KIM & CHANG

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A Quarterly Update of Legal Developments in Korea

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TAX

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Korea's Strategy and Finance Ministry Proposes Tax Law Changes for 2017

On July 28, 2016, the Ministry of Strategy and Finance ("MOSF") announced the proposed tax law amendments for 2017. MOSF has submitted the draft tax law amendment to the National Assembly.

The proposed amendment is expected to effect for the fiscal year commencing on or after January 1, 2017.

Major Tax Amendments Being Proposed:

1. **New limit on utilization of Net Operating Losses ("NOL") carryforwards for foreign companies**

   Up to fiscal year that ended on or before December 31, 2015, NOL of a domestic company may be carried forward for 10 years, and fully deducted against taxable income in subsequent years.

   - However, as a result of the 2015 tax law amendment, from the fiscal year commencing on or after January 1, 2016, the amount of NOL carryforward that can be deducted in any given year is limited to 80% of taxable income for such year.
   - The new limit does not apply to foreign companies with a permanent establishment in Korea ("Korean branch"). This means there will be a discrepancy in NOL utilization between domestic companies and foreign companies with Korean branches.
   - To remove such incongruity, a new tax amendment is being proposed to impose the same limitation on the utilization of NOL carryforwards by foreign companies with Korean branches as currently applicable to domestic companies.

2. **County-by-Country ("CbC") reporting requirements for Multinational Enterprises ("MNEs") Introduced**

   In the wake of OECD/G20's on-going efforts to prevent Base Erosion and Profit Shifting ("BEPS"), amendments to the tax law have been proposed to require the filing of Country-by-Country ("CbC") report.

   - This would be an additional requirement. Under the tax law, which passed last year (2015), companies are required to file the Comprehensive Report on International Transactions.
   - More specifically, domestic parent companies of MNEs with prior fiscal year consolidated revenue exceeding KRW 1 trillion will be required to submit: (i) the CbC report that includes details of overseas affiliates' business activities (e.g., revenue, profit, headcount, assets, etc.); and (ii) their tax payment in overseas jurisdictions, within 12 months of such taxpayers' fiscal year end.
   - The proposed amendment applies to Comprehensive Report on International Transactions filed on or after January 1, 2017.

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The Patent Court Publishes Guidelines for Appeals of IP Infringement Cases

On March 16, 2016, the Patent Court published its "Guidelines Regarding Appeals of IP Infringement Actions" ("Guidelines").

Since January 1, 2016, the Patent Court has had jurisdiction over most appellate IP infringement cases in Korea, in addition to invalidity cases, which it already heard. As a result, the Guidelines essentially articulate specific procedures to be followed in most appellate IP cases in Korea going forward.

The Guidelines also provide rules for negotiating procedural issues concerning appeals of IP infringement cases. For example, they designate (i) deadlines for submitting claims and defenses, (ii) procedures for conducting argument sessions (including hearings for each issue), and (iii) methods for requesting and examining evidence.

Other Notable Aspects Include:

1. New case management conference procedures (similar to U.S. practice)

   - The Guidelines establish a "Case Management Video Conference" procedure, similar to case management conferences used in U.S. federal district courts, which allows the court to discuss and negotiate various procedural issues with the parties.

   - Specific procedural issues include: (i) the dates and number of hearings, and the issues to be discussed at each hearing; (ii) deadlines for submitting claims and evidence; (iii) whether there is a need for evidence that requires time to prepare (e.g., expert testimony or testing), and any relevant deadlines; (iv) whether the parties will utilize technical presentations to explain any relevant technologies; (v) whether to refer the case to mediation; and (vi) any other procedures that may be helpful for confirming and organizing the issues of the case.

   - Under the Guidelines, the court can then issue a "Preparation Order for Procedural Matters," similar to a U.S. scheduling order.

     Potential Impact: Since the Guidelines do not outline any specific sanctions or penalties for failure to follow the deadlines prescribed in a preparation order, it remains to be seen how the Patent Court will utilize such orders.

2. Specific issues can be heard on different dates

   - The Guidelines also allow the court to set up separate dates for pleading different issues where: (i) a case includes several claims that are consolidated, or involves multiple issues, which need to be heard separately; (ii) a case requires a hearing on the interpretation of the claims first, as there is a dispute over interpretation affecting other issues in the case; or (iii) there is some other reason that requires issues to be heard separately.

     Potential Impact: It may become more common to hold a separate hearing in patent cases to determine the meaning of patent claims, as with Markman hearings in the U.S.

3. Formal expert witness procedures

   - The Guidelines specify new procedures for qualifying and admitting the testimony of expert witnesses.

- Features of these procedures include: (i) when moving for the admission of expert witness, the party must include a statement showing the expert's expertise and objectivity; (ii) the court may issue an order specifying procedural matters necessary for the examination of the expert witness (e.g., setting a submission deadline for a witness affidavit, setting the subject matter for a particular expert examination, setting time limits on witness examination, and setting deadlines for submitting witness impeachment arguments and evidence); and (iii) direct examination should not go beyond what is included in the corresponding expert affidavit.

  Potential Impact: The new rules may encourage greater use of expert witnesses in patent litigations in Korea.

4. **Higher threshold for introducing new arguments or evidence on appeal**

   - Previously, the Patent Court would generally accept new arguments and evidence even if they were presented for the first time on appeal.

   - Now under the Guidelines, parties seeking to introduce new arguments or evidence on appeal must provide reasons why such arguments or evidence could not have been presented during the lower court proceedings.

     Potential Impact: This requirement is expected to encourage parties to develop and present their arguments and evidence at the first instance trial level, rather than relying on late disclosures for strategic or other reasons.

ENVIRONMENT

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Korea's Environment Ministry Preparing Tougher and More Expansive Regulations for Chemical Substances & Products

Korean public interest in chemical safety has been higher than ever. The public has been hearing news reports that continue to raise health and safety risks of certain household and industrial products (e.g., humidifier sanitizers, air fresheners, filters used in air purifiers or air conditioners). Meanwhile, South Korea's environment authority, the Ministry of Environment ("MOE"), has been taking active consumer protection measures, such as product recalls.

Specifically, the MOE recently conducted a comprehensive inspection of "potentially risky products." Based on the data gathered, the MOE is preparing an amendment to the regulations to: (i) expand the list of regulated products; and (ii) strengthen the safety and labeling standards applicable to these products.

Potential Impact on Chemical Regulatory Compliance:

In light of the above MOE activities, regarding the overall management of chemicals by companies doing business in Korea, we expect stronger monitoring and enforcement by the regulators, making chemical regulatory compliance more important than ever for the affected companies.

- In particular, the "Central Environmental Investigation Team" (task force) was recently created.

- Environmental authorities, such as the MOE, have been accumulating vast data through their independent investigations and statutory reporting requirements.

Considerations for Companies and Their Business Partners:

Accordingly, companies are advised to ensure they are fully compliant with the various requirements under K-REACH and the Chemicals Control Act, including those relating to chemical confirmation, registration of new chemical substances, hazardous substance business licenses, declaration of hazardous substance subcontracts, appointment and declaration of hazardous substance managers, and hazardous substance handling standards and facilities standards.

In addition, we believe it would also be useful to ensure that your business partners are up-to-date on their chemical regulatory compliance to prevent any disruption in the supply chain.

MOE Has Begun Disclosing Results from the 2015 Statistical Survey of Chemical Substances

The Ministry of Environment ("MOE") is currently carrying out the data disclosure procedures relating to the results from the 2015 Statistical Survey of chemical substances.

On July 30, 2016, the MOE publicly disclosed the first set of data on its website. This first set involved data submitted by companies, which did not file a data protection application earlier this year.

By comparison, for those companies that filed a data protection application, the MOE is now reviewing the applications. We understand that for this set of applicants, following its review, the MOE will make the same type of public disclosure sometime after the review of the applications.

Details on MOE's Disclosure:

- The above disclosure constitutes an independent disclosure by the MOE (i.e., disclosure is not initiated by a third party's specific request for information), and does not involve all chemical information submitted in the Statistical Survey report.
- The data subject to disclosure include only select types of data applicable to hazardous substances (e.g., chemical name, annual volume handled, name of products containing the chemical) that constitute a "hazardous substance" as defined under the Chemicals Control Act, or a "hazardous factor" under the Industrial Safety & Health Act.
- To be part of this public disclosure, for all other data, such as a product's chemical composition and content, the MOE requires a third party's specific request for information, and the MOE's review of such request.

Potentials for Appeal: At the conclusion of the MOE's review, should the MOE decide to disclose data for which data protection was claimed, the disclosure (decision) can be appealed in two ways: (i) to the same review committee; or (ii) through an administrative litigation proceeding.

Recommendation: Accordingly, companies that have claimed data protection are advised to monitor the MOE's review process, and to consider the need for any follow-up measures, such as filing for appeal, or, in the event of an unfavorable decision by the MOE, an administrative litigation proceeding.

REAL ESTATE

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To Redevelop Aging Urban Logistics Facilities, Korea Introduces New System for Developing Urban High-tech Logistics Complexes

On June 30, 2016, certain amendments to the Act on Development and Management of Logistics Complexes (the "Act"), and the enforcement decrees and regulations (collectively, the "Amendments") came into effect. These Amendments aim to redevelop aging logistics facilities located in cities throughout Korea for the development of high-tech, mixed-use complexes for logistics and distribution.

Key Aspects:

The Amendments include, among others, the following:

1. **Changes to Existing Regulatory Scheme to Allow Installation of Facilities Related to Distribution/ Logistics/High-tech Industries in Logistics Complexes**

   Under the Amendments, existing logistics complexes are re-classified as "general logistics complexes," and urban high-tech logistics complexes are newly introduced.

   In urban high-tech logistics complexes, the following can be installed, but in each case, must be related to high-tech industries and logistics/distribution business:
   - Urban-type plants;
   - Facilities relating to knowledge-based industries;
   - Facilities relating to the information and communications industry; and
   - Educational and research facilities.

2. **Promotion of Multi-dimensional Development through Installation of Facilities Permitted in Other Districts (e.g., in Public Housing Districts)**

   Under the Amendments, simultaneous district designation is possible at the site for an urban high-tech logistics complex.

   Pursuant to the Amendments, certain other districts prescribed by the Presidential decree to the Act, including a public housing district, can be simultaneously designated as urban high-tech logistics complex sites.

   Also, a single building can be developed through consolidation of facilities permitted under such other districts, as well as urban high-tech logistics complex facilities and their supporting facilities.

3. **Mandatory Contributions to Public Interest upon Designation as Urban High-tech Logistics Complex**

   Under the Amendments, the developer of an urban high-tech logistics complex is obligated to make contributions of up to 25% of the market value of the concerned land to the national or a local government by way of the provision of public facilities. Contribution examples include support centers for business start-ups in the logistics industry, joint logistics facilities, and public housing or contributing to their operational costs.

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Supreme Court's Exceptional Decision on Performance Guarantee Deposit Despite Contractual Language

On July 14, 2016, the Supreme Court reversed the lower court's decision in the lawsuit brought by a consortium of investors led by Hanwha Chemical Corporation (such consortium, "Hanwha") against the Korea Development Bank ("KDB") and the Korea Asset Management Corporation ("KAMCO," and together with KDB, the "Sellers").

In its lawsuit, Hanwha sought the return of the performance guarantee deposit, which it delivered in connection with its attempted acquisition of DSME Co., Ltd. (the "Deposit"). Hanwha argued that despite the relevant agreement expressly providing that the Deposit constitutes a penalty in case of a breach of the agreement, the Deposit constitutes a liquidated damage in case of a breach of the agreement.

The Supreme Court's decision in this case is deemed exceptional, because despite the contractual language providing that the Deposit constitutes a penalty, the Supreme Court ruled that it constitutes liquidated damage, and accordingly, reduced the amount of such liquidated damage.

<u>Details of the Decision – Long-standing Principles, Key Facts, Court's Discretionary Power:</u>

In its decision, the Supreme Court reaffirmed the long-standing principles that:

1. In determining whether certain down payment or performance guarantee deposit payable under an agreement and subject to forfeiture in case of a breach is deemed a penalty, or whether liquidated damage should be made, a court will take into account the intent of the parties and the totality of the facts and circumstances; and
2. In case such down payment or performance guarantee deposit is forfeited upon a breach of the agreement, it is presumed that the forfeited amount constitutes liquidated damages rather than penalties. For such amount to be deemed a penalty, exceptional facts and circumstances are required to be shown.

Applying the principles above to this case, the Supreme Court held that the following facts indicate that the parties intended for the Deposit to be a means to enforce the execution of a definitive agreement, and cover all monetary compensation that may arise in the future. Thus, the Court reasoned, the Deposit should be deemed liquidated damage.

Key facts include:

1. The memorandum of understanding between the parties (the "MOU") provides that all monetary damages should be covered and addressed through the forfeiture of the Deposit; and
2. During the negotiation:
   - Hanwha was not able to fully understand the risk of executing a definitive agreement without confirmatory due diligence; and
   - Hanwha was not in a position to object to the performance guarantee deposit provision.

While a court cannot reduce the amount of penalties unless the imposition of such penalties is against public order and good morals, a court may – in its discretion – reduce the amount of unreasonably excessive liquidated damage.

Here, the Supreme Court reasoned that the amount of the Sellers' damages arising from the termination of the MOU should be limited to losses arising from the Sellers' reliance on the execution of the MOU. Therefore, the Court ruled that approximately KRW 315 billion of the

Deposit forfeited is unreasonably excessive, and should be reduced.

Specifically, the Court stated that:

1. The MOU does not provide any representation or warranty regarding the value of the DSME assets. The MOU only includes a performance guarantee deposit provision binding on Hanwha; and
2. Hanwha did not have any opportunity to conduct confirmatory due diligence despite the sizable amount of the Deposit.

Impact of the Decision:

When entering into an agreement that includes performance guarantee deposit clauses providing for liquidated damages or penalties, it would be advisable for the parties to comprehensively take into account the relevant facts (e.g., the underlying facts for including such clauses in the agreement) and the intent of the parties to prevent potential disputes over the nature of such deposit.

LITIGATION

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Korean Supreme Court Announces New Civil Procedure Rules on Page Limit and Other Administrative Requirements for Briefs

The Korean Supreme Court has recently announced changes to the rules of civil procedure, which are applicable to all civil case briefs filed on or after August 1, 2016 (including in pending cases). The amendments include new rules regarding standard paper size, margins, line spacing, and font size. One noteworthy change in these amendments includes a page limit (to 30 pages) on briefs for district court and appellate court cases.

Under the new rules, unless otherwise agreed by the parties and approved by the court, the court may order any nonconforming brief to be corrected and re-submitted by the filing party in a format that conforms to these rules. In setting the maximum page limit, the new rules also provide that briefs should not repeat what has been previously submitted.

The new rules are intended to help courts review cases more efficiently, while placing greater emphasis on effective advocacy. As the new rules take effect, how strictly the rules are applied may vary somewhat, depending on the complexity of the case and the court panel. This change will require all parties in civil litigation to make extra effort to assess whether their main arguments are being presented in the most concise and persuasive manner possible.

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Korea's Antitrust Watchdog Proposes Amendment to the Enforcement Decree of the Monopoly Regulation and Fair Trade Act

In June 2016, the Korean Fair Trade Commission ("KFTC") announced its proposed amendment to the Enforcement Decree of the Monopoly Regulation and Fair Trade Act ("MRFTA," and such proposed amendment, the "Proposal"). The Vice Minister and the State Council have reviewed the Proposal.

Mainly, the Proposal seeks to narrow the scope of an "Enterprise Group subject to Limitations on Mutual Investment."

Timeline:

During September 2016, the KFTC is seeking comments from the public, interested stakeholders, and other relevant government authorities. In October 2016, the KFTC will submit the Proposal as an agenda item for the National Assembly.

Key Highlights of the Proposal:

Scope of "Enterprise Group subject to imitations on Mutual Investment" Narrowed

- Under the current regime, an enterprise group with consolidated assets of KRW 5 trillion or more is regarded as being subject to the Limitations on Mutual Investment.
  - In an effort to reflect the relevant economic circumstances (changes), including the growth in the Gross National Product ("GNP"), the Proposal seeks to adopt an adjustment (increase) to the asset size threshold to KRW 10 trillion.
  - Likewise, under the existing exemption, an enterprise group with consolidated assets not exceeding KRW 7 trillion will be excluded from the scope (as compared to those with less than KRW 3.5 trillion).

- In addition, the Proposal would exclude a public enterprise group.
  - Such an enterprise group has been under regulation in terms of capital contribution requirements, disclosure requirements, as well as mid-and long-term financial management requirements (e.g., via the Act on the Management of Public Institutions, and the Local Public Enterprises Act).

Deadlines Adjusted / Extended

- The current regime requires the KFTC to complete its designation of enterprises subject to Limitations on Mutual Investment by April 1 of each year (or April 15, if necessary).
- In Korea, as most enterprises hold a general meeting of shareholders in late March, the Proposal seeks to take into account practical difficulties in preparing relevant materials for KFTC submissions.
  - Accordingly, the designation deadline is to be adjusted to May 1 of each year (or May 15, if necessary).
  - Also, the Proposal extends the deadline to file details of equity ownership and debt guarantee status for a company newly designated as an enterprise subject to Limitations on Mutual Investment from the end of April to the end of May.

Asset Requirement for a Holding Company Adjusted

- The Proposal would increase from the current KRW 100 billion holding company asset requirement to KRW 500 billion to bring it in line with the above threshold adjustments.

Regular Threshold Review (New Requirement)

- In order to timely incorporate changing dynamics in the business environment, the Proposal seeks to adopt a provision requiring a review of the above thresholds every three years, including the holding company asset requirement.

SECURITIES

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Korea's Top Financial Regulator Announces Proposed Amendments to the Presidential Decree of the FSCMA on Qualified Professional Investors

On June 27, 2016, the Financial Services Commission ("FSC") announced the proposed amendments to the Presidential Decree to the Financial Investment Services and Capital Markets Act (FSCMA). The amendments are anticipated to come into effect around November 2016.

Potential Impact: The changes, if implemented, should result in more opportunities for foreign fund managers to manage Korean investor's assets.

Major Change – Broader Definition of "Qualified Professional Investors":

While the proposed amendments are quite broad in scope, we highlight below the major change to the relevant regulations governing investment management business in Korea.

Under the existing regulations, an offshore fund that will be privately placed is eligible to register in Korea under the simplified private placement registration regime. Upon such registration, the offshore fund may be offered and sold to Qualified Professional Investors (QPIs). The current scope of QPIs include the Government, certain statutory pension funds and financial institutions, while excluding general corporates (i.e., non-financial institutions) and high net worth individuals.

Such target investor base is narrower than that of Korea-domiciled private funds, which are allowed to be offered and sold to certain qualified corporations and individuals. This has resulted in a disadvantage to offshore fund managers by limiting the scope of target investors, while also limiting the range of fund products available to general corporates and high net worth individuals (who have substantial investment experience and would not be in need of full investor protection measures typically required in a true retail offering).

To address this regulatory gap, the proposed amendment will expand the definition of QPIs to cover the following entities (in addition to the current scope of QPIs):

1. General corporates that are listed on the Korea Exchange;
2. General corporates that are listed on an offshore exchange;

3. General corporates that are "professional investors" (which is expected to be amended shortly to mean companies that have outstanding financial investments of KRW 5 billion or more, and are subject to external audit); and

4. Individual investors who are "professional investors" (which is expected to be amended shortly to mean individuals that: (i) have outstanding financial investments of KRW 500 million or more, and have annual income of KRW 100 million or more; or (ii) have outstanding financial investments of KRW 500 million or more, and total assets of KRW 1 billion or more).

Regulatory Reform: FSC's New Supervisory Measures Relating to Corporate Governance Regulations of Financial Institutions Now in Effect

Beginning August 1, 2016, Korea's revised law on the corporate governance of financial companies took effect. On the same day, the FSC announced its year-long review of controlling shareholders of Korean financial companies under the revised law on corporate governance of financial companies, including owners of Korean conglomerates.

Background:

On April 28, 2016, the FSC had announced that it had drafted "The Proposed Regulations Regarding the Supervision of Corporate Governance of Financial Companies" (the "Proposed Regulations") as a follow-up measure to the Corporate Governance Act, and the related draft Enforcement Decree.

In the previous regime, corporate governance regulations were complicated and differed depending on the type of the financial business involved. To tackle this issue, the FSC proposed a statutory reform of corporate governance of financial institutions. In July 2015, The Act on Corporate Governance of Financial Companies (the "Corporate Governance Act") was passed by the National Assembly with the purpose of establishing consistent and systemized regulations.

Earlier this year, on March 17, 2016, the FSC then announced the draft Enforcement Decree of the Corporate Governance Act, which provides further clarification on how the Corporate Governance Act should be applied to financial companies. The Enforcement Decree of the Corporate Governance Act passed through the cabinet at the end of July 2016.

Key Details of the Current Proposed Regulations:

While the Proposed Regulations do not include any provisions that deviate from what has already been announced in the Corporate Governance Act and the draft Enforcement Decree, some key details include:

1. Standards for determining whether financial companies' officers and employees may hold concurrent positions in other companies;
2. Standards for internal rules and annual reports regarding corporate governance matters;
3. Standards on establishing and operating internal control policy;
4. Standards for risk management;
5. Specific requirements for the approval of a change of major shareholders, depending on the type of shareholder; and

6. Practical procedures for approving a change of major shareholders, and qualification requirements for the largest shareholder.

Newly Added Key Requirements:

Details that were newly added to the Proposed Regulations include:

1. A financial company will be required to submit a report of an audit committee's work within one month of the end of every semi-annual period to the Financial Supervisory Service (the "FSS");
2. In preparing the annual report on the remuneration system, a financial company will be required to specify details on the remuneration and performance bonus of officers and certain employees; and
3. A financial company must report the establishment of or amendment to its internal control policy to the FSS, and must also install an internal control committee comprised of its: (i) representative director (who will take on the chairman role); (ii) compliance officer; (iii) risk management officer; and (iv) officer in charge of the internal control system.

Regulatory Reform: FSC Eases Various Licensing and Eligibility Requirements for Asset Management Companies

On May 11, 2016, the FSC announced comprehensive plans to reform the licensing policies and regulations to promote market competition and innovation in the Korean asset management industry.

New Regulation:

1. Beginning in June 2016, securities companies are now allowed to concurrently undertake private fund management business (including hedge funds and private equity funds) with their other lines of securities business, subject to certain Chinese wall requirements and rules.
   - However, there must be a physical separation between private fund management business and the company's other securities business.
   - Among other requirements, there must be a separate compliance function and personnel.
2. As of May 11, 2016, the requirements for a private fund management company to undertake the management of a public fund (single asset type) are now reduced to:
   - 3 years of experience in discretionary investment management and fund management (at a minimum, 1 year of fund management);
   - KRW 300 billion of assets under management (including discretionary investment management assets); and
   - No regulatory sanction equating to an institutional warning or above for the past 2 years.
3. Also in effect as of May 11, 2016, the requirements to transition into a fully-licensed asset management company was reduced.
   - Previously, 5 years of experience managing single-asset type public funds, and KRW 5 trillion of assets under management were required to transition into a fully-licensed asset management company.

- Now, 5 years of any type of fund management experience, and KRW 3 trillion of assets under management (discretionary investment management assets included) is sufficient.

4. Lastly, the so-called "1 group – 1 asset management company rule" has been abolished.

Impact:

These measures have been implemented to foster and promote the asset management business in Korea by allowing eligible asset managers to more easily enter the Korean market via mergers and acquisitions. This caters to the private fund management segment. The easing of the eligibility requirements also makes it easier to offer retail fund products in the market.

With the abolishment of the so-called "1 group – 1 asset management company rule," multiple asset management companies can now coexist as affiliates within one financial group.

INSURANCE

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FSC Announces the Proposed Partial Amendments on the "Deregulation of the Insurance Business Act including the investment of [A]ssets"

On June 28, 2016, the Financial Services Commission ("FSC") announced the proposed legislation to partially amend the Insurance Business Act ("Proposed Amendment") with a goal to, among other changes, deregulate insurance companies' investment protocol and practices.

The Proposed Amendment is expected to be submitted to a plenary session of the National Assembly in the near future.

Noteworthy Changes:

1. **Requirements for expanding insurance product lines clarified, and procedures for holding subsidiaries simplified.**

   As a prerequisite to the FSC's authorization, the Proposed Amendment clarifies that if a licensed Korean branch of a foreign insurance company intends to add an insurance product line to its existing insurance business, the branch must prove that the head office is engaged in the same insurance business (i.e., insurance product line).

   No approval from or report to the Korean regulatory authorities is required for an insurance company to hold a financial company as a subsidiary, so long as the required prior registration or approval to establish and/or become a major shareholder of the financial company was/were obtained in accordance with the applicable laws.

2. **Deregulation of product development and asset investment**

   In most cases, the Proposed Amendment will permit insurance companies to file the basic insurance product documents to the Financial Supervisory Service

("FSS") after the launch of the new product (i.e., "use and file").

In exceptional cases, prior filings will be required (i.e., "file and use").

Also, the Proposed Amendment would abolish various asset management regulations that limit the amount an insurance company can invest for certain specific asset types (as prescribed by the law). However, the regulations limiting investments in, or loans made by, an insurance company to its controlling shareholder and affiliates must remain unaffected.

3. **Requirement to verify the appropriateness of policy reserves enhanced.**

   The Proposed Amendment would require an insurance company to verify the appropriate amount of its policy reserves by an independent third party actuary.

4. **Obligations introduced** – an insurance company (and its agents) must verify: (i) overlapping coverages on indemnity medical insurance; and (ii) a system to evaluate the understanding of product information materials.

   The Proposed Amendment imposes administrative fines of up to KRW 10 million:

   - Triggered if an insurance company and its agents engaged in insurance solicitation fail to comply with the obligation to verify overlapping coverages for an insurance applicant on indemnity medical insurance during the solicitation process.

   Also, an insurance company's product information materials will now be subject to an evaluation system to assess and confirm consumers' level of understanding of such materials.

5. **Fair competition reinforced between and among insurance companies and mutual aid organizations**

   The Proposed Amendment allows the FSC to request other competent authorities supervising mutual aid organizations. This enables the FSC to consult on matters not only relating to the subject products, but also to assess their financial soundness.

   It also newly establishes related subordinate provisions to allow the competent authorities supervising mutual aid organizations to make joint inspection requests to the FSC, if needed, to ensure their financial soundness.

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FSC to Enhance Financial Consumer Protection, including Greater Regulatory Power of the FSS

On June 28, 2016, the Financial Services Commission ("FSC") proposed the enactment of the "Act on the Financial Consumer Protection Framework" (the "Proposed Enactment").

The Proposed Enactment seeks to enhance the regulatory power of the Financial Supervisory Service ("FSS") by increasing the maximum amount of administrative fines that can be assessed, and by allowing the FSS to estimate damages suffered by financial consumers.

Below we highlight five notable features of the Proposed Enactment:

1. **Financial Consumer's Right to Terminate or Revoke Financing Contracts Introduced**

   The Proposed Enactment provides financial consumers with the right to revoke certain financing contracts.[1] Such right can be exercised by providing a written notice to the seller of the financial product (including persons licensed as a broker or agent for selling financial products pursuant to other finance-related laws) within 14 days after receiving the loan. This revocation right is intended to provide financial consumers the opportunity to reconsider the need of incurring debt, and to seek optimal financing solutions.

   In addition, financial consumers may provide a written request to terminate a given financing contract within 5 years of its execution, if the seller committed mis-selling. Permissible examples include failure to provide adequate explanations, unlawful solicitation, or unfair marketing practices regarding the financial product sold.

2. **Remedies for Financial Consumers Expanded**

   The Proposed Enactment allows financial consumers to seek remedies during dispute mediation and lawsuit proceedings by securing the consumers' rights to receive, access, and listen to copies of the materials held by financial companies.

   Furthermore, for dispute mediations involving claims of less than KRW 20 million, the Proposed Enactment prevents financial companies from separately filing another lawsuit related to the dispute mediation until such mediation is concluded.

   For cases that involve claims of KRW 20 million or more, the Proposed Enactment allows courts to issue suspension orders for the lawsuit proceedings in the event that such proceedings are conducted simultaneously with the dispute mediation procedure.

   Regarding lawsuits for damages related to mis-selling, the Proposed Enactment partially shifts the burden of proof to financial companies – companies are required to prove that they did not commit gross negligence or willful misconduct in light of suitability and appropriateness of the financial product sold, and their obligation to provide adequate explanation thereof.

3. **Regulations and Sanctions Related to the Sales of Financial Products Expanded**

   The Proposed Enactment strengthens regulations related to the selling of financial products, and increases the level of sanctions that can be imposed on financial companies for violating such regulations.

[1] The enforcement decree of the Proposed Enactment will set out the applicable financing contracts, which will include loan contracts

The Proposed Enactment requires the application of the principles of suitability and appropriateness with respect to the financial product sold, even for loan-type products.

It also expands the seller's obligations to notify and explain, as well as the scope of unfair sales activities that are prohibited. A financial company may be subject to an administrative fine of up to 50% of its revenues that was generated from engaging in sales activities that are in violation of the Proposed Enactment, and the financial consumer may also terminate the relevant contract.

Additionally, the FSS may prohibit the sale or solicitation of certain financial products, if such a sale or solicitation can result in monetary damages to financial consumers.

4. **Pre-Sale Disclosure Obligations to Financial Consumers Expanded**

The Proposed Enactment expands the scope of information that must be provided to financial consumers in the sales of financial products.

Under the Proposed Enactment, the FSC may make information publicly available, in which the regulator compares the major terms of financial products in each category.

The FSS may evaluate individual financial companies' status regarding consumer protection, and may publicly issue its findings.

Furthermore, financial companies are obligated to inform financial consumers of any compensation (including commissions and remunerations) that the seller of the financial product paid out to sales agents, brokers, and consultants in connection with the sale of financial products.

5. **Regulatory Requirements for the Sale of Financial Products Now Classified by Product Function (4 Types)**

The Proposed Enactment classifies financial products and their services into four types according to their practical functions.

Specifically, these four types are: (i) deposit-type products (products that guarantee the principal investment amount, such as time deposits); (ii) investment-type products (products that do not guarantee the principal investment amount, but generate return on the investment); (iii) insurance-type products (products that pay out insurance payments for certain insured events after the policyholder have paid insurance premiums for a long period); and (iv) loan-type products (a financial company provides a loan and the borrower repays the principal amount of the loan and accrued interest thereon).

The Proposed Enactment prescribes a different set of regulations for the sale of each type of financial product based on several factors, including the principles of suitability and appropriateness for each relevant financial product, explanatory obligations, and regulations on advertisement.

New Enforcement and Supervisory Regulation for Enhanced Corporate Governance Take Effect

On March 17, 2016, the FSC (in line with its promulgation) announced a proposed Enforcement Decree of the Act on Corporate Governance of Financial Companies (the "Corporate Governance Act"), designed to implement a uniform and systematic framework in regulating corporate governance of financial companies (the "Decree"). On April 28, 2016, the FSC issued the proposed Regulations Regarding the Supervision of Corporate Governance of Financial Companies (the "Regulations").

Both the Decree and the Regulations became effective as of August 1, 2016, along with the Corporate Governance Act. We now have in effect several regulatory measures concerning corporate governance of financial companies, including (among other things) detailed guidelines and standards on director qualifications, composition of the board of directors, and internal control of financial companies.

We analyze below four notable changes:

1. Biennial Review of Largest Shareholder – Scope Expanded

   Before: Under the previous regulatory regime, only banks, financial holding companies, and savings banks were subject to a biennial review of their largest shareholder (whether that shareholder is an individual or a corporate entity).

   Now: Under the Corporate Governance Act, however, the individual who is either directly or indirectly the largest shareholder of other financial companies (such as insurance companies, financial investment companies (i.e., securities firms and asset management companies), and specialized credit financial companies) are now also subject to biennial review.

   Specifically, the Decree and Regulations prescribe qualifications for the largest shareholding individual of financial companies (including the requirement that the individual shall not have received a criminal fine or greater penalty for violating any financial law or regulation, the Punishment of Tax Evaders Act, and/or the Monopoly Regulation and Fair Trade Act within the past five years).

   The Decree and Regulations also grant the FSC the authority to order a restriction upon exercising that individual's voting rights beyond a 10% of the individual's shareholding in a financial company for severe violations of the prescribed qualifications (e.g., the largest shareholder or special related person of an insolvent financial company, whose banking transactions are suspended due to an insolvency in the past five years).

2. Director Limitations Expanded

   Before: Under the previous regulatory regime, a person who was expected to represent the interest of a company that manages the assets of a financial company or its subsidiary was prohibited from becoming a director of a bank or financial holding company.

   Now: The Decree and Regulations expand the application of this restriction to directors of all financial companies.

   In addition, the Decree and Regulations impose greater limitations on outside directors holding concurrent positions, and also limit the term of directorship to 6 years (or an aggregate of 9 years, in the case of holding directorships at various subsidiaries of a financial company).

3. Composition of Board of Directors, Public Disclosure Requirements, Etc.

The Decree and Regulations require financial companies with total assets of KRW 5 trillion or more to have at least three (and in any event, a majority) of its board of directors, and at least 2/3 of its audit committee members consist of outside directors.

Also, all financial companies must publicly disclose their internal regulations concerning corporate governance. Specifically, in terms of the composition, authority, and management of its board of directors, and all financial companies must prepare a "management succession program", setting forth the principles of management succession for the CEO, qualifications for the succeeding CEO, and the recommendation procedures for qualified candidates.

4. Performance-based Incentive Regulations Expanded

Under the Decree and Regulations, financial companies with total assets of KRW 5 trillion (for savings banks, the threshold is KRW 700 billion) or more must provide performance-based incentives that takes into account various factors, such as job characteristics, level of responsibilities of their directors and employees, and whether the work constitutes investment activities, instead of applying a "one-size-fits-all" performance-based incentive scheme to all directors and employees.

In addition, the Decree and Regulations require a certain percentage of the performance-based incentives for directors and financial investment personnel to be subject to deferrals over at least a three-year period.

INTERNATIONAL TRADE & CUSTOMS

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Key Takeaways of the "Brexit" Vote

In the United Kingdom ("UK") European Union membership referendum held on June 23, 2016, the UK electorate voted to leave the European Union (the "EU"). The UK's exit from the EU ("Brexit") signifies its withdrawal from the Treaty of Lisbon, which forms the constitutional basis of the EU since the treaty took effect in 2009.

The withdrawal process is expected to take more than two years, and there is considerable uncertainty regarding the prospects of the EU and UK, following Brexit. Nonetheless, the exit of the UK, which has accounted for over 20% of the EU's economy, is expected to substantially impact the existing legal regimes and global market conditions.

<u>Potential Impact to Korea:</u>

When the UK officially withdraws from the EU, pursuant to the Treaty of Lisbon and the applicable territory provision of the EU-Korea Free Trade Agreement ("FTA"), the UK will no longer be bound by the EU-Korea FTA. In the interim period, both Korea and the UK are subject to all EU-Korea FTA provisions.

<u>What Can We Expect?</u>

- As of 2015, the EU makes up 9.1% of Korea's export, and the UK only makes up approximately 1.4%. Therefore, the impact Brexit will bring upon the Korean economy would be limited, but, when the Brexit is

actually implemented, one can expect numerous changes regarding UK-Korea trade relations, as the EU-Korea FTA will no longer govern their relationship.

- We can also expect that the uncertainty surrounding the impact of Brexit will result in shrinkage of investment and stagnancy of business transactions. This negative effect on the global economy could both directly and indirectly affect the Korean economy.

- If the UK withdraws from the EU, UK goods will no longer be eligible for preferential tariff treatment under the Korea-EU FTA, and therefore, the Korean importer would be required to pay customs duties according to applicable non-preferential tariff rates. However, it is likely that preferential tariff rates would apply until the UK's withdrawal from the EU takes actual effect.

- Korea mainly imports crude oil, automobiles, medical supplies, and alcoholic beverages from the UK. The UK mainly imports automobiles, machinery, and electronic equipment from Korea. Because most imported goods (such as crude oil, automobiles, and alcoholic beverages) are currently subject to preferential tariff treatment under the Korea-EU FTA, if the UK does not separately sign a FTA agreement before withdrawing from the EU, the benefits accorded under the Korea-EU FTA will no longer apply, resulting in reduced pricing competitiveness.

- Nonetheless, if the British pound continues to be weak following Brexit, the import price could be relatively lower, possibly leading to an increased import of goods.

- Because domestic importers will only receive preferential tariff treatment until the UK withdraws from the EU, they may consider response measures, including: (i) advance negotiation of prices; and (ii) clarification of contractual rights and obligations to prepare for possible changes in supply & demand, price, or the general trading environment.

- Also, importers of raw material who currently receive preferential tariff treatment under the Korea-EU FTA may consider finding new suppliers while re-examining its current supply chain.

- Exporters and producers of products who currently benefit from preferential tariff treatment under the Korea-EU FTA may need to consider response measures in advance. Even if the UK withdraws from the EU, preferential tariff treatment may still be accorded if Korea and the UK sign a new FTA agreement. However, since such FTA agreement will require a new round of negotiations, it is entirely possible that the tariff concessions may not be identical from those in the Korea-EU FTA.

- It is also possible that different sets of rules of origin may apply in determining the "originating" status of the goods traded between Korea and the UK on a going-forward basis.

<u>Key Considerations:</u>

Therefore, if Brexit becomes a certainty, and Korea and the UK enter into negotiations, companies that produce, export or import goods subject to preferential tariff treatment under the Korea-EU FTA may want to carefully monitor the negotiation process on issues such as the tariff elimination rate and rules of origin, and if necessary, provide their comments and opinion to both negotiating parties.

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

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Korean Legislature Passes the Amendment to the Game Industry Promotion Act

On May 19, 2016, the National Assembly passed the proposed amendments (the "Amendments") to the Game Industry Promotion Act (the "Act")[2], which will become effective on January 1, 2017.

Introduced in late last year[3], lawmakers introduced the Amendments in response to the rapidly changing gaming industry, including new platform introductions, such as IPTV and Virtual Reality devices (VR) that do not belong to any of the existing classifications.

Key Change – Self-rating Operators May Now Rate Games:

The Amendments include a new provision, allowing self-rating operators to rate games. These self-rating operators are to be designated by the Minister of the Ministry of Culture, Sports and Tourism ("MCST").

- If designated as self-rating operators, they can rate games on their own, including those that they have developed, as well as games they publish.
- In the case of platform service providers, self-rating operators can rate games that are provided on the platform (except for games that are not suitable for youth, and arcade games that can raise the risk of gambling).

Government's Demonstrated Efforts:

This Amendment demonstrates the South Korean government's effort to promote freedom of expression, and guarantee the autonomy of the private sector regarding the rating of games by permitting self-rating (private) operators to be established. Previously, this rating authority was generally given to the Game Rating and Administration Committee ("GRAC"), a public institution.

Removed Provisions:

However, it is important to note that in exchange for the new authority given to self-rating operators, the Amendments removed the provisions that currently recognize the authority of online open market operators to self-rate their games. In a subsidiary statute, lawmakers provide for a two-year transitional period.

- As such, online open market operators will not be able to distribute games through their self-rating system after such a 2-year period, unless the online open market operator is separately designated as a self-rating operator.
- While the Amendments include criteria for being designated as a self-rating operator, we expect the MCST and the GRAC to provide more detailed criteria (i.e., delegation of power through an ordinance of the MCST).

Recommendation:

Accordingly, impacted businesses (such as an online open market operator who wish to be designated as a self-rating-operator) should regularly monitor the relevant updates, and carefully review the detailed criteria (once prepared), so that you can be designated as a self-rating operator within the transitional period.

Implication for Foreign Companies:

Under the current regulations, foreign games made by foreign companies that do not have a presence in Korea cannot apply for a rating. Thus, foreign companies could find themselves in violation of the Act for providing games that have not been rated (even when domestic users gain access to the games through regular routes).

[2] The The Amendments were officially promulgated on May 29, 2016.
[3] The Amendments were introduced on November 6, 2015

However, the Amendments include a provision allowing self-rating agencies to provide such foreign games to domestic users (except for games that are provided to Youth Game Suppliers and General Game Suppliers), as long as the game's main purpose is not domestic distribution.

Impact:

With this, even foreign companies that do not have a domestic presence will be able to provide their games to domestic users. As such, once the Amendments become effective in January, overseas game producers will be able to avoid violating the Act by taking advantage of the Amendments.

Korean Government Issues New Guidelines on the Right to Request Revocation of Access to One's Internet Postings

While active discussions are taking place globally on how to guarantee the "right to be forgotten," guidelines for implementing the relevant rights have been enacted in Korea.

Specifically, on April 29, 2016, after obtaining extensive opinions from a wide social spectrum, the Korea Communications Commission ("KCC") established guidelines on the "Right to Request Revocation of Access to Self-Posts" ("Access Revocation Right") (the "Guidelines").

Prior to the implementation of the Guidelines, the South Korean Government had confirmed its policy to not provide an exception for the Access Revocation Right. Now, the Access Revocation Right allows for comprehensive deletion of all postings, including "product reviews written in exchange for payment," and "post[ings] that can be deemed as a single copyrighted work[,] such as Jisik-iN from Naver," which had been subject to continued criticism.

Overall Implications & Recommendations:

These Guidelines are designed to ensure the users' rights to request that others be restricted from accessing his/her own Internet postings[4].

Although the Guidelines are not legally binding[5], as the foundation for future legislation, they likely reflect the service providers' operational difficulties, and results from trial and error.

- As such, online service providers who manage and operate online forums ("Forum Administrators"), and Internet portal operators who provide Internet search services ("Search Service Providers") (collectively, "Business Operators") should pay particular attention to the relevant developments.
- In particular, please note that foreign businesses which provide their services in Korea in the Korean language are also subject to the Guidelines.

Major Items Covered:

1. User's request to revoke access to self-postings

    - The Access Revocation Right will apply when a user cannot on its own delete an Internet posting s/he made due to, for example, loss of the user's membership information either from account deactivation or non-use of his/her account for one year.

[4] "Revocation of access" means ensuring that others are restricted from accessing the user's own Internet postings without deleting such postings.
[5] Rather, these Guidelines are voluntary.

- That is, when a user intends to request others to be restricted from accessing his/her own Internet postings, the user should first confirm whether he/she can delete his own Internet postings.

- If the user cannot delete his/her own posting, the user can make an initial request to the Forum Administrator to revoke access to his/her posting.
  - However, if due to "special reasons," the Forum Administrator cannot revoke access (e.g., the Forum Administrator discontinues administration of the website), the user may instead make a second request to Search Service Providers.
  - These "special reasons" include cases where: (i) the Forum Administrator discontinues its business; or (ii) the Search Service Provider finds that the user cannot revoke access to his or her posting, because the forum is no longer actively administered.

2. Determination of access revocation request

Access revocation by Forum Administrators

- If after reviewing the materials submitted by the requesting party, the Forum Administrator determines the relevant posting is, in fact, a posting by that requesting party, the Forum Administrator must immediately revoke access to the relevant posting by "hiding (i.e., blinding) them" in lieu of deletion.
- This "hiding" requirement was introduced to prevent postings from being deleted due to false requests.

Access revocation by Search Service Providers

- If the Forum Administrator takes measures to revoke access due to an access revocation request, the Search Service Provider must also take measures to revoke access by deleting relevant cache memories from its search service. This should be done without making an independent determination as to whether to take such measures.
- However, if a requesting party directly requests the Search Service Provider to take measures to revoke access due to a "special reason," the Search Service Provider must evaluate the request.
  - Upon determination that the relevant posting was created by the requesting party, the Search Service Provider must take measures to revoke access by removing the relevant posting from being listed on search results.

Standards for rejecting Access Revocation Right

- Users have the Access Revocation Right only if the user himself/herself cannot delete the relevant posting.
  - If the requesting party can delete the posting himself/herself, or otherwise presents insufficient evidence that the posting subject to the Access Revocation Right is in fact a self-posting, Business Operators may reject the requesting party's request to revoke access.

- Also, even if the user proves that he/she wrote the posting, and cannot delete it on his/her own, the Business Operator may still refuse the user's request to revoke access if either: (i) the Business Operator has a legal duty to preserve the posting (e.g., preservation order from a court); or (ii) the relevant posting has "significant relevance to the public interest" (i.e., postings published by public figures regarding their official duties, or postings published by public officials (or press organizations and other such entities) relating to the duties of the official that are of public interest).

3. Notification of measures taken and third party appeals

Notification of measures taken

- When a Business Operator revokes access to a posting, because it has been proven from the requesting party's submissions that the posting is by the requesting party, the Business Operator must notify the requesting party of: (i) the post for which access is being revoked; (ii) the post's URL; and (iii) the access revocation date.

- Moreover, the Business Operator must also publicly announce that access has been revoked pursuant to the request of the requesting party, so that other users are made aware of such revocation.
- If the Business Operator rejects the access revocation request – either because there was insufficient evidence that the requesting party created the posting, or the posting falls into an exception for access revocation – then the Business Operator must also notify the requesting party the reasons for the rejection.

Appeals by third parties

- A third party who claims that the restricted posting was posted by himself/herself, and not by the original requesting party, such a third party can appeal and request the Business Operator to resume access by providing the reasons for the request, and attaching supporting documents.
- If the Business Operator finds that there is a legitimate reason to resume access, then the Business Operator must immediately implement measures to resume access, and notify the original requesting party and the third party that access has been resumed.
- Notification should include: (i) the posting for which access is being resumed; (ii) the access resumption date; and (iii) reasons for the resumption.

LABOR & EMPLOYMENT

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Seoul Central District Court Answers the Question of What Constitutes a Breach of the Representative Bargaining Union's Duty of Fair Representation?

On July 21, 2016, the Seoul Central District Court rendered its decision[6] addressing the duty of fair representation under the Trade Union and Labor Relations Adjustment Act ("TULRAA"), and the effect of a breach of this duty.

In its decision, the court stated that the duty of fair representation has both substantive and procedural aspects.

- Substantively, it is a duty to be fair to minority unions in terms of the working terms and conditions contained in the final CBA.
- Procedurally, it is a duty not to discriminate against minority unions in the course of conducting the bargaining process.

Accordingly, the court reviewed whether there was a breach of the substantive and procedural aspects.

This issue has been much debated, because there were few precedents, and as such, the court's recent judgment is very meaningful.

Background:

Under the TULRAA, if a business has more than one union, the multiple unions must determine which one will be the representative bargaining union that will have exclusive rights to collectively bargain and lead any industrial action. The minority unions then have limited rights to participate in the bargaining process.

[6] Case number 2014 *GaHap* 60526

The law provides exclusive rights to the representative bargaining union to ensure efficiency in the bargaining process, and consistency in union members' working conditions.

However, to minimize the risks to minority unions' rights, the TULRAA also imposes a duty of fair representation on the representative bargaining union. Accordingly, a representative bargaining union has a duty to bargain and conclude a collective bargaining agreement ("CBA") that is in the interests of other minority unions and/or their members.

Further under the TULRAA, representative bargaining unions must not, without reasonable grounds, discriminate against other unions or its members who took part in the procedures to create a single bargaining channel.

The Recent Case:

Recently, the Korean Metal Workers' Union ("Metal Union") brought a lawsuit under TULRAA against eight representative bargaining unions, whose employers have Metal Union branches as minority unions.

In the lawsuit, the Metal Union claimed that the representative bargaining unions breached their duties of fair representation.

In the same action, the Metal Union also requested that the court invalidate the CBAs entered into with two employers involved, because the representative bargaining unions had failed to represent the minority unions fairly.

Specifically, a breach of the duty of fair representation occurred where:

- Under the CBA, the representative bargaining union is the only principal body that can consult and make agreements with the employer, and/or review and make decisions.
- Under the CBA, the only union foundation day is the date the representative bargaining union was founded.
- The representative bargaining union refused to disclose bargaining meeting minutes and/or to hold a town hall meeting with minority unions.
- The representative bargaining union failed to respond to minority unions' CBA demands.
- The representative bargaining union failed to share any of its final CBA demands with the minority unions, and also failed to update the minority unions on how the bargaining was going.
- One representative bargaining union had only 11 more members than the total employees in the minority unions. However, 70% of the total permissible time-off for union activities was allocated to the representative union.

Breach of the duty of fair representation was not found where:

- A negotiation update was provided in a newsletter that was made public and accessible to minority union members.
- A union vote on the tentative CBA was opened to the members of the representative bargaining union only in accordance with its bylaws.
- The representative bargaining union kept a member of the minority union out of collective bargaining.

Other meaningful aspects of this decision:

Finally, we believe this judgment is meaningful, since the court discussed many other debated issues involving the duty of fair representation for the first time. These clarifications include:

- The representative bargaining union is not a delegate of the other union[s]. Rather, the representative union conducts its own business, as it partakes in collective bargaining and enters into an agreement with the employer.
- Therefore, the representative bargaining union has an obligation to collect the opinions of minority unions. However, this obligation does not need to include the minority members in the voting process provided under its bylaws, or obtain their consent when finalizing the CBA.
- Even if a breach of the duty of fair representation is found, it does not automatically invalidate the CBA concluded by the breaching union.

Korea's Employment Ministry Announces New "Smart Labor Audits" and Stronger Enforcement of Maternity Protection Laws

On May 31, 2016, the Ministry of Employment and Labor (the "MOEL") announced that it will implement so-called "smart labor audits" by using its existing data concerning childbirth and pregnancies ("Data") to identify companies likely to be in violation of Korea's maternity protection laws ("High Risk Companies").

After identifying the High Risk Companies, the MOEL has begun conducting full-fledged, unannounced inspections on such companies starting in June 2016.

What We Know About These Audits:

The MOEL will conduct these inspections even in the absence of an employee complaint or report, and employers may be prosecuted and punished by the MOEL for unfairly terminating an employee in connection with her pregnancy or childbirth, and/or failing to grant childcare leave to a qualifying employee.

This year, the MOEL intends to make a list of 1,500 High Risk Companies, and send segments of the list to the relevant regional labor offices. The regional labor offices will then assess the actual working conditions at these companies, and thereafter, narrow down the list to 500 companies with the greatest likelihood of being in violation of maternity protection laws. These 500 companies will then undergo on-site investigations.

These measures by the MOEL build on a recent trend in Korea towards strengthening employees' maternity protections and the enforcement of maternity protection laws.

MOEL May Now Receive Data from the National Health Insurance Corporation:

The Data will be based on "National Happiness Card" submissions, which are provided by employees to the National Health Insurance Corporation (in connection with their pregnancy and childbirth-related medical insurance coverage).

The MOEL will use the Data to identify High Risk Companies, and the subsequent inspections will focus on uncovering companies, where: (i) pregnant employees are not granted maternity leave, (ii) less than 30% of the employees who took maternity leave then took childcare leave, and (iii) employees are unfairly terminated on grounds of pregnancy, childbirth, or childcare.

Expected Impact:

In the past, employees were hesitant to report their employers' violations of the maternity protection laws to the MOEL, and such employers went mostly unpunished. However, since the MOEL may now receive Data from the National Health Insurance Corporation, and investigate of High Risk Companies, even without any employee complaint or report, these MOEL measures are expected to bolster the regulation of maternity protection laws and prevent related violations.

In light of MOEL's above plans, it is advisable for your company to examine your maternity protection-related policies and practices, and check whether they are compliant with the law.

Recent Lower Court Ruling Regarding Discriminatory Treatment against Non-Fixed-Term Employees

In Korea, discrimination against fixed-term employees and dispatched workers are specifically prohibited under the Act on the Protection of Dispatched Workers (the "Dispatch Act"), and the Act on the Protection, etc. of Fixed-Term and Part-Time Employees ("APFP"), respectively.

In contrast, there is no corresponding provision or regulation that prohibits discrimination against "non-fixed-term employees," who, just like regular employees, are employees without a specified term, but unlike regular employees have different working terms and conditions, including wages.

On June 10, 2016, the 13th Civil Division of the Seoul Southern District Court recognized various types of employment, such as non-fixed-term, fixed-term, and regular employees, as "social status" under Article 6 of the Labor Standards Act ("LSA"). Discrimination based on "social status" is one of the prohibited factors, and, the Court, in so recognizing, ruled in favor of the non-fixed-term employee plaintiffs. These plaintiffs claimed benefits that are only provided to regular employees of the defendant company, including housing/family allowance, meals, among other benefits.

Details of the Case:

The defendant company in this case classified its employees as general, annual salaried, and duty-based.

The plaintiffs were: (i) employees who joined the defendant company as fixed-term employees, but then continued to renew their contracts until they converted to duty-based or annual salary-based employees; or (ii) those who joined as duty-based employees.

Duty-based and annual salary-based employees are no different from regular employees in terms of job security, as they entered into "employment agreements without a specified term," but differed in terms of compensation (i.e., did not receive housing, family, or meal allowances).

Article 6 of the LSA provides that "employers shall not discriminate based on nationality, religion or social status."

The trial court held that since duty-based and annual salary-based employees cannot be assigned to other positions or be promoted like general employees, their employment type or work form is a type of "social status." Further, the trial court held that there was no "justifiable reason" for not providing housing, family, or meal allowances to such duty-based and annual salary-based employees, who do not differ from general employees in terms of their work scope or amount of work. Thus, the trial court held that the employment agreement with the duty-based and annual salary-based employees violated Article 6 of the LSA, thereby rendering it null and void.

Accordingly, the defendant company was ordered to pay the plaintiffs the wage difference as unjust enrichment.

Expected Impact:

Given the lack of any Supreme Court precedent on point, it is difficult to assess whether the above ruling will be upheld in the higher courts. However, we believe the controversy regarding whether differences in working conditions based on employment type or work form (such as occupation, position, rank) within the company without justifiable reason can constitute a violation of Article 6 of the LSA.

As such, companies that have employees with different working conditions from their regular employees should assess whether there is any unreasonable discriminatory treatment within the company, and consider improving the various personnel-related policies, regulations, and practices.

CORPORATE

CJ CGV Expands Its Global Business by Acquiring Turkey's Largest Movie Theater Chain Operator, Mars Entertainment Group

For approximately KRW 790 billion, CJ CGV Co., Ltd. ("CJ CGV"), together with a consortium of investors, acquired 100% of the issued and outstanding shares of Mars Entertainment Group, the largest movie theater chain operator in Turkey. In so doing, CJ CGV is expanding its global footprint, including in the European market.

The transaction garnered a high level of interest, as CJ CGV, Korea's market-leading movie theater chain operator in South Korea, acquired Turkey's market-leading moving theater chain operator, Mars Cinema.

Our Representation:

We advised CJ CGV in exploring financing alternatives, and in structuring the financing for the transaction, as well as warranty and indemnity insurance-related matters. This required us to deal with various cross-jurisdictional issues and challenges. Our team collaborated with other legal advisors to effectively conduct due diligence, negotiate and execute the definitive and ancillary agreements, negotiate and subscribe to warranty and indemnity insurance, obtain merger clearance, and close the acquisition.

Doosan Infracore Sells Its Machine Tools Business to MBK, Korea's Largest Private Equity Fund

On March 2, 2016, in a business transfer transaction, Doosan Infracore Co., Ltd. ("DI") made a sale to Doosan Machine Tools Co., Ltd. ("DMT"), a company newly formed by MBK Partners. MBK Partners then purchased DI's machine tools business from DI for a purchase price of KRW 1.13 billion.

Our Representation:

Structured as a business transfer, this transaction required detailed and complex legal analysis and advice relating to the transfer of the various assets, as well as permits and licenses.

It also involved the share transfer of DI's three overseas subsidiaries in China, Europe, and the U.S., as well as the business transfer of DI's Indian subsidiary. For each overseas subsidiary transfer, our team worked with local counsel to provide cross-jurisdictional legal advice, considering local laws.

Kim & Chang represented DI and DMT, leading the successful completion of the transaction. We provided comprehensive legal advice in general, including the transaction structure, legal due diligence, contract drafting and negotiation, and on all closing-related matters.

Global Cement Company, LafargeHolcim Group, Sells Lafarge Halla Cement Corporation to a Consortium of PEFs

On April 29 2016, for a purchase price of KRW 560 billion, LafargeHolcim Group, a global cement company, sold 99.7% of the outstanding and issued shares of Lafarge Halla Cement Corporation to a consortium of two private equity funds ("PEFs"), Baring Point Equity Asia and Glenwood Private Equity.

Our Representation:

Kim & Chang provided comprehensive advice and services to LafargeHolcim Group, including in negotiating and finalizing the share purchase agreement and the transition services agreement, preparing and submitting requisite regulatory and other filings, and in assisting with all closing and tax-related matters to successfully close the transaction.

After Winning Hotly Contested Takeover Battle, KB Financial Acquires Hyundai Securities for KRW 1.25 Trillion

Kim & Chang represented one of Korea's leading financial services companies, KB Financial Group Inc. ("KB Financial"), in its KRW 1.25 trillion acquisition of 22.56% of the issued and outstanding shares of Hyundai Securities Co., Ltd. ("Hyundai Securities"), a listed company that traded on the Korea Exchange for 41 years.

Our Representation:

Our team assisted KB Financial on all phases of this complex transaction within a very compressed timeline mandated by the sell side. Our representation included: due diligence, drafting and negotiation of the transaction documents, and all matters relating to the closing (including fulfilling the legal and regulatory requirements in a number of jurisdictions).

The controlling shareholder's (Hyundai Merchant Marine Co., Ltd. ("Hyundai Merchant Marine") key rationale for the sale was to implement restructuring and address liquidity issues. Thus, it was critical for the sell side to achieve closing within an expedited timeline.

At the same time, in addition to the usual due diligence challenges, for the buy side, the main challenge was to prepare appropriate deal protection mechanism in the transaction documents in case the rehabilitation procedures were to commence for Hyundai Merchant Marine.

Further, given the global footprint of Hyundai Securities, this transaction was subject to regulatory processes in multiple jurisdictions. Relying on our extensive M&A experience advising a financial services company with similar challenges, Kim & Chang's attorneys were able to help KB Financial close the transaction on the client's satisfactory terms.

Doosan Group and Other Financial Investors Sell Doosan Group's High-tech Weapons Manufacturing Unit, Doosan DST, to Hanhwa Techwin

On May 31, 2016, DIP Holdings Co., Ltd.("DIP Holdings"), an affiliated company of Doosan Group, and Odin Holdings Co. Ltd., a co-investor company established by certain financial investors, sold 100% of the issued and outstanding shares of Hanwha Defense Systems Corp. (formerly known as "Doosan DST") to Hanhwa Techwin, the weapons technology affiliate of Hanhwa Group. The purchase price was approximately KRW 655 billion.

Our Representation:

This transaction required careful and detailed legal analysis given that the target company is in the defense industry, subject to a strict regulatory regime. Thus, it was critical to obtain all relevant government approvals necessary for the successful closing of this transaction.

Kim & Chang's team provided comprehensive legal advice and services to both sellers, including negotiating and finalizing all relevant agreements, preparing and submitting all requisite regulatory and other filings, and assisting with all closing-related matters.

Also, in simultaneously representing a strategic investor and a financial investor, our attorneys successfully took into account the differing interests of each investor, which contributed to the timely closing that satisfied both investors.

ANTITRUST & COMPETITION

KFTC Closes 4-year Investigation on CD Rate-Rigging Allegations of 6 Commercial Banks

On July 5, 2016, the KFTC also notified that it would close its 4-year investigation[7] into the alleged collusion by six commercial banks on CD rates.

Our Representation:

In this matter, as with the alleged LIBOR rate rigging investigation, Kim & Chang represented multiple banks.

Our team again successfully demonstrated to the KFTC that in order to presume an unlawful agreement under Korean law, one must show both sufficient "external parallelism" among competitor conduct, and a "substantial probability" that such parallelism was the result of an agreement.

Here, the KFTC agreed with our analysis that: (i) it unclear whether there was sufficient "external parallelism" to find illegal collusion; (ii) despite a widespread 4-year investigation, no direct evidence of an agreement was revealed; and (iii) the changes in CD interest rates were true reflections of the market.

As a result, the KFTC concluded that it would be difficult to confirm the facts to determine whether there was sufficient "external parallelism," and a "substantial probability" of an agreement sufficient to find collusion in violation of Korean competition law.

KFTC Closes 3-year Investigation into the Alleged LIBOR Rate-Rigging

On July 5, 2016, the Korea Fair Trade Commission ("KFTC") announced that it would close its 3-year investigation[8] into the alleged "unfair collaborative acts" by FX traders at foreign banks, who were accused of colluding on LIBOR interest rates.

Our Representation:

In this matter, Kim & Chang represented multiple foreign banks.

Our team demonstrated that Korean competition law applies to overseas conduct only when there is a "direct, substantial, and reasonably foreseeable" effect on the Korean market. Specifically, we presented our analysis and arguments that in this case: (i) the overseas conduct did not specifically target the Korean market; and (ii) as Korea-based traders hardly transacted in any of the products suspected of being affected by collusion among foreign-based traders, the KFTC lacks the authority to conduct an investigation due to the lack of direct, substantial, and reasonably foreseeable effect on the Korean market.

Ultimately, the KFTC closed its investigation, agreeing with Kim & Chang's analysis and conclusion that it would be difficult to confirm that any overseas collusion regarding LIBOR interest rates had a direct, substantial, and reasonably foreseeable effect on the Korean market.

REAL ESTATE

A Foreign Private Qualified Investor Fund Acquires Jongno Tower in Seoul

Earlier this year, IGIS No. 81 Private Real Estate Investment Limited Liability Company ("IGIS No. 81"), a private qualified investor fund invested by a foreign fund, acquired the "Jongno Tower," the 33-story office building located in the heart of Seoul, from Samsung Life and Youngbo Hapmyung Hoesa.

Transaction Details:

On March 9, 2016, IGIS No. 81 entered into a sale and purchase agreement (the "SPA") with Samsung Life Insurance Co., Ltd. ("Samsung Life") and Youngbo Hapmyung Hoesa ("Youngbo," and together with Samsung, "Sellers") for the acquisition of a strata building known as "Jongno Tower" (the "Properties", and the acquisition thereof, the "Transaction"). The closing of the

[7] The KFTC notifies "closure of investigation process" when it concludes that it is impossible to determine whether the law has been violated due to difficulties in verifying the relevant facts of the matter.
[8] See fn. 7 above.

SPA with each Seller occurred on March 31, 2016, and April 1, 2016.

Our Representation:

Kim & Chang contributed to the successful closing of the Transaction by: (i) providing comprehensive legal advice during all stages of the Transaction, including establishing a private qualified investor fund, conducting legal due diligence, negotiating and executing the SPAs, lease agreements, and loan agreement for the Transaction; and (ii) by proposing optimal transaction terms designed to minimize any risks associated with acquiring a strata building owned by two Sellers, and assumption of existing lease agreements.

Korean Institutional Investors Acquire Equity Stake in a Luxembourg Company for a Multi-Use Building Investment in the Netherlands

A private qualified investor fund (the "Fund") invested by the Korean Federation of Community Credit Cooperatives and the Korean Teachers' Credit Union acquired 70% equity interest in IMMO INVEST LUX HOLDCO A S.à.r.l ("PropCo"), a Luxembourg company, through Société en Commandite Simple, a Luxembourg company.

In turn, PropCo acquired a multi-use building in Rotterdam, Netherlands, comprising of offices, a hotel, retail stores, and parking facilities (the "Transaction").

Our Representation:

Kim & Chang contributed to the successful closing of the Transaction by: (i) providing comprehensive legal advice during all stages of the Transaction, including reviewing and assessing due diligence issues, reviewing and negotiating a joint venture agreement with OPCIMMO, a listed French fund that acquired the remaining 30% equity interest in PropCo, as well as the definitive agreements for the Transaction; and (ii) reviewing and proposing optimal transaction structure and terms necessary to facilitate the funding discussion and the overall Transaction.

LITIGATION

Taxpayers' Procedural Rights Protected: Taxes Assessed without Pre-Assessment Notice Ruled Invalid

On April 15, 2016, the Korean Supreme Court held that the failure to issue a pre-assessment notice to a taxpayer prior to assessing his/her taxes[9] violates a taxpayer's procedural rights.

The Supreme Court also held that assessment instructions and correction instructions from the Board of Audit and Inspection ("BAI") do not count as exceptions under Article 81-15(2) of the National Tax Basic Law, which allow for tax assessments without an opportunity to pursue a Review of Adequacy of Tax Imposition ("RATI").

Background:

The lower court ruled that an imposition of corporate tax pursuant to a BAI request without advanced notice, or an opportunity for the taxpayer to pursue a RATI appeal did not result in any significant violations of a taxpayer's procedural rights. However, the Supreme Court disagreed, and stated (based on the Principle of Due Process under Article 12(1) of the Constitution) that taxation depriving a taxpayer's rights to notice and a request for RATI is a significant procedural violation, absent exceptional circumstances.

Our Representation and Impact:

We successfully represented the taxpayer in the Supreme Court case after the taxpayer suffered losses at the district and appeals court levels (where the taxpayer was represented by a different law firm). In doing so, Kim & Chang's team helped set a precedent which protects taxpayers' rights and solidified the importance of issuing pre-assessment notices and providing taxpayers an opportunity to pursue RATI appeals.

This decision suggests a recent trend in the Supreme Court placing greater focus on taxpayers' procedural rights.

[9] This failure to issue a pre-assessment notice to a taxpayer would deprive him/her of an opportunity to pursue a Review of Adequacy of Tax Imposition ("RATI").

TAX

Important Precedent Set for Future Business Restructurings in Korea – Clarifications on Tax-Qualified Spin-off Requirements

In the case of the biggest tax assessment made against a taxpayer by the Korean tax authorities, Kim & Chang's team successfully defended the taxpayer, resulting in cancellation of tax assessments made by both the municipal government and Korea's National Tax Service ("NTS").

This is an important precedent for future business restructuring, giving us clarity on the requirements for a tax-qualified spin-off.

Case Background:

In relation to a vertical spin-off, our client, a taxpayer company, spun off its manufacturing business to a third party, and established a NewCo.

The municipal government of the City of Incheon assessed acquisition tax, registration tax, and other local taxes to the NewCo. In addition, the NTS assessed corporate income tax on capital gains, and value added tax to the de-merged company by treating the divestiture as a non-tax-qualified spin-off.

Our Successful Defense:

Kim & Chang, on behalf of the taxpayer, filed claims for the cancellation of the corporate income tax assessment to the Seoul Administration Court. Our team also filed a claim for the cancellation of the local tax assessment to the Incheon District Court.

After both courts decided in favor of our client, the assessment authorities appealed the decisions to the High Courts. Recently, the High Courts affirmed the lower courts' decisions for our client by cancelling the tax assessments.

Significant Issues Clarified:

The case dealt with a number of major issues relating to the requirements for tax-qualified spin-off. The Seoul High Court decided in favor of our client based on the following legal grounds:

1. Regarding the Independent Operation requirement:

   The court ruled that the business being spun-off must be of a type that can operate separately and independently after the spinoff, and even where OldCo disposes of certain business place while maintaining its business, the Independent Operation Requirement is satisfied.

2. Regarding the Comprehensive Transfer requirement:

   The court clarified that such requirement is satisfied if the assets essential for the business being spun-off, or assets directly related to the business, are transferred to the NewCo.

3. Regarding the requirement that 50% or more of the transferred assets should be used directly by NewCo:

   The court ruled that such requirement is satisfied if the NewCo: (i) operates the transferred manufacturing business independently. and delegates substantial part of its business operation to a third party; and (ii) performs the activities essential for its business as a developer of urban development projects through the use of outside service providers.

Who is the Beneficial Owner of the Dividend Income? Kim & Chang Successfully Defends French Multinational Parent Company at Korea's Highest Court

Case Background:

Our client, a French multinational company, invested in a Korean company through an intermediate holding company in the UK, and withheld tax on the dividend by applying the reduced rate (5%) under the Korea-UK Tax Treaty.

The Korean tax authority argued that the UK holding company cannot be recognized as the beneficial owner of the dividend income under the Korea-UK Tax Treaty, and assessed additional withholding tax on the taxpayer.

The Korean tax authority did so by alleging that the French parent company is the beneficial owner of the dividend income, and applied the reduced withholding tax rate available under the Korea- France Tax Treaty (15%).

Our Successful Defense:

As counsel for the taxpayer in the Supreme Court case, our team was obtained a successful decision.

The Court held that the intermediate UK holding company should be recognized as the beneficial owner of the dividend income when considering the relevant facts, including incorporation background of the intermediate UK holding company, and details of its business activities. Thus the Court opined that our client was correct to apply the reduced withholding tax rate under the Korea-UK Tax Treaty.

CHINA

Kim & Chang Enables China Everbright Bank to Obtain Final Approval to Open Its First Seoul Branch in a Record Amount of Time

On December 16, 2015, China Everbright Bank Co., Ltd. ("China Everbright Bank") Seoul Branch ("Seoul Branch") obtained the final approval from the Financial Services Commission to engage in banking business in Korea.

Kim & Chang provided all legal consulting services required for the successful opening of China Everbright Bank's Seoul Branch, including obtaining preliminary and final approvals necessary for its establishment within nine months, which is an unprecedentedly short period of time.

Until the recent approval, China Everbright Bank, a Chinese joint-stock commercial bank, has been providing a range of financial products and services primarily in China and Hong Kong. The bank's products and services are customized for small and medium-sized businesses.

China's Top Online Mobile Ticketing Service and China's Leading IT Company Acquire Shares of YG Enertainment, One of Korea's Largest Entertainment Companies

Recently, Kim & Chang represented Weying Technology Co., Ltd. ("Weying"), China's top online mobile ticketing service provider, in all aspects of the transaction, including structuring the transaction, conducting legal due diligence and negotiations, preparing transaction documentations, and advising on all closing matters.

Details:

On May 27, 2016, Weying, together with Tencent Group ("Tencent"), China's leading IT company, entered into a share subscription agreement with YG Entertainment Inc., one of Korea's largest entertainment companies ("YG"), acquiring 953,676 newly issued shares by YG, for the purchase price of approximately KRW 41.9 billion. Additionally, Weying and Tencent acquired 519,699 existing shares from Hyun-Suk Yang, the largest shareholder, and from Min-Seok Yang, YG's CEO, at a purchase price of approximately KRW 22.8 billion.

This transaction required sophisticated legal review and advice that considered: (i) the nature of the transaction – intent to set up a strategic alliance in doing a joint venture business in China among Weying, Tencent, and YG; (ii) Weying's first investment in Korea; and (iii) the acquisition of a listed company's shares.

Seoul High Court Case Clarifies the New "Catch-All" Provision of the UCPA In Favor of the French Luxury Goods Maker, Hermès

On January 28, 2016, the Seoul High Court upheld a lower court decision in favor of Hermès (the plaintiff, represented by Kim & Chang) that the manufacture and sale by a Korean accessory company (the "Defendant") of certain so-called "Printed Bags" which used images of famous Hermès handbags (such as the "Kelly" and "Birkin" bags) was a violation of the "catch-all" provision of the Unfair Competition Prevention Act ("UCPA")[10].

Significantly, the High Court clarified how the "catch-all" provision should be applied in practice, an important development since the statute itself lacks specific guidance as to what activities are covered by the "catch-all" provision.

Case Details:

TThe retail price of a Birkin or Kelly bag can range from about KRW 10 million to about KRW 100 million. Because only a small number are produced each year, customers wishing to purchase these bags generally must put their names on a wait list and wait approximately 1 to 3 years before receiving a bag.

Defendant's "Printed Bags":

Defendant produced the Printed Bags by taking photographs of the plaintiff's products, and printing them on bags made of polyester using a 3-D photo-printing technique. This created an optical illusion that the designs were three-dimensional. Defendant then sold the Printed Bags through department stores, duty-free shops, and online shopping malls.

While Hermès brought both a direct consumer confusion claim and an unfair competition claim based on the "catch-all" provision of the UCPA at the first instance, the trial court did not rule on the direct consumer confusion claim (possibly because there was some question as to whether customers would actually mistake one of the defendant's bags for a genuine Hermès bag due to the substantial difference in materials used). However, Hermès prevailed on the "catch-all" claim and was granted injunctive relief and damages at the first instance court.

Plaintiff's product (The Birkin bag)	Front of Defendant's product (The Birkin bag is printed on the fabric)	Appearance of Defendant's product when folded
		

[10] Seoul High Court Case No. 2015*Na*2012671.

On Appeal – The High Court's Reasoning & Decision:

Defendant appealed the case, but the High Court emphatically affirmed the first instance decision.

The High Court clarified that the "catch-all" provision of the UCPA should only be applied if: (i) the product subject to protection is the result of the right holder's "substantial amount of investment or effort"; (ii) the product rights to be protected are "worthy of protection under the law" – in view of Korean IP statutes and the Korean legal system as a whole – and should not be considered part of the public domain; and (iii) the infringer's actions are "against the customs of fair commercial transactions or fair competition order."

The High Court determined that:

1. The Birkin and Kelly bags were indeed the result of Hermès' extensive investment and efforts;
2. Hermès' rights in the images of the Birkin and Kelly bags should be protected under the law; and
3. Defendant's act of producing and selling the Printed Bags was an unfair use of Hermès' designs.

The Court ordered that Defendant immediately stop manufacturing, selling, or otherwise disposing of the Printed Bags, and awarded damages to Hermès in the amount of KRW 150 million (KRW 100 million in damages to property, and KRW 50 million in intangible damages to reputation and credibility). The fact that the High Court separately awarded intangible damages (rather than simply including them in the total monetary damage award) is of some note since this is unusual in Korea, and may indicate that the High Court wanted to signal that it recognized the special harm Defendant's infringing products had caused to Hermès' brand and luxury image, since the Birkin and Kelly bags are famous for using the highest quality leather and craftsmanship, whereas Defendant's Printed Bags were sold at a relatively affordable price of approximately KRW 180,000 ~ 200,000, and were commonly used as shopping or diaper bags.

INTERNATIONAL TRADE & CUSTOMS

Supreme Court Provides Important Guidelines on How Clinical Drugs Imported by Pharmaceutical Companies Should Be Valued for Customs-related Duties

The Supreme Court recently rendered a decision on the issue of how clinical trial drugs imported by pharmaceutical companies should be valued for the purpose of imposing customs duties, which has been an on-going disputed issue.

Outcome & Value Created:

This Supreme Court decision is the first ever court decision from the highest court in Korea on the valuation of clinical trial drugs, and provides important guidelines.

Kim & Chang was able to pool its expertise from the various teams, including Customs, Litigation, and Healthcare, to effectively research and analyze the distinct characteristics of drug pricing, as well as R&D in the pharmaceutical industry. Our team was able to successfully challenge arguments proffered by the customs authorities, resulting in the Supreme Court decision.

Background:

The customs authorities argued that since clinical trial drugs are identical or similar to drugs later approved by the health authorities for sale, the import price of commercial drugs should be the basis for calculating customs duties of clinical trial drugs.

In response, the Supreme Court opined that given various aspects that factor into the customs duty calculations[11], clinical trial drugs could not be viewed as identical or similar to commercial drugs.

Also, in addressing how to calculate the import price of clinical trial drugs, the Supreme Court affirmed the High Court's decision, which vacated the customs authorities' assessment of duties, explaining that the

[11] Various aspects include including not only the purpose of use and similarity in appearance, but also the commercial value, safety, and efficacy verification status, reputation among consumers, etc.

duties should be calculated based on a "reasonable" standard as prescribed in Article 35 of the Customs Duties Act. Specifically, by means such as considering the commercial drug's reported import price, the manufacturing price, and in turn, excluding and adjusting for exporter's profit, as well as selling and administrative expenses.

ENGINEERING & CONSTRUCTION DISPUTES

Kim & Chang Wins a Turnkey Construction Case, Helping to Set Precedent on Requests for Project Time Extensions

Recently, Kim & Chang's Engineering & Construction Disputes Practice successfully represented a consortium against S city to resolve a dispute regarding extension for time based on unexpected and inevitable construction delay. The Arbitration tribunal issued its award in favor of our client on July 22, 2016.

Details of the Case:

S city had announced a bid for "XX rainwater undercurrent drainage system facilities for damage prevention expansion construction" using the turnkey method ("this bid").

The guidebook for this bid states that "the bidder shall implement numerical modeling to determine the smooth flow of the entrance, tunnel, and the exit[,] and include such results in the basic construction report, and the selected bidder shall execute such hydraulic model test during the execution period[,] and shall verify the safety of the facility."

The consortium (our client) performed the basic design through numerical modeling and participated in this bid, and it was selected as the final contender.

However, the results from the hydraulic model experiment were different from the numerical modeling experiment. When the consortium received such unexpected results, it was clear that a construction delay was inevitable.

The consortium then requested an extension of time on the project. S city, though, took the position that since the bid was based on the turnkey method, an extension of time cannot be granted, even if unexpected results came out of the hydraulic model experiment. The consortium and S city agreed to go through arbitration to resolve the dispute.

Our Key Arguments:

Our experts argued that the consortium was neither at fault regarding the adequacy of the numerical and hydraulic modeling, nor the differing results between the hydraulic modeling and the numerical modeling. Further, we argued that even though this construction is based on the turnkey method, if the reason for requesting the extension of time is not the builder's fault, then the 14-month extension should be approved.

Decision:

The arbitration tribunal agreed with our argument and adjudicated a 12-month extension of time.

Although the delay and extension of time is inevitable even if the contractor of the turnkey construction does not have any fault, generally, the project owner rejects the request of the delay and extension of time, because the project is a turnkey construction.

In rendering its decision, the arbitration tribunal stated tin its judgment that "should there be a reasonable excuse for a change order[,] and extension of time would be inevitable due to the change order, such requests for extension of time shall not be rejected." The tribunal also stated that "if the design or construction delay is due to the Project Owner, and if otherwise[,] it is the case that the reason for the delay is not the fault of the Contractor, a request for construction delay should be approved and considered reasonable[,] if the reason for such a request is within the substantial realm."

Impact of the Case:

This precedent makes it clear that requests for extension of time by the contractor in turnkey constructions should be allowed as long as there are "reasonable excuses."

CAPITAL MARKETS

Offshore RMB (Panda) Bond Offering by the Republic of Korea

This offering was the first Panda bond issuance in China by a foreign sovereign issuer. As a result, a number of unclear issues arising out of an issuance of this type under applicable laws and regulations had to be addressed and resolved. In the absence of any rules and regulations directly applicable to Panda bond issuance by sovereign issuers in the PRC due to a lack of precedents, it was unclear whether the offering would be feasible under the PRC laws and regulations. The parties, however, managed to clarify certain unclear issues under the PRC laws and regulations through close consultations with the PRC regulatory bodies (such as PBOC and NAFMII).

In particular, the parties' effort to emphasize the distinct characteristics of sovereign issuer allowed regulators to interpret relevant laws and regulations in reasonable manners. Due to characteristics of sovereign issues which are distinct from those of private enterprises, a securities issuance by sovereign issuer needs to be regulated under different legal framework. Given that the current regulations for Panda bonds are designed for issuance thereof by private enterprises, the establishment of a separate set of regulations for sovereign issuers seemed necessary. The parties managed to assist the issuer in successfully closing the bond transaction by resolving unclear issues under the PRC laws through close consultation and cooperation with the PRC regulators.

Kim & Chang prepared and reviewed the transaction documents in light of the distinct characteristics of the transaction.

AWARDS & RANKINGS

Kim & Chang Ranks First Among Korean Law Firms by Revenue and Headcount in The Lawyer's Global 200 (June 2016)

According to *The Lawyer*'s Global 200, Kim & Chang ranks 49th among the world's largest law firms (by revenue), and first among all Korean law firms.

In terms of headcount (number of lawyers), according to *The Lawyer*'s Asia Pacific 150, our firm ranks 8th among the largest law firms, and again first among Korean firms.

About *The Lawyer*

The Lawyer, UK-based legal magazine, announced the world's top 200 firms in the "Global 200" for the first time. *The Lawyer* regularly announces the top 100 local firms and top 50 international firms in its "Asia Pacific 150." Results are based on law firm surveys and interviews, and also on its own independent research.

Kim & Chang Receives Top Tier Ranking in the IFLR1000 Energy & Infrastructure (2016)

For the third consecutive year, Kim & Chang has been ranked as a top tier firm in Energy and Infrastructure. This recognition was recently announced in the 2016 rankings for *IFLR1000 Energy & Infrastructure*, a Euromoney publication.

In its announcement, *IFLR1000* mentioned that our firm is a mainstay in a stable legal market, and that Kim & Chang has built its credibility and expertise over time in energy and natural resources, including in both inbound and outbound project development work, regulatory advice, and dispute resolution.

Additionally, three of our attorneys – Mr. Ick Ryol Huh, Mr. Young Kyun Cho, and Ms. Chang-hee Shin – were selected as leading lawyers for Energy and Infrastructure.

Only Korean Firm Named by Acritas' Asia Pacific Law Firm Brand Index 2016, Ranking 4th Overall

Kim & Chang was ranked 4th in the Asia Pacific Law Firm Brand Index 2016 by *Acritas*, a global legal market researcher based in the UK.

Among local firms, our firm took first place in *Acritas*' "Top 10 Law Firms," and was the only Korean firm to be named in the survey.

About *Acritas*' Asia Pacific Law Firm Brand Index:

Acritas' Asia Pacific Law Firm Brand Index is an independent brand strength audit based on interviews with 375 chief legal buyers in the Asia Pacific region, and 255 buyers from outside the region with international legal needs within key Asia Pacific jurisdictions.

This Index draws on eight measures – top of mind awareness, favorability, consideration for top-level litigation, consideration for top-level M&A, consideration for multi-jurisdictional litigation, consideration for multi-jurisdictional M&A, most used for high value work by Asia Pacific buyers, and most used for high value Asia Pacific work by overseas buyers.

SEMINARS & ANNOUNCEMENTS

7th Edition of Tax Practice Research Published

Kim & Chang's Tax Audit & Tax Dispute Resolution team within our top-ranked Tax Practice contributed to the recent publication of the 7th edition of "Tax Practice Research."

About Tax Practice Research:

Since 2009, Tax Practice Research has been gathering research papers on recent Korean tax issues, and accumulating major judicial precedents of the Supreme Court of Korea, decisions of Korea's Tax Tribunal. It is published annually.

About Kim & Chang's Tax Practice:

Our Tax practice has been widely recognized as top tier by world- renowned legal media, including *Chambers Asia-Pacific* and *World Tax*.

Kim & Chang Establishes International Law Institute

In May 2016, Kim & Chang established the "International Law Institute," conducting internal research international legal issues, and cases pertaining to international and cross-border litigation.

Mr. O-Gon Kwon was named as the Kim & Chang International Law Institute's first president. Mr. Kwon served as a Vice President of the UN's International Criminal Tribunal for the former Yugoslavia (ICTY). He has extensive experience with both the national and international judicial systems, serving in the Korean judiciary for 22 years as a judge, and for a decade in the ICTY (as Korea's first permanent judge and VP).

Our International Law Institute will study the international judicial system and dispute cases, such as Investor State Dispute ("ISD"). It will also play a key role in supporting our clients' overseas investments.

Kim & Chang Presents at the Finance & Tax Forum Seminar

On June 14, 2016, our senior foreign attorney, Mr. Eun Jip Kim, presented on the current regulatory system of private equity funds and future directions at the Finance & Tax Forum. The seminar was held at the Korea Exchange.

Mr. Kim represents a broad range of companies in various sectors, including the securities, capital markets, and investment management. He specializes in securities and investment management regulatory work. Mr. Kim is a member of the Finance & Tax Forum, an association of finance and tax experts who regularly gather to discuss recent issues.

In his presentation, Mr. Kim noted that "the regulation on Private Equity Fund operator is necessary, while not recommending regulation on the fund itself." He also advocated for a regulatory system that is customized and focused on private equity, and not based on the public offering fund.

Kim & Chang Participates at the IBA Asia Pacific Arbitration Group Training Day

On June 3, 2016, our senior attorney, Ms. Liz Kyo-Hwa Chung, spoke at the International Bar Association ("IBA") Asia Pacific Arbitration Group ("APAG") Training Day.

Held in Kuala Lumpur, Malaysia, the IBA's APAG organized the Training Day. The IBA Arbitration Committee, together with the IBA Asia Pacific Regional Forum, established the APAG to further the development of international arbitration across Asia.

Widely recognized arbitrators and attorneys attended and discussed best practices in international arbitration in the Asia Pacific region.

Ms. Chung's "Enforcement of Arbitral Awards in Korea" presentation provided the Korean perspective, and compared the Malaysian and the Korean arbitration regimes.

Kim & Chang's Top Tax Practitioners Present at the Asia-Pacific Regional Tax Conference 2016

In May 2016, three of our senior tax practitioners – Mr. Yun-Jun Park, Mr. Dong Jun Yeo, and Mr. Je-Heum Baik – participated as moderator and panelists in the Asia-Pacific Regional Tax Conference 2016, hosted by IFA Seoul.

About the Conference:

On May 12th and 13th, the Asia-Pacific Regional Tax Conference 2016 was held at the Nine Tree Convention Gwanghwamun in Seoul, Korea. It was co-sponsored by Kim & Chang and other major law firms, accounting firms, and corporate taxpayers.

In this conference, representatives from private and public sectors, including government officials, OECD representatives, university professors, tax practitioners, and court judges shared their views on the international tax system. They also discussed the "Implementation of BEPS in the Asia-Pacific Region," including BEPS actions and strategies implemented by various Asia-Pacific countries.

Mr. Yun-Jun Park led the discussion as a moderator in the "Implementation of BEPS: South East/North East Asia" session. Mr. Dong Jun Yeo took part as a panelist in the same session.

Mr. Je-Heum Baik participated as a panelist in the "Round Table for Korean corporate officers" session.

Newsletter

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