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MEMORANDUM

To: International Swaps and Derivatives Association, Inc.
(Attention: Ms. Jing Gu)

From: Hyunjoo Oh / Yohan Gohng / Ji Young Cheung

Date: October 28, 2009

Re: Electronic Execution of Transactions under the ISDA Master Agreement

I. INTRODUCTION

This memorandum is prepared in response to your inquiries in relation to the electronic execution of transactions under the ISDA Master Agreement. You have asked for our opinion on:

1. Whether a transaction entered into, under the ISDA Master Agreement, by means of electronic data interchange or other means of electronic communications would be enforceable under the laws of the Republic of Korea (“**Korea**”);
2. Whether an electronic record relating to such electronic transaction would be admissible into evidence in a civil proceeding in Korea; and
3. Whether there would be a presumption as to the authenticity and integrity of the electronic records.

In analyzing the foregoing issues, we have examined the following matters:

1. Whether Korea has specific legislation giving legal recognition to electronic transactions and/or specific legislation dealing with the admissibility into evidence of electronic records; and
2. What conditions must be satisfied to ensure the enforceability of electronic transactions, admissibility into evidence of electronic records and the presumption of the authenticity and integrity of the electronic records.

II. ANALYSIS

A. Enforceability¹ of Electronic Transactions under Koran Law**1. Proceeding that Took Place in Foreign Jurisdiction Applying Foreign Law**

The governing law of most transactions ("ISDA Transactions") under the ISDA Master Agreement is either the New York law or the English law, and the New York courts and the English courts, respectively, have jurisdiction over such transactions as provided in the ISDA Master Agreement. As such, most disputes arising out of or in connection with ISDA Transactions are in actuality governed by non-Korean (foreign) law and brought to a foreign court.

If a judgment is obtained from a foreign court in accordance with the law of the foreign jurisdiction, such judgment will be enforced by the courts of Korea without a further review of its merits; provided that (a) the judgment was final and conclusive and given by a court having valid jurisdiction, (b) the party against whom the judgment was awarded (i) received the complaint or equivalent document and received service of process of the summons or order given with sufficient time to defend otherwise than by publication or equivalent process or (ii) responded to the action without being served with process, (c) recognition of the judgment is consistent with the public policy of Korea and (d) judgments of the courts of Korea are accorded reciprocal treatment under the laws such foreign jurisdiction.

The method of execution employed with respect to the underlying transaction is not an issue in determining whether a judgment rendered by a foreign court is enforceable in a Korean court. Therefore, as long as electronic transactions are enforceable in the foreign jurisdiction rendering judgment, such judgment will be enforceable in Korean courts provided that the above conditions are satisfied.

2. Proceeding Taking Place in Korean Court Applying Foreign Law

As stated in the foregoing, the ISDA Master Agreement provides that where the governing law of an ISDA Transaction is either the New York law or the English law, the New York courts or the English courts, respectively, will have jurisdiction. Notwithstanding this provision, if a proceeding over an ISDA Transaction takes place in a Korean court while the governing law of such transaction is a foreign law, the Korean court will apply the foreign law and the enforceability issue will be determined by that foreign law.

3. Proceeding Taking Place in Korean Court Applying Korean Law

Notwithstanding the discussions in 1 and 2 above, if the Korean law is determined to be the governing law of any part of the ISDA Transaction, the Korean court will recognize the enforceability of the electronic transaction for the following reasons.

¹ Please be advised that the fact that a transaction is enforceable does not mean that it will be automatically enforced by the court. Even if the court recognized enforceability, one must, in order to actually enforce an enforceable transaction, proceed with the enforcement by first obtaining the final judgment and the judgment of execution.

First, the Korean contract law is based on the principle of liberty of contract. Contracts and other legal actions can accordingly be entered into by any method of execution, unless a specific method of execution is required by law (e.g., as in the case of executing a will). Therefore, parties may enter into a valid contact by various means including oral, written or electronic communications. Korean law does not require that an over-the-counter derivative transaction must be executed in a specific method or must take a document form.

Second, the Framework Act on Electronic Commerce of Korea prescribes that an electronic document shall not be found invalid for being in an electronic form, unless otherwise prescribed in other laws or regulations. There are no such other laws or regulations relevant for an over-the-counter derivative transaction.

Accordingly, we are of the opinion that a transaction entered into, under the ISDA Master Agreement, by means of electronic data interchange or other means of electronic communications should be enforceable under the laws of Korea.

B. Weight of Electronic Records as Evidence in Civil Proceeding in Korea

1. Issues

The weight of electronic records as evidence in a Korean civil proceeding depends on the following issues: (i) whether electronic records are admissible into evidence under Korean law; (ii) by which methods evidence is examined; and (iii) how the weight of evidence is determined following the examination of evidence.

2. Admissibility into evidence of Electronic Records under Korean Law

The Korean civil procedures are based on the principle of free examination of evidence (Civil Procedure Act, Article 202). Under this principle, all evidence is admitted unless specifically excluded by law. With respect to electronic records, there is no Korean law specifically denying its admissibility. Therefore, electronic records are admissible. We note that regardless of whether an ISDA Master Agreement or transactions entered into thereunder are governed by Korean or a foreign law, the issue of whether electronic records of such ISDA Master Agreement or transactions are admissible into evidence in civil proceedings in Korea is a matter of Korea law.

3. Methods of Evidence Examination with Respect to Electronic Records

An electronic record would be examined by reviewing the printed copy of such record. However, if the opposing party objects to this method, the memory drive containing the electronic record may be inspected by the opposing party and its expert witness. The details of examination methods are described below.

The Korean Civil Procedure Code (the “**Civil Procedure Code**”) classifies evidence

examination methods into the following categories: witness examination, document examination, inspection, expert witness examination. However, with respect to drawings, photos, voice recoding tapes, video tapes, magnetic discs used in computers and other non-document materials containing information, the Civil Procedure Code provides that examination of such evidence shall be conducted in accordance with the Regulations of the Civil Procedure Code (the "**Civil Procedure Regulations**"). According to the Civil Procedure Regulations, information contained in magnetic discs, optical discs and other such information memory media (collectively the "**Information Memory Media**") may be admitted into evidence in printed copies.

In practice, a party may submit only the printed copy of electronic record or the printed copy plus the Information Memory Medium containing the electronic record to enhance the evidentiary weight. In the latter case, the court may return the Information Memory Medium to the party if the opposing party does not raise any objection with respect to the printed copy. If an objection is raised, the opposing party would have an opportunity to conduct an inspection or an expert examination of the Information Memory Medium. For the inspection, the judge may allow the information contained in the Information Memory Medium to be printed or displayed on screen. The judge may also order an expert examination to determine whether any of the information in the Information Memory Medium has been altered after the fact.

4. Determination of Evidentiary Weight of Electronic Records

In a civil proceeding, the judge, in principle, has the discretionary authority to freely determine the weight of evidence. Nevertheless, with respect to documentary evidence, the weight is determined by its (i) authenticity (i.e., whether the document has been executed by the appropriate person) and (ii) substantive integrity (i.e., the value of the evidence in proving certain facts).

In relation to (i), the Civil Procedure Code states that a document is presumed to be duly authenticated "if it is signed, sealed or thumb-marked by the appropriate person or his or her agent." However, with respect to an 'electronic document', no Korean court has rendered an opinion on whether the same presumption would apply and academics have conflicting theories on the applicability of the presumption. As there is no court precedent on this matter, it would be reasonable to state that there is no presumption as to the authenticity of electronic records. Nonetheless, this does not mean that the authenticity of electronic records is automatically denied or suspected. In the event of a dispute over the authenticity of electronic records, the court will decide on the issue based on the principle of free examination of evidence, taking into consideration various evidentiary materials and using the court's discretionary authority.

For your reference, although the Digital Signature Act of Korea provides a system for an authorized electronic signature, such signature is produced upon the issuance of an authorized certificate by an authorized certification institution in Korea. As it would be difficult to satisfy these conditions, authentication would be difficult to achieve through an authorized

electronic signature under the Digital Signature Act.

There is no presumption as to the substantive integrity of electronic records, and the court will use its discretionary power to determine the value of such records in proving facts. Nevertheless, the court's discretionary authority *per se* should not bring added uncertainty to the determination of the substantive integrity of electronic records. No presumption is available as to the substantive integrity of written documents, either, and the court uses its discretionary power to determine the substantive integrity of written documents as well.

Should you have any further questions or concerns, please contact us at any time.

Yours truly,

A handwritten signature in black ink that reads "Lee & Ko". The letters are cursive and stylized, with the ampersand being particularly prominent.

Lee & Ko