Class actions in Korea

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Introduction

The class action system in Korea was firstly introduced in 2005, but only limited to the securities field. As of October, 2014, almost ten years since introduced, seven class actions were filed and one of them was completed by a settlement. Noticeably, two out of seven actions were raised against foreign financial institutions. While there has not been the flood of class actions that some predicted, the trend is on the rise considering that six out of seven actions were raised after 2010.

With the launch of the Park Keun Hye government in 2013, the authorities are trying to expand the area of class actions from the securities to the anti-trust. Some lawmakers went even further and submitted a bill expanding the area not just to the anti-trust but also to the environment as well as the general consumer protection. It is generally agreed that the expansion of class actions is a trend that cannot be avoided with the growth of collective disputes such as a dispute for information leak.

Hannuri Law has been active as a plaintiff lawfirm in class actions by raising four out of seven actions, two of which were certified by the Courts, and Hannuri Law attorneys have been actively participating in the introduction and amendment of the class action system.

Class actions in Korea should be understood in light of civil procedures and practice in Korea. This quick guide will provide brief look at the current state and future of class actions in Korea from a practical viewpoint. We hope that it is helpful to all those who have an interest in class actions.

What is a class action?

A class action is a type of lawsuit in which one or several representatives sue on behalf of a large group or "class" of persons, and the effect of which binds all members of the class in principle. Unlike general lawsuits where victims have to do some "participating acts" to become plaintiffs, victims of a class automatically get the benefit of the actions unless opting out.

When was the class action system introduced in Korea?

The class action system in Korea was firstly introduced by the Securities-Related Class Action Act (hereinafter "Act"), a special law of the Civil Procedure Act, effective from January 1, 2005.

Why were class actions introduced?

Securities-related class actions were introduced with the following objectives:

- to provide a more effective way of dealing with damages of minority investors; and
- to enhance the operational transparency of companies

The direct objective of securities-related class actions was to prescribe special cases of the Civil Procedure Act in order to efficiently seek a relief for collective injuries incurred in the course of trading securities. In many times, it is hard for an individual to bring a solo action for his or her injuries because individual injuries are too small while they are large enough in the aggregate. Class actions were introduced to solve this problem systematically.

Class actions also were introduced with the indirect objective of forcing companies to operate transparently in order not to be the target of class actions because the potential recovery is significant enough for companies to fear.

Why were class actions controversial when introduced?

The class action system in Korea was introduced after Korea felt keenly the necessity of the operational transparency of companies after the foreign exchange crisis of 1997.

There were concerns, however, that the introduction of class actions to Korea would result in the flood of "US-style litigation," and the opposition was strong against the introduction.

The opposition group warned of confusion in the national economy arguing that the introduction would make bona fide companies bankrupt just by getting involved in class actions and there was no way to compensate company losses suffered as a result of unmeritorious claims. Also, there was this argument that even in the winning cases the victims themselves would receive very little because large compensation would go to the attorneys.

The class action system introduced in Korea after intense controversy, thus, limits the filing requirements very tightly in order to prevent filings of unmeritorious claims.

What type of claims could be the subject of class actions?

While in the U.S. there is no limitation on the subject of class actions, in Korea class actions can be filed only for the following claims:

- a damages claim based on a false representation in a registration statement or prospectus;
- a damages claim based on a false representation in an annual, bi-annual or quarterly report;
- a damages claim based on insider trading, market price manipulation and unfair trading; and
- a damages claim based on a false representation in an audit report

Who can file a class action?

A class action can be commenced where:

- there are no less than 50 victims who hold in the aggregate at least 0.01% of the total number of securities issued by the defendant company;
- material issues of law or fact are common to all victims; and
- the securities-related class action is an efficient and proper method for the realization of rights of the class and the protection of their interests

If the above criteria are met, a person who is able to represent the interests of the class in a fair and appropriate manner, such as the person who is likely to receive the largest economic benefit from the class action among the class members, can file the class action as a representative party on behalf of all the class members.

Who would be the defendant of a class action?

The Act requires a class action be related to the purchase, sale and other transactions of securities issued by a listed-corporation, and thus, only a listed corporation could be the defendant of a class action.

Are class actions in Korea "opt-in" or "opt-out"?

The class action system in Korea employs an "opt-out" model. This means that all potential claimants who fall within the definition of the class become members of the class on the filing of the claim whether they are aware of it or not. They will all be bound by the judgment of the Court or any approved settlement unless they opt-out of the proceedings individually.
If a class member chooses to opt-out, they will no longer be bound by the outcome of the proceedings.

The "opt-out" model can be distinguished from the "opt-in" model approach which requires potential class members to indicate positively that they want to be part of the group on whose behalf the claim is being brought. If they do not opt-in, they will not become members of the class and will not be bound by the final judgment or approved settlement. While it is better in terms of respecting individuals' will, the "opt-in" model has this critical shortcoming that victims are not likely to indicate that they want to participate in the proceedings because individual losses are usually very small compared to the total damages of the class. In most countries including Korea, the "opt-out" model is general in the class action system.

Is the Court's certification necessary to file a class action?

Yes. The Court's certification is necessary to file a class action.

Since the representative party in a class action brings the suit without explicit delegation from the class members and the outcome of the proceedings affects the class members whether they are aware of it or not, it is necessary to supervise the proceedings so that the interests of the class members are not unfairly invaded. Thus, the Act requires the Court to certify a class action to proceed.

Is the Court's ruling on certification appealable?

Yes. The Court's ruling on certification is appealable whether it is for or against certification.

Initially in the first draft proposed by the Ministry of Justice or proposed legislation of 1998, the Court's decision on certification was not appealable if the proceedings got certified. The final legislation, however, made it possible to appeal any decision on certification, which causes a problem of delaying the certification procedure.

In the case of Hanwha Smart 10 ELS, the filing for certification was brought on December 30, 2010. The case, however, is still pending at certification phase in the Supreme Court after the certification was dismissed by the district court on May 1, 2012 and by the appellate court on May 31, 2013, respectively. In the C-Motech case as well, while the filing for certification was brought on October 13, 2011, the district court did not rule on certification until almost 2 years have passed after the filing and the case is still at certification phase pending in appellate court level.

Are there special requirements to be an attorney for class members?

The attorney for plaintiffs in a class action should be a person who may represent the interests of the class in a fair and appropriate manner. Any person who has a conflict of interest with a class so that it is found that the person is inappropriate to conduct affairs as an attorney in the proceedings because the person owns any security subject to the class action or has any monetary interest directly in such securities cannot act on behalf of the plaintiffs of the class action.

Furthermore, a person who has engaged in more than three class actions as an attorney during the preceding three years is disqualified from becoming the attorney of the plaintiffs, provided that the above rule does not apply to a person who the Court determines has no difficulty in meeting the requirements under the paragraph (2) of the article 11 of the Act in light of the overall circumstances.

In the class action system in Korea, a person who has engaged in more than three class actions as an attorney during the preceding three years is disqualified from becoming the attorney of the plaintiffs while there is no limitation on the attorney for the defendants. This is a unique rule in Korea which is criticized because it prohibits experienced attorneys in securities-related class actions from representing the class.

Who would be the attorneys representing the defendants and who would be the attorneys representing the plaintiffs in class actions?

The Act requires both plaintiffs and defendants to appoint attorneys to represent them because of the public interests, complexities, and expertise of class actions. Defendant companies which usually have enough money hire big firms to represent them.

On the other hand, to be an attorney for plaintiffs is not easy and requires determination and courage because the attorney should spend considerable amounts of money and time in advance without any certainty of winning. If lost, the attorney should bear the legal costs of defendants as well as its own costs, and even if he won the case, there is no guarantee of the execution of judgment. Law firms that has the capacity to afford the costs or to take risk has the difficulty to represent the plaintiffs because of the risk of losing company clients. To make matters worse, an attorney who has determination and courage to represent plaintiffs is not free to take class action cases because of the three strikes rule. Thus, it is very hard to find experienced attorneys in Korea who can represent plaintiffs in class actions with expertise.

Does the "discovery" system exist in Korea?

The discovery system which provides the parties with the extensive right of access to the evidences held by the other parties is not allowed in Korea.

The discovery system is the pre-trial phase in a lawsuit in which each party, through the law of civil procedure, can obtain evidence from the opposing party or third parties by means of discovery devices including requests for answers to interrogatories, requests for production of documents, requests for admissions and depositions. When discovery requests are objected to, the requesting party may seek the assistance of the court by filing a motion to compel discovery.

In securities cases, the complexities, specialties and asymmetry of information make it hard to prove the plaintiff's case. In the U.S., because plaintiffs can request and investigate evidence held by defendants through the discovery system, it is hard for the defendants to have the monopoly on the information; however, in Korea, without the discovery system, the proceedings tend to favor defendants who hold the evidence.

Are punitive damages allowed in Korea?

Punitive damages are damages awarded in order to reform or deter the defendant and others from pursuing the same conduct where the conduct was egregiously invidious or out of malice or intent. In Korea, punitive damages are not allowed because the legal system only acknowledges compensatory damages for torts.

Is Litigation Funding is available in Korea?

No. A litigation funding is not available in Korea.
A third party litigation fund is a commercial organization which enters into an agreement, primarily with the representative party, to pay the legal costs of the representative party and to accept liability to pay the defendant' s costs if the action is unsuccessful. In return, if the claim is successful, the fund receives its money back together with a share of the amount awarded.

Third party litigation funding has been criticized as allowing someone with no direct interest in the actual dispute to conduct and control the litigation while it has the merit of allowing plaintiffs to file a suit without the burden of considerable legal costs.

In foreign countries, third party litigation funds are active, and in fact they are necessary because of enormous legal costs of class actions. However, because the Attorney-At-Law Act provides that fees and other profits earned through services that may be provided only by attorneys should not be shared with a non-attorney and the Court does not acknowledge agreements in violation of the Act, such fund is not allowed in Korea.

Is a contingency fee plan available in Korea?

Yes. A contingency fee plan where the fee is calculated by reference to a percentage of the amount awarded either by a judgment or settlement is available in Korea.

The Act requires to stipulate an agreement on the attorney' s fee when applying for certification, and the Court has the authority to reduce the attorney' s fee taking into account various factors such as the fee agreement, the period and difficulty of the suit, awarded and distributed amounts to the class members, the time spent on the preparation for briefs and the quality of the briefs.

Thus, according to the Act, an attorney' s fee should be decided based on the fee agreement and awarded amounts as well as the time spent and fee calculated by reasonable hourly rate.
Therefore, a contingency fee plan is absolutely valid, and practically a fee plan of a class action where plaintiff' s attorneys play a vital role in the proceedings is generally based on contingency.

Are losers required to pay the legal fee?

In Korean legal system, plaintiffs are required to pay in advance the filing fee calculated by reference to damages, and losers bear the legal fee incurred to the other party after the action is completed.

Similarly in a securities-related class action, the plaintiff should pay the legal fee of the other party if lost, regardless of whether the case is meritorious or frivolous. For example, when the case was dismissed just because the plaintiff failed to establish loss causation while having succeeded in proving defendant' s torts, still the plaintiff should bear the burden of legal fee.

This is contrast to English legal system where plaintiffs are free to go when the case is not frivolous.

Does the Court have to approve any settlement?

In ordinary civil proceedings, parties are free to withdraw or settle a suit under the principle of private autonomy; however, any settlement with the class representative requires an approval of the Court.
While a settlement in ordinary proceedings can complete the suit without any interference of the Court, in class actions, the Court should consider whether the proposed settlement is a fair and reasonable compromise of the claims of the class members and not just in the interest of the representative parties and defendants.

What was the first securities-related class action in Korea?

The first action was Jinsung T.E.C. case which was filed on April 2009 for failure of Jinsung T.E.C. to represent fairly the loss related to a notorious derivative financial instrument (KIKO). Suwon District Court certified the action on February 2010, but the parities settled afterward.

What cases were filed against foreign corporations?

Since the Act went into effect on January 1, 2005, two of seven cases were against foreign financial institutions.

On January 7, 2010, investors of Hanhwa Smart 10 ELS filed a class action against Royal Bank

of Canada, the back-to-back hedge party, which was the first class action against foreign financial institutions and also the first one based on the Capital Market and Financial Investment Service Act which went into effect on February 2009.

On March 2, 2012, the second class action was filed against Deutsche Bank in relation with Rich Father ELS 289 of Korea Investment Securities.

What type of claims have been the subject of class actions?

The types of class actions which have been brought since the class action system was introduced in 2005 are as follows:

Filing date	Cases	Plaintiff's attorney
April 13, 2009	Jinsung T.E.C. (related to accounting fraud for KIKO)	INS
January 7, 2010	Hanhwa Smart 10 (market manipulation related to ELS)	Hannuri Law
October 13, 2011	C-Motech (false representation of registration statement)	Hannuri Law
March 2, 2012	Korea Investment 289 (market manipulation related to ELS)	Hannuri Law
October 8, 2013	GS E&C (accounting fraud)	Hannuri Law
December 1, 2013	JeneMatrix (market manipulation)	Yul, Kunjin
June 10, 2014	Dongyang CP (false representation of registration statement)	Jung Yul

While accounting frauds were expected to be the primary causes for class actions when introduced, class actions have been filed based on various reasons; 2 cases for accounting fraud, 1 case for market manipulation, 2 cases for market manipulation related to ELS, and 2 cases for false representation of registration statement. As shown by the fact that six out of seven cases were filed after 2010, class actions are on the rise.

What type of claims are likely to be brought in the future?

The demand for class actions in Korea is on the rise as collective damage increases for mass-manufacture, mass-distribution and mass-consumption, and as gathering of victims becomes

easy thanks to IT development such as internet. Other emerging and potential areas which have been identified are:

- Claims for breach of personal information
- Claims by consumers for unfair transactions such as anti-trust activities
- Claims by apartment residents for construction failures
- Environmental claims

In the meantime, the Korean government is pushing ahead with the plan to expand the causes of class action from securities to unfair transactions. Especially, the government' s policy is to compensate consumers by class actions when companies are punished for unfair transactions such as anti-trust activities, and even further, the causes of securities-related class actions which currently are available only in relation with securities issued by listed-companies could be expanded to include inappropriate business activities such as misselling of financial instruments.

What are the main differences between Korean and US class actions?

Claims

In the U.S., there is virtually no limitation on claims for bringing about class actions if collective injuries occurred; however, in Korea class actions are limited to the particular claims specified in the Act.

Qualification for attorneys

In the U.S., there is no limitation on how many times an attorney can represent plaintiffs in class actions. In Korea, however, a person who has engaged in more than three class actions as an attorney during the preceding three years is disqualified from becoming the attorney for plaintiffs in the next class actions, which makes it hard for attorneys to have expertise in class actions.

Discovery system

In the U.S., thanks to the discovery system which is useful in searching and acquiring defendants' proofs, it is easy to bring about class actions; however, in Korea plaintiffs have to rely on the prosecutors or governmental authorities in finding clues.

Costs

In the U.S., each party bears their own costs irrespective of outcome. In Korea,

however, the unsuccessful party will usually be ordered to pay the costs of the successful party no matter how enormous they are. Furthermore, the filing fee could be significant in Korea because the fee is calculated by reference to the amounts of damages while in the U.S. filing fee is negligible in most cases.

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