## Index

ABS see Asset-Backed Securitization Act 1998
accounting process 127–30
legislative basis for 128–9
accounting records
board meeting minutes 133
contracts 132–3
definitions 125–7
directors duties regarding 128–9
passbooks 131–2
shareholder right to inspect 123–5
court rulings on 135–48
exclusions, implications 131–4
as means of management control 125–6
in US 123–4
tax adjustment statements 133–4
Acushnet Co, investment by Fila Korea Ltd 233
Asset-Backed Securitization Act 1998
asset transfer registration 180
basic principles 176–8
definitions 176–8
disclosure rules 184–6, 190–91
growth trends following 174–5, 197–8
issuance 180–81
procedures under 178–86
purpose 174–5
reform proposals 191
disclosure rules 190–93
eligible entities, restrictions on 186–7
on mortgage acquisitions 189–90
multiple plan registrations 188–9
risk retention practices 193–5
synthetic securitization 195–7
restrictions under 176
securitization plans
filing requirements 178–80
multiple plan registration,
proposals for 188–9
refusal 179–80
Securitization Specialty Companies (SPCs) 177
special provisions
Keun-mortgage, fixation of claims secured by 181–2
on mortgage acquisitions 182–3, 189–90
perfection rules 181
tax advantages 184
and true sale 183–4
structure, permitted types 177–8
assets, securitized see also Asset-Backed Securitization Act 1998
definition 176–7
audit committees
composition 5, 36, 84, 93, 97
independence 5, 89–90
liabilities 5
and protection of minority shareholders 97–8
reform role 97–8
requirement for 5
in US 89–90, 93
Aungunsa Co Ltd 109–13
Australia
directors’ personal liability 33–4
Banking Act 1998
corporate governance reforms 238–9
offshore foreign financial institutions
extraterritorial applicability 159–60
onshore foreign financial institutions
bankruptcy procedures 152–6
licensing requirements 150–51
preferential treatment rules 152–6
regulation of assets 152

281

Hwa-Jin Kim - 9781781003404
Downloaded from Elgar Online at 05/23/2019 08:13:35PM
via free access
bankruptcy
directors’ personal liability 35–6
of foreign financial institution,
preferential treatment rules
152–6
banks see foreign financial institutions;
Korea First Bank
beneficiary certificates, definition 161
board of directors see also directors’
duties; directors’ liabilities; outside
directors
independence 27–8, 93
meeting minutes, disclosure 133
staggered boards, as takeover
defense tactic 242–3
brokers
prime brokers, regulation reforms
regarding 235–6
role 168
business combination reports 227
business judgment rule
acquisition of majority stake in
troubled affiliate 7–8
directors’ criminal acts 10–11,
20–24
and directors’ personal liability 7–12,
31, 40–41
in Hyundai Elevator case 18–19
and judicial abstention 24–5
in Korea First Bank case 12–14
and leveraged buyouts 23–4
losses for payment guarantee 8–9
sale of shares below market value
9–10
in Samsung Electronics case 7–12
in SK Corporation takeover defense
case 19–20
and takeover defense 17–20, 260
unsecured business loans 12–14
Up-Mu-Sang-Bae-Im 20–22
Canada
directors’ personal liability 33–4
Capital Market and Financial Business
Act 2008
disclosure rules, public offerings of
asset-backed securities 185–6
Re. Caremark International, Inc.
Derivative Litigation (1996)(US)
16
Carlyle Group, acquisition of KorAm
Bank 204
carve-out clauses, in securities issuance
by foreign institutions 162–4
cash-out mergers 58–9, 67–8, 70, 73–5
certificates of deposit, definition 161–2
Chaebol companies
characteristics 80–81
corporate governance
conflicts between 92, 94–8, 100
dominance 9, 80–81, 92, 94
institutional investor role 96–7,
203
reform 84–5, 92, 94
debt, reliance on 81–2
economic importance 81, 92
fiduciary duties 81–2
foreign investment influence on 203,
211
minority shareholders, effect on 82–4
outside directors in 94–6
China
foreign investment trends 209
Chipstead Co Ltd 104–6
civil law regimes
convergence thesis 2
class actions
and corporate governance 6
and directors’ personal liability 36,
41–2, 45
collective investment securities, foreign
sale to domestic residents, regulation
167–8
common law regimes
convergence thesis 2
compensation committees
responsibilities 91, 93
compromise thesis
on takeover defense tactics 261
compulsory purchase squeeze-out
mechanisms 55–8
contributions in kind
allocation as takeover defense
268–70
convergence theses
common law vs. civil law regimes 2
corporate control see also corporate
governance
court rulings on 1–2
high levels, negative aspects 237–8
and market value 237
thresholds, abolition 1, 238
corporate governance
in Chaebol companies
  conflicts between 92, 94–8, 100
  dominance 9, 80–81, 92, 94
  institutional investor role 96–7, 203
  reform 84–5, 92, 94
class action claims 6
Code of Best Practice, 1999 3
and cumulative voting provisions 96–7
development
  in Korea 79–80, 238–9
  in US 78–80, 85–91, 100
  institutional investors’ role in 96–7
  of private equity funds under
  FSCMA 222–3
  takeover defense cases, influence on
  244–8, 253, 257–8

corporate veil, piercing
  abuse of corporate personality 102–4, 106–9, 119–20
  corporate intermingling, relevance
  117–18
  court criteria for 115–17, 121–2
  disregarding separate legal
  personality 120–21
  in Japan 119
  subjective intent/purpose 118–20
  de fact control 106–9
  distinct legal entities 104–6
  general concept 101
  identical successive incorporation
  109–13
  and principle of good faith 101–2, 109–13
  trends 122
  credit default swaps 195–7
  cross-holding restrictions 224–5
  cumulative voting, restrictions 96–7

directors, generally see also outside directors
directors’ criminal acts 10–11, 20–24
golden parachutes 242
independence 27–8, 93
qualifications, restrictions on 241–2
takeover defense measures, legality 260–62
Up-Mu-Sang-Bae-Im 20–22
directors’ duties see also business judgment rule; directors’ liabilities;
outside directors
  and audit committees 5
  basic principles 3–5
  conflicts of interest 1, 260–62
  and criminal acts 10–11, 20–24
  and good faith judgments 16–17, 41
  joint and several liability 4
  under KCMA 6
  law on, development 1
  and leveraged buyouts 23–4
  negligence basis for 4
statutory internal control obligations
  5, 16–17
  and takeover defense tactics 260–62
  to third parties 4, 35–6, 40–41
  and Up-Mu-Sang-Bae-Im 20–22
  and wrongful self-dealing 11–12
directors’ liabilities
  acquisition of majority stake in
  affiliate 7–8
  and business judgment rule 7–12, 31, 40–41
  and criminal acts 10–11, 20–24
  derivative suits over 16
  class actions 36, 41–2, 45
  against inside directors 37–9
  legislative protections 29
  against outside directors 35–7, 39–40, 45–8
  personal liability, influences on 29
  shareholding requirements for 36
trends 28, 41
and fraudulent intention 20–22
for insolvency 35–6
in Korea First Bank case 12–14, 37
losses for payment guarantee 8–9
personal liability
class actions 36, 41–2, 45
in common law jurisdictions 33–5
influences on 29, 45–8
liability capping 36–7
‘loser pays’ rules, relevance 33–4, 42
settlement trends 28, 30
in US 30–34
restrictions on
D&O insurance 16, 29, 31–2, 34, 43–5
indemnification 14–16, 43
sale of shares below market value 9–10
in Samsung electronics case 7–12, 37–8
sources of
under corporate law 40–41
under securities law 41–2
and third parties 4, 35–6, 40–41
unsecured loans 12–14
disclosure rules
for asset-backed securitizations 184–6, 190–93
board meeting minutes 133
reforms
IOSCO proposals 191–2
in US 192–3
in squeeze-out mechanisms 54–5
D&O insurance 16, 29, 31–2, 34, 43–5
market trends 44–5
Dodd–Frank Wall Street Reform and
Consumer Protection Act 2010
(US) 90–91, 95–6, 192, 194
Dongah Construction 38
Dongbang Peregrine 38
European Union
squeeze-out mechanisms 57–8
Everland convertible bonds 271–3
fiduciary duties see directors’ duties
Fila Korea Ltd, investment in
Acushnet Co 233
financial crisis
Asian crisis
background to 200–201
Korean reactions to 79–80, 200–202
US reactions to
after Great Depression 78–9
corporate governance scandals 79–80
financial institutions see foreign financial institutions
Financial Investment Services and
Capital Markets Act 2009
directors’ duties under 6, 17
Financial Supervisory Service (FSS)
on offshore banking operations 159–60
private equity funds investment guidelines 223
role in asset-backed Securitization 178
Foreign Exchange Transaction
Regulation
extraterritorial applicability 165–6
foreign financial institutions
offshore operations 149
arranging/underwriting overseas
securities issuance by Korean entity 160–67
carve-out clauses, for securities
issuance 162–4
collective investment securities,
sale to domestic residents 167–8
derivatives, sale to Korean residents 170–72
extraterritorial applicability 159–60, 164–6
foreign discretionary/non-
discretionary investment
advisers 156–7
licensing requirements 156–9
permitted communications 166–7
reforms relating to derivative
securities 160
reverse inquiry activities 157–9
role of broker or dealer 168–9
Standard Terms on Transactions
of Foreign Fund Interests 168
onshore operations 149–56
bankruptcy or liquidation procedures 152–6
branch, conversion to local subsidiary 172–3
definitions 150–51
derivatives, sale to Korean residents 169–70
foreign institution’s assets, regulation 151–6
licensing requirements 150–51
preferential treatment rules assets 152–6
foreign investment, generally see also Foreign Investment Services and Capital Markets Act
international policy influences on 200–202
Foreign Investment Services and Capital Markets Act 2007
definitions 158–9, 161
offshore operations
arranging/underwriting overseas securities issuance by Korean entity 160–67
carve-out clauses, for securities issuance 162–4
extraterritorial applicability 164–6
foreign collective investment securities, sale to domestic residents 167–8
foreign discretionary/non-discretionary investment advisers 156–7
licensing requirements 156–9
permitted communications 166–7
reforms relating to derivative securities 160
reverse inquiry activities 157–9
onshore operations 149–56
bankruptcy or liquidation procedures 152–6
definitions 150–51
foreign bank/financial institution’s assets, regulation 151–6
licensing requirements 150–51
preferential treatment rules assets 152–6
private equity funds under asset management rules 224
borrowing restrictions 224
corporate governance 222–3
cross-holdings and restricted business groups 224–5
forecasting 234
form 219–20
formation and registration rules 220, 226–7
guarantee restrictions 224
hedge funds, amendment to incorporate 234–6
investment disposals 223
leveraged investments, growth trends 231–2
limited liability partnerships under 221–2
managing partner’s role 226
membership and structure rules 221–2
merger restrictions 224
option features 223
overseas investment by 233–4
prior approval requirements 226–7
restrictions 223–4
special purpose vehicles 224–6
structure examples 232–4
term 221
trends 228–32, 234
purpose 218–19
securities, classification 161
takeover defense tactics under 278
public offering of shares to third parties 265–8, 275
treasury shares, sale 240, 245–6
Foreign Investment Services and Capital Markets Act 2009
scope of coverage 150, 158–9
Foreign Services Commission foreign financial institution licensing requirements 150–51
fractional shares 69–70
France
directors’ personal liability 33–4
fraud
intent, and directors’ liability 20–22
FSCMA see Foreign Investment Services and Capital Markets Act
Germany
civil law influences 2
directors’ personal liability 33–4
German stock corporation
supermajority squeeze-outs 59
Gilson, R.J. 254
golden parachutes 242

Hanbo Steel see Korea First Bank
hedge funds
amendments to FSCMA to
incorporate 234–6
and takeover defense tactics 250–53,
257
hostile takeovers see takeover defense
tactics
Hyundai Elevator
takeover defense case 248–50, 257,
264–5, 279–80
and business judgment rule 18–19
Hyundai Mip Dockyard 104–6
Hyundai Motor
directors’ liability case 38

Icahn Group, hostile takeover of
TK&G 250–53
IMF
influence on Korean need for foreign
investment 201–2
indemnification, of directors’ liability
14–16, 43
Indirect Investment Asset Management
Business Act 2004
mutual funds/investment trusts
under 218
purpose 218
Inheritance Tax and Gift Tax Act 1999
formula for calculating share price 9
insolvency
directors’ personal liability 35–6
of foreign financial institution,
preferential treatment rules
152–6
institutional investors see also foreign
financial institutions
and corporate governance 96–7
International Organization of
Securities Commissions (IOSCO)
on disclosure reforms 191–2
on risk retention practices 193–4
investment contract securities,
definition 161
ISDA Master Agreement 172

Japan
corporate veil piercing doctrine 119
directors’ liabilities 33–4
indemnification 15, 43
poison pill takeover defense in 254
right of shareholders to inspect
account books and records 123
Joh, Sung Wook 83

KCC Korean Commercial Code
corporate governance reforms 238
directors’ liabilities established under
3–5, 40–41
on foreign financial institution
bankruptcy 155–6
new issuance of shares, as takeover
defense tactic under 18–19,
240–42
private offerings to third parties
262–5, 275
public offerings to third parties
266, 275
Preliminary Injunctions, and
takeover defense tactics 275–8
shareholder rights under 53–4
KCMA (Korean Financial Investment
Services and Capital Markets Act
2009)
directors’ duties under 6, 17
Keun-mortgage
and fixation of claims secured under
Asset-Backed Securitization
181–2
knock-in/knock-out (KIKO)
transactions 171
Kohberg Kravis Roberts
acquisition of Oriental Brewery
210–211
KorAm Bank
Carlyle Group acquisition of 204
Korea Development Bank 215
acquisition of Daewoo E&C 232–3
Korea Exchange Bank
acquisition by Lone Star 206–9,
211–12
Korea First Bank
Directors’ duties case 37
background 12–13
and business judgment rule 12–14
unsecured loans 12–14
Newbridge Capital acquisition of 204
Korea Life Insurance 38
Korea Telecom Philippines Inc 113–20
Korean Asset Management Corporation 215
Korean Financial Services Commission on directors’ duties and liabilities 17
Korean National Pension Service 215
KSEA (Korean Securities and Exchange Act 2008) 238–9
KT&G takeover defense case 250–53, 257
Kumho Industrial acquisition of Daewoo E&C 232–3
Kunyoung Co Ltd 106–9
Lechon Electric see Samsung Electronics
leveraged buyouts directors’ duties 23–4
leveraged investments growth trends 231–2
LG Chemical directors’ liability case 38–40
Lone Star acquisition of Korea Exchange Bank 206–9, 211–12
mergers changing attitudes towards 239 squeeze-out mechanisms
cash-out mergers 58–9, 67–8, 70, 73–5
long-form mergers 58–9
short-form mergers 59
statutory mergers 58–9
minority shareholders activism trends in Korea 60–62, 73 audit committee’s protection role 97–8
Chaebol, effect on 82–4 squeeze-outs against basic principles 53–4
cash-out merger mechanisms 58–9, 67–8, 70, 73–5
compulsory purchase mechanisms 55–8
and consolidated tax return system 60–62
economic justification for 60 fractional shares 69–70
German forms 59
Korean reforms 70–75
Korean trends 60–66, 73
long-form merger mechanisms 58–9
reverse-split provisions 69–70 share transfer and share exchange 68–9, 72–3
short-form mergers 59
statutory mergers 58–9
supermajority mechanisms 59, 70–71, 73–4
tender offer type 55–8, 73
UK forms 55–8
US forms 58–9
Monopoly Regulation and Fair Trade Act 2010 60
business combination reports under 227
on business group cross-holding restrictions 224–5
mortgages acquisition, by asset-backed securitization 182–3 reform proposals 189–90
Keun-mortgage and fixation of claims secured under Asset-Backed Securitization 181–2
Newbridge Capital acquisition of Korea First Bank 204 non-executive directors see outside directors
OECD influence on Korean need for foreign investment 200–202
Oriental Brewery acquisition by Kohlberg Kravis Roberts 210–211
Origin Co Ltd 102–4 outside directors on audit committees 5 and Chaebol companies 94–6 conflict of interests 98–9 liability suits against 35–7, 39–40, 45–8
motivation, and risk of liability 45–7
nomination rules 90, 93, 241–2
purpose 5, 27–8, 77–8
and self-dealing 28, 98–9
statutory minimum numbers 4–5, 27, 36
in US
importance 86–8, 98–9
reform of role 88–92
trends 77–8

parent-subsidiary relationships, abuse of see corporate veil
Park, Chul-Joon 210
passivity thesis
on takeover defense tactics 260–61
PEF see private equity funds
preferential treatment rules
applicability to foreign financial institutions 152–6
Preliminary Injunctions
and takeover defense tactics 19–20, 249–50
director injunctive rights 275–7
share injunctive rights 275–7
timing and filing procedures 276–8
prior approval requirement
under Structural Improvement of the Financial Industry Act 2011 226–7
private equity funds
and corporate globalization 215
domestic investment
50 per cent market share rule 213
advantages /disadvantages 212–13
foreign investment
advantages 203–4
compared with investment in China 209
conflict of interest over goals 205–6
corporate raider practices 205–9
early development 199–204, 215–16
influence on Chaebol 203, 211
international policy influences on 200–202, 215–16
investment strategy changes 210–211

local investment trends 205
political influences on 210
reform proposals 212
tax issues 205–9
trends 209–10
under FSCMA
asset management rules 224
borrowing restrictions 224
corporate governance 222–3
cross-holdings and restricted business groups 224–5
forecasting 234
form 219–20
formation and registration rules 220, 226–7
guarantee restrictions 224
hedge funds, amendment to incorporate 234–6
investment disposals 223
leveraged investments, growth trends 231–2
limited liability partnerships under 221–2
managing partner’s role 226
membership and structure rules 221–2
merger restrictions 224
option features 223
overseas investment by 233–4
prior approval requirements 226–7
restrictions 223–4
special purpose vehicles 224–6
structure examples 232–4
term 221
trends 228–32, 234
hybrid funds 213–15
Provisional Suspension
and takeover defense tactics 278–9
proxy contests 259
reverse-split provisions 69–70
Samjin Co Ltd 106–9
Samsung Electronics
corporate control, and market vulnerability 237–8
directors’ liability case 37–8
acquisition of majority stake in Lechon Electric 7–8
and business judgment rule 7–12
Index

and criminal acts 10–11
implications 11–12
losses for payment guarantee 8–9
sale of shares below market value 9–10
Samsung Securities Co Ltd
credit default swap by 195–6
Sarbanes–Oxley Act 2002 (US)
corporate governance reforms under 89–90
influence on Korean law 6, 24
SCAA see Securities Class Action Act 2004
securities, generally
carve-out clauses 162–4
classification 161
and domicile of issuer 161–2
offerings, standard form 162
Securities and Exchange Act 2008 238–9
Securities Class Action Act 2004
directors’ liabilities established under 41–2
limits on claims 6, 42
purpose 6, 61–2
securities depositary receipts, definition 161
Securities Issuance and Public Disclosure Regulation
carve-out clauses 162–6
extraterritorial applicability 164–6
registration requirement exceptions 162–4
on sale of foreign collective investment securities to domestic residents 167–8
shareholder offerings under 273
set-off under ISDA Master Agreement 172
share exchange and share transfer mechanisms 68–9, 72–3
shareholders see also minority shareholders
activation trends in Korea 60–62, 73
appraisal rights 53–4
class actions, against directors 36, 41–2, 45
rights to inspect account books and records 123–6
voting
cumulative voting, restrictions 96–7
supermajority voting, as takeover defense tactic 243–4
veto rights, development 52–3
shares
forfeited shares, as takeover defense 270–74
fractional shares 69–70
new issuance 279–80
contribution in kind to third parties 268–70
countermeasures 274–9
forfeited shares 270–74
poison pill proposals 255–7
and preliminary injunctions 19–20, 249–50, 275–8
private offerings to third parties 262–5, 275
and Provisional Suspension 278–9
public offerings to third parties 265–8, 275
shareholder offerings 270–74
subscription option proposals 255–7
prices, formulae for calculating 9–10
sale, below market value 9–10
shareholder offerings, as takeover defense 270–72
SK Corporation
takeover defense case 244–8, 257
business judgment rule 19–20
Preliminary Injunctions 19–20
SK Telecom see SK Corporation
squeeze-outs, of minority shareholders
basic principles 53–4
economic justification for 60
Korean trends 60–66, 73
mechanism types 54–5
cash-out mergers 58–9, 67–8, 70, 73–5
compulsory acquisition 55–8
fractional shares 69–70
German forms 59
Korean reforms 70–75
long-form mergers 58–9
reverse-split provisions 69–70
share transfer and share exchange 68–9, 72–3
short-form mergers 59
statutory mergers 58–9
supermajority mechanisms 59, 70–71, 73–4
tender offer type 55–8, 73
UK forms 55–8
US forms 55–9
Standard Terms on Transactions of Foreign Fund Interests 168
Structural Improvement of the Financial Industry Act 2011
prior approval requirement 226–7
subscription options
and issuance of new shares 255–7
supermajority squeeze-out mechanisms 59, 70–71, 73–4
synthetic securitization 195–7
Taewon Co Ltd 102–4
takeover defense tactics
activist thesis 260
and business judgment rule 17–20, 260
compromise thesis 261
directors’ approaches to 260–62
directors’ qualifications requirements 241–2
golden parachutes 242
contribution in kind to third parties 268–70
countermeasures 274–9
forfeited shares 270–74
poison pill proposals 255–7
and preliminary injunctions 19–20, 249–50, 275–8
private offerings to third parties 262–5, 275
and Provisional Suspension 278–9
public offerings to third parties 265–8, 275
shareholder offerings 270–74
subscription option proposals 255–7
KT&G case 250–53, 257
legality of defense measures 260–62
passivity thesis 260–61
poison pill defense 253–5
draft proposals for 255–7
in Japan 254
Preliminary Injunctions 19–20, 249–50, 275–8
proxy contests 259
sale of treasury shares 240, 245–6
SK Corporation case 19–20, 244–8, 257
staggered boards 242–3
strategic alliance 241
supermajority voting 243–4
taxation
consolidated tax return system, and shareholder activism 60–62
and foreign private equity investment 205–9
tax adjustment statements, disclosure 133–4
tender offers
purpose, trends in 60–66, 239
reforms to 239–40
squeeze-out mechanisms 55–8, 73
third parties
contribution in kind to, as takeover defense tactic 268–70
directors’ duties towards 4, 35–6, 40–41
private offerings of shares to, as takeover defense tactic 262–5, 275
public offering of shares to, as takeover defense tactic 265–8, 275
treasury shares
sale, as takeover defense tactic 240, 245–6
United Kingdom
compulsory purchase squeeze-outs 55–8
directors’ personal liability 33–5
minority shareholders, mechanisms against 55–8
tender offer squeeze-outs 55–8
United States
  accounting records
    shareholder right to inspect
      123–4
  audit committees 89–90, 93
  corporate governance
    development 78–80
    dispersed public ownership
      patterns 85–6
    key concerns 86, 100
  management power, relevance 86
  outside directors' role in 86–91, 98–9
  reform 88–91
  directors' personal liability 30–34
  disclosure reforms 192–3
  D&O insurance 31–2
  Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 90–91, 95–6, 192, 194
  fiduciary duty suit trends 32–3
  financial crisis, responses to 78–80
  outside directors
    importance 86–8, 98–9
    reform of role 88–92
    trends 77–8
  ‘perfect storm’ requirements 38–9

risk retention practices 194
Sarbanes–Oxley Act 2002 6, 24, 89–90
settlement trends 31–2
squeeze-out mechanisms
  cash-out merger mechanisms 58–9, 67–8
  disclosure rules 54–5
  limitations on 55
  long-form merger mechanisms 58–9
  short-form merger mechanisms 59
  supermajority type 59

Up-Mu-Sang-Bae-Im
  and business judgment rule 20–22
  importance 21–2
  and leveraged buyouts 23–4
  principles 20–24

voting
  cumulative voting, restrictions 96–7
  shareholders veto rights, development 52–3
  supermajority voting, as takeover defense tactic 243–4

wrongful trading 35–6