical evacuation and repatriation services. Also, professional and subjective decision on whether the services should be provided or not, and if provided, how and when the services should be provided, etc. are made by International SOS as the service provider. Therefore, the Services which are provided by International SOS are determined by its own global networks, knowledge and experiences which are different from insurance benefits that basically seek to indemnify or settle evacuation costs to compensate for economic losses suffered by the insured.

- Members who subscribe to the Services are government agencies, public companies, and general companies, and it is highly reasonable to view that each had subscribed to the Services for health and safety protection for their employees. Also, the members actually believed that they would be provided with professional advice and evacuation services designed for the health and safety of their employees from International SOS and not from insurance benefits.

This Supreme Court decision is significant in that it suggests certain judgment standards can be applied to distinguish insurance products with prepaid service contracts.

LABOR & EMPLOYMENT

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Court Decisions Since the Supreme Court Rulings on Ordinary Wage

Since the Supreme Court rulings in *Kabul Autotech* cases last year, the courts rendered a number of decisions applying these Supreme Court rulings on ordinary wage and the applicability of good faith preclusion, including the following.

Fixed Bonus Does Not Constitute Ordinary Wage If Payment Is Conditional on Employment at the Time of Payment

Recently, the lower courts determined that a fixed bonus paid only to employees who are employed at the time of the payment does not constitute ordinary wage. (*See* 2011*Na*826, Daegu H. Ct., May 1, 2014, and others.) These judgments seem to be in line with *Kabul Autotech*.

Like welfare benefits, whether a fixed bonus, if paid only to the employees who are employed at the time of payment, lacks "on a fixed basis" element to qualify as ordinary wage was questionable. However, the recent lower court judgments suggest that payment of a fixed bonus conditional on employment at the time of payment lacks "on a fixed basis" element and, therefore, do not qualify as ordinary wage.

Wage Does Not Constitute Ordinary Wage If Payment Is Conditional on Employment by Implied Consent or Customary Practice at the Time of Payment

Recently, the Supreme Court ruled that even if a condition that limits payment of certain wage to employees who are employed at the time of payment is not expressly stated in the collective bargaining agreement (or any other agreement), such wage lacks "on a fixed basis" element and, therefore, do not qualify as ordinary wage if implied consent or customary practice of paying the wage on such condition of employment has been established. (*See* 2012*Da*39639, S. Ct., Jun. 12, 2014.)

This ruling suggests that the condition of employment, which negates "on a fixed basis" element of ordinary wage, need not be expressly stated. Therefore, in determining whether certain wage qualifies as ordinary wage, express agreements (e.g., collective bargaining agreement) as well as implied agreements and customary practices must also be considered.

Concrete Financial Figures Need Not Be Shown to Assert Good Faith Preclusion

Recently, the Supreme Court ruled that the possibility that the actual ordinary wage will far exceed the amount of ordinary wage agreed to between the employer and the employee and the possibility that the actual wage increase rate will far exceed the wage increase rate agreed to between the employer and the employee may be sufficient to show that there is an unforeseeable financial burden on the company to qualify as "significant business difficulties." (*See* 2012*Da*116871, S. Ct., May 29, 2014.)

This ruling is notable as it suggests that the courts may apply good faith preclusion even in the absence of showing any concrete financial figures.

However, in certain cases, the courts sought to review concrete financial figures in determining good faith preclusion. For instance, the Seoul Central District Court rejected the good faith preclusion reasoning that there is no evidence to show that the financial burden that the employer would need to bear exceeds 1~2% of the pre-existing labor costs and that the additional increase rates for ordinary wage and actual wage are excessively high. (*See* 2012*GaHap*33469, Seoul Central Dist. Ct., May 29, 2014.)

Since the standard for determining good faith preclusion has not yet been settled, it is recommended that the upcoming court decisions be monitored.

Good Faith Preclusion Is Inapplicable to Other Allowances

Aside from fixed bonus, the Supreme Court ruling, in Kabul Autotech, was unclear as to whether the good faith preclusion is applicable to other allowances. Recently, however, the Seoul Southern District Court, in a case where whether an allowance for continuous employment and an incentive qualifies as ordinary wage was at issue, determined that the good faith preclusion does not apply in cases other than fixed bonus. (*See* 2013*GaHap*3805, Seoul Southern Dist. Ct., April 18, 2014.)

However, the Court, in its decision, did not offer any ground or reason as to whether the good faith preclusion must be applied differently depending on the particular wage item. Accordingly, whether the Court's judgment will be sustained if appealed is worth monitoring.

TAX

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Update on Korea-Hong Kong Tax Treaty

The Korean government and the Hong Kong government officially signed the Korea-Hong Kong tax treaty ("Tax Treaty") on July 8, 2014. The Tax Treaty is expected to come into force after the announcement of ratification from the National Assembly followed by an exchange by both governments on the ratification of the Tax Treaty in their respective countries.

In the event a domestic company pays dividends, interest or royalties to a Hong Kong company, such payments are, in general, subject to a withholding tax rate of 22% under Korean Tax Laws. Investments from and through Hong Kong are expected to increase due to applicability of the Tax Treaty's reduced withholding tax rates. In addition, measures to ensure compliance and proper enforcement have been included. An example of such a measure is a provision allowing for the exchange of tax information between the tax authorities of both governments upon request.

Withholding rules and rates on main income incurred by taxpayers residing in the other country under the Tax Treaty are as follows:

- **Reduced withholding Tax Rate on Dividend Income:** 10% when a beneficial owner directly holds 25% or more of the equity, otherwise 15%
- **Reduced withholding Tax Rate on Interest Income:** 10%
- **Reduced withholding Tax Rate on Royalty Income:** 10%
- **Taxation on Capital Gain:** Taxable in the source country where the relevant income was earned
- **Taxation on Incomes not Separately Specified in the Tax Treaty:** Taxable only in the country where the income earner resides

ENVIRONMENT

By Yoon Jeong Lee (yjlee@kimchang.com) and Joo Hyoung Lee (joohyoung.lee@kimchang.com)

Amendment to Soil Environment Preservation Act - Potential Exemptions from Environmental Contamination Liabilities

Since March 25, 2015, the definition of a "polluting party" and its liabilities under the Soil Environment Preservation Act ("SEPA") was amended in view of a 2012 ruling by the Constitutional Court. The amendment implements the court's ruling that had determined (i) unconstitutional failure to exempt a land owner from any liabilities related to contamination on and around land and (ii) held the successor to the land owner liable for all the damages, for example, even if the land was contaminated prior to conveyance. The amendment expands the scope of the exemption – to both the land owner and its successor – and allows a land owner to apply for governmental subsidies for a certain amount of cost over a threshold limit if the owner and its successor is subject to the cleanup liability.

Exemption from Liabilities in Connection with the Contamination

According to the amendment, a landowner would be exempt from the liabilities if:

- (i) The contaminated land was purchased before January 5, 1996, (ii) the contaminated land was transferred to a third party before January 5, 1996, or (iii) the contaminated land that was transferred to the landowner before January 5, 1996.

- The landowner had in *good faith* (i.e., those who were unaware of the soil contamination and not responsible for causing the contamination) verified that the contamination level of the land did not exceed the environmental exposure limits at the time of purchase. Those who conducted Soil Environment Site Assessment and found that the contamination level did not exceed the exposure limit are *prima facie* good faith land owners.

- The landowner did not cause the contamination even though the contamination occurred on his or her land. For example, the owner of the land on which the *facility* that caused the contamination is located would not be liable as long as he or she did not contribute to the contamination. Instead, the owner/operator of the facility would be obligated to clean the contamination (but would be eligible for government subsidies).

Notwithstanding above, the *exemption is not allowed* if, on or after January 6th, 1996, the landowner leased or otherwise permitted the use of the land to (i) those who caused soil contamination or (ii) those who owns or operates the facility that caused the contamination to operate on the land.

Eligibility for Governmental Subsidies

If exemption is not available, the land owner or its successor may still be eligible for *subsidies* for the entire or partial cost of soil de-contamination if:

- The transfer/purchase of the contaminated land took place no later than December 31, 2001 and the cost of remediation substantially exceeds the value of the land; or

- The transfer/purchase of the contaminated land took place no sooner than January 1, 2002 and the cost of remediation exceeds the value of the land plus the profit that was and could be generated from land. The profit includes increase of the fair market value of the land due to appreciation from the remediation. Thus, subsidies are available only if the total cost of remediation exceeds the profits subject to the presidential decree to be promulgated in the future.

Takeaways

After the enactment of the amendment, disputes to avoid liabilities and to determine the scope of indemnities are expected to increase. Thus, due diligence on a commercial real estate transaction, including an environmental site assessment, from the early stage is critical to identify potential or existing environmental contamination liabilities under the amended Act, including (i) conducting a *good faith* Soil Environment Site Assessment and (ii) understanding the liabilities of the interested parties.

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

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

Amendments Strengthen Korea's Online Privacy Regulations

On May 2, 2014, the Korean National Assembly passed amendments to the Act on Promotion of Information and Telecommunications Network Utilization and Information Protection, Etc. (the "Network Act") aimed at strengthening provisions related to the protection of personal information online. The amendments introduce material changes to the current data protection regime, and the notable changes are summarized below.

Subject	Amendments
Limits on the Collection and Delegation of Personal Information	• Collection of personal information by online service providers is limited to the extent necessary for providing the relevant online services. • User consent is not required for delegation of personal information processing only to the extent that such delegation is necessary for the performance of the underlying contract and for increasing user convenience and benefits.
Notification and Reporting Requirements Following Leakage Incidents	• In the event of a data leakage incident, online service providers must notify users and file reports with designated authorities within 24 hours of becoming aware of the data leakage incident absent justifiable reasons.
Deletion of Personal Information	• If personal data is required to be deleted, any such deletion must be irrevocable, without the possibility of recovery or reproduction, and a violation of this requirement is now subject to criminal sanctions.
Statutory Damage Awards	• A user is now entitled to claim up to KRW 3 million (approximately USD 3,000) in damages if he/she can prove that an online service provider intentionally or negligently violated provisions of the Network Act concerning the protection of personal information, and his/her personal information was lost, stolen, and/or leaked as a result. • The burden of proof is shifted to the online service provider to show lack of bad intent or negligence with respect to such leakage.

Subject	Amendments
Designation of Chief Information Protection Officer ("CIO")	• Designation of an executive-level, CIO is now mandatory for certain online service providers, and the designation must be reported to the Ministry of Science, ICT and Future Planning.
Administrative Fine	• Administrative fine is increased from 1% of the relevant revenues to 3%, and the delegator of personal information processing can be fined for a vendor's failure to comply with the Network Act's requirements for protecting personal information. • As for the loss, theft, leakage, modification or damage of personal information, the upper limit of the administrative fine (KRW 100 million) is abolished. Further, a showing of causation between the failure to take proper technical/managerial protective measures and any loss, theft, leakage, modification or damage of personal information is no longer required.
Spam Regulation	• Opt-in consent also required for email spam. • A recipient who provided his/her consent to receive spam must be periodically notified of this fact.

The Ministry of Science, ICT and Future Planning and the Korea Communications Commission are currently preparing corresponding changes to related sub-regulations, and public debate and discussion on the specific meaning and application of the amended Network Act are ongoing. As the amended Network Act will become effective on November 29, 2014, it is necessary for businesses that process personal information to evaluate their practices to see if they are aligned with the amended Network Act and take appropriate measures to ensure full compliance.

INTERNATIONAL ARBITRATION & CROSS-BORDER LITIGATION

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

Amendment of Civil Procedure Act on Recognition of Foreign Decisions

The provisions regarding recognition of foreign decisions in the Korean Civil Procedure Act has been recently amended and went into effect on May 20, 2014. The amendment has increased the scope of authority that Korean courts may exercise in recognizing a foreign decision. How the change will impact the recognition of foreign decisions in Korea remains to be seen.

The main substance of the amendment is as follows.

Recognition of Final Decision on Damage Compensation (Newly Created Article 217-2 of the Civil Procedure Act)

The biggest change to the Civil Procedure Act is the newly created Article 217-2 regarding the recognition of foreign courts' final decisions on damage compensation. Under Section 1 of the Article, if a foreign court's decision on the amount or the type of damage compensation is in clear violation of the fundamental principles of the laws of Korea or any treaty ratified by Korea, Korean courts may refuse to recognize such judgment, in whole or in part. This allows Korean courts to refuse to recognize any foreign decisions that exceed the scope of compensatory damage generally allowed under Korean legal practice. This amendment codifies prior decisions from lower courts which had held that courts may "limit the recognition of foreign damages awards that clearly exceed amounts considered reasonable in Korea in contravention of good morals and other forms of social order in Korea" (*See* 99*GaHap*14496, Seoul District Court Southern Division, October 20, 2000, etc.).

In addition, under Section 2 of the new Article, when determining whether a foreign court's decision is in clear violation of Korean laws, Korean courts must consider whether the amount of damages awarded by the foreign court includes legal costs, such as attorney's fees, and review the scope of such damages. It remains to be seen how Korean courts will review and decide on foreign courts' damage awards that include attorney's fees and other legal costs.

Expanding Recognition to Foreign "Decisions" and Court's Investigation Obligation (Article 217 of the Civil Procedure Act)

There were also amendments to the existing Article 217 to provide further clarity on the intent of the Article as follows.

- **Section 1:** Before the amendment, the subject of recognition was limited to "foreign court judgment," but the amendment extended the recognition to "foreign decisions" to include not only final foreign court judgments but other types of decisions that have the same effect as a final court judgment.

- **Section 1 (4):** Given that the meaning of the "reciprocity" requirement, one of the existing conditions for the recognition of foreign decisions, was considered ambiguous, a clarification has been added that "the conditions to recognizing final decisions in Korea and the foreign country are not clearly unequal or substantially different in important aspects."

- **Section 2:** Korean courts must now investigate into whether foreign courts' final decisions satisfy the conditions for recognition as set forth in Section 1.

Any party considering a foreign court proceeding for damages that may need to be enforced in Korea should be aware of the possible risks under the amended Civil Procedure Act and strategically plan ahead to increase the chances of a successful recognition and enforcement of the final foreign decision in Korea. Dispute experts should be consulted in advance to ensure that the impact of the amendment on the enforcement process and the corresponding risks are properly understood.

Opening of SIMC and Expected Establishment of SICC

Over the last few years, the Singaporean government has been promoting the establishment of new international dispute resolution institutions. As a result, the Singapore International Mediation Center (SIMC) opened in March 2014, and the Singapore International Commercial Court (SICC) is expected to be established in the fall of 2014.

SIMC will closely collaborate with the Singapore International Arbitration Center (SIAC) to promote mediation for cases commenced under arbitration. SIMC and SIAC have developed the so called "Arb-Med-Arb" procedure which enables parties to an international arbitration to engage in a separate mediation procedure during the early stages of the arbitral proceeding, if they agree to do so. Under SIMC Rules, a separate mediator will be appointed to ensure the neutrality of the mediation procedure. Even if the mediation turns out to be unsuccessful, the contents of the mediation will remain confidential and not be disclosed to the arbitral tribunal. The main perceived benefit of the "Arb-Med-Arb" procedure is that it will provide the parties with an opportunity to settle their disputes early without unduly delaying the pending international arbitration proceeding.

On the other hand, SICC, while a part of the Singaporean judicial system, will be a new form of judicial organization which will have exclusive jurisdiction over matters of commercial dispute between parties of different nationalities. SICC will be handling cases where the parties have agreed to its jurisdiction or cases that have been removed to SICC from the state courts in Singapore by the Supreme Court of Singapore. As the decisions of the SICC can be appealed and third-party participation is possible just as in general litigation, demand is expected to be high from parties who prefer litigation over arbitration. Another notable point is that lawyers from different countries will be allowed to represent parties in SICC cases where the governing law is the law of a country other than Singapore, or where the case has no actual connection to Singapore. This makes it possible to appoint Korean counsel in SICC cases where the governing law is the law of Korea.

The introduction of these new types of international dispute resolution institutions provides a wider range of options in drafting dispute resolution clauses in various contracts. Yet, as the rules and procedures of these institutions have not been finalized and it will take some time before the institutions gain sufficient experience through a trial-and-error process, users of these new institutional options should beware of unexpected complications. When drafting contractual dispute resolution clauses, we recommend that an expert in dispute resolution is involved from the early stages to ensure that the most appropriate choice is made under the circumstances.

SELECTED REPRESENTATIONS

Anheuser-Busch InBev acquires Oriental Brewery from KKR and Affinity

On April 1, 2014, Anheuser-Busch InBev, through its affiliate, acquired a 100% equity stake of the holding company of Oriental Brewery Co., Ltd., the largest beer producer in Korea, from KKR & Co. and Affinity Equity Partners for approximately USD 5.8 billion.

The transaction was the largest cross-border M&A transaction, as well as the largest private equity transaction, in Korean history. The transaction gave rise to complex, novel cross-border legal and tax issues given the unprecedented large stake and multi-jurisdictional nature.

Kim & Chang represented both the purchaser and the seller consortium and assisted the parties to navigate and resolve various Korean legal and regulatory issues, including transaction structuring to resolve complex tax issues and obtaining approval from the Korea Fair Trade Commission to close the transaction.

Tyco International sells ADT Caps

On May 22, 2014, Tyco Far East Holdings Ltd., a subsidiary of Tyco International Ltd., sold 100% stake in Tyco Fire & Security Services Korea Co., Ltd to Siren Investments Korea Co., Ltd.

Kim & Chang represented Tyco International Ltd. in all aspects of the transaction, including legal due diligence, drafting and negotiation of the share purchase agreement and related agreements and closing of the transaction.

NH Financial Holdings acquires Woori Investment & Securities

On June 27, 2014, NH Financial Holdings acquired 37.85% of Woori Investment & Securities Co., Ltd., 98.89% of Wooriaviva Life Insurance Co., Ltd. and 100% of Woori Saving Bank shares from Woori Financial Group. The deal was conducted as part of the privatization plan of Woori Financial holdings Co., Ltd. Thanks to this deal, NH Financial Holdings now ranks first in the securities industry in terms of total investment assets.

Kim & Chang represented NH Financial Holdings and provided comprehensive legal services such as structuring the transaction, conducting legal due diligence, drafting the negotiation and transaction documents and obtaining the Financial Services Commission's approval regarding takeover of subsidiaries and termination of trade.

Vogo Fund buys Enuri.com

On April 30, 2014 Vogo Fund acquired a 87.81% stake in Enuri.com from 9 shareholders including its largest shareholder.

Kim & Chang represented Vogo Fund in all aspects of the transaction, including legal due diligence, drafting and negotiation of the share purchase agreement and related agreements, merger filings and closing of the transaction.

KTB PE and Q Capital buys Dongbu Express

On May 27, 2014, KTB PE and Q Capital Partners acquired 100% stakes in Dongbu Express Co., Ltd. from Dongbu Corporation and Gaia DBEX.

Kim & Chang provided comprehensive legal services to KTB PE and Q Capital Partners in connection with the transaction, including reviewing the transaction structure, drafting and negotiating the transaction documents including the share purchase agreement and shareholders agreement, obtaining government permits and licenses including an approval from the Financial Supervisory Service and assisting with the closing of the transaction.

IMM Private Equity acquires LNG transportation business of Hyundai Merchant Marine

On June 30, 2014, IMM Private Equity and IMM Investment ("IMM Parties") jointly acquired the LNG transportation business of Hyundai Merchant Marine Co., Ltd. ("HMM") through a newly established joint venture company ("JVC") in which an SPC formed by the IMM Parties and HMM had a shareholding ratio of 80:20, respectively.

Although a number of complicated legal issues arose in connection with the assignment of ship financing contracts, foreign exchange regulations and tax matters, Kim & Chang successfully represented the IMM Parties and the JVC and provided comprehensive legal services throughout the transaction, including deal structuring, negotiation and documentation, advice on PEF regulations, acquisition financing and the closing of the transaction.

Korean Supreme Court decision on new car replacement claims

In a case of first impression, the Korean Supreme Court recently ruled on how and when consumers can exchange a defective car for a new replacement, setting a high threshold for such claims in Korea.

The plaintiff in this case had sued to claim a new replacement car due to a malfunctioning dashboard, rejecting repairs (which would have presumably fixed the alleged defect at no cost since the car was still under the manufacturer's warranty). The legal claim itself was based on a buyer's right to a new replacement for a defective product under the Korean commercial laws. The plaintiff also sued both the dealer and importer on the theory that the importer had assumed the seller's liability against defects by providing buyers with a manufacturer's warranty.

The lower Seoul High Court held in the plaintiff's favor, finding that car dealers were indeed subject to the legal obligation to provide a replacement vehicle, absent any special circumstances (e.g. if the claim was based on a quite minor defect, although some may argue that this applied to the present suit also.). The court also found the importer liable based on the manufacturer's warranty theory advanced by the plaintiff.

The Supreme Court reversed this decision, finding that the instant replacement claim was not supported by the facts – (i) severity of the defect, (ii) ease of repair, (iii) curability of the defect, and (iv) the seller's burden in providing a replacement car. The Court also ruled that a buyer was not entitled to a new replacement product if this would significantly burden the seller compared to other remedies, particularly if the defect could be fully cured by straightforward repairs.

The Court also rejected the importer's liability, finding that the manufacturer's warranty was not drafted or offered with the intent to hold the importer liable for the seller's obligations, and that the alleged defect did not fall within the scope of the warranty in any case (i.e. "a serious defect relating to the operation and safety of an automobile").

Kim & Chang represented the defendants in this case, focusing our fact finding on (i) why this case did not involve "a serious defect relating to the operation and safety of an automobile," (ii) the curable nature of the defect, and (iii) the relatively minor repair time and costs compared to the seller's burden in providing a new replacement.

We believe that this decision will serve as important precedent for product replacement claims in Korea, for cars certainly but also for other goods in general, in addition to setting a boundary for importer liability arising from manufacturer warranties. We also believe that our experience in persuading the Supreme Court through a detailed technical analysis of the alleged defect will provide a useful roadmap in defending against similar future claims.

IPO of existing shares of BGF Retail

On May 7, 2014, BGF Retail Co., Ltd. ("BGF") that is currently running Korea's biggest convenience store chain "CU," undertook its Initial Public Offering ("IPO") by listing 6,160,030 of its existing shares. The existing shares were those owned by major shareholders of BGF, and they represented 25% of the total issued and outstanding shares of BGF. The IPO price was KRW 41,000 per share, and BGF raised a total of KRW 252.5 billion through the IPO. 20% of the publicly offered shares through the IPO were allocated to an employee stock ownership association of BGF, and the remaining shares were allocated to the general public.

Kim & Chang provided comprehensive advice on the IPO, advised on various legal and tax issues, and assisted in securities filings concerning the IPO.

Issuance of permanent bonds by Hyundai Commercial

On June 12, 2014, Hyundai Commercial Co., Ltd. ("Hyundai Commercial") issued permanent bonds in the amount of KRW 120 billion through private placement. The bonds have the term of 30 years, subject to automatic extension of additional 30 years if not repaid at maturity.

Kim & Chang provided comprehensive legal services, including drafting transaction documents, advising on the transaction structure, reviewing various issues related to Korean securities law, fair trade law and other applicable laws and regulations, and assessing whether the bonds can be characterized as supplemental capital of Hyundai Commercial as issuer.

Issuance of new shares by GS Construction

The board of directors of GS Construction Co., Ltd. ("GS Construction") approved the issuance of new shares on February 18, 2014. The approval covered the allocation of the new shares to existing shareholders of GS Construction, followed by offering portions of the new shares unsubscribed by the existing shareholders to the general public. Based on the approval, GS issued its 20,000,000 new shares on June 12, 2014 in the amount of KRW 552 billion.

Kim & Chang acted as adviser to Woori Investment and Securities Co., Ltd., the lead manager of the issuance. Kim & Chang offered various legal services, including advising on the transaction timeline, reviewing legal and tax issues, and conducting legal due diligence.

KB Financial Group executes acquisition of LIG Insurance

On June 27, 2014, the KB Financial Group Inc. ("KBFG") entered into a share purchase agreement acquiring a controlling stake of 19.47% in LIG Insurance Co., Ltd. ("LIG") for a purchase price of KRW 685 billion.

Kim & Chang represented KBFG in the transaction and provided legal due diligence on LIG, reviewed and negotiated the share purchase agreement and provided other important legal advice.

ARA Group enters into real estate investment market in Korea

On December 20, 2013, ARA Group ("ARA"), which mainly engages in management of real estate investment companies and funds through numerous management companies and provision of real estate asset management services in the Asia-Pacific regions including Hong Kong and Singapore, entered into a share purchase agreement, pursuant to which ARA agreed to acquire from Macquarie Group 10% of the shares of Macquarie NPS Real Estate Investment Company (of which 90% of the shares are owned by the National Pension Service) and 100% of the shares of Macquarie Real Estate Korea Limited, an asset management company. The shares were acquired on April 17, 2014 after obtaining the relevant permit and approval from the Ministry of Land, Infrastructure and Transport.

Kim & Chang contributed to the successful entry into the Korean market by ARA, a leading Asian real estate investment management company, by providing comprehensive legal services to ARA in connection with the transaction, including conducting due diligence, reviewing the investment structure, negotiating and executing the share purchase agreement, obtaining the permit and approval from the Ministry of Land, Infrastructure and Transport, changing the trade names and acquiring the shares. Macquarie Real Estate Korea Limited and Macquarie NPS Real Estate Investment Company which have changed their names to ARA Korea and ARA-NPS Real Estate Investment Company, respectively, are currently operating their respective businesses in Korea, contributing to revitalizing the depressed domestic REITs market and real estate investment market.

Government of Singapore Investment Corporation acquires logistics facilities in Kyunggi-do, Korea

On April 4, 2014, the Government of Singapore Investment Corporation ("GIC") executed a sale and purchase agreement, pursuant to which GIC agreed to acquire certain land and logistics facilities newly being built within the Dukpyeong Logistics Center in Dukpyong-ri, Icheon-si, Kyunggi-do. On the same date, GIC secured a stable source of rental income by executing a lease agreement with Hyundai Logistics Co., Ltd ("Hyundai Logistics"), pursuant to which GIC agreed to lease the foregoing land and logistics facilities to Hyundai Logistics for 15 years.

Kim & Chang provided comprehensive legal services to GIC and contributed to the successful execution of the sale and purchase agreement in connection with the transaction, including proposing optimal terms and conditions, taking into account the unique transaction structure whereby the parties executed the sale and purchase agreement before the seller obtained title to the land and commenced the construction of the logistics facilities.

District Court rejected preliminary injunction prohibiting patent infringement for lack of urgent necessity to preserve a right

On April 23, 2014, the Seoul Central District Court rejected a petition filed by Cuckoo Electronics Co., Ltd. ("Petitioner"), a manufacturer of Korean-style electric pressure rice cookers and other home appliances, seeking a preliminary injunction to prohibit the sale of rice cookers by its competitor, Lihom-Cuchen, Co. Ltd ("Respondent"), on the basis of patent infringement.

A preliminary injunction is sought to preserve a party's rights even before the existence of such rights can be recognized and affirmed in a main action. As such, a preliminary injunction can be granted only when there is an urgent necessity to preserve the rights of the party seeking the injunction. In this case, the court rejected the Petitioner's preliminary injunction claim for the reason that the "necessity to preserve its rights" requirement was not met.

The court denied the necessity to preserve Petitioner's rights after considering the following facts: (i) Petitioner failed to take actions against the respondent's sale of infringing products for a considerable period of time after it came to know about such infringement; (ii) the rise of Respondent's market share was not necessarily caused by the alleged patent infringement; (iii) Petitioner has not used the patent at issue for its own products; and (iv) if the preliminary injunction is granted, Respondent would suffer substantial damages because the allegedly infringing product represents a large portion of Respondent's total revenue

Kim & Chang represented and successfully defended Lihom-Cuchen in the above preliminary injunction action.

Supreme Court affirms High Court's decision recognizing an intermediate holding company as beneficial owner

According to the Korea-Netherlands Tax Treaty, capital gain from the sale of shares of a Korean corporation held by a Dutch company is not taxable in Korea. The case involved the transfer of shares of a Korean corporation held by a Dutch holding company to an unrelated Korean corporation. The Tax Authorities deemed the Dutch holding company as a conduit and imposed withholding tax to its shareholder, a French company, by arguing that the shareholder was the actual beneficial owner of the capital gain.

The Administrative Court ruled that the Dutch holding company is the beneficial owner of capital gain in light of the following considerations: (i) the Dutch holding company was established a long time ago (about 30 years) and holds shares in approximately 50 other companies; (ii) engaged in the business by establishing a Korean corporation for approximately 12 years; (iii) directly received the remuneration on the share transfer and reinvested the same into its own business without distributing it to the French company; and (iv) the Dutch holding company engaged in administrative matters on the share transfer. The judgment of the Administrative Court was upheld at the High Court and then later affirmed by the Supreme Court.

This case is the first of its kind where the Supreme Court has recognized an intermediate holding company as the beneficial owner. Kim & Chang represented the plaintiff in the case.

Regulatory approval obtained for location information business license

Kim & Chang advised Qualcomm CDMA Technology Korea Co. Ltd. ("Qualcomm") in obtaining a Location Information Business ("LIB") license from the Korea Communications Commission in May 2014.

Qualcomm had originally retained a different law firm to prepare its LIB license application, but Kim & Chang was brought in shortly before the deadline when it became apparent that preparations by Qualcomm's then-legal advisor were not going as planned. Despite the short timeframe, Kim & Chang was able to prepare a successful LIB license application based on its extensive experience with advising global companies in this area.

Advised on filming Avengers 2: Age of Ultron in Korea

Kim & Chang advised Marvel Studios, an affiliate of the Walt Disney Company, in connection with its filming of Avengers 2: Age of Ultron in Korea during March and April of 2014.

This was the largest location shoot ever filmed by a foreign studio, and many of the legal issues raised by the shoot were unprecedented in Korea. Kim & Chang utilized its unparalleled expertise in all major practice groups to provide practical guidance on a wide variety of legal matters, from the establishment of a local entity to negotiating traffic control with government agencies.

Dismissal of data leakage case against mobile carrier affirmed by Supreme Court

In 2008, a third party hacked into a mobile carrier's systems for managing its users' personal information, and created a website that provided access to users' information. The users sued the mobile carrier for damages citing mental distress, and the Seoul Central District Court decided partly in favor of the users. Kim & Chang was retained by the mobile carrier when the District Court's decision was appealed to the Appellate Court. Based on its extensive expertise in hacking incidents, Kim & Chang successfully argued that the hacking incident in this case did not constitute a "leakage" of personal information under the relevant laws, leading to the Appellate Court's dismissal of Plaintiffs' complaint on February 18, 2011. Thereafter, Kim & Chang successfully represented the mobile carrier at the Supreme Court, which affirmed the Appellate Court's dismissal of the Plaintiffs' damages suit on May 16, 2014.

The Supreme Court's decision is significant, because it clarified the definition of "leakage" which is a factor in deciding whether businesses should be held liable, and provided reasonable guidance on businesses' liabilities in leakage cases.

Korean companies' first time wins in international arbitration: Post-M&A dispute under UNCITRAL rules and energy development dispute under ICC rules

Win in an Ad-hoc Arbitration under UNCITRAL Arbitration Rules Related to Overseas Investment

Kim & Chang represented a Korean company in a significant win in a dispute with the sellers under an acquisition agreement for a steel producing company in Southeast Asia in an ad-hoc arbitration under UNCITRAL Arbitration Rules.

Despite the challenges faced by our team that (i) there was a risk of procedural delay given that the arbitration was an ad-hoc proceeding without the support of any arbitration institution; and (ii) the governing law of the dispute was the law of the country of the sellers, Kim & Chang was able to speedily bring about an agreement on the arbitration timetable with the opposing party and succeeded in winning on all counts with the help of local counsel. The Korean company was awarded the full amount of claimed damages.

This is the first time a Korean company has won a post-M&A dispute related to an overseas investment through an ad-hoc UNCITRAL arbitration.

Korean Company Wins in an ICC Arbitration Related to Overseas Energy Development

Kim & Chang successfully represented a Korean company in an ICC arbitration initiated against an overseas oil developing company related to an oil exploration project in Central Asia.

Kim & Chang successfully argued that the overseas business partner of the Korean company was in breach of its obligations under the parties' joint development agreement for oil exploration in Central Asia. The Tribunal found in favor of the Korean company and awarded USD 16 million in damages, including half of its legal fees.

This is the first time a Korean company has won a dispute concerning overseas energy development.

FIRM NEWS

AWARDS & RANKINGS

Recognized as one of the world's top 150 law firms - Who's Who Legal 100 (2014)

Kim & Chang has been recognized as one of the world's top 150 law firms in the *Who's Who Legal 100* (2014, 3rd edition), published by Who's Who Legal that is an international publication affiliated with London-based publishing group, Law Business Research. Kim & Chang has been the only law firm in Korea to be included in the list for three consecutive years.

Who's Who Legal announces the result based on 18 years of independent research, including interviews with leading lawyers and key clients over 140 jurisdictions, votes and recommendations.

Recognized as innovative law firm - Financial Times Asia-Pacific Innovative Lawyers Awards & Report 2014

Kim & Chang has been selected for the "Legal Innovation in Real Estate Finance" award for providing exceptional legal advice in connection with the case involving KHFC's issuance of two different types of covered bonds in the first-ever *Financial Times (FT) Asia-Pacific Innovative Lawyers Awards 2014*.

In addition, our firm ranked 7th in "FT Law 25 - Asia-Pacific headquartered firms," and was a "Highly Commended" law firm in the categories of "Corporate & Commercial - Asia-Pacific Headquartered Firms" and "Corporate Strategy - Asia-Pacific Headquartered Firms" according to the research report issued by FT.

FT conducted client/professional interviews and other nomination research of law firms and in-house counsels in order to select in-house teams and Asia-Pacific innovative law firms and lawyers. The awards ceremony was held on June 11th, 2014 in Hong Kong.

Recognized as best law firm for asset management - AsianInvestor Korea Fund Awards 2014

Kim & Chang has been named as the "Best Law Firm for Asset Management" from *AsianInvestor Korea Fund Awards 2014*, hosted by AsianInvestor affiliated with Haymarket Media Ltd, a global media company. It is the fourth consecutive year that the firm has been honored for this award.

AsianInvestor, a publication for the asset management industry, has annually recognized the best Korean asset owners, funds, and service providers since 2011. The ceremony was held on June 12, 2014 at the Westin Chosun Hotel in Seoul, and Messrs. Yong Seung Sun and Kyle Park of our firm attended the ceremony.

Named No. 1 M&A advisor in Korea - Mergermarket M&A League Tables of Legal Advisors H1 2014

Kim & Chang ranked as No. 1 M&A legal advisor in Korea by deal value and deal counts with USD 22,874 million and 42 deals in the *Mergermarket Legal Advisor League Table for H1 2014*.

Kim & Chang also ranked as No. 1 by deal counts and No. 4 by value in the Asia-Pacific Buyouts category (excluding Japan).

Selected as an Elite competition practice in Korea – GCR Country Survey: Korea 2014

Kim & Chang has been selected again in *Global Competition Review (GCR)'s Country Survey: Korea 2014* as "an Elite competition practice in Korea." In the survey, our Antitrust & Competition Practice Group was recognized as the one "leading the way in Korean competition law work," particularly in regard of the size of practice group and the significance of the cases handled.

GCR is the world's leading antitrust and competition law journal and news service.

Ranked tier 1 in Energy and Infrastructure – IFLR 1000 Energy & Infrastructure Guide (2014)

Kim & Chang was named as a top-tier law firm for Energy and Infrastructure area according to the recent edition of *IFLR 1000 Energy & Infrastructure Guide*, a Euromoney publication.

IFLR 1000 mentioned Kim & Chang as "One of Korea's largest firms and has a strong reputation in a wide variety of practice areas."

In addition, Messrs. Young Kyun Cho, Ick Ryol Huh and Chang-hee Shin at our firm were selected as leading lawyers in Energy and Infrastructure area.

PRO BONO

Kim & Chang Committee for Social Contribution signs MOU with Overseas Korean Cultural Heritage Foundation

Kim & Chang Committee for Social Contribution has signed a MOU with Overseas Korean Cultural Heritage Foundation on August 12, 2014 to provide legal support to repatriate overseas Korean cultural relics.

As part of the firm's pro bono activities, the Committee will provide legal counselling for the Foundation's research and utilization of Korean cultural relics overseas that were illegally or illicitly looted.

Kim & Chang Committee for Social Contribution donates for *Sewol* victims

Kim & Chang Committee for Social Contribution donated 200 million won to help the victims of *Sewol* ferry and its rescue operations.

The donation was collected from professionals and staff of Kim & Chang and was delivered to the Korean Bar Association in July.

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