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RECENT DEVELOPMENTS ON ENFORCEMENT OF SERIOUS ACCIDENTS PUNISHMENT ACT (SAPA): FIRST TRIAL COURT DECISION AND INDICTMENT OF FIRST SAPA VIOLATION CASE

On April 6, 2023, the Goyang Branch of Uijeongbu District Court (the **"Trial Court"**) issued the first trial court decision (the **"First Court Decision"**) regarding alleged violation of the Serious Accidents Punishment Act (**"SAPA"**), sentencing a representative director of a construction company to a suspended imprisonment sentence for a fatal accident occurred in May 2022. In another case, a week earlier on March 31, 2023, the Uijeongbu District Public Prosecutor's Office (the **"PO"**) filed a criminal indictment for SAPA violation not against the registered representative director but a "chairperson" of a group of companies (who had no official position in any company) regarding the first fatal accident triggering application of SAPA which occurred on January 29, 2022 (the **"First SAPA Incident Indictment"**).

I. FIRST COURT DECISION

A. Factual Background

1. Overview of Accident

After securing a construction project for a convalescent hospital with a total project budget of KRW 8.1 billion (approximately US\$6.2 million, using the exchange rate of 1,300 KRW/USD), Construction Company A subcontracted a part of the project to Business Partner B employing five workers. While working on the subcontracted project worth about KRW 600 million (approximately US\$460k, using the exchange rate of 1,300 KRW/USD), a worker employed by Business Partner B fell from a high point. It was subsequently discovered that neither a safety handrail nor a safety bar was in place to prevent workplace casualty from falling accidents.

2. Summary of Indicted Facts

Upon conclusion of its investigation into the accident, the public prosecutor filed an indictment against a number of defendants for violation of the Korean Occupational Safety and Health Act (the **"OSHA"**), violation of the Korean Criminal Code (the **"KCC"**) for causing death through occupational negligence, and violation of SAPA.

The representative director of Construction Company A was not charged with violation of the OSHA or the KCC. However, with regard to the SAPA violation, the prosecutor identified the representative director of Construction Company A as the Responsible Management Party (the **"RMP"**), and held him liable for causing workplace casualty by completely failing to (a) identify and inspect hazards and risk factors and establish work procedures to address relevant factors; (b) devise criteria to assess work performance of the person in charge of safety and health

management; and (c) prepare and review any manual to respond to serious industrial accidents.

It is noteworthy that the representative director of Business Partner B who directly employed the victim was not charged with the SAPA violation, as the SAPA could be enforced against certain small-size businesses starting on January 2024.

3. Court Ruling (regarding SAPA)

(a) Identification of RMP

The Trial Court concurred with the prosecutor's identification of the representative director of Construction Company A as the RMP for the purpose of SAPA application in this case.

(b) Violation of SAPA Obligations and Causation

The Trial Court concluded that there was causation for RMP's violation of SAPA obligations and subsequent death resulting from the accidental fall as follows:

SAPA Obligations	Violation of Obligation to Take Specific Measures regarding Safety and Health at Workplace	Causation
<ul style="list-style-type: none"> Obligation to identify and inspect hazards and risk factors and establish work procedures to address relevant factors 	<ul style="list-style-type: none"> Responsible safety management officers failed to appropriately assess hazards at the workplace, thereby failing to (i) establish a proper work plan, and (ii) provide safety handrail and associated safety equipment. 	<ul style="list-style-type: none"> RMP's failure to establish and implement proper safety and health management system caused occurrence of a serious industrial accident resulting in death of a worker.
<ul style="list-style-type: none"> Obligation to devise criteria to assess work performance of the person in charge of safety and health management 		
<ul style="list-style-type: none"> Obligation to prepare and review procedures and measures to respond to a serious industrial accident, including but not limited to preparation of manuals regarding work suspension, worker evacuation and eradication of risk factors 	<ul style="list-style-type: none"> Responsible safety management officers failed to stop the dangerous work or eliminate/minimize risk factors contributing to fall accidents. 	

(c) Factors Considered in Actual Sentencing

While the SAPA provides that a RMP in violation of the SAPA should serve a minimum imprisonment term of one year, the representative director of Construction Company A in the current case was sentenced to imprisonment one year and six months (which sentence was suspended for three years). In its sentencing, the Trial Court considered the following

“positive” factors: (i) the fatal accident was caused in part by certain customary practice of construction workers removing safety handrails; (ii) the bereaved family expressed a wish not to impose criminal sanction against the RMP after reaching an amicable settlement agreement; (iii) the representative director of Construction Company A proposed specific plans to prevent recurrence of similar accidents and establish more robust safety and health management system; and (iv) the representative director of Construction Company A did not have any similar criminal record.

B. Analysis

The First Court Decision, by no means, represents the Korean courts’ general views or tentative conclusions regarding many disputed issues regarding proper interpretation of SAPA including what would constitute violation of SAPA obligations and existence of causation between violation of SAPA obligations and accident. The Trial Court concluded that there was SAPA violation in the current case, because (i) there was no dispute that the representative director of Construction Company A did not undertake “any” legal obligation under the SAPA, and (ii) the representative director of Construction Company A did not challenge prosecutor’s allegations regarding his violations of SAPA obligations or causation regarding death. Additional court precedents ruling on the disputed facts would present clearer picture on the court’s analysis methodologies.

C. Implication

With regard to causation between violation of SAPA obligation and occurrence of an accident, the Korean prosecutors generally tend to enumerate all failures of SAPA obligations, and then make generalized conclusions that such legal breaches resulted in the serious accidents.

Until there are sufficient court precedents to derive meaningful factors to establish causation between specific SAPA obligation breach and resulting accident, it would be safer to be able to put forth arguments that “all” SAPA obligations have been performed. Additional care should be taken to ensure that all legal obligations under the SAPA are addressed. Attention should also be paid to check and confirm that subcontractors are in observance of SAPA obligations.

II. FIRST SAPA INCIDENT INDICTMENT

A. Definition of RMP under SAPA

There have been many disputes regarding who should be recognized as the RMP under the SAPA when the RMP is defined as a person “authorized to represent and oversee the business” and/or “responsible for the safety and health of such business.” Discussions to date have focused on whether a Chief Safety Officer (the “CSO”) may be deemed as RMP under the SAPA in lieu of the representative director who oversees and supervises all facets of business for a given corporate entity. The Korean regulatory authorities, including the Ministry of Labor and the prosecutor’s office, have not yet made it clear on whether CSO should be viewed as RMP for the purpose of the SAPA application and whether the representative director should be targeted as the RMP even though a separate CSO responsible for all safety and health issues has been duly appointed and functioning.

B. Summary of Indictment

In the First SAPA Incident Indictment resulting in deaths of three employees hired by a member of Sampyo group of companies (the "**Sampyo Group**"), the PO, contrary to its customary practices to date, decided not to indict the representative director of the company who hired the deceased employees (the "**Sampyo Subsidiary**"). Instead, the PO identified the "chairperson" of Sampyo Group (the "**Chairperson**") who did not hold any official position in the Sampyo Subsidiary as RMP under the SAPA.

In identifying the Chairperson as the RMP under the SAPA, the PO cited the following grounds: that the Chairperson (i) made a final decision regarding establishment of the quarry where the accident occurred, and how to dig stones; (ii) was aware of hazardous conditions of the quarry where the accident occurred; (iii) issued specific instructions regarding safety and health issues when the Sampyo Subsidiary undertook quarrying activities to achieve production objectives; and (iv) exercised ultimate decision-making powers regarding quarrying which was one of the core businesses of the Sampyo Group.

C. Implication

The PO's interpretation of the SAPA in the First SAPA Incident Indictment means that the management (CEO) of a parent company who exercises supervision and management control over a subsidiary may be held liable for SAPA violation when a serious industrial accident occurs at the subsidiary level.

In this regard, working relationship among the parent company and local subsidiaries and actual operation of the safety and health system of the subsidiary need to be reviewed carefully to prevent a management of the parent company from being inadvertently subject to SAPA investigation. More specifically, the following issues should be checked:

- (i) What business reports from the Korean subsidiary are received by the parent company;
- (ii) How the parent company gets engaged in the business management of the subsidiary;
- (iii) What decision-making power is exercised by the parent company regarding customary and essential business functions of the subsidiary;
- (iv) Whether the top management of the subsidiary concurrently holds any position in the parent company and receives and supervision and/or instructions from the top management of the parent company;
- (v) Whether the management and officers exercise independent decision-making regarding business operation of the subsidiary;
- (vi) How involved is the parent company regarding safety and health measures undertaken by the subsidiary; and/or
- (vii) Whether any person hold concurrent position to serve as the responsible person for safety and health at the parent company and the subsidiary.

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For any additional information or questions concerning SAPA issues, please reach out to the BKL SAPA Response Team (project.safety@bkl.co.kr) or your BKL contact professional.

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