



Korean Court Ruling - Forfeiture of 10% Deposit for Terminated M&A Transaction

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On March 13, 2025, the Supreme Court of Korea upheld the lower courts' rulings that the sellers do not have any monetary obligation towards the buyers in relation to the sellers' termination of the share purchase agreement and the share subscription agreement ("**Definitive Agreements**") and forfeiture of the deposit by the buyers as penalty. The transactions were for the acquisition of a controlling equity interest in Asiana Airlines for about KRW 2.5 trillion (about USD 2.16 billion at the time) where the Definitive Agreements were entered into on December 27, 2019 and terminated in November 2020 during the COVID-19 pandemic. We, Shin & Kim, advised the sellers on the transaction as well as in all court proceedings for the satisfactory outcome to the clients.

I. Dispute Termination

Upon signing of the Definitive Agreements, the buyers, HDC Hyundai Development Company and Mirae Asset Securities, deposited about KRW 250 billion (about USD 216 million at the time) to the sellers, Asiana Airlines and Kumho Construction, and received a security interest on such sum. Subsequently, the buyers refused to close the transaction on the basis that the target's businesses and financials deteriorated due to the COVID-19 pandemic and asked for renegotiation of the terms of the transactions. In response, the sellers terminated the Definitive Agreements on the basis of the buyers' breach of their obligations to close. At the same time, the sellers commenced a litigation against the buyers to confirm the non-existence of the sellers' obligation to return the deposit, extinction of the security interest on the deposit and damages for the buyers' breach.

II. Key Issues in the Case

The buyers sought to justify their failure to close the transaction by arguing that the conditions precedent were not satisfied for the reasons of, among others, (i) the occurrence of the COVID-19 pandemic as a material adverse effect, (ii) the sellers' breach of representations and warranties relating to the accounting treatment of aircraft lease liabilities and

(iii) the sellers' breach of pre-closing covenant not to issue convertible bonds without obtaining the buyers' prior consent. The buyers also added that they merely asked to confirm these points before closing and did not refuse to close and, thus, the sellers' termination is not lawful.

Through detailed analysis of relevant facts and domestic and international literature and precedents, the sellers effectively rebutted all of these claims and established that (i) the COVID-19 pandemic was carved out from the material adverse effect under the Definitive Agreements, (ii) accounting treatment of aircraft lease liabilities did not violate accounting rules and (iii) the buyers unreasonably withheld their consent for the issuance of the convertible bonds. The sellers also added that the conditions precedent were satisfied and the buyers' claims are merely pretexts for eventually withdrawing from the transactions and, thus, the buyers are refusing to close the transaction without a valid ground in breach of the Definitive Agreements.

III. Rulings

The trial court, appellate court and Supreme Court completely sided with the sellers' arguments and held that the sellers' termination of the Definitive Agreement was lawful because the buyers refused to close the transaction even though the conditions precedent were satisfied. The courts further confirmed that the sellers had no obligation to return the deposit and ordered the buyers to extinguish the security interest and pay damages for actual losses incurred by the sellers.

IV. Significance of the Case

This case sets an important precedent for future M&A transactions as it touched upon one of the most contested area—whether one can break an agreed transaction. Specifically, it touches upon the issues of the existence of material adverse effect, breach of representations and warranties, breach of pre-closing covenants and the nature and forfeiture of deposit.

This case significantly deviates from the precedents in that it acknowledged that the sellers are entitled to keep 100% of the deposit. In previous cases involving large scale M&A deals where the amounts of deposits were magnificent, the courts affirmed sellers' obligation to return some of deposits to buyers. For instance, in Hanwha Group's failed acquisition of Daewoo Shipbuilding & Marine Engineering in 2008, Hanwha was able to recoup 40% of the deposit. In Hyundai Group's failed acquisition of Hyundai Engineering & Construction in 2010, Hyundai was able to recoup 75% of the deposit.

This case emphasizes the significance of carefully drafting M&A agreements and the importance of cooperation between M&A lawyers and litigation lawyers, when litigation involving M&A transactions is expected, in establishing strategies for and handle the litigation. As we, Shin & Kim, participated in all phases from the beginning of the transaction to the final closure of the dispute, we were able to promptly outline the facts relevant to the dispute and, through meticulous analysis of legal reasoning, invalidated frivolous claims of the counterparties, thereby ultimately securing a complete

victory for our clients, the sellers.

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