

Korean Contract Law I

1 May 2019

- The duration of the examination is 75 minutes (from 12:00 to 13:15 pm).
- During the course of the examination, you may freely consult materials in your possession and online resources.
- On each Answer sheet, you must write your **student number only**. Please do **not** write your name.
- You must attempt the following **two (2)** Questions.

[1] Question 1

Whole Foods, Inc., a non-profit corporation authorised by the Minister of Health and Welfare (“**Whole Foods**”) wanted to build their flagship store in the city centre and concluded a contract to purchase a parcel of land from Earnings Unlimited, Ltd., a joint stock company incorporated under the Korean Commercial Code (“**Earnings Unlimited**”). The agreed purchase price was 2 billion KRW.

The contract was signed by Mr Kim, the CEO and director of Whole Foods and Mr Lee, the representative director of Earnings Unlimited. Mr Kim instructed the financial officer of Whole Foods to pay the contract deposit (0.2 billion KRW) and the deposit was paid. The Memorandum of Incorporation (“**MOI**”) of Whole Foods has a provision that each director shall have the power to conclude any contract which is worth 1 billion KRW or less. Any contract which is worth more than that would require at least two directors acting jointly.

The sale contract has a liquidated damage clause which stipulated that if the buyer commits a breach, the contract deposit shall be forfeited and that if the seller commits a breach, the seller shall return double the amount of contract deposit to the buyer. Whole Foods could not and did not pay the balance of the purchase price because its board of directors took the view that the contract was a terrible misjudgement of Mr Kim, who was actually removed from the post of CEO after the contract was concluded. When Earnings Unlimited terminated the contract and purported to keep the contract deposit, Whole Foods argued that the contract is not binding because Mr Kim acted alone in violation of Whole Foods’ MOI. Whole Foods also argued that since the parcel of land in question was the only significant asset of Earnings Unlimited, the contract cannot bind Earnings Unlimited either because the contract was concluded by Mr Lee without an approval of the board of directors of Earnings Unlimited.

When Whole Foods demanded full refund of the contract deposit, Earnings Unlimited declined to do so, saying that “every earning helps” is the company’s founding principle.

Discuss various possibilities of how this dispute might be resolved.

[Please turn to page 2.]

[2] Question 2

Paros Co. (“**Paros**”), a Greek company, wanted to acquire Manna Foods, Inc. (the “**Company**”), which is a leading manufacturer of processed cheese in the Korean market. Paros entered into negotiations with Dawon Co. (“**Dawon**”), a Korean company who owns 100% shares of Manna Foods.

There is an urban planning about a road which affects the main factory site of the Company. If the planned road is built, the Company will have to relocate many of its key production facilities and the operation of the Company will be disrupted for an extended period of time while the relocation works are carried out.

During the period of due diligence which took place for two months leading to the signing of the Share Purchase Agreement (“**SPA**”), Dawon provided a real estate surveyor’s report which is prepared in Korean. The report did mention the urban road plan. The surveyor’s report also included a map image which would have shown the location of the planned road. For some reason, however, the image was too dark and unreadable. However, it is the same map image which is freely and easily available online at a website operated by the Ministry of Land, Infrastructure and Transport.

Near the end of the due diligence period and at the last stage of the negotiation, Paros and Dawon agreed upon the following clause in the SPA:

Seller’s disclosure must be done in English and that the Due Diligence Materials provided to the Purchaser’s representatives in Korean shall not, of themselves, constitute a disclosure.

Dawon did not provide an English translation of the surveyor’s report. The SPA was signed. Paros paid 50 billion KRW and acquired the Company.

After a while, the directors of Paros realised that there is an urban road plan. They made an inquiry to the local government as to whether there is any chance of cancelling or modifying the planned road. The local government replied that the road will be built as planned.

Paros sent a notice to Dawon informing that Paros hereby exercises its right to void the SPA. Paros demand the return of the purchase price plus interest. Dawon denied and argued that there is simply no ground to void the SPA. Dawon argued that the urban road plan is a matter of public knowledge. Dawon also argued that Paros or its Korean advisors or lawyers could have easily obtained the information anyway.

Discuss how this dispute should be resolved.

[End of questions. You must answer **both questions**.]