KIM & CHANG

Newsletter

A Quarterly Update of Legal Developments in Korea

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By Jong Koo Park (jkpark@kimchang.com) and Seoyeon Lee (seoyeon.lee@kimchang.com)

FSC Proposes Changing the Law Governing External Audits

On April 19, 2018, the Financial Services Commission ("FSC") proposed an amendment of the Act on External Audit of Stock Companies (the "Act") and its Enforcement Decree.

The following takeaways are noteworthy:

1. More companies subject to external audits

Under the current Act and its Enforcement Decree, external audit requirements only apply to stock companies, and the criteria for whether a company is subject to an external audit are the company's assets, liabilities and number of employees (but not revenue). Thus, sizable limited liability companies ("LLCs") and stock companies with market influence but low revenue are left out of sight.

The amended Act brings LLCs within the scope of external audits and adds a revenue threshold to the existing criteria. Further, the amended Enforcement Decree specifies that in addition to listed companies and prospective listed companies (by merger or backdoor listing), other companies are subject to external audit unless they are small-sized companies. A company is a small-sized company (and thus exempt from external audits) if it satisfies any three of the following four standards (as of the end of the preceding business year): (i) total assets are less than KRW 10 billion; (ii) total liabilities are less than KRW 7 billion; (iii) revenue is less than KRW 10 billion; and (iv) the number of employees is less than 100.

Thus, an LLC will be subject to external audit unless it is a small-sized company, and companies whose total assets, total liabilities or number of employees that do not meet the threshold will nevertheless be subject to external audit if they are not small-sized companies.

2. Rotation of external auditors

The amended Act will adopt a so-called "periodic external auditor designation system" for listed companies and certain owner-managed companies to warrant auditor independence and audit quality.

Specifically, a company that has appointed its auditor for six consecutive years is required to appoint a Securities and Futures Commission-designated auditor if:

(i) its stock is listed on KOSPI or KOSDAQ; or
(ii) if unlisted: (a) its total assets are at least KRW 100 billion (as of the end of the preceding business year); and (b) its large shareholder or related party holds at least 50% of its shares of stock in aggregate and is a representative director.

However, this requirement does not apply, if the company has not engaged in accounting fraud, or its accounting practice is otherwise deemed reliable based on the external audits in the preceding six years (per the Presidential Decree).

3. External audit of internal accounting management system

The amended Act brings the internal accounting management system of listed companies under the scope of external audits. Thus, the representative of a company must report on the state of its internal accounting management system annually at the general meeting of shareholders. The external auditor is required to audit the target company's compliance with its internal accounting management system and report its findings in the audit report.

Significance:

The amended Act becomes effective on November 1, 2018 (provisions on LLCs will apply from the business year commencing after November 1, 2019). Companies are advised to review the amended Act and its Enforcement Decree, and if applicable, take necessary

By Sung Eyup Park (separk@kimchang.com) and Wooju Lee (wooju.lee@kimchang.com)

KFTC Announces and Implements Regulations on Digital Forensic Investigation Procedures

On April 3, 2018, the Korea Fair Trade Commission ("KFTC") promulgated and implemented the Regulations on the Collection, Analysis and Management of Digital Evidence as well as guidelines that set forth greater details on the KFTC's forensic review procedure (collectively, "Forensic Review Rules").

These new rules are intended to increase transparency in the forensic investigation procedures and measures, protect investigated companies' due process rights, and enhance the security of the collected digital evidence.

We anticipate that the Forensic Review Rules would enhance the KFTC's investigation expertise and efficiency.

Significance:

This recent regulatory development comes in the wake of the KFTC's September 2017 establishment of a new division named "Digital Investigation and Analysis," housed under its Competition Policy Bureau, and the hiring of a number of technical personnel capable of conducting forensic review.

Since then, the newly hired forensic experts have been fully engaged and conducting more expansive and aggressive evidence gathering during the initial stage of KFTC investigations. As such, the KFTC is expected to increasingly utilize its forensic capabilities in future investigations. In light of this, it will be more important than ever for companies to have in place appropriate procedures and systems for managing documents and give employees clear guidelines on how to manage documents before, during and following a KFTC investigation.

Key Points of the New Forensic Review Rules:

1. **Increased transparency in forensic investigation procedures and measures**

   The Forensic Review Rules provides detailed procedures regarding the KFTC's collection, delivery, registration, analysis, management and disposal of forensic evidence. These rules and standards are designed to protect the integrity of the data and enhance evidentiary value and ensure that the chain of custody remains fully documented after the KFTC's seizure of the relevant documents.

   For example, the KFTC is required to prepare a note on the content, collection date and hash value of seized materials, must record and manage a list of documents that are destroyed, and must (upon request by the company) provide written confirmation that data have been destroyed.

2. **Stronger protection of due process for investigated companies**

   Previously, investigated companies were only entitled to request a copy of extracted documents and protection of personal information. However, under the Forensic Review Rules, investigated companies may now request that the KFTC collect digital data in their presence and they participate in the data collecting and imaging process.

   Further, they are entitled to receive a copy of extracted image files. The KFTC is required to accede unless it has a justifiable basis for refusing the request.

Investigated companies may also request the KFTC to protect personal information, trade secrets and other sensitive information included in seized documents, and the KFTC must engage in good faith discussion with the company regarding the appropriate method of protection.

3. Enhanced security for collected materials

The Forensic Review Rules provides principles and standards for keeping seized digital data secure and preventing data misuse/disclosure and other security breaches for purposes other than permitted. For example, the KFTC is required to collect only the minimum amount of data necessary, and officials must not use the data for other purposes or divulge the data to other parties.

Once the collected data have been registered in a digital forensic system and the analysis of the materials and evidence has been completed, any data remaining in the system must be destroyed to prevent any leakage.

Also, those who wish to access and use the saved information must explain the reasons for requesting access and receive approval from the Director of the Digital Investigation and Analysis Division, and a log on the basis for and time/date of access must be preserved.

4. Clarification on R&R among relevant divisions

The Digital Investigation Division will be exclusively responsible for forensic investigations, except that the case management team will be responsible for initially searching, reviewing and seizing digital materials during an on-site investigation.

ENVIRONMENT

By Yoon Jeong Lee (yjlee@kimchang.com) and Hyeongjun Hwang (hyeongjun.hwang@kimchang.com)

National Assembly Passes the Act on the Safe Control of Common Household Chemical Products and Biocides

On February 28, 2018, the Korean National Assembly passed the Act on the Safe Control of Common Household Chemical Products and Biocides ("Biocides Act" or the "Act"), which was proposed by the Ministry of Environment ("ME") on August 16, 2017. The new Biocides Act was promulgated on March 20, 2018, and is scheduled to become effective on January 1, 2019.

Major provisions of the new Act are as follows:

1. Safe control regime for household chemical products

- If after a hazard assessment, a household chemical product[1] is determined to be hazardous, the Minister of Environment shall designate the product as a "household chemical product subject to safety confirmation." An importer or manufacturer of such a product is then required to obtain a safety confirmation from a certified

[1] A household chemical product refers to a product used in living spaces, such as a home, office or multi-purpose facility, and has the potential to cause exposure of chemicals to humans or the environment.

laboratory that the product is in compliance with the safety standards (Articles 3 and 10).

- "Potentially hazardous products" regulated under K-REACH will be newly designated as "household chemical products subject to safety confirmation" under the Biocides Act. In so doing, the scope of chemical products subject to safety confirmation is expanded to now include products used in offices and multi-use facilities, as well as those for home use (Article 3).

2. Biocidal active substance approval system

- A manufacturer or importer of a biocidal active substance2 is required to obtain an approval from the Minister of Environment. If the chemical structure, hazard level, efficacy and effectiveness of the biocidal active substance are equivalent to those of an authorized substance, the approval can be deemed to have been obtained (Article 16).
- Among the active substances that have already been distributed in the market before December 31, 2018, only those substances that are declared to the ME by June 30, 2019 will be designated as "existing substances," depending on the harmfulness, hazard level and type of product using the substance. Once designated, the product is exempt from needing approval for up to ten years (Article 18).

3. Biocidal product approval and labeling system

- A manufacturer or importer of a biocidal product is required to obtain an approval from the Minister of Environment. Products that have been recognized as "similar" to an already-authorized biocidal product shall be deemed to have been approved. Here, "similar" means, among others, products that contain the same biocidal active substance(s), have substances with similar composition/content, have similar use/application, have similar levels of hazardousness, and have similar levels of effect/efficacy of eliminating harmful organisms.
- Manufacturers or importers of approved biocidal products shall affix a label to the products indicating the composition and content of biocidal active substance(s) used, information on dangers associated with the use of the products, and first aid methods (Article 27).

4. Safe management and labeling standards for biocidal treated articles

- Only approved biocidal products may be used in biocidal treated articles (Article 28).
- Manufacturers and importers are required to warn of the risk of the biocidal-treated article, and give precautions for handling (i.e., provide information regarding the efficacy and biocidal effect of eliminating harmful organisms of the relevant biocidal article) (Article 28).

5. Standards for distribution management of household chemical products & biocides

- Advertisements for household chemical products subject to safety confirmation and biocidal products cannot use expressions such as "non-toxic" and "environmentally-friendly" (Article 34).
- Safety containers/packaging must be used to prevent accidents during handling/use of biocidal products (Article 20).
- For biocidal products or biocidal treated articles which have not been approved by the ME, advertisements or claims that may mislead consumers to believe the product has a biocidal function is prohibited (Article 34).
- When a manufacturer or importer becomes aware of any side effects of its product, such manufacturer or importer shall report this finding to the Minister of Environment. Here, manufacturer or importer refers to those who: (i) obtained an approval for the biocidal active substance/product; and/or (ii) manufactures/imports a household chemical product subject to safety confirmation/biocidal-treated article (Article 36).

[2] A biocidal active substance is a chemical substance, natural substance or microorganism that has the effect of eliminating, controlling, rendering harmless or deterring harmful organisms.

- An administrative fine, corresponding to the sales revenue, may be imposed for failing to conduct conformity testing for a household chemical product subject to safety confirmation, or for manufacturing or importing unapproved or unauthorized products (Article 38).

Significance:

Once the Biocides Act takes effect, in principle, marketing of all biocidal active substances and biocidal products is possible in Korea only if they are proved to be safe, except for those which were granted a grace period.

As the Biocides Act will take effect on January 1, 2019, companies that handle any biocidal active substances, biocidal products or biocidal-treated articles should carefully review the main provisions of the Act to identify any potential issues that need to be addressed.

INTERNATIONAL ARBITRATION & CROSS-BORDER LITIGATION

By Byung Chol Yoon (bcyoon@kimchang.com), Byung Woo Im (bwim@kimchang.com) and Bo Ram Hong (boram.hong@kimchang.com)

Successful Setting Aside of an Arbitration Award in Korean Courts

Members of Kim & Chang's International Arbitration & Cross Border Litigation Practice ("Arbitration Team") successfully set aside an arbitration award for violation of a Korean bank and a foreign party's arbitration agreement. The case was appealed, and the Korean Supreme Court issued the final memorable decision to set aside the award.

Under the arbitration agreement between the parties, they had agreed to arbitration under the auspices of the Korean Commercial Arbitration Board ("KCAB").

Background:

The KCAB has two sets of arbitration rules: one for domestic arbitration and one for international arbitration. International arbitration rules apply when one of the parties has its principal place of business outside of Korea. The two sets of rules have different procedures for the constitution of the arbitral tribunal. In this case, as the parties were from different countries, international arbitration rules should have been applied with the tribunal constituted in accordance with the international rules.

However, the Korean bank, as claimant, initiated the arbitration at the KCAB under the domestic arbitration rules, and the KCAB proceeded to constitute the tribunal under the domestic rules.

Following the constitution of the arbitral tribunal, the foreign party, as respondent, submitted an answer to the claim ("Answer"), which included its objection to the jurisdiction of the tribunal, since it was constituted under the domestic rules in violation of the parties' agreement to arbitration under the international arbitration rules.

The arbitral tribunal rejected the respondent's jurisdictional objection on the ground that the respondent had lost its right to make such an objection under article 50 of the then applicable KCAB international arbitration rules. Article 50 provides that an objection to any procedure in violation of the arbitration agreement or rules need to be made immediately, and if no objection is made and the procedure goes on, the party loses its right to object. The tribunal proceeded to decide on the merits of the case and issued an award against the respondent. The respondent party then went ahead and applied to the Korean courts to set aside the arbitral award.

In the set-aside proceedings, the claimant also argued that under article 5 of the Korean Arbitration Act, a party loses the right to object if the procedure continues without the party making an objection without delay, once it is aware that the arbitral proceedings are in violation of the parties' agreement or the arbitration act. In representing the respondent, the Arbitration Team argued that the constitution of the tribunal was in violation of the parties' agreement, and was thus a cause to set aside the award (under article 36 (2) 1. d. of the Arbitration Act). Specifically, we pointed out that article 17 of the Arbitration Act provides that any objection regarding the jurisdiction of the tribunal must be raised no later than the submission of a party's Answer to the merits of the dispute. This meant that the respondent did not lose its right to make its objections by objecting at the Answer stage. The Korean courts accepted this argument and set aside the arbitration award. The other party appealed, but the Korean Supreme Court ultimately dismissed the appeal.

Supreme Court's Ruling:

In dismissing the appeal, the Supreme Court ruled that in arbitration proceedings, the constitution of the tribunal is a fundamental factor to the arbitration agreement and proceeding. Further, if the constitution was in violation of the parties' agreement, then the foundation of the tribunal's authority is affected.

The Court went on to rule that objection to the tribunal's jurisdiction can be made in accordance with article 17 of the Arbitration Act (rather than under article 5 of the Arbitration Act or article 50 of the KCAB international arbitration rules). Based on this, the Supreme Court decided that even if the tribunal determined that it had jurisdiction over the arbitration, a tribunal constituted in violation of the parties' agreement was sufficient to set aside the award issued by such a tribunal.

Significance:

This case was challenging, because there were no precedents in the Korean legal system regarding the relationship and the interpretation of articles 5 and 17 of the Korean Arbitration Act or under article 50 of the KCAB international arbitration rules. Also, the tendency of Korean courts to strictly limit the requirements to set aside an arbitral award made this case particularly difficult and unpredictable.

The Arbitration Team supplemented the lack of Korean court precedent with interpretations of foreign arbitration acts and foreign cases, such as research and analysis of the UNCITRAL Model Law and other countries' arbitration laws and cases.

In doing so, the Arbitration Team ultimately persuaded the court, creating an important precedent in the highest Korean court that supports the autonomy of the parties to agree on the composition of the arbitral tribunal. This decision also provides further clarity on the support for international arbitration from the Korean judiciary.

UPDATES

ANTITRUST & COMPETITON

By Sung Eyup Park (separk@kimchang.com) and Wooju Lee (wooju.lee@kimchang.com)

KFTC Amends Criminal Referral Guidelines and Plans to Aggressively Pursue Employee and Corporate Violations of the FTL in Its Investigations

The amended Criminal Referral Guidelines ("Amended Guideline") prepared by the KFTC became effective on April 9, 2018. The Amended Guideline is designed to reinvigorate the KFTC's objective to curtail violations of the Monopoly Regulation and Fair Trade Law ("FTL") by actively pursuing criminal referrals of individuals and corporations in future KFTC investigations.

Details:

The Amended Guideline (i) provides detailed and clearer criteria for criminal referrals; and (ii) sets out a low bar for criminal referrals against both individual employees and companies.

More specifically, in contrast to KFTC's past practice of making criminal referrals against company representatives or key management members, the KFTC makes its intent clear to aggressively pursue criminal referrals against individual employees, regardless of their position. As for companies, the Amended Guideline reduces penalty points needed for mandatory criminal referrals so that a violation may be mandatorily referred to the prosecutors' office even though it is not deemed "highly significant" based on the Guidelines on Administrative Fines.

1. New criteria for criminal referrals of individuals

The Amended Guideline newly introduces a separate set of detailed severity determination criteria for pursuing criminal referrals against individual employees. Such criteria include: (i) whether the individual took a leading role in the decision-making process; (ii) the degree of the individual's awareness of illegality; (iii) the extent of the individual's involvement in the conduct that is in violation of the FTL; and (iv) the duration of such involvement.

Also, the Amended Guideline sets a relatively low bar for criminal referrals, since being deemed a "high level" violation for at least one of the first three criteria would significantly increase the chance of the individual in question to become subject to a mandatory criminal referral under the Amended Guideline.

Further, the new criteria do not take into account the individual's position. For example, a non-management, working-level employee may be subject to criminal referral due to the increased likelihood that the overall penalty points would exceed 2.2, which is the threshold for a mandatory criminal referral in case he/she "assists in the decision-making process by delivering directions from the upper-level personnel, participating in the mid-level decision-making, coordinating for problem solving, or developing opinions for the decision-making" (2 penalty points).

2. Unified and stricter criteria for determining severity of violation as grounds for criminal referrals

Prior to the amendment of the Criminal Referral Guideline ("Guideline"), the KFTC provided separate sets of criteria under different guidelines for determining the severity of violations for companies – one for the previous Guideline and another for administrative fine calculation. Recognizing that the existing bifurcated structure has been a source of confusion in practice, the KFTC decided to remove

the criteria in the previous Guideline and instead refer to the criteria for determining the severity of violations for the administrative fine calculation under the Guidelines on Administrative Fines.

This change may have significant implications, since it lowers the bar for mandatory criminal referrals for companies from 2.5-2.7 penalty points to 1.8 penalty points.

3. **Streamlined and clearer criteria for exemption from criminal referrals**

The existing Guideline provides that the KFTC may reconsider its decisions to make criminal referrals considering factors that, in practice: (i) may not always provide clear guidance; or (ii) be redundant or not aligned with the overall structure of the Guideline.

Under the Amended Guideline, the KFTC decided to remove such vague elements and provide for clearer and more limited grounds for reconsideration, such as "voluntary correction of violation," "past history of violation," "potential impact on the safety/health of the general public," and the "level of cooperation with the KFTC investigation" that would impact the severity of the violation.

Significance:

Given the increased risk of criminal referrals for individual employees, whether management level or not, it will be important for companies to educate each employee accordingly, enhance their awareness of compliance requirements, and in doing so, help them refrain from any conduct in violation of the FTL.

BANKING & SECURITIES

By Sang Hwan Lee (shlee@kimchang.com), Sun Hun Song (shsong@kimchang.com), Tae Han Yoon (thyoon@kimchang.com), Keun-Chul Song (keunchul.song@kimchang.com) and Sungjin Kim (sungjin.kim@kimchang.com)

FSC Announces Key Changes to the Corporate Governance Act

On March 15, 2018, the FSC announced proposed amendments (collectively, the "Amendment") to the Act on Corporate Governance of Financial Companies ("Corporate Governance Act"), including the related Enforcement Decree ("Enforcement Decree") and Supervisory Regulations on Corporate Governance of Financial Companies ("Regulations"). The Amendment is expected to become effective in the third quarter of 2018.

The Amendment is an extension of regulatory efforts to strengthen the corporate governance of financial companies since the implementation of the Corporate Governance Act in August 2016.

Highlights of Key Changes:

1. Strengthened eligibility review for majority shareholders

   Under the shareholder review system, certain shareholders of financial institutions in Korea are subject to a periodic review by the FSC on the soundness of the management of the institution.

   The Amendment expands the scope of the review to include not only the single largest investor, but also the shareholders of the subsidiary that are specially related parties to the single largest investor. Disqualification factors were also added to include violations of the Korean Act on the Aggravated Punishment, Etc. for Specific Economic Crimes, which may result in imprisonment.

2. Transparency in CEO succession

   The Amendment requires companies to stipulate in the internal governance regulations, qualifications and standards for selecting CEO candidates and obligations to provide shareholders with regular reports on CEO candidate assessments.

3. Independence of outside directors

   In addition, the CEO/representative director is not allowed to participate on the executive candidate recommendation committee for outside directors and audit committee members. Outside directors shall be staggered and must go through an external evaluation when serving consecutive terms.

4. Independence of the audit function

   The Amendment prohibits full-time auditors/audit committee members from serving more than six years in the same financial institution. Further, audit committee members shall be guaranteed at least a two-year term, and they shall be prohibited from holding a concurrent position on a different committee within the board of directors (with the exception of the remuneration committee).

5. Tighter regulation on remuneration

   The remuneration of executives and employees who earn a performance-based salary of a predetermined amount must be disclosed through an annual report on the remuneration system. The Amendment also provides that the remuneration committee may independently determine the scope of employees who are to be subject to deferred payment (i.e., employees in roles where short-term performance-based pay could result in excessive risk-taking) and publicly disclose such details through the annual report on the remuneration system.

Significance:

The Amendment strengthens regulations that will impact foreign financial institutions operating in Korea. Accordingly, we advise businesses to prepare in advance for the changing regulatory environment.

INSURANCE

By Jae-hong Ahn (jhahn@kimchang.com), Hyun Wook Shin (hwshin@kimchang.com) and Il-Suk Lee (ilsuk.lee@kimchang.com)

The Establishment Act of the FSC Amended to Toll the Statute of Limitations When Request for Mediation is Made Regarding Financial or Insurance Products

On April 17, 2018, the Act on the Establishment, Etc. of Financial Services Commission was amended to enable tolling of (suspending) the statute of limitations.

Details:

Consumers can make a request for mediation with the Financial Supervisory Service ("FSS") for complaints relating to financial or insurance products.

Prior to the amendment, such requests for mediation did not specify whether the clock continued to run under the statute of limitations, which left often the possibility that the financial contract or insurance policy could expire during the process.

Now, under the amendment, when a dispute is submitted to mediation under the processes established by the FSS, the statute of limitations relating to the underlying claim will be suspended.

Significance:

This change will likely further encourage consumers to utilize the mediation process, as it, among other effects, will not force a consumer to immediately choose between mediation and other remedies.

The FSS dispute mediation option has recently begun to play an increasingly significant role in resolving consumer complaints, and this amendment is in line with recent policy trends toward strengthened consumer protection.

TAX

By Woo Hyun Baik (whbaik@kimchang.com), Christopher Sung (chrissung@kimchang.com) and Sung Sik Kim (sungsik.kim@kimchang.com)

Existing NTS Model No Longer Accepted as a Legitimate Transfer Pricing Calculation Method for Payment Guarantee Fees

The Supreme Court recently decided that the existing National Tax Service Model ("NTS Model") is no longer acceptable as a legitimate transfer pricing calculation method for payment guarantee fees by a Korean parent to an offshore subsidiary. Also, the applicability of the Moody's Model, which has been presented by the National Tax Service ("NTS") as an alternative, should be determined based on facts of each case and general practices.

Background:

Domestic companies often provide payment guarantees for its offshore subsidiaries and receive payment guarantee fees. In 2012, the NTS developed a "transfer pricing model of guarantee fee for overseas subsidiaries" ("NTS Model"), which led to tax assessments of many companies on the ground that the guarantee fee rate paid by domestic companies were lower than the rate calculated by the NTS Model. However, many lower courts determined the NTS Model could not be used as a legitimate transfer pricing calculation method and rendered judgments in favor of the taxpayers.

After losing many cases under the NTS Model, the NTS introduced another transfer pricing calculation method created by a credit rating agency ("Moody's Model") and continued to maintain its previous tax assessment position. Accordingly, the Supreme Court made a judgement on both the NTS Model and Moody's Model.

Case Details:

The Seoul High Court affirmed that the NTS Model was not a legitimate transfer pricing calculation method. Further, while the Moody's Model was generally acceptable, it was not reasonable to apply the Moody's Model to this case (i.e., newly established corporation) in light of the facts of the transaction and general practices[3]. After the tax authorities appealed such decision to the Supreme Court, recently it ultimately dismissed the case and accepted the Seoul High Court's decision [4].

Significance:

As a result of the Supreme Court decision, the NTS Model will no longer be used for tax assessments on payment guarantee fees. Further, the applicability of the Moody's Model would depend on the facts of the case, e.g., whether the payment guarantee fee is within the transfer pricing range presented in the Moody's Model, whether the offshore subsidiary is a new corporation, etc. We believe this decision would have great significance to taxpayers who have been assessed on their payment guarantee fees based on the NTS Model or Moody's Model.

[3] Seoul High Court Decision 2015Noo66006, December 29, 2017
[4] Supreme Court Decision 2017Doo73983, March 29, 2018

By Weon Jung Kim (wjkim@kimchang.com) and Do-Yoon Kim (doyoon.kim@kimchang.com)

National Assembly Passes Partial Amendment to the Minimum Wage Act, Affecting the Scope of Minimum Wage Calculation

On May 28, 2018, in a plenary session, the National Assembly passed a partial amendment to the Minimum Wage Act ("Amendment") that would gradually include bonuses and certain wages granted for welfare purposes (and that are paid in currency) into the minimum wage calculation. The Amendment was enacted on June 12, 2018.

Details:

The purpose of the Amendment is to ease the impact of the drastic increase of the minimum wage this year, and to expressly stipulate the scope of the minimum wage in the law.

The major contents of the proposed Amendment are as follows:

- Bonuses regularly paid at least once a month (and other equivalent wage items determined by any relevant ordinance of the Ministry of Employment and Labor) and certain wages for welfare purposes that are paid in currency and respectively exceed 25% (bonuses) and 7% (certain wages for welfare purposes) of the minimum wage for a given year shall be included in the minimum wage calculation as of January 1, 2019 (Article 6, Paragraph (4) of the Amendment).

- The percentage of bonuses and welfare benefits not included in the minimum wage calculation must be gradually reduced beginning in 2020, with a goal of including all the aforementioned wage items in the minimum wage calculation after 2024 (Article 2 of the Addendum to the Amendment).

- In the event an employer modifies its rules of employment from paying at intervals exceeding a one-month period to paying wages on a monthly basis, and does not change the total amount, for purposes of including such wage items in the minimum wage calculation, the employer will be required to seek the opinion of the majority labor union or the majority of workers regardless of Article 94, Paragraph (1) of the Labor Standards Act. If an employer fails to meet this requirement, it will be subject to a fine not exceeding KRW 5 million under a new penal provision that has also been established by the Amendment (Article 6-2 and Article 28, Paragraph (3) of the Amendment).

Significance:

As such, through a gradual inclusion of regular bonuses and welfare benefits in the minimum wage calculation, the Amendment is expected to ease the burden of the recent minimum wage increase on companies.

However, as the law does not clearly define "bonuses" or "wages for welfare purposes," legal uncertainties regarding which wage items would actually fall under these categories remain.

Also, given the strong opposition from organized labor against the Amendment, we cannot rule out the possibility that conflict between labor and management will intensify in the course of changing actual payment cycles.

INTELLECTUAL PROPERTY

By Jay (Young-June) Yang (yjyang@kimchang.com), Duck Soon Chang (ducksoon.chang@kimchang.com) and Seung-Chan Eom (seungchan.eom@kimchang.com)

UCPA Amended to Protect Trade Dress for Service Providers and to Introduce New Protection Against Idea Theft

An important amendment to the Unfair Competition Prevention and Trade Secret Protection Act ("UCPA") will go into effect on July 18, 2018, specifying the protection of trade dress for service providers in Korea and introducing a new protection against idea theft.

Trade Dress Protection for Service Providers:

Currently, the UCPA prohibits activities that may create confusion between one party's mark and a well-known source identifier of another party, or dilute another party's well-known source identifier, through commercial use of a mark that is identical or similar to the well-known source identifier. Such well-known source identifiers not only include trademarks, but also names, product configurations, product packaging and any other signs identifying the source of the products or services.

The recent amendment added the overall appearance of the physical location where a business provides services as a potential source identifier, effectively creating trade dress protection for the general appearance of a business under the UCPA.

While there has been no express protection for trade dress in Korea until now, in recent years, Korean courts have begun protecting trade dress under a different provision of the UCPA, the so-called "catch-all" provision. The catch-all provision generally prohibits a party from infringing another person's right to business profit by making unauthorized commercial use of the output produced at great effort or expense by that person through means that contravene fair trade practice or competition order.

The first decision issued by the Supreme Court of Korea concerning the protection of trade dress states that the overall appearance of a store design qualifies as a "protectable right" under the catch-all provision[5]. Courts have established three requirements that must be met for a service provider to enjoy trade dress protection under the catch-all provision: (i) the trade dress has to be distinctive; (ii) it cannot be merely functional; and (iii) there must be a likelihood of consumer confusion. In addition, courts have generally been reluctant to enforce the catch-all provision to protect IP that is covered elsewhere under the law (e.g., trademark or design law).

Ironically, while it creates express protection for trade dress under the UCPA, in practice, the amendment may actually make it more difficult to protect the trade dress of service providers, because plaintiffs will now have to prove that the trade dress is well-known (unlike under the catch-all provision). Since this is usually a difficult element to establish, it remains to be seen whether trade dress is more effectively protected under the amendment than under the catch-all provision.

New Provision Regarding the Theft of Ideas:

It is often the case that creative ideas are not easily protected using standard intellectual property laws such as patent, copyright or trademark laws. Yet, it is sometimes necessary to disclose such ideas in the course of negotiating with other companies for financing or business collaboration purposes.

Unfortunately, it is not uncommon for a smaller party presenting a new idea to a larger company to find out after negotiations have ended that the larger company

[5] Supreme Court Decision 2016Da229058, September 21, 2016

has simply taken the smaller party's idea for its own use. To protect such ideas, parties have often resorted to other legal theories (such as implied contract, unjust enrichment, misappropriation, breach of fiduciary relationship, or passing off) with mixed success.

Under the amendment, a new type of unfair competition relating to the theft of ideas is recognized – a new provision has been added, prohibiting the unfair use of information with economic value (including technical or business ideas) that has been obtained through a business proposal, bidding, public contest or business negotiations, or during the process of a transaction.

The unfair uses covered by this provision include uses for one's own business or for a third party's business, as well as provision of the information to a third party for its use. However, there is no violation if the person accused of obtaining the idea had previous knowledge of the idea, or if the idea was widely known in the relevant business field.

While violation of this provision may subject the offender to civil or administrative liability, the amendment does not provide for any criminal liability or penalties.

Korean Supreme Court Confirms that Scope Confirmation Actions May Be Filed Regardless of Pending Infringement Actions

A unique feature of Korean patent practice is the scope confirmation action, which is an administrative proceeding filed at the Intellectual Property Trial and Appeal Board ("IPTAB") of the Korean Intellectual Property Office to confirm whether a given product or process is within or outside the scope of a particular patent. Scope confirmation actions are often filed by the accused or potential infringers to get a quick decision that their product/process does not fall within the scope of a particular patent with which they are threatened, and then to hopefully use that decision as persuasive evidence in a court infringement proceeding.

However, scope confirmation actions have always been somewhat controversial – while they are, in effect, a sort of infringement determination, they have no binding authority (only Korean courts may determine patent infringement), so some parties have questioned their purpose in the Korean patent system. Particularly in situations where an infringement action has already been filed, a scope confirmation action may still be filed by the defendant knowing that the IPTAB will generally expedite the action, thereby forcing the patentee to make its infringement argument twice in two different proceedings.

Recent Decision:

These competing concerns were the subject of a recent decision by the Supreme Court[6], which confirmed that an alleged infringer is entitled to fully litigate a scope confirmation action in response to a pending court infringement action, even if the infringement decision is issued before the scope confirmation decision. This decision reversed the decision of the lower court (the Patent Court).

[6] Supreme Court Decision 2016Hu328, February 8, 2018.

In this case, the Plaintiff filed a court patent infringement action against the Defendant's product in 2014, and the Defendant subsequently filed a scope confirmation action after the oral hearing in the infringement action. Because the Defendant filed the scope action quite late in the proceedings, the infringement decision was actually issued first (in favor of the Plaintiff), but the scope confirmation action was issued several months later and reached the opposite conclusion (that the Defendant's product was outside the scope of the patent). The scope confirmation decision and the infringement decision were both appealed to the Patent Court.

Interestingly, without reviewing the substantial merits of the case, the Patent Court cancelled the IPTAB decision on the basis that the Defendant lacked sufficient legal interest to file the scope confirmation action in the first place. The Court reasoned that such legal interest was lacking, because: (i) filing a scope confirmation action after an infringement action had already been filed was an improper attempt to obtain an interim decision on infringement, and was a waste of judicial resources; (ii) the Plaintiff was unduly burdened by having to respond to the scope confirmation action in addition to the infringement action; (iii) only the infringement court had the authority to grant an injunction against patent infringement; and (iv) allowing scope confirmation actions and patent infringement actions on the same patent to proceed independently involves a substantial risk of inconsistent outcomes, which may have a detrimental effect on the integrity of the patent system and patent litigation procedures.

However, the Supreme Court reversed the Patent Court's ruling, reasoning that: (i) even if a scope confirmation action is not legally binding, it still has a purpose in that it is a relatively quick and inexpensive way to confirm whether a product or process is likely infringing, and therefore, may prevent or quickly resolve infringement disputes; and (ii) the Patent Act separately provides for scope confirmation actions and infringement actions as independent procedures, and the fact that an infringement action is filed does not negate the independent legal interest of the defendant in responding by filing a scope confirmation action.

Significance:

The tension between the two decisions clearly illustrates the larger debate concerning the role of scope confirmation actions in Korean patent litigation. While the Patent Court decision focused on the burden of litigating them in parallel with an ongoing infringement action, the Supreme Court paid more attention to the utility that scope confirmation actions can have in some cases.

Additionally, it should be noted that in the context of pharmaceutical patents, scope confirmation actions can have significant legal consequences, because a scope confirmation decision can provide a basis for generic marketing exclusivity as well as a stay of generic sales.

For now, it is clear that reactive scope confirmation actions remain legal and must be litigated regardless of any burden they may present. However, future courts may still seek to limit the potential burden of reactive scope confirmation actions on patentees in some way.

By Yoon Jeong Lee (yjlee@kimchang.com) and Hyeongjun Hwang (hyeongjun.hwang@kimchang.com)

Amendments to the Laws Related to Chemical Substances

The amendment to the Act on the Registration, Evaluation, Etc. of Chemicals ("K-REACH") is expected to go into effect on January 1, 2019. Additionally, the proposed amendment to the Chemicals Control Act ("CCA") was issued on May 3, 2018.

Below are the details of these updates.

1. Amendment to K-REACH

On February 28, 2018, the National Assembly passed the proposed amendment to K-REACH ("K-REACH Amendment"). The K-REACH Amendment is expected to become effective on January 1, 2019 after promulgation.

The K-REACH Amendment changes the registration requirement of chemicals such that in addition to non-phase-in substances, all phase-in substances that are manufactured or imported in the amount of at least one ton per year must be registered. Violating this requirement subjects the manufacturer or importer to administrative fines of up to 5% of the total sales generated from the phase-in substance(s) at issue as well as criminal prosecution.

Also, the K-REACH Amendment provides for a grace period, which will be calculated based upon the amount of phase-in substances to be manufactured or imported per year (ranging from 2020 to 2030). To manufacture or import such non-registered phase-in substances during the grace period, the manufacturer or importer must submit a report to the Ministry of Environment ("ME") within six months of the effective date of the K-REACH Amendment.

2. Amendment to the CCA

In addition to amending the K-REACH, on May 3, 2018, the ME issued a public notice regarding a proposed amendment to the CCA ("CCA Amendment"). Among the changes, the proposed CCA Amendment introduces a chemical substance tracking control system, which replaces the submission of a written confirmation of chemicals with a confirmation reporting system, and the implementation of a chemical substance identification number system. The details are explained below.

- Confirmation of reporting chemical substances & introduction of a chemical substance identification number system
  - Under the current CCA, the manufacturer or importer of chemical substances is required to check whether the products it manufactured or imported contain any regulated chemical substance(s), and if necessary, submit a written confirmation.
  - The ME has faced great difficulties under the current written confirmation system in verifying whether the written confirmation contains accurate information, or whether there was any omission of information. Taking this into account, the ME plans to adopt a new confirmation reporting system and a chemical substance identification number system.
  - Under the proposed CCA Amendment, a manufacturer or importer of a chemical substance must report, among others, to the ME: (i) the chemical composition and

contents; (ii) hazards and risk information; (iii) phase (solid, liquid or gas) of the chemical substance; and (iv) the country where the chemical substance was manufactured. Once the submitted report is processed, the ME will issue a separate identification number for the chemical substance.

- Obligation to list the chemical substance identification number and to provide the information to subsequent users
  - Under the current CCA, only information relating to hazardous substances are required to be listed on the product container or packaging. However, under the proposed CCA Amendment, if the chemical substance is assigned, the identification number as well as information regarding the hazards and risks must be provided to the assignee.

Significance:

After the proposed CCA Amendment is ratified, distribution of a chemical substance is expected to be difficult if a chemical substance identification number has not been assigned, since the substance would have failed to comply with the new confirmation reporting requirement. Moreover, in the process of complying with the new confirmation reporting requirement, a previous failure in submitting a written confirmation of a manufactured or imported chemical substance may be discovered. Therefore, it is strongly recommended that there is full assurance of compliance with these new chemical regulations.

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

By Dong-Shik Choi (dschoi@kimchang.com) and Wookil Kim (wookil.kim@kimchang.com)

Korean Government to Relax Regulations on Location Information

On March 30, 2018, the National Assembly passed a bill to amend the Act on the Protection, Use, Etc. of Location Information ("Act"). This amendment ("Amendment"), set to take effect on October 18, 2018, will: (i) relax regulations related to location information of objects; and (ii) lower entry barriers for new location information businesses ("LIBs") that do not use personal location information.

Background:

Utilizing location information of mobile objects has been difficult in Korea, because under the current Act, such information may not be collected, used or transferred without the object owner's consent. Furthermore, complicated business reporting procedures made it difficult, especially for smaller companies, to enter the market and, in some cases, even delayed their launch of services.

The Amendment:

Against this backdrop, the Amendment aims to relax regulatory requirements relating to: (i) business license; (ii) reporting by certain smaller companies; (iii) disclosure of terms of service; and (iv) object owner's consent.

1. **Lower entry barrier for LIBs that do not use personal location information**

   Under the current Act, all LIBs are required to obtain a business license from the Korea Communications Commission ("KCC"). Under the Amendment, only those LIBs that use personal location information will be required to obtain such a license, and LIBs that do not use personal location information can simply file a business report with the KCC. Details on the reporting procedures will be set out in the Presidential Decree.

2. **Relaxed reporting procedures for certain location-based service providers**

   Under the current Act, all location-based service ("LBS") providers that use personal location information are required to file a business report with the KCC. Under the Amendment, certain qualified "small enterprises" and "one-person creative enterprises" will have a grace period of one month from the launch of their LBS to file their report with the KCC.

3. **Relaxed disclosure requirement for terms of service**

   Under the current Act, both LIBs and LBS providers are required to report their terms of service to the KCC. Under the Amendment, both LIBs and LBS providers only need to disclose their terms of service on their websites or by other methods that allow easy access at any time by their users. Any modification to the terms of service must also be promptly disclosed, be easily recognizable and explain the reasons for the modification.

4. **No consent required to process object location information**

   The scope of location information for which consent is required will be reduced from "location information regarding persons or mobile objects" to "personal location information." As a result, object location information may be processed without a prior consent of the object owner.

Significance:

As location information of object is the basis of various Fourth Industrial Revolution technologies and services (such as Internet of Things, drones and autonomous vehicles), these relaxed regulations are expected to attract more entrants into the LIB market, incentivize the existing players to expand the scope of their LIBs, and generally promote the launch of new types of services using location information of objects.

SELECTED REPRESENTATIONS

CORPORATE

Temasek, a Singaporean Sovereign Wealth Fund, Sells Shares in Celltrion Healthcare and Celltrion

On March 7, 2018, Temasek, a sovereign wealth fund of Singapore, sold 2.24 million shares (1.82%) in Celltrion, Inc. ("Celltrion") and 2.9 million shares (2.09%) in Celltrion Healthcare Co., Ltd. ("Celltrion Healthcare") held through its wholly-owned subsidiary, Ion Investments B.V. ("Ion Investments") through after-hours block trading. Kim & Chang advised Temasek in all legal aspects of the transaction, leading to a successful closing.

Ion Investments is a major shareholder, holding more than 10% share in Celltrion and Celltrion Healthcare, respectively, and the total value of the after-hours block trading was KRW 1.69 trillion (approx. USD 1.52 billion).

The scale of the transaction demanded not only thorough review of all legal issues and transaction documents, but also a detailed risk analysis of the transaction's impact on the market and investors.

Doosan Engine's Investment Division Merges with Doosan Heavy Industries, and Shares Subsequently Sold to Socius-Well to Sea Investment PEF

On June 5, 2018, Doosan Engine Co., Ltd. ("Doosan Engine") and Doosan Heavy Industries & Construction ("Doosan Heavy Industries") closed a transaction whereby the investment division of Doosan Engine was horizontally divided and merged into Doosan Heavy Industries. On June 8, 2018, 42.66% of the shares in the surviving entity of Doosan Engine (i.e., engine business division) held by Doosan Heavy Industries were sold to Socius-Well to Sea Investment PEF No. 1.

Occurring in separate steps within only three days, the transaction demanded that all legal issues that may arise in the two transactions be addressed concurrently throughout the transaction process. In addition, thorough regulatory review was required, because the transaction: (i) was between listed affiliates in the same business group (which limits cross-capital investment); (ii) resulted in a change of control in Doosan Engine; (iii) was valued at over KRW 500 billion in aggregate; and (iv) involved a defense company (i.e., Doosan Engine), requiring prior approval of the Ministry of Trade, Industry and Energy.

Kim & Chang represented Doosan Engine and Doosan Heavy Industries, providing comprehensive legal advice on due diligence, transaction documents, and the various corporate and regulatory approvals for a successful closing.

LITIGATION

Recent Supreme Court Decision on Strata Ownership

The Supreme Court recently issued a new judgment on the "legal principle regarding the violation of good faith of an original owner's claim of title in respect of a strata building which has not qualified for strata ownership." The case dealt with a third party that won a bid for and purchased a strata building (commercial building), which had not met the requirements necessary to qualify as a strata building under the Act on Ownership and Management of Condominium Buildings ("AOMCB").

Background:

The plaintiff (developer) constructed a commercial building and created a building ledger for it as a strata building ("Strata Commercial Building"). Title preservation registration ("Strata Registration") was also completed. A kun-mortgage was created and registration of trust was issued in reliance of the Strata

Registration. Thereafter, the Strata Commercial Building was sold to a third party by foreclosure on the kun-mortgage, and in a public auction process under the trust deed. The defendant ultimately purchased the Strata Commercial Building, completed the title transfer registration, and commenced its business.

However, the plaintiff demanded the deregistration and delivery of the Strata Commercial Building, claiming that since the Strata Commercial Building did not satisfy the requirements to qualify as a strata building under the AOMCB at the time of the Strata Registration, the Strata Registration was not in effect and therefore, both the kun-mortgage and registration of trust were invalid.

In the past, the Supreme Court had ruled that in the event the Strata Registration did not satisfy the requirements necessary to qualify for strata ownership under the AOMCB, it was not effective, and thus, the kun-mortgage was invalid. The winner was required to deregister and deliver the building to the original owner.

The Supreme Court dismissed the purchaser's arguments and accepted the plaintiff's claim.[7]

Our Representation:

Kim & Chang represented the defendant from the final appeal, making various arguments identifying the unlawfulness of the lower court's decision, including its violation of the principle of good faith. The Supreme Court accepted our grounds for final appeal regarding the violation of the principle of good faith, and ruled that:

- The Strata Registration for the Strata Commercial Building, which did not satisfy the requirements for strata ownership, does not have any effect. Thus, in principle, the purchaser cannot acquire the title to the Strata Commercial Building.

- Other material issues on which the Court rested its decision include: (i) plaintiff cannot claim the strata ownership was invalid when in fact, plaintiff had made the Strata Registration based on the Strata Ownership and even created a kun-mortgage; (ii) the requirements for strata ownership will be potentially satisfied by the defendant; and (iii) an extended period of time has lapsed after the plaintiff's Strata Registration. Given this, it would be in violation of the principle of good faith for the plaintiff to argue that the Strata Registration was invalid, and claim deregistration and delivery against the defendant.

Significance:

Although there is no doubt whether registration is invalid with respect to a building for which a building ledger as a strata ownership was created and the Strata Registration was completed, previous Supreme Court decisions showed that for the Strata Commercial Building which had not satisfied the requirements for strata ownership, not only was its registration invalid, but also other registrations based thereon were also invalid. As such, the claim regarding the principle of good faith was not accepted. The concern was that legal security based on such registrations was being impaired.

In summary, a person who purchases a unit of Strata Commercial Building from a developer will not be able to acquire the title, and the contractors who executed their claim for the construction price through its beneficial interests (by way of in-kind payment, kun-mortgage, trust registration, etc.) for the construction price, and the financial institutions which executed loan claims in the same manner had a potential of returning the paid amounts without recovering such claims.

According to the recently issued Supreme Court decision, however, as the plaintiff's claim in this case may be deemed to be in violation of the principle of good faith, we believe that it will be a basis to claim that the previous creation of the kun-mortgage and trust registration, and payment based thereon are valid.

[7] Supreme Court Decision 92Da3151, April 24, 1992; Supreme Court Decision 99Da46996, November 9, 1999; Supreme Court Decision 2009Ma1449, January 14, 2010

ANTITRUST & COMPETITION

KFTC Clears Consumer Goods Companies of Alleged Abuse of Market Dominance

On April 4, 2018, the KFTC finally concluded its two-year investigation over a major consumer goods company with a finding of "no violation" in relation to the alleged abuse of its monopoly position in the sanitary pad market (i.e., allegedly engaging in abusive pricing).

Details:

The decision was based on the KFTC's confirmation that it is difficult to conclude that the consumer goods company had engaged in any unreasonable price adjustment, by significantly increasing or too slightly decreasing the price, compared to the changes in the demand-supply balance and/or supply costs.

In order to establish a claim of abusive pricing, the price must have increased significantly or declined too slightly compared to changes in the demand-supply balance or supply costs in the relevant market. In this case, the KFTC found that there was no such steep rise or slight decrease in the pricing for new and renewal products and declared that no violation was found. For the existing products as well, the KFTC concluded that no significant increase was found, in view of the changes to the main raw materials and manufacture costs.

Our Representation:

Kim & Chang's Antitrust & Competition experts successfully defended the consumer goods company by presenting detailed facts and analyses showing, among others, that: (i) the new/renewal products' higher prices reflected enhanced performance compared to the existing products, and thereby removing the misconception that they were priced more expensively solely because they were new/renewal products despite having little difference from the existing products; (ii) the supply price remained the same in the long-term based on the thorough supply price analysis over the past seven years; and (iii) the retail price in Korea was not high compared to that of other jurisdictions.

In particular, regarding the third point above, given that the KFTC investigation was partly motivated by numerous media reports that the retail price in Korea was excessively higher than that in other jurisdictions, our team argued that the products subject to price comparisons must be as equivalent as possible because of the diversity in sanitary pad product types, and substantiated the fact that the Korean price was not more expensive based on price comparisons (i.e., analyses performed by an international research institution) and/or based on overseas sales data.

KFTC Declares Duty-Free Shops' Commitment to Restrict Competition at Incheon International Airport Does Not Constitute an Unfair Collaborative Act

On May 9, 2018, the KFTC concluded that, in connection with the allegation of four duty-free shops' unfair collaboration to restrict competition by soliciting brands to launch their shops in Incheon International Airport duty-free shops, there is no or insufficient evidence supporting the existence of an agreement on such collaborative act.

The KFTC also found that even if the agreement was to be established, the alleged collaborative act may not be regarded as anti-competitive. On the above grounds, the KFTC cleared Company A of the charge of unfair collaborative act (limiting transacting partners).

Background:

During the past several years, the KFTC conducted multiple investigations, looking over data related to biddings of duty-free shops, information on brand

shops launched in duty-free shops, and Company A's sales data.

In submitting an examiner's report to the Commissioner's hearing, the KFTC examiner stated that "the four duty-free shops agreed to restrict the practice of soliciting brands to launch their shops in Incheon International Airport duty-free shops in case the brands are already operating in-store shops in other duty-free shops, and that such agreement unfairly restricts competition in the boutique store market for Incheon International Airport duty-free shops." However, the KFTC eventually found that it is difficult to conclude that there is a collusive agreement based solely on a commitment letter (the evidence submitted to support the existence of the collusive agreement), because of a difference between the contents of the commitment letter and the actual brand shop launching status. Also, the KFTC determined that the above agreement has not resulted in any anti-competitive effects, such as a reduction in consumer welfare or higher sales price.

Our Representation:

Kim & Chang's team contributed to the KFTC's finding of no violation through our dedicated efforts to defend Company A throughout the entire KFTC on-site investigation, and in responding to the KFTC's request for submission of voluminous data, such as information on biddings and multiple brands, as well as in the Commissioner's hearing.

Based on our extensive experience in dealing with major cartel cases, our team of attorneys, accountants and economists collaborated to successfully persuade the KFTC that Company A's conduct does not constitute an unfair collaborative act, and that any anti-competitive effects or illegality should be not be recognized.

After a Six-year Investigation, the KFTC Finds No Evidence of Collusion Among a Vehicle Importer and Eight Dealerships

On March 30, 2018, the KFTC declared no violation of the Monopoly Regulation and Fair Trade Law ("FTL") in the case involving alleged collusion among a vehicle importer and its eight dealerships (the "Respondents") concerning the pricing of hourly retail labor rate and the refusal to use third-party car parts.

Significance:

This decision clarifies the permissible scope of information exchange. In particular, given that there is often no bright-line test for whether a certain type of communication among vertical and horizontal business partners is prohibited under the FTL as perpetrating a cartel (so-called "hub-and-spoke" conspiracy), the KFTC's decision provides guidance on how a car importer and its dealerships should interact with each other going forward.

Our Representation:

Since the commencement of the KFTC investigation six years ago, Kim & Chang has been representing the Respondents from the beginning. Our team has provided, among others, assistance in a number of dawn raids, interviews of summoned officers/employees, preparation and production of extensive documents, and submission of opinion briefs on multiple issues.

Eventually, our team persuaded the KFTC to rule in favor of the Respondents through our top-notch advocacy with a business savvy approach, and technical expertise on price fixing cases involving information exchange. We performed in-depth legal analysis and extensive research into precedents on whether a case amounts to collusion between enterprises in both vertical and horizontal relationship through a mastermind that perpetrated such hub-and-spoke conspiracy.

KFTC Finds No Evidence of Collusion in the Pricing of Four Vehicle Importers' Car Parts, New Car Release Date Schedule and Promotion Plans

On January 30, 2018, the KFTC declared no violation of the FTL in the case involving alleged collusion among four vehicle importers (the "Respondents") in their prices of car parts, new car release date schedule and promotion plans.

Background:

Initially, the KFTC claimed that the Respondents engaged in price-fixing based on their exchange of information on the latest sales figures, current inventories, new car release date schedules, promotion plans and prices of car parts.

However, despite the finding of price information exchange among the Respondents, the KFTC eventually decided they did not violate the FTL, because such exchange, in and of itself, would not be sufficient to establish an anti-competitive agreement prohibited under the FTL (i.e., an agreement to decide, maintain or amend prices in a manner that improperly restrains competition).

Significance:

Going forward, this decision is expected to serve as the guidance on how proper information exchange should be carried out among competitors on issues commonly faced by the industry.

The KFTC's decision takes into consideration the Supreme Court's December 19, 2016 Decision (Case No. 2016Du31098), which states that "the act of exchanging information on sales prices and records amongst seven large-scale commercial trucks, in and of itself, does not amount to an act of collusion." That is, the KFTC's decision makes it clear that information exchange (even on important matters such as prices) alone is not enough to prove the existence of collusion unless there is evidence showing reciprocity among the Respondents (e.g., joint determination of price) and anti-competitiveness of the agreement.

Our Representation:

Over the course of five years, Kim & Chang represented the Respondents from the commencement of the KFTC's investigation to assisting them in a number of dawn raids, interviews of summoned officers/employees, preparation and production of extensive documentation, and submission of opinion briefs on multiple issues.

Eventually, our team persuaded the KFTC to rule in favor of the Respondents through our technical expertise in price fixing cases involving information exchange (including in-depth legal analysis and extensive research into precedents) and top-notch advocacy with a business savvy approach.

SECURITIES

Kakao Lists Its Global Depositary Receipts on the Singapore Exchange

On February 2, 2018, Kakao Corp. ("Kakao") listed its Global Depositary Receipts ("GDRs") on the Singapore Exchange ("SGX"). Kakao, a listed company on the KOSPI, issued GDRs representing 8,261,731 shares through Citibank, N.A., its depository bank, and successfully listed the GDRs on the SGX. Through this listing, Kakao was able to raise a total of USD 1 billion.

This listing was the largest overseas equity offering by a domestic issuer in a decade.

Our Representation:

Kim & Chang advised Kakao on all aspects of this transaction. In addition to providing general listing services, our team also reviewed: (i) both the Singaporean

and Korean laws for cross-border issues concerning conflicts that arise from a Korean company listing its GDRs on the SGX; (ii) the alignment of the Korean company's Articles of Incorporation with the SGX regulations; and (iii) the listing regulations of the SGX.

Mirae Asset Capital Invests in China's Leading Car Sharing Operator, Didi Chuxing

On April 4, 2018, Mirae Asset Capital acquired a minority stake in Didi Chuxing, the No. 1 operator in China's car sharing market.

Significance:

Mirae Asset Capital's KRW 280 billion investment in Didi Chuxing's offshore holding company is the first large-scale investment by a domestic fund into a global unicorn company. Mirae Asset Financial Group announced that it will continue to explore investment opportunities in other global unicorn companies.

Our Representation:

Kim & Chang provided comprehensive advisory services on a variety of complex issues arising from the transaction, including registering Mirae Asset Capital as GP, receiving regulatory approval on the share acquisition by the private equity fund ("PEF"), filing a report on the establishment of the PEF, establishing an offshore special purpose company ("SPC"), and providing documentation for the transaction.

TAX

Kim & Chang Wins Lawsuit on Levying Corporate Income Tax for Dividends in Applying the Reduced Tax Rate (5%) under the Korea-Japan Tax Treaty

Kim & Chang's Tax Practice successfully persuaded the Trial Court that the lower dividend withholding tax rate (i.e., 5%) was applicable to the case, instead of the 15% rate assessed by the Korean tax authorities, under the Korea-Japan Tax Treaty.[8]

Details:

On March 2014, a domestic resource development corporation made dividend payments to a Japanese corporation (which had a 30% interest), and withheld tax at a 5% rate under the Korea-Japan Tax Treaty. Subsequently, the Japanese corporation sold its entire interest in the domestic resource development corporation on mid-December 2014. However, due to such sale, the Korean tax authorities determined that a 15% tax rate (and not 5%) under the Korea-Japan Tax Treaty should have been used for the March 2014 dividend distributions.

The key issue of this case was whether the lower tax rate of 5% under the Korea-Japan Tax Treaty was applicable. The Korean tax authorities argued that the 5% tax rate was available only if the Japanese corporation held shares of the domestic company until the end of the accounting period, i.e., December 31, 2014 based on their interpretation on the Korea-Japan Tax Treaty. The Korean tax authorities also asserted that since the Japanese corporation sold its shares mid-December, which was prior to December 31, the 5% tax rate was not applicable and therefore had to apply the 15% rate.

Our Representation:

Kim & Chang's Tax Practice Experts analyzed the Korea-Japan Tax Treaty in detail based on the OECD model, interpretation of Article 10 (2) of the Korea-Japan Tax Treaty, the corporate income tax law, and other tax treaties concluded by Japan, and successfully persuaded the administrative courts that the lower 5% tax rate was applicable to our case.

[8] Appeal is currently pending in the High Court (trial court).

Supreme Court Decides on Places of Tax Payment for Acquisition Tax of Leased Vehicles

The Supreme Court, in its latest decision regarding this matter, held that the place of taxation for acquisition tax of leased vehicle means the place of usage recorded under the automobile registration. Thus, the acquisition tax paid by the lease companies based on branch location was legitimate, while the acquisition tax assessed by the Seoul City government ("Seoul City") had no merit.

Following the Supreme Court's decision, Seoul City has voluntarily refunded acquisition tax to all lease companies except one company. On January 5, 2018, Seoul City filed for an appeal against this one company in order to make a final attempt to justify its position to the Supreme Court.

Background:

In 2012, Seoul City conducted widespread tax investigations related to car acquisition tax for operational and finance lease contracts. Seoul City claimed that many leasing companies paid the car acquisition tax to the wrong local government. Since most companies have their main operations in Seoul and only operate small branches outside of Seoul, Seoul City argued that the car acquisition tax should have been paid in Seoul. In a few cases, some companies received the assessment that local branches do not qualify as regular branches.

Significance:

It is unlikely that the Supreme Court will reverse its recent decision, but the proceedings should nonetheless be monitored. Given the latest Supreme Court decision and refund procedures undertaken, we expect the risk of potential acquisition tax assessment (causing double taxation) will be relieved.

REAL ESTATE

Deutsche Asset Management Purchases Logiport Icheon Warehouse for KRW 61.2 Billion

In February 2018, for KRW 61.2 billion, Lasalle Private Real Estate Investment Trust No. 3, a real estate private fund managed by Lasalle Asset Management Company Limited, sold a six-story warehouse facility (called Logiport Icheon[9]) in the City of Icheon to Deutsche No. 22 Professional Investors Private Real Estate Investment Limited Liability Company ("Purchasing Entity"). The Purchasing Entity is managed by Deutsche Asset Management Company Limited.

Logiport Icheon is a warehouse center that was newly developed and completed in May 2017. The facility is leased and occupied by Mercedes Benz as its Asia distribution center; by Li & Fung, a professional distribution company for clothing brands such as Nike and Converse; and by two other domestic distribution companies. The Purchasing Entity was able to assume all of the lease agreements with the existing tenants on an as-is basis.

Our Representation:

Members of Kim & Chang's Real Estate Practice provided comprehensive services, including drafting all major transaction agreements and ancillary agreements (e.g., the memorandum of understanding, and the real property sale and purchase agreement), advising on the establishment and capital injection of the Purchasing Entity, which is a collective investment vehicle, and drafting all relevant legal documents for financing and funding, such as the members' loan agreement and units transfer agreement.

Using its broad and in-depth experience and expertise in collective investment vehicles, our team was able to assist foreign investors to fully understand the deal structure and successfully complete the funding and purchase of assets.

[9] Logiport Icheon has two basement floors and four above-ground floors and has a total area of 43,405.16㎡.

LABOR & EMPLOYMENT

Supreme Court Rules in Favor of Just Cause for Termination of Employment with Only One Case of Employee Misconduct

On March 15, 2018, in a case where a passenger transport service business dismissed intercity bus driver employees for gambling, the Supreme Court rendered a judgment that quashed a lower court's decision that the company had violated and abused its discretionary disciplinary powers, and remanded the case to the lower court for further consideration.

Case Details:

In this case, the lower court ruled that the plaintiffs' gambling was not, according to social norms, considered to have destroyed the relationship of trust between the company and the employees to the extent that their acts constituted a just cause for dismissal. Reasons included: (i) the plaintiffs only gambled on one occasion; (ii) the plaintiffs successfully completed their driving work in the morning following the gambling; and (iii) the continuance of the employment relationship with the plaintiffs would not interfere with the company's business operations.

However, the Supreme Court ruled that the lower court's judgment that the company abused its discretionary disciplinary powers was erroneous on the grounds that: (i) due to the nature of the company's passenger transport business, the company and bus drivers have the obligation and duty to protect passengers' safety, and to guarantee this obligation, the bus drivers needed sufficient rest so that they were not drowsy; (ii) as it is difficult to control time while gambling and it can lead to huge losses of physical and mental energy, it is essential to prohibit driver gambling to ensure sufficient rest time; (iii) for the above reasons, the company has entered into a collective bargaining agreement that lists gambling as a cause for dismissal, has conducted education on the prohibition of this act, and has investigated whether gambling occurred; (iv) based on these measures, the plaintiffs were well aware that gambling was strictly prohibited and could lead to their dismissal; and (v) the plaintiffs' gambling was condemnable, because their driving abilities may have been impaired if they had gambled late into the night or early into the next morning.

Our Representation:

During the case, Kim & Chang's team emphasized to the Supreme Court that: (i) drivers of a passenger transport business have an obligation to protect the life and well-being of its passengers; (ii) gambling activities of drivers will inevitably lead to drowsy driving by those drivers; (iii) drowsy driving has the potential to inflict irreversible damages to the lives and well-being of the passengers; and (iv) the company is implementing a variety of efforts to prohibit such gambling.

Further, we argued that, due to the these reasons, even a one-time violation of gambling-related misconduct by the employees should be considered a serious case of misconduct and should be acknowledged as a just cause for termination of employment. The Supreme Court accepted most of our arguments and ruled in our client's favor.

Significance:

This Supreme Court decision is significant, as there are only few cases in which the Court has quashed a lower court's decision that an employer's disciplinary action was excessive.

The apparent intent of the Court was to establish that dismissal from employment was justified here in consideration of various factors, such as the distinctiveness of the business and jobs, the strictness of the company's prohibition against gambling, the company's disciplinary provisions regarding the prohibition of gambling, and the impact on legitimate business operations.

Therefore, for misconduct that may impact a company's legitimate business operations, corporations should review and revise their personnel and disciplinary rules to prohibit such misconduct, conduct appropriate training on the applicable rules, and then promptly investigate any violations.

AWARDS & RANKINGS

"Country and State Awards: Korea" for 13 Straight Years – Who's Who Legal Awards 2018

On May 8, 2018, Kim & Chang received the "Country and State Awards: Korea" at the Who's Who Legal Awards 2018. This marks the 13th consecutive year that our firm has been honored with this award.

About Who's Who Legal Awards: Who's Who Legal Awards is annually hosted by the world-recognized legal media group Who's Who Legal. Based on independent research and in-depth evaluation, Who's Who Legal recognizes law firms and lawyers with the most impressive performance in the past year in over 70 jurisdictions across major practice areas. This year's awards ceremony took place at Plaisterer's Hall in London.

Most Professionals Ever Recognized from Kim & Chang as Leading Lawyers – Asialaw Leading Lawyers 2018

asialaw 2018 LEADING LAWYER

Asialaw Leading Lawyers 2018, a leading legal directory published by Asialaw, named 37 Kim & Chang professionals as leading lawyers, up from 29 recognitions in 2017. Nine were named "Market-Leading Lawyers," while 26 were recognized as "Leading Lawyers" and two as "Rising Stars."[10]

Our firm was once again the leading Korean law firm with the most number of professionals listed in the directory, surpassing our own record from one year ago.

The following is the list of our recognized professionals:

Market-Leading Lawyer:

- Chiyong Rim (Restructuring & Insolvency)
- Dong Shik Choi (IT, Telco & Media)
- Duck Soon Chang (Intellectual Property)
- Jay Ahn (Banking & Finance, Competition & Antitrust, Corporate/M&A)
- Jay (Young-June) Yang (Intellectual Property)
- Jin Yeong Chung (Dispute Resolution & Litigation, Restructuring & Insolvency)
- Kook Hyun Yoo (Dispute Resolution & Litigation)
- Kye Sung Chung (Banking & Finance, Corporate/M&A)
- Kyung Taek Jung (Competition & Antitrust, Corporate/M&A)

Leading Lawyer:

- Byung-Chol (B.C.) Yoon (Dispute Resolution & Litigation)
- Byung-Suk Chung (Shipping, Maritime & Aviation)
- Chang Hyeon Ko (Private Equity, Corporate/M&A)
- Deok Il Seo (Labour & Employment)
- Eun Young Park (Dispute Resolution & Litigation)
- Gene-Oh (Gene) Kim (Competition & Antitrust)
- Hoin Lee (Banking & Finance, Labour & Employment)
- Hi Sun Yoon (Banking & Finance)
- Jae Ho Baek (Corporate/M&A, Insurance)
- Je Heum Baik (Taxation)
- Jin Hwan Kim (IT, Telco & Media)
- Jong Hyun Park (Corporate/M&A)
- Jong Koo Park (Corporate/M&A)
- Liz Kyo-Hwa Chung (Dispute Resolution & Litigation)
- Myoung Jae Chung (Capital Markets, Corporate/M&A, Investment Funds)
- Sang Hwan Lee (Banking & Finance)
- Sang Wook Han (Intellectual Property)
- Sup Joon Byun (Corporate/M&A, Dispute Resolution & Litigation)
- Sung Ku Jeong (Capital Markets)
- Sung Nam Kim (Intellectual Property)
- Sung Uk Park (Corporate/M&A)
- Woo Hyun Baik (Taxation)
- Youngjin Jung (Competition & Antitrust)
- Young Jay Ro (Capital Markets, Corporate/M&A)
- Young Man Huh (Capital Markets, Private Equity)
- Yun Bak Chung (Private Equity)

Rising Star:

- Hee Jeong Kim (Capital Markets)
- Joon Kim (Corporate/M&A)

[10] - **Market Leading Lawyer:** A head of a practice and/or with a management role in their firm, and has an exceptional record of client service
- **Leading Lawyer:** A long-established member of a practice team with a reputation for superior client service
- **Rising Star:** A lawyer, including junior partner, of less than seven years' experience who has made an immediate impact as an adviser in their practice area

About Asialaw Leading Lawyers: Asialaw, a legal media branch of Euromoney, annually publishes Asialaw Leading Lawyers, a directory of leading lawyers in the Asia-Pacific region. The directory's 2018 edition published in May relied on survey responses of corporate executives and lawyers to determine the most outstanding lawyers from across 24 countries in 18 practice areas.

Again Named as "Employer of Choice" 2018 – Asian Legal Business 2018

In the April 2018 issue of Asian Legal Business ("ALB"), Kim & Chang was again named as an "Employer of Choice" in South Korea.

About ALB's "Employer of Choice": ALB, Asia's leading legal publication affiliated with Thomson Reuters, conducted this anonymous survey of law firm attorneys across the Asia-Pacific region on categories such as job satisfaction, remuneration, work-life balance, career prospects, mentorship, and job security. Based on this annual survey, ALB announces the highest ranking law firms per country.

Winner of Asian-MENA Counsel Deals of the Year 2017

Two deals advised by Kim & Chang were chosen as "Deals of the Year 2017" by Asian-MENA Counsel, a leading legal magazine in Asia. The deal involving sale and transfer of Carver Korea to Unilever by a consortium of Bain Capital and Goldman Sachs was named a "Winning Deal," and the transaction concerning HP's purchase of Samsung's printer business received an "Honorable Mention."

Below are the recognized deals:

Winning Deal
- Bain Capital/Goldman Sachs exit of Carver to Unilever

Honorable Mention
- HP's acquisition of Samsung Electronics' printer business

Asian-MENA Counsel Deals of the Year: Asian-MENA Counsel annually determines the most notable deals of the year based on their sophistication, innovation and complexity. This year's results were chosen from deals closed between December 1, 2016 and December 31, 2017 and were announced in the magazine's Volume 15, Issue 7, which was published in May 2018.

Top Tier Rankings in All Categories Surveyed - Benchmark Litigation Asia Pacific 2018

In the 2018 edition of Benchmark Litigation Asia-Pacific, a review of dispute resolution and litigation practices in the Asia-Pacific, Kim & Chang ranked "Tier 1" (top tier) in all four categories.

Also, eleven of our firm's attorneys were chosen as "Dispute Resolution Stars" and "Future Stars" in their respective practice areas.

The following are the details of our wins:

Firm Rankings ("Tier 1" in all four categories surveyed)
- Commercial and Transactions
- Construction
- Intellectual Property
- International Arbitration

Dispute Resolution Stars
- Byung-Chol (B.C.) Yoon (International Arbitration)
- Duck Soon Chang (Intellectual Property)
- Eun Young Park (International Arbitration)
- Hye Kwang Lee (Commercial and Transactions)
- Jay (Young-June) Yang (Intellectual Property)
- Jin Yeong Chung (Commercial and Transactions)
- Jung Keol Suh (Commercial and Transactions)
- Sang-Wook Han (Intellectual Property)
- Yong Sang Kim (Commercial and Transactions)

Future Stars

- Hye Sung Kim (Commercial and Transactions, International Arbitration)
- Sejong Youn (International Arbitration)

About Benchmark Litigation Asia-Pacific: Benchmark Litigation Asia-Pacific, published by the global legal media group Euromoney, selects and announces the most distinguished dispute resolution and litigation firms and attorneys based on law firm submissions, interviews and independent research. The results are based on surveys of law firms in nine major countries across the Asia Pacific.

Kim & Chang Takes Home Three Distinguished Awards - The Asia Legal Awards 2018

On March 22, at The Asian Lawyer-sponsored The Asia Legal Awards, Kim & Chang was recognized as "Competition and Trade Firm of the Year." The awards ceremony took place at the Four Seasons Hong Kong. Winning this award demonstrates our firm's market-leading position in the antitrust and competition practice area, not only in Korea, but also in the Asia-Pacific region.

We also received two additional recognitions. Our participation in Toshiba Corp.'s sale of its memory chip business won "M&A Deal of the Year: North Asia," while our participation in solar power plant financing in Misaki, Okayama won "Finance Deal of the Year: Projects and Assets."

About The Asia Legal Awards: The Asian Lawyer is a sister publication of The American Lawyer, a leading US legal publication, and an affiliate of ALM, the worldwide legal media group. The Asian Lawyer annually hosts The Asia Legal Awards. The awards select and celebrate law firms, lawyers, deals, and in-house teams that have demonstrated excellence during the past year.

The following are the details of our wins:

Firm Categories

- Competition and Trade Firm of the Year

Deal Categories

- M&A Deal of the Year: Toshiba Corp.'s sale of memory chip business
- Finance Deal of the Year: Projects and Assets: Misaki, Okayama solar power plant financing

Antitrust & Competition Practice Ranked as "Elite" – GCR 100 (2018)

In its 2018 edition, Global Competition Review 100 ("GCR 100"), the world's leading journal in competition law, ranked Kim & Chang's Antitrust & Competition Practice as "Elite," the highest possible classification.

About "GCR 100": GCR 100 groups law firms into one of three categories: "Elite," "Highly Recommended," and "Recommended." Among the evaluation criteria are: size of a firm's competition practice; number of attorneys nominated in its sister publication (Who's Who Legal: Competition); results from surveying hundreds of lawyers and clients in the field; and stability and attractiveness of a firm's antitrust practice (e.g., hires, promotions and departures).

"South Korea Tax Firm of the Year" and "South Korea Transfer Pricing Firm of the Year" – 2018 Asia Tax Awards

On May 3, 2018, Kim & Chang was named "South Korea Tax Firm of the Year" and "South Korea Transfer Pricing Firm of the Year" at the 2018 Asia Tax Awards. For the second year in a row, Kim & Chang has been recognized as Korea's top tax law firm at the prestigious International Tax Review's Asia Tax Awards.

About Asia Tax Awards: The annual Asia Tax Awards are hosted by International Tax Review ("ITR"), an affiliate of Euromoney and publisher of prestigious tax papers recognized by industry experts. ITR selects the winners among law firms and accounting firms across 20 countries in the Asia-Pacific region based on criteria such as performance, innovation, complexity, professional influence and reputation. The 2018 Asia Tax Awards ceremony was held at Mandarin Orchard Hotel in Singapore.

Only Korean Law Firm in Top Tier - International Tax Review's Tax Planning Survey 2018

In the recently published International Tax Review ("ITR") Tax Planning Survey 2018, Kim & Chang was ranked as a "Tier 1" (top tier) law firm for tax in South Korea. Our firm was the only law firm in Korea to place in Tier 1. ITR is a globally recognized tax journal affiliated with Euromoney.

About ITR's Tax Planning Survey: ITR conducts this annual survey to determine which firms offer the most outstanding tax planning service. In order to select the top tax planning firms, the journal asks its readers and tax directors of the world's leading multinational companies to vote for their top three transactional firms from more than 50 jurisdictions across the world.

PRO BONO

Kim & Chang's Social Contribution Committee Signs MOU with Korean Women Lawyers Association to Support Female Victims of Violence

On May 31, 2018, Kim & Chang Committee for Social Contribution signed an MOU with Korean Women Lawyers Association ("KWLA") to provide pro bono legal services for female victims of violence.

Kim & Chang Committee for Social Contribution will actively assist KWLA in fundraising efforts for female victims of violence, and provide pro bono legal counseling to female victims of violence.

Kim & Chang Attorneys Provide Translation and Interpretation to the Ecuadorian Ambassador to Korea and to Elementary School Students in His Talk on World History and Culture

On April 19, 2018, at Seoul's Unhyun Elementary School, members of the Kim & Chang Committee for Social Contribution provided volunteer interpretation services for a world history education program called "Story of World History and Culture Told by a Diplomat."

In continuing last year's efforts, this year's program invited the Ambassador of Ecuador to South Korea to speak about Ecuador's culture and history, and also answer questions from the students. Throughout the program, Kim & Chang attorneys provided translation and interpretation for the Ecuadorian Ambassador and the students.

Kim & Chang Committee for Social Contribution will continue supporting these educational programs to help students learn about world history in a vivid way through the stories and experiences of diplomats from across the globe.

KIM & CHANG
39, Sajik-ro 8-gil, Jongno-gu, Seoul 03170, Korea
Tel: +82-2-3703-1114 Fax: +82-2-737-9091/ 9092 E-mail: lawkim@kimchang.com www.kimchang.com