GIR KNOW-HOW EXTRADITION

Korea

Michael S Kim and Daniel S Lee
Kobre & Kim

Seong-Jin Choi and Tak-Kyun Hong
Shin & Kim

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GIR
INSIGHT

** This article was written as a collaborative project between Shin & Kim and Kobre & Kim. Shin & Kim contributed summaries of Korean law. Kobre & Kim LLP contributed thoughts on international legal issues arising in extradition matters, as well as insights from a practical and strategic point of view.

1 Are extradition proceedings regulated by domestic legislation, treaties or both?

Extradition proceedings in Korea are regulated by both domestic legislation and treaties. The main body of domestic legislation is the Extradition Act (the Act). This is supplemented by Supreme Court Rules on Review Process for Extradition under the Extradition Act (the Supreme Court Rules), which set out the court's internal rules on extradition in accordance with the Act.

Korea is a signatory to bilateral extradition treaties with 32 countries and is a party to the European Convention on Extradition. In the case of a conflict between the Act and an extradition treaty, the treaty supersedes the Act (article 3-2 of the Act).

Domestic legislation is published on the Korea Ministry of Government Legislation website (http://www.law.go.kr/lsSc.do?tabMenuId=tab18&p1=&subMenu=1&nwYn=1&section=&tabNo=&query=%EB%B2%94%EC%A3%84%EC%9D%B8%20%EC%9D%B8%EB%8F%84%EB%B2%95#undefined).

The unofficial (but most widely used) English translation is provided by the Korea Legislation Research Institute and is also published on the Korea Ministry of Government Legislation website (http://www.law.go.kr/engLsSc.do?tabMenuId=tab45&query=%EB%B2%94%EC%A3%84%EC%9D%B8%20%EC%9D%B8%EB%8F%84%EB%B2%95#).

2 Is there a central register of extradition treaties that your state has entered into?

The Korea Ministry of Foreign Affairs maintains an online database of the register and text of all treaties to which Korea is a party. While the online database is only accessible through the Korean version of the website (the English website provides only a summary), it is still possible to run searches in English. To search for extradition treaties in English, select the second option in the drop-down menu (조약명(영어)) then search 'extradition'. Clicking on the floppy disk icon in the second column (영어) brings up the English text of the treaty, if available.

http://www.mofa.go.kr/www/wpge/m_3834/contents.do

At the time of writing, Korea has entered into bilateral extradition treaties with 31 countries: Algeria, Argentina, Australia, Brazil, Bulgaria, Cambodia, Canada, Chile, China, France, Guatemala, India, Indonesia, Iran, Japan, Kazakhstan, Kuwait, Mexico, Malaysia, Mongolia, New Zealand, Paraguay, Peru, Philippines, Thailand, South Africa, Spain, Vietnam, United Arab Emirates, United States and Uzbekistan.

In terms of multilateral treaties, Korea acceded to the European Convention on Extradition, to which the 47 member states to the Council of Europe, Israel and South Africa are signatories.

3 Do special extradition arrangements apply to certain foreign states, for example states that are geographically proximate, or politically, legally or economically closely linked?

Korea does not have any such special extradition arrangements.

4 Is extradition possible to states that have no bilateral or multilateral extradition treaty with your state if they are party to an international convention?

No. However, extradition is possible based on a guarantee of reciprocity from the requesting state that it will accept extradition requests from Korea for identical or similar offences (article 4 of the Act).

5 Is extradition possible to states that are not extradition treaty partners as an ad hoc arrangement?

Korea has not entered into an ad hoc arrangement with states that are not extradition treaty partners.

6 For which offences is extradition from your state allowed?

Under article 6 of the Act, extraditable offences are defined as those that are subject to the death penalty, life imprisonment or imprisonment for not less than one year under the laws of both Korea and the requesting state. Under Korean law, a prison sentence can be either with or without prison labour. As discussed in question 1, whenever there is conflict between the Act and

an extradition treaty, the treaty supersedes. For example, the treaty between Korea and France defines extraditable offences as those that are subject to imprisonment for not less than two years under the laws of both Korea and France.

7 Is there a requirement for double (dual) criminality? How is this assessed?

Article 6 of the Act requires dual criminality. The extradition treaties to which Korea is a party generally provide that it is sufficient for the offence to be substantially analogous taking into account the totality of the conduct, and the offence does not have to be regulated in precisely the same way in terms of categorisation, terminology and constituting elements in both the requesting and requested states.

8 How would your state deal with a request that includes an offence for which extraterritorial jurisdiction is claimed?

There is no general provision under the Act for an offence for which extraterritorial jurisdiction is claimed by the requesting state. However, if part or all of the offence was committed in Korea, this qualifies as grounds for discretionary refusal (article 9(2) of the Act).

On the other hand, the extradition treaties to which Korea is a party generally provide that if the offence was committed outside the territory of the requesting state, extradition shall be granted if the law of the requested state provides for the punishment of an offence committed outside its territory in similar circumstances. If the law of the requested state does not so provide, the requested state may, at its discretion, grant extradition.

9 What must be included as part of a valid extradition request made by the foreign state?

While the Act does not specify the information or evidence to be included in an extradition request or impose translation requirements, the Supreme Court Rules specify the requirements for a prosecutor's request for extradition review as follows (articles 5 and 6 of the Supreme Court Rules):

- name, age, gender, nationality, occupation and residence of the requested person;
- if the name is unknown, other forms of identification, such as appearance;
- if the age, gender, nationality, occupation or residence is unknown, it should be stated as unknown;
- if the requested person is a Korean national, the residence registration number and legal domicile;
- whether the requested person has been arrested;
- the name of the offence and underlying facts;
- the requesting state and date of request;
- the law of the requesting state to which the offence is applicable, and the corresponding Korean law;
- if the request is based on an extradition treaty, the provisions under which the offence is made extraditable;
- if the request is not based on an extradition treaty, the guarantee of reciprocity under article 4 of the Act;
- a guarantee from the requesting state that it will comply with the speciality requirement under article 10 of the Act;
- a summary of the criminal procedures against the requested person in the requesting state; and
- if an extradition arrest warrant or a provisional arrest warrant has been issued: (i) the date on which the warrant was issued; (ii) if the requested person was arrested, the time and place of the arrest; (iii) the date on which the notice of request for extradition review was issued; and (iv) if the requested person was released prior to the request for extradition review, the date of release.

The Supreme Court Rules require documents in a foreign language to be translated into Korean (article 4 of the Supreme Court Rules).

Bilateral extradition treaties generally specify the information and documentary requirements, but not in the same way as the Supreme Court Rules, according to the type of the request:

- All requests must provide information on the identity of the requested person (including specific descriptive information) and the probable location of the person, the facts of the offence, and the applicable law regarding the essential elements to establish the offence, punishment and statute of limitations.
- For a request involving an accusation case, a copy of the warrant of arrest or detention and information providing reasonable grounds to suspect that the requested person has committed the offence are required.
- For a request involving a conviction case, a copy of the judgment setting out the conviction and the sentence imposed, and information establishing that the person sought is the person found guilty, are required.

Bilateral extradition treaties generally require documents submitted by the requesting state to be certified and translated into Korean. Some extradition treaties that Korea has entered into with non-English speaking countries also allow the translation to be in English rather than Korean.

10 What are the stages of the extradition process?

Request for extradition by the requesting state

The requesting state makes a request for extradition to Korea's Minister of Foreign Affairs through diplomatic channels. The Minister reviews the threshold question of whether an extradition treaty or guarantee of reciprocity exists between Korea and the requesting state. Once the Minister of Foreign Affairs is satisfied that these requirements are met, the request for extradition and supporting materials are sent to the Minister of Justice (article 11 of the Act).

The Minister of Justice's Order to request the court's judicial review on extradition

The Minister of Justice reviews whether the extradition request complies with the Act or the extradition treaty, and may either (i) order the Chief Prosecutor of the Seoul High Prosecutor's Office to assign a prosecutor to request the court's judicial review on extradition, or (ii) choose not to order the request, based on grounds to refuse extradition or other reasons the Minister considers appropriate to refuse extradition (article 12 of the Act).

Extradition arrest

Upon the Minister of Justice's order to request the court's judicial review on extradition, the responsible public prosecutor (i) requests the court's judicial review on extradition and (ii) when the requested person does not have settled residence or when there is a risk that he or she would flee, files for a warrant to arrest the requested person (articles 13 and 19 of the Act).

The court issues an arrest warrant unless it finds that (i) the procedure with regard to the request for the court's judicial review on extradition violated the law, (ii) there are clear grounds to refuse extradition, or (iii) the requested person has a stable residence and there is no risk of him or her absconding (article 25 of the Supreme Court Rules). Upon arrest, the requested person is sent to a prison until the Seoul High Court's decision on extradition. If the court refuses to issue the arrest warrant, the requested person will not be held in custody until the Seoul High Court's final decision on extradition.

The propriety of an arrest may be reviewed by the court upon request by the arrested person or the person's legal representative or family (see questions 15 to 18 for more details). Also, if there are legitimate reasons, the prosecutor may suspend the arrest and instead hold the person in custody or under house arrest, or invalidate the arrest (article 23 of the Act).

Review and extradition order by the Seoul High Court

The Seoul High Court (the Court) reviews the request for extradition. An oral hearing may be held, if the Court considers it necessary or the requested person so requests. In reviewing the request, the Court must provide an opportunity for the requested person and his or her counsel to state his or her position, unless the decision is to dismiss or refuse the extradition. The Court may examine the witness, order expert opinion or a translation (article 14 of the Act). The hearing is public unless the Court decides that it may cause harm to national security, public policy or good morals (article 13 of the Supreme Court Rules).

In its decision, the Court may dismiss, refuse or allow the extradition (article 15 of the Act). In making an order allowing extradition, the Court must be satisfied that the alleged offence constitutes an extraditable offence and that no bar to extradition applies. The Court's order must be reasoned and cannot be appealed.

Release or extradition decision by the Minister of Justice

Based on the Court's order, the Minister of Justice makes the final decision to either release or extradite the requested person. The prosecutor in charge must release the requested person if the Minister of Justice withdraws the request for judicial review on extradition or the Seoul High Court dismisses or refuses the request for extradition review (article 32(1) of the Act).

The Minister of Justice may decide to extradite the requested person, unless the extradition is considered to be highly inappropriate in protecting Korea's interests or the requesting state withdraws the extradition request (article 34(1) of the Act). The requested person may or may not be in custody when this final decision is made (see 'Extradition arrest', above). If in custody, the requested person is to be kept in custody under the existing extradition arrest warrant; and if not in custody, the requested person is to be arrested under a new extradition execution warrant.

Release or surrender of the requested person to the requesting state

An authorisation to surrender is sent through diplomatic channels to the requesting state. The requesting state may extradite the requested person from the requested state's prison by presenting the authorisation to surrender (articles 36(1) and 40(1) of the Act).

11 If an initial political decision is required, what factors can be considered?

There is no formal political decision process that precedes the set extradition process as governed by the legislation and treaties.

12 Is provisional arrest, before the extradition request is received, possible?

Yes, provisional arrest is possible. The process is similar to the extradition request in that it flows from the requesting state to the Minister of Foreign Affairs, Minister of Justice, Chief Prosecutor of the Seoul High Prosecutor's Office and the prosecutor in charge. If it is considered appropriate, the Minister orders the prosecutor to provisionally arrest the requested person under a provisional arrest warrant (articles 24 to 26 of the Act).

13 Must a domestic arrest warrant be issued or can an Interpol red notice be used to carry out a provisional arrest?

An additional domestic arrest warrant is required to carry out a provisional arrest. However, the Minister of Justice shall not order the provisional arrest if there are insufficient reasons to believe that there exists (i) a warrant of arrest or detention, or conviction of the requested person in the requested state, or (ii) a guarantee from the requesting state that a request for extradition for the person sought will follow. Upon the Minister of Justice's order for provisional arrest, the prosecutor in charge arrests the requested person under a provisional arrest warrant issued by the court.

Under the Act or Korean law, an Interpol red notice is not a basis for carrying out a provisional arrest. However, in bilateral extradition treaties between Korea and Canada, Paraguay and Argentina, provisional arrest may be requested through Interpol channels.

14 What is required to apply for a domestic extradition arrest warrant?

A domestic arrest warrant may be requested based upon the Minister of Justice's order to either request extradition review or provisional arrest. Upon the Minister's order for provisional arrest, the requested person is to be arrested with a domestic arrest warrant issued by the court.

A request for domestic extradition arrest warrant shall include (i) the name, address and nationality of the requested person, (ii) the requesting state, (iii) the name of the crime for which extradition is requested, (iv) a summary of the facts of the offence, (v) the place of custody, and (iv) the dates of issue and expiry of the arrest warrant (article 19 of the Act).

15 What rights does the requested person have while under arrest?

In general, when the prosecutor in charge requests an extradition review, the requested person has the right to receive a copy of the request from the prosecutor (article 13(4) of the Act). If arrested, the requested person may request that the court reviews the propriety of the arrest. In the court's review, the requested person has the right to be (i) notified of the right to request a review of the propriety of the arrest and (ii) represented by an attorney or a public attorney appointed by the court (paragraphs (2) to (14) of article 214-2, articles 214-3 and 214-4 of the Korean Criminal Procedure Act, applied mutatis mutandis pursuant to article 22(2) of the Act).

16 Is bail available in extradition proceedings?

When the court reviews the propriety of an arrest, it may order the release of a requested person under the condition of payment of bail money to guarantee appearance in court by a criminal suspect (article 214-2(5) of the Korean Criminal Procedure Act, applied mutatis mutandis pursuant to article 22(2) of the Act).

17 If so, what are the factors that a court will take into account in deciding whether to grant bail?

The court may grant bail unless there is good reason to believe that a subject is likely to (i) destroy evidence, or (ii) do harm, or is likely to do harm, to the life, body or property of a victim, a person who is deemed to know the facts necessary for the trial of the case, or such a person's relatives (article 214-2(5) of the Korean Criminal Procedure Act, applied mutatis mutandis pursuant to article 22(2) of the Act).

18 Can the court impose conditions when granting bail? What conditions can be, and usually are, imposed?

If bail is granted, payment of bail money, house arrest, a duty to attend on a date and at a place designated by the court or prosecutor, or other proper conditions may be added (article 214-2(6) of the Korean Criminal Procedure Act, applied mutatis mutandis pursuant to article 22(2) of the Act).

19 What bars can be raised to resist extradition?

There is no applicable provision on the burden and standard of proof when a court considers the bars to extradition under the Act. On the other hand, a lack of probable cause to believe that an offence was committed is a mandatory bar to extradition (article 7(3) of the Act). The extradition judge has, in nearly all respects, the same powers at an extradition hearing as would be available in criminal proceedings.

Political offence (mandatory bar; article 8 of the Act)

An offence of a political nature or committed in relation to a political offence are not extraditable. In addition, an offence is not extraditable if it is for the purpose of trying or punishing the requested person for another offence of a political nature.

However, a political offence is still extraditable if:

- the offence threatens or causes harm to the life or body of a head of state or government or that person's family;
- Korea has an obligation under a multilateral treaty to either exercise jurisdiction or to extradite (eg, 1948 Genocide Convention, 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1979 International Convention against the Taking of Hostages, 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances); or
- the offence threatens, endangers or causes harm to the life or body of numerous persons.

An offence may be purely or relatively of a political nature. Purely political offences directed against a political organisation or state government that contain no element of a common crime qualify under the political offence exception and the extradition must be refused. However, for a comparative political offence in which a common crime is committed in connection with a political act, the Seoul High Court has ruled that the political offence exception can only be applied when the political motive prevails over the intent to commit a common crime. In determining the prevailing motive, the Court found that factors such as (i) the motive of the offence, (ii) the victim, (iii) the connection and proportionality between the political purpose and the offence, (iv) the factual and legal nature of the offence and (v) the cruelty of the offence must be considered. The Court also took the view that political factors such as the relationship between the requesting state and the requested state, the historical background and differing views on historical fact need to be considered.

There have been two cases in which the Seoul High Court refused extradition on the basis that the offence was of a political nature.

Other mandatory bars to extradition (article 7 of the Act)

- Expiry of the limitation period;
- proceedings regarding the offence pending in the Korean court;
- no probable cause to believe that the offence was committed; and
- concern that the requested person may be punished or treated unfairly based on race, religion, nationality, gender, political belief or membership of a social organisation.

Discretionary bars to extradition (article 9 of the Act)

The discretionary bars under the extradition treaties to which Korea is a party supersede those in the Act. As such, the discretionary bars to extradition under the Act only apply when they do not conflict with the treaty or when requests for extradition are made from states that do not have extradition treaties with Korea. The discretionary bars under the Act are:

- the requested person is a Korean national;
- the offence was committed wholly or in part in Korea;
- proceedings against the requested person regarding an offence other than the extraditable offence are pending in Korean courts, or the person had been sentenced and has not served the full sentence or has been exempted from the sentence;
- the person has already been convicted and punished, or decided not to be punished for the extraditable offence in a third country (meaning a state other than Korea or the requesting state); and
- the extradition is inhumane, considering the nature of the offence and the person's situation.

20 Does your state extradite its own nationals and residents?

Korea may elect not to extradite based on the fact that the requested person is a Korean national (article 9(1) of the Act). The Act is not clear as to when Korean nationality needs to be acquired for the bar to apply. Extradition treaties to which Korea is a party have differing approaches. For example, the extradition treaty between Korea and the United States provides that the nationality shall be determined at the time of the commission of the offence for which extradition is requested. However, while the Treaty on Extradition between the Republic of Korea and Australia states that nationality is a bar to extradition, it is silent as to when nationality needs to be acquired.

21 Are potential breaches of human rights after extradition considered in the extradition process?

Yes. If the nature of the offence and the situation of the requested person so dictates, extradition can be considered inhumane (article 9(5) of the Act).

22 Can a person consent to extradition, and what is the procedure? Is consent irrevocable?

Yes, a person may consent to extradition. To consent, the person is required to make a submission in writing to the court. The court must confirm directly with the person that it is the person's true intent. Upon a valid consent, the court must promptly reach a decision on the extradition request. The court may not deny extradition on the basis of discretionary grounds for refusal. Upon the court's decision, the Minister of Justice decides whether to order the extradition (article 15-2 of the Act).

23 Is there a speciality protection? How is it provided? Does it apply if a person consents to extradition?

Yes, the requesting state must guarantee that the requested person will not be punished for offences other than for the offence for which it requested extradition, nor be extradited to a third country (article 10 of the Act). However, the speciality protection does not apply if:

- the person is punished for an offence that is within the factual scope of the offence for which extradition is granted;
- the person is punished for an offence committed after extradition;
- the person leaves the territory of the requesting state after extradition and voluntarily returns to it;
- the person does not leave the territory of the requesting state within 45 days of the day the person is free to leave; or
- the offence is not subject to mandatory bars under articles 7 and 8 of the Act, and the Minister of Justice considers it appropriate that the requested person may be punished for offences other than the offence for which it requested extradition, or be extradited to a third country and provides consent thereto (article 10-2 of the Act).

However, there are no express limits to speciality protection by reason of a person's consent to extradition.

24 If there is a political decision at the end of the extradition process, what factors can be considered?

In a final decision of the Minister of Justice (see question 10: 'Release or extradition decision by the Minister of Justice'), the Minister may not extradite the requested person if the extradition is considered to be highly inappropriate in protecting Korea's interests.

25 What ability is there to appeal against or judicially challenge decisions made during the extradition process? What are the requirements for any appeal or challenge?

No appeal or judicial challenge is available as part of the extradition process. The constitutionality of the lack of appeal process was raised to the Korea Supreme Court and Constitution Court. Both courts ruled that the single stage review is a matter of discretion for the legislator and not in violation of constitutional rights.

26 What are the time limits for the extradition process? How long does each phase of the extradition process take in practice?

In practice, it generally takes approximately one to two months from the date of the prosecutor's request for extradition review until the Seoul High Court's decision on the request, and two months from the date of the requesting state's request for extradition until the surrender of the requested person.

There are exceptions to this standard practice. In a highly politically sensitive case in which the requested person, a Chinese national, had already served a prison sentence in Korea for the offence subject to extradition, the prosecutor took nearly six months to make the request for extradition review to the Seoul High Court after the date on which Japan made its request for extradition. Within two months of the request for extradition review, the Seoul High Court denied extradition on the basis that the offence was of a political nature.

The prescribed time limits under the Act for the extradition process are as follows:

Provisional arrest

A provisional arrest warrant is effective for two months from the date of arrest (article 31(2) of the Act), after which the requested person must be released.

Arrest under an extradition arrest warrant

The prosecutor must request extradition review within three days of the date of the arrest (article 13(2) of the Act). The court must decide on the request within two months of the date of the arrest (article 14(2) of the Act).

If a review of the propriety of an arrest is requested, the court must hold a hearing within 48 hours of the request (article 214-2(4) of the Criminal Procedure Code, applied mutatis mutandis via article 22(2) of the Act). The court renders its decision within 24 hours of the hearing (article 106 of the Regulation on Criminal Procedure).

Surrender based on an extradition order by the Minister of Justice

The surrender must be made within 30 days of the order (article 35(2) of the Act). If the requested person was not arrested at the time of the Minister of Justice order, the surrender shall be made within 30 days of the arrest based on the extradition execution warrant or re-arrest as a result of cancellation or suspension of the execution of arrest (article 35(3) of the Act).

27 In what circumstances may parallel proceedings delay extradition?

As pending domestic criminal proceedings are mandatory grounds for resisting extradition, this may delay extradition.

28 What provision is made for legal representation of the requesting state or the requested person?

With the court's permission, the requesting state may attend or testify at the hearing through its government official or representative (article 15 of the Supreme Court Rules).

Michael S Kim

Kobre & Kim

Michael S Kim is the co-founder of Kobre & Kim, a global disputes and investigations firm. He regularly serves as lead counsel in cross-border regulatory enforcement actions and criminal investigations, with a focus on advising Korea-based corporations and private clients in addressing investigations or prosecutions by US law enforcement authorities. He has been recognised as one of the most highly regarded individuals in business crime defense by the publisher of the *Global Competition Review* (UK), noting his "extraordinary advisory and trial skills". Prior to establishing Kobre & Kim, Mr Kim served as a prosecutor for the US Department of Justice, as an Assistant US Attorney in the Criminal Division of the US Attorney's Office for the Southern District of New York.

Daniel S Lee

Kobre & Kim

With significant experience as a US Department of Justice (DOJ) prosecutor, Daniel S Lee focuses his practice on representing multinational companies in US regulatory investigations and enforcement actions, with particular experience in matters involving Korea. Mr Lee regularly investigates fraud allegations, including those related to financial fraud, government contracts fraud, money laundering and public corruption.

Before joining Kobre & Kim, Mr Lee was a DOJ prosecutor (as an Assistant US Attorney for the Western District of Texas and Special Assistant US Attorney for the District of Hawaii). While serving in that capacity, Mr Lee focused on white-collar criminal cases involving investment fraud, healthcare fraud, defence contractor fraud, and multijurisdictional asset forfeiture and tracing. Earlier in his career, he was a trial attorney for the US Department of Defense, litigating major crimes for the Pacific region, including Korea, Japan, Hawaii and Guam.

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9F, Tower B, The-K Twin Towers
50, Jong-ro 1-gil, Jongno-gu
Seoul, 03142
South Korea
Tel: +82 2 369 1212

www.kobrekim.com

Michael S Kim
michael.kim@kobrekim.com

Daniel S Lee
daniel.lee@kobrekim.com

Seong-Jin Choi

Shin & Kim

Seong-Jin Choi is a partner of Shin & Kim and his major practice areas include corporate crime, high-tech crime, financial crime, money laundering, intellectual property rights, personal information protection, information and communications, and forensic science.

Starting his career as a prosecutor at the Seoul District Prosecutors' Office in 1997, Mr Choi was in charge of special investigations at the Northern Branch of the Seoul District Prosecutors' Office, Suwon District Prosecutors' Office, among others. In particular, he investigated politicians and large corporations as a member of the presidential election funds investigation team of the Central Investigation Unit of the Korean Supreme Prosecutors' Office. Working as a prosecutor, he was dispatched to the Special Prosecutors' Office on Ddos (a cyberattack case related to Korean elections), accumulated experience in forensic science, including information and communications and digital forensic science, and served as Digital Forensic Science Officer and Forensic Science Planning Officer at the Korean Supreme Prosecutors' Office. Mr Choi also worked at the Korea Financial Intelligence Unit of the Financial Services Commission, engaging in anti-money laundering tasks, such as the analysis of illegal financial transactions and foreign exchange transactions.

Tak-Kyun Hong

Shin & Kim

Tak-Kyun Hong is a partner at Shin & Kim and his areas of practice include white-collar crime, anti-corruption and competition. Mr Hong has carried out a number of corporate criminal investigations and litigations. Prior to joining Shin & Kim in 2007, Mr Hong spent four years as a public prosecutor in Korea. He is a Chambers Asia Leading Individual for Dispute Resolution (White-Collar Crime, 2015–2018) and has been named an Expert for Investigations by Who's Who Legal (2016–2017).

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23F, D-Tower (D2),
17 Jongno 3-gil
Jongno-gu,
Seoul 03155,
Korea
Tel: +82 2 316 4114
Fax: +82 2 756 6226

www.shinkim.com

Seong-Jin Choi
sjinchoi@shinkim.com

Tak-Kyun Hong
tkhong@shinkim.com