

IN THE MATTER OF AN ARBITRATION

Case No. 22221/CYK/PTA

UNDER THE RULES OF ARBITRATION

OF THE INTERNATIONAL CHAMBER OF COMMERCE

BETWEEN:

LSF-KEB Holdings SCA
(Kingdom of Belgium)

Claimant

vs/

Hana Financial Group, Inc.
(Republic of Korea)

Respondent

FINAL AWARD

13 May 2019

ARBITRAL TRIBUNAL

Gary Born
Toby Landau QC
Professor Zachary Douglas QC (Presiding)

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A **INTRODUCTION**

1. This arbitration concerns claims made by the claimant, LSF-KEB Holdings SCA, against the respondent, Hana Financial Group, Inc., arising under a share purchase agreement, dated 25 November 2010 (*Original SPA*) and Korean civil law. The object of the Original SPA was for Hana Financial Group, Inc. to acquire LSF-KEB Holdings SCA's 51.02 per cent shareholding in Korea Exchange Bank (*KEB*). This is the Final Award in this arbitration.

A1 The Claimant

2. The claimant is LSF-KEB Holdings SCA, organised under the laws of Belgium (hereinafter referred to as *Lone Star* or the *Claimant*) with the following address:

2, Avenue Pasteur
B-1300 Wavre
Belgium

c/o: Michael Thomson
Email: mthomson@lonestarfunds.com

3. The Claimant is represented in this arbitration by Stanimir A. Alexandrov of Stanimir A. Alexandrov PLLC and by Marinn Carlsin and James E. Mendenhall, of Sidley Austin LLP and Beomsu Kim, John M. Kim, Eun Nyung (Ian) Lee and by Byungsup F. Shin of KL Partners LLC. Their addresses are:

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Tel: +82 2 6226 7700
Email: bkim@klpartners.com
jmkim@klpartners.com
enlee@klpartners.com
bfshin@klpartners.com

A2 The Respondent

4. The Respondent is Hana Financial Group, Inc. (hereinafter referred to as *Hana* or the *Respondent*), a financial holding company organised under the laws of the Republic of Korea, the address of which is:

55, Eulji-ro
Jung-gu Seoul
04539
Republic of Korea

5. The Respondent is represented by Anton A. Ware, John Muse-Fisher and Katelyn A. Horne of Arnold & Porter LLP and by Kap-you (Kevin) Kim, John P. Bang, Junu Kim, Kyongwha Chung, Woochul Hwang, Sangchul Kim, Yoojoung Kang, Soyun Sophie Oh and Bhushan Satish of Bae, Kim & Lee LLC. Their addresses are:

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Suites 3808-3811, CITIC Square
1168 Nanjing Xi Rd
Shanghai, China 200041

Tel: +86 21 2208 3680
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Arnold & Porter, LLP
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San Francisco, California 94111-4042
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133 Teheran-ro, Gangnam-gu
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Tel: +82 2 3404 7587
Email: kevin.kim@bkl.co.kr
john.bang@bkl.co.kr
junu.kim@bkl.co.kr
kyongwcha.chung@bkl.co.kr
sangchul.kim@bkl.co.kr
yoojoung.kang@bkl.co.kr
soyun.oh@bkl.co.kr
bhushan.satish@bkl.co.kr

6. The Claimant and the Respondent are referred to collectively as the *parties*.

A3 Procedural Law and Applicable ICC Rules

7. In Article 11.15.2 of the Original SPA, the parties agreed for the seat of the arbitration to be Singapore. As a result of this choice, and given that this is an international arbitration, the International Arbitration Act (Chapter 143A) (1994) of Singapore, as amended, applies to these arbitration proceedings.
8. According to the arbitration agreement contained in Article 11.15.2 of the Original SPA, the proceedings shall be governed by the “*the rules of the Court of Arbitration of the International Chamber of Commerce*”, which are to be understood as the ICC Arbitration Rules in force as from 1 January 2012 (*ICC Rules*), in accordance with Article 6.1 of the ICC Rules.
9. In the remaining part of this section of the Final Award, the Tribunal will provide an overview of the procedure that has been followed in this arbitration. This is not intended to be a comprehensive account of the procedure or the materials exchanged between the parties and the Tribunal.

A4 Commencement of proceedings

10. On 21 August 2016, the Claimant filed its Request for Arbitration (*Request*). On 23 August 2016, the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (*Secretariat*) acknowledged receipt of the Request and indicated that the arbitration was deemed to have commenced on 22 August 2016 when the Secretariat received the Request.
11. The Secretariat forwarded the Request to the Respondent on 26 August 2016.
12. On 27 September 2016, the Respondent acknowledged receipt of the Request and requested an extension to file its answer (*Answer*) and to appoint its arbitrator.
13. On 2 November 2016, the Respondent filed its Answer. The Secretariat acknowledged receipt on 8 November 2016.
14. On 27 February 2017, the Secretariat transmitted the file to the Tribunal.

A5 The Tribunal

15. On 21 August 2016, the Claimant nominated Judge Charles Brower as its arbitrator and proposed that the same tribunal constituted to hear a dispute submitted by the Claimant against the Republic of Korea under the ICSID Arbitration Rules be appointed for the present arbitration. At the same time, it reserved its right to nominate a different arbitrator in the event that the Respondent objected to its proposal.
16. On 27 September 2016, the Respondent objected to the Claimant's proposal in relation to the constitution of the tribunal.
17. On 29 September 2016, the Secretariat requested that the Claimant nominate its arbitrator by 13 October 2016.
18. On 12 October 2016, the Claimant nominated Gary Born as co-arbitrator. His address and contact details are as follows:

Gary Born

Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane
London W1K 1PS
United Kingdom

Tel: +44 20 7872 1020
E-mail: gary.born@wilmerhale.com

19. On 14 October 2016, the Secretariat invited the Respondent to nominate its arbitrator by 28 October 2016.
20. On 28 October 2016, the Respondent nominated Toby Landau QC as co-arbitrator. His address and contact details are as follows:

Toby Landau QC

Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Tel: +44 207 813 8000
E-mail: tlandau@essexcourt.net

21. On 9 December 2016, the Secretariat informed the Parties that the Secretary General of the ICC International Court of Arbitration (the *Court*) had confirmed Gary Born and Toby Landau QC as co-arbitrators
22. On 16 January 2017, the Parties informed the Secretariat that they had been unable to agree on a presiding arbitrator and requested the ICC to proceed to make the appointment.
23. On 24 February 2017, the Secretariat informed the Parties that the Court had appointed Prof. Zachary Douglas QC as president of the Tribunal upon the proposal of the Australian National Committee. His address and contact details are as follows:

Professor Zachary Douglas QC

Matrix Chambers
Rue Général-Dufour 15
1204 Geneva, Switzerland

Tel: +41 22 310 6875
E-mail: zacharydouglas@matrixlaw.co.uk

A6 Terms of Reference and Procedural Timetable

24. On 14 March 2017, the Tribunal provided the parties with a draft Terms of Reference, and requested comments on or before 27 March 2017. On the same date, the Tribunal addressed the parties on several procedural issues and instructed them to respond to such issues on or before 27 March 2017.
25. On 20 March 2017, the Respondent submitted its comments to the Tribunal on the draft Terms of Reference and the procedural issues. Comments were submitted by the Claimant on 21 March 2017.
26. On 21 March 2017, the Tribunal acknowledged receipt of the parties' suggested amendments and comments on the draft Terms of Reference. On 22 March 2017, the Tribunal transmitted the final version of the Terms of Reference to the parties for signature.
27. On 3 April 2017, the parties jointly addressed the Tribunal and advised that they had reached an agreement on most of the procedural issues raised in the Tribunal's letter of 14 March 2017. On 5 April 2017, the parties jointly submitted an agreed procedural timetable, and requested the Tribunal to decide on the outstanding procedural issues.
28. On 6 April 2017, the Tribunal requested the parties to advise on whether in light of the parties' agreement on the most important procedural matters in this arbitration, they would be content to waive the requirement of a Case Management Conference in Article 24 of the ICC Rules and for the Tribunal to execute Procedural Order No. 1 at latest on 25 April 2017, after having received the parties' comments. On 7 April 2017, the Claimant confirmed its agreement with the Tribunal's proposals. This confirmation was given by the Respondent on 10 April 2017.
29. On 13 April 2017, the Tribunal provided the parties with draft Procedural Order No. 1 and invited the parties to provide any comments on or before 21 April 2017. Comments were submitted by both parties on 21 April 2017.
30. On 26 April 2017, the Tribunal rendered Procedural Order No. 1 which included the Procedural Timetable for this arbitration.
31. On 28 April 2017, the Secretariat acknowledged receipt of the Terms of Reference signed by the parties and by the Tribunal. It further acknowledged receipt of the Procedural Timetable and noted the parties' agreement to waive the Case Management Conference.

32. On 12 May 2017, the Secretariat informed the Tribunal and the parties that the Procedural Timetable had been transmitted to the Court on 11 May 2017.

A7 Time limits for the rendering of the Final Award

33. On 28 April 2017, the Secretariat informed the Tribunal and the parties that the time limit of six months within which the arbitral tribunal must render the final award started to run on 11 April 2017, i.e., the date on which the Terms of Reference were last signed (Article 30(1) of the ICC Rules).

34. On 14 September 2017, the Court extended the time limit for rendering the final award until 29 March 2019. On 14 March 2019, the Court extended the time limit for rendering the final award until 28 June 2019.

A8 Procedure leading to the hearing

35. On 1 July 2017, the Claimant filed its Statement of Claim (*Statement of Claim*) and accompanying legal and factual exhibits.

36. On 24 August 2017, the Claimant addressed the Tribunal to inform a change in the contact details of its counsel.

37. On 15 September 2017, the Respondent filed its Statement of Defence (*Defence*) and accompanying legal and factual exhibits.

38. On 26 September 2017, the Respondent sought an order for the production of “*selected records*” in the ICSID arbitration between Lone Star and others and the Republic of Korea (ICSID ARB/12/37) (the *ICSID Arbitration*). On 2 October 2017, the Claimant filed its comments regarding this application. On 5 October 2017, the Tribunal denied the Respondent’s application.

39. The parties exchanged document production requests on 7 October 2017, and provided objections to document requests not agreed on 28 October 2017.

40. On 24 October 2017, the Respondent submitted an application for an order directing Lone Star to seek the consent of the Republic of Korea for the production of certain documents on the record of the ICSID Arbitration. On 2 November 2017, the Claimant filed its response to Respondent’s application. On 9 November 2017, the Respondent filed a reply

to the response filed by Claimant. On 13 November 2017, the Claimant filed a further response.

41. On 11 November 2017, the parties filed their requests for document production.
42. On 18 November 2017, the parties filed their Confidentiality Agreement governing materials submitted and exchanged in this arbitration.
43. On 12 December 2017, the Tribunal transmitted to the parties its decisions on their requests for document production. In its covering letter, the Tribunal invited the Respondent to indicate whether or not it maintained its application of 24 October 2017 in relation to the record of the ICSID Arbitration once it had a chance to review the Tribunal's decisions on the requests for document production. In the event, that application was not renewed by the Respondent.
44. On 9 March 2018, the Claimant filed its Reply Brief (*Reply*).
45. On 25 May 2018, the Respondent filed its Rejoinder (*Rejoinder*).
46. On 4 June 2018, the Respondent requested a temporary suspension of these proceedings pending issuance of the final award in the ICSID Arbitration. On 8 June 2018, the Claimant filed its observations on the Respondent's request. The Respondent replied on 11 June 2018 and the Claimant then replied on the same day. On 13 June 2018, the Tribunal rejected the Respondent's request for the temporary suspension of the proceedings.
47. On 27 June 2018, the Claimant requested the Tribunal to strike out allegedly new arguments made in Sections 6.2 and 6.4 of the Respondent's Rejoinder. On 5 July 2018, the Respondent filed its observations on the Claimant's application.
48. On 7 July 2018, the parties filed their first round of witness statements.
49. On 9 July 2018, the Tribunal declined the Claimant's application to strike out Sections 6.2 and 6.4 of the Respondent's Rejoinder and afforded the Claimant an opportunity to file a short written submission dealing exclusively with those sections of the Respondent's Rejoinder. On 3 August 2018, the Claimant filed its Supplementary Reply on Statutes of Limitations in response to Sections 6.2 and 6.4 of the Respondent's Rejoinder.
50. On 23 August 2018, the parties submitted their second round of witness statements.

51. On 18 September 2018, the parties filed their expert reports with accompanying factual and legal exhibits.
52. On 27 October 2018, the parties filed their rebuttal expert reports with accompanying factual and legal exhibits.
53. On 6 November 2018, the parties submitted their joint *dramatis personae*.
54. On 12 November 2018, the parties submitted their joint chronology of the main events.
55. On 12 November 2018, the Respondent requested leave to call Hana's Korean law expert, Professor Young-Joon Kwon, to testify at the hearing, even though the Claimant had elected not to call him for cross-examination pursuant to Section 4.6 of Procedural Order No. 1. On 14 November 2018, the Claimant filed its comments regarding such application.
56. On 15 November 2018, the parties and the President of the Tribunal held a pre-hearing conference call.
57. On 15 November 2018, the Tribunal upheld the Respondent's application of 12 November 2018, subject to the qualification that there would be no expert conferencing with Professor Kwon. The Tribunal further noted that the Claimant had reserved the right to cross-examine Professor Kwon.
58. On 27 November 2018, the parties filed their skeleton arguments.
59. On 30 November 2018, the Respondent requested a full version of Exhibit C-006 from the Claimant. The Claimant responded to this application on 1 December 2018 by agreeing to include on the record a full version of Exhibit C-006 subject to the conditions set out in its letter.

A9 The hearing

60. The hearing took place at the Raffles City Convention Centre in Singapore, over a period of six days from 3 to 8 December 2018 inclusive. The hearing was attended by the following persons:

Tribunal
Gary Born
Toby Landau QC
Professor Zachary Douglas QC

Claimant

Stanimir A. Alexandrov
Stanimir A. Alexandrov PLLC

Marinn Carlson
Michael Krantz
Carys Golesworthy
Avery Archambo
Sidley Austin LLP

Beomsu Kim
John M. Kim
Eun Nyung Lee
Jae Hyuk Chang
Byungsup Shin
KL Partners

Michael Thomson
Marjorie Harrigan
Lone Star

Respondent

Anton A. Ware
Katelyn Horne
Arnold & Porter LLP

Kap-You (Kevin) Kim
John P. Bang
Junu Kim
Kyongwha Chung
Woochul Hwang
Yoojung Kang
Sangchul Kim
Yoojoung Kangsunhee Cho
Bhushan Satish
Sophie Oh
Bae, Kim & Lee LLC

Kwang-il Choi
Hana

61. The following factual witnesses gave oral evidence during the hearing:

61.1. For the Claimant: John P. Grayken, Ellis Short, Michael Thomson.¹

¹ Also referred to as Mike Thomson.

61.2. For the Respondent: Seung Yu Kim (Chairman Kim), Hyeonkee Bae.

62. The experts, Professor Jin Su Yune, Justice Il Hoan Park and Professor Young-Joon Kwon also gave oral evidence at the hearing.

A10 Post-hearing procedure

63. On 12 December 2018, the Tribunal requested the parties' observations on a draft communication that would be sent by the Claimant to the tribunal in the ICSID Arbitration. The Claimant provided its consent to the draft communication on 14 December 2018. On 18 December 2018, the Respondent objected to the communication but, in the alternative, proposed some amendments to the text. The Tribunal adopted those amendments and directed the Claimant to send the communication to the ICSID Tribunal on 20 December 2018. The Claimant confirmed that it had done so on 21 December 2018.
64. On 21 January 2019, the Claimant applied to share the testimony of the Respondent's witnesses in the hearing in this arbitration and this Tribunal's Final Award with the tribunal in the ICSID Arbitration. On 23 January 2019, the Tribunal invited the Claimant to make submissions on the legal basis for its application, following which the Respondent would have an opportunity to respond both to the application and the legal submissions. The Claimant filed its legal submissions on 7 February 2019. The Respondent filed its response on 23 February 2019. On 28 February 2019, the Tribunal issued Procedural Order No. 2, the dispositive order of which reads: "*The Claimant shall be entitled to apply to the ICSID Tribunal to admit into the record of the ICSID Arbitration: (a) the written and oral testimony of the factual witnesses for Hana in this proceeding (Hana Chairman Seung Yu Kim and Mr Hyeonkee Bae); and (b) the Award in these proceedings (should it be rendered before the Award in the ICSID Arbitration).*"
65. On 6 March 2019, the Tribunal fixed a timetable for the remaining steps in the proceedings. It noted the agreement of the parties to provide corrections to the transcript on 15 March 2019. It requested the parties to file cost submissions on 22 March 2019 and then file rebuttal submissions on 5 April 2019. The parties duly complied with these steps.
66. On 16 April 2019, the Tribunal declared the proceedings closed with respect to the matters to be decided in this Final Award in accordance with Article 27 of the ICC Rules.

B GOVERNING LAW AND ARBITRATION CLAUSE

67. The governing law and arbitration clause is contained in Article 11.15 of the Original SPA in the following terms:

11.15.1 This Agreement and the documents to be entered into pursuant to it, save as expressly referred to therein, shall be governed by and construed in accordance with Laws of the Republic of Korea.

11.15.2 Any and all disputes arising out of, relating to or in connection with this Agreement shall be submitted to the Court of Arbitration of the International Chamber of Commerce and shall be finally settled through binding arbitration under the rules of the Court of Arbitration of the International Chamber of Commerce. The arbitration shall be conducted before a panel of three arbitrators. Each of the Seller and the Purchaser shall nominate one arbitrator each and attempt to agree on a third arbitrator who shall serve as the Chairman. If no agreement on the third arbitrator can be reached within (30) days of the confirmation of the second arbitrator, then the Chairman shall be appointed by the Court of Arbitration of the International Chamber of Commerce. The seat of the arbitration shall be in Singapore, and the arbitral proceedings shall be in the English language. All the parties irrevocably submit to the non-exclusive jurisdiction of the courts of Singapore to support and assist the arbitration process pursuant to this clause 11.15.2, including if necessary the grant of interlocutory relief pending the outcome of that process.

68. The law applicable to this dispute is thus the law of the Republic of Korea. Neither party has raised any issue in relation to the jurisdiction of this Tribunal over the dispute submitted to it on the basis of the arbitration clause in the Original SPA.

C REQUESTS FOR RELIEF

69. The Claimant's request for relief is set out in its Reply at paragraph 398, in the following terms:

(i) Declare that Hana breached Clause 6.3.2 of the SPA; and

(ii) Declare that Hana violated the following provisions of the Korean Civil Code:

a) Article 110, such that the December Amended and Restated SPA of December 3, 2011, is voidable and rescinded based on fraud and duress;

b) Article 750, such that Hana is liable for damages because of its tortious conduct of fraud and duress;

c) Article 109, such that the December Amended and Restated SPA of December 3, 2011, is voidable and rescinded based on mistake;

d) Article 104, such that the December Amended and Restated SPA of December 3, 2011, is null and void as an unfair juridical act; and

e) Articles 148 and 150, such that the conditions to the July Amended SPA are deemed fulfilled following Hana's wrongful interference to avoid its contractual obligation.

(iii) Award to Lone Star, based on any or all of the above claims, damages and/or restitution as indicated above including for:

a) the lost sale proceeds, which amount to approximately US\$ 586 million;

b) appropriate interest based on the express terms of the SPA (10%); and

c) a tax gross-up to compensate Lone Star for Belgian and Korean taxes that it would not have paid on capital gains but will be obligated to pay on ordinary income on any award from this Tribunal.

(iv) Award to Lone Star the costs and fees of this arbitration.

70. The Respondent's request for relief is set out at page 209 of its Rejoinder. The Respondent requests a final award by which the Tribunal:

(I) DISMISSES all of Claimant's claims in their entirety;

(II) ORDERS Claimant to reimburse Respondent all costs, including all fees and/or expenses of the arbitral tribunal, attorneys, expert(s), and witness(es), and the administrative fees of the International Chamber of Commerce;

(III) DECLARES the final award to be immediately enforceable; and

(IV) AWARDS Respondent any other relief deemed just and reasonable.

D THE TRIBUNAL'S ANALYSIS OF THE FACTUAL RECORD

71. In this part of the Final Award, the Tribunal will set out a chronology of the more important events relating to the parties' dispute and make findings of fact based upon its comprehensive review of the documentary evidence and the oral testimony of the witnesses both in the ICSID Arbitration (in so far as this has been made available) and in these ICC proceedings. Where, for the purposes of giving a full chronology, the Tribunal records an

event that is not contested, it may rely upon the parties' joint and agreed chronology rather than upon documentary evidence.

D1 Lone Star's investment in KEB and events leading up to the Supreme Court's decision in March 2011

72. Lone Star purchased a majority stake in Korea Exchange Bank (*KEB*) on 31 October 2003² (the *KEB Shares*). The next month, KEB acquired the shares of KEB Credit Services Inc. (*KEB Card*), which was owned by Olympus Capital and other public shareholders. KEB Card was later merged into KEB.³
73. On 19 May 2006, Lone Star executed a share purchase agreement with Kookmin Bank to sell its KEB Shares.⁴ That SPA was terminated by Lone Star on 23 November 2006.⁵
74. Also in November 2006, the Korean prosecution charged Mr Paul Yoo (a director of KEB appointed by Lone Star's representatives on the board)⁶ and Lone Star with manipulating the stock price of KEB before the merger⁷ (the *KEB Card Case*).
75. On 3 September 2007, Lone Star executed a share purchase agreement with HSBC to sell its KEB Shares.⁸
76. On 1 February 2008, the Seoul Central District Court found Mr Paul Yoo of KEB, KEB and Lone Star guilty in the KEB Card Case.⁹ That decision was then overturned on appeal to the Seoul High Court on 24 June 2008.¹⁰
77. On 18 September 2008, HSBC terminated the share purchase agreement with Lone Star to purchase the KEB Shares.¹¹

² Parties' Joint Chronology.

³ Parties' Joint Chronology.

⁴ Exhibit R-039, Share Purchase Agreement between Lone Star and Kookmin Bank for the sale and purchase of Korea Exchange Bank dated 19 May 2006.

⁵ Parties' Joint Chronology.

⁶ Exhibit R-013, Seoul Central District Court Judgment, Case No. 2007Gohap 71 and 2006Gohap 1272, 1 February 2008, p. 3.

⁷ Parties' Joint Chronology.

⁸ Parties' Joint Chronology.

⁹ Exhibit R-013, Seoul Central District Court Judgment, Case No. 2007Gohap 71 and 2006Gohap 1272, 1 February 2008.

¹⁰ Exhibit R-015, Seoul High Court Judgment, Case No. 2008, No. 518, 24 June 2008.

¹¹ Parties' Joint Chronology.

78. In the ICSID proceedings, Lone Star claims that the transactions with Kookmin Bank and with HSBC collapsed due to political pressure on the FSC, which translated into the FSC's failure to approve those respective banks' applications to acquire KEB.¹²
79. On 25 November 2010, Lone Star and Hana entered into a share purchase agreement for the KEB Shares¹³ (the *Original SPA*) (the transaction between the parties will be referred to generically as the *KEB Transaction*). The agreed price was KRW 14,250 per share (which amounted to approximately USD 4.1 billion). The parties agreed to amend the Original SPA on 9 December 2010 to deal with the expected dividend for 2010 given that closing under the Original SPA was unlikely to occur prior to the record date for the said dividend.¹⁴
80. On 13 December 2010, Hana submitted an application to the FSC for approval to incorporate KEB as a subsidiary of Hana in accordance with Article 16 of the Financial Holding Companies Act (*FHCA*).¹⁵ Although Hana was to submit a new application on 5 December 2011, each application will be referred to as *Hana's Application* unless the context requires otherwise.
81. In early February 2011, Chairman Kim of Hana met with the FSC Chairman. Chairman Kim's account of this meeting was as follows:

We had attended the same high school and had a cordial relationship. I met with him to congratulate him on his appointment to the chairmanship of the FSC and to exchange the Lunar New Year's greetings. During this meeting, we discussed recent events in the financial industry, and in this context I briefly mentioned Hana's pending application before the FSC.¹⁶

82. Both Lone Star and Hana expected the FSC to approve Hana's Application in March 2011. Mr Hyeonkee Bae gave the following evidence:

On 1 February 2011, the FSC sought supplemental materials from Hana concerning Hana's (i) business plan for KEB, post-merger, and (ii) financing of the transaction. This request was shared with Lone Star, and after submitting these materials to the FSC on 10 March 2011, Hana duly

¹² Claimant's letter to the Tribunal, 8 June 2018.

¹³ Exhibit C-001, Share Purchase Agreement Between Lone Star and Hana Financial Group, 25 November 2010.

¹⁴ Exhibit C-002, First Amendment to Share Purchase Agreement Between Lone Star and Hana Financial Group.

¹⁵ Exhibit R-021, Hana's Application for Preliminary Approval of Incorporation of Subsidiary (1st).

¹⁶ RWS-002, First WS of Chairman Kim of Hana, §13.

informed Lone Star of this request. On 10 March 2011, the [Fair Trade Commission] approved the transaction, and the FSC was expected to approve the transaction during the FSC Commission's meeting scheduled for 16 March 2011.¹⁷

83. Chairman Kim also testified in cross-examination that “*we felt that there would not be any problems*”¹⁸ until the Supreme Court decision on 10 March 2011. He also confirmed that Hana had ensured that all the necessary debt and equity financing for the KEB Transaction was in place in February 2011 in expectation of approval in March 2011.¹⁹
84. Mr Thomson testified in the ICSID proceedings that Lone Star was convinced that the FSC would have approved Hana's Application but for the Supreme Court's decision,²⁰ to which the Tribunal now turns.

D2 The Supreme Court's decision and its aftermath

85. On 10 March 2011, the Korean Supreme Court issued its decision in the KEB Card Case reversing the Seoul High Court's decision in 2008 by which Mr Paul Yoo and Lone Star had been acquitted for stock price manipulation.²¹ The case was remanded to the Seoul High Court. Mr Byoung-ho Kim emailed Mr Thomson and Mr Short on the same day with the message: “*In the late afternoon... supreme court decision came out and we had to deal with the regulators as for the court decision's impact on the major shareholder eligibility of Lone Star...*”²² Indeed, Mr Hyeon-keek Bae testified that he received a call from an FSC official immediately after the Supreme Court had rendered its decision and then a meeting took place between FSC officials and Mr Hyun Joo-Lee (then Vice President of Hana Bank), Mr Byoung-ho Kim²³ and himself shortly afterwards on the same day. According to Mr Hyeon-keek Bae: “*During this meeting, we were informed that the FSC would have to conduct a legal review of Lone Star's eligibility to hold the KEB shares and that consideration of Hana's Application would be suspended pending such review*”.²⁴ This is the first of many examples of close communication and coordination

¹⁷ RWS-001, First WS of Mr Hyeon-keek Bae, §14.

¹⁸ ICC Transcript D3/P475 (Chairman Kim).

¹⁹ ICC Transcript D4/P684-8 (Chairman Kim).

²⁰ Exhibit C-122, ICSID Transcript, D2/P456-7 (Thomson).

²¹ Exhibit CLA-016, Supreme Court Judgment, Case No. 2008Do6335.

²² Exhibit C-041, Email from Byoung-ho Kim to Mike Thomson and Ellis Short.

²³ He confirmed his attendance in cross-examination in the ICSID Arbitration: ICSID Transcript D7/P1806 (Byoung-ho Kim).

²⁴ RWS-001, First WS of Mr Hyeon-keek Bae, §16.

between the FSC and Hana in relation to Hana's Application and the KEB Transaction more generally.

86. On the same day, Hana drafted an internal memorandum entitled "*Lone Star's Eligibility as Major Shareholder and Approval for HFG's Inclusion into Subsidiary*".²⁵ This is a significant document because it reveals Hana's immediate and contemporaneous reaction to the Supreme Court's decision and likely impact of that decision on the completion of the Original SPA with Lone Star from the perspective of the FSC. The memorandum records Hana's view that: "*There is no reason to withhold pending approval for inclusion into subsidiary because of Supreme Court's judgment against Lone Star*".²⁶ Hana's analysis leading to this conclusion was as follows:

Since requirements for approving inclusion [into subsidiary] are appropriateness and soundness of the business plan of the subsidiary, financial status and management soundness of the financial holding company, and anti-competitiveness, etc., whether seller violated requirement of eligibility as shareholder holding shares in excess of limit is not relevant.²⁷

87. The memorandum also makes reference to "*an opinion*" that if the FSC were to issue a disposal order, then the "*likelihood that [Lone Star] would have to sell [the KEB shares] below ordinary purchase price would increase, and, therefore, outflow of national wealth will decrease*". Hana's analysis expresses disagreement with that opinion and concludes that: "*While outflow of national wealth is unlikely to be minimized due to delay of approval for inclusion into subsidiary, huge side effects are expected for HFG, financial markets and national economy.*" Elsewhere Hana states that, even in the event of a delay of FSC approval, "*[i]t is highly likely that [Lone Star] will sell its [KEB shares] by receiving fair market value or higher with premium*".²⁸
88. Hana's position as stated in the memorandum is thus clear: the FSC had no regulatory basis to delay or withhold approval; any such delay would not be likely to result in the lowering of the price of the KEB Shares to be paid to Lone Star (and therefore decrease the "*outflow of national wealth*"); and, there were likely to be very significant negative effects upon Hana

²⁵ Exhibit C-093, Hana Financial Group, Lone Star's Eligibility as Major Shareholder and Approval for HFG's Inclusion into Subsidiary.

²⁶ Exhibit C-093, p. 2, Hana Financial Group, Lone Star's Eligibility as Major Shareholder and Approval for HFG's Inclusion into Subsidiary.

²⁷ Exhibit C-093, p. 2, Hana Financial Group, Lone Star's Eligibility as Major Shareholder and Approval for HFG's Inclusion into Subsidiary.

²⁸ Exhibit C-093, p. 3, Hana Financial Group, Lone Star's Eligibility as Major Shareholder and Approval for HFG's Inclusion into Subsidiary.

and the national economy in the event that the FSC were to withhold its approval. The latter was stated to include the following: “*Share price [of Hana] could plummet below the market price prior to the execution of agreement with Lone Star due to extinguished expectation that corporate value would increase after acquisition of KEB and burden of volumes due to paid-in capital increase, etc.*” Hana, moreover, listed the possible “*indirect damages*” as “*deterioration of reputation, withdrawal of deposits, downgrade of credit rating, and increase cost of capital*”. At the level of the national economy, Hana opined that the “*failure to close the deal*” could “*cause instability of domestic financial markets and industry*” and lead to the possibility of Lone Star “*filing international lawsuit responding to its third failure to close the deal*”.²⁹

89. There is no doubt in light of the position expressed in this memorandum that Hana’s position was perfectly aligned with Lone Star’s in the immediate aftermath of the Supreme Court’s decision.
90. It is also significant that Hana expressed the view that Lone Star would be acquitted upon retrial at the High Court because the joint penal provision under Article 215 of the former Securities and Exchange Act pursuant to which Lone Star had been charged had been found by the Constitutional Court to be unconstitutional since 2008. Thus, according to Hana, upon retrial at the High Court, “[*e*]ven if *Hoe-Won Yoo* is decided to be guilty, the judgment of not-guilty of Lone Star will not change”.³⁰ Hana did, however, anticipate a delay of at least three years for the case to reach a conclusion.³¹ Lone Star’s lawyers, Kim & Chang, had come to the same view.³²
91. A further memorandum drafted by Hana and dated 11 March 2011 noted that the application process was very much a political affair:

Political judgment necessary for the issues with KEB sale

²⁹ Exhibit C-093, pp. 4-5, Hana Financial Group, Lone Star’s Eligibility as Major Shareholder and Approval for HFG’s Inclusion into Subsidiary. See also Exhibit C-098, Hana Financial Group, Issues with KEB Sale.

³⁰ Exhibit C-093, p. 6, Hana Financial Group, Lone Star’s Eligibility as Major Shareholder and Approval for HFG’s Inclusion into Subsidiary.

³¹ Exhibit C-093, p. 6, Hana Financial Group, Lone Star’s Eligibility as Major Shareholder and Approval for HFG’s Inclusion into Subsidiary.

³² Exhibit C-095, pp. 7-8, Kim & Chang, Legal Opinion regarding Approval of Application for Incorporation of a Company as a Subsidiary under the Financial Holding Company Act.

○ The examination of LS' eligibility as a major shareholder and the approval of HFG are not legal issues.³³

92. On 15 March 2011, Chairman Kim of Hana had a meeting with the FSC Chairman.³⁴ It was Chairman Kim's evidence that he had requested the meeting.³⁵ Chairman Kim's testimony was that, during that meeting, he "*attempted to convince [the FSC Chairman] that the FSC ought to continue with the anticipated approval of Hana's Application*".³⁶ According to Chairman Kim:

Hana's view was that the issue of Lone Star's disqualification was separate from Hana's Application, not least because Lone Star had not yet been convicted. I tried to convince the FSC Chairman to take the same view. During my meeting with the FSC Chairman, he indicated that the FSC was undertaking a legal review of the situation and that the final decision on Hana's Application was for the FSC to make, which it would do in due course. The FSC Chairman mentioned that the FSC was under a lot of public and political pressure at the time. However, it was clear to me that if the pressure were to be reduced then he would not be opposed to working toward finalizing the approval of the transaction. Hence I inferred from our conversation that he would need the Parties' help in overcoming the hurdles he faced. However, the FSC Chairman did not suggest — and I did not think it appropriate to ask — what the Parties could do in this regard.³⁷

93. Chairman Kim testified under cross-examination that as a result of his meeting with the FSC Chairman, he formed the view that Hana would stand a better chance of securing the FSC's approval if there was a reduction in the price.³⁸ For the reasons that the Tribunal will elaborate upon in due course, the Tribunal finds that it is highly likely that the FSC Chairman communicated to Chairman Kim of Hana that a price reduction would alleviate the political pressure on the FSC. Indeed, it is difficult to conceive of anything else that the parties to the KEB Transaction would be able to do to achieve that. The Tribunal finds that in respect of this conversation between Chairman Kim of Hana and the FSC Chairman and the others that followed, what Chairman Kim testified could be inferred is more likely to have been expressly stated.
94. On 16 March 2011, the FSC issued a press release on the "*Results of the Evaluation of the Qualification of KEB as Shareholder Holding Shares in Excess of Prescribed Limit*". Under the heading "*Extraordinary Evaluation of Qualification*", the FSC referred to the Supreme Court's

³³ Exhibit C-098, Hana Financial Group, Issues with KEB Sale.

³⁴ RWS-002, First WS of Chairman Kim of Hana, §15.

³⁵ ICC Transcript D3/P495 (Chairman Kim).

³⁶ RWS-002, First WS of Chairman Kim of Hana, §15.

³⁷ RWS-002, First WS of Chairman Kim of Hana, §16.

³⁸ ICC Transcript D3/P486 (Chairman Kim).

decision and stated: “It was determined as a result of the extraordinary evaluation of qualification that additional review of legal principles was necessary to decide whether Lone Star Fund IV satisfied the social credibility requirements among the requirements for qualification.”³⁹ Thus, contrary to Hana’s contemporaneous position, the FSC appears to have taken the view that the Supreme Court’s decision was relevant to its regulatory approval. This is how Kim & Chang interpreted the FSC’s press release.⁴⁰

95. Both Kim & Chang⁴¹ and Hana⁴² drafted further detailed memoranda towards the end of March 2011 that, according to Mr Hyeonkee Bae, were submitted to the FSC and FSS (Financial Supervisory Service).⁴³ Hana’s memorandum reflected the same position set out in Hana’s previous memorandum of 10 March 2011. It contained a series of “counter-arguments” to rebut the negative public views against the KEB Transaction with Lone Star.⁴⁴ All those arguments were fully supportive of the existing deal with Lone Star.
96. On 29 March 2011, a meeting took place between Mr Ellis Short of Lone Star and Mr Byoungho Kim of Hana in Honolulu.⁴⁵ This meeting, and several subsequent meetings between representatives of the parties, were secretly recorded by Lone Star’s representatives without the knowledge of Hana’s representatives. Transcripts of these recordings have been presented as evidence in this arbitration. No point has been taken concerning their admissibility as evidence and the Tribunal will refer to them extensively in this Final Award.
97. Mr Byoungho Kim opens the substantive part of the conversation with Mr Ellis Short by conveying how “desperate” he is for the deal to go through in the aftermath of the Supreme Court’s decision.⁴⁶ He returns to the same theme at the end of the conversation as well, emphasizing that Hana had raised trillions of Won in debt and equity financing for the

³⁹ Exhibit R-002, p. 2, FSC Press Release dated 16 March 2011.

⁴⁰ Exhibit C-095, pp. 2-3, Kim & Chang, Legal Opinion regarding Approval of Application for Incorporation of a Company as a Subsidiary under the Financial Holding Company Act.

⁴¹ Exhibit C-095, Kim & Chang, Legal Opinion regarding Approval of Application for Incorporation of a Company as a Subsidiary under the Financial Holding Company Act.

⁴² Exhibit C-096, Hana Financial Group, Review of Approval of HFG’s Inclusion into Subsidiary and Lone Star’s Eligibility as Major Shareholder.

⁴³ RWS-001, First WS of Mr Hyeonkee Bae, §17.

⁴⁴ Exhibit C-096, Hana Financial Group, Review of Approval of HFG’s Inclusion into Subsidiary and Lone Star’s Eligibility as Major Shareholder. Other memoranda were drafted by Hana around the same time all reflecting the same positions: Exhibit C-097, Hana Financial Group, Issues with KEB Sale; Exhibit C-099, Hana Financial Group, Issues with KEB Sale; Exhibit C-100, Hana Financial Group, Issues with KEB Sale.

⁴⁵ Exhibit C-015, Transcript of Meeting in Honolulu between Ellis Short and Byoungho Kim.

⁴⁶ Exhibit C-015, p. 3, Transcript of Meeting in Honolulu between Ellis Short and Byoungho Kim.

transaction.⁴⁷ (Mr Ellis Short noted that the “*best thing we have going for us*” was the fact that Hana was therefore seriously exposed if the FSC refused its approval because it would affect the whole financial system.)⁴⁸ Mr Byoungcho Kim continues that he is “*really upset with the FSC these days*” but assures Mr Ellis Short that “*Chairman Kim [of Hana] and I am exerting our best effort*”. He says: “*Our Chairman Kim, as far as I understand, he, at least talk to the Chairman of FSC almost every day.*”⁴⁹ The Tribunal infers that this was an exaggeration and that would have been obvious to Mr Short as a sophisticated counterparty. The sentiment conveyed was that Hana was trying to do everything to ensure that the deal with Lone Star would be completed and the Tribunal, for the reasons that will be elaborated upon further in due course, considers that that sentiment was genuinely held.

98. Mr Byoungcho Kim next conveyed to Mr Short that Chairman Kim of Hana had been delivered a message by the Chairman of the FSC:

[The Chairman of the FSC] is, he is really willing to do something to approve this transaction. But he also in need of, in a sense, assistance or help from us, uh, to wisely overcome the hurdles that he is facing with, especially related to the public blame, or political blame that he might come up with when he approved this deal.⁵⁰

99. He described the nature of the political pressure in more detail in the following passage:

But what they view really stressful and important for them not to both of us is the political blame or public blame. And understanding that especially KEB... uh... uh... labor union, what they are right now insisting every day, three hours, two hours, in front of FSC and even Hana bank head office. They sing songs and... It's real headache. And one of their strong argument is why not FSC declare Lone Star is not eligible.⁵¹

100. This is a direct reference to the political factors relating to Lone Star's perceived excess profits from the KEB Transaction. Mr Byoungcho Kim then spelt out the three scenarios that the FSC was taking into consideration in the aftermath of the Supreme Court's decision. The first was simply to acknowledge Lone Star's eligibility. Mr Byoungcho Kim stated that the problem with this approach was the “*public perspective*”.⁵² In discussing this scenario, Mr Byoungcho Kim conveyed Hana's analysis that Lone Star was not guilty of stock price

⁴⁷ Exhibit C-015, p. 23, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁴⁸ Exhibit C-015, p. 23, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁴⁹ Exhibit C-015, p. 3, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁵⁰ Exhibit C-015, p. 4, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁵¹ Exhibit C-015, p. 9, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁵² Exhibit C-015, p. 4, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

manipulation for the constitutional reasons that had been set out in Hana's internal memorandum of 10 March 2011.⁵³ Mr Byoungcho Kim also alluded to a report that they had sent to the FSC with the message that "*Even with this Supreme Court case, Lone Star is eligible.*"⁵⁴ It is likely that this report was, or was based on, Hana's memorandum of 10 March 2011, which endorsed that conclusion. The second scenario as described by Mr Byoungcho Kim was that the FSC would simply not decide on Lone Star's eligibility, which apparently was the FSC's position in relation to the two previous attempts by Lone Star to sell the KEB Shares. Mr Byoungcho Kim considered that this was unlikely to be repeated.⁵⁵

101. The third scenario according to Mr Byoungcho Kim's account of the FSC's internal deliberations was that Lone Star would be declared to be ineligible to own the KEB Shares, would be ordered to sell the shares and Hana's FSC application would be approved.⁵⁶ It was intended that this would lead to a lower transaction price for the KEB Shares for Lone Star.⁵⁷ Mr Byoungcho Kim prefaced the discussion of this scenario by saying that "*our Chairman Kim warned me not to give you any wrong impression that we renegotiate any terms and conditions of already agreed SPA*".⁵⁸ Mr Byoungcho Kim and Mr Short discussed various possibilities relating to the third scenario but the latter made it clear that "*for now let's leave it as the contract stands*". They both agreed that if the FSC were to pursue the third option then it would be "*illegal*" for the regulator to do so.⁵⁹
102. It is important to note that it was this third scenario that eventually came to pass. The Tribunal considers that it is likely that the FSC had communicated this possibility to Hana before Mr Byoungcho Kim gave his summary of the FSC's thinking to Mr Short on 29 March 2011. There is no evidence to suggest that this was Hana's preferred option or that Hana had conceived it independently of the FSC simply to pursue a price reduction for the KEB Shares. Hana's internal memoranda throughout this period flatly contradict this.
103. In April 2011, Hana drafted another memorandum entitled "*Issues Related to KEB Sale*", which sets out three scenarios relating to the FSC's likely course of action: "*(1) Eligible – Approval; (2) Ineligible – Disposal Order – Approval/Disapproval; (3) Delay of decision regarding*

⁵³ Exhibit C-015, p. 5, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim

⁵⁴ Exhibit C-015, p. 5, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁵⁵ Exhibit C-015, p. 9, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁵⁶ Exhibit C-015, p. 7, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁵⁷ Exhibit C-015, p. 9, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁵⁸ Exhibit C-015, p. 9, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

⁵⁹ Exhibit C-015, p. 20, Transcript of Meeting in Honolulu between Ellis Short and Byoungcho Kim.

eligibility before final and conclusive [court] judgment – Approval/Disapproval".⁶⁰ Once again, this memorandum evidences Hana's commitment to complete the existing deal under the Original SPA with Lone Star. For instance, the memorandum records Hana's proposed solution to deal with a possible negative public perception if the FSC were to approve Lone Star's eligibility before the final outcome of the criminal proceedings would be known: "Proactively engage in public relations by [explaining that Lone Star] is currently eligible, and, even if guilty verdict becomes final and conclusive in the future, disposal of shares that are held in excess would be [the remedy], so there would be no reason to delay approval of the sale".⁶¹ The memorandum concludes with "five reasons to let Lone Star leave":

- As [decision] is delayed, the dividend that Lone Star will receive will compound like snowball
- No method to stop "eat and run"
- Weakening of international competitiveness of banks, damage to Korea's international credibility and 'Yang-ho Byeon Syndrome' should stop at this point⁶² [this apparently is a reference to delaying a policy decision for fear of being held accountable⁶³].

104. A detailed action plan was also drafted by Hana in April 2011, setting out the various steps it proposed to take depending on the decisions of the various interested authorities.⁶⁴ Hana was also closely monitoring the Korean press and seeking to influence public opinion in favour of the KEB Transaction with Lone Star.⁶⁵ At one point it forwarded a Wall Street Journal article to the FSC that was critical of the situation pertaining to the KEB Transaction to ensure that the FSC was apprised of the negative international public opinion that the situation was provoking.⁶⁶

105. On 12 May 2011, the FSC made the following press announcement:

⁶⁰ Exhibit C-068, p. 2, Hana Financial Group, Issues Related to KEB Sale.

⁶¹ Exhibit C-068, p. 2, Hana Financial Group, Issues Related to KEB Sale.

⁶² Exhibit C-068, p. 5. Hana Financial Group, Issues Related to KEB Sale.

⁶³ See Exhibit R-027, "Seok-Dong Kim Raises the White Flag to Yang-Ho Byun Syndrome," Korea JoongAng Daily, 14 May 2011.

⁶⁴ Exhibit C-101, Hana Financial Group, Comprehensive Measures by Date (April 27-May 4).

⁶⁵ Exhibit C-102, Hana Financial Group, Minutes of Meeting of the Task Force of the Synergy Promotion Committee, 29 March 2011; Exhibit C-103, Hana Financial Group, Minutes of Meeting of the Task Force of the Synergy Promotion Committee, 30 March 2011; Exhibit C-104, Hana Financial Group, Minutes of Meeting of the Task Force of the Synergy Promotion Committee, 26 April 2011; Exhibit C-105, Hana Financial Group, Minutes of Meeting of the Task Force of the Synergy Promotion Committee, 25 April 2011.

⁶⁶ Exhibit C-103, Hana Financial Group, Minutes of Meeting of the Task Force of the Synergy Promotion Committee, 30 March 2011.

With respect to the Supreme Court's reversal and remand of lower court's decision in the KEBCS Stock Price Manipulation case, we have engaged in the review of the legal principles as to the eligibility of Lone Star Fund IV as a major shareholder of KEB (e.g., as a shareholder holding KEB shares in excess of limit).

As a result of such review, the outside legal experts are currently giving conflicting opinions on Lone Star Fund's eligibility as a major shareholder.

Given that there are conflicting opinions among outside legal experts as to Lone Star's eligibility as a major shareholder of KEB and also given that judicial proceedings are underway, it is, at this point in time, difficult to make a final determination as to the Lone Star's eligibility as a major shareholder.

Taking into account the foregoing circumstances, we decided to wait and see the progress status of the ongoing judicial proceedings among others in making the final determination of whether to approve Hana Financial Group's ("HFG") application for inclusion of KEB in its subsidiaries' group.⁶⁷

106. When the FSC Vice Chairman then took questions from reporters, he repeatedly refused to state whether the FSC would approve Hana's Application before the KEB Card Case reached a final conclusion.⁶⁸ It was recognized that this could take years if Lone Star pursued all avenues of appeal.⁶⁹ Two of the most prestigious Korean law firms, Bae Kim & Lee (Hana's Korean counsel) and Kim & Chang, prepared legal opinions to the FSC explaining that the KEB Card Case had no legal significance for the FSC's consideration of Hana's Application and that there was no good regulatory reason to delay.⁷⁰ Hana submitted these legal opinions to the FSC.⁷¹
107. The Tribunal considers that by the time of the FSC's announcement of 12 May 2011, both Hana and Lone Star would have been on notice that the FSC's timely approval of Hana's Application could not be taken for granted. The clear and unequivocal legal advice coming from both Lone Star's and Hana's legal counsel in Korea was that Hana's Application under Article 16 of the FHCA and the question of Lone Star's eligibility as a shareholder with

⁶⁷ Exhibit R-026, p. 1, Transcript of FSC Briefing, 12 May 2011.

⁶⁸ Exhibit R-026, p. 4, Transcript of FSC Briefing, 12 May 2011.

⁶⁹ Exhibit C-093, Hana Financial Group, Lone Star's Eligibility as Major Shareholder and Approval for HFG's Inclusion into Subsidiary, 10 March 2011.

⁷⁰ See Exhibit C-094, Bae Kim & Lee, Legal Opinion regarding Approval of Application for Incorporation of a Company as a Subsidiary under the Financial Holding Company Act, 20 March 2011; and Exhibit C-095, Kim & Chang, Legal Opinion regarding Approval of Application for Incorporation of a Company as a Subsidiary under the Financial Holding Company Act, 19 March 2011.

⁷¹ R's Statement of Defence, §94.

excess shareholding under Article 11-4(1) of the Enforcement Decree of the Banking Act were legally separate.⁷² Both Hana's and Lone Star's understanding would have been that the FSC was stalling its consideration of Hana's Application due to political pressure.

108. That was certainly how the Korean press was interpreting the situation at that very time. The Korean newspaper, *Joongang Daily*, published an article on 14 May 2011 entitled "*Seok-Dong Kim [the FSC Chairman] raises the white flag to 'Yang-Ho Byun Syndrome'*".⁷³ The newspaper provides the following commentary on why the FSC Chairman failed to render a decision on Lone Star's eligibility despite the financial industry's strong desire for clarity on the issue:

The biggest pressure came from the National Assembly. The minority party members of the National Policy Committee warned, "if the Financial Services Commission allows Lone Star to get away with unreasonably high profits without any penalty, the National Assembly will hold a hearing to hold the FSC to account, and request an audit on the FSC to the Board of Audit and Inspection of Korea and file a complaint with the prosecution." The members of the majority party, who SD Kim expected to defend him from the offensive of the minority parties, just stood by, and some of them even sided with the minority parties. Chung Wa Dae consistently distanced itself from the issue, emphasizing its "non-intervention principle."

SD Kim's allies continued to decrease within the government. An increasing number of government officials began to express their concern, "this issue could be a 'gate' in the last phase of this administration. The FSC would completely lose its authority and power if it is concurrently attacked by the National Assembly, Board of Audit and Inspection of Korea, and the Prosecution." Working-level officials were reluctant to make a decision, saying, "the interpretations on the legal principles provided by outside law firms are totally in disagreement." The "Yang-Ho Byun Syndrome" has kicked up again...

109. In May 2011, Hana drafted a memorandum entitled "*Proposal to Lone Star*" to deal with the FSC's announcement of 12 May 2011. The memorandum records that "*negative public opinion was generated regarding the announcement*" and that "*new solutions must be discussed*". A "*step-by-step approach in response to the situation*" was proposed: "*Step 1: Extension of the [Original SPA]*"; "*Step 2: If the situation is not improved, acquisition of 10% of KEB Shares associated with the participation in management of KEB*"; "*Step 3: Potential transaction schemes for share transfer*".⁷⁴ There is no mention

⁷² E.g. Exhibit C-095, pp. 3-4, Kim & Chang, Legal Opinion regarding Approval of Application for Incorporation of a Company as a Subsidiary under the Financial Holding Company Act, 19 March 2011.

⁷³ Exhibit R-027, "Seok-Dong Kim Raises the White Flag to Yang-Ho Byun Syndrome," Korea Joongang Daily, 14 May 2011.

⁷⁴ Exhibit C-072, pp. 1-2, Hana Financial Group, Proposal to Lone Star, May 2011.

of any possibility of reducing the share price for the KEB Shares in this memorandum and the proposals can only be described as a *bona fide* attempt to deal with the fallout from the FSC's announcement. The idea behind the interim share purchase was that Hana Financial Group and Hana Bank would each purchase 5% of the KEB Shares, which would leave Lone Star with a 41% shareholding.⁷⁵ Such a transaction would not require regulatory approval because Hana was not purchasing more than 10% of KEB's shares. Hana's proposal was, therefore, to bypass the FSC. Lone Star had also requested a separate loan from Hana so that Lone Star could return some value to its investors while waiting for the FSC's approval to Hana's Application.⁷⁶

110. A further memorandum from Hana was drafted in May 2011 and is entitled "*Issues on KEB Acquisition after Suspension of Inclusion Approval*". The memorandum notes that, after the FSC's 12 May announcement, "*the stock price of [Hana] fell significantly*" and there was "*concern about how to handle the funds raised for acquisition*". Indeed Hana's share price fell more than 17% and Moody's announced that the decision to suspend approval would have a negative impact on Hana's credit rating.⁷⁷ It is further noted that "*media and opinion leaders were highly critical of the decision to suspend*".⁷⁸ Once again, the analysis in this memorandum reveals a *bona fide* attempt to deal with the fallout from the FSC's announcement on 12 May and there is no suggestion of a renegotiation of the transaction price in the Original SPA.
111. On 18 May 2011, the parties met in Tokyo⁷⁹ to determine how to proceed given that the lock-up period of the Original SPA was set to expire on 25 May 2011. That meeting was not recorded.
112. An internal memorandum of Hana dated 1 June 2011, which contained talking points to explain Hana's proposals to third parties, confirmed that the FSC had no legal grounds to change the terms of the SPA even if it issued a compulsory sale order:

According to legal advice and review opinions, based on the good faith obligations between contractual parties, even if a compulsory sale order

⁷⁵ R's Statement of Defence, §88; C's Reply, §55.

⁷⁶ R's Statement of Defence, §89; C's Reply, §56.

⁷⁷ Exhibit C-073, p. 1, Hana Financial Group, Issues on KEB Acquisition after Suspension of Inclusion Approval, May 2011.

⁷⁸ Exhibit C-073, p. 1, Hana Financial Group, Issues on KEB Acquisition after Suspension of Inclusion Approval, May 2011.

⁷⁹ RWS-001, First WS of Mr Hyeonkee Bae, §20.

is issued during the 6-month extension period, there are no legal grounds to change the current terms of the agreement.⁸⁰

113. Hana had taken that consistent position internally in other memoranda of March and April 2011.⁸¹

114. On 23 June 2011, Mr Byoungcho Kim wrote to Mr Short to convey the FSC's views on Hana's proposals regarding the interim share sale and loan to Lone Star:

As I explained to you, FSC views a combined package of 5% purchase and a share-backed loan as an effective transfer of KEB ownership (of course, neither of us agree with their groundless interpretation), therefore, FSC is against the idea of Hana's loan to Lone Star. If we choose to do only a sharebacked loan, FSC's argument would lose its ground and I cautiously predict we would be able to extend a loan to you. This may not give a powerful signal to regulators as we intended, it could be an inevitable choice we can make under the current circumstance.⁸²

115. It appears from the contemporaneous emails exchanged between Mr Byoungcho Kim and Mr Short, as well as internal emails among representatives of Lone Star,⁸³ that Hana was reporting that the Korean National Bank, the FSC and the Ministry of Finance were against Hana's proposal. Whilst the FSC had no power to block a share sale of less than 10%, the Bank of Korea would be able to use its leverage in deciding whether to approve a loan in US Dollars to Lone Star as a means of pressuring Hana to abandon the interim share sale.⁸⁴ Mr Byoungcho Kim expressed his frustration with the "Korean regulators" on 24 June 2011 in an email to Mr Short: "*After more than 6 months of intense interaction with Korean regulators, I wish I could have more patience in dealing with them. We continue to try, but failed to get an appropriate response until today.*"⁸⁵

116. On 27 June 2011, Mr Byoungcho Kim sent an email to Mr Short stating that the Ministry of Finance was not going to allow Hana to extend a loan in a foreign currency. He stated that:

⁸⁰ Exhibit C-074, Hana Financial Group, Regarding the Extension of Hana Financial Group's KEB Purchase Agreement, 1 June 2011.

⁸¹ Exhibit C-096, Hana Financial Group, Review of Approval of HFG's Inclusion into Subsidiary and Lone Star's Eligibility as Major Shareholder, 19 March 2011; and Exhibit C-097, Hana Financial Group, Issues with KEB Sale, April 2011.

⁸² Exhibit C-077, Email from Ellis Short to Michael Thomson, 23 June 2011.

⁸³ Exhibit C-075, Email from Ellis Short to Byoungcho Kim and Michael Thomson, 27 May 2011; C-076, Email from Ellis Short to Michael Thomson and John Grayken, 23 June 2011; Exhibit C-077, Email from Ellis Short to Michael Thomson, 23 June 2011; C-078, Email from Ellis Short to Michael Thomson, 24 June 2011.

⁸⁴ Exhibit C-076, Email from Ellis Short to Michael Thomson and John Grayken, 23 June 2011.

⁸⁵ Exhibit C-078, Email from Ellis Short to Michael Thomson, 24 June 2011.

*“It is now my assessment that the only feasible alternative is KRW loan-only deal (without 5% purchase). I understand you have shown your reservation on the loan-only deal as a condition for contract extension, but if you agree, let us contact BOK and other related regulators to push forward.”*⁸⁶ Shortly after this email was sent, Mr Byoungcho Kim and Mr Short had a discussion by telephone which Mr Short then reported to his colleagues at Lone Star:

Now, [the FSC] have “warned” Hana not to buy any shares, not even 5%. They believe that they might be criticized politically/by the labor union/public opinion if Hana takes a position that comes with some control, such as the board seat. They know they have no authority to stop this, so have made this warning verbally. Hana believes that they are very serious about this.

The Deputy Chairman of the FSS communicated this verbally to Mr. Yoon, who is working with Hana. Yoon used to be the CEO of IBK and also used to be an FSS committee member. Yoon was told by the Deputy Chairman of the FSS that if Hana will give them “assurance” that Hana will not pursue any share sale, they will allow the Korean Won loan. The assurance would have to be verbal, as they know they’re asking for something they’re not allowed to ask for.⁸⁷

117. This is a contemporaneous account of Hana reporting to Lone Star that the FSC was directly interfering with the KEB Transaction for political reasons long before, on the Claimant’s case, Hana is alleged to have misrepresented the FSC’s position to pursue negotiations with Lone Star for a price reduction. Hana had no possible incentive to misrepresent the FSC’s position; indeed it appears that the idea of acquiring an initial tranche of the KEB Shares came from Hana itself.
118. On 1 July 2011, Mr Short sent an email to his colleagues at Lone Star, Mr Thomson and Mr Grayken, reporting the contents of a call he had had with Mr Byoungcho Kim:

Byoungcho mentioned that immediately after the KEB dividend was approved, a mid management guy from the FSS called Mr. Bae (spelling?) at Hana’s holding company and asked him what change in Hana’s pricing of KEB would result from the dividend. Mr. Bae explained that we were still in negotiation so no definitive answer.

The FSS guy then said that Hana should negotiate a price that is 14,250 less, dollar for dollar, the dividend paid. Mr. Bae was taken a bit by surprise that the regulator would be discussing their pricing. Apparently, the regulators are afraid that they’ll be blamed for Lone Star taking this

⁸⁶ Exhibit C-079, Email from Ellis Short to Michael Thomson, 27 June 2011.

⁸⁷ Exhibit C-079, Email from Ellis Short to Michael Thomson, 27 June 2011.

dividend as a result of their delay, and are hoping that they can say that the dividend didn't result in Lone Star getting more money.⁸⁸

119. Once again, Mr Short's email records Hana's contemporaneous statements that the FSS was actively seeking to influence the price of the KEB Shares in the context of its regulatory relationship with Hana.
120. Hana's counsel, Bae, Kim & Lee, reinforced this message that the Korean regulator was concerned about the price for the KEB Shares due to political pressure. In their email of 5 July 2011, which was sent to representatives of Hana, Lone Star, Linklaters and Credit Suisse, Mr Steve Kim of Bae, Kim & Lee explained their proposed amendments to the SPA as follows:

The primary reason for the changes (and [Hana's] concern) is the recent negative political sentiment and media coverage related to Lone Star and the large 2nd quarter dividend amount declared by KEB. With an objective to close the deal as smoothly as possible going forward by mitigating such negative political and media pressure, and because HFG anticipates that the FSC will be looking to verify that the final purchase price takes into consideration the large 2nd Quarter KEB dividend, HFG would like to make very clear in the 2nd Amendment that a purchase price adjustment has been made.⁸⁹

121. On 8 July 2011, Lone Star and Hana executed an amended share purchase agreement for the KEB Shares with a new sales price of KRW 13,390 (which amounted to approximately USD 4.1 billion) and extended the lock-up period to 30 November 2011 (*July Amended SPA*).⁹⁰
122. On 11 August 2011, an internal document of Hana's Communication Committee recorded that there was a "*Controversy over excessive premium for management rights after the fall in KEB share prices*" and that "*A sound logic is necessary to respond to distorted perspectives of the KEB labor union and some media. e.g. controversy over excessive purchase price compared to the current share price/ whether contributing to Lone Star's 'eat and run'/ whether there was a breach of trust by undermining the shareholder value/ the appropriateness of providing loans with KEB shares as collateral amid the fall in share prices, etc.*"⁹¹ Hana thus recognized that a drop in share price could not justify reopening the July Amended SPA: at the time it prepared this memorandum the KEB share price had in fact fallen by approximately

⁸⁸ Exhibit C-070, Email from Ellis Short to Michael Thomson and John Grayken, 1 July 2011.

⁸⁹ Exhibit C-019, Email from Steve Kim to Keith Johnson, et. al., 5 July 2011.

⁹⁰ Exhibit C-003, Second Amendment to the Share Purchase Agreement Between Lone Star and Hana Financial Group, 8 July 2011.

⁹¹ Exhibit C-085, Hana Financial Group, Meeting of Communication Committee, 11 August 2011.

33%.⁹² Another memorandum in August 2011 noted that Hana's position in relation to this controversy was as follows:

Rises and falls of share price in the short term would not influence the intrinsic value of a company. Upon extension of the agreement, the purchase price was calculated based on the book value of KEB.⁹³

123. On 8 September 2011, the Seoul High Court declared that the evidentiary hearing in the KEB Card Case was closed. According to Mr Hyeonkee Bae, “[i]t became clear that the Seoul High Court would issue a guilty verdict soon”.⁹⁴
124. On 28 September 2011, Chairman Kim of Hana made a statement to reporters at the Westin Chosun Hotel in Seoul for the 2nd anniversary celebration of the Korea Capital Market Institute that appeared to suggest that the price of the KEB Shares could be subject to renegotiation if the market value changed.⁹⁵ In the ICSID proceedings, Chairman Kim testified that he “leaked... information out” about Hana’s desire to reduce the price.⁹⁶ In the ICC proceedings, he testified that there was no intentional leak⁹⁷ and in fact he may have used the term “leak” mistakenly given the connotation of an intentional act in the English language.⁹⁸ Instead he explained that he mentioned a possible price reduction to reporters in an answer to repeated questions in a highly pressured situation:

22 At the time, hundreds of people gathered around
23 the offices--my office, and FSC office, they were always
24 standing in front of the building with pickets, and there
25 were times where I would not be able to actually go out of
1 the entrance of the building.
2 And the reporters, whenever there were issues,
3 they came to me asking questions; and, in order to mollify,
4 you know, their concern, I have responded by saying that
5 even the price could adjusted. There could be that
6 possibility. But, in our mind, basically we wanted the
7 whole process to go as smoothly as possible and ASAP as
8 possible.⁹⁹

⁹² Exhibit C-058, Compilation of KEB Share Prices 2010-2012.

⁹³ Exhibit C-107, Hana Financial Group, Table of HFG's Responses to Key Issues. August 2011.

⁹⁴ RWS-001, First WS of Mr Hyeonkee Bae, §31.

⁹⁵ Exhibit C-056, “Seung-Yu Kim, Purchase Price for KEB Is Subject to Change,” Korea Economic Daily, 28 September 2011.

⁹⁶ Exhibit R-090, ICSID Transcript D6/P1664-5 (Kim).

⁹⁷ ICC Transcript D3/P505-6 (Chairman Kim).

⁹⁸ ICC Transcript D3/P511 (Chairman Kim).

⁹⁹ ICC Transcript D3/P514-5 (Chairman Kim).

125. Lone Star considers that this “leak” was a turning point in Hana’s approach to the KEB Transaction in the sense that, from this point of time onwards, Hana was seeking to reduce the price of the KEB Shares for commercial reasons.¹⁰⁰ The Tribunal does not accept this interpretation of events. There is nothing on the record leading up to Chairman Kim’s “leak” to the press, and that record includes copious internal memoranda on the KEB Transaction drafted by Hana, that suggests that Hana’s strategy was changing in order to exploit the FSC’s delay in approving Hana’s Application for commercial reasons. The Tribunal considers that Chairman Kim’s testimony in the ICC proceedings as to the circumstances in which he gave an indication to a reporter that the price could be revised is likely to reflect the reality at the time. Moreover, as Hana’s internal documents demonstrate, it was itself under massive pressure to close the KEB Transaction and would not have reasonably taken the risk of alienating Lone Star by seeking to negotiate a price reduction if it were not directed to do so by the FSC. The Tribunal will return to this issue later in this part of the Final Award.

126. The Claimant has relied upon another press article in September 2011 to buttress its theory that Chairman Kim deliberately floated the idea about a price reduction beginning in September 2011. It is entitled “*Hana Financial Group Gears-up Acquisition Work Under-the-Table*” published by the Korea Herald Business and reads, in relevant part:¹⁰¹

[...]

However, even if financial authorities grant final approval, there is no guarantee that this will be granted before the end of November, which is the deadline of negotiations between Hana and Lone Star. Therefore, Hana is preparing for the possibility of renegotiations. Hana Chairman Seung-Yu Kim recently stated, “The agreement (with Lone Star) will be extended if necessary.”

It has also been reported that Hana is preparing for additional negotiations on the share price with Lone Star in the event that a sale order is issued against Lone Star.

127. The only statement attributed to Chairman Kim in this article is supportive of the existing July Amended SPA: “[*it*] will be extended if necessary”. The statement about a possible negotiation of a price is not attributed to anyone at Hana but rather that information has

¹⁰⁰ C’s Statement of Claim, §134.

¹⁰¹ Exhibit C-055, “Hana Financial Group Gears-up Acquisition Work Under-the- Table,” Korea Herald Business, 7 September 2011.

“*been reported*”. This does not support the Claimant’s theory of a deliberate campaign to reduce the price of the KEB Shares.

D3 The Seoul High Court’s decision in the KEB Card Case

128. On 6 October 2011, the Seoul High Court rendered its judgment in the KEB Card Case and found both Mr Paul Yoo and Lone Star guilty.¹⁰² Mr Yoo was sentenced to three years imprisonment and Lone Star was ordered to pay a fine of KRW 25 billion.¹⁰³ On 12 October 2011, Lone Star communicated its decision not to appeal the judgment.¹⁰⁴ The conviction thus became final against Lone Star on 12 October 2011.¹⁰⁵
129. Following the guilty verdict of the Seoul High Court, Hana once again produced a series of internal memoranda in response to this new development and potential obstacle for the closing of its transaction with Lone Star. In an undated document entitled “*Review of LS Proposal*”, two “*response plans*” are articulated. The first plan was to persuade Lone Star not to appeal the High Court’s decision to the Supreme Court because “[i]f Lone Star files an appeal, concern that FSC measures will be delayed, and adverse impact on the market is expected”. The second plan is “*price renegotiation*” and it is noted: “*Mention price reduction for the reason that it would be difficult to obtain approval from the authorities without changing the terms*”.¹⁰⁶ In another memorandum, which also appears to have been drafted prior to Lone Star’s decision not to appeal the High Court’s decision, Hana identifies the risk of delay that would entail if the FSC decides to issue a compliance order following the High Court’s decision. It lists two “*response plans*”. The first is to “*actively persuade that there is no need to issue a compliance order*”. It is then recorded: “*Although the FSC appears to have a firm stance, persuade as much as possible through law firms and public opinion.*” The second plan is to: “*Observe all the procedures of the compliance order/disposal order, but shorten the schedule as much as possible*”.¹⁰⁷
130. A further memorandum entitled “*Key Issues*” appears to have been drafted after Lone Star elected not to appeal the High Court’s decision. Hana sets out the likely steps that the FSC would take given these events. Then under the heading “*Likelihood of price adjustment*” it is recorded:

¹⁰² Exhibit CLA-005, Seoul High Court Judgment, Case No. 2011No806, 6 October 2011.

¹⁰³ Exhibit CLA-005, Seoul High Court Judgment, Case No. 2011No806, 6 October 2011.

¹⁰⁴ Exhibit C-031, Letter from John Grayken to FSC Chairman Seok Dong Kim, 12 October 2011.

¹⁰⁵ Parties’ Joint Chronology.

¹⁰⁶ Exhibit R-091, Review of LS Proposal, October 2011.

¹⁰⁷ Exhibit C-120, Hana Financial Group, Review of Procedures following High Court's Judgment, October 2011.

- The share purchase agreement was entered into in November 2010 at KRW 14,250 per share based on a comprehensive analysis of KEB's intrinsic value, market value, profitmaking capacity, synergy effects after acquisition, premium for management rights, etc.

[...]

- Objectively compared with the past M&A cases of KEB, HFG's acquisition price is lower in both relative and absolute terms.
- Currently, the low price of KEB's shares is due to the drop in the share price caused by the announcement of acquisition and the general downward effect on the market caused by factors such as the credit rating downgrade of the US, etc.
- With regard to price adjustment, we are closely monitoring the current economic conditions and stock market and if it is determined that the fall in the stock price is not temporary but a long-term trend, we may discuss with Lone Star if necessary.
- However, since the parties have contradicting positions and perceptions regarding price, it is not certain yet as to whether the price can be lowered. If the price can be lowered, it can help with the approval of the supervisory authority.¹⁰⁸

131. On 11 October 2011, an article by Reuters was published entitled "*Hana says no decision yet on renegotiating KEB deal*". It was reported that: "*Market talk has swirled that Hana may seek to cut the purchase price as KEB shares have tumbled sharply since the transaction was agreed on due to the global financial market turmoil.*" It was then reported: "*Hana chairman Kim Seung-yu told Reuters on the sidelines of a local forum that it was open to renegotiating the deal should Lone Star not appeal against the court ruling.*"¹⁰⁹ Lone Star complained to Hana about Chairman Kim's statement to Reuters. Mr Byoung-ho Kim replied that Hana was "embarrassed" about the article and it was an "exaggeration" of what Chairman Kim had actually said.¹¹⁰ A complaint was then made by Hana to Reuters which resulted in a partial retraction: "*We haven't decided yet (on renegotiation) and we are waiting to see whether (Lone Star) files an appeal or not.*"¹¹¹

¹⁰⁸ Exhibit C-090, Hana Financial Group, Key Issues on Acquisition of KEB, October 2011.

¹⁰⁹ Exhibit C-111, Email from Ellis Short to Michael Thomson and John Grayken, 12 October 2011 (the article is copied into the email).

¹¹⁰ Exhibit C-111, Email from Ellis Short to Michael Thomson and John Grayken, 12 October 2011.

¹¹¹ Exhibit R-057, Emails between Mike Thomson, Ellis Short and John Grayken dated 12 October 2011. See also: Exhibits C-109, "Hana Says May Renegotiate KEB Deal if no Lone Star Appeal," Reuters, 11 October 2011; and Exhibit C-110, "Hana Chairman: Willing to Renegotiate \$4.1 bln KEB Deal," Reuters, 10 October 2011.

132. Also, on 12 October 2011, Larry Klane, the CEO of KEB appointed by Lone Star's representatives on the board, sent an email with the following assessment:

I am thinking that the FSC will only approve the HFG transaction once they issue a forced sales order and will not do so beforehand... The FSC seems likely to find some reason to delay action on the transaction until after the contract expires to force (completely inappropriately) some price negotiation. Their delay could be either through a long corrective action period or something else—such as “legal review” of what conditions should or should not be attached to the forced sale order.

What I was trying to say was with the assumption that they will not approve any transaction until a forced sale order is given, a lengthy corrective action period would mean Lone Star is simply likely to hold the shares in January.¹¹²

133. Mr Thomson replied: “*I understand what you are saying, and agree with you.*”¹¹³ Mr Krane's assessment of the FSC's future actions, in the Tribunal's estimation, proved to be entirely accurate. And Mr Thomson, of Lone Star, agreed with it at the time.
134. On 13 October 2011, Mr Grayken in an email to Senator Phil Gramm gave an assessment of the likelihood of a price renegotiation: “*Hana's stock was way up, as was ours [after it was reported that Lone Star would not be appealing the High Court's conviction] That is good. To renegotiate the price, they have to terminate the contract after November first. That would give us options (not necessarily good ones), creating uncertainty as to whether or not they could successfully renegotiate with us. The market would not like that and it would be a big risk for them to take.*”¹¹⁴ Senator Gramm, according to Mr Grayken's testimony, is “*a very well respected and very senior US politician*” whose wife is Korean and who had a “*number of relationships with senior individuals in business and in politics*” in Korea.¹¹⁵ He was an independent advisor to Lone Star throughout this period.
135. Mr Grayken gave the following testimony in cross-examination in relation to his assessment:

9 Q. But the fact that you had those other potential
10 options would create uncertainty as to whether Hana would
11 be able to succeed in renegotiating its deal with you; right?
12 A. Correct.
13 Q. And the market would not like that uncertainty,
14 meaning that Hana's share price would come under pressure;
15 right?

¹¹² Exhibit R-061, Emails between Mike Thomson, Ellis Short and Larry Klane dated 12 - 13 October 2011.

¹¹³ Exhibit R-061. Mr Thomson confirmed his agreement with Mr Klane's assessment in cross-examination: ICC Transcript D2/P372-4 (Thomson).

¹¹⁴ Exhibit R-058, Emails between John Grayken and Phil Gramm dated 13 October 2011.

¹¹⁵ ICC Transcript, D2/P248 (Grayken).

16 A. Right.

17 Q. And that would be risky for Hana and would
18 undermine their leverage to seek a lower price; correct?

19 A. Correct.

[...]

25 Q. If Hana approached you about a price reduction,
1 you had the option of holding firm, refusing to
2 renegotiate, and forcing Hana to decide whether to take
3 this risk of terminating the Contract; correct?

4 A. Yeah, but there--our decision would have been simple,
5 which we wouldn't have renegotiated the price with contract,
6 with Hana. There was no reason to. We know they wanted to
7 close the deal. We know that there were significant costs to
8 them if they didn't close the deal.

9 The only reason that we would negotiate the price of
10 the Contract prior to the expiration of the lock-up period was
11 if they could assure us--they could--that the FSC Chairman
12 would tell them that you get approval. It was the only reason.¹¹⁶

136. Mr Grayken's evidence shows that the only reason that Lone Star would renegotiate the price of the KEB Shares was because it was necessary for the FSC's approval of Hana's Application. Mr Grayken had no doubt that Hana wanted to close the deal.

137. On 17 October 2011, a press article from *MK News* appeared with the following commentary:

If a compulsory sale order is issued to Lone Star, then the most likely scenario is that all of the private equity firm's shares in KEB will be sold to Hana Financial Group (HFG), which had already entered into the agreement to acquire the bank. Still, however, there is one hurdle to the KEB sale: the sale price.

The existing unit price set to be paid by HFG to acquire KEB has been considerably criticized for being too high—which is why, to acquire KEB, HFG needs to go through the last difficult stage of renegotiating the unit acquisition price with Lone Star.¹¹⁷

138. The Korean press thus took the view that the FSC would not approve Hana's Application unless there were to be a price reduction.

139. The FSC issued a press release on 17 October 2011 outlining the future schedule for dealing with Lone Star. The actual press release is not on the record of this arbitration but its

¹¹⁶ ICC Transcript D2/P253-4 (Grayken).

¹¹⁷ Exhibit R-094, "KEB Sale Gains Momentum," Korea Economic Daily, 17 October 2011.

contents were summarised in an email from Mr Krane to Mr Short and Mr Thomson.¹¹⁸ Mr Krane provided the following commentary on the FSC's announced schedule:

Whilst the issuance of the preliminary order today in advance of the October 19th FSC meeting gives the appearance of moving forward expeditiously, the overall process has enough steps and open-ended timing to stretch well beyond the end of November and current expiration of the HFG [Hana] deal. The challenge of their approving a deal by end-November is exacerbated by the limited calendar of regularly scheduled upcoming FSC meetings before the end of November—the only two are on 2nd and 16th. The next regular meeting after November 16th is December 7th. Because of today's action and the next step being after October 25th, I understand that there is nothing further about Lone Star or HFG on the agenda at the upcoming FSC meeting on October 19th.¹¹⁹

140. Mr Thomson testified that he had no reason to doubt Mr Krane's assessment of the FSC's timing.¹²⁰
141. On 18 October 2011, Mr Thomson wrote to the FSC in response to the FSC's letter of 17 October 2011, by which Lone Star was given a Preliminary Compliance Order. In that letter, Lone Star waived any cure period to comply with the Preliminary Compliance Order because of the objective impossibility of Lone Star being able to comply.¹²¹ It could not undo the criminal conviction.
142. On 21 October 2011, the press coverage relating to the KEB transaction was circulated internally to Lone Star's representatives. It included an article published by *Bloomberg* entitled "*Hana Financial to Renegotiate KEB Price with Lone Star, Kim Says*". Chairman Kim of Hana is quoted as saying: "*We expect it'll be easier for us to negotiate the KEB price after the regulator orders Lone Star to sell the Korea Exchange Bank stake, Kim said.*"¹²²

D4 The FSC issues a Compliance Order

143. On 25 October 2011, the FSC issued its Compliance Order to Satisfy the Qualifications to Hold Shares in Excess of the Prescribed Limits against the KEB Shareholder Holding Shares in Excess of the Prescribed Limits against Lone Star.¹²³ Once again, Lone Star wrote to the

¹¹⁸ Exhibit R-062, Emails between Stever Shearer and Ellis Short dated 17 October 2011.

¹¹⁹ Exhibit R-062, Emails between Stever Shearer and Ellis Short dated 17 October 2011.

¹²⁰ ICC Transcript D2/P364 (Thomson) (as amended).

¹²¹ Exhibit C-114, Letter from LSF-KEB to FSC, 18 October 2011.

¹²² Exhibit R-064, Email from Mike Thomson to Ellis Short dated 21 October 2011 (and attachment).

¹²³ Exhibit C-032, Compliance Order to Satisfy Major Shareholder Qualifications, Financial Services Commission, 25 October 2011.

FSC, on the same day, to waive any cure period as compliance with the Compliance Order would be impossible. The letter concluded:

We also again emphasize that the FSC has expressed no basis for continuing to delay its review of Hana Financial Group's application filed on December 13, 2010 for the FSC's approval on acquisition of KEB as a subsidiary pursuant to the Financial Holding Companies Act, and thus we respectfully urge the FSC to promptly process that application.¹²⁴

144. No response was received to this or other letters sent by Lone Star.¹²⁵
145. On 28 October 2011, Mr Short reported a conversation that he had had with Mr Byoungcho Kim to Mr Thomson and Mr Grayken. According to Mr Short, Mr Byoungcho Kim had explained the following:

The FSC has asked Hana to approach us to renegotiate the price of our contract downward. The FSC realize they should approve the deal, but dont want to be criticized for allowing Lone Star to make too much profit.

I told him that the FSA should request this directly to us rather than going through Hana. He said that the FSA could not propose this to us since the request is improper because it is not within their scope to set the price. He said that is why they are doing it through Hana verbally rather than in writing.

He said that chairman kim was told this directly by the FSA.¹²⁶

146. Mr Short was asked about his calls with Mr Byoungcho Kim in cross-examination in the ICSID proceedings. He testified that Mr Byoungcho Kim talked about the political pressure on the FSC many times in late October and early November 2011.¹²⁷ Mr Short's report of his call with Mr Byoungcho Kim is consistent with the other contemporaneous evidence to the effect that the FSC was insisting on a price reduction through Hana. Mr Byoungcho Kim did not give evidence in the ICC proceedings.
147. Later, on 28 October 2011, Chairman Kim of Hana wrote to Mr Grayken. As the parties have debated the significance of this letter at some length in their pleadings, quotation of its full text is warranted:

Dear Mr. Grayken,

¹²⁴ Exhibit C-131, Letter from LSF-KEB to FSC, 25 October 2011.

¹²⁵ ICC Transcript D2/P368-9 (Thomson).

¹²⁶ Exhibit C-009, Email from Ellis Short to John Grayken and Michael Thomson, 28 October 2011.

¹²⁷ Exhibit C-123, ICSID Transcript D3/P942-3 (Short).

It's been a year since we first signed the SPA and I hope we could close the transaction soon with amicable relationship. As we expect FSC's sale order notification to be made in next week, I am writing to you to share my view on the current situation and necessary actions for a coordinated closing of our transaction.

It is regrettable that the Seoul High Court's final verdict was not in favor of you, and FSC has subsequently given you a fulfilling order with a short remedy period. However, I believe this is a gesture by FSC that they would like to resolve the situation as soon as possible, if they could find a way without being blamed.

After the court verdict, there are increasing voices that a punitive measures should be applied to Lone Star. It is not only KEB labor union, but NGOs/civil activists and politicians who argue for a punitive forced sale by Lone Star. Some politicians have claimed that the existing contract should be nullified and National Assembly should pass a new law for punitive sale measures. They claimed that Lone Star was in-eligible in its original purchase of KEB and reaps excessive premium from the current market price.

Moreover, Mr. Sohn, a head of the opposition party, publicly declared at the KEB labor union rally last Sunday that the current contract between Hana and Lone Star should be invalidated and his party would strongly urge the government to make a punitive sale order. Considering political situations in Korea (i.e., recent loss of Seoul Mayor position by the ruling party, National Assembly election in April next year, Presidential election in December next year, etc), I believe that we would face increasing stronger political resistance, unless we strive to expedite the closing of our transaction.

Despite an increasing demand for a punitive sale order, Hana has persuaded FSC that such an order would not be applicable in this situation. But, even if a normal sale order is made by FSC, we are required to submit a new contract, as the existing contract was not entered in accordance with the sale order. In submitting a new contract, we should find a way to alleviate political pressure on FSC in approving the transaction, especially by reflecting market valuation and turbulent financial industry. Otherwise, FSC can not be expected to proceed to an approval with the existing contract.

I believe it would be mutually beneficial if we could close the transaction at the earliest possible time by doing so. I appreciate your cooperation to date and hope that we both do our best to complete the last part of our transaction.

Yours sincerely,

Seung-Yu Kim

Chairman & CEO

Hana Financial Group¹²⁸

148. Chairman Kim testified in the ICSID proceedings that the FSC had not actually requested a new “*contract*” as stated in the underlined passage of his letter:

11 Q. And then in the last sentence you say:
12 "Otherwise, FSC cannot be expected to proceed to an
13 approval with the existing contract." Right?
14 A. That's how it is written. And, as I
15 mentioned earlier, this was part of our tactic to
16 begin price negotiation.
17 Q. So, it's not a true statement that the FSC
18 cannot be expected to proceed to an approval with the
19 existing contract; is that right?
20 A. That's right.¹²⁹

149. In the ICC proceedings, Chairman Kim stated that the FSC had informed Hana several weeks before the FSC's announcement on 18 November 2011 that a new application would be expected from Hana and that Hana had informed Lone Star of this fact.¹³⁰ He also testified that his understanding of a new “*application*” extended to a new contract with a new price.¹³¹ The Tribunal considers that, given the surrounding circumstances, the FSC's request for a new “*application*” was for the purpose of having a justification for stalling its decision on Hana's existing application so that a price reduction for the KEB Shares could be procured. This was certainly the view of Mr Krane at the time, and Mr Grayken had the same understanding even today. When asked in cross-examination why Lone Star had not verified with its own lawyers whether a new contract had to be submitted as was represented by Chairman Kim of Hana in this email, Mr Grayken's response was as follows:

10 A. What good would that have done? Our lawyers had
11 been advising us that [the FSC] had been operating illegally for
12 years.
13 Q. Okay. So, you already--you already had a very
14 clear view of what was going on at the time with the FSC;
15 correct?
16 A. It was very simple, all right? They had--after
17 we decided not to appeal, their pretense that the legal
18 issues were holding them up were over. They could have
19 very easily then approved the Contract with Hana, and we
20 would have been--our deal would have been done, and we

¹²⁸ Exhibit C-006 (emphasis added by the Tribunal), Email from Hana's Chairman to John Grayken, 28 October 2011.

¹²⁹ Exhibit R-090, ICSID Transcript D6/P1677 (Chairman Kim).

¹³⁰ ICC Transcript D3/P545 (Chairman Kim).

¹³¹ ICC Transcript D3/P546 (Chairman Kim).

21 would have complied with their Sale Order. They used this
22 new contract as an excuse to delay. That seems obvious to
23 me.

24 Q. And the "they" you're talking about there is the
25 FSC; correct? The FSC used this new Contract as an excuse?

1 A. That's correct.¹³²

150. Mr Grayken was also asked about whether Chairman Kim was drawing an explicit link between the FSC's approval and a price reduction in this email:

8 Q. Now, would you agree with me that Hana Chairman
9 Kim does not say in this e-mail that the FSC had told Hana
10 that the FSC would approve Hana's Application only if Hana
11 convinced Lone Star to accept a price reduction?

12 A. He doesn't say that here, but I know that's what
13 happened.

14 He's going to try to protect the FSC because the
15 FSC knows that, if they're explicit about that, that
16 they're going to get sued by us, but I know that they're
17 telling him directly what has to be done for them to take
18 action.

19 Q. You know that?

20 A. I know it.

21 Q. Based on your long experience of seeing how the
22 FSC was handling these applications over the years;
23 correct? It was obvious to you?

24 A. Yeah, it's obvious to me. Plus, again, the
25 pretense that they had been using for so long has now
1 disappeared. It's gone. So, now they can approve, and
2 there is a contract. They can stamp it "approved" and it's
3 over with, but they refuse.

4 Q. And at the time, you believed the reason they
5 were delaying or refusing approval was because the FSC was
6 worried about the political reaction; right?

7 A. That's correct.

8 Q. So, Hana Chairman Kim's e-mail expresses the idea
9 that a price reduction would alleviate that political
10 pressure that the FSC was feeling; right?

11 A. Right.

12 Q. And at the time the public was focused on the
13 level of profit that Lone Star stood to gain on this deal;
14 right?

15 A. One of the things that they were focused on, yes.

16 Q. So, the theory behind Hana Chairman Kim's idea
17 that reducing the price would take some of the heat off of
18 the FSC is that it would give the FSC political cover to
19 approve the Transaction; right?

20 A. Yes. I believe that's what the FSC was telling
21 him, that's correct.

¹³² ICC Transcript D2/P262-3 (Grayken).

22 Q. And that made sense to you at the time; right?
23 It was consistent with how you believed the regulators had
24 operated in Korea, based on your own experience in losing
25 the HSBC deal; right?
1 A. That's right.¹³³

151. On 29 October and 1 November 2011, Mr Short reported further conversations that he had had with Mr Byoungcho Kim to Mr Thomson and Mr Grayken:

Guys, I had another talk with Byoungcho Kim of Hana Bank this morning. He didn't have any different information than yesterday. He reiterated that the FSA was pushing them to reduce the price. He said that Hana was happy that it was a good price and is anxious to close the deal as it is, and their request for a reduction is only because of the FSA demands. I'll let you know if I hear anything else.¹³⁴

[...]

Guys, Byoungcho Kim from Hana Bank called me last night. He repeated what he said last time: that the FSC was pressuring them to renegotiate a lower price to "give them an excuse" to approve the deal. I, of course, told him that the sale order should be excuse enough. Nothing different from last time.¹³⁵

152. On 31 October 2011, the FSC issued a "*preliminary notice of contemplated measure*" that it was planning on issuing a compulsory sale order against Lone Star to dispose of its KEB Shares.¹³⁶ On 1 November 2011, Lone Star replied that Lone Star was already obligated to sell its KEB Shares to Hana under the July Amended SPA, pending only the FSC's approval of Hana's Application, and hence any such order would be a formality. Further it stated: "*We reiterate that there is no legitimate basis for the FSC continuing to delay ruling on HFG's Application.*"¹³⁷
153. Chairman Kim of Hana met with the FSC Chairman on 2 November 2011. Chairman Kim's account of that meeting was as follows:

During that meeting, the FSC Chairman maintained, as he had before, that it was for the FSC Commission to make a decision on Hana's Application and that he was not in a position to confirm whether the FSC would approve the transaction before 30 November 2011. This response

¹³³ ICC Transcript D2/P264-5 (Grayken).

¹³⁴ Exhibit C-010, Email from Ellis Short to John Grayken and Michael Thomson, 29 October 2011.

¹³⁵ Exhibit C-011, Email from Ellis Short to John Grayken and Michael Thomson, 1 November 2011.

¹³⁶ Exhibit C-033, Preliminary Notice of Contemplated Measure, Financial Services Commission, 31 October 2011.

¹³⁷ Exhibit C-115, Letter from LSF-KEB to FSC, 1 November 2011.

from the FSC Chairman did not give me any reason to change my view that approval before 30 November 2011 was highly unlikely at that point.¹³⁸

154. Likewise, in cross-examination in the ICSID proceedings, Chairman Kim testified that all that the FSC Chairman could promise during the meeting on 2 November 2011 was that Hana's Application would be decided in due course in accordance with the laws and regulations.¹³⁹ The Tribunal considers that it is very unlikely that this was the extent of their conversation given the intense political controversy surrounding the KEB Transaction that was being reported on by the Korean press throughout this period and the enormous pressure that both the FSC and Hana were under to resolve the situation: Hana's internal memoranda earlier in the year identified a precipitous fall in its share price and systemic consequences for the Korean banking system in the event that the KEB Transaction were to founder.
155. On 3 November 2011, Mr Thomson relayed the information that he was obtaining from senior and independent advisors in Korea in relation to the situation concerning the KEB Transaction, including former US Ambassador HC Hyun (now a senior partner at Kim & Chang—Lone Star's counsel in Korea)¹⁴⁰ and Mr Sukhan, a partner at the American law firm Akin Gump with contacts in Korea. According to Mr Thomson, the discussions that he had with these advisors "*fundamentally corroborat[es] what we've believed to be the case*":

[B]asically, SD (FSC) Kim wants to move forward with the sale to HFG, but feels he can't do so without some price reduction to take the heat off them. And interestingly, SY (HFG) Kim is lobbying SD (FSC) Kim to order the sale on a shortened basis, so as to strengthen HFG's hand in the anticipated upcoming price renegotiation. It seems we are making them both nervous by our refusal to discuss a price reduction. Finally, the advisers all are of the view that this deal needs to get approved this year; as we go into a major election year, the odds increase significantly of them being even less willing to do anything controversial, so the risks go up of them simply sitting on this if we don't get the deal done this year.¹⁴¹

156. In relation to this email, Mr Thomson testified in cross-examination:

19 Q. Okay. Now, you state in your e-mail that Lone

¹³⁸ RWS-002, First WS of Chairman Kim of Hana, §37.

¹³⁹ ICSID Transcript D7/P1712-3 (Kim).

¹⁴⁰ Mr Thomson testified in cross-examination that he met with Ambassador Hyun on several occasions during this period: ICC Transcript D2/P375 (Thomson) (as amended).

¹⁴¹ Exhibit R-067, Email Chain between Phil Gram and Lone Star Executives dated 3 November to 4 November 2011.

20 Star's belief at this time was that the FSC Chairman wants
21 to move forward but feels he can't do so without some price
22 reduction to take the heat off of the FSC; right?
23 A. That's right.
24 Q. And your discussions with these various advisors
25 fundamentally corroborated that belief; correct?
1 A. Right.¹⁴²

157. Mr Thomson also testified in the ICSID proceedings in relation to the same email that his various independent “sources” and “channels” were corroborating that “*the Chairman of the FSC and the FSC wanted to approve this, wanted to move it forward, but politically it needed to be done showing that we were punished, we suffered in some way. A price reduction of some manner was necessary to give them what they needed to advance--to go forward with the approval*”.¹⁴³
158. Mr Grayken also testified in cross-examination that Lone Star’s advisors had corroborated Lone Star’s belief that the FSC Chairman wanted to move forward with the approval of the sale but felt that he could not do so without a price reduction to alleviate the political pressure that he was under.¹⁴⁴
159. On 8 or 9 November 2011, Mr Hyeonkee Bae received a call from Mr Joo Hyung Sohn (then Team Leader for the Financial Services Team of the FSC) asking for a written status update on the KEB Transaction and, in particular, “*whether Hana intended to continue with the SPA after expiration of the lock-up date on 30 November 2011*”.¹⁴⁵ According to Mr Bae’s testimony in the ICSID proceedings, his response was that Hana would provide an answer after the 11 November 2011 meeting with Lone Star, when Hana planned to raise the issue of reducing the price of the KEB Shares.¹⁴⁶ The Tribunal finds that it is highly probable that, in asking to defer Hana’s answer to the FSC’s question, Hana was keeping the FSC informed of its efforts to obtain a price reduction for the KEB Shares. The alternative explanation, that Mr Bae simply asked for a deferral but did not give any reasons to justify it, does not seem credible. Moreover, Mr Bae testified that Hana had not given any thought to the possibility that the FSC might approve Hana’s Application at any point in time and thus deprive Hana of the opportunity to seek a reduction of the price.¹⁴⁷ The obvious reason that Hana did not give this possibility any thought was that Hana was acting in coordination with the FSC

¹⁴² ICC Transcript D2/P387-8 (Thomson).

¹⁴³ Exhibit C-122, ICSID Transcript, D2/P469, P489 (Thomson). See also: ICSID Transcript, D2/P464, D2/P488 (Thomson).

¹⁴⁴ ICC Transcript D2/P267-8 (Grayken).

¹⁴⁵ RWS-001, First WS of Mr Hyeonkee Bae, §44. See also: ICSID Transcript D7/P1789 (Bae).

¹⁴⁶ ICSID Transcript D7/P1791-2 (Bae).

¹⁴⁷ ICSID Transcript D7/P1793-4 (Bae).

throughout this period and that Hana was the conduit for the FSC's insistence that the price be reduced before it could give its approval.

160. On 10 November 2011, *Yonhap News* published an article entitled "*Regulator Mulls Next Step on Lone Star's KEB Stakes Sale*". The article gives a flavor of the political situation surrounding the KEB Transaction at that time:

SEOUL, Nov. 10 (Yonhap) -- South Korea's financial regulator is carefully mulling what steps it should take to move forward on the sale of Lone Star Funds' controlling stake in Korea Exchange Bank (KEB) amid growing public demand for punitive measures against the U.S. firm's exit from the country, watchers said Thursday.

[...]

However, after issuing a prior notice to Lone Star ahead of the actual sale order on Oct. 31, the FSC has stayed mum on the issue, fueling speculation that it is facing a dilemma.

Politicians and activists have been mustering support for a punitive measure, arguing that the regulator should first re-evaluate whether Lone Star is a financial or non-financial investor based on the size of the buyout firm's non-financial assets.

They said that under local banking law, Lone Star should be classified as a non-financial investor, which would nullify the buyout firm's agreement with Hana Financial and strip it of its shares that exceed a 4 percent stake.

On Tuesday, KEB's unionized workers filed an injunction with the country's constitutional court, asking the top court to stop the FSC from ordering Lone Star's stake sale before its status is clarified.

"The FSC should first rule whether Lone Star is a financial or non-financial investor. If they go ahead with the sale order without such a process, it would be going against fairness to give special benefits to the firm," said a KEB labor union official.

In what is deemed as a populist move ahead of next year's elections, politicians from both the ruling and opposition parties have also been drumming up support for punitive actions.

"It is not too late to issue a sale order after verifying whether Lone Star is a non-financial investor. (The gain of) a management premium should be prevented at the least," Grand National Party chief Hong Joon-pyo said in a Twitter message, echoing Democratic Party leader Sohn Hak-kyu's earlier call for punitive action.

A punitive measure would include attaching conditions to Lone Star's stake sale, such as ordering a bourse sale, a move which would block the U.S. buyout fund from pocketing gains from its deal with Hana Financial.

Under Lone Star's pending deal with Hana Financial which was signed in November 2010, the U.S. buyout fund is expected to pocket more than twice the money it spent on purchasing KEB stocks.¹⁴⁸

161. On 10 November 2011, Lone Star's counsel, Kim & Chang, informed Mr Thomson that Chairman Kim of Hana had sent a letter to Mr Grayken with a proposal of a price reduction "to persuade the regulators and various interested parties". The lawyer at Kim & Chang, DY Kim, stated: "We do not believe Chairman Kim has an acceptance of this new price from the FSC, but thought the approval should be available if Lone Star agrees on the proposed reduction."¹⁴⁹
162. Mr Thomson acknowledged in cross-examination that Kim & Chang had regular contact with the FSC on Lone Star's behalf during this period:

10 Q. I see. So, just to help us to understand the
11 context at the time, so Kim & Chang had other lawyers or
12 consultants who had the contacts and the ability to have
13 discussions with the regulators; whatever information they
14 were gleaning, they would feed to DY Kim, and because he
15 was your contact, he would then relay some impression of
16 that to you. Is that--

17 A. That's a fair description, yeah.

18 Q. Did DY Kim ever describe in more detail who at
19 the regulators they were speaking with?

20 A. No, and rarely would they, and I don't remember
21 any specifics around this.

22 Q. But as far as you can recall, the information
23 that was being relayed to you from Kim & Chang was
24 consistent with the information you were receiving from
25 Hana at the time?

1 A. Yes.¹⁵⁰

163. On 11 November 2011, Mr Byoungho Kim travelled to London to meet with Lone Star's representatives. There were two meetings. At the first meeting, Mr Byoungho Kim was joined by Mr Grayken and Mr Short. At that meeting, Mr Byoungho Kim handed a letter from Chairman Kim of Hana that was addressed to Mr Grayken and dated 10 November 2011. The letter read as follows:

Dear Mr. Grayken,

¹⁴⁸ Exhibit C-036, "Regulator Mulls Next Step on Lone Star's KEB Stakes Sale," Yonhap News, 10 November 2011.

¹⁴⁹ Exhibit R-098, Email from Do-Young Kim (Kim & Chang) to Mike Thomson dated 10 November 2011.

¹⁵⁰ ICC Transcript D2/P380-1 (Thomson) (as corrected). See also ICC Transcript D2/P371. Mr Short also acknowledged in cross-examination in the ICSID proceedings that Kim & Chang had many conversations or outreach to Government officials at various levels on Lone Star's behalf. See: Exhibit C-123, ICSID Transcript, D3/P916 (Short).

I am writing to you to express my concerns on the current situation adversely affecting the progress of our transaction, and would like to seek your understanding and support to bring the closing of our transaction.

As we are approaching to the last step toward the closing of our transaction, we are facing substantial hostility not only from the people who have been against the transaction but from those who believe they could take advantage of this situation by opposing to the transaction. These people endeavors to do anything to make the situation politically sensitive and increase legal uncertainties. Most recently, KEB labor union has filed an injunction request to Constitutional Court and argued that FSC should review Lone Star's status as Financial Business Operator first before making a sale order. To make the situation worse, now some members of the ruling party, including Mr. JP Hong who is a head of the party, have started to sympathize with arguments, as they are competing against the opposition party to win support from the public for the upcoming elections.

As I have written to you in my previous e-mail, we would face increasing political risks, unless we strive to expedite the closing of our transaction. Considering current political dynamics and election schedules, we think December would be the last window for us to close the transaction.

In expediting the closing, I believe that we would need to lower the price to KRW*****/share (about **% from the current contract price of KRW13,390/share), so that we could contain political pressure and get the process proceed. Compared to the total proceeds of the original agreement of the last year, total proceeds with a new price, together with 2011 1H dividend, would not be significantly different.

While this may not be perfectly satisfactory to you, I would like to make it clear that I am not taking a position to negotiate a price in the interests of Hana and regard this as our final efforts to win the approval. Even if the transaction is closed at a lower price than originally agreed, I would be personally blamed for collaborating with Lone Star's exit but I am ready to face such criticism.

I sincerely hope that we could reach an agreement, and that you could understand the necessity of it. I fully understand how difficult it would be on your side to make such a decision and equally feel my responsibility to deliver the closing of our transaction. It has not been as smooth as we wished, however, I appreciate your cooperation to date and promise you that I would put my utmost efforts to bring the mutually beneficial outcome in an expedited manner.¹⁵¹

164. Chairman Kim testified in the ICSID proceedings that the statement in his letter of 10 November 2011 that the sale price would need to be lowered in order to contain political

¹⁵¹ Exhibit R-033, Letter from Seung-Yu Kim (Hana) to John Grayken (Lone Star), 10 November 2011.

pressure and get the approval from the FSC was a truthful statement,¹⁵² albeit that he maintained that this information did not come from FSC but from other sources.¹⁵³ The Tribunal considers that it is more likely that the information came directly from the FSC.

165. Hana produced an internal note of the meeting that records the following:

- Explained the need for price adjustment based on political circumstances and public opinion, etc. around the time of the sale order and Hana made a proposal for price adjustment (KRW 11,190/share).

- Chairman Grayken made it clear that it was not acceptable since “Hana’s proposal meant a burden of USD 400 million or more simply due to public opinion and political circumstances, and not only are there no legal grounds, there is no justification to convince investors in LS fund.”

- LS would rather stick to the existing agreement and take legal measures if approval is delayed or find another buyer. LS claims that there is a way to keep control of the Board of Directors and dividends even if voting rights are restricted (considering stock return to investors).

- We explained that, given the current market situation and possible political changes, early closing is most important and that all other alternatives are less feasible considering time and economic costs (including fine), etc.¹⁵⁴

166. This internal note is not consistent with the idea that Hana was using the FSC’s position as a false pretext for negotiating a lower price for the KEB Shares, as the Claimant maintains.

167. The second meeting was between Mr Byoungcho Kim and Mr Short and was secretly recorded by the latter. At the start of the transcript of the 11 November 2011 meeting, Mr Byoungcho Kim explained that there was pressure from the politicians to revise the price of the KEB Transaction because it was at a premium over the current market price.¹⁵⁵ Mr Ellis then asked about the FSC’s position, leading to the following exchange:

ELLIS: [...] And the regulator has, has specifically told him to reduce the price. Is that...

BYOUNGHO: I think, I think... They are implicitly saying. Because they’re really care, careful about the legal...

ELLIS: Right.

¹⁵² ICSID Transcript D7/P1714 (Kim).

¹⁵³ ICSID Transcript D7/P1715 (Kim).

¹⁵⁴ Exhibit C-082, Hana Financial Group, Report on the Meeting with Lone Star, 11 November 2011.

¹⁵⁵ Exhibit C-008, p. 1, Transcript of Meeting in London Between Ellis Short and Byoungcho Kim (corrected), 11 November 2011.

BYOUNGHO: Framework. So they really are very careful in saying that. But we, we, we clearly know that, that's their objective.

ELLIS: That the regulator's objective...

BYOUNGHO: Yeah.

ELLIS: And the regulator wants us to take a lower price because they feel like that makes the people happy?

BYOUNGHO: That makes not, not, not that way, but opposite way for them to protect themselves. They, they do not think that whatever price they approve, they will get blamed, too. So actually from that perspective, they are taking the risk. Because I believe that's because of our Chairman Kim. Chairman Kim has real good connection with the regulators, especially the head of FSC. And persuaded and persuaded and persuaded that he will take, he, Chairman Kim himself, Seung-Yu Kim will take all the blame after the deal is being closed. While you have to give the approval – twice. And I think that was persuaded. But with a condition, which is the justification; justification that the regulators should have to protect themselves at least.¹⁵⁶

168. Mr Ellis then asked Mr Byoungho Kim whether Chairman Kim of Hana had had a discussion about a specific reduction of the KEB share price with the Chairman of the FSC:

ELLIS: He makes Chairman Kim, he must have had the discussion with Kim Seok Dong.

BYOUNGHO: I believe so. But I don't think he explicitly talked over this specific number with him. 'Cause that's probably the area that the regulators may like to avoid. Because the price, right?

ELLIS: Because it... but it's illegal for them to even be having this discussion.

BYOUNGHO: They will find other excuses if they think that... if really, the price is the heart of the matter, then I think not the price. They will find other excuses for them to have to delay the approval process. I am sure about it because that's what they did to us in March. So...¹⁵⁷

169. Mr Byoungho Kim thus clearly believed that the FSC Chairman and Chairman Kim had discussed the issue of the price of the KEB Shares, albeit that they may not have talked about a specific figure for the reduction.

¹⁵⁶ Exhibit C-008, pp. 1-2, Transcript of Meeting in London Between Ellis Short and Byoungho Kim (corrected), 11 November 2011.

¹⁵⁷ Exhibit C-008, p. 3, Transcript of Meeting in London Between Ellis Short and Byoungho Kim (corrected), 11 November 2011.

170. Mr Ellis then proposed various alternative mechanisms to deliver a reduction of the headline figure for the price per KEB share while protecting the economic benefits to Lone Star envisaged under the July Amended SPA.¹⁵⁸ Basically, Mr Ellis was suggesting that, on the assumption that the headline KEB share price was lowered from KRW 13,590 as in the July Amended SPA to KRW 11,900 (the number suggested by Mr Byoungcho Kim¹⁵⁹), Lone Star would nonetheless be compensated when the share price then increased after Hana's acquisition. Hana's note of the meeting described the proposal as follows:

[A]djust to KRW 11,190, but make a post adjustment for increases in the stock price for a certain period of time and grant dividend rights for the period until closing.

(e.g., additional payment applying a multiple of 1.5 to the greater of the increase of the stock price of Hana and that of KEB in the following three years, dividend of about KRW 300)¹⁶⁰

171. Mr Byoungcho Kim then commented on the dynamics of the negotiation of the price reduction:

BYOUNGHO: Ah. You once told me that it's a negotiation between Lone Star and regulators, not with Hana. I think that's right. At the end of the day, we have to negotiate with the regulators. But it is fortunate that they will not negotiate with your [phonetic] sell.

ELLIS: Yeah.

BYOUNGHO: So whether us...

ELLIS: Because what they're doing is illegal. And they don't mind if you know they're doing, they're conducting illegal activity. They don't want us to know.

BYOUNGHO: That is, that is why there is no proof that they are asking price reduction.

ELLIS: Right.

BYOUNGHO: That is why. They are ver- very careful. They really do not want to be, uh, so that's the difficulty that we have.

¹⁵⁸ Exhibit C-008, pp. 7-16, Transcript of Meeting in London Between Ellis Short and Byoungcho Kim (corrected), 11 November 2011.

¹⁵⁹ Exhibit C-008, p. 4, Transcript of Meeting in London Between Ellis Short and Byoungcho Kim (corrected), 11 November 2011.

¹⁶⁰ Exhibit C-082, Hana Financial Group, Report on the Meeting with Lone Star, 11 November 2011.

ELLIS: So, so you think they know they're breaking the law. But they're just, because of that they're careful not to leave evidence.

BYOUNGHO: That, that may be true. But that's my own speculation.¹⁶¹

172. At the conclusion of the meeting, Mr Ellis stated Lone Star's position to be as follows: Lone Star would accept a symbolic reduction of the headline KEB share price from KRW 13,590 to KRW 13,390, but if there were to be a substantial reduction to KRW 11,900 per share, Lone Star would insist on being compensated if the share price then increased.¹⁶²

173. On 14 November 2011, Hana provided the FSC with a "*Report on the Status of the KEB Share Purchase Agreement*". Mr Bae confirmed in cross-examination that Chairman Kim had "*confirmed*" the status report before it was sent to the FSC.¹⁶³ It was shared with Lone Star on the same day. The status report includes the following statement:

Lone Star has been notified that, in view of the political climate in Korea, the changes to the legal status of Lone Star after the execution of the SPA Amendment and the recent changes to the environment of the financial markets, there is a need to change some of the terms and conditions of the SPA (including the proposal to reduce the existing purchase price), and HFG is promoting discussions thereon.¹⁶⁴

174. As the Tribunal will assess later in this Award, this information was actually irrelevant to the FSC's consideration of Hana's Application under Article 17 of the FHCA and Article 12 of the Enforcement Decree of the FHCA because that provision focuses exclusively on Hana as the acquirer of the KEB Shares and not on Lone Star as the seller. It is likely, however, that the FSC required Hana to put this in writing in order to justify its next steps, and, in particular, its decision of 18 November 2011, to which the Tribunal will turn shortly. It will be recalled that Mr Bae requested this report to be presented to the FSC after Hana's meeting with Lone Star on 11 November 2011. This deferral allowed Hana to confirm with the FSC in its report of 14 November 2011 that Lone Star had been informed that the price had to be reduced. The Tribunal has no doubt that Hana and the FSC were coordinating these steps. Indeed, only four days later, on 18 November 2011, the FSC issued a final sale order requiring Lone Star to dispose of its shares above 10% within six months. It was explained

¹⁶¹ Exhibit C-008, p. 16, Transcript of Meeting in London Between Ellis Short and Byoungho Kim (corrected), 11 November 2011.

¹⁶² Exhibit C-008, pp. 18-19, p. 21, Transcript of Meeting in London Between Ellis Short and Byoungho Kim (corrected), 11 November 2011.

¹⁶³ ICC Transcript D4/P711 (Bae).

¹⁶⁴ Exhibit C-012, Hana Financial Group, Report to FSC on Status of KEB Share Purchase Agreement, 14 November 2011.

in the press release that this order was required because Lone Star had failed to comply with the FSC's compliance order of 25 October 2011. The press release noted that its disposition order did not require Lone Star to dispose of its shares by a particular method. Specifically, the FSC stated that it would not be appropriate to compel Lone Star to sell its KEB shares on the stock exchange because there were no such precedents for an order of this nature (and reference was also made to the practice in the United States and the United Kingdom) and minority shareholders in KEB would suffer given that the stock price would be likely to fall significantly in that scenario.¹⁶⁵ The FSC also rejected the possibility of any punitive disposition order as being inconsistent with the applicable banking legislation, despite the views of "some media outlets and politicians".¹⁶⁶ In relation to Hana's pending application, the FSC said the following:

A significant time has lapsed since the submission of the application by the Hana Financial Group, and there has been a significant change to the factual background relating to the requirements* for the addition of KEB, due to the increased uncertainties in the domestic and overseas economic environments.

Lone Star has lost its major shareholder status due to the guilty verdict on the share price manipulation case, which limits Lone Star's voting rights with respect to those shares held in excess of the prescribed limit (i.e., 41.02% out of 51.02% held by Lone Star) as of October 25, 2011.

Considering the changes taking place to the circumstances, it is viewed that it is difficult to proceed with the approval process based on the previously submitted application for the addition of subsidiary.

Accordingly, the FSC has resolved to notify the Hana Financial Group to submit a fresh application concerning the addition of subsidiary, taking into account the changes to the circumstances.¹⁶⁷

175. Although this press release refers to a requirement to submit a "fresh application", it is clear from the previously reported exchanges between Hana and the FSC that the FSC was expecting a change of price for the KEB Shares to be reflected in a new SPA to accompany that fresh application. This is certainly how the Korean press interpreted the FSC's press release on the same day. A press article from *Hankook Ilbo* entitled "A Message to Hana Bank

¹⁶⁵ Exhibit C-013, pp. 2-3, FSC Press Release, "FSC Orders Lone Star Share Disposal Within Six Months", 18 November 2011.

¹⁶⁶ Exhibit C-013, p. 5, FSC Press Release, "FSC Orders Lone Star Share Disposal Within Six Months", 18 November 2011.

¹⁶⁷ Exhibit C-013, pp. 6-7, FSC Press Release, "FSC Orders Lone Star Share Disposal Within Six Months", 18 November 2011.

to Open a Safety Exit for Lone Star and to Lower the KEB Purchase Price” contained the following commentary:

Simply put, the FSC wants Hana to submit a new application reflecting the circumstantial changes over time as the acquisition process has been delayed for more than one year, which is, in fact, a message to “lower the purchase price.” A high-ranking official of the FSC said, “KEB’s stock price has significantly dropped, which is why we think the purchase price agreed on the current agreement (KRW 4.4059 trillion) is too high,” adding, “we will wait and see as Hana Financial Group said that they would lower the price.”¹⁶⁸

176. A “*high-ranking*” official of the FSC is directly quoted in this article as being concerned that the price for the KEB Shares in the existing July Amended SPA was “*too high*”. The FSC was clearly interested in the price of the KEB Shares while Hana’s Application was pending.
177. The minutes of the FSC’s meeting on 18 November 2011 are essentially reflected in the press release issued by the FSC, which has been quoted above. It is noted in the minutes that the labour union of KEB had applied for the recusal of the Chairman, Vice-Chairman and non-standing Commissioners of the FSC and had previously unsuccessfully applied for a court injunction preventing the exercise of their voting rights in relation to the KEB Transaction. The application was refused.¹⁶⁹ The pressure on the FSC was clearly at a critical level.
178. The minutes also record that a question was asked as to what circumstances had changed to justify requesting that Hana submit a new Application. The answer is stated to be as follows:

Lone Star lost its eligibility as a major shareholder due to guilty verdict of stock price manipulation against Lone Star. Of the KEB shares held by Lone Star (51.02%), the voting rights of shares held in excess of the limits (41.02%) came to be restricted. HFG also sent an official letter to FSC notifying that there is an ongoing renegotiation with regard to the share sale and purchase agreement with Lone Star.¹⁷⁰

179. As the Tribunal will assess later in this Final Award, the information pertaining to Lone Star in this passage does not appear to be relevant at all to the FSC’s consideration of Hana’s Application under the FHCA. The information concerning Hana’s notification omits to record that this notification was sent upon the FSC’s request. As the Tribunal has found, it

¹⁶⁸ Exhibit C-035, “A Message to Hana Bank to Open a Safety Exit for Lone Star and to Lower the KEB Purchase Price,” Hankook Ilbo, 18 November 2011.

¹⁶⁹ Exhibit C-118, p. 2, FSC, Minutes of the 12th Ad Hoc Meeting, 18 November 2011.

¹⁷⁰ Exhibit C-118, p. 10, FSC, Minutes of the 12th Ad Hoc Meeting, 18 November 2011.

is likely that these steps were closely coordinated with the FSC and that the FSC required something in writing from Hana to support its decision to require a new Application from Hana.

180. Hana commented upon the FSC's decision of 18 November 2011 in an internal memorandum:

- The FSC's decision is worthy of high praise from the perspective that it overcame the so-called 'Byeon Yang-Ho' syndrome and showed the will to resolve issues in accordance with laws and principles at a difficult time when issues related to external and internal risk factors are building up, such as the European fiscal crisis, mutual savings banks, household debt, etc.

- Especially, it is praiseworthy that the financial authorities did not render an extrajudicial decision, such as a so-called 'punitive' sale order, based on political logic or sentiment against foreign capital and made its decision based on transparent legal procedures.¹⁷¹

181. Hana also stated that its proposed transaction with Lone Star for the KEB Shares should not be interfered with:

Price negotiation regarding shares held by Lone Star is a private agreement with a counterparty and should be respected as long as it is proceeded within the framework of legal order.¹⁷²

182. Hana recognised that any argument about the premium of the negotiated share price under the KEB Transaction by reference to the current share price was misconceived:

- Therefore, the purchase price is determined by the parties to the sale and purchase based on their own interests and strategies, and it is problematic if a third party argues only based on the current share price.¹⁷³

183. Hana's contemporaneous internal documents do not, therefore, corroborate a sudden change of strategy to the effect that they would attempt to squeeze Lone Star for a price reduction by using the FSC's regulatory conduct as a pretext.

184. Also on 18 November 2011, Mr Daniel Jassem, Deputy Economic Counselor of the American Embassy in Seoul, sent an email to Mr Thomson setting out some information

¹⁷¹ Exhibit C-092, Hana Financial Group, Reference Material on KEB Compulsory Sale Order, November 2011.

¹⁷² Exhibit C-092, Hana Financial Group, Reference Material on KEB Compulsory Sale Order, November 2011.

¹⁷³ Exhibit C-092, Hana Financial Group, Reference Material on KEB Compulsory Sale Order, November 2011.

that he had received from one of his “local hires” about the situation concerning the KEB Transaction. The headline of this communication read: “*Financial Services Commission (FSC) faces a bumpy road to the selling order. Following negative comments of ruling and opposition party leaders, law professors asked the financial regulator to issue a punitive selling order. The Constitutional Court also embarked its review late last month on whether the FSC neglected its duty to probe the shareholder eligibility of Lone Star, accepting a petition from small shareholders.*”¹⁷⁴ Again, this provides further insight into the intense political pressure that the FSC was under in relation to the KEB Transaction.

185. On 21 November 2011, *Yonhap Infomax* published an article entitled “*FSC, Pressure on Hana Financial and Lone Star to Reduce Price*”. This article also interpreted the FSC’s request that a new application be submitted by Hana as a directive to lower the price for the KEB Shares:

The FSC is pressuring HFG to reduce the purchase price by having HFG reapply for approval to acquire KEB as a subsidiary, the original application of which was previously submitted.

[...]

The FSC essentially alluded that they would not approve the acquisition of subsidiary if there was the risk that acquiring KEB would harm HFG’s financial soundness. As such, in actuality, it is interpreted that the FSC is requiring HFG and Lone Star to reduce the purchase price for KEB.

At the press meeting held on November 18 after deciding to issue the compulsory sale order for Lone Star to sell the shares in KEB, Standing Commissioner Suk-Joon Lee of the FSC stated that “it is being reported that HFG and Lone Star are renegotiating. Once the negotiations are settled, the circumstances will change greatly.”

Commissioner Lee added that “once a new application is submitted, we will review based on such document,” and further adding that “the financial soundness of HFG will be reviewed and the price will also be a factor.”

A member of the bank circles interpret that “the FSC is indirectly using the soundness of HFG’s financials as a way to place pressure on HFG and Lone Star to lower the purchase price for KEB” and that “feeling burdens from the ‘eat and run’ controversy arising from issuing a simple sale order, the FSC is creating safety mechanisms to keep the situation in check.”¹⁷⁵

¹⁷⁴ Exhibit R-074, Emails between Mike Thomson and Daniel M Jassem dated 10 November 2011 and 19 November 2011 (the article is pasted into the email).

¹⁷⁵ Exhibit C-034, “FSC, Pressure on Hana Financial and Lone Star to Reduce Price,” *Yonhap Infomax*, 21 November 2011.

186. The article thus directly reports that the FSC was insisting that Hana renegotiate the price of the KEB Shares. There is even a direct quote from one of the Commissioners of the FSC to the effect that its approval of Hana's Application would depend in part on whether Hana succeeded in obtaining a price reduction from Lone Star.

D5 Meeting between Hana and Lone Star on 25 November 2011

187. On 25 November 2011, there was an important meeting in London between Mr Grayken, Mr Short and Mr Thomson of Lone Star and Chairman Kim and Mr Byoungcho Kim of Hana. Once again, the meeting was secretly recorded by Lone Star's representatives.
188. Early in the meeting, Chairman Kim described the political pressure to reduce the price of the KEB Shares:

CHAIRMAN KIM: [...] But the problem is in, which is not real, you know, contract between two private parties. They, their argument is uh, you know, most of their politicians, politicians think about this is forced sell-buy. Due to verdict. So that's why our agreement should be changed; but not by FSS or Blue House. Because right by ruling party, you know, some of the ruling party and National Assembly. And they advised to Blue House and also advised to FSS, and...

CHAIRMAN KIM: More frankly...

CHAIRMAN KIM: They told me, we should reduce at least 20% of the, you know, our contracted price, which is under 11,000 won per share. So I can't do that, no way. They would not accept this proposal at all. I tried to push it, and, and they still told me under 11,000 won per share, so that's why, no, no, no, did you say 11, under 11, 11, 900. It was my proposal. Well, if you insist under 11,000 won share, I can try to push it and 11,900. That's the only way I can, you know contact with Lone Star people, no other way I told them.

ELLIS SHORT: So they specifically told you the price they wanted you...

CHAIRMAN KIM: Not FSS. It was not FSS. Well, I met many congressmen, many national...

MICHAEL THOMSON: These are National Assemblymen, you're talking about?

CHAIRMAN KIM: Yeah.

ELLIS SHORT: Okay.

CHAIRMAN KIM: You know, ruling party leader, Mr. Hong, you know, he's my college junior. And opposition party leader, Mr. Sohn is my high school junior. I know every-everybody, you know. I've known them more

than 10 years, 20 years. So I try to contact one by one – not collectively. But well, some of them tell me, “Well, we should reduce by minimum of 1 trillion -- can’t think of any, any numbers. You know, 1 trillion won, or somebody 2 trillion won. Well, but somebody know about these issues. They told me the price should be under 11,000 won per share...”¹⁷⁶

[...]

JOHN GRAYKEN: I mean, okay, Chairman Kim, thank you. Let me just see if I can understand that we, uh, following the verdict, pursuant to Korean law and precedent, the, uh, repercussions of a guilty verdict are that we have to pay a fine, which we did pay... and we’re under an order to sell the bank within a certain period of time: 6 months. Um, but there’s nothing under th- in the law or in precedent which would impose punitive measures.

CHAIRMAN KIM: No.

JOHN GRAYKEN: Nothing.

CHAIRMAN KIM: Nothing.

JOHN GRAYKEN: Despite that, the people in the General Assembly have come to your and say that, that the, in order to satisfy public sentiment, the price has to be reduced. That’s what they said?

CHAIRMAN KIM: Uh-huh.

JOHN GRAYKEN: But it’s actually not their decision.

CHAIRMAN KIM: No.

JOHN GRAYKEN: To approve the deal or not.

CHAIRMAN KIM: Yes.

JOHN GRAYKEN: If it is the FSC’s decision.

CHAIRMAN KIM: It’s true. It’s true.

JOHN GRAYKEN: So, what does the FSC say?

CHAIRMAN KIM: But even though FSC didn’t say anything until now, but the FSC might put off their decision, put on their decision. Because, uh, you know, even both party leader, you know, ruling party leader – Mr. Hong – and uh, opposition, opposition party leader Mr. Sohn, you know, agree to, you know, FSC Chairman should step down...

[...]

¹⁷⁶ Exhibit C-014, pp. 3-4, Transcript of Meeting in London Between Lone Star and Hana Representatives (corrected), 25 November 2011.

JOHN GRAYKEN: Well Chairman... Okay. Let me, let me ask you this, a simple question, which is, you're asking us for something. You're saying to change the contract. Reduce the price by 500 billion won. And so I have to ask you a simple question, which is: if we do that, what assurances can you give me that the FSC is going to approve this deal? Why should we, why should we do this without something in return?

CHAIRMAN KIM: Well, if we decide the price, I'll give you assurance within one or two days.

JOHN GRAYKEN: So you have, have you discussed this price reduction with the FSC?

CHAIRMAN KIM: Not really, but uh, I do have a feeling. I do have you know many dialogues with FSC. But I have a feeling, I told them 1 trillion won reduction. I told them, "He's kidding. No way." I talked to, you know, FSC people. One trillion reduction, no way.¹⁷⁷

189. Chairman Kim was cross-examined in respect of this last statement in the transcript of the 25 November 2011 meeting. He was asked to confirm whether this indicated that people at the FSC were discussing the price of the KEB Shares.¹⁷⁸ He conceded that "*there were some FSC people from FSC, not the FSC Chairman*" who were "*throwing the idea about 1 trillion... in a light-hearted way or joking manner*".¹⁷⁹ In the Tribunal's assessment, this is an admission that Hana was having discussions with the FSC about the price of the KEB Shares. Moreover, Chairman Kim's "*feeling*" about whether the FSC would accept a price reduction at KRW 11,900 per share based on "*many dialogues with FSC*" is likely to have been based on actual and explicit discussions with the FSC about the price rather than inferences he could draw from conversations in which the price was not discussed at all.

190. The transcript of the 25 November 2011 meeting then continues:

JOHN GRAYKEN: Have they asked you to reduce it?

CHAIRMAN KIM: No. They didn't say anything. But the, you know, you... They told me, I should, you know, recognize the political part- two parties', you know, reaction on this deal.

JOHN GRAYKEN: They said that?

CHAIRMAN KIM: Yeah.

JOHN GRAYKEN: They said that their, that this is important to them?

¹⁷⁷ Exhibit C-014, pp. 4-6, Transcript of Meeting in London Between Lone Star and Hana Representatives (corrected), 25 November 2011.

¹⁷⁸ ICC Transcript D3/P615-617 (Chairman Kim).

¹⁷⁹ ICC Transcript D3/P616 (Chairman Kim).

CHAIRMAN KIM: Uh huh. That's why two parties, you know, all these Chairman of the FSS should step down.

JOHN GRAYKEN: And both of those parties want the price reduced today? So the FSC has basically told you that they need the, they need the price reduced as well?

JOHN GRAYKEN: That's right?

JOHN GRAYKEN: Hmm. But they didn't say...

CHAIRMAN KIM: So that's why I met with...

JOHN GRAYKEN: But they didn't say how much?

CHAIRMAN KIM: Many, many, you know, National Assembly men, rather than, you know bureaucrats

JOHN GRAYKEN: So you can't tell us then, if we, if we, uh, agree to a price reduction?

CHAIRMAN KIM: Well...

JOHN GRAYKEN: That the deal will be approved?

CHAIRMAN KIM: Well, I can assure you within tomorrow because FS Ch- FS Chairman is coming to London tomorrow night. But he's on the way back to Seoul. He just stop over London.¹⁸⁰

191. Mr Hyeonkee Bae testified in the ICSID proceedings that he had a contact at the Ministry of Finance and Economy who was posted in London and responsible for protocol for visiting Korean dignitaries. According to Mr Bae, this contact had communicated the details of the FSC Chairman's flight arrangements and travel itinerary to him and he, in turn, had informed the FSC Chairman of this.¹⁸¹ Even if Mr Bae's version of how Chairman Kim came to know these details of the FSC Chairman's travel itinerary were to be accepted, it nonetheless demonstrates that, prior to the meeting of 25 November 2011 with Lone Star's representatives, Hana thought that it would be important to be able to have access to the FSC Chairman immediately after the meeting had concluded. Given the purpose of the meeting was to discuss the price for the KEB Shares, this is another indication that the FSC was both interested and informed about Hana's attempts to procure a price reduction.
192. It was put to Mr Grayken in cross-examination that what he was asking from Chairman Kim, in substance, was only for Chairman Kim's personal assurance that the KEB

¹⁸⁰ Exhibit C-014, pp. 6-7, Transcript of Meeting in London Between Lone Star and Hana Representatives (corrected), 25 November 2011.

¹⁸¹ ICSID Transcript D7/P1778-80 (Bae).

Transaction would go through with the price reduction, rather than the FSC Chairman's assurance. His response was as follows:

18 You have to remember now, we have been under
19 contract with this man for a year. When we signed it a
20 year ago, he assured us he could get it approved. His
21 personal assurance isn't worth anything anymore. We know
22 that. The FSC is controlling this. Okay? His personal
23 assurance is not worth anything anymore. We've had a year
24 of that. He needs to talk to the FSC Chairman personally,
25 and the FSC Chairman has to personally commit. Based on
1 that, we'll go forward--or not.¹⁸²

193. The Tribunal finds this response to be compelling. If Lone Star were to agree to drop the price by KRW 500 billion, then clearly Mr Grayken needed the assurance of the FSC that its approval of Hana's Application would be forthcoming. That was and that had been the only obstacle to the completion of the KEB Transaction.
194. It was also put to Mr Grayken that if Chairman Kim was really promising to discuss the issue of price with the Chairman of the FSC, then Chairman Kim would be committing to do something illegal. Mr Grayken was clear in his response:

9 Q. Is it your testimony that you understood that
10 Hana Chairman Kim was promising to have an illegal
11 discussion with the FSC Chairman on your behalf?
12 A. Look, as I told you before, my view is the FSC
13 was operating illegally for years regarding this deal and
14 that we wanted to get approved, and Chairman Kim was simply
15 going to find out from them whether or not they would
16 approve this deal, if this was enough punishment for us to
17 take, and if they would approve this deal based on this
18 price. It's as simple as that.¹⁸³

195. The transcript of the 25 November 2011 meeting then puts Mr Grayken's intention for asking for an assurance beyond doubt:

JOHN GRAYKEN: Let me... Okay, let me just try again to understand what it is you're, you're asking. You're asking us to reduce the price to 11,900. And what you're saying...

CHAIRMAN KIM: There, there is no reason at all, why 11,900 as I told you. [Laughing] They told me, 11,000. So I told them...

¹⁸² ICC Transcript D2/P278-9 (Grayken).

¹⁸³ ICC Transcript D2/P284 (Grayken). See also: ICC Transcript D2/P282 (Grayken).

JOHN GRAYKEN: The politicians told you 11,000.

CHAIRMAN KIM: So I told them: “11 is 11. 11-9...”

JOHN GRAYKEN: But at 11,900, is it your judgment that the FSC is going to do this? At 11,900?

CHAIRMAN KIM: I try. But I can do it.

JOHN GRAYKEN: You think you can do it.

CHAIRMAN KIM: Yeah.

JOHN GRAYKEN: And you will know when?

CHAIRMAN KIM: By tomorrow or by early Monday. I’ll be back tomorrow. Fortunately, I can meet, you know FS Chairman at the airport today. He’s coming 4:30 in the afternoon from Turkey, and... I suppose to meet him tomorrow.

JOHN GRAYKEN: Alright, tomorrow.

CHAIRMAN KIM: Tomorrow. Tomorrow. Not today. Tomorrow¹⁸⁴

196. Chairman Kim undertook to “try” to get the FSC to agree to approve Hana’s Application if the price was lowered to KRW 11,900. And he undertook to get an answer from the FSC Chairman the very next day. The Tribunal considers that there is simply no other way to interpret this portion of the transcript.
197. Chairman Kim testified in cross-examination that what Mr Grayken was actually requesting was an assurance that Hana’s Application would be dealt with by the FSC before the end of the year. According to Chairman Kim, Mr Grayken was not really interested in getting an assurance in respect of the price because he had said that he would be able to recover any shortfall from the Government in litigation.¹⁸⁵ As the Tribunal has already found, this interpretation of what was actually said during the 25 November 2011 meeting is unsustainable.
198. Mr Grayken emphatically disagreed with Chairman Kim’s testimony. He stated that Chairman Kim had given his personal assurance for a year that the KEB Transaction would close since they signed the Original SPA and hence Lone Star “*under no circumstances*” would

¹⁸⁴ Exhibit C-014, pp. 13-14, Transcript of Meeting in London Between Lone Star and Hana Representatives (corrected), 25 November 2011.

¹⁸⁵ ICC Transcript D3/P618-622, D3/P625 (Chairman Kim).

have agreed to a price reduction unless Chairman Kim had personally talked to the FSC Chairman and the FSC Chairman had told him that the deal would be approved at a lower price.¹⁸⁶ The Tribunal finds that Mr Grayken's evidence accords with reality.

D6 Chairman Kim of Hana's telephone conversation with the FSC Chairman on 25 November 2011

199. Chairman Kim of Hana called the FSC Chairman on his mobile phone during the evening of 25 November 2011. Chairman Kim gave the following account of this conversation in his written evidence:

During our brief call, I recall informing the FSC Chairman that the Parties were close to reaching an agreement to extend the SPA and asked when we might expect the SPA to be approved. The FSC Chairman replied by saying, as he had previously said, that the FSC Commission would decide Hana's Application in due course. However, I did not infer from the FSC Chairman's words or his tone any negative signal about the timing or outcome of the approval, and on that basis I felt comfortable reiterating my personal assurance to Mr. Grayken that Hana would be able to obtain approval at the reduced price. After the call, I asked Mr. Hyeonkee Bae to write to Lone Star asking for a follow-up meeting between Mr. John Grayken and me to be arranged on 26 November 2011.¹⁸⁷

200. In cross-examination, Chairman Kim was asked why he was able to conclude from his conversation with the FSC Chairman on 25 November 2011 that Hana's Application would be approved, when all the FSC Chairman had said, on Chairman Kim's account, was that the FSC would decide Hana's Application in due course. What was special then about the 25 November 2011 conversation, when, on Chairman Kim's account, the FSC Chairman had said the very same thing at their previous meeting on 2 November 2011?¹⁸⁸

9 [Q.] Something must have changed in terms of the

10 reaction by the FSC Chairman to your question between

11 November 2nd and November 25. What was it?

12 A. So, basically, on November the 2nd, when we met,

13 we had not--the Parties had not yet arrived at a new price

14 negotiation. It was before that point in time.

15 And on November 25th, when we had the call, the

16 Parties have, meaning myself with Grayken, have reached a

17 negotiated and have arrived at the new price. That is

18 different.¹⁸⁹

¹⁸⁶ ICC Transcript D2/P238 (Grayken).

¹⁸⁷ RWS-002, First WS of Chairman Kim of Hana, §47.

¹⁸⁸ ICC Transcript D4/P646-7.

¹⁸⁹ ICC Transcript D4/P647 (Chairman Kim).

201. This statement only makes sense if the FSC Chairman was in fact interested in the price of the KEB Shares. It was only the negotiated price for the KEB Shares between Hana and Lone Star that changed between the two meetings so the fact that Chairman Kim was able to conclude from his conversation with the FSC Chairman on 25 November 2011 that the FSC would be able to approve Hana's Application must have been the result of the FSC Chairman's understanding that there had been a price reduction.
202. It is true that Chairman Kim flatly denied raising the price reduction with the FSC Chairman during his call on 25 November 2011 in cross-examination.¹⁹⁰ Instead he stated that his sole question to the FSC Chairman was as follows:

19 THE WITNESS: My question was, as I have
20 testified previously, the two parties are now soon to
21 arrive at a new Contract. Then, if we submit a new
22 Application, we will be able to get approval before end of
23 December. That was the question asked.¹⁹¹

203. The Tribunal does not find this testimony credible. But even on this basis, Chairman Kim was prepared to concede that the FSC Chairman would have understood from his question that there had been a price reduction:

10 Q. Is it your testimony, Chairman Kim, that the FSC
11 Chairman understood that the extended SPA would involve a
12 new price reduction, even though you didn't say that?
13 A. I can conjecture that he would have thought that
14 that aspect would have been included.¹⁹²

[...]

3 PRESIDENT DOUGLAS: And you testified today that
4 it would have been clear to him that the new Contract that
5 you talked about would have included a price reduction,
6 even if that wasn't said expressly.

7 THE WITNESS: But he did not say the price, nor
8 did he ask me for what the price was. I would think that
9 he had the feeling that I would have taken care of reducing
10 the pricing now, based on my judgment.¹⁹³

204. Chairman Kim's testimony that it would have been clear to the FSC Chairman that he had "*taken care of reducing the pricing*" strongly suggests that there was a prior agreement or

¹⁹⁰ ICC Transcript D4/P656, D4/P660. See also: ICSID Transcript D7/P1726-7 (Kim).

¹⁹¹ ICC Transcript D4/P652.

¹⁹² ICC Transcript D4/P657.

¹⁹³ ICC Transcript D4/P691 (Chairman Kim).

understanding between the FSC Chairman and Chairman Kim that the latter would be tasked with reducing the price before the FSC could give its approval to Hana's Application. Chairman Kim also conceded that the FSC would objectively have had a keen interest in the price of the KEB Shares due to the political pressure it was under:

14 THE WITNESS: Because FSC had to make its
15 Decision amidst the backdrop of a significant pressure in
16 terms of political from the civic organizations, from the
17 labor unions, NGOs, so they had to make a decision within
18 this pressure market environment, so it would be difficult
19 for me to give you a confirmed answer at this point.
20 PRESIDENT DOUGLAS: Could I take it from the
21 answer that you just gave that the FSC was, therefore, very
22 interested in the price reduction?
23 THE WITNESS: Although they were not directly
24 involved in this topic of price, I would presume that they
25 would have had interest at what price this deal was going
1 to happen.¹⁹⁴

205. The evidence also demonstrates that Chairman Kim had very good access to the FSC Chairman. Chairman Kim confirmed that he had his mobile telephone number.¹⁹⁵ Chairman Kim evidently considered that he had a close enough relationship with the FSC Chairman to call him on his mobile phone in the evening while he was in London without prior warning. Indeed, he accepted that he had a good enough relationship with the FSC Chairman that he could call him on his mobile phone whenever he needed to.¹⁹⁶
206. In the evening of 25 November 2011, Mr Hyeonkee Bae emailed Mr Short with the following message:

Byoungho left London tonight due to his another schedule, while Chairman Kim and I stay in London for tomorrow's meeting with FSC Chairman.

By the way, tonight two chairmen had a long conversation about our meeting result over the phone call, which made it unnecessary for them to meet each other at the airport.

Chairman Kim want to meet with you tomorrow in order to explain the responses from FSC Chairman and discuss about the subsequent issues.¹⁹⁷

¹⁹⁴ ICC Transcript D4/P667 (Chairman Kim).

¹⁹⁵ ICC Transcript D4/P688 (Chairman Kim). See also: ICSID Transcript D7/P1724 (Kim).

¹⁹⁶ ICC Transcript D4/P689 (Chairman Kim).

¹⁹⁷ Exhibit C-007, Email Chain Between Ellis Short and Hyeonkee Bae, 25 November 2011.

207. Mr Bae testified in cross-examination that Chairman Kim had not described the contents of his phone call with the FSC Chairman before he wrote this email such that any details provided were an “*embellishment*”.¹⁹⁸ Indeed, in the ICSID proceedings, Mr Bae said that even the fact that the meeting was for the purpose of discussing the responses from the FSC Chairman was simply “*speculation*” on his part.¹⁹⁹ The Tribunal does not find Mr Bae’s evidence on this point credible.

D7 Mr Grayken’s meeting with Chairman Kim of Hana on 26 November 2011

208. Mr Grayken then met with Chairman Kim of Hana on the morning of 26 November 2011.²⁰⁰

209. Mr Grayken gave the following account of the meeting in his testimony in the ICSID proceedings:

As it turned out, he spoke to the FSC
Chairman on the phone, and he called for a meeting
with me.
I met him the next day at the Peninsula Hotel
in London. It’s a private meeting, just the two of
us, and he told me that he had spoken to the FSC
Chairman about it, and that the price reduction was
acceptable, it was enough for the FSC to approve the
deal, and that they would do it if we would contract
for it.
I told him that we would do that, we shook
hands, and that was the end of the meeting, and I left.²⁰¹

210. Mr Grayken gave very similar testimony in the ICC proceedings:

The purpose of the meeting was
8 to discuss his conversation with the FSC Chairman. He
9 related to me that he had discussed the price reduction
10 with him and that, based on that, the FSC Chairman was
11 going to move to approve the deal. I clearly remember
12 that.
13 Q. You clearly remember him using those words?
14 A. I clearly remember him telling me that he had
15 spoke to the FSC Chairman, and the FSC Chairman was going
16 to approve the deal based on the price reduction. Yes. I
17 clearly remember that. We wouldn’t have shaken hands and
18 the deal would not proceeded had I not heard that.²⁰²

¹⁹⁸ ICC Transcript D4/P716 (Bae).

¹⁹⁹ ICSID Transcript D7/P1786-7 (Bae).

²⁰⁰ Exhibit C-049, Email from John Grayken to Mike Thomson, 26 November 2011.

²⁰¹ Exhibit C-124, ICSID Transcript, D4/P1157(Grayken).

²⁰² ICC Transcript D2/P288 (Grayken).

[...]

19 PRESIDENT DOUGLAS: I think the last question:
20 Given, again, everything you know now and with the benefit
21 of hindsight, do you think that Chairman Kim did actually
22 discuss the share price with the FSC and that the FSC did
23 give an indication that the reduction would be acceptable?
24 THE WITNESS: I'm certain of it. I'm certain of
25 it. I mean--again, he was desperate to get this deal done.
1 He needed to get this deal done for the reasons I've
2 already cited.
3 Had he lied to me and then they didn't approve
4 it, we never would have done business with him again. He
5 never would have had a chance to buy this bank. The stakes
6 were much too high for him. He knew what he needed to do.
7 He wanted to do it, too. He needed the assurance. He
8 needed that, and so did we, and that's what we got.²⁰³

211. Chairman Kim's account of his meeting with Mr Grayken on 26 November 2011 was very different. In the ICSID proceedings he testified:

6 A. On the 26th, in our conversation, I clearly
7 said, on the previous day, that I would try to get an
8 assurance, I will get an assurance, but the next day
9 when we had a meeting about the assurance, it was
10 mentioned as a means to decrease the price, and I was already satisfied
that the
11 price was decreased by \$500 million. So, the next day, since I didn't
12 really have a conversation with Chairman Kim [of the FSC]
13 specifically about the price at all, in my feeling, this is what I said. I
definitely did not say that I got an assurance. What I said the next day
was, in my
20 feeling, if he worked this way, then it would happen. That is what I
said. I don't know if Mr. Grayken took this to mean that I got an
assurance, but since I did not get any such assurance, I said, in my feeling,
if we do it this way, it can happen easily.²⁰⁴

212. Chairman Kim insisted in cross-examination in the ICC proceedings that all he told Mr Grayken was that the FSC Chairman had confirmed that the FSC would be able to deal with Hana's Application by the end of December 2011.²⁰⁵ He was asked:

23 Q. Chairman Kim, did you tell Mr. Grayken that the
24 FSC would approve the deal at the reduced price?
25 A. No, because Mr. Grayken at that time, his
1 interest was not about the price.²⁰⁶

²⁰³ ICC Transcript D2/314-5 (Grayken).

²⁰⁴ ICSID Transcript D7/P1731(Kim).

²⁰⁵ ICC Transcript D4/P659-60 (Chairman Kim).

²⁰⁶ ICC Transcript D4/P661-2 (Chairman Kim).

213. The Tribunal prefers Mr Grayken's evidence to Chairman Kim's evidence on this point. It is simply inconceivable, given all the water that had flowed under the bridge in respect of the KEB Transaction, that Mr Grayken would have parted on good terms with Chairman Kim on 26 November 2011 if Chairman Kim had not told Mr Grayken that the FSC Chairman had provided his assurance that Hana's Application would be approved if the price were to drop to KRW 11,900. Obtaining that assurance was the only reason for Chairman Kim to have had a conversation the prior evening with the FSC Chairman, and the communication of that assurance from the FSC Chairman was the only reason for Chairman Kim and Mr Grayken to have met on 26 November 2011.

D8 Subsequent events leading to the FSC's Approval of Hana's Application

214. On 30 November 2011, the lock-up period under the July Amended SPA expired. On the same day, Lone Star and Hana representatives met in Hong Kong.²⁰⁷ That meeting was not recorded.

215. An amended share purchase agreement was executed by the parties on 3 December 2011 (the *Amended December SPA*). The sales price was KRW 11,900 per share (which was approximately USD 3.5 billion).²⁰⁸

216. On 5 December 2011, Hana submitted a new application to the FSC on the basis of the Amended December SPA.²⁰⁹

217. On 29 December 2011, Senator Gramm wrote to Mr Grayken offering to talk to Chairman Kim of Hana:

John, I hope all is well with you. I think it would be helpful for me to talk to Chairman Kim. I need a better picture of what is happening in Korea. I have a good relationship with him and he might give me his real reading of what is going to happen and when. He also might share assurance he has been given.²¹⁰

²⁰⁷ Parties' Agreed Chronology.

²⁰⁸ Exhibit C-004, Amended and Restated Share Purchase Agreement Between Lone Star and Hana Financial Group, 3 December 2011.

²⁰⁹ Parties' Agreed Chronology.

²¹⁰ Exhibit C-089, Email from John Grayken to Phil Gramm, Ellis Short, and Michael Thomson, 30 December 2011.

218. Senator Gramm was thus clearly apprised of the fact that Chairman Kim had been given an assurance from the FSC Chairman; no doubt because Mr Grayken, or someone else at Lone Star, had told him about it.
219. On 27 January 2012, the FSC approved Hana's Application to incorporate KEB as its subsidiary²¹¹ and, on 9 February 2012, Lone Star and Hana closed the KEB Transaction.²¹²

D9 Events following the FSC's approval of Hana's Application

220. On 10 December 2012, Lone Star filed a Request for Arbitration against the Republic of Korea under the ICSID Arbitration Rules.²¹³
221. On 26 April 2013, KEB's shares were delisted from the market²¹⁴ and, on 1 September 2015, KEB and Hana merged to create KEB Hana Bank.²¹⁵
222. On 21 August 2016, Lone Star filed a Request for Arbitration against Hana under the ICC Arbitration Rules, thus commencing these proceedings.

D10 The Tribunal's conclusions on the evidence

223. The Tribunal has to decide between three different factual narratives. The first, as pleaded by Lone Star in the ICC proceedings, is that Hana's representatives pursued a strategy of securing a price reduction from Lone Star by using the FSC's delay in approving Hana's Application as a pretext in circumstances where the FSC was not actually insisting upon a price reduction to approve Hana's Application. Hana's representatives, according to Lone Star, deliberately misled Lone Star's representatives into believing that it was the FSC who required the price reduction.²¹⁶ The second narrative, as pleaded by Hana in the ICC proceedings, is the same as the first narrative save that Hana's representatives did not, according to Hana, ever mislead Lone Star's representatives about the FSC's position. In other words, in accordance with this second narrative, Hana never actually conveyed to Lone Star that the FSC was insisting on a price reduction.²¹⁷ The third narrative, which was not

²¹¹ Parties' Agreed Chronology.

²¹² Parties' Agreed Chronology.

²¹³ Exhibit C-005, LSF-KEB Holdings SCA and others v. Republic of Korea (ICSID Case No. ARB/12/37), "Case Details," available at <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/12/37>.

²¹⁴ Exhibit R-088, Summary of Corporation After KEB Delisting from Stock Market on 26 April 2013.

²¹⁵ Parties' Agreed Chronology.

²¹⁶ C's Statement of Claim, §§3-6.

²¹⁷ R's Statement of Defence, §§11-16.

pleaded by either party in the ICC proceedings, is that Hana's representatives correctly represented to Lone Star's representatives that a price reduction was necessary to secure the FSC's approval of Hana's Application because this was the FSC's actual position. It is this third narrative that Lone Star is relying upon in the ICSID proceedings against the Republic of Korea.²¹⁸

224. For the reasons that have been given by the Tribunal already and which will be developed further now, the Tribunal has concluded based upon the overwhelming circumstantial evidence that the third narrative accords with the truth.
225. Lone Star's witnesses, in cross-examination in both the ICSID and the ICC proceedings, gave consistent and unequivocal testimony in support of this third narrative. In the ICC proceedings, they did so in direct contradiction with Lone Star's pleaded case. The Tribunal does not consider that this was done unconsciously: Lone Star's witnesses when cross-examined simply refused to support a version of events that they considered, to this day, to be untrue.
226. Mr Grayken was adamant both in the ICSID²¹⁹ and the ICC proceedings²²⁰ that it was the FSC who has insisted upon a price reduction in order to give them cover for political reasons. He gave the following evidence in cross-examination in the ICC proceedings:

13 A. They were directing Hana. The FSC was directing
14 Hana. They were telling them how to negotiate.
15 Q. And you know that how?
16 A. Well, the people at Hana had told us that a
17 number of times. We knew that the FSC was withholding, had
18 been withholding approval of this deal for many years. We
19 knew that was the key in getting this bank sold.
20 The FSC was always controlling this Transaction.
21 That's obvious from the record.
22 Years had gone by where applications were pending
23 with banks that were qualified to buy this bank, and the
24 FSC had not acted.
25 Q. So, you're referring to the fact that the FSC had
1 delayed and not acted with respect to the Kookmin
2 Transaction; is that right?
3 A. And the HSBC Transaction.
4 Q. And the FSC had delayed and not acted on the HSBC
5 Transaction; correct?
6 A. That's correct.

²¹⁸ Claimant's letter to the Tribunal, 8 June 2018; Respondent's letter to the Tribunal, 11 June 2018.

²¹⁹ Exhibit C-124, ICSID Transcript, D4/P1125-6, D4/P1127, D4/P1137 (Grayken).

²²⁰ ICC Transcript D2/P271, D2/P272, D2/P273, D2/P299-300, D2/P302-3 (Grayken).

7 Q. So, this was over a period of many years that you
8 had this experience with the FSC; correct?
9 A. That's right.
10 Q. And, as a result of that experience, you formed
11 the belief that the FSC was delaying approval of these
12 sales for improper reasons; correct?
13 A. That's correct.
14 Q. And you had that belief before Hana ever even
15 came into the picture; right? Because we're talking about
16 events going back to 2007, 2006, 2008, Hana comes into the
17 picture in 2010; right?
18 A. That's right.
19 Q. So, this is a belief that you held before you had
20 heard anything from Hana; correct?
21 A. That's correct.²²¹

227. Mr Grayken testified that he maintains his belief, to this day, that the FSC would not have approved the KEB Transaction without the price reduction.²²²

3 ARBITRATOR LANDAU: So, as far as your
4 understanding goes, was there any prospect that the FSC
5 would have approved this, absent a reduction in price?
6 THE WITNESS: None.
7 ARBITRATOR LANDAU: And that's something which--
8 THE WITNESS: No way.²²³

[...]

1 PRESIDENT DOUGLAS: Just to make the position
2 absolutely clear, and given everything you know today about
3 the situation, do you think that the FSC would have
4 approved the Transaction without a price reduction?
5 THE WITNESS: No, I don't.²²⁴

228. In this sense he continues to believe that he made "*the right call*" in accepting the price reduction in order to get FSC approval.²²⁵

229. Mr Short's testimony in the ICC proceedings was also unequivocal:

4 Q. Mr. Short, as you sit here today, do you believe
5 that the FSC, in fact, did directly tell Hana Chairman Kim
6 to reduce the price?
7 A. Yes.²²⁶

²²¹ ICC Transcript D2/P257-8 (Grayken).
²²² ICC Transcript D2/P271 (Grayken).
²²³ ICC Transcript D2/P301 (Grayken).
²²⁴ ICC Transcript D2/P308 (Grayken).
²²⁵ ICC Transcript D2/P284 (Grayken).
²²⁶ ICC Transcript D2/P335 (Short).

230. Mr Thomson's evidence in cross-examination in the ICC proceedings was that he was convinced at the relevant time that the FSC was not approving the KEB Transaction for political reasons:

10 Q. Now, you mentioned that you were involved with
11 this KEB investment from the beginning all the way to the
12 bitter end. Lone Star acquired its shareholding in KEB in
13 2003; correct?

14 A. That's correct.

15 Q. And the first attempt to sell was to Kookmin Bank
16 in 2006; is that right?

17 A. That's correct, too.

18 Q. And after the sale to Kookmin failed, Lone Star
19 tried to sell its stake in KEB to HSBC in the 2007-2008
20 time period; is that right?

21 A. Correct.

22 Q. Now, both efforts to sell KEB first to Kookmin
23 and then to HSBC collapsed waiting for the FSC to approve
24 the Purchasers; correct?

25 A. Correct.

1 Q. And the problem, as you understood it at the
2 time, was that the FSC feared public criticism and
3 political push-back that they would face if they were to
4 approve a purchase of Lone Star's KEB Shares that resulted
5 in significant profits for Lone Star; is that right?

6 A. That's right.

7 Q. And you believed that this fear of public
8 criticism and political push-back had, in your words,
9 "completely paralyzed the FSC"; is that right?

10 A. Yes.

11 Q. You also believed that the FSC became afflicted,
12 if you will, with that same sort of paralysis in 2011 in
13 the context of Lone Star's attempts to sell its shares to
14 Hana; correct?

15 A. Yes, following the Supreme Court reversal of the
16 case.

17 Q. After the March 10, 2011, Supreme Court Decision;
18 correct?

19 A. Correct.²²⁷

231. Mr Thomson also testified that his understanding of the situation with the FSC was based not only on what Hana was communicating to him but also on information from Lone Star's independent advisors, which, as has already been detailed above, included the Korean law firm Kim & Chang (and a former Ambassador to the US in that law firm), a partner at the US law firm Akin & Gump and US Senator Gramm:

²²⁷ ICC Transcript D2/P360-1 (Thomson).

7 Q. Okay. So, you had other avenues of information
8 that were telling you that the FSC was unwilling to approve
9 Hana's Application for political reasons; right?

10 A. That's correct.

11 Q. Okay. And you also state in Paragraph 22 that,
12 of course, we also believed that the FSC had stalled the
13 HSBC sale for the same reasons; that is, the political
14 reasons. Correct?

15 A. That's right.

16 Q. So, you had this belief going back to 2008 that
17 the FSC was paralyzed by fear of public and political
18 opposition; right?

19 A. Correct.

20 Q. And we're now in 2011, and after the Supreme
21 Court Decision, this same paralysis has re-emerged; right?

22 A. Yes.

23 Q. And what you were hearing from Hana in 2011 about
24 the reasons for the FSC's delays was consistent with what
25 you already believed, which was that the FSC was stalling
1 for political reasons; right?

2 A. That's right.

3 Q. And it was also consistent from information that
4 you were obtaining from other independent sources?

5 A. It was consistent, yes.

6 Q. So, you were not relying solely on what Hana told
7 you about the FSC's actions and likely actions; correct?

8 A. Not solely, that's right.²²⁸

232. This evidence is important. Not only was the narrative that it was the FSC who was insisting upon a price reduction with Hana emphatically endorsed by Lone Star's witnesses against the interests of Lone Star itself in the ICC proceedings, the same version of events was corroborated at the relevant time by senior insiders who were providing independent advice to Lone Star. Further, that was the same narrative that Hana's representatives were representing to Lone Star throughout the relevant period and is also consistent with Hana's own internal analysis at the time. Finally, it was also the narrative that was being reported in the Korean press.

233. It is fair to record, nonetheless, that Mr Thomson was the only one of Lone Star's witnesses to say that his view of the reasons behind Hana's request for a reduction of the price had changed. But he was very careful to say that this view was based solely on the testimony of Hana's witnesses in the ICSID proceedings. And he was candid about his difficulty in accepting that version of events:

²²⁸ ICC Transcript D2/P370-1 (Thomson).

18 PRESIDENT DOUGLAS: But in your testimony in
19 relation to this point, you said that at that time you
20 weren't that surprised because you thought everything was
21 coordinated with the Government--

22 THE WITNESS: Yes.

23 PRESIDENT DOUGLAS: --I think were your words.

24 That's what you thought then.

25 What do you think now?

1 THE WITNESS: It wasn't so orchestrated. Based
2 on the testimony of the Hana officials in the ICSID
3 proceedings²²⁹

[...]

21 So, it's really--I still have a hard time

22 believing it, I will be honest with you because we were so

23 much of the view throughout, before Hana and through Hana,

24 that the Government itself was saying, you know, "We just

25 can't do this without some cover, something that gives us

1 some cover," as we've all testified about. So, I honestly

2 have a little bit--I have trouble letting go of that

3 notion, but the testimony is inconsistent with that.²³⁰

234. Hana's witnesses did not give consistent evidence on whether or not the impetus for seeking a price reduction from Lone Star came from the FSC. As the Tribunal has already surmised in relation to Chairman Kim's evidence, whilst he was unequivocal in the ICSID proceedings that price was never discussed explicitly or implicitly with the FSC, he conceded in the ICC proceedings that Hana's staff were having conversations with the FSC's staff in relation to the price of the KEB Transaction, and he also conceded that he had understood implicitly from the FSC Chairman that a price reduction was necessary to relieve the pressure on the FSC and that the FSC Chairman had understood implicitly from Chairman Kim that Hana had succeeded in obtaining a price reduction. The Tribunal finds that, on the balance of probabilities, it is more likely that Chairman Kim and the FSC Chairman had explicit discussions about the price of the KEB Transaction and that Hana was directed by the FSC to seek a price reduction in return for the FSC's approval of Hana's Application.
235. Moreover, Chairman Kim also testified that the FSC was unlikely to have approved Hana's Application for less than the reduction that Hana had proposed and that Lone Star had ultimately agreed. In response to a question from the Tribunal as to what would have happened if the price reduction had been USD 100 million, Chairman Kim stated:

20 THE WITNESS: So, rather than the FSC, you have to
21 look at the other stakeholders. I'm not just talking about

²²⁹ ICC Transcript D2/P425 (Thomson).

²³⁰ ICC Transcript D2/P426 (Thomson).

22 Hana, but also there is KEB and other civic groups,
 19 whether all these stakeholders, interested parties, it
 20 would be up to whether they can agree on it.
 21 But, once again, this is strictly my personal
 22 feeling. If you say \$100 million, I think that's about KRW
 23 500 per share, maybe less than KRW 500 per share. And so,
 24 with that nominal decrease of about 200 or 300, then I
 25 would think that that would actually trigger a fiercer
 1 opposition from the civic groups or from the political
 2 circle.
 3 So, my thoughts are that, so due to such
 4 pressure, it's my view that it would have been difficult
 5 for FSC to make an easy decision. Even at 11,900, the
 6 civic groups, the press--although they don't have any
 7 direct bearing on this Transaction--I mean, it's not a
 8 price that they are satisfied with.
 9 As I said yesterday, even for me, I couldn't
 10 actually walk out the front entrance door. The front foyer
 11 was always packed with demonstrators, so whenever I had to
 12 leave the premise, I would go behind--I would go below the
 13 basement floor and get in the car and go out the building.
 14 So, at the time, the whole environment was not a
 15 peaceful environment at all, as you would think today.²³¹

236. What this testimony establishes is that, in Chairman Kim's estimation, the FSC was beholden to external political pressure regarding the price of the KEB Shares, and would not have been prepared to approve Hana's Application unless that pressure could be alleviated by a substantial price reduction well beyond USD 100 million.

237. There is a further inference that the Tribunal draws from the Respondent's failure to disclose any documents that support its narrative that it was pursuing a price reduction purely for commercial reasons and independent of any direction from the FSC, despite receiving specific document requests from the Claimant to do so.²³² For instance, the Respondent maintains that Chairman Kim's letter of 10 November 2011 to Mr Grayken simply contained "*negotiation points*" and does not suggest that the FSC was requesting a price reduction.²³³ Not only does the express text of that letter appear to contradict this interpretation, but when the Respondent was asked to produce documents evidencing any internal discussions leading to the draft of this letter, none were found.²³⁴ It would be surprising if Hana really were pursuing a strategy to exploit the FSC's delay and secure a price reduction from Lone Star that this would not have been discussed internally given that Hana committed to writing

²³¹ ICC Transcript D4/P671-4 (Chairman Kim).

²³² See C's Reply, Appendix 2.

²³³ R's Statement of Defence, §130.

²³⁴ C's Reply, §77.

so many analytical memoranda at each stage of the process. Likewise, in relation to the August/September period, the Claimant requested “*documents that discuss Hana’s decision in approximately August or September to renegotiate the price of the share sale with Lone Star*”. The Respondent agreed to produce all the documents in its possession that were responsive to this request but ultimately produced only a one-page document discussing a press article that claimed the sales price was too high.²³⁵ If Hana really did hatch a plan in August/September to pursue a price reduction for purely commercial reasons with Lone Star, it is surprising that it does not have a single document in its possession that evidences that change in strategy.

238. The Tribunal is fortified in these conclusions by the fact that there does not appear to have been any regulatory justification for the FSC to withhold its approval of Hana’s Application by reference to the Stock Market Manipulation Case. This indeed was Hana’s view (and the view of its Korean legal counsel) and the view of Lone Star’s Korean legal counsel throughout the relevant period. The only credible explanation for the delay in approving Hana’s Application following the Supreme Court’s decision on 10 March 2011 until after Hana submitted a new Application on 5 December 2011 (with a price reduction) was that the FSC was, in fact, seeking a price reduction through Hana. The Supreme Court’s decision did not provide a regulatory justification for this delay, but it did galvanise political pressure upon the FSC to prevent Lone Star from exiting Korea under the terms of the Original SPA.
239. Hana’s Application was submitted in accordance with Article 16 of the FHCA²³⁶ and Article 12 of the Enforcement Decree of the FHCA.²³⁷ It is the latter that sets out the information that must be provided, and the information relates entirely to either Hana as the acquirer or KEB. It does not even specifically list the transactional documents that form the basis for the acquisition (here the SPA).
240. The factors that the FSC must consider in deciding whether to approve Hana’s Application so submitted are set out in Article 17 of the FHCA and Article 13 of the Enforcement Decree of the FHCA. These provisions read as follows:

Article 17 of the FHCA

²³⁵ C’s Reply, FN 288.

²³⁶ Exhibit CLA-008, Korean Financial Holding Companies Act (Law No. 10,361, as amended on June 8, 2010).

²³⁷ Exhibit CLA-009, Enforcement Decree to the Korean Financial Holding Companies Act (Presidential Decree No. 22,577, as amended on December 30, 2010).

(1) Any financial holding company that intends to obtain approval under Article 16 shall meet the following requirements:

1. The business plan of a company included as a subsidiary, etc. shall be appropriate and sound;

2. The financial standing and business management of such financial holding company and its subsidiary, etc. shall be sound;

3. The swap ratio of stocks shall be appropriate in the event that a company is included as a subsidiary, etc. through such stock swap.²³⁸

Article 13 of the Enforcement Decree of the FHCA

1. The business plan under Article 17(1) 1 of the Act shall meet each of the following requirements:

(1) The business plan is required to be appropriate for the continuous operation of business and maintenance of sound management of a financial holding company and company subject to incorporation, and the estimated financial statements and prospects for profits shall be feasible in light of the business plan;

(2) The method of procurement of funds, such as the money needed for advancement of the business plan, is required to be appropriate;

(3) The business plan must not violate acts and subordinate statutes and nor disrupt the sound order on the financial market;

(4) Where a foreign corporation to be incorporated as a subsidiary intends to control a lower-tier subsidiary or the foreign subsidiary intends to newly incorporate a lower-tier subsidiary, such lower-tier subsidiary must not be a domestic financial institution; and

(5) The business plan must not substantially restrict competition on relevant markets.

2. Detailed criteria for the soundness of financial standing and business management conditions under Article 17(1) 2 of the Act as mentioned in the following subparagraphs:

(1) The equity capital of a financial holding company, etc. and company subject to incorporation is required to meet the criteria for capital adequacy determined and announced by the Financial Services Commission under subparagraph 1 of Article 28; and

(2) The business management conditions of a financial holding company, etc. and company subject to incorporation are required to be sound as discovered from an assessment of soundness of business management of the financial holding company, etc. and company subject to incorporation

²³⁸

Exhibit CLA-008, Korean Financial Holding Companies Act, (Law No. 10,361, as amended on June 8, 2010).

conducted under conditions determined and announced by the Financial Services Commission

[...] ²³⁹

241. The FSC's inquiry is thus directed exclusively at the legal, financial and operational standing of the entity that is acquiring the shares in the financial institution. In this case that was Hana. And there was never any suggestion from the FSC or anyone else that Hana did not meet the requirements set out in the provisions as quoted above. Moreover, according to Article 19 of the Administrative Procedure Act²⁴⁰ and the Table for Processing Standards for Civil Applications²⁴¹ (adopted pursuant to the former Act), the FSC was obliged to process Hana's Application within 30 days, subject to a maximum extension of a further 30 days due to "*unavoidable causes*". Evidently the FSC did not comply with these deadlines in processing Hana's Application.
242. An entirely separate matter was Lone Star's eligibility as a "*shareholder with excess shareholding*" (i.e. a shareholder in a financial institution with more than ten percent of the shares). In accordance with the Enforcement Decree of the Banking Act, the FSC is required to assess on a regular basis whether a shareholder such as Lone Star meets certain requirements, which includes no record of punishment due to a violation of the finance-related laws and regulations within the past 5 years.²⁴²
243. It will be recalled that the FSC in essence declared, on 16 March 2011 (i.e. shortly after the Supreme Court's decision), that it would link its consideration of Hana's Application with its assessment of Lone Star's eligibility as a shareholder of KEB. That was confirmed by the FSC unequivocally on 12 May 2011. As there was no guilty verdict in respect of Lone Star at that point in time, that entailed waiting for the outcome of the KEB Card Case, which had been remanded to the Seoul High Court.
244. It may well be, as both Bae Kim & Lee²⁴³ (Hana's Korean counsel) and Kim & Chang²⁴⁴ (Lone Star's Korean counsel) opined at the relevant time, that it was not appropriate for the

²³⁹ Exhibit CLA-009, Enforcement Decree to the Korean Financial Holding Companies Act (Presidential Decree No. 22,577, as amended on December 30, 2010).

²⁴⁰ CLA-132, Administrative Procedure Act, 31 December 1996.

²⁴¹ CLA-133, Table for Processing Standards for Civil Applications.

²⁴² CLA-006, Enforcement Decree to the Korean Banking Act, "Requirements for Excess Holding of Shares by Shareholder," (Presidential Decree No. 17,717, as amended on November 15, 2010) (Excerpts).

²⁴³ Exhibit C-094, Bae Kim & Lee, Legal Opinion regarding Approval of Application for Incorporation of a Company as a Subsidiary under the Financial Holding Company Act, 20 March 2011.

²⁴⁴ Exhibit C-095, Kim & Chang, Legal Opinion regarding Approval of Application for Incorporation of a Company as a Subsidiary under the Financial Holding Company Act, 19 March 2011.

FSC to delay its approval of Hana's Application by linking it to the issue of Lone Star's eligibility as a shareholder of KEB. The Tribunal need not enter that debate. What is critical, however, is how the FSC then acted after the KEB Card Case had concluded, which was when Lone Star communicated its decision not to appeal the guilty verdict of the Seoul High Court's decision of 6 October 2011. The guilty verdict thus became final on 12 October 2011. The sanction that the FSC could then apply was an order to Lone Star to sell its shares in KEB. And that is exactly what Lone Star had been trying to do for a considerable period of time. After the FSC issued its sale order on 18 November 2011, it would have accorded with the very purpose of the sale order, which was obviously to compel Lone Star to relinquish its management powers over KEB, to approve Hana's Application so that Lone Star could dispose of its shares in KEB in accordance with the existing July Amended SPA. It is difficult, perhaps even impossible, to conceive of a *bona fide* regulatory reason for continuing to withhold its approval for Hana's Application at that point in time. The only proper inference that can be drawn is that the FSC was withholding its approval because it was under political pressure to ensure that there was a price reduction.

245. Lone Star's witnesses gave clear and consistent testimony that they considered the FSC's failure to approve Hana's Application after they had communicated their decision not to appeal the Seoul High Court's decision as a definitive sign that it was pursuing a price reduction. Mr Grayken's testimony was as follows:

20 PRESIDENT DOUGLAS: Can you recall at what point
21 in time in this process you became convinced that, for the
22 political reasons that you've discussed, you were going to
23 have to take a hit--in other words, you are going to have
24 to perhaps reduce the share price? At what point in time
25 in this continuum did you come to that view?

1 THE WITNESS: Really not until the end. I mean,
2 we were, I guess, naively hopeful that once we decided not
3 to appeal Paul Yoo's conviction that this pretense that
4 they were using for so long regarding the legal issues,
5 once that was gone, that--and we paid the appropriate fine
6 or did whatever we had to do, that they would approve that
7 deal. We were hopeful of that.

8 And, in fact, everybody was pretty sure once the
9 Supreme Court remanded it back to the High Court in March,
10 we were pretty sure--everybody was pretty sure that meant
11 it's going to get--there's going to be a conviction,
12 there's going to be a reversal of the acquittal. But we
13 didn't do anything. Hana didn't do anything, we didn't do
14 anything, because we were hopeful that if there was an
15 acquittal and we didn't appeal that they'd go ahead and

16 approve the deal. They'd say: "Okay, now we can approve
17 it. We'll fine them, and we'll approve the deal." But it
18 didn't--it didn't happen. They came back and wanted more.²⁴⁵

246. Lone Star's other witnesses had the same view. Mr Thomson testified that he expected the FSC to approve the KEB Transaction once the KEB Card Case had run its course. But once Lone Star had foregone any right to appeal and the Seoul High Court's decision was final:

2 [W]ithin two to three weeks later that the feedback we were
3 getting from all corners, really, was that, no, there was
4 going to be an insistence that the price be--that we be
5 punished in some way, and really the only way to do that is
6 to give us less money, so Hana was the vehicle for that to
7 reduce the price in the Contract.²⁴⁶

247. Mr Short testified to the same effect.²⁴⁷

248. Chairman Kim had a very different view. During his cross-examination in both the ICSID and the ICC proceedings, Chairman Kim testified that the critical factor during this same period from late October 2011 onwards was that it was no longer objectively possible to close the July Amended SPA by 30 November 2011, which was the end of the lock-out period. He testified that, given this new reality, his exchanges with Lone Star entered a different context, which was that of a "*typical M&A negotiation process*".²⁴⁸ The necessary assumption behind this new reality according to Chairman Kim was that Hana would have been prepared to walk away from the KEB Transaction after 30 November 2011 (as it would have been contractually entitled to do) and thus had leverage over Lone Star to negotiate a lower price in the lead up to that deadline.

249. The Tribunal does not accept that either party treated their exchanges during that period as a typical M&A negotiation. Hana is likely to have been quite desperate to close the deal. It had raised over USD 4 billion in debt and equity financing, which had been in place since February 2011.²⁴⁹ Hana was paying interest on the debt financing it had raised. Furthermore, Hana's internal memoranda had identified both the possibility of a significant

²⁴⁵ ICC Transcript D2/P31-35 (Grayken). See also: ICC Transcript D2/P301 (Grayken).

²⁴⁶ ICC Transcript D2/P394-5 (Thomson).

²⁴⁷ ICC Transcript D2/P341-4 (Short).

²⁴⁸ ICC Transcript D7/P586 (Chairman Kim).

²⁴⁹ Exhibit R-090, ICSID Transcript D6/P1639 (Chairman Kim).

drop in Hana's share price as well as systemic consequences for the entire Korean banking system if the KEB Transaction were to collapse.

250. Chairman Kim nonetheless testified that, due to positive market fluctuations, he could have managed the situation regarding Hana's exposure in respect of the USD 4 billion in debt and equity financing if the deal did not go through.²⁵⁰ Whether or not that is true, the Tribunal does not accept that Chairman Kim or Hana had any intention whatsoever of walking away from the KEB Transaction after the lock-up period under the July Amended SPA expired on 30 November 2011. There is no contemporaneous evidence to suggest otherwise. Moreover, Lone Star's witnesses testified that they were not concerned at all about Hana's commitment to the KEB Transaction at the relevant time. Mr Grayken's evidence in direct was as follows:

17 [Q.] At that time, were you concerned that if Lone
18 Star had not agreed to amend the SPA and reduce the price,
19 Hana would have walked away from the deal after the lock-up
20 period expired on November 30th?

21 A. No, I wasn't.

22 I knew how important this deal was to Hana.

23 Chairman Kim had told me several times that this was
24 transformative for Hana Bank, and this was going to be the
25 last deal that he did in a long line of M&A transactions.

1 He had told us numerous times that he was

2 prepared to close the bank at the original contract price.

3 And, of course, Hana had committed to their investors.

4 They'd issued debt. They'd issued equity. And so I was

5 quite confident that they wanted to close this deal.²⁵¹

251. Mr Short stated: "*I wasn't worried about Hana. We weren't even considering that they would walk away. They'd raised money in the capital markets.*"²⁵²

252. In conclusion, the Tribunal has found that the third narrative as described above accords with the truth: Hana's representatives correctly represented to Lone Star's representatives that a price reduction was necessary to secure the FSC's approval of Hana's Application because this was the FSC's actual position at the relevant time.

²⁵⁰ ICC Transcript D7/P559-60 (Chairman Kim).

²⁵¹ ICC Transcript, D2/P238-299 (Grayken).

²⁵² ICC Transcript D2/P340 (Short).

E THE CLAIMANT'S CLAIMS

E1 Introduction

253. The Claimant has advanced three claims for breach of Article 6.3.2 of the Original SPA and/or the July Amended SPA, namely: failure to use best efforts; failure to cooperate; and failure to engage in consultations. The Claimant has also advanced a further six claims based upon violations of the Korean Civil Code, namely: fraud (Article 110); duress (Article 110); tort for fraud and duress (Article 750); mistake (Article 109); unfair juridical act (Article 104); and obstruction of a contractual condition (Articles 148 and 150). Each claim will now be considered by the Tribunal in turn.

E2 Failure to use best efforts

254. Lone Star claims that Hana failed to use its “*best efforts*” to obtain the FSC’s approval of its Application in breach of Article 6.3.2 of the Original SPA.²⁵³ Article 6.3.2 reads:

Taking of Necessary Action. Each of the parties agrees to do or cause to be done all things required to be done by such party (and, in the case of the Seller, to use all reasonable efforts, including without limitation the exercise of its Voting and Procurement Rights, to cause the Company to do all things required to be done by the Company) under applicable Laws to consummate the Transactions as soon as reasonably practicable, Including using its best efforts to obtain all Required Regulatory Approvals applicable to it (and, in the case of the Seller, using all reasonable efforts, including without limitation the exercise of its Voting and Procurement Rights, to cause the Company to obtain the Company Required Regulatory Approvals), and to cooperate with one another and the Company in taking all necessary actions with respect to the foregoing. Each of the parties agrees that all requests and enquiries from any Governmental Authority which relate to Required Regulatory Approvals shall be dealt with by the parties in consultation with each other and each party shall promptly co-operate with such Governmental Authority and provide all necessary Information and assistance reasonably required by such Governmental Authority upon being requested to do so by another party or by the Company.²⁵⁴

255. According to the Claimant, the best efforts obligation in Article 6.3.2 of the Original SPA (which was reproduced in the July Amended SPA) is an obligation of means²⁵⁵ and “*Hana failed to exercise its best efforts when, rather than pressing the FSC to approve the existing deal in September,*

²⁵³ C’s Statement of Claim, §§147-170.

²⁵⁴ Exhibit C-001, Share Purchase Agreement Between Lone Star and Hana Financial Group, 25 November 2010.

²⁵⁵ C’s Statement of Claim, §150.

October, and November 2011, Hana instead, according to its sworn testimony, abandoned the original deal, stalled the FSC, and worked to force Lone Star to reduce the price.”²⁵⁶ In particular, Lone Star relied upon the testimony of Chairman Kim and Mr Bae in the ICSID proceedings: Chairman Kim confirmed that he did not ask the FSC to approve Hana’s Application under the terms of the July Amended SPA and Mr Bae testified that he never considered the possibility that the FSC would approve Hana’s Application based on the July Amended SPA.²⁵⁷ Moreover, Hana, according to the Claimant, “actively undermined the July Amended SPA when it affirmatively misled Lone Star into believing that FSC approval was contingent on a price reduction”²⁵⁸ and “affirmatively delayed the FSC approval”.²⁵⁹

256. The Respondent countered that the best efforts obligation did not, by virtue of the express language in Article 6.3.2 of the Original SPA or as a matter of Korean law, require Hana “to take steps beyond the necessary legal steps such as filing the approval application and responding to the FSC’s queries”²⁶⁰ and that, on this basis, Hana clearly discharged the obligation in Article 6.3.2.²⁶¹

257. The parties and their experts have debated at some length the precise scope of a “best efforts” clause by reference to the text of Article 6.3.2 and Korean law. The Tribunal need not resolve those issues. Even assuming that the Claimant’s broad interpretation of the best efforts clause is correct, this claim would still fail as the factual predicate for the claim is unsustainable.

258. At no point in time during the relevant period in 2011 or otherwise did Lone Star raise any complaint with Hana that it was failing to use its best efforts to obtain the FSC’s approval of its Application. Given that Lone Star was represented by a leading Korean law firm and a number of independent senior advisors and was in constant communication with Hana about the progress of its Application throughout the relevant time, it would be very surprising if Lone Star was oblivious to its rights under Article 6.3.2 or any acts or omissions on the part of Hana that might serve to undermine those rights.

259. The Claimant sought to answer this point as follows:

[...] Hana argues that Lone Star never complained previously that Hana’s attempts to obtain FSC approval were inadequate. This is wholly

²⁵⁶ C’s Statement of Claim, §147.

²⁵⁷ C’s Statement of Claim, §162.

²⁵⁸ C’s Statement of Claim, §163.

²⁵⁹ C’s Statement of Claim, §164.

²⁶⁰ R’s Rejoinder, §226.

²⁶¹ R’s Rejoinder, §236.

irrelevant... Hana's executives informed Lone Star at the time, based on their discussions with the FSC, that the FSC planned to withhold approval until Lone Star agreed to a price reduction to give the FSC political cover. Lone Star thus believed at the time that Hana was working diligently, as the SPA required, toward FSC approval. Only when Hana's executives testified years later, during the ICSID Arbitration, that their contemporaneous statements were false did Lone Star understand the extent of Hana's deception. The record reflects that clear causal chain.²⁶²

260. The Tribunal has already found that the factual premise of this submission—that the FSC was not withholding its approval to seek a price reduction—is incorrect. Lone Star had good reason to believe at the time that “*Hana was working diligently... toward FSC approval*”. Hana was doing exactly that: Hana was using its best efforts in circumstances where it was plain to Lone Star, Hana, Lone Star's counsel and advisors and the Korean press that the FSC would not approve Hana's Application without a price reduction. Indeed, Mr Thomson testified that if it were assumed that the FSC was requesting a price reduction through Hana, then it would follow that Hana was using its best efforts throughout the relevant time.²⁶³

261. The Tribunal has also found that Hana was desperate to ensure that the KEB Transaction would be concluded with Lone Star. The record shows that, following every relevant event that might impact upon the FSC's approval of Hana's Application, Hana's staff drafted detailed and extensive memoranda to assess that new event and determine whether any steps needed to be taken by Hana to move the application process forward. Mr Bae testified that, following the Seoul High Court's guilty verdict on 6 October 2011, Hana exerted efforts to ensure that FSC's next steps would be timely. For instance, a normal compliance order would give six months to take remedial action. Under Hana's influence, the FSC limited it to three days.²⁶⁴ When the FSC was debating the form of the sales order, Hana provided its legal analysis to ensure that it would not be a punitive order.²⁶⁵ The documentary record supports Mr Bae's testimony on the fact that Hana did use its best efforts throughout this period.

²⁶² C's Statement of Claim, §168.

²⁶³ ICC Transcript D2/P431-2 (Thomson). The Claimant conceded that Hana's mere act of asking for a renegotiation of the price could not amount to a breach of the best efforts clause: ICC Transcript D6/P994 (Carlson).

²⁶⁴ ICC Transcript D4/P701 (Bae).

²⁶⁵ ICC Transcript D4/P701 (Bae).

262. In conclusion, the Claimant's claim for breach of the best efforts obligation in Article 6.3.2 of the Original SPA and/or the July Amended SPA rests upon a factual premise that has been proven to be wrong. The claim must therefore be dismissed.²⁶⁶

E3 Failure to cooperate

263. The Claimant also claims that the Respondent failed to fulfil its obligation in Article 6.3.2 of the Original SPA to "*cooperate with [Lone Star] in taking all necessary actions with respect to*" the regulatory approval process.²⁶⁷ According to the Claimant:

Rather than cooperate with Lone Star in an effort to earn FSC approval, Hana, according to its executives' testimony in the ICSID Arbitration, intentionally deceived Lone Star into believing that the FSC had expressed to Hana that approval was only possible with a price reduction. Hana did so in order to secure a US\$ 500 million price reduction for itself. Under oath, Hana executives claimed that, despite what they had told Lone Star at the time, they had not communicated directly with the FSC and that their contemporaneous statements were instead part of a negotiation strategy to drive down the sales price. Lone Star would not have agreed to a price reduction had Hana not intentionally deceived Lone Star into believing that a price reduction was a condition to FSC approval, and that the FSC would approve based on the agreed price cut.²⁶⁸

264. Once again, the factual premise for this claim has been found by the Tribunal to be incorrect. There was no complaint by Lone Star at the relevant time in respect of Hana's level of co-

²⁶⁶ Mr. Born dissents from the dismissal of Claimant's claim for breach of Article 6.3.2's best efforts obligations. In his view, the actions of Hana and its Chairman throughout the course of 2011 reflected a desire, and entailed an effort, on the part of Hana to exploit the political circumstances and the FSC's approval processes for Hana's commercial benefit by encouraging governmental intervention to require a price reduction. In Mr. Born's view, although the Award is correct that the FSC ultimately insisted upon a price reduction, this insistence was not resisted, but was instead likely inspired and certainly later encouraged, by Hana. That inspiration and encouragement reflected Hana's (natural) commercial interest in a lower price, particularly in light of the drop in the price of KEB's shares, which was repeatedly noted both internally and externally by Hana. In Mr. Born's view, while it is correct that Hana worked (indeed, worked diligently) for approval of the sale, the essential point is that it did so while also seeking a price reduction as a condition of approval. In his view, that deliberate (and successful) effort to procure governmental intervention to alter the commercial terms of the SPA violated Article 6.3.2. In response to Mr. Born's dissent, the majority considers that the evidence demonstrates that Hana was the conduit for the FSC seeking a price reduction as a condition for its approval. There is no evidence that Hana inspired, procured or encouraged the FSC to take the position that its approval would be conditional upon a price reduction and this is consistent with both Lone Star's and Hana's contemporaneous appraisal that the consequences for Hana if the KEB Transaction were not to complete would be disastrous. Lone Star's witnesses testified that they would not have agreed to the price reduction unless it was objectively necessary to procure the FSC's consent to the KEB Transaction and that, to this day, they remain convinced that the price reduction was objectively necessary to achieve that. It follows that Hana could not have violated its best efforts obligation in Article 6.3.2 of the SPA in acting as the FSC's conduit in these circumstances: it did what it had to do to complete the KEB Transaction.

²⁶⁷ C's Statement of Claim, §171.

²⁶⁸ C's Statement of Claim, §171.

operation because both parties were proceeding under the correct basis that the FSC would not approve Hana's Application unless there were a price reduction. There was no deception as is asserted in respect of this claim. There was instead full co-operation between Lone Star and Hana towards their mutually-shared objective, which was for the FSC to approve Hana's Application. The Claimant conceded that, on the assumption that the FSC was directing Hana to reduce the price of the KEB Shares, "*it had no basis at the time to complain about Hana's actions*".²⁶⁹ It has no basis to complain now either given the factual conclusions that the Tribunal has drawn. This claim must also be dismissed.

E4 Failure to engage in consultations

265. The Claimant advances a further claim for breach of Article 6.3.2 of the Original SPA in respect of Hana's obligation to deal with "*all requests and enquiries from any Governmental Authority which relate to Required Regulatory Approvals... in consultation with [Lone Star]*".²⁷⁰

266. The Claimant makes a general complaint and a more specific complaint in respect of Hana's alleged lack of consultation. The general complaint is pleaded as follows:

First and foremost, there could be no adequate consultation unless Hana faithfully conveyed what the FSC had said in its meetings and communications with Hana. The parties could not deliberate over any given FSC request if Hana did not provide Lone Star with a truthful account of Hana's and the FSC's analysis of the situation. Instead, Hana's executives lied.²⁷¹

267. The Tribunal has found that, contrary to this submission, Hana's representatives had correctly conveyed to Lone Star that the FSC, due to political pressure, could not be expected to approve Hana's Application without a price reduction. The factual premise for this general complaint is therefore wrong.

268. The specific complaint relates to Hana's filing of a status report upon the request of the FSC on 14 November 2011.²⁷² The Respondent does not dispute that Hana did not consult with Lone Star before submitting it to the FSC.²⁷³ It was, however, provided to Lone Star the

²⁶⁹ C's Statement of Claim, §179.

²⁷⁰ Exhibit C-001, Share Purchase Agreement Between Lone Star and Hana Financial Group, 25 November 2010.

²⁷¹ C's Statement of Claim, §183.

²⁷² C's Statement of Claim, §184.

²⁷³ R's Rejoinder, §266.

same day and Lone Star never raised an issue about its contents with Hana thereafter or complained that it was not consulted.

269. The Tribunal has found that the FSC was directing Hana to secure a reduction of the price for the KEB Shares before it gave its approval and that the FSC's request to Hana around 8-9 November 2011 for a status report was towards that purpose. The FSC is likely to have wanted confirmation in writing that Hana would seek to reduce the price before the FSC issued its sale order. Mr Bae is likely to have told the FSC that it would provide the status report after it had communicated the necessity of reducing the price with Lone Star at their scheduled meeting on 11 November 2011. This is consistent with the documentary evidence. On 10 November 2011, Chairman Kim wrote to Mr Grayken with exactly that message (albeit he was careful not to write explicitly that the request had come from the FSC). At the meeting between Mr Short and Mr Byounggho Kim on 11 November 2011, which was secretly recorded, Mr Byounggho Kim left no doubt as to the source of the request to reduce the price: "*BYOUNGHO: Ab. You once told me that it's a negotiation between Lone Star and regulators, not with Hana. I think that's right. At the end of the day, we have to negotiate with the regulators.*"²⁷⁴

270. It follows that the status report that Hana filed on 14 November 2011 was accurate:

Lone Star has been notified that, in view of the political climate in Korea, the changes to the legal status of Lone Star after the execution of the SPA Amendment and the recent changes to the environment of the financial markets, there is a need to change some of the terms and conditions of the SPA (including the proposal to reduce the existing purchase price), and HFG is promoting discussions thereon.²⁷⁵

271. Hana was no doubt directed by the FSC to seek to reduce the purchase price, and that accorded with Lone Star's firm belief at the time and to the present day. It was incumbent upon Hana under the July Amended SPA to procure the FSC's approval of its Application and Hana was convinced, for objectively sound reasons, that the FSC's approval would only be forthcoming if there were to be a price reduction. Lone Star's witnesses themselves testified that they had understood that the FSC required a price reduction to "*punish*" Lone Star not long after the Seoul High Court had rendered its guilty verdict. That was on 6 October 2011. Even if, *arguendo*, Hana was obliged to consult with Lone Star on a draft of

²⁷⁴ Exhibit C-008, p. 16, Transcript of Meeting in London Between Ellis Short and Byounggho Kim (corrected), 11 November 2011.

²⁷⁵ Exhibit C-012, Hana Financial Group, Report to FSC on Status of KEB Share Purchase Agreement.

the status report before it was submitted to the FSC in order to act consistently with Article 6.3.2 of the July Amended SPA, that failure has caused Lone Star no conceivable loss: the status report simply records that Hana had transmitted what is likely to have been the FSC's instruction to Lone Star. It is quite impossible to conclude from the evidence that the FSC would not have pursued a price reduction but for the statement in Hana's status report.

272. The Tribunal concludes that there was no breach of the obligation to consult with Lone Star.

E5 Fraud

273. Lone Star claims that Hana induced it to lower the price of the KEB Shares through fraud in violation of Article 110(1) of the Korean Civil Code,²⁷⁶ which reads: "*A declaration of intent obtained through fraud or duress is voidable.*"²⁷⁷ Lone Star's claim for fraud is particularised as follows:

[...] Lone Star declared an intent in the July Amended SPA to sell its KEB shares at a price of KRW 13,390 per share (a total of approximately KRW 4.405 trillion). Hana declared its intent to purchase the shares at that price. This meeting of the minds created a juridical act, the July Amended SPA. After agreeing to this contract in July, however, Hana's executives, according to their later testimony, attempted to deceive Lone Star into believing that the FSC would withhold its approval (blocking the sale of shares) unless Lone Star reduced the price. This led to another contract, the Amended and Restated SPA in December 2011, wherein Lone Star declared an intent to sell its shares for KRW 11,900 per share (a total of approximately KRW 3.9 trillion) and Hana declared its intent to purchase the shares at that price. Lone Star formed its declaration of intent based on its belief that Hana's representations were true—that the FSC simply would not allow Lone Star to sell its shares at the higher price set in July.²⁷⁸

274. As these particulars of the claim demonstrate, the deception that is pleaded by Lone Star is that the FSC would withhold its approval unless Lone Star reduced the price of the KEB Shares. As the Tribunal has found, however, this was not a deception but the truth. In this respect, Mr Grayken's testimony is critical as he was and remains the Chairman of Lone Star and thus his evidence sheds the most direct light on Lone Star's corporate mind at the time. He was, in his own words, the ultimate decision-maker in respect of the KEB Transaction.²⁷⁹

²⁷⁶ C's Statement of Claim, §§196-225.

²⁷⁷ Exhibit CLA-003, Korean Civil Code (Excerpts) (corrected v2), 9 August 2009.

²⁷⁸ C's Statement of Claim, §196.

²⁷⁹ ICC Transcript D2/P245 (Grayken).

Mr Grayken's evidence was that he was not deceived by Hana: he emphatically believed then and continues to believe emphatically now that the FSC would not have approved Hana's Application without a price reduction. Mr Grayken stated that he "*made the right call*" by agreeing to reduce the price of the KEB Shares to facilitate the FSC's approval of Hana's Application.

275. Lone Star asserts, more specifically, that Hana engaged in four different deceptive acts:

In this case, Hana committed deceptive acts in 2011 when it—falsely, according to the Hana executives' later testimony—(1) told Lone Star that it was in regular communication with the FSC; (2) communicated a message that the FSC would only approve Hana's application if Lone Star reduced the price; (3) promised Lone Star that Hana's Chairman would seek an express assurance from the FSC Chairman that the FSC would approve the conditionally agreed lower price; and (4) told Lone Star that that assurance had been obtained. Individually and in concert, Hana's statements created in Lone Star a "mistaken belief" that the FSC had told Hana that a price reduction was necessary before the FSC would allow the deal to close.²⁸⁰

276. The Tribunal has found that each of these representations was true.²⁸¹ It follows that there was no deception on the part of Hana and Lone Star's claim for fraud under Article 110(1) of the Korean Civil Code must be dismissed.

277. Lone Star has additionally claimed fraud under a separate provision of the Korean Civil Code, namely in tort under Article 750:²⁸² "*Any person who causes loss to or inflicts injury on another person by an unlawful act, intentionally or negligently, shall make compensation for damages arising therefrom.*"²⁸³ According to Lone Star, Hana's "*fraudulent statements... constitute wrongful acts giving rise to tort liability*".²⁸⁴ This claim is, therefore, parasitical upon Lone Star's allegations of fraud that have been dealt with and rejected already. Lone Star's additional claim under Article 750 of the Civil Code is also dismissed.

E6 Duress

278. Lone Star claims that Hana induced it to reduce the price of the KEB Shares by threatening that the KEB Transaction would not close without a price reduction.²⁸⁵ According to Lone

²⁸⁰ C's Statement of Claim, §203.

²⁸¹ See, *inter alia*, §§179, 189, 191, 193, 196, 197, 205, 213, 232, 234, 236, 237 of this Final Award.

²⁸² C's Statement of Claim, §§226-230.

²⁸³ Exhibit CLA-003, Korean Civil Code (Excerpts) (corrected v2), 9 August 2009.

²⁸⁴ C's Statement of Claim, §227.

²⁸⁵ C's Statement of Claim, §§231-248.

Star, this constitutes duress under Article 110(1): “*A declaration of intent obtained through fraud or duress is voidable.*”²⁸⁶ The particulars of this claim are as follows:

Here, Lone Star’s December 2011 declaration of intent to sell its KEB shares to Hana at a reduced price of KRW 11,900 per share was made only through duress. The July Amended SPA obligated Hana to use its “best efforts” to achieve FSC approval promptly. Nevertheless, Hana took a series of actions that delayed the FSC approval process and threatened to push it beyond the November 30 lock-up expiration in order to increase pressure on Lone Star to accept a reduced price. In that context, Hana also told Lone Star that the FSC would not approve Hana’s application at the July price and would instead delay (or even take action against Hana) to extend the review process. Hana’s delay tactics and threats that the FSC would not approve Hana’s application at the existing sales price put Lone Star under duress. Faced with no choice, Lone Star agreed to the price reduction. Lone Star’s declaration of intent that formed part of the Amended and Restated SPA is therefore voidable for duress.²⁸⁷

279. Hana committed an act of duress, in the Claimant’s submission, “*when it threatened Lone Star that the sale of the KEB shares could not occur unless Lone Star agreed to a price reduction*”.²⁸⁸ The Tribunal has found, however, that far from being a threat, this was the reality that was accurately communicated to Lone Star not only by Hana but also by Lone Star’s legal counsel in Korea, its other independent advisors and by the Korean press. Mr Grayken testified that, even with the benefit of hindsight, he would have still agreed to the price reduction because that was the only way to secure the FSC’s approval for Hana’s Application. That testimony from Lone Star’s Chairman is fatal to the claim of duress. It follows that there was no act of duress on the part of Hana and Lone Star’s claim under Article 110(1) of the Civil Code must be dismissed.
280. Lone Star’s related claim under Article 750 of the Korean Civil Code in tort²⁸⁹ must also be rejected on the same basis. The unlawful act is said by the Claimant to be Hana’s threat that the FSC would not approve Hana’s Application without a price reduction.²⁹⁰ But as the Tribunal has found, Hana’s position was not a threat based upon a falsehood; it was the reality as both parties clearly understood at the time.

²⁸⁶ Exhibit CLA-003, Korean Civil Code (Excerpts) (corrected v2), 9 August 2009.

²⁸⁷ C’s Statement of Claim, §§232.

²⁸⁸ C’s Statement of Claim, §§236.

²⁸⁹ C’s Statement of Claim, §§249-252.

²⁹⁰ C’s Statement of Claim, §250.

E7 Mistake

281. Lone Star claims that Hana induced it to lower the price of the KEB Shares through mistake such that Lone Star may void the December Amended SPA.²⁹¹ The claim is founded upon Article 109(1) of the Korean Civil Code, which reads:

A declaration of intent may be voidable if made under a mistake in regard to a material element of the juridical act. If, however, there has been gross negligence on the part of the declarant, it shall not be voidable.²⁹²

282. The particulars of the mistake are claimed by Lone Star to be as follows:

As in the above claims based on fraud and duress, the declaration of intent at issue is Lone Star's agreement to reduce the sales price for its KEB shares from KRW 13,390 to KRW 11,900 in the December Amended and Restated SPA. Lone Star entered into this agreement under the mistaken belief that the FSC had told Hana that the price reduction was necessary to give the FSC the political cover to approve Hana's application to purchase the KEB shares, and that Hana could and did obtain an FSC assurance that the approval would follow from the price reduction. Hana later testified under oath that, contrary to the statements it made to Lone Star at the time, the FSC had made no such request to Hana and had given no such assurance. Crediting Hana's testimony as truthful, then Lone Star entered into the Amended and Restated SPA based on a mistaken belief and the agreement is therefore voidable.²⁹³

283. Lone Star's claim for mistake must fail for the same reason as its claim for fraud and duress: the factual predicate of the claim has been proven to be incorrect. There was no mistake: a price reduction was necessary to give the FSC the political cover to approve Hana's Application and Hana did obtain the FSC's assurance that approval would follow from the price reduction. The Tribunal, therefore, rejects this claim.

E8 Unfair juridical act

284. Lone Star claims that the December Amended SPA with the lower price for the KEB Shares constituted an "*unfair juridical act*" due to Lone Star's distress.²⁹⁴ This claim is based on Article 104 of the Korean Civil Code, which reads: "*A juridical act that is manifestly lacking in fairness due to the distress, rashness, or inexperience of a party shall be null and void.*"²⁹⁵ Article 104 is linked

²⁹¹ C's Statement of Claim, §§253-264.

²⁹² Exhibit CLA-003, Korean Civil Code (Excerpts) (corrected v2), 9 August 2009.

²⁹³ C's Statement of Claim, §253.

²⁹⁴ C's Statement of Claim, §§265-280.

²⁹⁵ Exhibit CLA-003, Korean Civil Code (Excerpts) (corrected v2), 9 August 2009.

to Article 103, which provides: “*A juridical act that is contrary to good morals and other social order shall be null and void.*”²⁹⁶

285. It is important to place Articles 103 and 104 of the Korean Civil Code in their proper legal context. A juridical act that violates Article 104 is void *ab initio* and cannot be validated by post facto ratification by the victim.²⁹⁷ This stands in contrast with Article 110(1) in relation to fraud or duress, where the victim can affirm the juridical act as it is “*voidable*”. This difference is explicable because Articles 103 and 104 of the Korean Civil Code are concerned with acts that violate the social order. The interests of society might be said to trump the personal interests of the parties in this instance such that the principle of party autonomy is relegated.
286. There are three elements to a claim that an unfair judicial act is null and void on the basis of a party’s distress. The first is that one of the parties must have been in a state of distress. The second is that the other party must have knowingly taken advantage of that state of distress. The third is that there must have been a significant disparity between the benefit that the party in distress received and the benefit that the party in distress conferred.²⁹⁸
287. The first element is said to be the “*subjective element*”.²⁹⁹ According to the Korean Supreme Court, it must be determined, based on the totality of circumstances, whether the party was in a state of distress by taking into account: (i) the parties’ respective social standing and relationship; (ii) the extent of exigency faced by the injured party; (iii) the circumstances of the contractual negotiations and the benefits obtained from the transaction by the injured party; and (iv) whether there was a meaningful alternative to achieve the injured party’s goal in the transaction.³⁰⁰
288. The third element is said to be the “*objective element*”. According to the Supreme Court, “*significant disparity*” “*shall be determined based on the socially accepted norms of the general public in each specific and individual case. In making such determination, the degree of the injured party’s distress,*

²⁹⁶ Exhibit CLA-003, Korean Civil Code (Excerpts) (corrected v2), 9 August 2009.

²⁹⁷ Exhibit RLA-014, Jin Su Yune & Dong Jin Lee, Re Article 104, in COMMENTARIES ON CIVIL LAW, GENERAL PROVISIONS OF CIVIL CODE (2) 444, August 2010.

²⁹⁸ C’s Statement of Claim, §266.

²⁹⁹ RLA-006, Korean Supreme Court Judgment, Case No. 2000Da 54406, 4 September 2002. The Claimant’s expert, Justice Park, agreed with the characterisation of the first and third elements as the “*subjective*” and “*objective*” elements based upon this Supreme Court decision: ICC Transcript D5/P855 (Park).

³⁰⁰ CLA-056, Supreme Court Judgment, Case No. 2009Da50308, 15 July 2010; CER-002, First Expert Report Park, §33.

rashness or inexperience must be taken into consideration and must be based on the objective value of the transaction rather than a party's subjective value'.³⁰¹

289. The Tribunal will start with the third requirement of significant disparity. The importance of this requirement is evident: if there were not a threshold of a significant disparity, then the Korean courts would be flooded with claims to nullify hard bargains—in other words, contracts in which one party succeeded in leveraging its bargaining power to obtain a price that is higher or lower than what could be expected to be negotiated between two parties with equal bargaining power in an open market transaction. A leading commentary on the Korean Civil Code, co-authored by the Claimant's expert, thus suggests that a significant disparity might occur under Article 104 where the price is more than twice or less than half of the market price.³⁰²
290. The Respondent has cited a Supreme Court judgment in which there was a refusal to find a significant disparity between benefits exchanged where the assignee of a repurchase right for a property worth KRW 2,196,800 paid only half of the value—KRW 1,198,400.³⁰³ The Claimant conceded that “[i]n many cases, the comparison of the benefits exchanged is framed by the contract terms”³⁰⁴ and gave an example from one of the hold out cases where the developer was forced to purchase land for KRW 1.8 billion which the landowners had recently purchased for KRW 380 million.³⁰⁵ The Claimant's experts did not, however, give any examples from the Korean case law where the disparity was outside the range of more than twice or less than half of the market price. Indeed, the Claimant's expert, Professor Yune, accepted that there was no decision of the Korean courts where the disparity was outside this range “to date”.³⁰⁶
291. The Claimant instead invited the Tribunal to take an approach that did not simply compare the price of the KEB Shares as fixed in the July Amended SPA with the price in the December Amended SPA³⁰⁷ or, as was the Respondent's primary case, to compare the market value of the KEB Shares at the time the December Amended SPA was executed

³⁰¹ CLA-056, Supreme Court Judgment, Case No. 2009Da50308, 15 July 2010; CER-002, First Expert Report Park, §46.

³⁰² RLA-014, Jin Su Yune & Dong Jin Lee, Re Article 104, in COMMENTARIES ON CIVIL LAW, GENERAL PROVISIONS OF CIVIL CODE (2) 444, August 2010.

³⁰³ RLA-030, Supreme Court Judgment, Case No. 91Da 10732, 12 November 1991; R's Rejoinder, §357.

³⁰⁴ C's Statement of Claim, §277.

³⁰⁵ CLA-056, Supreme Court Judgment, Case No. 2009Da50308, 15 July 2010.

³⁰⁶ ICC Transcript D5/P785-6 (Yune).

³⁰⁷ C's Statement of Claim, §277.

with that contractual price.³⁰⁸ If the first measure were to be taken, then the disparity would amount to no more than 12%.³⁰⁹ If the second measure—then, according to the Respondent’s expert Mr Flower—the contractual price under the December Amended SPA was higher than the market price for the KEB Shares at that time (even taking into account a control premium of 30%).³¹⁰ The Claimant does not submit that there was a significant disparity if either of those measures were to be taken.

292. Instead, according to the Claimant, the disparity is “*between the US\$ 500 million price reduction benefit received by Hana and the value of the promise and assurance that Lone Star exchanged for that price reduction*”.³¹¹ The Claimant then submits that the value of the promise and assurance was nothing because “*Lone Star believed it was trading the US\$ 500 million price reduction for FSC approval*”.³¹² The Claimant concludes: “*An empty promise in exchange for a half billion dollar price reduction is clearly a significant disparity giving rise to an unfair judicial act.*”³¹³
293. Whilst it is not in dispute that the test for a significant disparity is not to be resolved by a mathematical calculation but rather must be determined based on a comprehensive review of the benefits exchanged through the overall transaction,³¹⁴ the Tribunal cannot accept the Claimant’s submission for two reasons.
294. First, the Claimant’s approach essentially extricates one element of the value exchanged in the KEB Transaction and suppresses the others. If this approach were to be generalised it would allow a party to identify one element of the price that was ultimately paid or withheld for the overall transaction and to claim that no consideration was given by the counterparty for that element. The difference would always be between the quantum of that element and zero. The Claimant’s approach sets up the differential between USD 500 million and zero, which of course is a significant disparity, but comes at the cost of making the test under Article 104 completely unworkable. It is thus not surprising that the Claimant has been unable to cite examples in the Korean case law of such an approach.
295. The second reason why the Tribunal cannot accept the Claimant’s submission is because, once again, its factual predicate is false. The Tribunal has found on the evidence that Lone

³⁰⁸ R’s Rejoinder, §360.

³⁰⁹ R’s Rejoinder, §361.

³¹⁰ RER-004, p. 36, First Expert Report Flower.

³¹¹ C’s Statement of Claim, §277.

³¹² C’s Statement of Claim, §278.

³¹³ C’s Statement of Claim, §278.

³¹⁴ C’s Statement of Claim, §276; C’s Reply, §347; R’s Rejoinder, §353.

Star did receive something in consideration for its agreement to reduce the price for the KEB Shares: the FSC's approval of Hana's Application, which was a condition precedent for closing the KEB Transaction. This chimes with the testimony of Lone Star's witnesses. Mr Grayken's evidence was that the benefit that he relinquished by agreeing to the price reduction was essentially money well spent because he is convinced to this day that the FSC would not have approved Hana's Application without the price reduction.

296. The Tribunal cannot, however, come to a conclusive view as to whether the full extent of the USD 500 million price reduction was necessary to achieve the purpose for which it was agreed. In other words, would the FSC have approved Hana's Application if the price reduction was lower? The Tribunal has been able to conclude based on the overwhelming circumstantial evidence that a price reduction was being discussed between the FSC and Hana at the FSC's insistence. But there is no direct evidence of what price reduction was requested by the FSC to alleviate the political pressure that the FSC was under before it could approve Hana's Application. It will be recalled that Chairman Kim was asked whether USD 100 million would have been enough and he answered in the negative and then listed the various political factors that would have made such a lesser reduction very difficult for the FSC in his "*personal opinion*". On the other hand, Lone Star was in a privileged position to take the temperature as to what sort of reduction would be acceptable as well. It had access to a large number of independent consultants with relationships with senior officials and politicians in Korea who were able to advise on what was necessary to deal with the political obstacle to its exit from KEB. If Mr Grayken had thought that a price reduction of significantly less than USD 500 million would have been sufficient to win the FSC's approval, then the meeting of 25 November 2011 between Mr Grayken and Chairman Kim (and others) would have concluded differently. Mr Grayken would have made a counter-offer to Chairman Kim for a lower price reduction for Chairman Kim to have put to the FSC Chairman the next day. Apart from being an acute businessman with decades of experience, Mr Grayken also has fiduciary obligations to the investors of Lone Star, as he pointed out to Chairman Kim during the 25 November 2011 meeting. If his advisors were telling him that there was a chance that the FSC would approve Hana's Application even if the price reduction were to be significantly less, then the Tribunal has no doubt that Mr Grayken would have made a counter-offer to Chairman Kim. The pressure on Lone Star to close the KEB Transaction was not of such a magnitude in November 2011 that Lone Star could not have afforded another few days or a week for a counter-offer to be transmitted to the FSC via Hana and for an answer to be given.

297. There is no evidence that Hana added its own premium to the price reduction that the FSC had required to allow the KEB Transaction to close. And even if there were such evidence, a claim under Article 104 would not provide a mechanism to claw back that premium from Hana. It is not the function of Article 104 to allow a court or tribunal to second guess whether a party got complete value for its money; Article 104 provides a means to intervene when there is a significant disparity in that value. Article 104 is a blunt instrument for nullifying juridical acts that violate good morals and the social order in circumstances where, *inter alia*, a party was in a state of distress.
298. Looking at the overall KEB Transaction as the Tribunal is required to do, Lone Star agreed to a 12% price reduction in the December Amended SPA as compared with the July Amended SPA. The price in the December Amended SPA was KRW 11,900 per share; the publicly traded price the day before that SPA was executed was KRW 8,400.³¹⁵ Given these parameters, there is simply no basis for concluding that there was a significant disparity between the benefit that Lone Star received from Hana and the benefit that Lone Star conferred.
299. The Tribunal's ruling on the objective element of a significant disparity means that the question of whether the subjective element is satisfied is moot. The Tribunal does, however, wish to state its views briefly on whether or not Lone Star was in a state of distress for the purposes of Article 104 of the Civil Code. A leading commentary to the Civil Code, co-authored by the Claimant's expert in these proceedings, gives the following examples of when financial distress has been found by the Korean courts to amount to distress under Article 104:

Examples for the first case are; (i) borrower was in need to procure hospital expense for his wife or father, or for his children school fees, (ii) an auction case was proceeding for the real property at the time of real property sale and purchase agreement, and seller was a homeless beggar without a job while putting her 3 children in an orphanage after her husband passed away, (iii) settlement was concluded within 1 week at an amount less than 1/8 of what the victim could have received while she was in financial, mental distress by losing her husband by accident, (iv) check issued by representative director was bounced due to the failure in procuring bank loan, etc.³¹⁶

³¹⁵ R's Rejoinder, §360.

³¹⁶ Exhibit RLA-014, Jin Su Yune & Dong Jin Lee, Re Article 104, in COMMENTARIES ON CIVIL LAW, GENERAL PROVISIONS OF CIVIL CODE (2) 444, August 2010.

300. The commentary continues:

On the other hand, the court did not acknowledge distress even when plaintiff was in need of business funds from business failure, unless there were special circumstances such as plaintiff and his family was at the point of starving or dying because of lack of treatment for illness or was experiencing difficulty in procuring children education expense, etc. Also, it was ruled that it cannot be deemed plaintiff was in distress even if his family was ruined, if he had several other real properties as asset.³¹⁷

301. Unlike all the Korean cases that the parties cited to the Tribunal involving commercial transactions, what was at stake for Lone Star was not the possibility of abandoning its investment or even failing to recuperate its initial capital outlay for the KEB Shares. What was at stake was the level of profits that Lone Star was going to make on its investment. That is a relevant factor in determining whether or not Lone Star was acting in a state of distress. Moreover, Hana had more to lose if the KEB Transaction failed than did Lone Star. Hana had put in place financing to the tune of USD 4 billion—enough to close the KEB Transaction at the price in the Original SPA—by February 2011 and had been incurring interest costs since then. It consistently identified the risk of its share price plummeting and its financial stability being threatened if the KEB Transaction did not close in its internal assessment of the consequences of the FSC’s continuing failure to approve its Application. If there was one thing that Lone Star’s witnesses were not concerned about during the critical months of October and November 2011 it was that Hana might walk away from the KEB Transaction. Lone Star’s position was less precarious. The Claimant maintains that, following the FSC’s sales order, Lone Star had six months to sell the KEB Shares and, if the deal with Hana collapsed, the only possibility would have been a sale on the open market.³¹⁸ If this were the only possibility, then Lone Star would undoubtedly have suffered losses in comparison with the price it was entitled to receive from Hana under the July Amended SPA. But that would have been a loss of profits, not an existential threat to Lone Star’s investment in Korea or to Lone Star itself. Moreover, Lone Star’s witnesses were not as bleak about the options available to Lone Star at the time. After Hana’s representatives had left the meeting on 21 November 2011, a discussion ensued among Messrs Grayken, Short and Thomson about other options if the deal with Hana fell through. A “*plan C*” involving a return swap with Nomura was mentioned so that Lone Star would formally no longer be the registered shareholder for the KEB Shares but, it appears, still

³¹⁷ Exhibit RLA-014, Jin Su Yune & Dong Jin Lee, Re Article 104, in COMMENTARIES ON CIVIL LAW, GENERAL PROVISIONS OF CIVIL CODE (2) 444, August 2010.

³¹⁸ ICC Transcript D6/P958 (Alexandrov).

retain some control. And the strategy was to delay any final resolution with Hana until February 2012 if the FSC/Hana could not agree on an acceptable price reduction to ramp up the pressure on Hana further. There was also a joke about voting through a large dividend at KEB if Lone Star was still on the records as a shareholder.³¹⁹ This was not the conversation of individuals in a state of distress.³²⁰

E9 Obstruction of fulfilment of contractual condition

302. Lone Star claims that Hana breached Articles 148 and 150 of the Korean Civil Code by obstructing the FSC approval process, which was a necessary condition to the closing of the KEB Transaction.³²¹ Articles 148 and 150 read:

Neither party to a juristic act subject to a condition shall, during the pendency of the condition, do anything to impair the benefit which the other party might derive from such act upon the fulfillment of the condition.

³¹⁹ Exhibit C-014, pp. 36-38, Transcript of Meeting Between Lone Star and Hana Representatives, 25 November 2011.

³²⁰ Mr. Born dissents from the dismissal of Claimant's claim based upon an unfair juridical act under Articles 103 and 104 of the Korean Civil Code. In Mr. Born's view, there was clearly a significant disparity in the terms of the December Amended SPA, which entailed a \$500 million price reduction at the Claimant's expense without any countervailing contractual benefit to the Claimant. In his view, the relevant inquiry under Articles 103 and 104 is whether, in consideration for the \$500 million price reduction, the terms of the December Amended SPA provided the Claimant with contractual rights or benefits that it did not already enjoy; the answer to that question is in Mr. Born's view, plainly no. Moreover, in Mr. Born's view, there is neither a legal nor evidentiary basis to conclude that, outside of the contractual terms of the December Amended SPA, the Claimant received benefits relevant under Articles 103 and 104 in the form of a governmental approval that would not otherwise have been granted; those putative benefits are irrelevant to analysis under Article 103 (in particular) and Article 104 because they were not provided by Hana and, in any event, because neither Article 103 nor 104 properly allow crediting Hana with the removal of an improperly imposed governmental obstacle (as was the case here). Finally, Mr. Born also does not agree that the Claimant was not in a state of distress. The decisive issue is whether the potential loss of most or all of its investment can constitute distress, which, in Mr. Born's view, ought to be answered in the affirmative: the economic and reputational consequences of a forced sale or similar outcome, after the preceding years of uncertainty and obstacles, was in Mr. Born's view, sufficient to constitute distress. The gallows humor of the Claimant's representatives, cited by the Tribunal, is not to the contrary, but is instead, like the December Amended SPA, the effort of distressed parties to mitigate the consequences of a deeply problematic situation over which they had no control. In response to Mr. Born's dissent, the majority reiterates that Korean law requires disparity to be tested in respect of the overall KEB Transaction and not one aspect of it (i.e. the price reduction in the December Amended SPA in isolation). There is no authority supporting a contrary view. Furthermore, as Hana was acting as the conduit for the FSC's insistence upon a price reduction in return for its regulatory approval, Lone Star was convinced, and remains convinced to this day, that it obtained a critical benefit in agreeing to the price reduction. Finally, there is no authority for the proposition that foregoing a portion of the profits in what would remain a highly profitable transaction can constitute distress. Hana was exposed to far greater risks of financial losses in the event that the KEB Transaction did not complete than Lone Star and Lone Star was acutely aware of its superior leverage over Hana at the relevant time. It follows that there was no unfair juridical act for the purposes of Articles 103 and 104 of the Civil Code.

³²¹ C's Statement of Claim, §281.

[...]

If a party who is to be disadvantaged upon the fulfilment of a condition has intentionally obstructed the fulfillment of such condition against the principles of trust and good faith, the other party may treat the condition as having been fulfilled.³²²

303. According to the Claimant, “[p]ut together, [Articles 148 and 150] allow for a claim against a party that improperly interferes with the fulfilment of a contractual provision to the detriment of the counterparty.”³²³ In particular, this claim requires, *inter alia*, that the offending party obstructs the fulfillment of a contractual condition against the principles of trust and good faith and that such obstruction must prevent the fulfilment of the condition.³²⁴ The Claimant’s factual case in relation to each of these requirements is unsustainable for the reasons already given.
304. In relation to the alleged acts of obstruction, the Claimant submits that: “Hana both failed to pursue the FSC approval in the fall of 2011 and intervened to delay the approval when it delayed responding to an FSC inquiry and then submitted a status report to the FSC suggesting that a new price and terms were forthcoming and a new application would be necessary.”³²⁵ The Tribunal has found that the FSC was directing Hana to procure a reduction in the price for the KEB Shares in the fall of 2011 and, to the extent that Hana was cooperating with the FSC in this respect, it cannot be adjudged to have been obstructing the approval process. The Tribunal has also found that the FSC’s request for a status report from Hana is likely to have been motivated by a desire to have something in writing to support the FSC’s request for a new Application on 18 November 2011.
305. It follows that Hana could not have caused the FSC approval process to stall and be delayed either as Lone Star has claimed. The FSC had been delaying the approval process since the Supreme Court’s decision in the KEB Card Case on 10 March 2011: it made this clear in its official press releases. There is no evidence that the FSC was on the verge of approving Hana’s Application in October/November 2011; indeed, Lone Star’s witnesses and advisors were convinced of the contrary. The FSC was delaying because it could not afford to approve Hana’s Application without a price reduction to the KEB Shares due to the political pressure that it was under. The delay was not caused by Hana, who was desperate to close the KEB Transaction given its exposure to financing costs that had been accruing since

³²² Exhibit CLA-003, Korean Civil Code (Excerpts) (corrected v2), 9 August 2009.

³²³ C’s Statement of Claim, §281.

³²⁴ C’s Statement of Claim, §282.

³²⁵ C’s Statement of Claim, §284.

February 2011 on USD 4 billion and the deleterious consequences on Hana's share price and financial stability if the deal were to collapse. The Tribunal dismisses this claim.

F COSTS

306. There is no provision of the arbitration agreement in Article 11.15.2 of the Original SPA dealing with costs. It follows that Article 37 of the ICC Rules regulates the Tribunal's power to award costs in this case and provides, in relevant part:

4 The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

5 In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

307. The Claimant maintains that, in the event it is successful in respect of any one of its claims, then it should be awarded its entire costs³²⁶ and that the Tribunal should take into account the Respondent's conduct, which it says has "*needlessly exacerbated the dispute and increased costs with unfounded applications and objections and untimely and improper pleadings*".³²⁷ The Claimant cites the following instances of such conduct: requests for confidential documents in the ICSID Arbitration; request to exclude Hana's executives sworn testimony in the ICSID Arbitration; request for stay of the proceedings; late pleading on statute of limitations; and failure to append internal documentary evidence from Hana to its Defence.³²⁸ The Claimant submits that this conduct, "*warns against any order that Claimant should pay Respondent's costs (regardless of the outcome)*".³²⁹ The total costs claimed by the Claimant amount to USD 8,265,541.56, which includes the fees and expenses of Sidley Austin LLP, Stanimir A. Alexandrov PLLC, KL Partners, the Claimant's experts Justice Il Hoan Park, Professor Jin Su Yune and the Brattle Group, as well as Lone Star's in-house fees and costs and the ICC costs of arbitration.

³²⁶ C's Cost Submissions, p. 2.

³²⁷ C's Cost Submissions, p. 2.

³²⁸ C's Cost Submissions, pp. 2-4.

³²⁹ C's Cost Submissions, p. 2.

308. Although the Claimant acknowledges that its costs are higher than those of the Respondent, the Claimant attributed this to the “Respondent’s litigation strategy and the burden that it has imposed on Claimant”.³³⁰
309. The Respondent maintains that Lone Star’s conduct has created unnecessary costs for the following reasons: it initiated this arbitration in the alternative to its primary case against the Republic of Korea and has taken contradictory positions in each; it rigorously pressed claims of fraud and mistake in these proceedings that were not supported by the evidence of its witnesses; adopted contradictory positions about the relevance of the record of the ICSID Arbitration to these proceedings.³³¹ The Respondent submits that, even if Lone Star were to prevail on one or more of its claims, its aforementioned conduct would justify a departure from the principle that the costs follow the event, whereas if the Respondent were to prevail then there would be no basis for departing from that principle.³³² The total costs claimed by the Respondent amount to KRW 2,873,903,517 + USD 1,308,169.12 + GBP 152,172.00 + SGD 72,572.39, (approximately USD 3,812,176 in total³³³) which includes the fees and expenses of Bae, Kim & Lee LLC, Arnold & Porter Kaye Scholer LLP, Kobre & Kim LLP, the Respondent’s experts Professor Young-Joon Kwon, Professor Chang-Soo Yang and Mr Andrew Flower, as well as expenses related to the hearing and the ICC costs of arbitration.
310. The Respondent maintains that its costs are reasonable³³⁴ but asserts that the Claimant’s costs are unreasonable as they are more than double the costs incurred by the Respondent.³³⁵ More specifically, the Respondent points to the fact that the legal fees for the 35-page Request for Arbitration amounted to USD 560,000; USD 1.1 million was expended on the preparation of experts and witnesses (the Respondent’s costs were approximately a third of this sum); and, USD 367,633 was incurred for in-house counsel fees at Lone Star, whereas Hana did not claim any such expenses.³³⁶
311. The Tribunal’s analysis of the factual record has revealed that Lone Star has been wronged in respect of the KEB Transaction with Hana. But the Tribunal’s conclusion, which is consistent with the oral testimony provided by Lone Star’s witnesses in this arbitration, is that Hana was not the author of that wrong. The Tribunal was impressed by the candour

³³⁰ C’s Rebuttal Cost Submissions, p.3.

³³¹ R’s Cost Submissions, §§12-15.

³³² R’s Cost Submissions, §16.

³³³ Using exchange rates on 11.04.19 from www.xe.com.

³³⁴ R’s Cost Submissions, §§7-11.

³³⁵ R’s Rebuttal Cost Submissions, §16.

³³⁶ R’s Rebuttal Cost Submissions, §§17-19.

and directness with which Lone Star's witnesses gave their oral testimony. They were impressive witnesses in every respect and the Tribunal feels bound to record that it has a great deal of sympathy for Lone Star's plight given the events that have been described in detail in the factual part of this Final Award. The fact remains, however, that Lone Star has advanced claims in this arbitration, including a claim for fraud, in circumstances where Lone Star's own witnesses do not subscribe to the factual predicate for such claims. Although the Tribunal understands Lone Star's anxiety to protect its position given the testimony of Hana's witnesses in the ICSID Arbitration, who disavowed any involvement of the FSC in Hana's negotiation of a price reduction for the KEB Shares with Lone Star, the Tribunal cannot ignore the financial burden that this litigation strategy has placed on Hana, who has been forced to defend claims that have no proper evidential basis or are otherwise deficient in law.

312. The Tribunal has dismissed all of Lone Star's claims against Hana. On any view, Hana is the successful party in this arbitration. The Tribunal considers that costs must follow the event unless there are particular factors relating to the conduct of the Respondent that would justify a departure from this principle. Whilst it is true that the Respondent has made several applications that have been rejected by the Tribunal, in particular in respect of the ICSID Arbitration, the Tribunal does not consider that they were vexatious or oppressive or patently unmeritorious applications to make. Hana's reluctance to cite and append its own internal documents to its Defence and its late pleading of statute of limitation points no doubt caused the Claimant to incur additional costs, but again the Tribunal cannot characterise that conduct as abusive or somehow justifying a departure from the principle that costs follow the event.
313. These proceedings commenced in earnest in March 2017 shortly after the constitution of the Tribunal. The hearing on the merits was in December 2018. This Final Award was submitted to the ICC Court in April 2019. Given the complexity of this dispute and the high stakes involved, this relatively short timetable was only possible due to the cooperative approach of the parties and their counsel. It cannot be reasonably said that the Respondent has delayed or prolonged the resolution of this dispute. The Tribunal thus declines to make any adjustment to its assessment of costs based upon the Respondent's conduct.
314. There are no grounds for awarding the Respondent's costs on an indemnity basis in this case and no such order has been sought by the Respondent. It follows that the Tribunal must be satisfied with the reasonableness and the proportionality of the Respondent's costs

before ordering the Claimant to pay them. The most important consideration in assessing their reasonableness and proportionality is to compare them with the Claimant's costs. Whilst the normal expectation would be that a claimant's costs would be higher given that it has carriage of the litigation, the disparity in this case is significant: the Claimant's costs are more than double the costs of the Respondent. It may be that this reflects the unreasonableness and disproportionality of the Claimant's costs rather than the reasonableness and proportionality of the Respondent's costs; but given this disparity the Tribunal is not in a position to conclude as a general matter that the Respondent's costs are unreasonable and disproportionate and the Claimant, for obvious reasons, has not suggested otherwise. In lieu of a detailed assessment of the individual costs incurred by the Respondent, the Tribunal will simply apply a discount of ten per cent to the Respondent's legal costs and expenses to ensure that the inevitable inefficiencies and duplicated efforts that arise in managing a litigation team of this size are properly accounted for in the ultimate order on costs. If no such discount were to be applied then the Tribunal's order would be tantamount to an award of costs on an indemnity basis.

315. On 9 May 2019, the ICC Court fixed the costs of the arbitration at USD 1,140,000, which sum is covered by the payments made by the parties in equal shares. The Claimant will be ordered to reimburse the Respondent for the full amount of the Respondent's advance on costs to the ICC in the amount of USD 570,000. The Claimant will also be ordered to pay the following amounts for the Respondent's legal costs and expenses (such amounts reflecting a ten per cent discount): KRW 2,586,513,165.30 + USD 664,352.21 + GBP 136,954.80 + SGD 65,315.15. The Claimant will bear its own legal fees and expenses.
316. The Respondent has not claimed interest on its costs and the Tribunal does not consider that such relief would have been appropriate in any event.

G DECISION

317. For the reasons set out above, the Tribunal, having heard and considered all the evidence and submissions of the parties, hereby decides and orders that:

317.1. The Claimant's claims are dismissed;

317.2. The Claimant shall pay to the Respondent the amount of USD 570,000 as reimbursement of the Respondent's share of the ICC's Administrative Costs and the Tribunal's Fees and Expenses;

317.3. The Claimant shall pay to the Respondent the amounts of KRW 2,586,513,165.30 and USD 664,352.21 and GBP 136,954.80 and SGD 65,315.15 for the Respondent's legal costs and expenses incurred in this arbitration;

317.4. All other requests for relief are rejected.

Place and seat of arbitration: Singapore

Date: 13 May 2019



Gary Born



Toby Landau QC



Professor Zachary Douglas QC