Cross-Border Insolvency Law in Korea

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Abstract

Korea's cross-border insolvency regime is founded on Chapter 5 of the DRBA, which adopted the UNCITRAL Model Law on Cross-Border Insolvency with few disparities. Chapter 5 shifted Korea's cross-border regime from strict territorialism to moderate universalism by abolishing the territoriality rules under the former Bankruptcy Act and Corporate Reorganization Act and establishing new rules based on the principle of universality. Certain provisions of the Model Law have not been adopted for practical reasons unique in Korea. For instance, although not expressly adopted, Articles 3, 7, and 8 are generally by Korean court rulings, local statutes and public international law theories. Article 14 has not been implemented because there are some differences between the civil law system on which Korean law and the DRBA are grounded and the common law system regarding the service of documents. Article 23 of the Model Law has not been adopted because the law on transaction avoidance is complicated and remains unsettled in Korea.

Keywords: Cross-border insolvency, International insolvency trustee, Hotchpot rule Universality, International arbitration

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I. Overview of Korean Insolvency System

The first western type statutes on bankruptcy and composition were promulgated on January 20, 1962, as the Bankruptcy Act (the "B.A.") and the Composition Act (the "C.A."). The Corporate Reorganization Act (the "C.R.A.," enacted December 12, 1962) was adapted from the Japanese corporate reorganization system which was also modeled after Chapter X of the U.S. Bankruptcy Act of 1898, especially the Chandler Act of 1938. In early 2002, the Korean government promised to amend the three bankruptcy laws and to make them as a unified bankruptcy law in light of the aftermath of the Asian Financial Crisis and IMF-led emergency assistance. The unified insolvency law (also known as the Debtor Rehabilitation and Bankruptcy Act, or "DRBA") was passed by the Parliament in 2005 and became in effect on April 1, 2006. The DRBA allows all legal entities including individuals, limited-liability companies and nonprofit organizations to file reorganization proceeding and abolished territoriality rule of cross-border insolvency.[1]

Since late 1998, work-out program based on multilateral umbrella agreements in which financial institutions voluntarily participated has played a significant role for restructuring big companies and the practices accumulated through work-out cases were reflected into a statute for work-out. The statute is the Corporate Restructuring Promotion Law (the "CRPA") which was a sunset law and has been revised six times since September 15, 2001. The current CRPA is the 6th version and will be expired on October 15, 2023.

A. Basic Structure of the DRBA

Court-supervised insolvency proceedings are governed by the DRBA which repealed the B.A., C.A., and C.R.A and consolidated the proceedings thereunder into the following three insolvency regimes. The DRBA is divided into six chapters:

Chapter 1 - General Provision (jurisdiction, notice, service, management committee, creditors' committee, registration of proceedings into corporate register and real estate register);

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1) *See* Soogeun Oh, Brief Research on Unified Insolvency Law, in Subject and Prospect on Korean Civil Law Society in the 21th century, 651-672 (Pakyoungsa, 2002); Soogeun Oh and Heejong Song, National Report for the Republic of Korea (South Korea), Commencement of Insolvency Proceedings, 573-798 Dennis Faber et al., ed, Oxford (2012).

Chapter 2 - Rehabilitation Proceedings (rehabilitation proceedings for all legal entities);
Chapter 3 - Liquidation Proceedings (liquidation proceedings for legal persons and individuals);
Chapter 4 - Rehabilitation Proceeding for Individuals with Regular Income;
Chapter 5 - Cross-Border Insolvency; and
Chapter 6 - Penalties.

The rehabilitation proceedings under Chapter 2 of the DRBA are primarily for the rehabilitation of insolvent business entities including individuals and are analogous to Chapter 11 of the U.S. Bankruptcy Code. However, the pure concept of debtor in possession ("DIP") is not fully recognized under Chapter 2 - rehabilitation proceedings but in practice the chief executive director/representative director is appointed or is regarded as an administrator in rehabilitation proceedings by the court unless there is cause of fraud, embezzlement, or gross mismanagement of the affairs of the debtor by current management.[2]

The straight bankruptcy proceedings[3] under Chapter 3 of the DRBA for the liquidation of insolvent business entities and individuals are similar to Chapter 7 of the U.S. Bankruptcy Code. The purpose of Chapter 3 for individuals is mainly to get discharge order from the bankruptcy court while the purpose of Chapter 3 for legal entities is mainly to dissolve the legal entity and liquidate assets and orderly distribute dividend to creditors. The rehabilitation proceedings for individuals who have regular income under Chapter 4 of the DRBA are also similar to Chapter 13 of the U.S. Bankruptcy Code. Individual debtors may repay their debts within 3 years according to the terms of the plan with their regular incomes.[4] After accomplishing the terms of plan, the debtors get discharged with the discharge order by the court.[5]

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2) Chaemuja hoesaeng mit pasane gwanhan beobyul [Debtor Rehabilitation and Bankruptcy Act (hereinafter "DRBA")], Act No. 15158, Feb. 22, 1958, *amended by* Act. No. 14476, Dec. 12, 2017, art. 74(2) (S. Kor.).

3) It is similar to liquidation proceedings in Insolvency Act 1986 in England. The expression of liquidation proceedings in this paper has same meaning of straight bankruptcy proceedings.

4) DRBA, art. 611(5) (S. Kor.).

5) *Id.* art. 624(1).

B. Basic Structure of Work-out under the CRPA

Korea offers another insolvency-related law called the CRPA. Generally, the current CRPA applies only to financial debt owed by an insolvent company which is rescheduled pursuant to out-of-court workout arrangements governed by the CRPA. As such workouts under the CRPA do not involve an appointment of administrator by the court, the CRPA does not include provisions related to avoidance, executory contract, or ipso facto clause issues. The CRPA has been re-enacted six times after being expired by operation of its sunset clause, and while the first to fourth versions of the CRPA were applicable to financial institutions such as banks, insurance companies, or savings banks, the fifth and sixth versions of the CRPA are applicable to anyone who has financial claims such as loans or corporate bonds against the debtor company.[6]

Because the proceedings under CRPA are not, in essence, insolvency proceedings and there are no provisions related cross-border insolvency matters, the proceedings under the CRPA may not be recognized as foreign insolvency proceedings in other jurisdictions.

C. Status of Foreign Creditors under the DRBA

1. Abolishment of Reciprocity

Article 2 of the DRBA does not require reciprocity as a precondition to obtaining recognition of a foreign insolvency proceeding by Korean bankruptcy courts. Although the C.R.A. did not require reciprocity, Article 2 of the B.A. required that the country in which the foreign bankruptcy proceeding was taking place provide for non-discrimination in legal status between Koreans and local creditors in order for the foreign bankruptcy proceeding to be afforded legal recognition in Korea. Now, by repealing reciprocity requirement in bankruptcy proceedings, the DRBA treats both foreign debtors and foreign creditors equally under both rehabilitation proceedings and liquidation proceedings. Foreign creditors have the same rights and obligations under the DRBA as domestic creditors.[7]

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6) Giup gujo chokjin beob [Corporate Restructing Promotion Act], Act No. 15855, Oct. 16, 2018, art. 2 (S. Kor.).

7) This derives from the principle of equal treatment under Article 11 of the Constitution. Constitutional Court Decision No. 99Hun-Ma494 rendered on Nov. 29, 2011 held that foreign

2. Equal Treatment for Foreign Creditors

Regarding a corporate reorganization case of Korea Takoma Shipbuilding, the Supreme Court held that a reorganization plan was neither fair nor equitable and it also discriminated against a Japanese creditor without justification because under the plan, a Japanese creditor was to get paid later than domestic creditors even though it belonged to the same class with local creditors.[8]

After Asian crisis befell Korea in 1998, in a mega corporate reorganization case, a creditor, an Irish company, filed an involuntary corporate reorganization petition against Jinro, a Korean producer of popular liquor and the holding company of Jinro conglomerate group, on April 3, 2003. The Seoul District Court issued the commencement order on May 14, 2003 despite the strong objection from Jinro and public opinion vociferously critical of involuntary petition by foreign investors. The Jinro case was successfully closed with an M&A administered as part of the corporate reorganization proceedings. These rules treating foreign creditors equal to local creditors are still valid under the DRBA.

In 2009, a Dutch creditor company incorporated under Dutch law whose main place of business is located in Amsterdam filed liquidation proceedings against a Korean debtor company which is a subsidiary of Lehman Brothers Holdings, Inc. in 2009. The Korean court issued an order for commencing liquidation proceedings under the DRBA.[9]

3. Treatment for Foreign Currency Denominated Claims under the DRBA

Article 137 of the DRBA states that every claim that is valued in a foreign currency denominated claim must be converted into Korean currency at the time of the order for the commencement of rehabilitation proceedings. This rule is used for the calculation of voting rights held by foreign creditors for the confirmation of the plan at the third interested parties' meeting held in court. In rehabilitation proceedings creditors who hold claims denominated in foreign currencies may be repaid in such foreign currencies according to the

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workers enjoy basic human rights protected by the Constitution.

8) Supreme Court [S. Ct.], 92Gue10. Jun.15, 1992 (S. Kor.).

9) Seoul Central District Court (Bankruptcy Division) [Dist. Ct.], 2009Hah-Hap77, Nov. 24, 2009 (S. Kor.).

rehabilitation plans; on the other hand, repayment to bankruptcy creditors holding claims denominated in foreign currencies in liquidation proceedings must comply with Article 426(1) of the DRBA. However, it is noteworthy that in liquidation proceedings estate claim holders (i.e., those who have claims against bankruptcy estate after bankruptcy trustee assumes the executory contract such as charter party) can receive repayment in the same foreign currency as the relevant claims are denominated.[10]

If a rehabilitation case is converted into a liquidation case due to the failure to fully accomplish a confirmed rehabilitation plan, the rehabilitation claims holders including holders of claims valued in foreign currencies must file proofs of claims again according to the terms of the plan which changed the amount or deferred payment date of the claims. On the other hand, if a rehabilitation case were converted into a liquidation case prior to confirmation of the rehabilitation plan, all rehabilitation claim holders including holders of claims valued in a foreign currency need not file proofs of claims again with the bankruptcy court. However, claims under Article 137 of the DRBA require review by the bankruptcy trustee and other creditors regarding value of claims as of the date of the commencement of bankruptcy proceedings.[11] If the trustee or other creditors object to the amount of those claims denominated in foreign currencies, holders of such claims must file a confirmatory summary action against the objectors within one month from the last day of claim allowance proceedings.[12]

D. Filing against Foreign Debtors

1. Jurisdiction

Under Article 3 (1) of the DRBA, if a foreign corporation whose main office is abroad has an establishment in Korea, rehabilitation proceedings or liquidation proceedings against the foreign corporation can be commenced in a Korean bankruptcy court where its establishment is located. Article 3(3) of the

10) In Hanjin Shipping Bankruptcy Case, foreign creditors who have estate claims against bankruptcy estate were repaid by the trustee with foreign currency denominated on the contract. *See* Chiyong Rim, Legal Issue in Hanjin Shipping's Insolvency, 92 Bus. Fin. L. 39, 51 (2018).

11) DRBA, art. 6(5) (S. Kor.).

12) *Id.* art. 170(2).

DRBA states that any claim pursued through a judgment under the Civil Procedure Act will be regarded as being existed only within Korea. For a creditor to pursue a claim through a judgment, the Korean court may have personal jurisdiction over the defendant and subject matter jurisdiction over the claim. It is not necessary for the creditor to have a domicile or a place of business in Korea to file an insolvency petition against debtors.

For instance, in a case involving an Italian creditor against a foreign debtor (LG. Philips Displays Holding B.V) under liquidation proceedings in the Netherlands who owned a bond deposited in the Seoul branch of ABN Amro was held to have standing to file an involuntary petition for liquidation against the debtor by virtue of section 3(3) of the DRBA.[13] The court issued a commencement order against the Dutch debtor in 2008 and 22 foreign creditors filed proofs of claims with the Seoul Central District Court (Bankruptcy Division) to participate liquidation proceedings to get dividend from the bankruptcy estate.

In DongA Tanker's rehabilitation case (Seoul Bankruptcy Court Case No. 2019 Hoe-Hap100085), the Seoul Bankruptcy Court issued a preservation order against a debtor and comprehensive prohibition order against creditors for the foreign SPC subsidiaries of DongA Tanker established in Panama as debtor companies on April 4, 2019. The court reasoned that it had a jurisdiction for rehabilitation proceeding of the debtor companies in Panama because the directors of those companies domiciled in Korea and it was in Korea that the loan agreements were executed, loans were repaid, and the debtor company received its hire for charter party, which was its main income.[14]

2. Grounds for Commencement of Local Insolvency Proceedings Based on Foreign Insolvency Proceedings

Article 38 of the DRBA adopts Article 31 of the Model Law,[15] which deals with requirements for instituting rehabilitation proceedings. Sections 305 and

13) Seoul Central District Court (Bankruptcy Division) [Dist. Ct.], 2008Hah-Hap8, Feb. 20, 2009 (S. Kor.).

14) However, on May 22, 2019, the court dismissed the petition for the commencement of rehabilitation proceedings based on Article 42(iii) of the DRBA which stipulates that the court must dismiss the petition if the commencement of rehabilitation proceeding is incompatible with the interests of creditors in general.

15) Presumption of insolvency based on recognition of a foreign main proceeding.

306 of the U.S. Bankruptcy Code deal with the same subject. While it is not necessary for a debtor to show grounds of insolvency for filing a voluntary bankruptcy petition in the U.S., however, the DRBA requires that Korean courts determine whether a debtor is generally not paying its debts as they become due in both voluntary and involuntary cases. Article 38 of the DRBA provides that where an insolvency proceeding is pending in a foreign court, the requirements for commencing local rehabilitation proceedings are presumed to be met. In other words, a valid foreign insolvency proceeding constitutes prima facie evidence of validity in local courts. Article 301 of the DRBA allows the same presumption to be made in liquidation proceedings in Korea.

II. Summary of Chapter 5 of the DRBA

A. Outline of Chapter 5

1. From Territoriality to Universality

In line with the international efforts for harmonization of cross-border insolvency regimes, Chapter 5 of the DRBA, titled "Cross-Border Insolvency," consists of 15 articles (Articles 628–642) adopts UNCITRAL Model Law on Cross-Border Insolvency (1997) ("Model Law") with few disparities. Chapter 5 shifted Korea's cross-border regime from strict territorialism to moderate universalism by abolishing the territoriality rules[16] under the B.A., C.A., and C.R.A. and establishing new rules based on the principle of universality.

While a bankruptcy trustee or a court appointed administrator under B.A. and C.R.A. did not have power to manage business and dispose assets located abroad because the assets in offshore did not constitute the property of the bankruptcy estate under the territoriality, a bankruptcy trustee or a court appointed administrator has power to dispose assets in abroad under the DRBA. The DRBA includes new provisions in Chapter 5, which address, among other matters, the recognition and enforcement of foreign insolvency proceedings in Korea, the outbound effect of Korean insolvency proceedings on assets located

16) Pasanbeob [Bankruptcy Act], Act No. 7428, Apr. 1, 2006, *amended by* Act No. 6627, Jul. 1, 2002, art. 3; Hwaeuibeob [Composition Act], Act No. 7428, Apr. 1, 2006, *amended by* Act No. 6627, Jul. 1, 2002, art. 11; Hoesajeongribeob [Corporate Reorganization Act], Act No. 7428, Apr. 1, 2006, *amended by* Act No. 6627, Jul. 1, 2002, art. 4.

in a foreign country, judicial cooperation including court-to-court communication as well as between insolvency office-holders, adjustment of concurrent insolvency proceeding and adjustment of payment related to insolvency proceedings or payment outside of insolvency proceedings (the hotchpot rule).

2. Comparison with the Model Law

Some provisions of the Model Law have not been adopted for practical reasons unique in Korea. For instance, although not expressly adopted, Articles 3, 7, and 8 of the Model Law are generally recognized by Korean court rulings, local statutes, and public international law theories.[17] Article 14 of the Model Law has not been implemented because there are some differences between the civil law system on which the DRBA are grounded and the common law system regarding the service of complaints, briefs, or other legal documents.[18] Article 23 of the Model Law has not been adopted because the law on avoidance claims in the context of main and non-main proceedings is complicated and remains unsettled in Korea.[19]

As used in this paper, the term 'foreign insolvency proceeding' includes both foreign main proceedings and foreign non-main proceedings. "Foreign main proceeding" is a foreign insolvency proceeding taking place in the country where debtor has the center of its main interests.[20] 'Foreign representative' covers representatives of both foreign main insolvency proceedings and foreign non-main insolvency proceedings. 'Insolvency proceeding' under the DRBA includes both liquidation and rehabilitation proceedings for corporations and individual debtors.

B. Definition of Chapter 5

Article 628 of the DRBA incorporates Article 2(a) of the Model Law.[21] The

17) United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, arts. 3, 7-8 (2014).

18) *Id.* art. 14.

19) *Id.* art. 23.

20) *Id.* art. 2; 11 U.S.C. § 1502 (2005).

21) *Id.* art. 2(a). "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by

types of proceeding included within the definition of 'foreign insolvency proceedings' are the same as in the Model Law, in that both definitions include interim liquidation proceedings and interim rehabilitation proceedings. Since these proceedings are included in the definition of 'foreign insolvency proceeding,' a representative of a foreign interim insolvency proceeding has the right to file a petition with the Korean bankruptcy court for certain limited relief such as suspension of a lawsuit, foreclosure, or prohibition of a debtor's repayment.[22]

Even though the characteristics of a foreign insolvency proceeding may not be exactly the same as those of a Korean rehabilitation proceeding, liquidation proceeding, or individual rehabilitation proceeding, the foreign insolvency proceeding can be recognized if the substantive requirement set out in the Model Law is similar to one of the three types of Korean insolvency proceeding. The terms 'foreign main proceedings' and 'foreign non-main proceedings' are not defined in Chapter 5. The concept of 'center of main interests' [COMI] is not as hotly debated a topic in Korea as in other countries.[23] Therefore, the DRBA does not provide automatic stay effect after recognition of foreign main insolvency proceedings like Article 20 of the Model Law. Instead, Article 3 of the DRBA emphasizes the location of a legal entity's establishment and the place of domicile for individual debtors for solving issue of jurisdiction.

The distinction between foreign main proceedings and foreign non-main proceedings is significant only in relation to the DRBA rules on coordination of concurrent foreign proceedings.[24] Under Article 631 of the DRBA, in order to obtain an order for recognition of a foreign proceeding, the proceeding need not be initiated in the jurisdiction of the legal entity's main establishment.

While non-main proceedings in a foreign jurisdiction based on the establishment can be recognized under the DRBA, other foreign insolvency proceedings in a foreign jurisdiction based on the location of a debtor's assets cannot be recognized in Korea because Article 631 of the DRBA precludes the existence of debtor's assets as valid ground for recognition of a foreign insolvency proceeding in Korean courts. Consistent with the Model Law, the definition of 'foreign representative' includes a debtor in possession recognized under the U.S. Bankruptcy Code.

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a foreign court, for the purpose of reorganization or liquidation.

22) DRBA, art. 635(1) (S. Kor.).

23) *See* Jejung Lee, Center of Main Interests in the UNCITRAL Model Law on Cross-Border Insolvency, 689 Bupjo 23-85 (2014).

24) DRBA, art. 639 (2) (S. Kor.).

C. The Scope of Application of Chapter 5 of the DRBA

Article 629 of the DRBA corresponds to Article 1(1) of the Model Law.[25] Chapter 5 of the DRBA covers the inbound effect of foreign insolvency proceedings, the outbound effect of Korean insolvency proceedings and the coordination of concurrent proceedings between local proceeding and foreign insolvency proceeding. Prior to the enactment of the DRBA, the Korean courts often authorised a local trustee to file an ancillary proceeding in the U.S. court pursuant to Section 304 of the U.S. Bankruptcy Code.[26] Prior to the introduction of Chapter 15 of the U.S. Bankruptcy Code, the U.S. bankruptcy court granted relief in the ancillary proceeding to an administrator appointed by the Korean court under the old C.R.A.[27] There was some argument over the legal grounds for the power of the administrator under the C.R.A. which was based on territoriality to file a petition in the United States for ancillary proceedings. But Article 629 of the DRBA precludes this legal controversy by entrusting the local bankruptcy trustee or administrator with the right to file a petition for insolvency proceedings, to participate in a foreign bankruptcy proceeding or to seek recognition for Korean insolvency proceedings in a foreign country.

Chapter 5 of the DBRA deals with cross-border insolvency, and applies in the following circumstances:[28]

(a) Where a representative of a foreign insolvency proceeding seeks recognition of the foreign insolvency proceeding and relief in connection therewith from a Korean bankruptcy court;

(b) Where a representative of a foreign insolvency proceeding submits a petition to a Korean bankruptcy court for commencing a domestic insolvency proceeding or participating in an ongoing domestic insolvency proceeding;

(c) Where an insolvency office-holder such as bankruptcy trustee or administrator, or any other person approved by a Korean court acts in a foreign country in connection with a domestic insolvency proceeding by participating in the proceedings of a foreign court, seeking recognition or

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25) United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, art. 1 (2014).

26) Section 304 was repealed by establishment of Chapter 15 of the U.S. Bankruptcy Code.

27) In re Kyu-Byung Hwang, 309 B.R. 842 (Bankr. S.D.N.Y 2004). Mr. Hwang was an administrator of debtor Onse Telecom Company.

28) *See* Chiyong Rim, South Korea, Cross-Border Insolvency, 579-596 (Globe L.& Bus.,2017).

relief from a foreign court, etc.; and

(d) Where cooperation is required between Korean and foreign insolvency courts and insolvency office-holders in multiple insolvency proceedings, including the recognition of foreign insolvency proceedings, as the proceedings progress concurrently in Korea and foreign jurisdictions.

III. Recognition of Foreign Insolvency Proceedings under Chapter 5 of the DRBA

A. Procedure of Recognition of Foreign Insolvency Proceedings

The DRBA does not automatically grant the effects of recognition set forth in Article 20 of the Model Law which effectuates main insolvency proceedings administered by foreign courts.[29] From the perspective of the DRBA, an insolvency proceeding commenced in a foreign country will affect the debtor's assets located in Korea only when and to the extent the foreign insolvency proceeding is recognized and enforced in Korea by a recognition order and subsequent relief orders granted by a Korean bankruptcy court pursuant to the DBRA. Like the U.S. Bankruptcy Code the petition for the recognition order can be made only by a representative of the foreign insolvency proceeding.[30] The Korean bankruptcy court is required to make an order on whether to grant recognition to the foreign insolvency proceeding within one month after the petition is filed.[31] The Seoul Bankruptcy Court has exclusive jurisdiction over cases regarding recognition of foreign insolvency proceedings.[32] The recognition order merely serves as a basis for subsequent issuance of relief orders, unlike the Model Law but similarly to Japanese Law on Recognition of and Assistance in Foreign Insolvency Proceedings.[33] As such, foreign insolvency proceedings affect the debtor's business and assets in Korean only via the relief orders issued by a Korean court. The recognition order and relief orders may be granted jointly or separately. For instance, a petition for a relief

29) United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, art. 20 (2014).

30) DRBA, art. 631(1) (S. Kor.).

31) *Id.* art. 632(1).

32) *Id.* art. 630.

33) *See* Shin-ichiro Abe, Japan, Cross-Border Insolvency, 321-357 (Globe L. & Bus., 2017).

order may be filed either simultaneously with or after the recognition order of foreign insolvency proceeding.[34]

B. Provisional Relief Order

Article 635 of the DRBA, implementing Article 19 of the Model Law,[35] allows the court or a foreign representative to institute assistance proceedings during the period between application for recognition and order of recognition. This right is not extended to parties in interest, which are entitled to file a petition for relief only after entry of the order for recognition.[36] Under this provision, the court may issue following injunction orders: a prohibition on commencement or continuation of lawsuits against the debtor; an attachment upon the debtor's assets; enforcement of a judgment; foreclosure of a mortgage; or a prohibition on repayment or disposition of the debtor's assets by the debtor.[37]

C. Relief Granted upon Recognition

Article 636 of the DRBA implements Article 21 of the Model Law.[38] Along with Articles 632 and 635 of the DRBA, it constitutes the core of Chapter 5. After the entry of a recognition order, however, foreign representative as well as any party in interest – including unsecured creditors, secured creditors and share/equity holders – may file a petition for relief listed in Article 636. The concept of judicial lien under common law countries is not recognized under the Korean legal system therefore judgment creditors are not treated as secured creditors but are treated as general unsecured creditors. If judgment creditors want to exercise their rights, they have to use compulsory execution proceedings under the Civil Execution Act and may not rely on the exercise of security interests by using foreclosure sale.

There are two distinctions between Article 635 and Article 636 of the DRBA. First, the court cannot order the appointment of an international bankruptcy trustee or impose other measures necessary for the protection of the debtor's

34) DRBA, art. 636(1) (S. Kor.).

35) United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, art. 19 (2014).

36) DRBA, art. 636(1) (S. Kor.).

37) Seoul Bankr. Ct., 2019Kookseoung100000, Jan. 24, 2019 (S. Kor.).

38) United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, art. 21 (2014).

business and properties and the interests of creditors prior to recognition under Article 635 of the DRBA. Secondly, a creditor cannot file a petition for relief prior to recognition; the creditor can file only after an order for recognition is entered pursuant to Article 636 of the DRBA.

In practice the courts usually issue a stay order or prohibits compulsory execution proceedings, an auction for the exercise of security interests, provisional attachment, provisional disposition, or preservation proceedings with respect to the debtor's business and assets. However, it is rare in practice for the court to terminate/cancel the local compulsory execution proceedings by judgment creditors or an auction proceeding for the exercise of security interests.

D. Foreign Insolvency Cases Recognized since 2006

As of 2019, insolvency proceedings, including both reorganization and liquidation, of the Netherlands,[39] the United States,[40] Hong Kong Special Administrative Region,[41] the United Kingdom,[42] Japan,[43] and the Philippines[44] have been recognized in Korea. By recognizing the companies (winding-up) proceedings in Hong Kong, administration proceedings in England and Chapter

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39) Seoul Central District Court (Bankruptcy Division)[Dist. Ct.] 2007Kookseoung1, Oct. 18, 2007 (S. Kor.). Debtor is LG. Philips Displays Holding B.V under liquidation proceedings in the court of Hertogenbosch.

40) *Id*. 2007Kookseoung2, Feb. 12, 2008 (S. Kor.). Debtor is Mr. Oh under Chapter 11 proceeding in the U.S. Bankruptcy Court Central District California, Santa Ana Division; *Id.* 2014Kookseoung1, Apr. 9, 2014 (S. Kor.). Debtor is Mr. and Mrs. Kang under Chapter 11 proceeding in the U.S. Bankruptcy Court for the Eastern District of Virginia. *Id.* 2016Kookseoung100000, Sep. 12, 2016 (S. Kor.). Debtor is Phoenix Heliparts, Inc. under Chapter 11 proceeding in the U.S. Bankruptcy Court District of Arizona.

41) *Id.* 2009Kookseoung1, Oct. 8, 2010 (S. Kor.). Debtor is Lehman Brothers Commercial Corporation Asia Limited under Companies (Winding-up) Proceedings in the High Court of the Hong Kong Special Administrative Region Court of First Instance.

42) *Id*. 2016Kookseoung100001, Oct. 10, 2016 (S. Kor.). Debtor is Lehman Brothers International (Europe) under administration proceeding in High Court.

43) *Id.* 2012Kookseoung1, Aug. 30, 2012 (S. Kor.). Debtor is Sanko Kisen Kabushiki Kaisha under Corporate Reorganization proceeding in Tokyo District Court; *Id.* 2015Kookseoung100001, Dec. 28, 2015 (S. Kor.). Debtor is Daiichi Chuo Kisen Kabushiki Kaisha under Civil Rehabilitation proceeding in Tokyo District Court.

44) Seoul Bankr. Ct., 2019Kookseoung100000, Jan. 25, 2019 (S. Kor.). Debtor is HHIC－Phil, Inc. under Regional Trial Court, Olongapo City.

11 proceedings in the United States, the Bankruptcy Division of Seoul Central District Court (now the Seoul Bankruptcy Court) appointed foreign insolvency representatives as international insolvency trustees under the DRBA to exercise the exclusive power to manage business and dispose of the debtors' assets in Korea.[45] However, there have been no concurrent foreign insolvency proceedings which were recognized by the Korean bankruptcy court.

E. The Status of Foreign Representative under Chapter 5

A bankruptcy trustee or an administrator in one country may have right to dispose assets located in foreign jurisdiction under the Model Law after the foreign court recognized the insolvency proceedings as a main proceeding. If a foreign representative wants to sell debtor's assets in Korea, he must get not only a recognition order but also an order of appointment him as an international insolvency trustee under the DRBA which is derived from Japanese system.[46] It is important to understand the status of an international insolvency trustee appointed by a Korean bankruptcy court. The international insolvency trustee, once appointed, is granted exclusive authority and power to control and dispose of the debtor's business and assets in Korea, including repatriation of proceeds of sales to a foreign jurisdiction, subject to the approval of the Korean court.[47] The following case dealt with this issue.

A Danish company ARTEC held a claim against a Korean company based on an exhibition contract signed between the two parties in 2009. In 2010, the Copenhagen Maritime and Commercial court issued an order to commence bankruptcy proceedings against ARTEC, and the court-appointed trustee assigned ARTEC's claims against the Korean company to a group of Austrian and Danish companies. This group of companies subsequently filed lawsuits for payment against the Korean company in Korean. Article 3 of the DRBA sets forth that the domicile of a third-party owing money to the debtor is deemed to be the place of location of the debtor's assets. As such, ARTEC was deemed to

45) Seoul Central District Court (Bankruptcy Division) [Dist. Ct.] 2010Kookji2, Dec. 6, 2010 (S. Kor.); *Id.* 2016Kookji100001, Nov. 9, 2016 (S. Kor.); *Id.* 2016Kookji10000, Oct. 17, 2016.

46) United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, art. 32 (2014). Article 32 of Law on Recognition of and Assistance in Foreign Insolvency Proceedings (in Japan).

47) This system is different from the Model Law which allows the foreign insolvency administrator or trustee to dispose of a debtor's offshore assets without getting any separate appointment order.

have assets in Korea with regard to claims against the Korean company. The Seoul High Court ruled that for a representative of a foreign insolvency proceeding to exercise the right to manage and dispose of the debtor's assets in Korea, the foreign representative must first obtain a recognition order of the foreign insolvency proceeding and an order for being appointed an international insolvency trustee according to Article 637 of the DRBA.[48] Without appointment of an international insolvency trustee, it is the representative director of ARTEC rather than the Danish trustee who may legitimately assign the claims owed by the Korean company.[49]

In other words, if a representative of foreign insolvency proceedings wants to dispose of the debtor's assets or file a lawsuit in connection with the debtor's assets in Korea, he/she must first be appointed as an international insolvency trustee by one of the relief orders issued by the Seoul Bankruptcy Court.[50] Therefore, after the decision of the Seoul High Court on the ARTEC case and the introduction of international insolvency trustee system under Article 637 of the DRBA, the Supreme Court decision in the Paolo Gucci case,[51] where it held that the U.S. trustee of Chapter 7 proceedings has the right to dispose the rights with regard to the trademarks registered in Korea under the B.A. is no longer valid.[52]

F. The Effect of Discharge Order under Foreign Insolvency Proceedings

1. History of Case (Mr. Todd Oh)

The effect of discharge under foreign insolvency proceedings is another interesting issue. An individual debtor Mr. Oh who resided and operated business in the United States filed for Chapter 11 protection in the U.S. His

48) Seoul High Court [Seoul High Ct.], 2012Na77541, 77558 Jul. 25, 2014 (S. Kor.) (no appeal).

49) The plaintiffs, i.e., the group of Austrian and Danish companies, won the case after the former representative director of ARTEC notified the assignment of claims to Korean counterparties in the middle of civil litigation procedures.

50) DRBA, arts. 636(1)(iv), 637 (S. Kor.).

51) Supreme Court [S. Ct.] 2000Da64359, Apr. 25, 2003 (S. Kor.).

52) *See* Kwang Hyun Suk, International Private Law and International Litigation, 407(Pakyoungsa, 2007); However, Kangho Je/Jehan Lee, Problems Related with Insolvency of Foreign Corporation, 42 Bus. Fin. L. 44-45 (2010) has an opposite view that old ruling of the Supreme Court is still valid under the DRBA.

Chapter 11 reorganization plan was confirmed by the U.S. bankruptcy court, and Mr. Oh was discharged from the debts listed in the rehabilitation plan pursuant to Section 1141 of the U.S. Bankruptcy Code. Afterwards, the U.S. reorganization proceeding was subsequently recognized under the DRBA by the Korean Court.[53] However, a Korean corporate creditor of Mr. Oh did not submit any proofs of claim in the U.S. although it was notified of the filing of the Chapter 11 proceedings. As a result, its claims were not listed in the reorganization plan. After finding out that the bankruptcy proceedings for Mr. Oh in the United States was recognized in Korea, the Korean creditor company filed an involuntary liquidation proceeding against Mr. Oh in Korea, relying on the fact that Mr. Oh had assets located in Korea. Mr. Oh sought dismissal of that petition, arguing that the Chapter 11 proceedings as well as discharge order had been recognized in Korea, the Korean creditor company was no longer a creditor against him because he had been discharged from his debts. The Bankruptcy Division of the Seoul Central District Court did not recognize the effect of discharge based on the confirmation order by the court in the United States, and ordered the commencement of liquidation proceedings against Mr. Oh.

2. Judgment of the Supreme Court[54]

The Supreme Court affirming the decision of the Bankruptcy Division of the Seoul Central District Court, held that (i) the recognition and relief orders under the DRBA were procedural supports for foreign insolvency proceedings and were not measures to change creditors' claims in a substantive manner; (ii) as a court's discharge order involved the determination of the existence of a claim under substantive laws, it would be proper to resolve a dispute on the effects of a discharge through separate civil procedures to which the debtor and the relevant creditor were parties; (iii) accordingly, even if a discharge was effected in the course of bankruptcy proceedings in the United States, recognition of the foreign court's order on a discharge should not be different from recognition of an ordinary foreign court judgment; and (iv) at the time bankruptcy proceedings were commenced against Mr. Oh in the United States, the relevant Korean insolvency law adopted the principle of territoriality (unlike the DRBA which

53) Seoul Central District Court (Bankruptcy Division) [Dist. Ct.] 2007Kookseoung2, Feb. 12, 2008 (S. Kor.).

54) Supreme Court [S. Ct.] 2009Ma1600, Mar. 25, 2010 (S. Kor.).

adopts the principle of universality), and it was reasonable for the Korean company creditor to expect that the effects of the bankruptcy proceedings in the United States would not extend to the debtor's assets in Korea and that expectation deserved to be protected. As such, the Supreme Court held that to recognize the discharging effect of foreign bankruptcy proceedings would be against the public policy of Korea.

3. Comments by Scholars

It is noteworthy that if a Chapter 11 case were filed with the U.S. Bankruptcy Court after the provision of the DRBA that adopted the principle of universality became effective in 2006, the Supreme Court would have accepted arguments of Mr. Oh and might have not relied its ruling on territoriality. Regarding this ruling there is disagreement among scholars. The majority of scholars opine that Supreme Court's ruling expressly relied on the method of recognition of foreign judgment under the Civil Procedure Act and it also followed the same reasoning as that of the U.K. Supreme Court's judgment in Rubin case.[55] Therefore, according to them, it is clear that the recognition of the effect of discharge under the plan confirmed in a foreign insolvency proceeding should follow the same route for the recognition of a foreign judgment, not via the recognition and relief for a foreign insolvency proceeding under the model law/the DRBA.[56] However, those who disagree with the court's ruling assert that the procedures for recognition of foreign insolvency proceedings under the DRBA must be applied to effectuate the discharge pending foreign insolvency proceeding.[57]

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55) [2012] UKSC 46. This case is a consolidated case of Rubin and another v. Eurofinance SA and others, [2010] EWCA Civ 895 and In re New Cap Reinsurance Corporation, Ltd. (in liquidation), [2011] EWCA Civ. 971.

56) For more elaborate analysis of the Supreme Court ruling, *see* Min Han, Recognition of Insolvency Effects of a Foreign Insolvency Proceeding: Focusing on the Effect of Discharge, Trade Development through Harmonization of Commercial Law, Hors-series XIX Comparative L. J. of the Pacific 345-363 (2015); Young Jun Oh, The Meaning of Recognition of Foreign Judgement under Civ. Pro. Act, 3979 Legal Times (2011); Soogeun Oh et al., Insolvency Law, Academy of Judicial Administration at 412 (2012).

57) *See* Kwang Hyun Suk, International Private Law and International Litigation Vol 5, 588 (Pakyoungsa, 2012).

IV. Concurrent Insolvency Proceedings and the Hotchpot Rule

A. Concurrent Insolvency Proceedings under Chapter 5 of the DRBA

Under the DBRA, it is possible for a domestic insolvency proceeding to be commenced against the same debtor, separately or in parallel with a foreign insolvency proceeding recognized in Korea, based on petition by the debtor, a creditor or any other qualified interested party.[58] Where domestic proceedings and recognized foreign insolvency proceedings are concurrently pending in Korea, the Korean court may proceed mainly based on the domestic proceedings and may change or cancel the orders previously granted to the foreign insolvency proceedings.[59] In the event that multiple foreign insolvency proceedings are recognized and pending in Korea, they must be procedurally consolidated and the Korean bankruptcy court may grant relief orders based on the main foreign insolvency proceeding taking into account the location of the main place of business and/or the level of protection of creditors.[60]

If there are concurrent insolvency proceedings of the same debtor in Korea, it would be the local proceeding that survives unless the court finds that the foreign proceedings is a main proceeding, it serves for the general interests of all creditors, and there is no likelihood of detriment to local creditors. It is noteworthy that foreign scholars concern the interpretation of the meaning of detriment to local creditors. Reading other articles of the DRBA that guarantee the foreign creditor's right same degree as local creditors, there will be no discrimination between the recognition petition for foreign insolvency proceedings and local insolvency proceedings. The DRBA provides for the coordination of more than one foreign proceeding. The court may consolidate multiple applications for recognition of cases involving the same debtor. The court may determine as to which proceeding is the main foreign insolvency proceedings and may also adjust relief according to the main proceeding.[61]

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58) DRBA, arts. 633, 638(1) (S. Kor.); *See* Seoul Central District Court (Bankruptcy Division) [Dist. Ct.] 2008Ha-Hap8, Feb. 20, 2009 (S. Kor.). After the recognition of Dutch liquidation proceeding for LG. Philips Displays Holding B.V in 2007, Seoul Central District Court (Bankruptcy Division) ordered a commencement order of bankruptcy for the same debtor.

59) *Id*. art. 638.

60) *Id*. art. 639.

61) *Id*. art. 639.

B. The Hotchpot Rule

Where a debtor is concurrently subject to a domestic insolvency proceeding and one or more foreign insolvency proceedings, a creditor who has received payment from a foreign insolvency proceeding or the debtor's assets abroad out-of-court insolvency proceedings may not receive any dividend or payment in the domestic insolvency proceeding until other creditors in the same class and ranking in the domestic insolvency proceeding have received a payment that is proportionately same.[62] It can be seen that the hotchpot rule of the DRBA is applied more widely than that included in the Model Law because the Model Law sets forth that the hotchpot rule (Article 32) is applicable only if an unsecured creditor is paid in a foreign insolvency proceeding and not if a secured creditor is paid in a foreign insolvency proceedings.[63] There has not yet been any court case or established court practice with regard to the application of the hotchpot rule in Korean insolvency proceedings. It appears that the hotchpot rule under the DBRA primarily addresses payments made to creditors in concurrent foreign proceedings. It is not entirely clear whether and to what extent the hotchpot rule will be applied with respect to (i) voluntary repayments made by the debtor from the debtor's overseas assets when there is no concurrent foreign insolvency proceeding, (ii) payments received from the enforcement of security interests in the debtor's assets outside Korea. The academic views are split whether a creditor has to give back payments received under foreign insolvency proceedings if the received payments are exceeded the dividend allowed in local insolvency proceedings for other local creditors in the same class. Some Japanese scholars assert the creditors who received more than local creditors' dividend must return the surplus based on the doctrine of unjust enrichment,[64] other's view that the creditors do not need to return because the payment from foreign insolvency proceedings is lawful according to local substantive law.[65]

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62) *Id.* art. 642.

63) *See* Min Han, Financial Transaction and Law, 855 (Pakyoungsa, 2018). For more details, *see* Min Han, The Hotchpot Rule in Korean Insolvency Proceedings' 7 J. Kor. L. 460-483 (Seoul Nat'l U., 2008); Kwang Hyun Suk, *supra* note 58, at 564.

64) Matsusida Junnichi, Outbound Effect of Local Insolvency Proceedings, 3 Shinzaibanjitsutaikei 467 (Seilinshoyin 2002).

65) Kwang Hyun Suk, *supra* note 57, at 566. He denies the return of surplus.

V. Outbound Effect of Korean Insolvency Proceedings

A. The Power of Bankruptcy Trustee or Administrator Appointed by Korean Courts in Foreign Jurisdictions

The Korean rehabilitation proceedings have been routinely recognized as a foreign main proceeding and court appointed administrator qualified as foreign representative in the U.S.[66] and the U.K.[67] With the enactment of Article 640 of the DRBA and thus the implementation of Article 5 of the Model Law, the territoriality rule was clearly abolished. Therefore, an insolvency proceeding commenced in Korea affects the debtor's assets outside Korea. Under rehabilitation proceedings as well as liquidation proceedings, as a bankruptcy trustee/administrator's authority to manage properties also applies to properties abroad, the bankruptcy trustee/administrator has power to conduct activities to dispose of properties abroad, including management and sale thereof. If a dispute arises over properties abroad in foreign countries, a bankruptcy trustee/administrator has the authority to file a suit as the plaintiff or can be sued as the defendant in foreign courts or arbitration tribunals. If a rehabilitation creditor or rehabilitation secured creditor executes judgment or exercises its security right against a debtor's properties located overseas, a request for suspension or cancellation of such exercise of right may be filed by bankruptcy trustee/administrator with the competent foreign court. For example, any bankruptcy trustee or administrator appointed by the local court can file a Chapter 15 case in the United States or recognition and relief order in High Court in England and is entitled to manage and sell assets located in the United States or the U.K after getting a stay order and other proper relief orders.

However, although the DRBA adopted the universality principle, it does not necessarily mean that the Korean insolvency proceedings are automatically effective overseas, and furthermore, that a bankruptcy trustee/administrator may at its discretion exercise its authority to manage and dispose of properties overseas. In order for the Korean insolvency proceedings to affect the debtor's

66) "[T]he bankruptcy laws of Korea are substantially similar to the laws of the United States and comport with general notions of due process" (Daewoo Motor Am., Inc. v. General Motors Corp., 315 B.R. 148, 159 [MD Fl 20040], *affd*; 459 F3d 1249 (11th Cir. 2006), *cert. denied* 549 U.S. 1362 (2007); Matter of Kyu-Byung Hwang, 309 B.R. 842, 846 (Bankr. S.D.N.Y. 2004); Tongyang, Inc. v. Tong Yang Am., Inc. 2018 N.Y. Misc. LEXIS 5551, at 19.

67) In the matter of Hanjin Shipping No. CR-2016-005448 High Court of Justice (unpublished).

properties located abroad, the relevant Korean insolvency proceedings should be recognized first in the foreign court. If foreign jurisdictions such as the U.S., the U.K, Japan, or Australia which have adopted the Model Law or Germany, Belgium, or Singapore[68] which have cross-border insolvency law based on universality even though without adopting the Model law have recognized the Korean insolvency proceedings, the Korean bankruptcy trustee/administrator may dispose assets located in those jurisdictions.[69] However, whether foreclosure sale initiated by secured creditors can be stayed and whether a vessel leased and operated, or chartered by a debtor can be protected from the attachment of creditors are entirely dependent on cross-border insolvency law of each foreign jurisdiction. On the other hand, under Chinese, Cambodian, Panamanian, or Egyptian insolvency laws, which do not adopt the universality, do not allow the Korean bankruptcy trustee/administrator to manage and dispose of debtor's assets located in respective jurisdictions. In fact, in some cases, assets that belong to Korean debtors, such as ships, were arrested in such jurisdictions, which obstructed revival of the debtors.

B. Recognition of Petition in Converted Liquidation Proceedings

It is commonly required that foreign representative to report regularly about the affairs of debtor's business and financial status to the court which issued a recognition order.[70] In the U.S., "a stay imposed pursuant to Chapter 15 is

68) In re Taisoo Suk (as foreign representative of Hanjin Shipping Co. Ltd.) [2016] SGHC 195. This order was rendered prior to Singapore's adoption of the Model Law in 2017.

69) Rehabilitation proceedings or bankruptcy proceedings for SamboTrigem Computer, Young Chang Piano, Daewoo Corporation, Boe Hydis, Samsun Logix, Daewoo Logistics, Daewoo, Daehan Shipping, Kumgang Valve, Daebo and Hanjin Shipping were filed for recognition with the competent courts in the United States and were recognized by the U.S. courts. In particular, the corporate reorganization proceedings for Sambo Trigem Computer were filed on March 11, 2005 and recognized as the first case in Chapter 15. Selinda A Melnik,United States, in Look Chan Ho (ed.), Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law, 3rd ed., Globe L. & Bus, 503-544 (2012). Cases in which arbitration proceedings in the United Kingdom were suspended in connection with Samsun Logix, Korea Line, and Pan Ocean. *See* Look Chan Ho, Smoothing Cross-Border Insolvency by Synchronizing the UNCITRAL Model Law, Butterworths J. Int'l Banking & Financial L., 3956-396 (Jul./Aug. 2009).

70) Seoul Central District Court (Bankruptcy Division) [Dist. Ct.], 2016Kookji100000, Oct. 18, 2016 (S. Kor.).

normally coterminous with the stay in the corresponding foreign proceeding and, accordingly, the Stays terminated at the close of ROK Rehabilitation."[71] It is critical to check the necessity of reporting the status of local insolvency case or filing another petition to have the converted liquidation proceedings recognized in foreign jurisdictions. The bankruptcy trustee of the converted liquidation proceeding of Hanjin Shipping filed a separate petition for the recognition of the Korean liquidation proceeding in Japan. However, the bankruptcy trustee of Hanjin Shipping does not need to file a separate petition for the recognition of the Korean liquidation proceedings with the U.S. Bankruptcy Court, so he only reported the change of the case status from rehabilitation to liquidation to the relevant bankruptcy court in the United States. Whether it is necessary to file a separate petition for the recognition for the converted liquidation proceedings in Korea depends on the cross-border insolvency laws of the relevant foreign jurisdictions.

C. The Coordination between Korean Insolvency Proceedings and Foreign Litigation or International Arbitration Proceedings

After rehabilitation or liquidation proceedings have commenced against a debtor in Korea, whether foreign litigation/arbitration proceedings against the same debtor can be stayed depends on the recognition and stay orders of the foreign courts. There is no distinct provision in the DRBA dealing with the status of foreign litigation proceedings or arbitration proceedings. Therefore, international comity or concession is the only route available to prevent possible conflict of procedures between Korea and relevant foreign countries. It follows that potential claimants are not necessarily prevented from relying on foreign court or arbitration proceedings. Nor are they prohibited from continuing such proceedings if they are already pending overseas when rehabilitation proceedings are commenced in Korea. It is the practice of Korean courts to allow foreign court litigation proceedings or international arbitration proceedings to continue and to take into account the decisions made in those foreign proceedings.

For example, in the restructuring case of Samsun Logix and case of Korea Line, arbitrations were taking place in London and the Korean court waited for the outcome of those arbitrations. The local arbitration proceedings stayed in

71) In re Daewoo Logistics Corp., Case No. 09-15558 (Bankr. S.D.N.Y. 2011) (unpublished).

Korea included cases where arbitrations were commenced both before and after the commencement of rehabilitation proceedings in Korea. In Korea Line case, the Seoul Bankruptcy Court stayed ongoing local summary proceedings pending the determination of relevant matters by the arbitration tribunal in London.[72] In both cases, the Korean court was prepared to give effect to a foreign arbitral award or judgment as adjudication on the merits.

After issuing a recognition of Korean rehabilitation proceeding in respect of STX Offshore & Shipbuilding under the Cross Border Insolvency Regulations 2006 in accordance with the provisions of Schedule 1, the English court action between the Buyers and STX was stayed due to Article 20.1 (a) of the Schedule 1, however, the English High Court lifted the stay order.[73] The court ruling based on the facts that there are already proceedings before the Commercial Court in London, and Buyers want the adjudication and quantification of their claim under the guarantee to be determined more speedily than is likely under the summary confirmatory review and objection proceeding process in Korea. The Supreme Court expressly held that if an arbitral award was rendered pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (or the New York Convention), the bankruptcy court must be bound by the arbitral award unless any of the grounds listed in Section 5 of the New York Convention exists.[74]

VI. Choice of Law Issues under Chapter 5 of the DRBA

A. General Rule of Choice of Law in Cross-Border Insolvency Proceedings

It is widely accepted that the core issues such as the jurisdiction of the insolvency proceedings, the grounds for commencement or closing of insolvency proceedings, the scope of bankruptcy estate, priority of claims, the appointment, power or duty of bankruptcy trustee/administrator, procedure of filing proofs of claims, claim allowance proceedings, or proceedings for recognition of foreign insolvency proceedings are governed by the law of bankruptcy court ("lex fori concursus").[75]

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72) Korea Line v. Cosco Bulk (No 1382 of 2011, no reported judgment).

73) Ronelp Marine, Ltd. v. STX OS [2016] EWHC 2228 (Ch).

74) Supreme Court Decision [S. Ct.], 2006Da20290, May 28, 2009 (S. Kor.).

B. Executory Contract

The Supreme Court set forth the criteria to determine whether a contract is an executory contract where both parties bear their respective obligations that are quid pro quo of the other parties' obligations and if the parties' obligations are interwound legally and economically in terms of their formation, performance and existence, and thus function as security ensuring each party's performance of their respective obligations then those obligations are quid pro quo to each other.[76]

Based on the executory contract rule, a bankruptcy trustee/administrator may elect to perform the executory contract or to terminate the executory contract.[77] The U.S. Bankruptcy Code and German Insolvency Act recognize the power of trustee to reject performance under existing contracts but not the power to terminate such contracts. Therefore, this rule under the DRBA may not be familiar to foreign creditors from such jurisdictions. If liquidation/rehabilitation is commenced against a debtor who has entered into contract governed by foreign law, the DRBA should be applied to issues such as whether the bankruptcy trustee/administrator has the right to elect to perform or terminate executory contracts or whether damages claims arising as a result of the bankruptcy trustee/administrator's termination of an executory contract are rehabilitation/bankruptcy claims or common benefit claims/estate claims.[78] However, issues concerning the scope of compensation for damages incurred by such a decision, if they arise, may be subject to foreign governing laws (e.g. English law in the case of shipping contracts).[79]

C. Set-Off

Legal scholars are split in their views on governing law of set-off with some arguing that the governing law of the set-off is the law that governs the cross-claim, while others opining that set-off should be governed by both the law that governs the claim and the law that governs the cross-claim.[80] Nevertheless,

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75) Kwang Hyun Suk, Private International Law Issues concerning Set-off in Judicial Proceedings between Claims Governed by English Law, 57 Seoul L. J. 233 (2016).

76) Supreme Court [S. Ct.], 2005Da38263, Sep. 6, 2007 (S. Kor.).

77) DRBA, arts. 119, 335 (S. Kor.).

78) Supreme Court Decision [S. Ct.], 2012Da104526, 2012Da104533, May 28, 2015 (S. Kor.).

79) *Id.*; *Id.* 2001Da30469, Dec. 24, 2001 (S. Kor.).

80) *See* Kwang Hyun Suk, Choice of Law Rules in the Cross-border Insolvency under Korean Law,

courts and scholars generally agree that under rehabilitation proceedings, the provisions that impose restrictions on setoffs under the DRBA are applicable in addition to the governing laws of those claims. Some of these issues were raised in a recent Korean Supreme Court case. The case[81] involved a set-off arising from a Bare Boat Charter Hire Purchase (BBCHP) agreement. The claim holder ("Party A") was subject to rehabilitation proceedings, while the holder of the cross-claim ("Party B") owed debt to Party C who attached the cross-claim. The BBCHP agreement was governed by English law and the cross-claim was attached based on an order of a Korean court pursuant to the Civil Execution Act. The Supreme Court held that the requirements, manner, and effectiveness of the set-off was governed by English law as the law governing the claim and the cross-claim but the effect of the attachment was governed by Korean law because the attachment order was issued pursuant to Korean law. The Supreme Court interpreted the Korean Civil Code to hold the set-off effective as a defense against the attachment. If English law had been applied to the effectiveness of the set-off against the attaching creditor, the facts of the case were such that the attaching creditor may have prevailed.[82] Scholars are critical on the court ruling because the Supreme Court characterized the attachment of claims under English law issue as a procedural but not substantive issue.[83]

While the DRBA imposes certain restrictions on the timing of exercising the rights to set off during an ongoing rehabilitation proceeding,[84] the New York Court in Tong Yang case applied New York law instead of the DRBA.[85] The court held that (i) because the Chapter 15 proceeding for the plaintiff closed before the plaintiff commenced the instant case against a U.S. company (TYA) in New York, there is no indication that the plaintiff sued TYA for the express purpose of assisting or facilitating the rehabilitation proceeding, (ii) TYA may exercise right of setoff after bar date for filing of proof of claims because "TYA did not receive individual notice from the Korean court, which is required under

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4 JURIS 143-144 (2008).

81) Supreme Court [S. Ct.] 2012Da108764, Jan. 29, 2015 (S. Kor.).

82) *See* Suhn-Kyoung Hong and Seong-Koo Cheong, Set-Off Law and Practice: An International Handbook, Ch. 30 South Korea, paras 30.01-30.36 (Oxford, 2018).

83) *See* Kwang Hyun Suk, *supra* note 75, at 241.

84) While there is no such restriction in liquidation proceedings, a rehabilitation creditor must still submit a notice to the administrator on his or her intent to set off by the last day of the period for filing proofs of claims as determined in the commencement order of rehabilitation proceedings. *See* DRBA art. 144 (1).

85) Tongyang, Inc. v. Tong Yang Am., Inc. 2018 N.Y. Misc. LEXIS 5551, at 19-29.

the DRBA Section 51(1) and (2) (iii) and the plaintiff's December 2013 letter fails to sufficiently alert TYA of the Rehabilitation Proceeding or suggest that it needed to act," (iii) in a federal bankruptcy proceeding, a debtor must give "reasonable notice" to a creditor of the bankruptcy proceeding and the applicable bar date or else the creditor's proof of claim cannot be constitutionally discharged, (iv) reviewing choice of law issue, New York has the most significant relationship to this case regarding setoff, therefore TYA is entitled to maintain it defense of setoff under New York's Debtor and Creditor Law § 151.

VII. Judicial Cooperation under Chapter 5 of the DRBA

The Hanjin Shipping Case is a typical example that shows the effectiveness of judicial cooperation in cross-border insolvency cases. In order for the administrator of Hanjin Shipping appointed by the Korean bankruptcy court to repatriate to Korea the proceeds from selling assets in the United States, the Seoul Bankruptcy Court and the Bankruptcy Court for the District of New Jersey had a conference call in 2017.[86] After the call, the U.S. Bankruptcy Court allowed the administrator of Hanjin Shipping to repatriate money to Korea. The Seoul Bankruptcy Court has also cooperated with the courts in several foreign countries. For example, it allowed the repatriation of sales proceeds of Korean debtors who are under Chapter 11 proceedings in the U.S. or administration in the U.K. by cooperating with the U.S. Bankruptcy Court of Eastern District of Virginia and the High Court of England and Wales.[87] In another case, to cooperate with the Federal Court of Australia, the Seoul Bankruptcy Court responded to questions about the status of Hanjin Shipping's liquidation proceedings in Korea.

To strengthen exchanges and cooperation with foreign courts, the Seoul Bankruptcy Court has also entered into memoranda of understanding for the

86) The conference call, lasting an hour and 7 minutes, was made possible because Article 641 of the DRBA permits judicial cooperation between South Korean courts and foreign courts regarding certain insolvency matters.

87) Seoul Central District Court (Bankruptcy Division) [Dist. Ct.] 2017Kookji1, Sep. 8, 2017 (S. Kor.). The court order is declaration of cooperation with the U.S. Bankruptcy Court for the Eastern District of Virginia with regard to the repatriation of proceeds of two Korean debtors. Seoul Bankruptcy Court 2016Kookji1000017, Sep. 5, 2018 (S. Kor.). The court order is to grant the repatriation of proceeds of foreign debtor to High Court of England.

cooperation in concurrent proceedings with foreign courts, including with the U.S. Bankruptcy Court for the Southern District of New York[88] and the Supreme Court of Singapore.[89]

VIII. Conclusion

Korea's old insolvency regime was an inadequate counterpart to foreign bankruptcy laws and was not efficient and effective for restructuring corporations in late 1990's. The enactment of the DRBA represents an understanding of the Korean legislature of the need for a more efficient and practical insolvency system.[90] One of the most significant changes to Korea's insolvency regime that the DRBA brought about is the introduction of globally accepted moderate universalism in cross-border insolvency cases. That the legislature incorporated the Model Law provision permitting direct court-to-court communication turned out especially effective to solve difficult issues such as repatriate funds to Korea and foreign courts, it would take more time to settle that issue without court-to-court conference call, given that some civil law countries such as Japan refused to adopt it.

Since the DRBA was passed in 2005, the Seoul Central District Court has recognized nine foreign bankruptcy cases and its practice becomes speedier than before. Korean judges have been paying close attention to trends in cross-border insolvency law by participating and hosting international insolvency fora regularly. This demonstrates their recognition of the importance of cross-border insolvency cases in the global era.

After Hanjin Shipping filed rehabilitation proceedings, the United Kingdom, Japan, Singapore, and Australia have recognized Korean rehabilitation proceedings. The scope of stay order differs among countries based on their cross-border insolvency laws. In this regard, it is likely that the Korean courts will begin to take a more positive attitude towards petitions than they have in years past and will need to pay attention to the cross-border bankruptcy law of

88) Memorandum of Understanding between the Bankruptcy Court for the Southern District of New York and the Seoul Bankruptcy Court (Apr. 23, 2018).

89) Memorandum of Understanding between the Supreme Court of Singapore and the Seoul Bankruptcy Court (May 16, 2018).

90) Soogeun Oh, An Overview of the New Korean Insolvency Law, 16 Norton J. Bank. L. & Prac. 782 (2007).

other jurisdictions. If the DRBA aligns with cross-border insolvency regimes of other jurisdictions, the concept of debtor's center of main interests which is at the core of a foreign main insolvency proceedings must be introduced in the DRBA. By introducing it, the sufficient degree of predictability for the parties in interests will be fully provided.[91]

91) *See also* Jejung Lee, *supra* note 23, at 81.

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