Newsletter

KIM & CHANG | A Quarterly Update of Legal Developments in Korea | December 2014, Issue 4

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CORPORATE

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

Proposed Amendment of the Financial Investment Services and Capital Markets Act Approved at the Cabinet Meeting

After reflecting public comments and the results of discussions and negotiations with interested governmental ministries and agencies, the proposed amendment of the Financial Investment Services and Capital Markets Act (the "Capital Markets Act") publicly announced by the Financial Services Commission on April 24, 2014 (the "Original Proposal") was approved at the Cabinet Meeting on September 2, 2014 (the revised proposed amendment, the "Proposed Amendment").

The Proposed Amendment largely retains the substance of the Original Proposal but significantly restricts the scope of deregulation relating to private equity funds (PEFs) belonging to a financial services group subject to legal limitations on mutual investment among group members.

In addition, the Proposed Amendment permits PEFs to utilize a multi-level special purpose company ("SPC") structure in making investments by allowing a SPC to acquire equity securities of another SPC.

The Proposed Amendment does not include deregulation measures related to asset management regulations contained in the PEF regulation reorganization plan such as allowing passive investments in securities, investments in derivative products for non-hedging purposes and real estate investments. We will need to monitor whether further deregulation is implemented through amendments of decrees to the Capital Markets Act.

ANTITRUST & COMPETITION

By Sung Eyup Park (separk@kimchang.com) and Tae Hyuk Ko (taehyuk.ko@kimchang.com)

Amendments to Criminal Referral Guidelines to Strengthen Enforcement against Individual Perpetrators of FTL Violations

On August 20, 2014, the Korea Fair Trade Commission ("KFTC") promulgated amendments to its Guidelines on Criminal Referral for Violation of the Monopoly Regulation and Fair Trade Law ("FTL") ("Amended Guidelines"). The Amended Guidelines establish new standards for requesting the criminal prosecution of individuals involved in cartel activities and other violations of the FTL. The Amended Guidelines went into effect on August 22, 2014.

The establishment of these new standards is consistent with the KFTC's recent focus on eradicating cartel practices engrained and recurring in certain industries. The establishment of these new standards for individual criminal referral is widely viewed as foreshadowing a shift in the KFTC's practice to refer more individuals for criminal prosecution. This stands in contrast to the KFTC practice in place during the past three years where of the administrative fines levied in 117 instances of cartel activities, individuals in only 13 cases were subjected to the KFTC's criminal referral.

Under the Amended Guidelines, individuals directly responsible for violating the FTL or who used physical force to impede the KFTC's investigation will, in principle, be subjected to criminal referral. Specifically, referrals are required to be made regarding persons who ordered or approved (either prior to or after the fact) the prohibited conduct, as well as those who carried out the prohibited conduct. Criminal referrals also required to be made for persons who impeded the KFTC's investigation by physical violence, verbal abuse, or intentional physical obstruction or delay in the KFTC examiners' entry to the site. Individuals who later actively cooperate with the KFTC's investigation may, however, be exempt from criminal referral.

The KFTC's adoption of the Amended Guidelines may be understood as part of a larger trend among government authorities to hold more individuals responsible for engaging in cartel activities, and companies are advised to continue to pay close attention to relevant developments.

Regulations on Subcontracting, Franchising and Distribution to be Amended

On September 30, 2014, the Korea Fair Trade Commission (the "KFTC") announced plans to amend regulations regarding the subcontracting, franchise and distribution sectors. In particular, the KFTC identified 12 action items that address the propriety and need for certain rules, and aim to mitigate burdens on industry. The KFTC plans to submit the relevant bills to the National Assembly and finalize the amended Enforcement Decrees by the end of 2014, and to update the subordinate regulations by the first quarter of 2015.

Key features of the proposal are discussed below.

Deadlines to be established for taking administrative measures in connection with alleged violations of the Subcontracting Act and the Franchise Act

The Fair Transactions in Subcontracting Act (the "Subcontracting Act") and the Fair Transactions in Franchise Business Act (the "Franchise Act") currently provide that a KFTC investigation must be commenced within three years from the date on which the transaction was completed (unless a complaint regarding the allegedly illegal conduct was filed within such three-year period, in which case the investigation may be commenced thereafter). However, these laws do not place any restriction on when such investigations must be concluded. This has led to concerns of prolonged KFTC investigations. To address such concerns, the KFTC will amend the relevant laws to require that sanctions such as corrective orders must be rendered within three years from the commencement of an investigation (if a complaint was filed with the KFTC, three years from the filing of such complaint).

Mitigating Large Franchise and Retail Business Operators' Duty to Compensate for Facility Costs

Under the current Act on Fair Transactions in Large Franchise and Retail Business, if a large franchise and retail business operator (the "Large Retailer") terminates or refuses further transactions with a supplier or a commercial tenant for whatever reason, the Large Retailer must compensate the supplier or tenant for the expenditures already made by the supplier or tenant in connection with the facilities to be used at the Large Retailer's business site. The KFTC will amend this law so that the Large Retailer has a duty to compensate only when the Large Retailer is at fault for the termination or refuses to engage in further transactions.

Adjustment to Definition of Prime Contractors As Applied to SMEs

According to the current Subcontracting Act, when two small and medium enterprises ("SMEs") enter into a subcontracting arrangement, the company entrusting the services is considered to be the prime contractor if it employs more regular employees than the subcontractor, even if its annual revenue is less than that of the subcontractor. To address this issue, the KFTC will only consider annual revenue and not the number of regular employees in determining whether an SME qualifies as a prime contractor.

SECURITIES

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Proposed Amendments to Financial Investment Business Regulations, Etc.

The Financial Services Commission (the "FSC") recently amended the Financial Investment Business Regulations and the Regulations on Issuance of Securities and Public Disclosure. The amendments reflect in the regulations various measures announced by the FSC last July, as well as certain changes of the financial regulatory regime.

Major points of the amendments, as proposed, are the followings:

Changes to the Applicability Scope of Rules Governing Sound Foreign Exchange Management

Under the amendment, a Korea branch of a foreign financial investment company is exempt from the requirement to comply with mandatory foreign currency liquidity ratios to the extent that the Korea branch has a commitment from its head office to provide sufficient liquidity support. The exemption, however, does not cover the requirement to comply with foreign exchange position limits. Separately, assets held by a financial investment business company in the form of trust is exempt from the rules established for sound foreign exchange management, such as foreign currency liquidity ratios and foreign exchange position limits.

Relaxing the Certain Accounting Filing Obligation of a Financial Investment Business Company

Previously, all financial investment business companies were required to submit an audited or reviewed report to financial regulators on a quarterly basis. Based on the amendment, a financial investment business company is permitted to submit such audited or reviewed report on a bi-annual basis if the amount of its assets is less than KRW 100 billion or if it does not engage in any investment dealing business covering securities or over-the-counter derivatives.

Permitting Offshore Outsourcing of IT Facilities by a Korean Subsidiary of a Foreign Financial Investment Business Company

Unlike a Korea branch, a Korean subsidiary of a foreign financial investment business company has not been able to outsource its IT facilities for over-the counter derivatives business to an offshore service provider due to the absence of applicable regulations. The amendment provides a legal ground for even Korean subsidiaries of foreign financial investment business companies to utilize the offshore outsourcing of such IT facilities.

Adding a New Exception to the Requirement to Postpone the Effective Date of a Securities Registration Statement

Previously, if the actual issue price of bonds was different from the planned issue price specified in the securities registration statement filed for the issuance of the bonds, the effective date of the securities registration statement must be postponed by three business days. Under the amendment, the effective date of the securities registration statement can remain the same without any postponement in case the actual issue price of the bonds comes within 20 percent of the planned issue price.

Providing a Legal Basis to Refuse or Cancel Foreign Investor Registration if the Registration is Sought by a Korean National Disguised as a Foreign Investor

In order to prevent a Korean national from investing in Korean securities as a foreigner, the amendment includes a provision enabling a financial investment business company to refuse or cancel foreign investor registration applied by a Korean national in the name of an overseas company as a foreign investor.

BANKING

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Plans for Strengthening Internal Controls in Financial Institutions by Enhancing Compliance Monitoring

On August 28, 2014, the Financial Services Commission ("FSC") announced key features of a proposed regulatory reform to enhance financial companies' compliance and internal control mechanisms. The proposal comes in the wake of a series of incidents that the FSC views as having seriously undermined the public's confidence in financial institutions. The FSC expressed its desire that the new rules will not merely bring about cosmetic change but also fundamentally improve internal control and establish a robust compliance culture at these institutions.

Key features of the new regime (which will involve amendments to relevant laws, regulations and model rules) include a unified and strengthened internal control tower for compliance monitoring. The new rules will initially apply to the banking sector, with other sectors to be added in accordance with industry characteristics.

Raise Legal Status of Compliance Officer and Confer Right to Demand Cessation of Illegal Activities (Relevant Laws to be Amended)

A compliance officer will be required to be appointed as an executive officer (with a term of office of two years or more) so that he/she can effectively serve as an internal control tower. The compliance officer will also have the right to participate in all office meetings and to demand cessation of unlawful activities that he/she becomes aware of. A standing "compliance department" will be required to provide support services for the compliance officer.

Increase "Optimal" Number of Compliance Personnel and Enhance Compliance Officer's Oversight Authority (Relevant Supervisory Regulations to be Amended)

The Financial Supervisory Service ("FSS") will encourage companies to devote a certain percentage of their personnel solely to compliance functions. If necessary, the FSS will encourage banks to transfer certain internal investigation personnel within their audit department to the compliance department. Compliance officers will also be given the responsibility of conducting HR evaluations of branch level compliance managers.

Strengthen Independence vis-à-vis Statutory Audit Committee and Prohibit Concurrent Office Holding (Relevant Laws to be Amended)

The FSS will seek to increase the independence of compliance officers by changing the definition of compliance officer under the relevant statute, from "one who reports to" the audit committee regarding internal control matters to "one who may report to" the audit committee on such matters.

Compliance officers will, in principle, be prohibited from concurrently holding another position, although an exception may be granted in light of the HR needs of the bank, to the extent that the compliance officer's independence is not compromised.

Make Disqualifying Factors More Reasonable (Relevant Laws to be Amended)

Under the current laws and regulations, a person may be disqualified from serving as a compliance officer if that person's conduct may lead to a warning notice (which is a relatively minor penalty). To alleviate the pressure that this rule may put on the compliance officer, the new rules will allow the person to be disqualified only if he or she engaged in a conduct that would warrant a salary reduction.

Amendments to Laws and Regulations on Sharing of Customer Data among Affiliates within a Financial Holding Company Group

The Financial Services Commission ("FSC") announced proposed amendments ("Proposed Regulations") to the Enforcement Decree and Supervisory Regulations of the Financial Holding Companies Act (the "FHCA"), which was recently amended and went into effect on November 29, 2014. The Proposed Regulations set forth new rules regarding the sharing of customer information among affiliates under a single financial holding company, and are scheduled to enter into force on the same date as the amended FHCA. However, rules regarding ex post notification of information shared with an affiliate, as explained below, will go into effect on May 29, 2015.

Key points of the Proposed Regulations are as follows:

Scope of "Use for Internal Administrative and Managerial Purpose," under which Information may be Provided to an Affiliate without Customer's Consent

Affiliates held by a single financial holding company are allowed to share information to (i) engage in risk management, internal control, and/or subsidiary investigation to promote business integrity; (ii) develop products and services, conduct customer analysis, and outsource services to promote synergies within the financial holding company group; and (iii) allocate outcomes and expenses among affiliates. However, introducing customers to or inducing customers' purchase of products and services do not fall within such exceptions and thus customer's consent is required for such promotional activities.

Methods and Processes for Sharing of Customer Information

The methods and processes for sharing customer data are set forth in the Supervisory Regulations, which seek to ensure that financial holding companies exercise greater care in managing such information. Key points include:

- Client data ledger must not be shared
- Must share and use only encrypted client data
- Client data received must be stored separately from internal data
- In principle, data may only be used for up to 1 month (this period may be extended if necessary for risk management, after consent from the client data manager)
- Data must be immediately deleted or destroyed as soon as it becomes obsolete, e.g., when purposes for which information was provided have been achieved
- When requesting or providing personal information, the client data manager must evaluate the appropriateness of purpose and period of use, scope of information provided, and the person who will be authorized to use the information, etc.
- The client data manager must conduct an annual comprehensive examination regarding how the client data is managed by the various affiliates, and report the findings to the Financial Supervisory Service ("FSS").

Notice to Customers regarding Provision of Client Data

Under the Proposed Regulations, financial institutions are obligated to provide customers with ex post notice regarding instances in which their data was shared with an affiliate of the company that originally collected the information from the customer. The notice must be provided at least on an annual basis and must contain details regarding the person/entity providing and receiving the information, the specific information provided, and the purpose of such data transfer, etc. This requirement will go into effect on May 29, 2015.

INSURANCE

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Proposed Amendments to the Insurance Business Act and Enforcement Decree

On September 25, 2014, the Financial Services Commission ("FSC") announced certain proposed amendments will be made to the Insurance Business Act ("IBA") and its Enforcement Decree. Below is a summary of the proposed amendment.

Insurer's Obligation to Fairly and Promptly Process Insurance Claims

- Insurers will be obligated to process insurance claims submitted by policyholders in a fair and prompt manner.

- Insurers will also be prohibited from providing false information to its policyholders regarding claims filing and handling procedures including the payment of insurance claim amounts and sending delayed notices to policyholders regarding decision to pay or deny claims for insurance proceeds. An insurer will be subject to an administrative fine of up to KRW 10 million for violations of the foregoing claims handling requirements.

Facilitation of the Insurance Product Development

- In the case of an insurance product which must be reported to the Financial Supervisory Service ("FSS") prior to the commencement of sales ("Report and Use Product"), a reporting period will be clarified in the IBA by changing "30 days before the expected implementation date" to "30 days before the implementation date" so that an insurer will be able to more accurately anticipate the sale commencement date taking into account a period for marketing efforts.

- In the case of an insurance product which does not need to be reported to the FSS ("Non-Report and Use Product"), a period during which an insurer must submit supporting materials to the FSS for its ex post verification of a Non-Report and Use Product will be extended from the current 15 days to 30 days, from the date of receipt of the FSS request.

Simplified Procedures on Reporting of Concurrent and Ancillary Business

- The concurrent business of an insurer which has been reported to the regulatory authorities pursuant to other laws and regulations will not be required to be reported in advance under the IBA.

- If an insurer intends to engage in an ancillary business which was previously reported by another insurer to the regulatory authorities and publicly disclosed, then such insurer may engage in the relevant ancillary business without its prior reporting to the Korean regulatory authorities.

Outside Assessment of Reserves

- Insurers will be obligated to secure an opinion and verification of outside actuaries as to the appropriateness of reserve calculations and preparations.

- This amendment to the IBA was introduced due to a call for verification of the appropriateness of the actuarial assumptions, calculations and preparations for claim reserves as a result of the recent changes in the related claims handling policies.

Increase in Sanctions for Repeated and Aggravated Unlawful Acts

- In the event that an insurer has repeatedly committed unlawful acts such as the mis-selling of insurance products or a violation of the duty to comply with the form and contents of the basic documents, the regulatory authorities may suspend all or part of such insurer's line of business up to a period of six months as a more severe sanction against the insurer.

- Further, if an insurer's agent is also determined to have committed repeated unlawful acts such as mis-selling of insurance products or execution of unfair renewal insurance contracts, the regulatory authorities may suspend all or part of such agent's line of business up to six months as a more severe sanction against the agent.

Increase in Penalty Surcharges and Administrative Fines

- The maximum amount for a penalty surcharge on an insurer will be increased by 10%p and the specific procedures for imposing the penalty surcharge will also be directly incorporated in the IBA.

- The maximum amount for an administrative fine on an insurer as a company will be increased two-fold from the previous KRW 50 million to KRW 100 million and, for officers and employees of an insurer as individuals the administrative fines will be increased by more than double the previous amount of KRW 20 million to KRW 50 million.

Eased Regulation on Insurance Advertisements

- An image advertisement of insurance products, which seeks to attract interest of potential customers by exposing overall image but not the details of such products, will be permitted.

- However, an insurer will still be required to inform the customers of major characteristics of an insurance product which may be unfavorable to the customers. Further, an insurer will be prohibited from launching advertisements which solicit insurance subscription by creating unnecessary discomfort for the viewers and exaggerate uncertain benefits in the future.

Strengthened Regulations on Transactions between an Insurer and its Large Shareholders

- An insurer will be prohibited from engaging in "asset or service transactions" with its large shareholders (including a specially-related party) under "unfavorable" terms and conditions. Since the current regulation prohibits a deal which is only determined to be a "clearly unfavorable asset transaction," the proposed amendment seeks to strengthen the scope and level of such regulation on transactions entered into between an insurer and its large shareholders.

- An insurer must first secure the prior consent of its board of directors by a unanimous vote if it intends to engage in an asset or service transaction exceeding a certain size (10% of equity capital or KRW 1 billion) with its large shareholders. Also, the transaction must be reported to the FSC within seven days from the closing of the transaction with a public announcement.

- An insurer that violates its duty to disclose the transaction with its large shareholders through a public announcement may be subject to an administrative fine of up to KRW 100 million.

- The standards for imposing a criminal penalty or surcharge due to unfair transactions between an insurer and its large shareholders will be strengthened to be in line with those sanctions imposed on other financial services companies. Further, the large shareholders that gained profits from such unfair transaction may also be subject to a penalty surcharge of 40% of the purchase price for the transaction.

Miscellaneous

- Although the current insurance regulations provide that the regulatory authorities may impose sanctions on an insurer as set out in the IBA and its Enforcement Decree "if a certain act is deemed to harm [or harmed] the sound management of the insurer," the proposed amendments will also confer the power to the regulatory authorities to impose sanctions on the insurer "if a certain act infringes consumer interests."

- Insurers will be required to disclose cases of non-payment and/or reduction of insurance claims in the informational materials which the insurer provides to its policyholders upon the execution of an insurance contract.

- Loans made for the purpose of investment in trading securities will be excluded from the list of assets where the management by an insurer is restricted.

- The proposed amendments will provide a legal basis for the establishment of a system which collects and shares solicitation history of insurance solicitors, and insurers will be required to confirm and consider such solicitation history when appointing and registering their insurance solicitors.

The submission of the IBA amendments to the National Assembly and follow-up actions required for the amendment of the Enforcement Decree are expected to be completed in 2014. At about the same time, the Regulation on the Supervision of Insurance Business will also be amended accordingly.

Amended Regulations on Audit and Sanctions of Financial Institutions

On August 27, 2014, the Financial Services Commission ("FSC") adopted an amendment to the Regulation on the Audit and Sanctions of Financial Institutions ("Amended Regulations"). The Amended Regulations seek to increase the efficiency of financial administrative and supervisory affairs while improving due process and effectiveness of sanctions in the financial services industry. The Amended Regulations became effective as of September 1, 2014 (with some exceptions) and the below is a summary of the Amended Regulations:

Financial Supervisory Service ("FSS") to report its Audit Plan to FSC

- The FSS is required to report its annual audit plan to the FSC at the beginning of a calendar year going forward. Such annual audit plan must contain information on basic principles of audits by the FSS, financial institutions subject to the FSS audit, audit objective, scope and period, etc. The FSC will monitor and discuss material aspects of the FSS audits based on the annual report.

Prompt Reporting on Audit Result by the FSS

- As a result of an audit conducted by the FSS and if it is determined that there is a material concern for system risks, substantial damage to the soundness of financial institutions or harm to consumer interests, the Governor of the FSS must report on such concerns to the FSC on an immediate basis after the completion of the audit.

Simplification of Procedural Matters for FSC Sanctions

- Pursuant to the former regulations, when the Governor of the FSS has made a proposal at a certain level of sanction to the FSC, the Governor may also attempt to send prior notices or conduct hearings, on behalf of the FSC for matters where the FSC has the authority to issue sanctions on violations of the IBA or subordinate regulations. However, as of January 1, 2015, such matters will be directly handled by the FSC pursuant to the amendments to the Regulations.

Increased Sanctions for Repeated Institutional Cautions

- If an insurer has received repeated institutional cautions on three separate occasions or more within the most recent three years from the current date, such insurer may be subject to an institutional warning.

- This regulation on increased sanctions was introduced to improve the effectiveness of institutional caution and is applicable to acts committed on or after September 1, 2014.

LABOR & EMPLOYMENT

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Updates Regarding Employee Retirement Benefit Plans in Korea

We provide an update on the Korean government's proposed amendment to the Guarantee of Employee's Retirement Benefits Act (the "Act") and introduce a recent court decision on the scope of attachment permissible on employee retirement benefits.

Government's Plan to Promote Employee Retirement Pension Plans

The Korean government recently announced a proposed amendment to the Act to promote the implementation of employee retirement pension plans and to gradually phase-out lump-sum severance payment schemes. The proposed amendment, along with the current Corporate Income Tax Code which will no longer recognize severance payment reserves as deductible corporate expenses after January 1, 2016, will likely incentivize companies to introduce employee retirement pension plans.

- Gradual Phase-out of Severance Payment Schemes

  In order to expand the implementation of employee retirement pension plans as a replacement for lump-sum severance payment schemes, the Korean government is considering amending relevant laws and regulations to require all companies to phase-out lump-sum severance payment schemes starting from 2016 and to mandatorily adopt employee retirement pension plans by 2022. However, in order to reduce the financial burden related to such transition, companies will be allowed to maintain severance payment reserves accrued prior to the effective date of the proposed amendment to the Act.

  In addition, while the current Act automatically deems all companies established after July 2012 that do not adopt an employee retirement pension plan within 1 year from their establishment to have adopted a lump-sum severance payment scheme, the proposed amendment to the Act will instead impose an administrative fine on companies for failing to adopt an employee pension plan within 1 year from the company's establishment.

- Employee Retirement Benefits Applicable to Employees with Less Than 1 Year of Service

  Whereas employees must have worked for at least 1 year to be eligible for employee retirement benefits under the current Act, the proposed amendment to the Act provides employees the opportunity to obtain employee retirement benefits, even if they have worked for less than 1 year.

- Greater Protection for Receiving Retirement Pension

  In order to protect employees' right to receive retirement benefits from the employer's bankruptcy risk, employers implementing the "defined benefit pension plan" will be required to gradually increase the portion of retirement benefits reserved outside the company from the current 70% to 100% by 2020.

Clarification on the Scope of Attachment Permissible on Employee Retirement Benefits

Earlier this year, the Supreme Court of Korea ruled that employee retirement pension pursuant to the Act may not be subject to any attachment. Meanwhile, the Daegu District Court recently held that given that the Act distinguishes employee retirement pension and severance pay, attachment on up to 50% of severance pay will be valid unlike retirement pension.

The Daegu District Court's ruling is significant because it reinforces the Supreme Court's decision that prohibits any attachment on retirement pension and also clarifies that, unlike retirement pension, attachment on up to 50% of severance pay is permissible pursuant to the Civil Procedure Act. It will be important to see if this approach is affirmed by the appellate court.

TAX

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Proposed Tax Law Changes for 2015

On August 6, 2013, the Ministry of Strategy and Finance announced proposed tax law amendments for 2015, most of which would take effect on January 1, 2015 if enacted into law. The main items as currently proposed are summarized below but are subject to change during the National Assembly's legislative review later this year.

New Excess Retained Earnings Tax (Article 56 of the Corporate Income Tax Law)

In the event a corporation (excluding small and medium-sized enterprises) with equity capital exceeding KRW 50 billion does not pay out its statutory ratio (20%~80%) of earnings as investments, salaries to employees or dividends, etc., a new proposed taxation scheme would impose an 11% tax on such under-used earnings. This taxation scheme, if enacted, would apply through December 31, 2017.

New Tax Credit Provided for Certain Employee Salary Increases (Article 29-4 of the Special Tax Treatment Control Law ("STTCL"))

The proposed tax law amendment also introduces a credit scheme whereby a corporation may claim a tax credit amounting to 5% (10% for small and medium-sized enterprises and medium-sized leading enterprises) of the difference between the salary increase rate for the year in which a credit is sought and the average salary increase rate for the immediately preceding 3-year period, so long as both of the following conditions are met.

- The average salary increase rate for the year in which a credit is sought is higher than the average salary increase rate for the immediately preceding 3-year period; and
- The number of full-time employees during the year in which a credit is sought is greater than or equal to the number of full-time employees in the immediately preceding year.

If enacted, the new credit scheme would apply through December 31, 2017.

Strengthened Application of Thin Capitalization Rules (Article 14 of the International Tax Coordination Law ("ITCL"))

Under current tax law, where a corporation is not a financial institution and its borrowings from a foreign controlling shareholder exceed three times the capital invested by the same foreign controlling shareholder, interest expenses allocable to such excess borrowings are not deductible since such interest expenses are deemed dividends. The proposed tax law amendment changes the threshold debt-to-equity ratio from three times to two.

Fines Imposed for Failure to Submit Details of International Transactions with Related Parties (Article 12 of the ITCL)

The proposed amendments also impose a fine of up to KRW 100 million for failing to submit details of international transactions with related parties by the applicable filing due date.

Extension of Eligibility Period for Tax Refund Claims (Article 45-2 of the National Tax Basic Law)

Taxpayers are currently allowed to pursue tax refund claims for over-reported and over-paid tax within 3 years from the filing due date of the relevant tax return. The proposed tax law amendments extend this tax refund limitation period to 5 years.

Extension of Flat Tax Rate for Foreign Workers (Article 18-2 of the STTCL)

Current tax law allows for the application of a flat 18.7% personal income tax rate on income to foreign workers working in Korea. The sunset date for this provision was originally December 31, 2014. Under the proposed tax law amendments, foreign workers providing labor to a regional headquarters located in Korea would be eligible for the flat rate beginning on the date in which work in Korea commenced and ending 5 years thereafter, regardless of the sunset period. All other foreign workers would be eligible for the flat rate through December 31, 2016.

REAL ESTATE

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Amendment to Act on Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents

In order to boost the housing market, an amendment to the enforcement decree of the Act on Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents (the "Amendment") which will ease the regulations related to reconstruction will become effective on March 25, 2015 following its promulgation on September 24, 2014.

According to the Amendment, the requirement to supply a certain percentage of small-sized housing units (each with an exclusive area of 60m^2 or less) in accordance with the ordinance of the relevant province or city (e.g., in the case of Seoul and Gyeonggi-do, small-sized housing units should constitute 20% or more of the total number of the housing units to be built in a housing reconstruction project) (the "Minimum Supply Requirement") will no longer apply to housing reconstruction projects. However, certain requirements such as the minimum percentage of certain small-sized housing units (i.e., housing units, each with an exclusive area of 85m^2 or less, *kuk-min-ju-taek* in Korean, should constitute 60% more of the total number of housing units constructed) that should be constructed in a housing reconstruction project will continue to apply.

As small-sized housing units (each with an exclusive area of 60m^2 or less) are voluntarily supplied to the housing reconstruction market due to a changed demand for housing, the Amendment appears to reflect the current state of the market that no longer requires the application of the Minimum Supply Requirement. As the Amendment allows the supply of housing units of various sizes at the election of the members of the association, it is expected to enhance market autonomy.

INTELLECTUAL PROPERTY

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Korean Supreme Court Case No. 2013Da41578 (Aug. 20, 2014) on Dissolution of a Jointly-Owned Patent

Recently, in a case where a co-owner sought dissolution of a jointly-owned patent, the Supreme Court ordered the patent to be sold in auction and the sales proceeds therefrom to be divided to the co-owners according to their respective shares in the patent (Case No. 2013Da41578).

Under the Korean Patent Act ("KPA"), Article 99, where a patent is jointly owned,

- Each co-owner may use, practice or work the patented invention without the consent of or accounting to the other co-owner(s);
- Neither co-owner may assign or establish a pledge upon his share in the patent without the consent of the other co-owner(s); and
- Neither co-owner may grant a license, either exclusive or non-exclusive, to the patent without the consent of the other co-owner(s).

The legislation is grounded on the concern that when a co-owner assigns his share or grants license to a third party, the economic value of the other co-owner's share may be significantly affected or diluted depending on the third party assignee/licensee's investment of capital or technology, etc. in practicing the patented invention. To protect the other co-owner's interests, Article 99 of the KPA prohibits co-owners from assigning or licensing their respective shares in the patent without the consent of the other co-owner. In the same context, the Supreme Court decided that a co-owner's share in a patent cannot be subject to attachment order by a third party without the consent of the other co-owners (Case No. 2011Ma2412, Apr. 16, 2012).

Case No. 2013Da41578 is noteworthy in that the Supreme Court applied a general principle on the dissolution of a jointly-owned property to patents to resolve the disputes between co-owners when the co-owners no longer hold common objectives or cooperative relationship. Under the Korean Civil Code, a co-owner of a jointly-owned property, either real or tangible, can seek a court order for dissolution of the jointly-owned property if no agreement on the division can be reached among co-owners. The court, in principle, may order division in kind or physical division. However, if division in kind is impossible or impracticable due to the nature of the property or the value of the property will be significantly harmed in case of division in kind, the court may order that the property be sold by auction and the sales proceeds be divided to co-owners according to their shares in the property. While approving a co-owner's claim for dissolution of a patent right on the ground that such dissolution would not be prejudicial to the economic value of the other co-owner's shares in the patent, the Court did not allow division in kind ("division in kind" here means that a co-owner will be deemed to hold the rights on the property independent of the other co-owner's rights on the same). Instead, the Court ordered the patent to be sold in auction and the sales proceeds to be divided to the co-owners according to their respective shares in the patent.

This decision indicates that when a patent co-owner desires to end a joint ownership, he can seek the dissolution of joint ownership with a court. However, since this dissolution is done by sale in auction, the other co-owner who practices the patented invention may be prejudiced in case the patent is sold to a third party. To block such dissolution by sale in auction, he may consider entering into an agreement with the other co-owners not to seek division of the patent or cause the patent to be divided (for five years maximum permitted under Korean Civil Code, Article 268, Paragraph 1) and record such agreement in the patent registry.

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

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

Easing off and Improving Shutdown System for Online Games

The Korean Government recently announced its plan to amend the Juvenile Protection Act ("JPA") and the Game Industry Promotion Act ("GIPA") for the purpose of easing off and improving the current "shutdown system" for online games. Details of the respective plan to ease off and improve the shutdown system (the "Plan") are as follows.

Easing off Compulsory Shutdown System

Based on the current shutdown system provided under JPA, an online game service provider must block the access of all children under the age of 16 to play online games during late hours (from 12:00 a.m. to 6:00 a.m.). However, the Plan amends the current system so that the application of the shutdown system may be lifted upon the request of the child's parent(s), and will be resumed upon child's parent(s) subsequent request.

In addition, GIPA currently provides that an online game service provider who is found to have violated the compulsory shutdown system shall be held criminally liable either via imprisonment of no more than 2 years or via a fine not exceeding KRW 10 million. The Plan introduces a "corrective order" phase before criminal prosecution of an online game service provider found to have violated the statute, whereby the online game service provider shall be given the opportunity to avoid criminal liability and to voluntarily correct the violation.

Improvement of Selective Shutdown System

The "selective" shutdown system, as one of the measures under GIPA to prevent excessive game absorption and addiction, blocks online game access of minors under the age of 18 even for time periods other than late hours upon the request of the minor's parent(s) or the minor him/herself. According to the Plan, the gist of such selective shutdown system will remain the same, but the system will now apply to minors under the age of 16 instead of 18 for consistency purpose.

Further, the Ministry of Gender Equality and Family and the Ministry of Culture, Sports and Tourism, the two central government authorities in charge of enforcing and overseeing JPA and GIPA regulations, plan to organize a consultative body to develop reasonable regulatory systems and review opinions and issues raised by game service providers.

ENVIRONMENT

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

MOE Notification of Korean Allowance Unit

On November 28, 2014, the Allocation Determination Evaluation Committee under the Ministry of Environment (the "MOE") held a meeting to determine the number of Korean Allowance Units ("KAU") to be assigned to the companies (the "Participant Companies") subject to the Act on Allocation and Trading of Emissions Permits (the "Emissions Trading Act") for the first three year period from January 1, 2015 to December 31, 2017 (the "First Planning Period"). After the meeting, the MOE notified each of 525 Participant Companies of the KAU allocated to them.

Under Article 13 of the Enforcement Decree of the Emissions Trading Act, during the First Planning Period, all KAUs will be allocated without cost. In addition, if a Participant Company previously voluntarily reduced emissions under the greenhouse gas ("GHG") Target Management System, such reductions may be taken into account and counted towards additional permits to be granted for Year 3 of the First Planning Period ("Korean Credit Units").

The MOE received applications for allocation of KAUs from Participant Companies until October this year. Also within that month, the MOE established a Joint Working Group composed of members from relevant industries, the academia and other experts, and a number of Sector-Specific Working Groups, to review the permit applications. After the MOE consulted with other relevant authorities, the allocation decisions on each Participant Company were passed by the Allocation Determination Evaluation Committee.

The Emissions Trading Act provides that Participant Companies may file objections to an allocation decision within 30 days of the relevant administrative notification or decision, along with supporting materials. Decisions regarding objection reports must be made and notice must be given thereof within 30 days of filing, except in certain special circumstances, in which case the decision-making period may be extended for not more than 30 days.

To protect confidential business information, the MOE's Guidelines on the Emissions Trading Act provides that information received by the MOE in connection with KAU allocation must not be used for any other purposes or disclosed to third parties.

Proposed Legislation for Environmental Pollution Damage Compensation Has Passed National Assembly

On December 10, 2014, the proposed legislation for the Environmental Pollution Damage Compensation and Recovery Act (the "Environmental Damage Compensation Act") was passed by the National Assembly by unanimous votes of the present members. This Act will enter into force one year after the date of its promulgation, provided that, however, the obligation to subscribe environmental liability insurance under Article 17 will be enforced 18 months after tis promulgation.

The key framework is as follows:

Expansion of Facilities Subject to Environmental Liability

Three types of facilities have been added as Facilities Subject to Environmental Liability ("Facility" or "Facilities"): construction waste processing facilities, facilities that emit persistent organic pollutants, and marine facilities specified by the Marine Environment Management Act. These, along with other types of facilities that the President may designate, join the previously designated Facilities: facilities that emit air pollutants, facilities that discharge waste water, facilities that discharges waste water with zero-discharge system, waste treatment facilities, facilities that discharge agricultural waste, soil-contaminating facilities, facilities dealing with toxic substances, facilities that are subject to the filing of risk management plan, facilities that produce noise and vibrations, and facilities that produce odors.

Presumption of Causation

The Environmental Damage Compensation Act presumes that a Facility has caused damage if it is "substantially likely" that the Facility caused the pollution-related damage, unless there is reason to believe that the damage occurred entirely due to different causes. "Substantial likelihood" depends on factors such as the Facility's operating process and equipment, types and concentration of substances that are injected or discharged, weather conditions, time and place of the polluting activity, the extent of damage, and other circumstances that affected the damage.

There had been some discussions to provide exceptions to such presumption of causation for Facilities that are legally operated (that is, Facilities that abide by operation management regulations and do not have any operational issues). However, these discussions were not reflected in the final proposal that was passed by the Environment and Labor Committee. Thus for a Facility operator to overcome the presumption of causation, he will need to prove that there is reason to believe that the damage occurred entirely due to different causes.

Strict Liability for Facility Operators

If the environmental pollution resulting from the installation or operation of a Facility causes damage to a third party, the Facility operator is subject to strict liability: the Facility operator must provide compensation regardless of his fault or negligence. A Facility operator is exempt from such liability only if the damage is caused by natural disaster or other acts of God.

Compensation Limits

A Facility operator found liable for environmental damage may be ordered to pay compensation of up to KRW 200 billion, taking into consideration the size of the Facility and the extent of damage. The maximum compensation for each case will be set by the presidential decree. Meanwhile, the limits will not apply if the Facility operator intentionally caused the damage or was grossly negligent in causing the damage, or if the Facility operator did not install/operate the Facility in a lawful manner (e.g., by exceeding discharge limits).

Victims' Right to Request Information

If a victim of environmental damage needs information to prove the "substantial likelihood" that a Facility operator caused the damage, the victim has the right to submit a request to the Facility operator to view or obtain information relevant to proving such "substantial likelihood." Relevant information would relate to the Facility's operating process and equipment, and the type and concentration of substances discharged by the Facility. Furthermore, the Minister of Environment may order a Facility operator to provide information to a victim, after the victim's request has been reviewed by the Committee for Environmental Pollution Recovery Policy Review. If a Facility operator fails to abide by such order, the Korean courts may interpret this as evidence that the victim's claims are true.

Certain Facility Operators' Obligation to Subscribe to Environmental Liability Insurance

Compulsory environmental liability insurance applies to certain Facilities deemed to have a higher risk of causing environmental pollution. This obligation does not apply to all Facilities, but only to those that emit designated air pollutants or designated water pollutants. If operators of such Facilities do not subscribe to environmental liability insurance, they will not be allowed to install or operate their Facilities.

The Environmental Damage Compensation Act presumes causation based on a relatively low threshold of "substantial likelihood," taking into account the Facility's operations and the type and concentration of discharged substances, and virtually provides no exception to the presumption of causation. It also imposes potentially severe penalties on Facility operators, by eliminating any limits to compensation if the Facility operator is found to have violated relevant standards and regulations. Facility operators should therefore objectively evaluate their operations to make sure they comply with discharge limits and safety standards. Such preventative measures to preempt environmental damage should be the first priority for Facility operators.

SELECTED REPRESENTATIONS

Hahn & Company acquires dedicated shipping business of Hanjin Shipping Co., Ltd.

On June 30 and July 1, 2014, Hahn & Company closed on the acquisition of 78% stakes in H-Line Shipping Co., Ltd., a newly established company in which Hanjin Shipping Co., Ltd. ("Hanjin") invested its dedicated shipping business, from Hanjin. Hahn & Company acquired the stakes through Hahn & Co. Shipping Holdings Co., Ltd., an SPC formed by the Hahn & Company.

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 Hahn & Company and provided comprehensive legal services at each stage of the investment, including the deal structuring, negotiation and documentation, advice on PEF regulations, acquisition financing and the closing of the transaction.

Goldman Sachs invests in Daesung Industrial Gases

On August 29, 2014, Goldman Sachs' institutional investors ("GS"), together with Atinum Partners and KB affiliated investors, purchased common stocks in Daesung Industrial Gases, Co. Ltd. ("DIG") from Daesung Group Partners, Co. Ltd. and subscribed for convertible bonds issued by DIG.

Kim & Chang provided comprehensive legal services to GS in connection with the transaction, including preparing the legal due diligence report, reviewing the transaction structure, drafting and negotiating the underlying transaction agreements including the share purchase agreement, convertible bonds subscription agreement and shareholders agreement, obtaining government permits and licenses including a merger control clearance from the Korea Fair Trade Commission and assisting with the closing of the transaction.

Cosmax's conversion to a holding company

On March 1, 2014, Cosmax, Inc., which is a publicly listed cosmetics manufacturing company, split off Cosmax, Inc. ("Cosmax"), a newly established operating company, and converted itself into a holding company, Cosmax BTI, Inc. ("Cosmax BTI"). Through an exchange tender offer from July 18 to August 11, 2014, Cosmax became a subsidiary of Cosmax BTI under the Monopoly Regulation and Fair Trade Law. Coxmax BTI attracted public attention by issuing discounted shares in the exchange tender offer unlike previous conversions to holding companies.

Kim & Chang advised on this transaction, including determining the conversion structure, obtaining permits and licenses and advising on relevant regulations.

Posco Energy acquires TongYang Power

On August 5, 2014, Posco Energy acquired 100% stake in TongYang Power from shareholders including TongYang Cement & Energy, TongYang Inc. Tongyang Leisure for KRW 431.1 billion.

Kim & Chang represented Posco Energy and provided comprehensive legal services such as establishing trade structure, conducting legal due diligence, drafting the negotiation and trade documents and merger filings and termination of trade.

CEO found innocent of charges of breach of fiduciary duty based on a defense of reasonable business judgment, despite substantially lower fees charged to a subsidiary

Recently, the Korean court dismissed charges brought against a CEO of a company who had been indicted for (i) criminal breach of fiduciary duty and (ii) violation of the Monopoly Regulation and Fair Trade Act (the "FTA"), for deciding to apply substantially lower sales commission rates in certain sale and purchase agreements between the company and its affiliates.

The charges were based on the alleged fact that the accused CEO had caused his company to suffer losses while allowing affiliates to enjoy gains by setting substantially lower sales commission rates to those affiliates, which in turn was an unlawful support of such affiliated companies that was "likely to impede the fair transaction in market" in violation of the FTA.

The Korean courts have developed and applied established legal principles regarding the elements required for the finding of breach of fiduciary duty where the business judgment of management resulted in substantial damages to the relevant company. The Korean courts consider the totality of the circumstances, including circumstances and motivations leading to the business judgment at issue, the nature of the business, economic conditions faced by the company, and probability of damages and gains. The court's finding of guilt or innocence would depend on the degree with which defense was able to explain and persuade the court of the reasonable nature of the business determination at issue, within such framework, and defendants generally faced an uphill battle in trying to convince the court of the reasonableness of his/her business decision where the company at issue had incurred actual damages.

In this case, the court dismissed the charge of breach of fiduciary duty based on: (i) the unique circumstances regarding the sale and purchase agreements in question, in that they were for products targeted to attract customers to the overall brand, at very low profit margins; (ii) contrary to the assertions of the prosecution, there was no established level of minimum sales commission rate at the time (which the company in question had allegedly failed to charge vis-a-vis its affiliates); (iii) there were other instances where the company had offered discounts regarding certain products to attract customers, even at the risk of suffering losses; and (iv) there were also instances where other rival companies set very low sales commission rates in order to allow stores to offer a diverse range of products to the customers.

As for the charges of violation under the FTA, this charge was also dismissed on grounds that the prosecution failed to show that there existed "normal/prevailing" sales commission rates, which would have been the basis for determining that the company had rendered unlawful support to its affiliates in violation of the FTA.

Kim & Chang successfully defended the accused CEO by engaging in in-depth analysis of the market conditions and prevailing commission rates, and was able to persuade the court that the rates charged to its affiliates was based on a reasonable business judgment. This case is expected to serve as an important precedent in future cases regarding the applicability of the business judgment rule.

Supreme Court decision involving life insurance products discusses the requirements for finding collusion from information exchange

On July 24, 2014, the Korean Supreme Court rendered decisions with significant implications for cartel enforcement regarding the exchange of information. The Supreme Court upheld the Seoul High Court decisions revoking the Korea Fair Trade Commission ("KFTC")'s decision issuing corrective orders and imposing administrative fines against 16 life insurance companies on allegations of collusion. In its decision, the Supreme Court declared the requirements for determining whether an exchange of information may constitute an agreement to unfairly restrain competition.

The KFTC's decision had relied primarily on the exchange between the life insurance companies of information undisclosed to the market, such as expected future interest rates, as sufficient evidence of an agreement to collude on insurance interest rates. In upholding the lower court decision, the Supreme Court held that the existence of an agreement (whether explicit or implicit) among the cartel participants is essential to establishing unlawful collusion to unfairly restrain competition, and found that the KFTC failed to prove the existence of such agreement. According to the Supreme Court, the mere (i) appearance of an unlawful collusive act and (ii) the exchange of pricing information among competitors are insufficient to find that there was an 'agreement' to restrain competition.

While the Supreme Court acknowledged that an exchange of information among competitors may be deemed as strong evidence to support the existence of collusion, the Court declined to infer an agreement despite evidence of possible information exchange given the existence of plausible alternative explanations for the parallel conduct. The Supreme Court held that the exchange of information should be evaluated based on the overall circumstances, including (i) purpose and intent of the information exchange, (ii) each company's actual decision-making and the degree of parallelism after the information exchange, and (iii) the impact of the information exchange on the relevant market, in addition to the factors referenced by the KFTC such as the structure and nature of the relevant market, nature/content, timing and method of the information exchange, and persons involved in the information exchange.

Kim & Chang represented a number of the aforementioned life insurance companies in all related appeals of the KFTC decision up to the Supreme Court.

Issuance of permanent exchangeable bonds by Korea Gas Corporation

On August 22, 2014, Korea Gas Corporation issued permanent exchangeable bonds in the amount of KRW 308.6 billion with the maturity of thirty (30) years, which can be extended at the issuer's option.

Kim & Chang provided comprehensive legal services for the issuance, including, without limitation, preparing relevant contracts, reviewing legal and compliance matters under the Financial Investment Services and Capital Markets Act, the Korean Gas corporation Act, the Act on Management of Public Institutions, and other laws, advising on the issuer's necessary internal procedures for the issuance, as well as the allocation of authorities between the issuer and the government relating to the payment of interest and dividends, and reviewing the terms and conditions of the bonds to confirm meeting qualification requirements for supplementary capital, such as whether there is interest payment priority over other types of hybrid securities.

Merger of KB SPAC No. 2

On September 16, 2014, KB SPAC No. 2 obtained its shareholders' approval for merger with KSign Co., Ltd., which is an IT security company specializing in encryption and authentication. The merged KSign was listed on KOSDAQ as of November 11, 2014.

Kim & Chang assisted KB Investment Securities Co., Ltd, in dealing with overall legal issues, including, without limitation, advising on substantive and procedural requirements for applying for preliminary approval of the merged listing, the closing timeline, and other relevant legal matters.

BNP Paribas Cardif acquires shares in Ergo Daum Direct

On May 6, 2014, BNP Paribas Cardif entered into a Sale and Stock Purchase Agreement with AXA to purchase 85% of the outstanding shares in ERGO Daum Direct for approximately KRW 10 billion, and the transaction closed successfully on July 29, 2014.

For this transaction, Kim & Chang represented both BNP Paribas Cardif and ERGO Daum Direct, and provided regulatory and legal services such as legal due diligence of ERGO Daum Direct, negotiations and preparation of transaction documents, and securing the necessary regulatory approvals.

Establishment of REITs for development of Public Rental Housing

Two real estate investment companies (each, a "REIT"), NHF No. 1 Third-Party Managed REIT for Development of Public Rental Housing ("NHF No. 1 REIT") and NHF No. 2 Third-Party Managed REIT for Development of Public Rental Housing ("NHF No. 2 REIT"), were established through joint investments by the National Housing Funds ("NHF") and Korea Land and Housing Corporation ("LH Corporation"). The two REITs obtained the business licenses for REITs from the Ministry of Land, Infrastructure and Transport on August 11, 2014 and entered into real property sale and purchase agreements for the purchase of project sites on August 29, 2014.

In addition to the investments by the NHF and LH Corporation (i.e., total investments of KRW 153.2 billion in NHF No. 1 REIT and KRW 69.5 billion in NHF No. 2 REIT), NHF No. 1 REIT and NHF No. 2 REIT received loans in the amount of KRW 540 billion and KRW 215 billion, respectively, from financial institutions and some of the loans were again securitized through asset securitization transactions.

The development of public rental housing by the REITs is a new model of supplying public rental housing which was previously supplied by LH Corporation. Through this new model, the government intends to reduce the debt of LH Corporation which increased significantly due to the supply of public rental housing and to increase the supply of the same in the market. Also, this is the first project for the development of public rental housing where private financial institutions have provided funding.

Kim & Chang has contributed to the successful completion of the transaction by providing comprehensive legal advice in all stages of the transaction so that the transaction complies with all the requirements under the Real Estate Investment Company Act, taking into account the unique features of the REITs for the development of public rental housing. Kim & Chang's service included establishing and obtaining business licenses for the REITs, receiving loans from financial institutions and completing the asset securitization transaction, and preparing real property sale and purchase agreement and construction services agreement.

Tax Tribunal decision recognizing high-technology tax exemption in cases of a consigned factory to an unrelated operator

According to Article 116-2 (1) of the STTCL, a foreign-invested company may take advantage of high-technology business tax exemptions so long as it installs or operates factory facilities. In this regard, it was previously unclear whether having another unrelated company operate a factory under a management consignment contract qualified as the taxpayer-consignor's "operation of a factory" for high-technology tax exemption purposes.

In a recent case, a company had an unrelated third party operate a factory under a management consignment contract. The tax authorities rejected the high-technology tax exemption and imposed additional corporate income tax arguing that the third party's operation did not qualify as the appellant's "operation of a factory," and therefore, a tax exemption did not apply.

Kim & Chang, representing the appellant (i.e., the party owning the factory and seeking the tax exemption),

obtained a favorable decision from the Tax Tribunal, which held that the tax exemption should apply. Specifically, the following arguments were particularly persuasive:

- The appellant carried out a design process and a mold manufacturing process, both of which were core processes using high-technology on their own;
- The purpose of the high-technology tax exemption is to spread the use of high-technology in Korea, and since the appellant conducted internal training for design skill development, the appellant's activities are consistent with the specific purpose of the tax exemption;
- The appellant rented a factory in its own name and owned machines used in the manufacturing process;
- Throughout the manufacturing process, the appellant supervised and managed the personnel of the third party operating the factory under a management consignment contract; and
- Products were sold by and in the name of the appellant.

Korean Supreme Court requires review of specification to define technical meaning for claim construction

Recently, the Korean Supreme Court clarified its guidance on claim construction for determining the technical meaning of a claimed invention.

Previously, the Korean Supreme Court's holdings were divided in two camps: (i) in cases where the scope of the claim was apparent from the language of the claim, the Court held that the claim should be construed based on the claim language itself and cannot be construed restrictively based on the specification (Supreme Court Case Nos. 2004Hu776 rendered on October 13, 2006, 2008Hu4202 rendered on June 24, 2010, and 2010Hu1107 rendered on July 14, 2011); at the same time (ii) the Court held that since the technical meaning of a claimed invention cannot be clearly understood without considering the specification, the claim should be construed objectively and reasonably based on the detailed description or drawings in addition to the ordinary meaning of the language of the claim (Supreme Court Case Nos. 2005Hu520 rendered on September 21, 2007, 2008Hu26 rendered on January 28, 2010, and 2010Hu3219 rendered on November 10, 2011). Consequently, courts tended to first focus on the plain and ordinary meaning of a claim term in determining the scope of a claim (without reviewing the detailed description and drawings) and did not further look into the technical meaning of the claimed invention if the claim scope seemed clear, although this sometimes varied based on the court's discretion. This generally had the effect of broadening the scope of a patent, particularly for validity analysis, and ultimately, made it difficult to defend against invalidity attacks.

In the recent ruling (*Canon v. Alphachem, et al.,* Supreme Court Case No. 2012Hu917 rendered on July 24, 2014), however, the Supreme Court held that the specific technical meaning of a claim feature must generally be construed in light of the detailed description of the invention considering the purpose and effect of the claimed invention. Specifically, in upholding the validity of the patent in view of the patent's detailed description and drawings, the Court stated, "the scope of a patented invention must be construed in an objective/reasonable manner based on the plain language of the claims and also in light of the invention's detailed description and drawings, [and]…where it is difficult to fully understand the inventive features from the claim language alone, other disclosures of the specification, including the drawings, should be considered to determine the technical features of the invention." Further, the Court noted the purpose of the claimed invention, the method of the claimed element in achieving the purpose, and the effect of the claimed invention in defining the technical meaning of the claimed element. Thus, the Supreme Court now appears to require an objective/reasonable interpretation of the claims based on the detailed description and drawings, and a clear understanding of the claimed "technical features" in view of the purpose and effect of the invention, beyond the simple ordinary meaning of the claim language.

Going forward, the present ruling will make it easier for patentees to defend against validity attacks.

Full victory in an ICC arbitration case regarding termination of a Joint Venture Agreement

Kim & Chang's International Arbitration & Cross-Border Litigation Practice Group successfully represented a major European automotive supplier against a Korean auto-parts manufacturer in an ICC arbitration with a claim valued at over USD 80 million. The Tribunal was composed of notable arbitrators from Canada, Germany, and Switzerland. (Governing Law: Korean Law / Seat of Arbitration: Tokyo, Japan)

The dispute arose out of a 50:50 joint venture agreement (the "JVA") entered into by the parties to establish and operate a joint venture company (the "JVC") in order to supply cutting-edge car modules to Korea's leading auto manufacturers. The opposing party filed for arbitration at the ICC alleging that the technology provided by our client to the JVC under the JVA during the operations of the joint venture was no longer of value and that our client impaired the ability of the JVC to obtain new supply contracts by refusing an unreasonable demand by the JVC's customer, a major automobile manufacturer. Furthermore, the opposing party began supplying auto parts directly to the JVC's customer in competition with the JVC utilizing technology provided by the JVC by our client. In turn, our client filed a counterclaim alleging that technology provided by our client to the JVC continues to have value and that the counterparty breached the JVA's non-competition provisions by directly supplying parts to the JVC's customer.

During a nine-day hearing in Tokyo, Kim & Chang presented evidence and argument on complex technical issues relating to the value of technology provided the JVC by the client, the proper interpretation of JVA provisions regarding confidentiality undertakings, non-competition obligations, and certain duty to generate profit for the JVC. Kim & Chang provided analysis of the proper interpretation of these contract provisions based on court precedents on contract interpretation under Korean law, and also played a key role in effectively explaining such interpretation to the foreign arbitrators. In addition, Kim & Chang reviewed voluminous factual records to identify and analyze materials to support this legal interpretation. Eventually, the Tribunal rendered a final award favorable to our client, dismissing all of the opposing party's original claims, finding in favor of our client on the majority of its claims, ordering the opposing party to refrain from supplying parts to JVC's customer for several years, and finding that our client is entitled to terminate the JVA and seek dissolution of the JVC as a result of Respondent's breaches of the JVA.

This case is significant in that that the final award provided a clear decision regarding the parties' obligations in a typical joint venture dispute with respect to protection of trade secret and the scope and effect of a non-competition obligation.

Supreme Court renders not guilty verdict regarding failure to comply with certain reporting requirements under the Foreign Exchange Transactions Act

The Supreme Court rendered a decision that, according to the principle of legality, an extended or analogical interpretation of "set-off, etc." shall not be permitted with respect to the obligation to report payments methods such as set-offs under the Foreign Exchange Transactions Act (the "Act").

Article 16, Paragraph 1 of the Act prescribes that a party shall file a prior report regarding certain payments if such payment is subject to "any settlement by extinguishing or offsetting a claim or liabilities by means of set-off, etc." Violations of this requirement result in criminal liability pursuant to Article 29, Paragraph 1-6 of the Act. When petrochemicals were sequentially traded among various parties in the trading market and the transaction parties mutually agreed to net the differences in the purchase prices among them instead of delivering the full amounts in order to simplify the transactions, both the trial court and the appellate court held that the parties were guilty because the above transaction constitutes set-off or "set-off, etc." under the Act.

In the above case, Kim & Chang effectively argued that interpreting an agreement to net transactions as

constituting "set-off, etc." under the Act would be a violation of the principle of legality. Kim & Chang argued that in order to impose criminal liability for failure to report a transaction as a "set-off, etc.," the concept of a given transaction must be judged to be legally the same as a set-off or at least be a type of transaction similar enough to a set-off so that it would be possible to foresee that such transaction would be considered a set-off. However, treating the parties' agreement to settle their accounts through netting as a form of set-off would be an interpretation that goes beyond the principle of legality. Such argument was based on the premise that, under the principle of legality, laws entailing criminal liability should not be interpreted in a manner that expands their scope or allows application to analogous situations to the detriment of the defendant. Kim & Chang argued that this same principle applies to interpreting the Act, even accepting the fact that the Act may need to resort to enumerating certain examples in its provisions, given the complexity and variety of the transactions that are regulated thereunder. In the case, the Supreme Court rendered a decision to reverse the appellate court's guilty decision.

The above Supreme Court decision reaffirmed that, even for foreign exchange transactions that are regulated by the Foreign Exchange Transaction Regulations which are promulgated by the Ministry of Strategy and Finance due to the complexity and diversity of the areas regulated by the Act, the basic principles for interpreting criminal laws should be applied. It is a significant new decision that Kim & Chang was able to obtain in the area of foreign exchange transactions where few Supreme Court precedents exist.

FIRM NEWS

AWARDS & RANKINGS

9 awards including 'Korea Law Firm of the Year'
- ALB Korea Law Award 2014

Kim & Chang was named as the 'Korea Law Firm of the Year' at the 2nd annual ALB Korea Law Award 2014, hosted by ALB (Asian Legal Business), a renowned legal publication in Asia affiliated with Thomson Reuters. The awards was held in Seoul on November 14, 2014.

ALB announced the winners in a total of 23 categories including best law firms, in-house counsels, and influential deals selected based on its own independent research and outside experts' voting results. Kim & Chang received awards in the following nine categories including 'Korea Law Firm of the Year,' and it received the highest number of awards among the winners.

Firm Categories - Only winner

- Korea Law Firm of the Year
- Deal Firm of the Year
- Construction Law Firm of the Year
- IP Law Firm of the Year
- TMT Law Firm of the Year

Deal Categories - Co-winner

- Korea Deal of the Year
  : Initial public offering of shares issued by Hyundai Rotem on the Korean Exchange
- Equity Market Deal of the Year
  : Initial public offering of shares issued by Hyundai Rotem on the Korean Exchange
- M&A Deal of the Year
  : Acquisition of ING Life Insurance Korea by MBK Partners
- Real Estate Deal of the Year
  : Acquisition of Four Seasons Hotel located in Sydney, Australia by a Korean real estate fund

Band 1 in all 14 areas - The Legal 500 Asia Pacific (2015)

Kim & Chang was recognized in the Legal 500 Asia Pacific (2015 edition), a leading global law firm directory published by Legalease, UK legal media, as a band 1 law firm for all 14 practice areas surveyed as below.

- Antitrust and competition
- Banking and finance
- Capital markets
- Corporate and M&A
- Dispute resolution
- Employment
- Insurance
- Intellectual property
- Intellectual property - Intellectual property: patents and trademarks
- Projects and energy
- Real estate
- Shipping
- Tax
- TMT (Technologies, Media & Telecommunications)

In addition, the following 12 professionals of Kim & Chang were recognized as leading individuals in their respective practice areas.

- Banking and Finance: Soo Man Park, Young Man Huh, and Young Kyun Cho
- Dispute Resolution: Sang Ho Han, Byung-Chol (BC) Yoon, and Eun Young Park
- Capital Markets: Soo Man Park, Young Man Huh, and Young Kyun Cho
- Intellectual Property: Jay (Young-June) Yang
- Corporate and M&A: Kyung Taek Jung, Young Jay Ro, and Jong Koo Park
- Shipping: Byung-Suk Chung, and Jin Hong Lee

Tier 1 in all practice areas - IFLR1000 (2015)

Kim & Chang was named as a top-tier law firm for all practice areas surveyed for the 11th successive year, according to the recent edition of IFLR1000, a Euromoney publication. In addition, 10 lawyers at our firm were selected as leading lawyers in each practice area and 2 lawyers as rising stars.

The details are as below:

Firm Rankings

- Banking & Finance
- Capital Markets
- Competition
- M&A
- Restructuring & Insolvency

Leading Lawyer

Kye Sung Chung, Kyung Taek Jung, Soo Man Park, Jin Yeong Chung, Jong Koo Park, Young Kyun Cho, Hi Sun Yoon, Chang Hyeon Ko, and Chang-hee Shin

Rising Star

Chul Man Kim, Myoung Jae Chung

Ranked No. 6 Asia Pacific Law Firm
- Acritas Asia Pacific Law Firm Brand Index 2014

Kim & Chang ranked sixth in the Asia Pacific Law Firm Brand Index 2014 by Acritas, a global legal market researcher based in UK. Among the local firms, Kim & Chang took the second place in the Acritas' 'Top 20 Law Firms,' and was the only Korean firm named in the survey.

Acritas announced the result based on interviews with 379 in-house counsels in organization in Asia-Pacific with revenues over USD 50 million, including the assessment of their awareness and favorability towards law firms and their consideration of firms for top-level, multijurisdictional deals and litigation.

Ranked amongst top 100 law firms
- The American Lawyer Magazine's Global 100 (2014)

Kim & Chang has been named in 'Global 100,' a special feature of The American Lawyer Magazine (ALM), a renowned US-based legal magazine. Our firm was ranked amongst Top 100 firms in 'Most Lawyers (List of the number of lawyers)' chart, in 'Most Global (List of the number of countries in the firm has offices)' chart, as well as in 'Pro Bono Commitment' chart. Kim & Chang is the only Korean firm to be listed in these charts.

The 'Global 100' is ALM's annual publication, and the results are based on the survey of global law firms. This year, it announced Top 100 law firms in each of the following category: Pro Bono Commitment, Most Revenue, Most Lawyers, Most Profits Per Partner, and Most Global.

PRO BONO

Recognized as one of the world's top 10 pro bono firms
- Who's Who Legal Pro Bono Survey 2014

Kim & Chang was recognized as one of the top 10 leading law firms in the world for its pro bono services according to Who's Who Legal Pro Bono Survey 2014 for two consecutive years. Kim & Chang is the only Asian firm to be listed. Who's Who Legal, an international legal media, conducts global surveys on law firms' pro bono services since 2013.

Who's Who Legal mentioned that "Kim & Chang's committee for social contribution has steered the way in Korea for the organisation and delivery of pro bono legal services." Also, as for the reason Kim & Chang was chosen as one of the world's top 10 law firms in pro bono services, Who's Who Legal said "[t]he firm has committed to providing legal advice to 30 NGOs and groups, … [and] the firm helped provide a proposal of legislation aimed at compensating South Korean companies that had invested in Gaesong Industrial Complex..."

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