NOTE

DON QUIXOTE OR ROBIN HOOD?: MINORITY SHAREHOLDER RIGHTS AND CORPORATE GOVERNANCE IN KOREA

BOONG-KYU LEE*

I. INTRODUCTION

On December 27, 2001, in a derivative suit brought by the minority shareholders of Samsung Electronics against 11 current and former directors, a court of first impression awarded damages of ₩97.7 billion. If confirmed by the appellate Seoul High Court and ultimately the Supreme Court, the individual defendants must repay ₩97.7 billion to Samsung Electronics – but of course, since this is a derivative suit, the minority shareholder plaintiffs will not be compensated directly.[1]

The Samsung verdict represents the second pro-shareholder derivative verdict since the one in 1998 against Korea First Bank, but in monetary terms the recent decision dwarfs the ₩40 billion awarded in the latter case.[2] It represents a major vindication of minority shareholder rights for good corporate governance and has been praised as a enlightened decision that takes away from the controlling owners what should be rightfully that of the shareholders as a whole.[3] A "Robin Hood"-like imperative of sorts.

Meanwhile, according to a recent securities analyst report, as of April 1, 2002, the aggregate market value of Samsung Electronics' listed stocks surpassed that of Sony Electronics.[4] Given that derivative suits may be assumed to be brought in times of what shareholders believe to be unjustified market collapse, the timing of the verdict seems interesting, to say the least.

In fact, the leader of the civic group behind the suit has claimed to have been compared to "Hitler" and "Stalin" in newspaper columns[5] and in various media outlets has been accused of being a mouthpiece of a "People's Revolution" to overturn capitalist society.[6] A similar, but less inflammatory comparison may be "Don Quixote" – tilting at windmills and doing battle in the name of minority shareholder rights, but actually

---

* J.D. (Columbia, 2002). B.A. (Yonsei), M.B.A. (Wharton), S.M. (Sloan).

[1] *See, infra* note 51.

[2] *See, infra* note 19.

[3] *See, e.g., Issue Report*, CENTER FOR GOOD CORPORATE GOVERNANCE (www.cgcg.or.kr), December 28, 2001.

[4] *See Samsung Electronics' Market Value Surpasses Sony Electronics*, KOREA HERALD, April 4, 2002. "According to Daewoo Securities, Samsung Electronics' market value reached only 35.38 percent of Sony's market value at the beginning of last year, but steadily rose to 81.78 percent early this year to finally surpass the Japanese electronics giant. Samsung Electronics' sales reached of ₩ 32.38 trillion last year, overwhelming Sony Electronics' ¥3.007 trillion, and recorded net profits of ₩2.94 trillion to once more surpass Sony's ¥4.5 billion."

[5] Symposium Comments by Professor Hasung Jang at the ADVANCING CORPORATE GOVERNANCE REFORM IN ASIA: AN ASIAN PERSPECTIVES PROGRAM held on February 25, 2002 at Columbia University's APEC Study Center.

[6] *See, e.g.*, J.C. Park, *Free Enterprise Institute NGO Director Publicly Criticizes the Ideology of the People's Solidarity for Participatory Democracy*, MONTHLY CHOSUN, May 2001.

hurting their interests in the process.

On the other hand, the same leader who chairs the Participatory Economy Committee of the People's Solidarity for Participatory Democracy is a professor of finance at Korea University, boasts a doctorate in finance from the Wharton School at the University of Pennsylvania, and is an advisor to the Korea Stock Exchange. He has also served as advisor to the Presidential Commission for Financial Reform and the Ministry of Finance and Economy and has been awarded the Graham & Dodd Award. In short, hardly the resume of a people's revolutionary.[7]

In the following, the paper presents a brief history of Korea's corporate governance, the crisis sparked by the 1997 Asian Financial Crisis, and the reforms sparked thereof. The role of the civic movement in the evolution toward global governance norms is evaluated and the primary statutory tools of minority shareholder rights will be examined. Finally, a closer look will be taken at the recent Samsung Electronics' ruling to provide a backdrop to understanding the Robin Hood vs. Don Quixote question.

II. HISTORICAL OVERVIEW OF KOREAN CORPORATE GOVERNANCE

Since its initially humble re-emergence as an independent nation following World War II and the devastation of the Korean War, Korea has transformed itself into one of the world's largest industrial economies and a member of the Organization for Economic Cooperation and Development (OECD).[8] The history of Korean economic development is one of government-led industrialization – exemplified by the series of Five-Year Economic Development Plans initiated and implemented by the bureaucrats at the (now-defunct) Economic Planning Board and the Economic Secretariat of the President, since 1961.[9]

---

[7] Biographical Information Sheet, ADVANCING CORPORATE GOVERNANCE REFORM IN ASIA: AN ASIAN PERSPECTIVES PROGRAM, *supra* note 5.

[8] As late as 1960, Korea had a per capita GDP (gross domestic product) of around $80. By 1996, the per capita GDP had grown over 120 times to $10,543 and Korea was the world's 11th largest industrial economy. Il-Chong Nam et al., *Corporate Governance in Korea,* at p.2 (Mar. 1999) (http://www.oecd.org/daf/corporate-affairs/governance/roundtables/in-asia/1999/namkang-kim-joh-Korea.pdf), that cites data from National Statistical Office, MAJOR STATISTICS OF THE KOREAN ECONOMY.

For a general introduction of the Korea's remarkable transformation, *see,* THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY (World Bank, 1993). *See also,* Robert E. Lucas, *Making a Miracle,* 61 ECONOMETRICA 251, 271 (1993), for a model of "economic miracles" based on Korea.

[9] *See generally,* Robert Wade, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE

The main particulars of the Korea's economic approach have been (1) preferential loans to targeted industries and management and (2) bank, as opposed to, equity financing.[10] Responding to a scarcity of capital and quality entrepreneurship, the government directed the state-owned banks to provide often below-market loans to preferred industries – beginning in wigs, moving on to shoes and clothing, graduating to steel and chemicals, and leading eventually to electronics, automobiles, and semiconductors.[11] By using export performance as a measuring stick, Korea was able to avoid the inefficiency and corruption endemic to other state-led industrialization efforts.[12]

The use of bank, as opposed to equity financing, was a way to further ensure strict government-control. As the sole source of external financing for companies thirsty for capital, the government wanted to avoid duplicative investments that presumably would "waste" the limited funds available.[13]

The process of rewarding successful entrepreneurs with more capital and the permits to enter new sectors led to the creation of the *chaebols*, or family-controlled unrelatedly diversified conglomerates. Following the Japanese example of pre-World War II *zaibatsu*[14], chaebols were justified as an efficient way to compensate for the scarcity of management talent and corporate funds. The conglomerate structure enabled the founding families to leverage its control of the mother company over to the entire group of companies through extensive cross-holdings.[15]

OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION (1990) and L. Jones and Il Sakong, GOVERNMENT, BUSINESS, AND ENTREPRENEURSHIP IN ECONOMIC DEVELOPMENT: THE KOREAN CASE (1980).

[10] *See generally,* Wade (1990), *supra* note 9 and Alice Amsden, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION (1989).

[11] *See* Kee-Young Kim and Boong-Kyu Lee, *The Innovation Triangle: Stimulating Innovation in Private and Public Enterprises* in Lewis M. Branscomb and Young-Hwan Choi (Eds.) KOREA AT THE TURNING POINT: INNOVATION-BASED STRATEGIES FOR DEVELOPMENT (1997).

[12] Essentially, companies that were not able to produce the dollar revenues represented by exports were cut-off from future financing or forced to sell its assets to a more "successful" exporter. On the other hand, good performance was rewarded by more loans and permission to enter new industrial sectors. Amsden (1989), *supra* note 3, refers to this control mechanism as a "carrot-and-stick" approach.

[13] The government saw its role as a gatekeeper to ration the loans obtained from foreign sources. In effect, the government was substituting the market to decide the most efficient allocation of resources. *See, supra* note 9, especially Wade (1990) and his notion of "governing the market."

[14] Indeed the two words share common Chinese characters, but are merely pronounced differently in Korean and Japanese.

[15] Along with the previous cited sources, *see* Bernard Black et al. (2001), *Corporate Governance in Korea at the Millennium: Enhancing International Competitiveness: Final Report and Legal Reform Recommendations*, 26 IOWA J. CORP. L. 537. According to data from the Bank of Korea cited in the Black Report, by 1995, the thirty largest chaebol represented 41% of total sales

Unfortunately, by 1997, when the so-called "Asian Financial Crisis" hit, the same economic infrastructure that enabled such impressive growth was exposed as particularly susceptible to an external liquidity crunch.[16]

The chaebol reliance on government-loans, which provided cheap capital (often at interest below-market) without compromising management control, had stunted the development of the equity market as an alternative to bank lending. Domestic institutional investors, especially in the form of insurance or mutual fund companies, are still largely within the chaebol structure. For example, Samsung, the chaebol known for its electronics subsidiary, also has Samsung Life, Samsung Fire and Casualty, and Samsung Securities, within its "group." Pension funds are a relatively recent addition to the economic environment.

As mentioned, the cross-holdings also lessened the need for Korean chaebols to access the equity market by leveraging existing loans taken out by the parent or sister companies.

Furthermore, companies have been and still are limited in directly accessing the foreign capital market. Only since the 1997 Financial Crisis, have foreign investors been able to participate in the domestic capital market.[17]

Of course, as noted previously, not all conflict of interest transactions are bad. For instance, an electronics subsidiary that is enjoying record profits can fund semiconductor subsidiary so that the latter can develop and market a new generation of chips. However, if the electronics subsidiary is public and the semiconductor subsidiary is private (or controlled by the "founder"), the ordinary shareholders of the former may have cause to complain, especially if the investment goes sour.[18]

The judiciary traditionally has been more involved in social, as opposed to business, issues, leaving economic adjudication to the

---

in the Korean domestic economy, while the five largest alone – Hyundai, Daewoo, Samsung, Lucky-Goldstar (LG), and Sunkyong (SK) – accounted for 26% of the total domestic sales. As to ownership, citing Fair Trade Commission statistics, Black et al. write that in 1997, within the top five chaebol, family members' holdings were 8.6% of total shares with group affiliates owning an additional 37% via cross-company shareholdings and intra-group loans and guarantees. The complicated shareholding structure has been likened to a "spider-web," while the avaricious expansion into unrelated areas enabled by this financial structure is compared to "octopus-legs" in the Korean media.

[16] *See* Nam et al. (1999), *supra* note 8, at 4 and more generally for an economic analysis of the 1997 Crisis.

[17] *See, e.g.*, Nam et al. (1999), *supra* note 8.

[18] This, of course, is how Samsung got into semiconductors in the early 1980s. Samsung is now the world's largest DRAM semiconductor manufacturer in the world. *See generally*, Kim and Lee (1997), *supra* note 11.

government bureaucrats at the Presidential Secretariat, Ministry of Finance, and Ministry of Trade and Industry. Naturally, without a tradition of litigating economic and management issues, it is probably safe to say that the expertise level of the Korean judiciary is well-short of that of Delaware.[19] There is still no class action law in Korea, although several legislative proposals have been put forward in the National Assembly and the government is in favor of the concept.[20]

Take-overs, especially the hostile sort, are almost unheard-of in Korea. The cross-holding structure and public hostility toward foreign ownership are usually mentioned as reasons.[21]

In general, it is safe to say the interplay of the aforementioned factors and the economic environment of Korean business, would suggest a liability system in which the rights of minority shareholders are protected after the fact through a "fairness" test. The lack of an active market for corporate control, inefficient capital market, and relatively unsophisticated investors coupled with the lack of institutional investor oversight calls for a legal safety net for minority investors. In fact, as seen below, the revised corporate laws in Korea, combine both the property and liability rules – i.e. the right to injunction ("majority of minority consent") as well as the right to file derivative suits ("fairness" test).[22]

Indeed, since the 1997 Financial Crisis, civic groups, in cooperation with foreign institutional investors, have achieved better transparency and outside director participation in the board.[23]

---

[19] Since the financial crisis of 1997, the judiciary has on occasion accepted and ruled on cases involving minority shareholders and in a celebrated case in 1998, a civic organization called the People's Solidarity for Participatory Democracy (PSPD) and its Participatory Economy Committee (PEC), initiated a suit against Korea First Bank. Korea First Bank was the major creditor bank of Hanbo Iron & Steel, and it was claimed that the vast and inappropriate loans made to the steel company were in violation of the bank's fiduciary duties of care and loyalty. In a case lasting 17 months, the Seoul District Court found the bank was responsible for poor management and a host of irregularities (including bribery). The Court jailed the bank's former president and other officials, and ordered them to pay a fine of ₩40 billion (at the time, in the depth of the Financial Crisis, the exchange rate was about $1 = ₩1,700). *See Minority Shareholders Active in Defending Interests*, KOREA TIMES, July 26, 1998.

On the other hand, the judiciary has refused to block a preferential convertible bond offering and similar bond/warrant offering that enabled the son of the current chairman of Samsung Group to achieve a father-son succession that minimized the son's tax consequences by diluting the existing shareholdings. *See Minority Shareholders Powerless to Block Father-to-Son Succession at Samsung Group*, KOREA HERALD, June 26, 2000.

[20] *See Seoul Decides to Phase-In Class Action Suit System*, KOREA HERALD, October 28, 2000.

[21] Nam et al. (1999), *supra* note 8.

[22] *See* Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, (Forthcoming March 2003), CALIFORNIA LAW REVIEW.

[23] *See, e.g., Activist Group Moving to Legislate Cumulative Voting, Class-Action Suits*, KOREA HERALD, October 17, 2000.

According to Goshen (2003)[24], there are four general alternatives to resolve the self-dealing problem in corporate law. A property rule prevents any transaction from proceeding without the minority owner's consent – in effect, a majority of the minority is required. In contrast, a liability rule allows transactions to be imposed on an unwilling minority but ensures that the minority is adequately compensated in objective market-value terms – i.e. a fairness test. At the extremes, first, there can be an absolute prohibition on self-dealing via a requirement of unanimous approval. The opposite possibility is complete non-intervention via a pure market solution.

Goshen (2003)[25] then enumerates various factors affecting a "right" solution that would determine the optimal configuration of governance – negotiation costs, adjudication costs, and finally extra-legal corrective mechanisms. Within negotiation costs, there can be: (1) administrative costs, (2) degree of institutional investor involvement, (3) strategic voting, and (4) the frequency and quality of conflict of interest transactions.

Adjudication costs are characterized by the quality and efficiency of the judiciary process and professional institutions. One can think of the judiciary's competence in complicated valuation exercises as an example of an adjudication cost.

In Goshen's (2003)[26] parlance, extra-legal corrective mechanisms include: (1) the market for corporate control, which if developed, points to a property rule to protect exploitation – otherwise, a liability rule should be preferred; (2) the capital market – i.e. if the capital markets are efficient, property rules protect by lowering funding costs; but companies who do not access the equity market often are not controlled; (3) sophisticated investors – i.e. if investors are sophisticated, even a non-intervention market solution may work; otherwise law must protect the minority shareholder rights; and (4) corporate reputation and trust, that is in a society where the if role of reputation is high, a liability rule can effectively protect the minority.

As noted, a more particular offshoot of corporate reputation may be found in the social pressure exerted by civic groups regarding minority shareholder rights. In that vein, what follows is an examination of the so-called NGO phenomenon in Korea and its effect on corporate governance, with an introduction to its most outstanding example – the People's Solidarity for Participatory Democracy.

---

[24] *See* Goshen *(2003), supra* note 22.
[25] *Id.*
[26] *Id.*

III. NGO-POWER IN KOREAN CORPORATE GOVERNANCE AND THE PEOPLE'S SOLIDARITY FOR PARTICIPATORY DEMOCRACY

A. THE ROLE OF NGOS

The first question is to be asked is what is an NGO? The Encyclopedia of Public International Law defines the term as follows:

> Non-governmental organizations (NGOs) are private organizations (associations, federations, unions, institutes, groups) not established by a government or by an international agreement, which are capable of playing a role in international affairs by virtue of their activities, and whose members enjoy independent voting rights. The members of an NGO may be individuals (private citizens) or bodies corporate. Where the organization's membership or activity is limited to a specific state, one speaks of a national NGO and where they go beyond, of an international NGO.[27]

To that definition, a statement of non-profit status and voluntary membership should probably be added (or at least made more specific), both of which aid the legitimacy and mandate of an NGOs' activities.[28]

In general, NGOs are the organizational instruments by which citizens demand protection and accountability from the power of government and business.

More formally, the various functions of an NGO can be classified into five major categories. What follows summarizes Jacobson (1984), as quoted in Gamble and Ku (2000).[29]

(1) *Informational* functions involve the gathering, analysis, exchange, and dissemination of data and points of view.

(2) *Normative* functions involve the definition and declaration of standards. This does not imply instruments that are legally-binding, but rather proclamations that are designed to affect domestic and international public opinion.

(3) *Rule-Creating* functions also involve standard-setting, but

---

[27] 9 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolph Bernhardt ed., 1986).

[28] *See, e.g.*, Paul Streeten, *The Role of NGOs: Charity and Empowerment*, 554 ANNALS 193 (November 1997).

[29] Harold K. Jacobson, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATION AND THE GLOBAL POLITICAL SYSTEM 83 (2d ed., 1984), quoted in John King Gamble and Charlotte Ku, *International Law – New Actors and New Technologies: Center Stage for NGOs?*, 31 LAW & POL'Y INT'L BUS. 221 (2000).

with the goal to create instruments with legally-binding, such as the international human rights covenants.

(4) *Rule-Supervisory* functions involve measures taken to insure compliance with the rules that are in place. This may include verification of violations and the imposition (or at least, recommendation for) sanctions.

(5) *Operational* functions involve the use of the resources (e.g. financial or technical) at the organization's disposal.

Armed with these functional tools, NGOs can provide enforcement of international human rights norms and prod eventual internalization of such norms so that external monitoring is less necessary.

Despite, or perhaps because of, the effectiveness of NGOs in promoting corporate governance and strengthening civil society, such operations are often in an antagonistic relationship with domestic corporations and host governments that are targeted by the NGOs.

In a human rights sense, governments are often led to human rights abuse because of their compromised legitimacy (e.g. Burma/Myanmar), which means any publicizing of their human rights record further destabilizes their mandate.[30] It is not surprising, therefore, that "non-government" organizations are seen as "anti-government" organizations that threaten "security and stability."[31] Domestic NGOs are portrayed as groups led or infiltrated by foreign agent provocateurs, while international NGOs are "imperialist tools" threatening national sovereignty.[32]

The paradox is that countries with relatively open societies are often subject to stricter standards and stronger condemnation when norms are violated. One explanation may be that such nations are more susceptible to international pressure and shaming, which makes NGO activities more effective. In short, it is a "you should know better" rationale. Indeed, a common complaint of the South Korean governments during the 1980s was their human rights report card was harsher than the completely hopeless North.[33]

---

[30] *See* HUMAN RIGHTS WATCH, *World Report 2001*, http://www.hrw.org (2000).

[31] *See generally*, Michael H. Posner & Candy Whittome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269 (Spring 1994) at 273.

[32] *Id.* at 277. "[China] has deemed independent human rights reporting to constitute counterrevolutionary propagandizing and disclosure of important state secrets." This kind of criticism echoes that presented by domestic corporate interests threatened by NGO activity. *See, e.g.*, Park (2001), *supra* note 6.

[33] *See generally*, Suk-Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants*, 14 MICH. J. INT'L L. 705 (Summer 1993). *See also*, HUMAN RIGHTS WATCH, *supra* note 5 ("[w]here public advocacy was possible..."). *But see, e.g.*, K.S. Shin, *Freedom House Calls N. Korea "Worst of the Worst"* (in Korean), YONHAP NEWS, Dec. 21, 2000, for a recent counter-

Interestingly, the same "you should know better" rationale is one of the primary cited reasons for the People's Solidarity for Participatory Democracy campaign against Samsung. Since Samsung is the leading corporate presence in Korea,[34] any pressure towards Samsung will presumably waterfall down to the less enlightened and more egregious domestic corporate players.[35]

B. PEOPLE'S SOLIDARITY FOR PARTICIPATORY DEMOCRACY

The People's Solidarity for Participatory Democracy (PSPD: *Cham-Yeoh Yeon-Dae*) is the leading example of a NGO. The PSPD was founded in Seoul, on September 10, 1994 with 200 members. At a period of transition between the past military regimes and the newly-democratic government of President Young-Sam Kim, the PSPD declared itself a bulwark against the conservative remnants of the prior ruling classes that still dominated society. The PSPD stood for fundamental institutional reform based on monitoring activities of the legislative, judicial, and executive branches of government.

Guided by leading academics, clerics, lawyers, and social activists, it now boasts over 10,000 members and has been widely cited as a positive force for civic and human rights expansion.[36] Its recent programs have focused on tax evasion by prominent industrialists, job protection, and oversight of the legislature, as well as its traditional emphasis on publicizing the judicial plight of various human rights activists.[37]

The Participatory Economy Committee (PEC) of the PSPD has engaged in a minority shareholder rights campaign to protect minority shareholders' and increase transparency of corporate management since 1997.[38] The PEC, established in January 1997, was founded and is led by

---

example.

[34] *See, e.g.*, William J. Holstein, *Samsung's Golden Touch*, FORTUNE, April 1, 2002.

[35] *See, supra* note 5. Professor Jang also commented, "If you want to make money, invest in the companies we target."

[36] People's Solidarity for Participatory Democracy, http://www.peoplepower21.org (2000).

See also, Korea Council of Citizens' Movement, http://members.kr.inter.net/kccm (2000) and NGOKorea.org, http://www.ngokorea.org/main.htm (2000).

[37] People's Solidarity for Participatory Democracy, *supra* note 36. Unfortunately, the PSPD also has many problems to solve as well: lack of political independence and the political leanings of many of the board members; conflict between the board and the permanent staff; lack of financial independence and acceptance of corporate and government support; and ultimately, a fundamental discrepancy between the leadership and the grass roots, the latter of whom enroll as members, but don't participate in PSPD activities nor pay dues.

[38] *See, supra*, note 36.

Hasung Jang, a professor at Korea University. The PEC is comprised of a diverse group of experts, including corporate attorneys, accountants, and academics. The Participatory Economy Committee has three full-time paid and about twenty volunteers, with its budget raised from membership dues and donations.[39]

The stated goal of the PEC is to:

> "enhance the Korean economic structure by urging corporations to promote transparency in management and conduct responsibility-taking management. The morale (sic) behind its active movements is that a notable turnaround as well as future development in Korean economy would not be feasible without reforms of the Chaebol system, characterized by over-diversification, excessive debt-ratio, inside trading and expedient donation and inheritance of owners."[40]

These aims are implemented through filing suits for the general public good in the name of civic NGOs, an active minority shareholders' rights movement, and monitoring chaebol policy via an aggressive media campaign.

The most notable success to date of the PEC has been the aforementioned Samsung Electronics derivative suit and therefore will be examined more closely following a look at the current legal structure for minority shareholder protection in Korea.

IV. MINORITY SHAREHOLDER PROTECTION LAWS

The following summarizes the current rules pertaining to the key rights of minority shareholders under relevant Korean laws such as the Commercial Act (CA) and the Securities and Exchange Act (SEA), both of which were amended recently.[41]

---

[39] Note the reliance on government and corporate donations that possibly taint the independence of the PEC. *See, supra*, note 37. If the funds required are obtained from a single dominant source, whether government, business, philanthropic organization, or wealthy individual, independence may be compromised. Of course, the issue is not an all-or-nothing proposition, but more properly conceived as a continuum on which financial dependence may lead to compromised independence after a certain point is crossed. *See generally,* Jay S. Ovsiovitch, *Notes: Feeding the Watchdogs: Philanthropic Support for Human Rights NGOs*, 4 BUFF. HUM. RTS. L. REV. 341 (1998).

[40] *See, supra*, note 36.

[41] Commercial Act, Act No. 6086, Dec. 31, 1999 and Securities and Exchange Act, Act No. 6176, Jan. 21, 2000 (English Translation: Ministry of Legislation and Korean Legislation Research Institute 2000).

OWNERSHIP PERCENTAGE REQUIRED

	Unlisted Companies	Listed Companies – Need to hold for more than 6 months
Right to Demand Extraordinary Meeting	3%	3% (1.5%)
Derivative Suit	1%	0.01%
Right to Demand the Dismissal of Directors	3%	0.5% (0.25%)
Injunctions to Prevent Illegal Acts of Management	1%	0.05% (0.025%)
Right to Open the Accounting Books	3%	0.1% (0.05%)
Right to Demand the Appointment of Inspectors	3%	3% (1.5%)
Right to Make Suggestions to Shareholders' Meeting	3%	1% (0.5%)

* Figures in parentheses are for corporations with capital in excess of ₩100 billion.

Since the SEA is a "special law" in relation to the CA, the rules under the former law prevail over those under the latter, in the event of any conflict between them. What follows is a more specific look at the relevant provisions.

A. RIGHT OF PROPOSAL[42]

Under the CA, any shareholder holding 3 percent or more of the total issued and outstanding shares carrying voting rights may propose in writing certain agenda for a general shareholders' meeting at least six weeks prior to the date of such meeting. In such case, the board of directors must adopt such proposed agenda for the general shareholders' meeting, unless such agenda contradicts applicable law or the articles of incorporation. If requested by the proposing shareholder, the board of directors must give such shareholder an opportunity to present and explain its proposed agenda.

Under the SEA, this right is triggered by 0.5 percent or more of the total issued and outstanding shares carrying voting rights for more than six months, in the case of a listed corporation with a paid-in capital of one hundred billion won or more. In the case of a listed corporation with a paid-in capital of less than one hundred billion won, this right is triggered on possession of 1 percent or more of the total issued and outstanding shares carrying voting rights which must have been held for

---

[42] CA: Article 363-2 (Shareholders' Right to Make Proposal)

(1) Shareholders who hold no less than 3/100 of the total outstanding shares other than nonvoting shares may propose to make a matter a subject matter of a general shareholders meeting (hereinafter referred to as "a shareholders' proposal") to directors in writing at least six weeks prior to the date set for such meeting.

(2) Shareholders under paragraph (1) may request in writing that directors record the summary of the proposal submitted by the shareholders in addition to the subject-matters of the meeting in a notice and public notice under Article 363 at least six weeks prior to the date set for such meeting.

(3) Where there is a shareholders' proposal under paragraph (1), directors shall report to the board of directors, which shall accept the proposal as a subject-matter of the general meeting of shareholders, unless its contents are in breach of the relevant acts, subordinate statutes or the articles of incorporation. In this case, the shareholders who made the proposal shall, on their request, be given an opportunity to explain the proposal at the general meeting.

SEA: Article 191-14 (Stockholder's Proposal)

(1) A person who has 10/1000 or more (in case of a corporation as prescribed by Presidential Decree, 5/1000 or more) of the total number of issued and outstanding shares of a stock-listed corporation or Association-registered corporation for six months as prescribed by Presidential Decree may propose to the directors that such directors place certain matters as agenda matters of the general meeting of stockholders under the conditions as prescribed by Presidential Decree (hereinafter referred to as "stockholder's proposal").

(2) Any person who makes a proposal as a shareholder pursuant to the provisions of paragraph (1) may ask directors to enter the summary of their proposal in a publication and a notice thereof in accordance with the provisions of Article 363 of the Commercial Act in addition to matters to be placed on the agenda of a general meeting of shareholders on the conditions as prescribed by Presidential Decree.

(3) The board of directors shall submit stockholder's proposals before the general meeting of stockholders as the agenda matters thereof, except where the contents of the stockholder's proposal violate statutes or subordinate statutes, the articles of incorporation or in the case as prescribed by Presidential Decree, and where a person who makes a stockholder's proposal requests, the board of directors shall give that person an opportunity to explain the concerned proposal at the general meeting of stockholders.

more than six months.

B. RIGHT TO CONVOKE A GENERAL SHAREHOLDERS' MEETING[43]

Under the CA, any shareholder which holds 3 percent or more of the total issued and outstanding shares may demand that the board of directors convoke a general shareholders' meeting by submitting a written statement of the proposed agenda and the reason for meeting. If the board of directors fails to convoke a meeting, then such shareholder may in its own name and authority convoke a meeting upon the approval of the competent court.

Under the SEA, this right is triggered by holding 1.5 percent or more of the total issued and outstanding shares carrying voting rights for more than six months, in the case of a listed corporation with a paid-in capital of one hundred billion won or more. In the case of a listed corporation with a paid-in capital of less than one hundred billion won, this right is triggered on possession of 3 percent or more of the total issued and outstanding shares carrying voting rights which must have been held for more than six months.

---

[43] CA: Article 366 (Demand for Convocation by Minority Shareholders)

(1) Shareholders who hold no less than 3/100 of the total outstanding shares may demand the convocation of an extraordinary general meeting, by submitting to the board of directors a written statement of the proposed subject-matters of the meeting together with the reasons for the proposed convocation.

(2) If the steps for the convocation of a general meeting are not taken promptly after the demand mentioned in paragraph (1), the shareholder who made such demand may convene such meeting with the permission of the court.

(3) At a general meeting held in accordance with paragraphs (1) and (2), an inspector may be appointed to investigate the affairs of the company and the status of its property.

SEA: Article 191-13 (Exercise of Minority Stockholders' Rights)

(4) A person who has held 30/1000 or more (in case of a corporation as prescribed by Presidential Decree, 15/1000 or more) of the total number of issued and outstanding shares of a stock-listed corporation or Association-registered corporation for six months as prescribed by Presidential Decree may exercise the stockholder's rights prescribed in Articles 366 and 467 of the Commercial Act. In this case, when a person exercises the stockholder's rights prescribed in Article 366 of the Commercial Act, the number of shares shall be calculated based on voting shares.

C. RIGHT TO DEMAND REMOVAL OF DIRECTOR AND STATUTORY AUDITOR[44]

Under the CA, any shareholder holding 3 percent or more of the total issued and outstanding shares may propose that a director or statutory auditor who has committed material misconduct or a material violation of applicable law or the articles of incorporation be dismissed at a general shareholders' meeting. If such dismissal is not resolved at the meeting, such shareholder may apply for the dismissal of the pertinent director or statutory auditor with the competent court.

Under the SEA, this right is triggered by holding 0.25 percent or more of the total issued and outstanding shares for more than six months, in the case of a listed corporation with a paid-in capital of one hundred billion won or more. This right is triggered on possession of 0.5 percent or more of the total issued and outstanding shares which must have been held for more than six months, in the case of a listed corporation with a paid-in capital of less than one hundred billion won.

D. RIGHT OF INJUNCTION[45]

---

[44] CA: Article 385 (Dismissal)

(1) A director may be dismissed from office at any time by a resolution at a general shareholders' meeting in accordance with Article 434: *Provided,* That in case where the term of office of a director was fixed and he is dismissed without cause before the expiration of such term, he may claim for damages caused thereby.

(2) If the dismissal of a director is rejected at a general shareholders' meeting notwithstanding the existence of dishonest acts or any grave fact in violation of the relevant acts, subordinate statutes or the articles of incorporation in connection with his duties, any shareholder who holds no less than 3/100 of the total outstanding shares may demand the court to dismiss the director, within one month from the date on which the above resolution of the general meeting was made.

(3) Article 186 shall apply *mutatis mutandis* in case of paragraph (2).

SEA: Article 191-13 (Exercise of Minority Stockholders' Rights)□

(2) A person who has held 50/10,000 or more (in case of a corporation as prescribed by Presidential Decree, 25/10,000) of the total number of issued and outstanding shares of a stock-listed corporation or Association-registered corporation for six months as prescribed by Presidential Decree may exercise the stockholder's rights prescribed in Article 385 (including cases applied *mutatis mutandis* under Article 415 of the Commercial Act) of the Commercial Act.

[45] CA: Article 402 (Right to Injunction)

If a director commits an act in contravention of the relevant acts, subordinate statutes or the articles of incorporation and the act is likely to cause irreparable damage to the company, the auditor or a shareholder who holds no less than 1/100 of the total outstanding shares may demand on behalf of the company that the director stop such act.

SEA: Article 191-13 (Exercise of Minority Stockholders' Rights)

(2) A person who has held 50/10,000 or more (in case of a corporation as prescribed by Presidential Decree, 25/10,000) of the total number of issued and outstanding shares of a stock-listed corporation or Association-registered corporation for six months as prescribed by Presidential Decree may exercise the stockholder's rights prescribed in Article 385 (including cases applied *mutatis mutandis* under Article 415 of the Commercial Act) of the Commercial Act.

Under the CA, any shareholder holding 1 percent or more of the total issued and outstanding shares may demand that a director cease and/or desist from an act which is or - if taken - would be, in violation of applicable law or the articles of incorporation and which poses the potential threat of irreparable damage to the corporation.

Under the SEA, this right is triggered by holding 0.25 percent or more of the total issued and outstanding shares for more than six months, in the case of a listed corporation with a paid-in capital of one hundred billion won or more. This right is triggered on possession of 0.5 percent or more of the total issued and outstanding shares which must have been held for more than six months, in the case of a listed corporation with a paid-in capital of less than a hundred billion won.

E. RIGHT TO FILE DERIVATIVE SUITS[46]

Under the CA, a director or statutory auditor who has violated the applicable law or the articles of incorporation or has neglected his or her duty shall be liable in damages to the corporation. Any shareholder

---

[46] CA: Article 403 (Derivative Suit by Shareholders)

(1) Any shareholder who holds no less than 1/100 of the total outstanding shares may demand that the company file an action against directors to enforce their liability.

(2) The demand under paragraph (1) shall be made in writing and shall state the reasons thereof.

(3) If the company has failed to file such action within 30 days from the date of the receipt of the demand under paragraph (2), the shareholder mentioned in paragraph (1) may immediately file such action on behalf of the company.

(4) If irreparable damage may be caused to the company with the lapse of the period set forth in paragraph (3), the shareholder mentioned in paragraph (1) may immediately file such action notwithstanding paragraph (3).

(5) The effect of commencement of an action shall not be prejudiced even where the number of shares held by a shareholder who files an action under paragraphs (3) and (4) comes to be less than 1/100 of the total outstanding shares after the commencement of the action (excluding where he no longer holds the issued shares).

(6) In case where an action is filed under paragraphs (3) and (4), the parties concerned shall not withdraw the action, renounce or admit the claim, or compromise, without permission from a court.

(7) Articles 176 (3) and (4), and 186 shall apply *mutatis mutandis* to the action under this Article.

SEA: Article 191-13 (Exercise of Minority Stockholders' Rights)

(1) A person who has held 1/10,000 or more of the total number of issued and outstanding shares of a stock-listed corporation or Association- registered corporation for six months as prescribed by Presidential Decree may exercise the stockholder's rights prescribed in Article 403 (including where it is applicable *mutatis mutandis* under Articles 324, 415, 424-2, 467-2 and 542 of the Commercial Act) of the Commercial Act.

(5) When a stockholder pursuant to paragraph (1) of this Article institutes a legal action as prescribed in Article 403 (including where it is applicable *mutatis mutandis* under Articles 324, 415, 424-2, 467-2 and 542 of the Commercial Act) and prevails in such legal action, the stockholder may request the payment of the costs of the legal action and all other costs resulting from such legal action.

holding 1 percent or more of the total issued and outstanding shares may demand in writing that the corporation institute a law suit to claim damages against such director or statutory auditor. If the corporation fails to institute the law suit within 30 days, such shareholder may file the lawsuit on behalf of the corporation. If irreparable damage to the corporation is threatened, such shareholder may file such lawsuit without waiting for 30 days.

Under the SEA, this right is triggered by holding 0.01 percent or more of the total issued and outstanding shares for more than six months, in the case of a listed corporation.

F. RIGHT TO INSPECT BOOKS AND RECORDS OF ACCOUNT[47]

Under the CA, any shareholder holding 3 percent or more of the total issued and outstanding shares may demand that certain books and records of account be inspected. The corporation may not refuse unless the corporation proves that such demand is groundless.

Under the SEA, this right is triggered by holding 0.5 percent or more of the total issued and outstanding shares for more than six months, in the case of a listed corporation with a paid-in capital of one hundred billion won or more. In the case of a listed corporation with a paid-in capital of less than one hundred billion won, this right is triggered on possession of 1 percent or more of the total issued and outstanding shares for more than six months.

---

[47] CA: Article 466 (Shareholder's Right to Inspect Account Books)

(1) Any shareholder who hold no less than 3/100 of the total outstanding shares may demand, in writing with the reasons therefore specified, to inspect or copy the account books and related documents.

(2) A company shall not refuse the shareholder's demand mentioned in paragraph (1) unless it proves that such demand is improper.

SEA: Article 191-13 (Exercise of Minority Stockholders' Rights)

(3) A person who has held 10/1000 or more (in case of a corporation as prescribed by Presidential Decree, 5/1000 or more)of the total number of issued and outstanding shares of a stock-listed corporation or Association-registered corporation for six months as prescribed by Presidential Decree may exercise the stockholder's rights prescribed in Article 466 of the Commercial Act.

G. RIGHT TO APPLY FOR APPOINTMENT OF INSPECTOR TO INVESTIGATE COMPANY AFFAIRS AND STATUS OF PROPERTY[48]

Under the CA, if a material violation of applicable law or the articles of incorporation is suspected in connection with the management of the corporation, any shareholder holding 3 percent or more of the total issued and outstanding shares may apply for the appointment of an inspector to investigate the company's affairs and status of property. Such application must be made with the competent court.

Under the SEA, this right is triggered by holding 1.5 percent or more of the total issued and outstanding shares for more than six months, in the case of a listed corporation with a paid-in capital of one hundred billion won or more. This right is triggered on possession of 3 percent or more of the total issued and outstanding shares for more than six months, in the case of a listed corporation with a paid-in capital of less than one hundred billion won.

V. THE SAMSUNG ELECTRONICS CASE (DECEMBER 27, 2001)

A. OVERVIEW

After being selected as the "target" of the PEC–PSPD's minority shareholder movement,[49] Samsung Electronics was formally requested to

---

[48] CA: Article 467 (Inspection on Affairs and Status of Company's Property)

(1) If there is any reason to suspect of dishonest act or of material fact in contravention of any relevant acts, subordinate statutes or the articles of incorporation in connection with the management of affairs, any shareholder who holds no less than 3/100 of the total outstanding shares may apply to the court for the appointment of an inspector to investigate the affairs of the company and the status of its property.

(2) The inspector shall report on the results of the investigation to the court.

(3) If the court deems it necessary according to the report mentioned in paragraph (2), it may order the representative director to convene a general shareholders' meeting. In this case, Article 310 (2) shall apply *mutatis mutandis*.

(4) Directors and auditors shall examine without delay whether or not the report of the inspector mentioned in paragraph (3) is accurate and shall report on the results thereof to the general shareholders' meeting.

SEA: Article 191-13 (Exercise of Minority Stockholders' Rights)

(4) A person who has held 30/1000 or more (in case of a corporation as prescribed by Presidential Decree, 15/1000 or more) of the total number of issued and outstanding shares of a stock-listed corporation or Association-registered corporation for six months as prescribed by Presidential Decree may exercise the stockholder's rights prescribed in Articles 366 and 467 of the Commercial Act. In this case, when a person exercises the stockholder's rights prescribed in Article 366 of the Commercial Act, the number of shares shall be calculated based on voting shares.

[49] Again, ironically, the very strength and competitiveness of Samsung Electronics created the conditions for its selection as a target. *See, supra* note 5.

initiate a derivative suit against its current and former directors on September 16, 1998. Attached as evidence were the inquiry results from the Seoul District Prosecutor's Office, Fair Trade Commission consent orders, and press reports detailing the already revealed unfair business practices committed by Samsung Electronics management.[50]

On October 16, 1998, however, the three auditors responsible for responding to the suit request submitted a formal response refusing to initiate a derivative suit against the current and former directors of Samsung Electronics, citing no applicable legal prohibitions for the activities in question.

Upon this anticipated refusal, 22 minority shareholders (i.e. the PEC-PSPD), representing collectively 15,373 shares or 0.01304% of the total shares outstanding,[51] filed a derivative suit against 11 current and former directors of Samsung Electronics in the Suwon District Court on October 20, 1998.[52] The claims were (1) bribery, (2) unfair trading practices, (3) unjustified investment in a financially-troubled company, and (4) selling investment property at below-market prices. The total damages requested were ₩351.2 billion.

The following is a summary translation of the court's holding released after over three years of deliberation on December 27, 2001.

B. SUMMARY TRANSLATION: PEOPLE'S SOLIDARITY FOR PARTICIPATORY DEMOCRACY (PSPD) V. LEE KUN-HEE ET AL[53]

Decision as to the derivative suit for damage claims filed by minority shareholders against the directors of Samsung Electronics, based on Commercial Act (CA) §399[54]and §403[55] (Act No. 6086, Dec. 31,

---

[50] *See, supra* note 3.

[51] Recall that the qualifying stake threshold for filing a derivative suit against a listed company is 0.01%. *See, supra* note 46.

[52] Suwon, a city about 30 miles south of Seoul, is the jurisdictional domicile of Samsung Electronics and the location of its main manufacturing plant complex.

[53] 98 Ga Hap 22553; December 27, 2001 (Suwon District Court, No. 7 Civil Court, Presiding Judge Chan-Seok Kim). There were 11 individual defendants: Lee Kun-Hee, Kim Kwang-Ho, Lee Yoon-Woo, Lee Hae-Min, Song Yong-Ro, Lee Hak-Soo, Yoon Jong-Yong, Park Hee-Joon, Moon Byung-Dae, Chin Dae-Jae, and Choi Do-Suk.

[54] CA § 399 (Liability to Company)

(1) If directors have acted in violation of any Acts and subordinate statutes or the articles of incorporation or has neglected to perform their duties, they shall be jointly and severally liable for damages to the company.

(2) If any act mentioned in paragraph (1) has been done in accordance with the resolution of the board of directors, the directors who have assented to such resolution shall be subject to the same liability.

(3) The directors who have participated in the resolution mentioned in paragraph (2) and whose dissenting opinion has not been entered in the minutes shall be presumed to have assented to

1999).

1. Damage claim as to bribes given to former President Roh Tae-Woo

The ₩7.5 billion[56] sourced from internal Samsung Electronics corporate funds that were used to bribe former President Roh Tae-Woo by defendant Lee Kun-Hee[57] via the unindicted co-conspirator, Lee Jong-Ki[58] from around March 1988 to August 1992 is an act of bribery and a criminal act.

This criminal act created an unnecessary ₩7.5 billion expenditure for Samsung Electronics and may be seen as causing losses for the company. Therefore, the defendant must repay the ₩7.5 billion to the company.

Corporate behavior must be pursued within the established legal boundaries and actions that may potentially bestow possible benefits to the company, if illegal, should not be allowed. The law does not justify illegal corporate actions committed in the name of necessity and such actions are not protected by the business judgment of management.

2. Damage claims as to the inter-subsidiary transactions with

---

such resolution.

[55] CA § 403 (Derivative Suit by Shareholders)

(1) Any shareholder who holds no less than 1/100 of the total outstanding shares may demand that the company file an action against directors to enforce their liability.

(2) The demand under paragraph (1) shall be made in writing and shall state the reasons thereof.

(3) If the company has failed to file such action within 30 days from the date of the receipt of the demand under paragraph (2), the shareholder mentioned in paragraph (1) may immediately file such action on behalf of the company.

(4) If irreparable damage may be caused to the company with the lapse of the period set forth in paragraph (3), the shareholder mentioned in paragraph (1) may immediately file such action notwithstanding paragraph (3).

(5) The effect of commencement of an action shall not be prejudiced even where the number of shares held by a shareholder who files an action under paragraphs (3) and (4) comes to be less than 1/100 of the total outstanding shares after the commencement of the action (excluding where he no longer holds the issued shares).

(6) In case where an action is filed under paragraphs (3) and (4), the parties concerned shall not withdraw the action, renounce or admit the claim, or compromise, without permission from a court.

(7) Articles 176 (3) and (4), and 186 shall apply *mutatis mutandis* to the action under this Article.

[56] Although the Korean currency, the Won (₩), obviously fluctuates according to market conditions, for the past two years, the band was roughly ₩ 1,200 - ₩ 1,300. As of April 20, 2002, 1 US$ = ₩ 1302.200 (http://kr.finance.yahoo.com/q?s=USDKRW=X&d=1b).

[57] Owner and Chairman of the Samsung Group, and of course, Samsung Electronics.

[58] Brother-in-law of Lee Kun-Hee and Chairman and CEO of Joongang Ilbo, the newspaper subsidiary of the Samsung Group.

Joongang Ilbo, Samsung Co., and Samsung Heavy Industries

These claims are based on the allegedly illegal transactions between Samsung Electronics and three of its affiliated subsidiaries within the Samsung Group.

The minority shareholder plaintiffs alleged first that the directors of Samsung Electronics improperly funded Joongang Ilbo[59] between 1994 and 1996, the alleged loss of which is estimated at ₩374.75 million. The method employed was over-paying for advertisements that were bought on the newspaper.

Similarly, the plaintiffs alleged that the directors of Samsung Electronics improperly funded Samsung Co. by making excessive payments for the down payment and monthly rent for the International Management Research Institute since December 5, 1994.

Finally, the plaintiffs alleged that the directors of Samsung Electronics improperly funded Samsung Heavy Industries by making excessive payments for the development and monthly rent for the Sanchung Training Center since June 14, 1997.

As a result of the latter two inter-subsidiary transactions, the minority shareholders of Samsung Electronics alleged that the company suffered an unnecessary loss estimated at ₩4.841 billion.

Furthermore, all three alleged misdeeds are claimed to have violated the Monopoly Regulation and Fair Trade Act (MR&FTA, Act No. 6043, Dec. 28, 1999)[60] or alternatively, represent breaches of the

---

[59] Joongang Ilbo, or the Central Daily News, is commonly regarded as one of the top national newspapers in Korea.

[60] MR&FTA Chapter V: Prohibition of Unfair Trade Practices

§ 23 (Prohibition of Unfair Trade Practices)

(1) No enterpriser shall commit any act falling under any of the following subparagraphs and that is likely to impede fair trade (hereinafter referred to as "unfair trade practices"), or make an affiliated company or other enterprisers perform such an act:

1. An act which unfairly refuses any transaction, or discriminates against a certain transacting partner;

2. An act designed to unfairly exclude competitors;

3. An act unfairly coercing or inducing customers of competitors to deal with oneself;

4. An act making a trade with a transacting partner by unfairly taking advantage of his position in the business area;

5. An act of trade under terms and conditions which unfairly restrict or disrupt business activities;

6. Deleted; *<by Act No. 5814, Feb. 5, 1999>*

7. An act assisting a person with a special interest or other companies by providing advanced payment, loans, manpower, immovable assets, stocks and bonds, or intellectual properties thereto, or by transacting under substantially favorable terms therewith; and

8. Any act that threatens to impair fair trade other than those listed in subparagraphs 1 through 7.

(2) The categories or standards for unfair trade practices shall be determined by Presidential

fiduciary duty by the directors[61], and therefore the company should be compensated. The court holds that even if the above claims were true, there is no proof to show that each of these corporate actions were implemented pursuant to a formal vote by the Samsung Electronics' Board of Directors.

Nor is there any proof that not being informed or appraised of such acts represents a breach of fiduciary duty on the part of the defendant directors.

Finally, there is no proof as well to show that the directors' deliberately ignored or gave silent assent to such activities. Therefore, the derivative damage claims as to this issue are rejected.

3. *Damage claim as to the capital investment and payment guarantees made for the acquisition of Icheon Electric by Samsung Electronics*

In light of the abnormal financial status of Icheon Electric immediately prior to its acquisition by Samsung Electronics, we find that the defendant directors have breached their ordinary fiduciary duty of care by approving the acquisition after a mere one hour of evaluation on March 14, 1997. Given the precarious financial statements of Icheon Electric, the directors who participated in the vote did not evaluate: (1) the relative merits of the acquisition of Icheon Electric as opposed to creating a brand-new company, (2) the additional investment expenses involved in normalizing Icheon Electric's operations, (3) the expected profits from the Icheon Electric acquisition, and (4) the expected risk involved in the Icheon Electric acquisition.

Decree.

(3) If necessary for the prevention of acts violating the provisions of paragraph (1), the Fair Trade Commission may make and announce publicly guidelines to be observed by enterprisers.

(4) In order to prevent the unreasonable inducement of customers, the enterprisers or enterprisers organization may voluntarily write a code (hereinafter referred to as the "fair competition code").

(5) Enterprisers or an enterprisers organization may request that the Fair Trade Commission examine whether or not the fair competition code as referred to in paragraph (4) violates the provisions of paragraph (1) 3 or 6.

§ 24 (Corrective Measures)

The Fair Trade Commission may, when an act in violation of the provisions of Article 23 (1) is committed, order the enterpriser concerned to discontinue those unfair trade practices, to delete any pertinent provisions from a contract, to publish notice of the violation, or to take any other necessary corrective measures against that act.

[61] CA § 382-3 (Duties of Directors to be Faithful)

Directors shall perform their duties faithfully for the good of the company in accordance with the relevant acts, subordinate statutes and the articles of incorporation.

The directors failed to do such analyses, nor did they ask for oral or written reports evaluating such factors. By participating in the vote after a perfunctory management presentation arguing for the need to enter directors breached their legally-mandated fiduciary duty. The actions of the directors in regard to the Icheon Electric acquisition cannot be seen as satisfying the informed and rational decision-making threshold and thus cannot hide behind the business justification protection.

As a result of such negligence, the defendant directors created losses for the company when Icheon Electric was liquidated less than 2 years after the acquisition.

From acquisition to liquidation, Samsung Electronics invested ₩199.9 billion and recouped ₩9.5 billion from the liquidation. Therefore, the defendant directors caused the company at least ₩190.4 billion in losses.

The court holds that ₩27.6 billion can be properly attributed to the acquisition vote and therefore the directors that voted to approve the acquisition must collectively compensate the company.

4. Damage claim as to the sale of Samsung Chemical shares

Samsung Electronics purchased 21.75 million shares from Samsung Chemical from July 23, 1998 to April 22, 1994 in 10 separate transactions at the par value price of ₩10,000. Of the total, 10 million shares were purchased on April 22, 1994.

On December 17, 1994, a mere eight months after the last April 22, 1994 transaction, Samsung Electronics sold 20 million shares (92% of the total amount owned) at ₩2,600. The ₩2,600 price was calculated from the various inheritance tax regulations then in effect. At the same time, the share value calculated by the conservative net asset value terms as ₩5,733.

Moreover, there was no particular reason for the share price to drop to one quarter of the 8-month earlier purchase price. In fact, the main financial indicators of Samsung Chemical were all improved over the period in question. In June 1993, there was a share transaction in which Samsung Chemical shares were sold for ₩6,600.

The fact that the directors of a for-profit corporation decided to sell the Samsung Chemical shares in question at a low price (that was based on value calculated for fair tax imposition reasons of the tax collecting agency) after a mere one-hour discussion cannot be seen as fulfilling a director's fiduciary duty of care.

The 20 million shares represent a controlling stake of Samsung Chemical and the decision to sell such control at 1/4th of the purchase

price (to say nothing of a premium) is not justifiable by directors who did not conduct an informed and rational evaluation.

Therefore, directors who participated in the Samsung Chemical share sale decision at issue are not entitled to the business judgment protection.

The five directors that participated and approved the decision must compensate the company, Samsung Electronics, in the amount of ₩62.66 billion. ₩62.66 billion is calculated by multiplying ₩3,133, the difference between the net asset value ₩5,733 and the sale price of ₩2,600 per share, by the 20 million shares sold.

C. EVALUATION OF THE VERDICT

As noted, the decision is that of a lower court against which both parties have announced intentions to appeal.[62] Without a settlement, the appellate process will move on to the Seoul High Court and possibly to the Supreme Court. Given that the first trial took over 3 years, it can be expected that the intermediate appeal alone will go on for at least a year.

Yet the lower court decision comes with a judicial lien, which means the personal property of the defendants, especially Chairman Lee, who as one of the richest men in the world is definitely not judgment-proof, may be attached by the victorious plaintiffs. However, it is questionable whether the individual minority shareholder plaintiffs have the enormous financial resources to implement a judicial attachment. Therefore, it is expected that the plaintiffs will demand that Samsung Electronics itself pursue the attachment proceedings. If the management and board of Samsung Electronics refuse to do so, they may be subject to another suit for breach of fiduciary duty – i.e. negligence in claiming the company's rightful attachment interest in the defendants' personal property.

Presumably in response to the derivative suit, the directors of Samsung Electronics are protected by a company-funded ₩100 billion directors' insurance policy from Samsung Fire and Casualty Insurance, but only for liability claims arising after April 6, 1998.[63] Therefore, if the lower court decision is ultimately ratified, the damages must be borne by the individual defendants.

For the minority shareholders, since the litigation is a derivative suit, there are no direct financial gains to the winning plaintiffs. But since the company's coffers will increase, while transparency and governance

---

[62] *See, e.g.*, J.S. Cho, *Conflicting Responses to the Samsung Electronics Damage Suit*, CHOSUN ILBO, December 27, 2001.

[63] *Id.*

may be positively affected, there can be significant indirect benefits to the minority shareholders.

As for the PEC attorneys who argued on behalf of the 22 minority shareholders, they can request their fees from the company if the suit is ultimately certified, but that may involve a new suit and a prolonged struggle against the company if the latter refuses payment.

VI. CONCLUSION

Naturally, the corporate interests, especially the chaebol-led Federation of Korean Industries (FKI), are aghast at the judgment.[64] They worry about the negative effects on the economy by the decision's impact on corporate autonomy and efficiency. The FKI denounced the Suwon District Court's rejection of the business judgment protection presumption and its implications for judicial oversight over day-to-day operations.

One might agree that hindsight-based rationales, as in the Icheon Electric claim, represent a threat to bold, aggressive, and creative management of the sort that enabled Samsung Electronics' now vastly-profitable foray into semiconductors and telecommunications. Similarly, the prohibition of intra-chaebol cross-capitalization may retard promising business initiatives in a capital market as relatively-undeveloped as Korea.

In terms of the function of the board of directors as a governance mechanism, the decision is a mixed bag. On the one hand, the old "rubber-stamp" board having been held obsolete, one might expect a significant upgrade in the power and autonomy of the board – i.e. with increased responsibilities come increased rights. On the other hand, the liability threat may deter qualified candidates serving as outside directors. Moreover, the liability imposition by the Suwon District Court on the approving directors alone, while thereby exempting those voting no or not-participating, a perverse incentive for automatic and unprincipled opposition (or absence) to any risky venture may have been created.

One can expect a gradual disintegration of the chaebol if individual companies put their own interests ahead of that of the group. Of course, that is one of the main goals of the PEC-PSPD, but it is hard to say the evidence is clear that cure won't be worse than the disease.

In conclusion, the Samsung Electronics case shows that while, on balance, the minority shareholder movement is more Robin Hood than Don Quixote, the result is not as clear as proponents on either side would

[64] *Id.*

believe.