

Introduction of Virtual Shareholder Meetings and Improvement of Appraisal Rights Regime

I. Pre-announcement of Virtual Shareholder Meetings and Appraisal Rights Regime

On January 26, 2023, the Ministry of Justice (“MOJ”) presented its annual work plan for 2023 and announced the following amendments of the Korean Commercial Code (“KCC”) aimed to improve the corporate environment and reinforce shareholder protection: (i) introducing a virtual shareholder meeting system; (ii) strengthening shareholder protection in corporate restructuring processes; (iii) easing regulations for small-sized companies to promote establishment and operation of start-ups; and (iv) improving dividend-related procedures and methods to promote in-kind and stock dividends.

As a follow-up measure to items (i) and (ii) above, the MOJ issued an advance notice of proposed amendments to the KCC (the “Proposed Amendment”) on August 24, 2023 that introduce virtual shareholder meetings and aim to improve the appraisal rights regime. If the Proposed Amendment is enacted into law, the introduction of virtual shareholder meetings is expected to fundamentally change how companies respond to minority shareholders and operate general shareholders’ meetings. In addition, the Proposed Amendment addresses a number of practical issues with respect to appraisal rights of dissenting shareholders that are commonly becoming a point of importance for various types of corporate restructuring, such as mergers, spin-offs, spin-off mergers, comprehensive stock exchanges and transfers, and business transfers. Furthermore, appraisal rights of dissenting shareholders will be recognized in the case of vertical spin-offs of unlisted companies.

The MOJ announced that it plans to pass the Proposed Amendment in this year's regular session of the National Assembly so that it can be enforced in 2024.

II. Introduction of Virtual Shareholder Meetings

1. Background

The KCC requires the resolution of the general meeting of shareholders, which is the highest decision-making body, for important matters of a company, such as fundamental reorganization (e.g., merger, spin-off, transfer of important business), matters that directly affect the economic interests of shareholders (e.g., dividends), and matters concerning the organizations of a company (e.g., appointment and dismissal of directors and determination of remuneration). However, due to time

and space constraints, the majority of minority shareholders have been unable to actually attend the general shareholders' meeting and exercise their voting rights despite the importance of such meeting.

In relation to this issue, it has been pointed out that the attendance rate of minority shareholders should be increased through non-face-to-face shareholder meetings, such as virtual shareholder meetings. Furthermore, the OECD Principles of Corporate Governance recommends the introduction of the virtual shareholder meeting system as part of guaranteeing shareholders' rights, and the COVID-19 pandemic has led to widespread discussion on virtual shareholder meetings.

However, since the KCC does not provide for a clear legal basis for convening and operating a virtual shareholders' meeting, the need for legislation regarding the virtual shareholder meeting system has increased, and against this backdrop, the Proposed Amendment introduces the system as a way to relieve the limitations on the exercise of shareholders' rights and the burden of corporate expenses in the decision-making process.

2. Key Features of the Virtual Shareholder Meeting System

The Proposed Amendment provides for the digitalization of the general shareholders' meeting, including the notice of convocation, holding of meetings, attendance of shareholders and voting. In addition to the physical shareholders' meeting, the following types of virtual shareholder meetings will be allowed pursuant to a company's articles of incorporation: (i) a fully virtual shareholder meeting where all shareholders are present via electronic means of communication; and (ii) a parallel virtual shareholder meeting for which shareholders may choose between physical attendance at the place of convocation and attendance by electronic means of communication (the Proposed Amendment to Article 364-2). However, it is impossible to exclude the physical shareholders meeting and the parallel virtual shareholders meeting and to allow only the fully virtual shareholders meeting. Therefore, the virtual shareholders meeting is a means to guarantee the exercise of shareholders' rights and promote the general meeting of shareholders, rather than to completely replace physical shareholder meetings.

In relation to the method of obtaining shareholders' consent for sending meeting convocation notices by means of electronic documents, the Proposed Amendment stipulates that shareholders' consent may be obtained by electronic means in accordance with the Enforcement Decree of the KCC (the Proposed Amendment to Article 636(1)).

III. Improvement of Appraisal Rights Regime

1. Background

The KCC does not grant appraisal rights to shareholders opposing a vertical spin-off. However, there have been some concerns about certain listed companies vertically spinning-off and listing their high-growth businesses. As a result, on December 27, 2022, the Enforcement Decree of the Financial Investment Services and Capital Markets Act (the "FSCMA") was amended to grant appraisal rights to shareholders opposing vertical spin-offs of listed companies (Article 165-5 of the FSCMA, Article 176-7 of the Enforcement Decree of the FSCMA). Following the amendment, there have been calls to recognize dissenting shareholders' appraisal rights in the event of a vertical spin-off of not only listed companies, but also unlisted companies, and this has been reflected in the Proposed Amendment.

Also, improvements have been made by reference to foreign legislative examples to address the following issues: (i) double payment of dividends and default interest (owing to the fact that the dissenting shareholders are recognized both as the shareholder and creditor during the ongoing dispute over the purchase price of shares subject to the appraisal rights) and (ii) the issue of substantial default interest at the rate of 6% per annum imposed even on the undisputed portion of the purchase price (owing to the inability for the company to make a partial deposit).

2. Key Features of the Appraisal Rights Regime

The Proposed Amendment to Article 530-12(2) provides that, with respect to a vertical spin-off of an unlisted company, appraisal rights must be granted to dissenting shareholders in the event of a vertical spin-off involving assets in excess of 10% of the total assets of the spun-off company. It is our understanding that this is to protect general shareholders from a vertical spin-off that undermines the shareholder value of the existing spun-off company or the trust of general shareholders by spinning-off and listing the core business units.

In addition, the Proposed Amendment has actively reflected the issues of the appraisal right system raised in practice as follows:

- If the purchase price for shares subject to appraisal rights that is calculated and specified by the company is fully paid by the effective date of the corporate restructuring event (such as merger and spin-off), the share purchase will become effective. Thereafter, the status of dissenting shareholders will be converted into creditors. The conversion into the creditor status will be limited to the case where the company has fully paid the specified amount, or the company may deposit an amount not less than the specified amount. In such event the company will be exempt from the delay damages to the extent of the deposited amount. This is to balance the interests of the company and its shareholders by (i) resolving the contradiction that the shareholders exercising the appraisal right receive not only the default interest accrued on the purchase price until receiving it as a creditor and the dividend as a shareholder and (ii) allowing the company to make a deposit and be relieved from excessive delay damages and permitting shareholders to receive at least a portion of the purchase price.

- Furthermore, when giving the notice of convocation of the general meeting of shareholders with respect to structural changes, a company is required to provide shareholders with accurate information, including the purchase price of appraisal rights and the specific grounds for calculation, and guarantee the shareholders' right to review and make copies of relevant records.

By Ji-Pyoung Kim (Attorney)

Chang-hee Shin (Foreign Legal Consultant)

Seung-Hwan Cheong (Attorney)

Il-Suk Lee (Attorney)

Kim & Chang

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