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ABSTRACT

The introduction of the squeeze-out provisions in the Korean Commercial Code has been much anticipated and discussed in academic and practitioner circles. The underlying rationale is to balance transactional efficiency and minority shareholder protection. Disputes in connection with the squeeze-out right are to be dealt with in the Courts.

This article takes a look at the Australian regulatory framework in which the Australian squeeze-out right referred to as compulsory acquisition exists and the Takeovers Panel which was established to deal with disputes relating to takeovers.

Empirical studies show that the Takeovers Panel has been successful in ensuring matters efficiently. There may be a case for a similar panel to be established in Korea.

KEYWORDS: Squeeze-out, Compulsory acquisition, Takeovers, Takeovers Panel, controlling shareholder

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I. Introduction

Major amendments to the Korean Commercial Act[1] ("KCC") will have taken effect on April 15, 2012. The amendments include the introduction of a "squeeze-out" right to compel minority shareholders to sell their shares at a fair price to a controlling shareholder who holds at least 95% of the shares in a Korean company.[2]

[1] Korean Commercial Act, No. 10281 (May 14, 2010).

[2] The following is the author's translation of Article 360-24 of the Korean Commercial Code. It is not the official translation.

① A shareholder who holds 95 *per cent.* or more of the issued and outstanding shares of the company for its own account (the "Controlling Shareholder") to the extent necessary to achieve the company's business purpose, may request another shareholder of the company (the "Minority Shareholder") to sell its shares.

② In calculating the number of shares held referred to in paragraph 1, the number of shares held by the parent company of the controlling shareholder and its subsidiary shall be aggregated. Where the controlling shareholder is not a body corporate the shares held a company in which such controlling shareholder holds more than 50 *per cent.* of the issued and outstanding shares of the company shall be aggregated with the shares held by the controlling shareholder.

③ Before a request for sale under paragraph 1 may be made, the approval at a shareholders' meeting must be obtained in advance.

④ When the notice for the convocation of the shareholders' meeting referred to in paragraph 3 is made, such notice shall set out each of the following matters, and the Controlling Shareholder requesting the sale shall explain each such matter at the shareholders' meeting.

1. Status of the Controlling Shareholder's holding of shares in the company
2. Purpose of the request for sale
3. Evaluation by the certified appraiser of the basis and appropriateness of the calculation of the sale price
4. Payment guarantee of the sale price

⑤ No later than one month before the date of the request for sale, the Controlling Shareholder shall publicly announce the facts set out in the following paragraphs, and shall separately notify the shareholders and pledges recorded in the register of shareholders of the same.

1. The fact that the Minority Shareholder shall deliver its share certificates to the Controlling Shareholder upon the receipt of the sale price
2. The fact that if the Minority Shareholder fails to deliver his share certificates on the day the Minority Shareholder receives the sale price or the Controlling Shareholder deposits the same, such share certificates will be nullified.

⑥ The Minority Shareholder to whom the request for sale under Paragraph 1 is made shall sell his shares to the Controlling Shareholder within two months from the date of such request for sale.

⑦ The sale price of the sale under Paragraph 6 shall be determined by consultation between the Minority Shareholder to whom the request for sale is made and the Controlling Shareholder who makes the request for sale.

⑧ In the event the sale price under Paragraph 7 is not determined by consultation within 30 days from the date of such request for sale under Paragraph 1, the Minority Shareholder to whom the request for sale is made or the Controlling Shareholder who makes the request for sale may request that the Court determine such sale price.

⑨ In the event the Court determines the sale price of shares under Paragraph 8, it shall calculate a fair price taking the financial condition of the company and other circumstances into consideration.

The KCC is silent on any specific rights that a stakeholder in a squeeze-out may have. Relevantly, disputes with respect to the squeeze-out are left to the Korean courts to adjudicate. The experience in Australia with squeeze-outs or compulsory acquisition as it is known in Australia, advocates the benefits of disputes being referred to an independent administrative body that is accessible and cost-efficient.

With the introduction of the squeeze-out provisions under the KCC, this paper summarises Australian takeovers law and the role the Australian Takeovers Panel has in settling disputes. The conclusion is that from a transactional efficiency perspective, there are some merits to having such an administrative body in Korea.

II. Squeeze-Out Provisions

The policy underlying the introduction of the amendments is to balance transactional efficiency and minority shareholder protection. In this regard, a controlling shareholder's ability to squeeze out the minority shareholders is subject to the following conditions:

(a) the squeeze-out is for the target company's business purpose;

(b) the squeeze-out has been approved at a shareholders' meeting;

(c) the minority shareholders' shares are appraised by a certified appraiser; and

(d) the outcome of such appraisal, among other things, is explained by the controlling shareholder to the shareholders at the shareholders' meeting noted above.

The controlling shareholder and the minority shareholders are to negotiate the price at which the shares of the minority shareholders are sold. Article 360-24 of the

KCC provides that if the parties are unable to agree on the purchase price within 30 days of the controlling shareholder's offer to buy the minority shareholders' shares, a party may request the Court to determine the purchase price. The Court determined purchase price would be the price at which the minority shareholders would be compelled to sell their shares to the controlling shareholder.

Focusing on the first condition noted above, the scope of what would be considered for the target company's business purpose is unclear. The ambiguity lies in the theoretical difference between the controlling shareholder's business purpose and the target company's business purpose. Simplistically, a controlling shareholder's business purpose in squeezing out the minority shareholders would be to ensure that it, among other things, wholly owns its subsidiary, to ensure operational, accounting and tax efficiencies. However, at the point where a controlling shareholder owns 95% of the shares of a target company, it would be difficult to foresee circumstances where the purposes of the controlling shareholder and the target company would not be aligned.[3]

Hostile takeovers in Korea are not common, however, with the introduction of the squeeze-out right, potential disputes may arise in relation to (a) whether a squeeze-out is justifiable to achieve the company's business purpose, (b) the squeeze-out procedure prescribed by the KCC has been duly followed, and (c) a fair price has been paid, particularly when the target company is unlisted. As one of the policy aims of the introduction of the squeeze-out provisions was to promote transactional efficiency, the lack of precedent or guidance in relation to the definition of "business purpose" may prove to be an obstacle to achieve transactional efficiency, particularly if any disputes are settled only conclusively by the Court.

Australia has a squeeze-out right for controlling shareholders who own at least 90% of the shares in a listed company or a public company which has more than 50 members. Disputes with respect to a takeover, including the exercise of a squeeze-out right may be determined by a Takeovers Panel. The following outlines the Australian takeovers law, the role, benefits of the Australian Takeovers Panel and its relevance to Korea.

[3] Hyeok-Joon Rho, *New Squeeze-Out Devices as a Part of Corporate Law Reform in Korea: What Type of Device is Required for a Development Economy?*, 29 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 41, at 47 (2011) for discussion on minority shareholder proprietary rights.

III. Outline of Australian Takeovers Law

To provide some background, the following is a summary of the takeover provisions in Australia.[4] Chapter 6 of the Corporations Act 2001 (Cth)[5] sets out the takeovers provisions with respect to listed companies, listed managed investment schemes and unlisted companies with more than 50 members. The chapters are as follows:

(a) Chapter 6A relates to 'Compulsory Acquisitions and Buy-Outs Following Takeover Bids', the so-called "squeeze-out" provisions under the Australian corporations legislation;

(b) Chapter 6B relates to 'Rights and Liabilities in relation to Chapter 6 and Chapter 6A Matters'; and

(c) Chapter 6C relates to 'Information about Ownership of Listed Companies and Managed Investment Schemes', the reporting requirements etc.[6]

Section 602 sets out the purposes of the takeover provisions, which include:

(a) that takeovers take place in an efficient, competitive and informed market;[7]

that the identity of any person who proposes to acquire a substantial interest in the company is known by shareholders and directors of the company;[8]

that shareholders and directors have a reasonable time to consider the proposal;[9]

(d) that shareholders and directors are given enough information to enable them to assess the merits of the proposal;[10]

(e) as fact as practicable, all shareholders have a reasonable and equal opportunity to participate in any benefits accruing to shareholders through any takeover proposal;[11] and

[4] Much of this summary is based on the summary accessible on the Takeovers Panel's website http://www.takeovers.gov.au

[5] All references to a Section, Part or Chapter in this paper is to the Corporations Act 2001 (Cth) unless otherwise noted.

[6] The disclosure requirements for persons who have or cease to have a substantial holding in a listed company or the responsible entity for a listed registered managed investment scheme are set out in Chapter 6C. Notification requirements also apply if the person has a substantial holding and there is a movement of at least 1% in their holding, or the person makes a takeover bid for securities of the company or scheme. A "substantial holding" is defined in Section 9 and includes where a person and their associates have a relevant interest in 5% or more of the total number of votes attaching to voting shares in the body.

[7] Section 602(a).

[8] Section 602(b)(i).

[9] Section 602(b)(ii).

[10] Section 602(b)(iii).

[11] Section 602(c).

(f) that an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares under Part 6A.1.[12]

Section 606 prohibits the acquisition of a "relevant interest" in voting shares if, because of that transaction, a person's voting power in the company:

(a) increases from under 20% to over 20% or

(b) increases from a starting point that is above 20% and below 90%.

In general terms, a person will have a relevant interest in securities if they are the holder of the securities, they have the power to exercise, or control the exercise of, a right to vote[13] attached to the securities or they have the power to dispose of, or control the exercise of a power to dispose of, the securities.[14]

There are a number of exceptions to the prohibition in section 606, including:

(a) an acquisition that results from an acceptance of an offer under a takeover bid;[15]

(b) an acquisition approved by a resolution of the company in which the acquisition is made;[16]

(c) acquisitions of no more than 3% in every 6 month period;[17]

(d) an acquisition that results from a rights issue;[18]

(e) a downstream acquisition resulting from an acquisition of relevant interests in another listed entity; and[19]

(f) acquisitions resulting from a scheme of arrangement.[20]

A. Types Of Bids

There are 2 types of takeover bids: off-market bids and market bids. The differences between market and off-market bids include:

[12] Section 602(d).

[13] A person's "voting power" in a body is determined in accordance with section 610. A person's voting power includes the total number of votes attached to all of the voting shares in the company in which that person or an associate has a relevant interest. The concept of "associates" is complex. It will include (a) a person with whom the other person is acting, or proposing to act in concert in relation to the company's affairs and (b) persons with whom they have entered or propose to enter into an agreement for the purpose of controlling or influencing the composition of the company's board or the conduct of the company's affairs. It will also include companies that the person controls or that control the person.

[14] Sections 608 and 609.

[15] Item 1 of Section 611.

[16] Item 7 of Section 611.

[17] Item 9 of Section 611.

[18] Item 10 of Section 611.

[19] Item 14 of Section 611.

[20] Item 17 of Section 611.

(a) consideration under a market bid must be cash only, while an off-market bid may offer any form of consideration (including cash, securities or a combination of both);

(b) a market bid can only extend to quoted securities, while off-market bids may be for quoted or unquoted securities;

(c) offers under a market bid must be for all the securities in the bid class, while an off-market bid may specify a proportion of the securities in the bid class to which the offer relates;[21]

(d) offers under a market bid must be unconditional, while offers under an off-market bid may be subject to conditions that are not prohibited by Sections 626 to 629; and

(e) for a market bid, an increase in consideration is not passed on to those who have already accepted the bid, while for an off-market bid, if the consideration offered under the bid is improved, those who had already accepted the bid are entitled to the increase.[22]

B. Information to Shareholders

The timetable for giving information to shareholders in an off-market bid is set out in Section 633.[23] A bidder must lodge a copy of the bidder's statement and the offer document with ASIC and must also send a copy of these documents to the target (and, if relevant, the market operator of the market on which the target's securities are quoted) either on the day it is lodged with ASIC or within the next 21 days. The bidder's statement must then be dispatched to target shareholders during a 3-day period within 14 to 28 days after the bidder's statement is sent to the target. The target must then dispatch a target's statement to the bidder no later than 15 days after the target receives a notice from the bidder that all the bidder's statements have been dispatched.

General and specific disclosure requirements apply to bidder's statements[24] and target's statements.[25] Where the bidder's existing voting power in the target is 30% or more (or there are common directors), the target's statement must be accompanied by a report from an independent expert stating whether, in the expert's opinion "the

[21] Section 618(1).

[22] Section 650B(2).

[23] An overview of information to be given to shareholders in a market bid is set out in Section 634.

[24] Section 636.

[25] Section 638.

takeover offers are fair and reasonable" and giving the reasons for forming that opinion.[26]

C. Compulsory Acquisition

A bidder under a takeover bid[27] may compulsorily acquire any remaining securities in the bid class if during, or at the end of, the offer period, the bidder and their associates have:

(a) relevant interests in at least 90% (by number) of the securities in the bid class; and

(b) acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid.

The requirements for the compulsory acquisition process are set out in Chapter 6A. In summary, the compulsory acquisition is initiated by the bidder by among other things, lodging a notice with ASIC and, if the target is listed on the Australian Securities Exchange.[28] The terms of compulsory acquisition must be the same as the terms of the takeover bid:[29]

(a) immediately before the compulsory acquisition notice is given, if such notice is given before the end of the takeover bid offer period; and

(b) immediately before the end of the takeover bid offer period, if such notice is given after the end of the takeover bid offer period.

The notice must inform the holder of the securities of their right under Section 661E to apply to the Court for an order that the securities not be compulsorily acquired.[30] The Court has power to order that the securities of the holder making the application will not be compulsorily acquired.

In addition to the rights noted above, minority shareholders have a right to apply to the Australian Takeovers Panel (the "Panel") during a takeover bid for a declaration of unacceptable circumstances.

[26] Section 640.
[27] A market bid or an off-market bid for all of the securities in the bid class.
[28] Section 661B.
[29] Section 661C.
[30] Section 661B(1)(a)(ii)(B).

IV. Australian Takeovers Panel

The Panel is the primary forum for resolving disputes about a takeover bid until the takeover bid has ended. Other than, among others, the Australian Securities and Investments Commission ("ASIC"), or Ministers of the Commonwealth of Australia, Australian State or Territory, private parties to a takeover do not have the right to commence civil litigation or seek injunctive relief from the Courts in relation to a takeover while the takeover is underway.[31]

It was established under section 171 of the Australian Securities and Investments Commission Act 1989 and is continued in existence by section 261 of this Act. All members of the Panel are government appointments and consist of M&A experts; either investment bankers, lawyers, company directors or other professionals.

A. Proceedings

The Panel only considers a matter on application from a person who has standing. A person who has standing is the bidder, the target, ASIC or any other person whose interests are affected by the relevant circumstances.[32] The Panel may refer a matter to ASIC for ASIC to consider making an application.

Once an application is made, a three-member Panel is appointed by the President. The selected Panel members are required to ensure that they do not have any material conflicts. The sitting Panel's first tasks are to decide whether to commence proceedings and whether to make any interim orders (to preserve the status quo).

Under the ASIC Regulations, the Panel is expressly required to ensure that its proceedings are:

(a) as fair and reasonable;

(b) conducted with as little formality; and

(c) conducted in a timely manner.

A party (other than the applicant) may make preliminary submissions about whether the Panel should conduct proceedings in relation to an application. Parties must not make rebuttal submissions to a preliminary submission.[33]

[31] Section 659B.
[32] Section 657C(2).
[33] The rules made under section 195 of the *ASIC Act (Cth)* sets out the detailed procedural rules.

B. Powers

The powers of the Panel are set out in Chapter 6; the primary power being its ability to declare unacceptable circumstances.[34] The Panel has the power under Section 657D to:

(a) make orders to protect the rights or interests of affected persons;

(b) to ensure that a takeover proceeds, as far as possible, in a way that it would have proceeded if the unacceptable circumstances had not occurred; or

(c) orders as to costs if a declaration of unacceptable circumstances has been made.

In making a declaration of unacceptable circumstances, the sitting Panel is to consider legal and policy issues as required in Section 657A. In particular, the sitting Panel has to consider whether the circumstances are unacceptable in light of, among others, the principles referred to in Section 602.

The sitting Panel also considers whether there has been or will be a contravention of Chapters 6, 6A, 6B or 6C. A contravention of any of these Chapters does not necessarily mean the sitting Panel will make a declaration of unacceptable circumstances; it is required to consider the Section 602 principles. Further, the Panel may only declare circumstances to be unacceptable circumstances or only decline to make a declaration, if it appears to the Panel that if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant. On the other hand, if the Panel does not find a contravention of Chapters 6, 6A, 6B or 6C, it can still make a declaration of unacceptable circumstances, particularly in light of the Section 602 principles.

In addition to having the power to make a declaration of unacceptable circumstances, the Panel may review certain decisions made by ASIC.[35] Upon application by any person whose interests are affected, the Panel may affirm, vary, or set aside an ASIC decision.

C. Timing

Applications to the Panel usually take between two to three weeks after the application is made. Matters can take shorter or longer than this, depending on the

[34] Section 657A.
[35] Section 656A.

circumstances and the urgency involved.[36] According to the Panel, the time a matter takes from application to conclusion will depend on a number of factors, including:

(a) the complexity of the matter;

(b) the urgency of the application; and

(c) whether the sitting Panel decides to conduct proceedings – matters will usually take longer if the Panel decides to conduct proceedings.

Under ASIC Regulation 20(a), the Panel must decide whether to conduct proceedings as soon as practicable after receiving an application. A decision on whether to conduct proceedings is usually made between a few days and a week after an application is received. If the sitting Panel decides not to conduct proceedings, the matter will usually conclude approximately within two weeks after the application is made. The reasons for the decision not to conduct proceedings will be provided to the parties.

V. Relevance to Korea

The objectives of the squeeze-out provisions under the amendments to the KCC are to balance transactional efficiency and minority shareholder protection. Currently, any disputes in relation to the squeeze-out provisions under the KCC can only be referred to the Courts. Submission to the Courts can take a long time and whether you are the bidder, minority shareholder or directors of the target company, even the most expeditious referral of disputes to the Court can take a long term to be heard, let alone conclusively determined. In addition, the inherent broad nature of the conditions to the squeeze-out, particularly the requirement that it be for the business purpose of the target could create opportunity for litigation to be used as a strategy to affect the acquisition.[37]

In Australia, the Panel is the main forum for resolving disputes about a takeover bid until the bid period has ended.[38] This does not mean that the Panel's decisions cannot be reviewed. It is possible for the Panel's decision to be reviewed by the Review Panel, and the High Court of Australia (being the highest appellate

[36] Refer to http://www.takeovers.gov.au
[37] Emma Armson, *Working with Judicial Review: The New Operation of the Takeovers Panel* MELBOURNE UNIVERSITY LAW REVIEW 657 at 660 (2009) for an analogous analysis in relation to the Australian context.
[38] *Id.* 660-661.

court in Australia) may challenge Panel decisions under Section 75(v) of the Constitution.[39] The advantages are:[40]

- timeliness of decisions
- access to the Panel
- less tactical litigation
- consultative process

A. Timeliness

In 2006, the median time for reaching the Panel to reach a decision was 14 days, with the average being 17.11 days.[41] In 2010, the median time was 13 days, with the average being 16.2 days.[42] By contrast, the average time in 2010 for the Seoul Central District Court to make a decision for civil actions was 135.1 days.[43]

B. Access to the Panel

An application to the Panel is relatively inexpensive. The current fee is A$2,010[44] which is substantially lower than commencing litigation in Australian and Korean courts. As Professor Ramsay notes, the overall costs are lowered as the Panel prefers parties to be represented by their commercial lawyers who are involved in the takeover rather than a litigation lawyer or a barrister.[45]

C. Less Tactical Litigation

One of the main problems with the courts as the main dispute forum is that the shareholders may not receive the opportunity to consider the bid. Directors of company may use litigation with the objective of preventing bids being considered by target shareholders. In theory, directors of a Korean company may flatly refute the bidder's assertion that the squeeze out is not for the target's business purposes. Professor Ramsay refers to one court referring to a trend of 'wasteful and expedient

[39] *Id.* 661 for a detailed summary.
[40] For a detailed analysis, please refer to Ian Ramsay, *The Takeover Panel: A Review*, MELBOURNE UNIVERSITY LEGAL RESEARCH SERIES 11 (2010).
[41] Chris Miller, Rebecca Campbell and Ian Ramsay, *The Takeovers Panel – An Empirical Study*, 3 MqJBL 199, at 220 (2006).
[42] Ramsay, *supra* note 41 at 16.
[43] http://www.scourt.go.kr/justicesta/JusticestaListAction.work?gubun=10
[44] *Corporations (Fees) Regulations 2001* (Cth) Sch 1, item 27(I).
[45] Ramsay, supra note 41 at 18.

litigation, designed not for the benefit of ensuring that shareholders are properly informed but simply to buy time'.[46] The Panel has noted in a Guidance Note that one of its purposes is to expressly reduce tactical litigation.[47]

The Panel could also be abused by parties making spurious or tactical applications. However, as the Panel has noted before, the 'Panel is interested to resolve material disputes between parties where genuine attempts at negotiation have failed and to ensure that it is not used for purely tactical purposes'.[48] There has also been a trend in recent years of the Panel dismissing applications without commencing proceedings.[49]

D. Consultative Process

A feature of the Panel is its undertaking of an extensive consultation process. The process includes.

(a) consultation in the its rules and guidance notes;
(b) review of its decisions;
(c) liaison with market players;
(d) hearing of stakeholders views before a declaration of unacceptable circumstances is made[50] and before the disclosure of the reasons for a decision.[51]

In Guidance Note 10 – Public Consultation, the Takeovers Panel notes that a transparent consultation process and clear commitment by the Panel to be responsible to submissions will ensure better acceptance and support from the market, minimal restriction on the efficiency of the market, fewer unwanted costs and fictions in the market and responsiveness to changing circumstances. It has issued a guidance note on this process. The consultative process also involves the Panel inviting parties to give feedback to the Panel after each matter.

[46] *Cultus Petroleum NL v OMV Australia Pty Ltd* (1999) 32 ACSR 1, 21.
[47] Takeovers Panel, *Guidance Note 5 – Specific Remedies – Information Deficiencies*, 2008, para 10(a).
[48] *Taipan Resources NL 07* [2000] ATP 18, 54-55.
[49] Ramsay, *supra* note 41 for data on the increasing number, in percentage terms, of rejected applications.
[50] Section 657D(1).
[51] Takeovers Panel, *Guidance Note 4 – Remedies – General*, paragraph 44.

VI. Conclusion

Whilst the squeeze-out provisions under the KCC are, in some respects, different to the Australian compulsory acquisition provisions under the Corporations Act (Cth), they share a common objective to ensure efficiency and protection of minority shareholder interests. The Panel has served as a useful forum to ensure that such objective is facilitated. Although we need to wait and see how the squeeze-out provisions under the KCC are applied and interpreted by the market and the Courts, reliance on the Courts to resolve disputes may hinder achieving the objectives of transactional efficiency and protection of minority shareholder rights. Perhaps there may be a case for a Takeovers Panel in Korea.

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