Joint Ventures and Innovation Policies in Asia

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Ryo Okubo, Nagashima Ohno & Tsunematsu, Tokyo, Japan
Joon B. Kim, Kim & Chang, Seoul, Korea
Kate Peng, King & Wood Mallesons, Beijing, China

Tokyo, October 20
Summary of the Committee’s sessions in Tokyo - Joint ventures and innovation policies in Asia - Tactical and operational considerations

This panel had been prepared by Mike Burke who unfortunately was unable to attend the Tokyo meeting, and Hermann stepped in for him as session chair. Joint ventures are an interesting instrument to introduce a foreign product on the Asian markets without having the costs and risks of either a full-fledged acquisition or the risks of starting a greenfield operation. One needs to be aware, however, that joint ventures involve complex legal structures which need to be thoroughly negotiated. The panel members discussed joint ventures in Japan, Korea and China.

The situation under Japanese law was explained by Ryo Okubo from the Japanese firm of Nakashima Ohno & Tsunimatse, Tokyo. From a Japanese perspective establishing a holding company in Hong Kong which is owning the shares in the operating companies in the various Asian countries affected by the joint venture is advantageous. The government has launched an initiative making the country more attractive as a research and development hub for foreign investment. Ryo explained the restrictions for acquiring shares in Japanese companies existing under anti-trust law and the Foreign Exchange and Foreign Trade Act. In addition many industries are heavily regulated which may impose additional restrictions on an investment project. Ryo then explained the principal typical clauses used in a JV with a Japanese majority and a local (ASEAN) minority shareholder.

The legal aspects of joint ventures governed by Korean law were presented by Joon Kim from Kim & Chang in Seoul. In his presentation Joon was putting a stronger emphasis on foreign investment into Korea. It was interesting to see that the largest contingent of foreign investment into Korea originates from the EU followed by the US, Japan and China. In order to be eligible to invest in Korea the foreign investor needs to file a report with the authorized foreign exchange bank. The different legal forms available under Korean law and their suitability for joint ventures were discussed in detail. Thereafter Joon concentrated his presentation on certain issues which typically need to be addressed in joint ventures, i.e. conflicts of interest for board members, covenants not to compete, dealings with overseas affiliates (require board resolution adopted with 2/3 majority) and the prohibition to take away corporate opportunities and exit mechanisms.

Kate Peng of King & Wood Mallisons presented the legal framework in terms of the requirements under Chinese law for the joint venture parties to seek approval of the envisaged transaction.

Thereafter there was a lively discussion with the audience about best practices in structuring joint ventures in Asia. The result was that there is no fit-for-all solution. Individual circumstances, market considerations and the competitive position of the products of the joint venture need to be taken into account. In any case, the form of a joint venture with a local partner for expanding into foreign markets was generally considered as a very effective way.
ABA 2016 Fall Meeting
Joint Ventures and Innovation Policies in Asia: Tactical and Operational Considerations (Japan)

October 20, 2016 Ryo Okubo Nagashima Ohno & Tsunematsu
When to use a JV?
Business Driven

- JV parties seek synergies - each party having essential IPs, licenses, know-hows or technologies

- Upcoming market for JV: Fintech

Diagram:
- Pokémon Characters
- Nintendo
- Google
- Pokémo
- Niantic
- Game know-how
- Google map
- Develop & Distribute Pokémon Go
When to use a JV?

Legally driven

- Mostly outbound deals in Asia
  - Foreign investment limitation
  - Limitation of land-owning/using under local law
  - For example, under Thai law, certain business cannot be conducted by a foreign person without permits and owning real estate by a foreign person is prohibited.
When to use a JV?

**Tax driven**

- If the JV conducts business globally, there may be a tax saving structure.
- E.g.

```
+----------------+-----------------+-----------------+
| JV partner    | JV partner      | JV partner      |
| 49%           | 51%             |                 |
|----------------+-----------------+-----------------|
| HK Holdco      |                 |                 |
|----------------+-----------------+-----------------|
| Other Opco     | HK Opco         | JP Co           |
| Other Jurisdictions | Hong Kong       | Japan           |
```

Other Opco

HK Opco

JP Co

Hong Kong

Japan
**When to use a JV?**

**Government Policy**

- METI (*1) is encouraging foreign direct investment in Japan
- Act for Promotion of Japan as an Asian Business Center (*2) attracts research and development hub or control hub of global enterprises to Japan.
- Following incentives will be provided if certified:
  - Assistance for fund raising (applicable only to SMEs)
  - Acceleration of patent examinations (22 months to 2 months)
  - 50% reduction of patent fees (applicable only to SMEs)
  - Shortened examination period for prior notification under the FEFTA (30 days to 2 weeks)
  - Acceleration of status of residency examinations (1 month to 10 days)

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*1 The Ministry of Economy, Trade and Industry

*2 Act on Special Measures for the Promotion of Research and Development Business, etc. by Specified Multinational Enterprises (Act No. 55 of 2012)
Which types of JV are allowed?

Contractual JVs

Types

• A partnership contract under the Civil Code (Act No. 89 of 1896)
• A limited partnership for investment under the Limited Partnership Act for Investment (Act no. 90 of 1998)
• A limited liability partnership (LLP) under the Limited Liability Partnership Act (Act No. 40 of 2005)
• An anonymous association (tokumei kumiai or TK) under the Commercial Code (Act No. 48 of 1899)

Usage

• Funds
• Entertainment projects (e.g. movies)
Which types of JV are allowed?
Incorporated JVs

Types
- A stock corporation (*kabushiki kaisha* or KK) under the Companies Act (Act No. 86 of 1896)
- A limited liability corporation (*LLC/godo kaisha* or GK) under the Companies Act

Usage
- GK is often used as an investment vehicle
- Most of the JVs are incorporated as KKs
Antitrust Consideration
Substantial Test

• Under the Anti-Monopoly Act (*1), if JFTC determines that the establishment of a JV substantially restricts competition in a particular field of trade or falls under unfair business practices, the JFTC can issue a cease and desist order.

• The Business Combination Guideline (*2) provides the safe harbour rule using the concept of the Herfindahl-Hirschman Index (HHI):
  – HHI after the business combination is not more than 1,500.
  – HHI after the business combination is more than 1,500 but not more than 2,500 while the increment of HHI is not more than 250.
  – HHI after the business combination is more than 2,500 while the increment of HHI is not more than 150.

*1 The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947)
*2 Guidelines to Application of the Anti-Monopoly Act Concerning Review of Business Combination
Antitrust Consideration
Substantial Test

- R&D Guideline (*1) also applies to the JVs that conduct joint R&D.
- Substantial restrictions on competition in the technology market and the products market in light of factors such as:
  - Number and market shares of the participants
  - Nature of the research
  - Necessity for the joint research
  - Scope and duration of the joint research
- Private monopoly if:
  - The total market share of the participants is substantially high
  - The result of the joint research is likely to be the de facto standard in the field
  - Thereby other participants are likely to be excluded from the market.

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*1 Guidelines Concerning Joint Research and Development under the Anti- Monopoly Act
Antitrust Consideration
Thresholds Test

- Stock acquisition, merger, company split or business transfer that satisfy certain thresholds must be notified in advance to the JFTC pursuant to the Anti-Monopoly Act.
- 30-day waiting period applicable.
- E.g. merger

\[ \text{the total amount of domestic sale} \geq \text{JPY20 billion} \quad \text{\&} \quad \geq \text{JPY5 billion} \]

- Total amount of domestic sales = domestic sales of the corporate group to which the company belongs.
- Corporate group = (i) the company and its subsidiaries + (ii) the company’s ultimate parent company and its subsidiaries (except for (i)).
- Ultimate parent company = a company that is not a subsidiary of another company.
Incorporation of JV

- The same process as incorporation of a KK which is not a JV.
  - Notarization of the Articles of Incorporation by a notary public
  - Commercial registration of incorporation with the relevant legal affairs bureau
- Capital contribution can be made by cash or tangible/intangible assets (contribution in-kind). No ratio restriction.
- In case of assets other than cash, an investigation by a court-appointed inspector unless certain exemptions apply.
- The JV partners typically enter into a shareholders agreement (and may call it as a joint venture agreement).
Restriction on Foreign Shareholding
FEFTA

• Foreign Exchange and Foreign Trade Act (Act No. 69 of 1951, the “FEFTA”)
  – Applicable to acquisition by a foreign acquirer of shares in a Japanese company by a foreign acquirer whose business relates to national security, public order, public security and certain protected businesses
    • e.g. agriculture, petroleum, leather, aviation and marine transportation
  – Advance approval required
  – A thirty (30)–day waiting period also applicable (unless shortened)
  – The competent Japanese authorities may issue a recommendation or order to amend the terms of, or even suspend, the acquisition.
    • However, only one example to date: potential acquisition of J–Power by The Children’s Investment Fund (TCI) in 2008
Restriction on Foreign Shareholding

Regulatory laws

- Certain industries are heavily regulated in Japan and the laws which regulate these businesses often require prior approval from, or advance notice to, the regulator in case of acquisition of certain percentage of voting shares in the company.
  - Financial services (e.g., banks, insurance companies and asset management companies)
  - Aviation
  - Transportation
  - Telecommunication
  - Broadcasting companies
  - Securities exchanges
• Day-to-day operation is managed by the board pursuant to the JV agreement
  – The board composition (e.g. number of board members, nomination rights)
  – Convocation and operation of the board meetings (e.g. convocation notice period, language, quorum, re-convocation if quorum is not met, minimum voting requirement)

• The articles of incorporation cannot copy all of the terms of the JV agreements under Japanese law.

• “Reserved matters” are subject to consent of the minority shareholders
  – Super-majority voting requirements at shareholders meetings
  – Contractual consent right of the minority shareholder
  – Voting requirement at the board to include at least one minority shareholder nominated director
Terms of JV Agreement
Non-competition/Non-solicitation covenants

- Non-competition and non-solicitation covenants that are effective during the JV agreement and a certain years thereafter are common.
- Generally considered that the non-competition/non-solicitation covenants should be reasonable to be valid and enforceable.
- Key factors courts take into consideration in deciding the validity of these covenants are:
  - Duration
  - Geographical scope
  - Scope of the restricted business
  - Whether the obligor is a natural person who has constitutional right to choose his or her profession
Terms of JV Agreement
Protection of IP/trade secrets

• Existing IPs may be:
  – contributed to JV by a partner (derivative/new IPs will belong to JV)
  – licensed to JV by a partner (derivative/new IPs belonging to be agreed)

• Non-competition of JV partners
  – target business must be made by JV
  – the obligation may continue for certain period of time after the exit

• Confidentiality obligation (no disclosure/no use) on the parties regarding company information
  – effective coupled with put/call options upon material breach

• How to distribute IPs upon termination of JV is agreed in the JV agreement
Terms of JV Agreement

Deadlock

• Definition
  – Matters are not approved at the board/shareholders meetings and the company cannot conduct ordinary operations.

• Traditional style
  – Good faith discussion between the parties (including the possibility of sale of the shares owned by one party to the other party and dissolution of the company)

• Global Style
  – Escalation procedure
  – Put option/call option
  – Detailed procedure to determine the fair market value of the shares
## Terms of JV Agreement

### Exit mechanisms

| Sale to the JV partner | • Put option/call options may be agreed  
• Price may be set in advance (e.g. DCF) or FMV to be determined by valuators  
• If terminating JV by default, penalties may apply  
• Buy/sell and other exotic methods are possible but rare |
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>IPO</td>
<td>• May require JV go IPO after an agreed period</td>
</tr>
</tbody>
</table>
| Sale to a third party  | • Transfer restriction (or lock-up period) is common  
• Right of first refusal/right of first offer  
• Tag-along/Drag-along |
| Liquidation            | • Triggering events may include deadlock, no achievement of milestones, and so on.  
• Need to agree on how to distribute assets/employees/contracts/IPs. |
Terms of JV Agreement
Exit mechanisms

• Practical Consideration
  – Majority: Japan /Minority: a local partner in an ASEAN jurisdiction
  – Apart from the governance terms of the JVA, the operation of the JV actually depends on the local partner
  – Turned out the JV business does not go well and the Japan party desires to terminate the JV
  – As the majority shareholder, the Japan party may have a call option but usually does not have a put option
  – Technically possible to send more directors but no candidate/liquidation route is too cumbersome
  – Should have had a better exit provision? (e.g. put option of the majority partner)
  – Foreign investment limitation may also become issue upon exit.
Terms of JV Agreement
Governing Law/Dispute Resolution

• The governing law is typically Japanese law because Japanese law (i.e., the Companies Act) applies to the operation and management of the JV.

• It is possible the JV agreement is governed by other laws (e.g. New York law or English law) for contractual rights and obligations.

• For the forms of dispute resolution, a wide variety of options
  – Japanese courts
  – Arbitration in Japan, Singapore, Hong Kong, London or New York (Japan is signatory to the New York Convention – recognition and enforcement of foreign awards guaranteed)
  – No mandatory mediation requirement
Formation and Operation of JV in Korea

October 20, 2016
CONTENTS

I. Recent Trends
II. Qualifications and Restrictions
III. Establishment and Operation
IV. Conflicts of Interest in JV Context
V. Regulatory Compliance
VI. Exiting Joint Venture
I. Recent Trends
Recent Trends

**Strengthened Ties between Korea and Japan**
- Increased trend in high-tech joint venture relating to advanced materials, *e.g.*, OLED display and touch-based sensor, PBV film for automotive products

**Continuing Global Partnership**
- Growing popularity relating to high-premium apparel, entertainment, mobile- and web-based game, integrated resort and casino development business

**2016 Top Industries: IT and Finance/Insurance**
- Highest percentage of foreign direct investment in Korea in terms of investment amount

![Country breakdown of foreign direct investment into Korea](chart)
Recent K&C Engagements in Joint Venture Deals

Recent JV activities in Korea came in various shapes and sizes.

<table>
<thead>
<tr>
<th>Company 1</th>
<th>Company 2</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lotte &amp; Salim</td>
<td></td>
<td>To establish e-commerce platform solution JV in Indonesia</td>
</tr>
<tr>
<td>SK Chemical &amp; Mitsui</td>
<td></td>
<td>To consolidate their polyurethane businesses to share technology and operate</td>
</tr>
<tr>
<td>Chemicals</td>
<td></td>
<td>15 factory plants in 9 countries</td>
</tr>
<tr>
<td>Kolon Water and Energy &amp;</td>
<td></td>
<td>To globally expand the oil and gas solution business</td>
</tr>
<tr>
<td>Aker Solution</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nolboo &amp; Mak Brands</td>
<td></td>
<td>To launch a restaurant franchise business in China</td>
</tr>
<tr>
<td>Lotte Foods &amp; Nestle</td>
<td></td>
<td>To launch premium beverage products in Korea</td>
</tr>
<tr>
<td>Huffington Post &amp;</td>
<td></td>
<td>To launch a Korean-language version of the U.S. online media platform</td>
</tr>
<tr>
<td>Hankyoreh</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
II. Qualifications and Restrictions
Qualification Requirements and Incentives

• In order to invest in Korea, a foreign investor must file an FIPL report with the authorized foreign exchange bank within a certain time period.

• To qualify as a foreign investment under the FIPL, the minimum foreign investment amount would have to be KRW 100 million or higher while depends on relevant industry and benefits sought.

• Certain cash grants, tax incentives and other incentives (e.g., rent-free lease) may exist for joint venture involving high-tech investment and certain level of job creation.
Foreign Investment Restricted Industries

Restricted Industries

- Utilities (gas, electricity)
- Telecommunications
- Broadcasting and Media
- Aviation and Shipping
- Defense Industry
- Airports
- Nuclear Power
III. Establishment and Operation
Options for Incorporation under KCC (1/2)

<table>
<thead>
<tr>
<th>Corporation</th>
<th>Limited Company</th>
<th>Limited Liability Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chusik Hoesa</td>
<td>Yuhan Hoesa</td>
<td>Yuhan Chaegim Hoesa (Introduced as of April 2012)</td>
</tr>
<tr>
<td>Minimum Capital</td>
<td>No Minimum</td>
<td>KRW 10 million</td>
</tr>
<tr>
<td>Transfer of Ownership Units</td>
<td>Allowed/ BOD approval may be required according to AOI</td>
<td>Allowed/ may be limited by AOI</td>
</tr>
<tr>
<td>Issuance of Bonds</td>
<td>Allowed</td>
<td>Not Allowed</td>
</tr>
<tr>
<td>Public Offering</td>
<td>Allowed</td>
<td>Not Allowed</td>
</tr>
<tr>
<td>BOD/Auditor Requirement</td>
<td>Mandatory</td>
<td>Not Mandatory</td>
</tr>
<tr>
<td>Equity Owner Written Resolutions</td>
<td>Not Allowed</td>
<td>Allowed</td>
</tr>
<tr>
<td>Check-the-box Rule (Partnership Taxation)</td>
<td>Not Allowed</td>
<td>Allowed</td>
</tr>
</tbody>
</table>
Incorporation Procedure

1. File Foreign Investment Report under the FIPL with designated foreign exchange bank.
2. Register Incorporation of Subsidiary with Court Registry
3. Register Subsidiary with local tax office
4. Obtain Certificate of Foreign Invested Enterprise
5. File Business Combination Report with the KFTC (if necessary)
6. Obtain governmental licenses / permits (if necessary)
Corporate Governance: General Meeting of Members (GMM)

Matters Subject to General Meeting Resolution

- Ordinary resolution Items (a majority of the votes)
- Special resolution Items (2/3 or more of the votes)
  - No veto power by the JV partner at the GMS if the other JV partner owns more than 66.67%
- But JVA may provide for a higher threshold as a contractual matter to afford more protection to a minority shareholder

Annual General Meeting Required To be Held within 3 Months From Fiscal Year End To Approve the following:

- Approval of the financials and business report
- Approval of the annual directors compensation
- Approval of the dividends (if any)
BOD Quorum Requirement in JV Practice: Presence of at least one director of the other JV partner

Unanimous voting requirement (not uncommon in JV practice)

- Can be stipulated in the JVA (and also Articles of Incorporation (AOI))
- *de facto* veto power of the other JV partner over certain matters at the BOD level

*Other considerations*

- Telephone conference BOD meetings permitted
- No alternate director allowed
Corporate Governance: Representative Director

General authority to represent and bind the company

- Authority can otherwise be restricted under the AOI or internal regulations (or both)

Specific authority granted under the Korean Commercial Code (KCC)

- Examples: preparing the financials and business report, maintaining the AOI, meeting minutes, members registry

Delegation of authority as a whole not permitted

- Delegation on specific matter commonly allowed through grant of power of attorney

Corporate seal (seal of Representative Director)

- “Use seal” duplicate allowed for certain kinds of transactions
Independent Auditing and Monitoring Authority

- Authority to audit activity of directors, audit subsidiaries, receive reports from directors, and request convocation of GMS and BOD meetings
- Authority to attend and state opinion at BOD (no voting right)

Appointment

- Appointed by GMS
- May not serve as director, general manager or employee of company or subsidiary

NOT related to External Audit / Outside Auditor

- “Act on External Audit of Joint Stock Companies” mandates external audit and disclosure of audit report for chusik hoesa above certain size
In-Kind Contributions

- Any asset that is stated as asset on the balance sheet can be contributed in-kind
- Subject to BOD approval and also preliminary appraisal by government-approved agency
- Can take several weeks in practice due to court-supervised review and approval process; thus not a preferred approach.

**Alternative**

Cash contribution to the JV company for the value of in-kind contribution and the company uses the contribution funds to purchase assets, subject to arm’s length basis requirement
IV. Conflicts of Interest in JV Context
Types of Conflict of Interest

Issues re fiduciary duty of directors come into play in joint venture context

**Types**

1. Competing Business / Concurrent Offices

2. Transaction with Overseas Affiliates

3. Usurpation of Corporate Opportunity

**Requirements**

- Procedural Requirement (E.g., BOD Approval)
- Substantive Duty of Care

- Violation of Law
- Violation of Duty of Care

- Director Liability

Breach

Breach
Prohibition of Competing Business / Concurrent Offices

1. **Competing Business**
   - **Consequences:** Cause for termination and liable for damages. Company has option to regard transaction as its own.

2. **Concurrent Offices**
   - **Consequences:** Cause for termination and liable for damages.

Procedural Requirement
- Majority BOD approval
Scope of self-dealing restrictions applies not only to the subject director but also to his/her immediate family, and the major shareholder (holding 10% or more shares or having *de facto* control), its subsidiaries, grandchild and great-grandchild companies.
Example: Transactions with Overseas Affiliates

Types of Transaction
- Management consulting agreement
- Technology license agreement
- Sale and purchase agreement

Procedural Aspects
- 2/3 BOD approval

Substantive Aspects
- “Fair” terms and conditions

Breach of fiduciary duty
- “Procedurally flawed payment
- Groundless or excessive payment

Takeaway: Prior 2/3 BOD approval, and fair terms and conditions
Usurpation of Corporate Opportunities

Scope
- Opportunities that a director became aware of (i) in the course of performing work for the JVC or (ii) using the information owned by the JVC
- Opportunities closely linked to the JVC’s current or future business
- Opportunities generating benefit to subject director or to a parent or affiliate

Procedural Aspects
- 2/3 BOD approval
V. Regulatory Compliance
TRIGGERS

When two or more parties create a joint venture company, the largest shareholder must file a business combination report with the KFTC, if:

- At least one of the parties (including affiliates) has assets or revenues which are equal to or exceed 200 billion Won (US$180 million); and
- At least one of the other parties (including affiliates) has assets or revenues which are equal to or exceed 20 billion Won (US$18 million).

If one of the JV partner's assets or revenues exceed 2 trillion Won, report has to be filed pre-incorporation.

GUN-JUMPING

Engaging in premature integration with the joint venture partner could be viewed as a violation of the Korean fair trade laws.

In addition, if the two joint venture partners are competitors or potential competitors, certain integration planning and coordination and supervision activities prior to closing can be construed as an “improper collusive conduct”
## Restraints on Information Exchange between JV Partners

### Establishment Stage
- Information exchange alone is not sufficient to constitute collusion, but can still be used as strong circumstantial evidence (esp. pricing).
- Korean courts have applied a stricter standard in accepting information exchange as evidence.

### Operational Stage
- Information exchange can still be viewed as means of cartel if the information is reasonably likely to flow to the JV partner and there was such understanding between the JV partners (hub-and-spoke).

### Risk Mitigation
- Minimize risk by undertaking precautionary measures.
- Restrict sharing price-sensitive information between JV partners if competitors, adopt clean-team.)
VI. Exiting Joint Venture
# Exit Mechanisms

| Sale to the other Shareholder | • FMV calculation may or may not be required  
| • Put/call options may be agreed  
| • If terminating JV by default, penalties may apply to defaulting shareholder (put at premium or call at discount, etc.) |
| IPO | • As a practical matter, this is the most likely exit route  
| • May require the JVC go IPO within a set, agreed upon period |
| Sale to a Third Party | • This is the 2nd most likely exit route  
| • Sale of the respective shareholder’s shares to an unrelated third party  
| • Finding a third party buyer may be very difficult  
| • JVA may include some share transfer restrictions:  
  (i) restriction period (except for certain subsidiary of shareholder)  
  (ii) right of first refusal, etc. |
| Liquidation | • Liquidation of the assets of the JVC and distribution of the proceeds to each respective shareholder based on shareholding |
Deadlock Exit

Deadlock mechanisms are required to break deadlock situations where the JVC is unable to make decisions at BOD / shareholder levels.

Upon deadlock, escalation procedures are implemented.

- Referral or Delegation
  - referral or delegation of BOD deadlock to internal subcommittee within the

- Expert determination

- Mediation or arbitration

- Resolution & Negotiation
  - shareholder resolution (in case of BOD deadlock) and negotiation between executives of the shareholder company (in case of shareholder deadlock)
At Kim & Chang, we offer unrivaled expertise on all aspects of domestic and cross-border public and private M&A, private equity and joint venture transactions.

Our Mergers & Acquisitions Practice Group is widely recognized not only within Korea but throughout Asia as the best in Korea, and our preeminence in this practice area has been recognized over the years in numerous rankings and publications. We offer a full range of legal services from the pre-deal to post-transaction stages, including post-transaction integration, and provide creative, innovative solutions tailored to the unique circumstances of each M&A transaction.

**Top Tier in Corporate/M&A in Korea**
- Chambers Global (2016)
- Chambers Asia-Pacific (2016)
- The Asia Pacific Legal 500 (2016)
- IFLR 1000 (2016)
- Asialaw Profiles (2016)

**M&A Leading Firm in Korea**
- ALB M&A Rankings (2015)

**M&A Deal of the Year: Acquisition of ING Life Insurance Korea by MBK Partners**
- ALB Korea Law Awards (2014)

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### Bloomberg Asia Pacific Legal Advisory M&A Rankings 1H 2016

<table>
<thead>
<tr>
<th>Law Firm</th>
<th>Rank</th>
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<tbody>
<tr>
<td>Kim &amp; Chang (USD 8,501 M / 49 deals)</td>
<td>1</td>
</tr>
<tr>
<td>Shin &amp; Kim (USD 6,929 M / 29 deals)</td>
<td>2</td>
</tr>
<tr>
<td>Lee &amp; Ko (USD 6,400 M / 24 deals)</td>
<td>3</td>
</tr>
<tr>
<td>Yulchon (USD 4,124 M / 20 deals)</td>
<td>4</td>
</tr>
</tbody>
</table>

### Mergermarket M&A League Tables of Legal Advisors 1H 2016

<table>
<thead>
<tr>
<th>Law Firm</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kim &amp; Chang (USD 8,847 M / 37 deals)</td>
<td>1</td>
</tr>
<tr>
<td>Lee &amp; Ko (USD 6,718 M / 16 deals)</td>
<td>2</td>
</tr>
<tr>
<td>Yulchon (USD 6,147 M / 11 deals)</td>
<td>3</td>
</tr>
<tr>
<td>Shin &amp; Kim (USD 6,000 M / 19 deals)</td>
<td>4</td>
</tr>
</tbody>
</table>
We have handled some of the largest and most complex M&A transactions in Korea, including the vast majority of high-profile cross-border M&A transactions. Our M&A Practice Group recently advised on the following transactions, among many others:

<table>
<thead>
<tr>
<th>Transaction</th>
<th>Year</th>
<th>Deal Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acquisition of Hyundai Securities by KB Financial Group</td>
<td>2016</td>
<td>USD 1.1 billion</td>
</tr>
<tr>
<td>Acquisition of Doosan Infracore’s machine tool business by MBK Partners</td>
<td>2016</td>
<td>USD 1.0 billion</td>
</tr>
<tr>
<td>Acquisition of Mars Entertainment Group by CJ CGV</td>
<td>2016</td>
<td>USD 670 million</td>
</tr>
<tr>
<td>Sale of Lafarge Halla Cement by LafargeHolcim</td>
<td>2015</td>
<td>USD 497</td>
</tr>
<tr>
<td>Merger of Samsung C&amp;T and Cheil Industries</td>
<td>2015</td>
<td>USD 10.06 billion</td>
</tr>
<tr>
<td>Merger of SK C&amp;C and SK Holdings</td>
<td>2015</td>
<td>USD 7.6 billion</td>
</tr>
<tr>
<td>Acquisition of Halla Visteon Climate Control by Hahn &amp; Company</td>
<td>2015</td>
<td>USD 3.5 billion</td>
</tr>
<tr>
<td>Acquisition of equity interest in POSCO E&amp;C by Public Investment Fund of the Ministry of Finance in the Kingdom of Saudi Arabia</td>
<td>2015</td>
<td></td>
</tr>
<tr>
<td>Acquisition of Tong Yang Life Insurance by Anbang Life Insurance</td>
<td>2015</td>
<td>USD 1.02 billion</td>
</tr>
<tr>
<td>Acquisition of Tong Yang Cement &amp; Energy by Sampyo</td>
<td>2015</td>
<td>USD 699 million</td>
</tr>
<tr>
<td>Acquisition of Oriental Brewery Co. Ltd. by Anheuser-Busch InBev</td>
<td>2014</td>
<td>USD 5.8 billion</td>
</tr>
<tr>
<td>Disposition of equity interest in ADT CAPS security business by Tyco Group</td>
<td>2014</td>
<td>USD 1.9 billion</td>
</tr>
</tbody>
</table>
Thank you
JOINT VENTURES AND INNOVATION POLICIES IN ASIA: TACTICAL AND OPERATIONAL CONSIDERATIONS (CHINA)

2016 ABA Fall Meeting
Kate Peng
October 2016
- When should a corporate lawyer consider merger filing in China?
- What clauses should a corporate lawyer pay attention to from an antitrust perspective?
- When should a corporate lawyer seek opinion from antitrust lawyer?
What are Joint Ventures under the Chinese law

- Joint venture (“JV”) is not defined under the Chinese law.

- Generally, JV in FDI context include:
  - Equity JV
  - Cooperation JV

- Establishment of JV could be subject to merger review.
- The Chinese Anti-monopoly Law (the “AML”) does not raise particular requirement on the form of a JV: it can be a legal person or other organizations.
Overview of merger filing in China

- From August 1, 2008 to September 30, 2016, AMB has closed review of 1476 merger filings, among which 27 filings were conditionally approved and 2 were prohibited.

- Among the conditionally approved cases, 4 of them are related to JV establishment.

What is the penalty for failure to notify
Up to the end of September 2016, 8 transactions have been penalized by MOFCOM due to failure to notify, 4 of which related to establishment of

When does a JV trigger merger filing
The transaction constitutes a “concentration” under the AML: “Change of Control” test

The parties to the transaction meet the applicable turnover thresholds.

Merger Review by MOFCOM
What constitute a change of control

- Types of control
  - **Sole control**
  - **Joint control**

- Factors to be considered
  - Transaction Purpose
  - Equity Structure
  - Board Composition
  - Voting Mechanism
  - Right to Senior Management
  - Other Business Cooperation

- MOFCOM takes a conservative approach
What constitute a change of control

- Establishment of JV is subject to merger review:
  - Newly-established JV
  - Establishment of JV based on Existing Entity

- Article 4 of Guiding Opinions on Declaring the Concentration of Undertakings
  - For any newly-established joint venture, in the event that at least two business operators jointly control such joint venture, a concentration of undertakings is constituted;
  - Where only one business operator controls such joint venture independently and other business operators share no control, no concentration of undertakings is constituted.
When is the turnover threshold met

**China Connection Test**
2 parties each have turnover in the preceding year that exceeds RMB 400 million in China

**Threshold 1**
Global Turnover Test
Combined worldwide turnover in preceding year exceeds RMB 10 billion

**OR**

**Threshold 2**
China Turnover Test
Combined China turnover in preceding year exceeds RMB 2 billion
How the turnover is calculated re establishment of JV
What is the timeframe of normal procedure

- **Statutory Timeframe**

  - **Phase I**: Initial Filing
  - **Phase II**: Case Initiation
  - **Phase III**: Final Decision

  - **Indefinite period**
  - **30 days**
  - **90 days**
  - **60 days**

- MOFCOM may stop the clock.

- It usually takes 4 to 6 months for MOFCOM to give clearance.
- More materials are required.
- MOFCOM normally asks for opinions from stakeholders.
What is the timeframe of simplified procedure

- Simple Case Procedure

  - Initial Filling
  - Case Initiation
  - Public Notification (10 days)
  - Substantial Review

- Timeframe of Review
  
  - No separate statutory timeframe for simple case.
  
  - In practice, most simple cases are cleared in Phase I (i.e. 30 days since public notification).
  
  - MOFCOM rarely asks for opinions from stakeholders.
  
  - From 3Q14 to 3Q16, out of the 694 unconditional merger clearances, 507 deals were placed under simplified merger review procedures, representing an...
Threshold for applying simplified procedure — in particular relating to JV

- Establish a JV outside China, which will not engage in any economic activities within China

- A JV jointly controlled by two or more undertakings will be controlled by one or more of the existing undertakings after the concentration
What will be reviewed by MOFCOM

- Major rights and interests held by each party of JV
- Major business, mode of operation, operating region and business relationship with each party and its affiliates
- Other agreements or arrangements between each party of JV and its affiliates (e.g. non-compete agreement, joint procurement agreement etc.)
What will be reviewed when JV parents are competitors

Non-compete clause ("NCC")

- Combined market power of JV partners
- Review of NCC

  - Whether the NCC is ancillary to the transaction
    - Directly related to the JV transaction?
    - Necessary for the realization of the purpose of the JV transaction?
  
  - Basic considerations for drafting a NCC
    - The geographic scope of a NCC
    - Products and services under the NCC
    - Purpose of a NCC
    - Duration of a NCC
What will be reviewed when JV parents are vertically related

If JV shareholders engage in vertical related business with JV, MOFCOM will consider whether JV shareholders will foreclose customers or inputs of competitors.

**Behavior Remedy:** JV should sell products to third parties according to fair, reasonable and non-discriminatory principle.
Review by MOFCOM vs. Review by NDRC/SAIC

JV between competitors for joint production / sales and distribution/ procurement / R&D, etc.

Structural (MOFCOM)
- Loss of competitor
- Stifling effect
- Network effect

Behavioral (NDRC/SAIC)
- Facilitate
- Anti-competitive foreclosure of third parties
What will be reviewed when JV parents are competitors

- Efficiency
  - Enhancing productivity
  - Scale economy
  - Reducing cost
  - Accelerating innovation

- Anti-competitive concerns
  - Cartel concerns

- Clauses with antitrust risks in JV agreement
  - Fixing the price of products sold by JV
  - Market segmentation
  - Restrain the independent R&D of a JV parent
  - Information exchange
What activities are subject to review by NDRC/SAIC

- Pre-concentration between competitors

Diagram:
- Party
- Working Team A
- Working Team B
- Party B
- Sensitive Information
What activities are subject to review by NDRC/SAIC

- Post – concentration between competitors

General principle of Firewall Arrangement:
- Minimize the “dual roles” situation
- Restrict the scope of information exchanged at the level of the management team, the directors, the supervisors, and the parties’ representatives.
- Provide internal guidelines to relevant persons
Thank you! Questions?
Kate Peng specializes in antitrust, competition, and intellectual property law.

Ms. Peng's antitrust practice focuses on merger filings and antitrust litigation. She represents clients, specifically technology companies, in merger control proceedings before MOFCOM as well as in administrative and civil litigations. She also represents clients in anti-cartel/monopoly investigations and related administrative reviews, and advises clients on antitrust compliance matters.

In her intellectual property practice, Ms. Peng advises corporate clients on IP rights protection strategies and complex licensing agreement negotiations. She has also advised clients on intellectual property issues related to mergers, acquisitions, and joint ventures. In addition to handling corporate intellectual property matters, Ms. Peng has extensive experience representing clients in trademark, patent, copyright (including software), domain names, unfair competition, trade secret misappropriation, and licensing disputes and litigation.

Ms. Peng joined King & Wood Mallesons in 2002.

She obtained her LL.B. degree from China University of Political Science and Law. She later received her LL.M. degree from Stanford University. Ms. Peng is qualified to practice in both the PRC and in New York, United States.

Ms. Peng's working languages are Chinese, Cantonese and English.