# 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

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
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
  disclosure rules, public offerings of asset-backed securities 185–6
  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
Index

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
Daehan Investment Banking Corp 38
Daesun Brewery 39
Daewoo Corp 38
Daewoo E&C
acquisition by Korea Development Bank 232–3
delisting, tender offers for 60–66
derivatives
definition 161
regulation of sale by foreign institutions to Korean residents 169–72
set-off, under ISDA Master Agreement 172
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;
exterior 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
Index

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 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 228–34
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
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
eyear 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
activism 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

Hwa-Jin Kim - 9781781003404
Downloaded from Elgar Online at 02/09/2019 12:47:35AM via free access
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
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
Hyundai Elevator case 18–19,
issuance of new shares 18–19,
240–41, 248–50, 259–60,
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
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
Index 291

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

corporate governance  
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

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