

The Country Report for the Republic of Korea was prepared by Judge Jaewan Park of Seoul District Court, for the World Bank Global Judges Forum 2003, held May 19-23, 2003. The paper has been adapted specifically for publication on the Global Insolvency Law Database.

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SOUTH KOREA

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1.0 INTRODUCTION AND OVERVIEW

1.1. Secured Claims and Enforcement

In the Korean legal system, there are two types of liens: consensual and statutory. The concept of a judicial lien is unknown. A creditor with an attachment is in a position very similar to that of a lien holder: the creditor has less priority than the holder of a lien that was taken earlier in time, but is equal in priority to lien holders who came later on.

There are three typical types of consensual liens enumerated in the real property law section of the civil code: mortgages, pledges, and leases. The mortgage is called the “king of liens”, and is the type used most frequently in business financing.

For statutory liens like rights of retention, there are specific provisions in the civil code (for instance, in the commercial code). The Provisional Lien Registration Act (or Act Relating to Security by Provisional Registration) and the Factory Estate Mortgage Act are good examples of special laws that created new liens or modified already existing liens.

A secured creditor can file a petition with the court for foreclosure. The procedure is very efficient with respect to both time and money. Interestingly, while a mortgage creditor does not have this extra-judicial power of sale, it is often the secured creditors, and not the mortgagees, who negotiate with debtors about selling the encumbered property to satisfy the secured claim when the debtor fails to pay.

1.2. Unsecured Claims and Enforcement

To initiate a civil execution procedure, an unsecured creditor must first seek a court judgment. Unsecured creditors may try to obtain a pre-judgment attachment if they can locate the debtor’s assets. The cost of

obtaining an attachment is very low and there is no requirement for the court to hear the debtor prior to ordering the attachment, so this method of obtaining some measure of security is widely used.

In Korea, lawsuits filed by financial institutions like banks to collect non-performing debts generally proceed very quickly. This is mainly because transactions in which financial entities are involved are well-documented, so that the fact-finding process is very easy.

When unsecured creditors fail to find assets of the debtor to seize, they become suspicious that a debtor might have in fact registered the assets under a third party's name and sometimes accuse the debtor of fraud. To prevent such problems, the Act on the Registration of Real Estate Under the Actual Titleholder's Name and the Act on Real Name Financial Transactions and Guarantee of Secrecy were put into force; and an order to search property was introduced into the new Civil Execution Act.

1.3 Liquidation

The first western-type statutes on bankruptcy were promulgated on January 20, 1962. They were the Bankruptcy Act (the "BA", Act No. 998) and the Composition Act (the "CA", Act No. 997). The text of the Korean Bankruptcy Act was based on the Japanese Bankruptcy Act, which closely follows the German concept. The text of the Composition Act also was drawn from the similar Japanese act, which was modeled after the Austrian Composition Act. Another relevant law, the Corporate Reorganization Act (the "CRA", Act No. 1214) was promulgated on December 12, 1962. It, too, was based on a similar act in Japan. At the suggestion of the occupation authorities after World War II, the Japanese corporate reorganization system was modeled after Chapter XI of the U.S. Bankruptcy Act of 1898.¹

There are special provisions and acts for financial institutions like banks. However, there is no special treatment for individuals, farms, and municipalities, or for airlines, railroads, and vessels.

Compared to the size of the economy, the number of straight liquidation cases has been quite low, although the number has begun to grow rapidly in recent times, due to the increase in individual bankruptcy cases. In most cases, a liquidation process is initiated by the debtor, and not by a creditor. The liquidation proceedings are governed by the Bankruptcy Act. It is a single code, applicable nationwide (Korea does not have federal system). The administration of liquidation proceedings is placed in the hands of a bankruptcy trustee appointed by the court and subject to court supervision.

1.4. Reorganization

There are two rehabilitation procedures in Korea: composition and corporate reorganization. The former is governed by the Composition Act, and the latter, by the Corporate Reorganization Act. Composition is a basic, watered down version of the rehabilitation procedure. In this process, the old management continues to run the company, and execution on secured claims can proceed unhindered and unimpaired. Corporate reorganization, on the other hand, is a specially designed, strong rehabilitation proceeding solely for corporations. The debtor company is operated by a trustee, who is appointed by the court and even the rights of secured creditors' are subject to the restrictions of the CRA.

The composition procedure is only voluntary only for the debtor, whereas the corporate reorganization procedure can be initiated by either debtors or shareholders.

1.5. Non-Bankruptcy Workouts and Restructurings

The government of Korea has led the country's national economic development. It selected industries to promote, and used banks as tools to support industry policy, rather than as independent, profit-earning instruments. Because it seemed that the failure of the companies could be imputed to the government as a failure of its policies, the government-led economy and government-led banking inevitably led to government intervention into the corporate exit mechanism. In the midst of economic crisis, the government forced financial institutions to establish an accord for out-of-court workouts in June 1998. This, in turn, led to enactment of the Corporate Reorganization (Restructuring) Promotion Act (the "CRPA") in 2001.²

2.0 LEGAL FRAMEWORK FOR CREDITOR RIGHTS

2.1 Creation and Enforcement of Security in Real Property / Mortgages

A mortgage is the archetypal security for real property. To create a mortgage requires, first, that the mortgagor and mortgagee execute a mortgage agreement and, second, that the mortgage be recorded in an appropriate registry. The application for recording is filed jointly by the mortgagor and the mortgagee; it must be accompanied by the mortgage agreement as well as proof of the reason for the mortgage. In bank transactions, an executed copy of the loan agreement is generally used to provide such proof.³

A mortgage gives the mortgagee a right in the burdened property, without requiring that he take possession. Once recorded, such a right gives the mortgagee a priority interest in the mortgaged property from which he may satisfy his claims before subsequent mortgagees or other subsequent security holders and the mortgagor's general creditors.⁴ Formerly, tax obligations falling due within one year after a mortgage was recorded used to take priority over the mortgage, but this exception was struck down by the constitutional court in 1990.

The mortgage can provide security not only for the principal amount of the loan, but also for any interest, fixed penalties, or default interest arising from non-performance. However, only default interest incurred during the one-year period following the date on which the secured principal became due can be used as security, unless the mortgage is a *kun* mortgage (Civil Code Art. 357; see *below*).⁵

The primary method for enforcing a mortgage when a debtor cannot pay is judicial foreclosure, which is governed by the Civil Execution Act. Any extra-judicial foreclosure agreement entered into prior to default is valid as long as the agreement provides that the mortgagee must return to the mortgagor any value received for the encumbered property in excess of the mortgagee's claim, whether the agreement is for straightforward foreclosure or for a power of sale.⁶

As for the types of mortgage, two types – a joint mortgage and a *kun* mortgage – are noteworthy. A joint mortgage is a single mortgage that covers several items of property. A *kun* mortgage is a mortgage that secures debts arising from a series of transactions, up to a certain fixed maximum amount to be reached on a day in the future.⁷

There are also laws providing for special mortgages. Some – the Factory Estate Mortgage Law and the Mine Estate Mortgage Law – enable the entire estate of a business, including land, buildings, equipments and intangible property, to be the object of a single mortgage. Others – the Ship Registration Law, the Vehicle Mortgage Law, Aircraft Mortgage Law, and the Equipment Mortgage Law – recognize chattels as the object of a mortgage.⁸

2.2 Security in Personal Property / Pledges

Of the types of security available for personal property, the most important is the pledge. Korean law recognizes two types of pledges: one for movables and the other for rights in property. Korean law also recognizes the concept of a pledge of movables represented by documents. Certain documents evidencing the storage or transportation of goods are deemed to represent the goods themselves. Such documents include warehouse receipts and bills of lading.

A pledge may be governed by the general civil code or commercial code provisions, or it may be governed by special laws or statutes. A pledge is governed by the commercial code if it arises out of a commercial transaction. Therefore, virtually all pledges taken by a financial lender would be commercial code pledges.

A pledge of rights is substantially the same as a pledge of movables. However, rights are generally pledged by delivery of the documents representing those rights. The principal types of rights that are pledged are (a) debts and (b) shares in a company. Probably the most common pledge of debts in financial transactions would be the pledge of a debenture.

The pledge is created by executing a pledge agreement and delivery of the pledged items from the pledgor to the pledgee.

Depending on what the parties agreed, a pledge may be enforced through a civil execution procedure under the Civil Execution Act, by a private sale, or by taking over the pledged item and collecting the profits. The civil code also provides that, with court approval, the pledgee may have the property appraised by an expert, acquire the ownership himself, and apply the appraised value of the property against the debt.⁹

2.3. Unsecured Claims

An unsecured creditor must usually obtain a judgment in order to initiate a civil execution procedure. Unsecured creditors may apply for a pre-judgment attachment if they know where to find the debtor's assets. Generally, the court does not hear the debtor prior to ordering the pre-judgment attachment, but the unsecured creditor is required post a bond as a precondition to the procedure. There has been no serious debate on the due process issue regarding the pre-judgment attachment. As the cost of obtaining an attachment is very low and there is no need for the court to call the debtor prior to applying for the pre-judgment attachment, it has been very popular.

In Korea, lawsuits filed by financial entities like banks to collect non-performing debts generally proceed very quickly, mainly because the transactions in which such entities are involved are well-documented and easy to substantiate.

Unsecured creditors may accuse debtors of fraud if they cannot find any assets to seize and have reason to suspect that a debtor might, in fact, have registered his assets under someone else's name. There was a time when the prosecutor's office, and even the court, readily accepted this fraud charge, acknowledging the public's perception that many people put their properties under someone else's name. To resolve this problem and make the civil debt collection system more effective, the Act on the Registration of Real Estate under the Actual Titleholder's Name and the Act on Real Name Financial Transactions and Guarantee of Secrecy were enacted, and the new Civil Execution Act introduced an order that allowed a property search.

3.0 LIQUIDATION

3.1 Principal Laws Governing Liquidation

The Bankruptcy Act governs the regular liquidation process. As there is no federal system in Korea, it is applicable nationwide.

3.2. Courts that Administer Liquidation

As Korea does not have a federal system, there is no problem of having to choose between federal and state courts.

Jurisdiction over the liquidation proceeding is established by law. If the debtor is a merchant, the three-judge panel of the district court sitting in the debtor's main place of business has exclusive jurisdiction. (BA Art. 96(1)). If the debtor is not a merchant or has no place of business, exclusive jurisdiction will be exercised by either the three-judge panel or the single-judge bench of the district court sitting in the location of debtor's domicile. (BA Art. 96(2)). Consumer bankruptcy cases filed by non-business individuals are heard exclusively by a single-judge bench in the district court.¹⁰

3.3. Commencement of the Liquidation Process

A liquidation proceeding can be initiated by either a voluntary petition or a non-voluntary petition. It should be noted that in Korea, the liquidation process does not start with either petition (voluntary or involuntary); it starts with the court's adjudication of a debtor as bankrupt.

There is no restriction with respect to eligibility as a debtor. The debtor may be an individual or a legal entity (including corporations, partnerships, and limited partnerships), although a joint petition by husband and wife is not allowed. They must file separately. Any private bank, credit association, insurance company, or non-commercial legal entity may file a voluntary petition; alternatively, an involuntary petition may be filed by their creditors.

Insolvency is the usual grounds for bankruptcy in both voluntary and involuntary petitions, whether it is experienced by an individual, a legal entity, or the estate of a decedent. Suspension of payments is also grounds for bankruptcy. "Suspension of payment" is defined as a subjective manifestation or action through which the debtor suspends repayment of all debts owed to all creditors (and not just some debt owed to some creditors in particular). The Bankruptcy Act provides that the suspension of payments is presumed to be due to the debtor's financial incapacity to pay. (BA Art. 116 (2)). However, the debtor is allowed to rebut a this presumption to prevent the creditors from filing an involuntary petition.

If the liabilities of a legal entity exceed its assets, that is grounds for bankruptcy of the juristic person, regardless of the subjective underlying intentions. (BA Art. 117 (1)).¹¹

3.4. Parties to a Liquidation

See section 3.7 below on creditors and claims.

3.5. Liquidation Estate

Until the adjudication of bankruptcy, in principle all of the debtor's property belongs to the estate, which is to be managed by the trustee. Whether property belongs to the estate or not is determined not substantively, but formally: that is, it is determined according to the name listed in the real estate registry.¹²

However, exempt property, property newly acquired after the adjudication of bankruptcy, and property that is in foreign countries do not belong to the estate. They are called "free" property.

3.6 Administrative Powers

At the time the debtor is adjudicated bankrupt, the court, in consultation with a management committee, appoints a trustee (receiver). The right to manage and dispose of the estate then vests exclusively with the trustee, subject to court supervision.¹³

3.7. Creditors and Claims

3.7.1. Bankruptcy Claims

Bankruptcy claims are the unsecured claims against the bankrupt before the adjudication of bankruptcy. The claims that are enumerated in article 32 of the Bankruptcy Act have priority over ordinary bankruptcy claims, and are called "superior bankruptcy claims". The bankruptcy claims listed in article 37 cannot be paid at all until the ordinary bankruptcy claims are fully paid; they are called "subordinate bankruptcy claims" or "junior claims". Bankruptcy claims other than superior or subordinate bankruptcy claims are called "ordinary" or "general" bankruptcy claims.

3.7.2. Secured Claims

Secured claims are based on a security interest in a specific asset or piece of property of the debtor. They are given preference by repayment or foreclosure upon the specific property outside of the bankruptcy proceedings. These rights of secured creditors are called "rights of separation".

3.7.3. Estate Claims

Estate claims are enumerated in article 38 of the Bankruptcy Act. Estate claims are senior to all bankruptcy claims and can be paid by the trustee at any time, regardless of the stage of the bankruptcy procedure. (BA Arts. 40 and 41).

3.7.4. Reclamation of Goods

Article 79 of the Bankruptcy Act stipulates that the order for relief may not affect the right to repossess from the bankrupt estate any property not belonging to the debtor. This provision has been interpreted since the enactment of the law to provide for repossession of goods, and merely expresses the rule *per se*: that is, the owner of the goods can recover his title from the ostensible holder of goods. Therefore, the owner of goods may reclaim them from the trustee, either through litigation or through an out-of-court settlement.¹⁴

At the first creditors' meeting, the administrator reports on the circumstances that led to the adjudication of bankruptcy, interim developments, and the present status of the bankrupt and the bankrupt estate. (BA Art. 183). To pass a resolution at the creditors' meeting, a majority of the creditors present must vote in favor of it and the amount of the claims of creditors voting in favor of the resolution must exceed 50 percent of the amount of claims of all creditors present at the meeting. (BA Art. 163). If the resolution adopted at the creditors' meeting is contrary to the general interests of the creditors, the court may prohibit its implementation. (BA Art. 168). Immediately after the general examination of claims, the administrator may distribute the money, if appropriate for distribution. (BA Art. 228). A bankruptcy proceeding concludes with a court judgment after the administrator makes the final distribution and presents the report to the creditors' meeting.¹⁵

3.8 Officers, Directors, Affiliates

By an amendment to the law in 1998, a facility for a management committee was introduced into Korean insolvency procedure. (CRA Art. 93-2, CA Art. 11-1, BA Art. 101-2). After thoroughly scrutinizing the U. S. Trustee system, the conclusion was that it did not suit Korea's needs. Instead, the management committee was established to administer the proceedings fairly and speedily. Its role is to present to the court with its opinion on the appointment of an interim trustee, the regular trustee, and the inspection commissioner; supervise the discharge of operations by the trustee; examine the reorganization plans; oversee transmission of information to creditors; and evaluate the progress of reorganization proceedings. (CRA Art. 93-2).¹⁶

3.9. Non-Judicial Liquidation

See section 4.12 below on insolvency treatment for banks and financial institutions.

4.0 REHABILITATION, COMPOSITION, AND REORGANIZATION

4.1. Overview of Schemes for Rehabilitation

As mentioned above, there are two types of rehabilitation procedures in Korea: composition and corporate reorganization. The former is governed by the Composition Act and the latter, by the Corporate Reorganization Act. The composition procedure is a basic, limited rehabilitation procedure. In this process, the old management runs the company and there is no way to hinder or impair the execution of secured claims. Corporate reorganization, on the other hand, is specially designed as a strong rehabilitation proceeding for corporations. The debtor company is operated by a trustee who is appointed by the court and even secured creditors' rights are subject to the restrictions in the Corporate Reorganization Act.

The current status of the rehabilitation procedure in Korea is roughly like that of the U.S. before the 1978 Bankruptcy Code was enacted. Unification of the two procedures and introduction of debtor in possession ("DIP") system are currently hot issues in Korea.

We will first examine the corporate reorganization procedures.

4.2 Courts that Administer Reorganizations

The court with jurisdiction over a corporation's head office has exclusive jurisdiction over its reorganization. (CRA Art. 6). It should be noted that all corporate reorganization and composition cases are decided by three-judge panels.

Litigation based on the trustee's power to avoid contracts falls within the jurisdiction of the court handling the reorganization (CRA Art. 82), as do contested matters (CRA Art. 148). But the jurisdiction of the court of reorganization does not coincide with that of the district court panel that handles the commencement or administration of the case. Avoidance actions usually have separate case names and numbers, and are allotted into another civil-law panel of the same district court.

As mentioned above, Korea has no federal system. Therefore, the jurisdiction of the corporate reorganization and composition is exclusive.

4.3 Commencement of a Reorganization

A petition for the commencement of reorganization proceedings may be filed by the debtor corporation, a creditor (or creditors) having claims against the debtor corporation equivalent to not less than one-tenth of its capital, or a shareholder (or shareholders) holding not less than one-tenth of the total number of the issued shares. The petition for reorganization may be filed in cases where a corporation is unable to pay its debts as they mature without markedly impeding continuation of business, or if there are facts falling under one of the grounds for bankruptcy. (CRA Art. 30). For a corporation, insolvency and an excess of indebtedness over the amount of assets are grounds for bankruptcy. The corporation may file in either case, but a creditor or shareholder can file only in the latter instance.¹⁷

The court may dismiss a petition when it recognizes one or more causes listed in the Corporate Reorganization Act. (CRA Art. 38). The most important feature of these causes is the comparison between the liquidation value and the going-concern value. Previously, the Corporate Reorganization Act mandated that the court should evaluate the probability that the company can be rehabilitated, which commentators interpreted as requiring that revival of the company would benefit the public. However, the 1998 amendments convert the above "probability of rehabilitation" test into an economic test, which compares the liquidation value and the going-concern value, in order to relieve the court of the burden of having to ponder what constitutes public benefit, and to hasten the process. Furthermore, the 1999 amendments change the way the economic test applies in the commencement stage in order to accelerate the process even more: After the 1999 amendments, the court must order rehabilitation to commence unless it determines that the liquidation value is "evidently greater" than the going-concern value. What the 1999 amendments really meant to do was to eliminate the examination into the financial condition of a debtor company prior to commencement. This approach was welcomed by most commentators.

In the Corporate Reorganization Act, there is no concept of automatic stay. The procedures are begun by the court's order of commencement. However, the court can issue temporary protection measures. Currently, the bankruptcy division of Seoul district court usually issues temporary protection measures about three days after the petition is filed.

4.4. Participants and Their Roles

The creditors and shareholders are the most important participants in corporate reorganizations. To participate in the procedure, they must file proof of their claims within the deadline set by the court upon commencement. If a creditor fails to file proof of the claim, it will be extinguished. Conversely, a shareholder's equity interest is only impaired to the extent that shareholders who met the deadline have their interest impaired. Thus, shareholders who fail to file proof of claim lose only the right to participate in the procedure, for instance, the voting right and power to appeal.

There has been much criticism that the information about an applicant corporation does not flow effectively among the interested parties in a reorganization process, including the creditors, the trustee, the corporation, and the court. As the trustee is responsible to the court, and not to the creditors, creditors did not have an appropriate way to communicate with the court or the trustee. To improve the situation, the 1998 amendments established a creditors' meeting.

Within a week of receiving notice that the corporate reorganization process has begun, the management committee organizes a creditors' meeting, which consists of up to ten major creditors. The meeting serves as a channel of communication between the court and creditors, disseminating information among the creditors and issuing creditors' opinions on major elements of the process, including appointment of trustees, payment approval (pre-confirmation or during the process) or on other matters requested by the court.¹⁸

4.5 Reorganization Estate

The trustee has full authority to manage and dispose of all the properties of the debtor company, including secured property and properties newly acquired after commencement.

4.6 Administrative Powers / Trustee

The trustee is appointed by the court after hearing the recommendation of the management committee. (CRA Art. 94). This is in contrast to chapter 7 of the U.S. Bankruptcy Code (section 702), in which creditors elect the trustee.¹⁹

There is usually only one trustee, but if necessary, the court may appoint more than one trustee. The trustee has full authority to manage the corporation. He must also report relevant information on the firm to the court and the management committee, including the liquidation value and the going-concern value.²⁰

The trustee has the authority to set aside preferential transactions. (CRA Art. 78). The trustee also has the authority to decide whether to perform or terminate any executory contracts under which obligations remain for the counterparty to perform. The court obtains information on the company mainly through documents submitted by the trustee. In addition, the court may question the trustee on any issue.²¹

Because the debtor corporation is supposed to continue to operate its business in the corporate reorganization process, the role of the trustee is much more important than it is when the business is to be discontinued. Consequently, Korean courts usually appoint experienced businessmen to the position of trustee. From time to time, the court may choose a high-ranking former bank official, especially upon the creditors' request. On the other hand, in bankruptcies, lawyers are often chosen to be the trustee.

4.7 Creditors and Claims

In reorganization proceedings, creditors are classified into three categories according to their priority:

- 1) common benefit claims,
- 2) secured claims,
- 3) unsecured claims.

Common benefit claims are to be repaid irrespective of the reorganization plan, with priority over both secured and unsecured claims. CRA article 208 describes the common benefit claims as including administrative fees for the procedure, employee salaries and retirement allowances, and claims that occur after commencement upon the approval of the court.²²

Secured claims are claims with liens and special priorities. They have priority over common benefit claims with respect to the encumbered property.

Unsecured claims are claims that arose prior to commencement of the process, regardless of whether the amount is fixed or not, liquidated or not, matured or not.

Tax claims are treated as either common benefit claims or unsecured claims, depending on the time at which the basis for the tax obligation arose. It should be noted that even when tax claims are unsecured, there are special provisions to ensure that tax claims are given more favorable treatment than secured claims. In drafting the new insolvency law, this favoritism towards tax claims was severely criticized.

4.8. Officers, Directors, Affiliates

Just like the role of the trustee is weightier in corporate reorganization procedures than in bankruptcy procedures, as we've seen above, the role of the management committee in corporate reorganization procedures is also of greater consequence. The committee advises the court on matters concerning the debtor company, and is expected to play a substantial role in managing day-to-day affairs of the procedure.

The committee is also empowered to conduct an examination into the reorganization plans (CRA Art. 93-3(3)) as well as serve as the trustee for small- and medium-sized companies. (CRA Art. 95-2). It reviews the suitability of the draft reorganization plan and coordinates the provision of information to creditors (CRA Art. 93-3(4)); and approves certain ordinary actions of the trustee upon delegation by the court of some of its supervisory power (CRA Art. 54-2). The committee conducts an annual review of the firm that is in the process of reorganization and reports its findings to the court (CRA Art. 247 (3)), as well as recommending to the court whether the plan should be concluded or discontinued. (CRA Art. 247. (4)).²³

4.9. Reorganization Plan and Process

If the court learns that the going-concern value exceeds the liquidation value, it will order the trustee to prepare and present a draft of a reorganization plan. Unlike the U.S. system, it is the trustee who usually prepares and presents the draft plan. However, the trustee's duties are not exclusive in this regard: a debtor company, creditors, or security holders who filed their claims and securities with the court may also prepare and present the plan. However, it is rare for any one other than the trustee to submit a draft plan.

The trustee must present the draft plan within the period set by the court. For large businesses, the period is not supposed to exceed four months from the date of filing the claims, although it may be extended for not more than two months. For small- and medium-sized businesses, the set period may not exceed one month. (CRA Art. 189).²⁴

Before 1998, reorganization plans usually consisted of rescheduling debt payments with only small "haircuts". Debt-equity swaps were almost never used. The plans were unrealistically optimistic. After the financial crisis of 1997 and two revisions of the Corporate Reorganization Act, the situation has changed considerably. The court is much more reluctant to authorize reorganization plans that appear unrealistically positive. Furthermore, debt-equity swaps are now widely used.²⁵

The court must serve advance copies or summaries of the plan to the trustee, the debtor, creditors who have filed proofs of claim, the shareholders, the Department of Justice, the Financial Supervisory Commission ("FSC"), and the administrative agency supervising the affairs of the corporation. (CRA Art. 200(2)). The Department of Justice and the FSC or the administrative agency supervising the affairs of the corporation may comment on the plan, as may the labor union(s). (CRA Arts. 232(2), 165).

Upon submission of the plan, the court will convene the creditors' meeting to examine the plan. (CRA Art.192). As soon as the court confirms the plan, it takes effect. (CRA Art.236). Any interested parties who filed proof of claim may appeal against the court's decision to confirm or reject the plan. (CRA Art.237(1)).²⁶

The court must discontinue the case *sua sponte* in the instances listed in article 272 of the Corporate Reorganization Act.

The provisions of the Corporate Reorganization Act governing the plans are quite elaborate. (CRA Art. 189- 271-2). For the plan to be confirmed by the court, it must conform with the Act's provisions (CRA Art. 233 (S)), and be fair, equitable and feasible. (CRA Art. 233 (T)).²⁷ The absolute priority rule is neither expressed in the Corporate Reorganization Act nor accepted in practice.²⁸

The resolution in the third creditors' meeting to approve a plan must be equitable and fair. (CRA Art.233 (U)). The plan must treat all the claims fairly and equally according to their priority. The order of priority under article 228 of the Corporate Reorganization Act is:²⁹

- (1) Secured interests
- (2) Claims with general priority
- (3) Claims other than those with general priority
- (4) Junior claims
- (5) Preferred shareholders
- (6) Common shareholders

Approval of the plan requires the consent of over three-quarters of the secured creditors, two-thirds of the unsecured creditors, and a majority of shareholders.³⁰ If the required consent is not obtained, the court can nevertheless approve a plan with the modification prescribed by article 234 of the Corporate Reorganization Act. That section permits the court to modify the plan to ensure "fair and equitable protection" to the creditors. This is a type of "cram down" power.

The duration of the plan may not exceed ten years; prior to the amendment in 1998, the term was twenty years. (CRA Art. 213).

Where the decision of confirmation or non-confirmation is publicly announced, an interested party may lodge an appeal against the decision within two weeks from the date of the public notice. (CRA Art.11).

Once a plan is confirmed, the debtor corporation is relieved of all liability with respect to claims and securities relating to the corporate property, and the right of shareholders is extinguished to the extent specified by provisions of the Corporate Reorganization Act or the plan. (CRA Art. 24). If the shareholders' rights are recognized in the plan, however, the same rights must be extended to all shareholders, regardless of whether they filed proof of their equity interest with the court or not. (CRA Art.244).³¹

Once the court approves the reorganization plan, the trustee implements it under the court's supervision. If the plan has been implemented completely, or if it is deemed certain that the plan will be successfully implemented, the court may conclude the reorganization proceeding. Merger and acquisition is a common cause for an early conclusion of the plan. Upon conclusion of the process, the authority of managing the company reverts to the company's directors.

If, on the other hand, it becomes apparent, either before or after the approval of the reorganization plan, that the company cannot be rehabilitated, the court may decide to discontinue the reorganization proceeding. In this case, the court must declare the corporation bankrupt. A declaration of bankruptcy also follows disapproval of the plan. (Art. 23). Even with the termination of the procedure, the change of claims or discharge according to the plan will be still effective. Termination of the procedure does not have retroactive effect.³²

4.10 Fast-track / Prepackaged Reorganization Procedures

The 2001 amendments to the Corporate Reorganization Act introduced the concept of "pre-presentation" of the draft reorganization plan, under which the creditors whose claims represent over half of the total can present a draft plan *before* the first meeting of the interested parties. (CRA Art. 190-2). Pre-presentation then allows the procedure to be expedited if creditors whose claims represent over two-thirds of the total then consent to the draft plan thus "pre-presented". Although the court is nevertheless obliged to order the trustee to present a draft and set a time frame for the procedure, the court can waive the trustee's obligation in this regard, thereby reducing the time required under the Corporate Recovery Act. (CRA Art. 190-2 (4), (6)).

4.11 Insolvency Treatment of State-Owned Enterprises

There is no special law in Korea regarding state-owned enterprises.

4.12 Insolvency Treatment for Banks and Financial Institutions

The Asian financial crisis provided an opportunity to apply the Act concerning Structural Improvement of a Financial Industry (“Financial Industry Improvement Act”), which is the relevant law for insolvent banks and financial institutions in Korea. The law gives the Financial Supervisory Commission (“FSC”) the authority to order management to implement improvement measures, such as the amortization of stocks, suspension of directors, appointment of a trustee, transfer of businesses, and the acquisition of third parties. The FSC may also suspend a bank’s business for a stipulated period and ask the Minister of Finance to cancel the bank’s license.

When a financial institution is dissolved or bankrupt, a recommendation for a trustee in bankruptcy may be made to the court by the FSC in conjunction with the Korean Deposit Insurance Company, whose role is almost similar to that of the Federal Deposit Insurance Company in the United States. The court then appoints the trustee in bankruptcy recommended by the FSC unless there exists special reasons not to. (Financial Industry Improvement Act, Art. 15).

Like creditors and debtors, the FSC also may file a petition for bankruptcy where it discovers facts constituting grounds for bankruptcy as referred to in article 117 of the Bankruptcy Act. (BA Art. 16 (2)). The court must serve the agency intervening in the bankruptcy with a written instrument specifying the matters enumerated in article 133(1) of the Bankruptcy Act at the time of adjudication. (BA Art. 17). In determining the deadline for filing proof of claims and fixing the date for examination of claims pursuant to article 132 of the Bankruptcy Act, the court is required to hear the agency’s opinion in advance.

The agency intervening in the bankruptcy may present or state its opinion to the court in the course of bankruptcy proceedings for any financial institution. (Financial Industry Improvement Act, Arts. 18, 19).³³

4.13. Composition

In regard to jurisdiction, the Composition Act (“CA”) refers to the relevant part of the Bankruptcy Act. Jurisdiction over the composition is exclusive. Only the debtor is eligible to petition for the composition, although the petitioner may be a natural or a legal person.

The court may dismiss the petition where the amount of assets and debts is huge and the number of interested parties is large. (CA Art. 19-2).³⁴ This provision was added in 2000, because after the 1997 crisis, too many big companies filed for the composition procedure. Of the factors influencing the court to make such a decision, the amount of debt is the most important. Currently, the bankruptcy division of Seoul district court dismisses a composition petition if the debts are greater than approximately US\$200 million.

A debtor is allowed to file when a cause of bankruptcy exists or when the debtor can show that such circumstances may occur. (CA Art. 12).³⁵

An automatic stay is not allowed in the composition procedure. Commencement of the procedure must be decided within three months from the date of filing, with the possibility of a one-month extension. Upon issuing the order to begin the composition, the court sets a period for filing claims and for the date of the creditors’ meeting. It also appoints both an administrator and an examiner upon commencement of the composition.³⁶

Secured claims are beyond the scope of the composition procedure. An administrator in the composition procedure does not have the amount of authority that a trustee in the corporate reorganization procedure has. The appointment of an administrator in the composition procedure does not affect the power of the debtor to manage and dispose of its assets, although the administrator does have authority to monitor the debtor’s activities.³⁷

The creditors vote on the proposed conditions for the composition at the creditors’ meeting. The conditions to which they consent will be examined by the court to see if they satisfy all the legal requirements.³⁸

Once the composition is approved, the debtor is allowed to run its business without interference by the court. Following approval, the debtor corporation must report to the court every six months with respect to payments under the plan. (CA Art. 62-2). The court has the discretion to discontinue the composition if it finds that the debtor has not met its repayment obligations according to the condition or will be unable to meet them in the future. If the composition is discontinued, disapproved or cancelled, the court adjudicates the debtor bankrupt *ex officio*. (CA Art. 9).³⁹

5.0 INSTITUTIONAL FRAMEWORK FOR INSOLVENCY

5.1 Role of Governing Institutions / Judicial Authorities

In Korea, judicial power is vested in an independent judiciary. The Korean judiciary has three levels of normal courts: the Supreme Court, the High Court, and the District Court. There are also specialized courts like the Family Law Court, the Administrative Law Court, and the Patent Law Court.⁴⁰

Through the course of the nation's development, commentators have given Korean judges high marks with respect to devotion to their work and freedom from corruption, as compared to other officials in the administrative or legislative branches.

Currently in Korea, the court is in charge of administrative tasks in insolvency procedures. The court appoints trustees, whom it supervises by way of "permitting acts", which list a broad range of actions for which trustees must first seek the permission from the court. There is no agency like the U.S. Trustee. Instead, Korea created the management committee, which can be established by a district court. A management committee consists of specialists like former bankers, certified public accountants, economists, and high ranking administrative officers.

5.2 Specialization among Courts / Judges and Tribunals

At present, Korea does not have a special bankruptcy court system or the institution of a bankruptcy judge. Many commentators inside and outside Korea argue that there should be a specialized bankruptcy court in Korea. Their contention is that to improve the expertise of judges who handle bankruptcy cases, a specialized bankruptcy court is indispensable under the career system adopted by the Korean court. Under the Korean court's career system, judges are regularly transferred or promoted to positions where they deal with different types of cases. Consequently, it is hard for a Korean judge to be in charge of a given type of case longer than two years. When the transfer and promotion of judges is so frequent, it is hard to find judges with sufficient maturity of experience in bankruptcy law and practice.

The Supreme Court of Korea is very seriously pondering this issue. In weighing the various factors, the Supreme Court has to decide whether two necessary assumptions are satisfied: first, can the bankruptcy court retain enough experienced judges without harming the whole judiciary? Second, will there be enough of a case load to maintain a separate bankruptcy court?⁴¹

Currently, the Korean court is taking a compromise position, establishing bankruptcy divisions in the major district courts. Seoul, Incheon, Suwon and Daegu district courts each have their own bankruptcy division that deals solely with bankruptcy cases.

In addition, to improve the abilities of bankruptcy judges, the court in Korea has made it a rule that, contrary to the ordinary situation, once a judge enters a bankruptcy division, the judge serves in the division for at least three years, rather than two. The court also tries to assign judges to the bankruptcy court, who had excellent credentials and experience in bankruptcy divisions. Moreover, to improve their abilities in this area of law, the court also holds a biannual Bankruptcy Judges Conference in the Judicial Training Center as well as seminars from time to time. The court supports other activities of the bankruptcy law community, such as publishing and updating bankruptcy law manuals and developing special court rules for bankruptcy practice.

5.3. Organization of the Court

As mentioned in section 5.1, there are three tiers of courts in Korea:

- *District courts* (including the specialized family court and the administrative court), which are courts of original jurisdiction;
- *High courts*, which are the intermediate appellate courts; and
- *Supreme Court*, which is the highest court.

The high courts and the district courts are divided into geographic districts. The Court Organization Act grants the courts general jurisdiction to preside over civil, criminal, administrative, electoral, and other types of lawsuits. It also allows for decisions in non-contentious cases and other matters that fall under their jurisdiction in accordance with the relevant provisions. In addition, military courts may be established under the Constitution as special courts to exercise jurisdiction over criminal cases in the military. Nonetheless, in these cases the Supreme Court retains final appellate jurisdiction.

5.3.1. The Supreme Court

The Supreme Court is the highest judicial tribunal of the nation. It is located in Seoul, the nation's capital, and is presided over by a chief justice and thirteen justices. The justice who has been appointed as the Minister of Court Administration does not sit on the bench while serving in that capacity.

The constitution has vested the Supreme Court with the authority for judicial administration as well as with the power to establish regulations regarding the internal discipline of the courts, the administration of judicial affairs, and trial procedures. This power is exercised by the Justices' Council, which consists of all the justices of the Supreme Court.

The Supreme Court maintains several administrative entities to ensure judicial independence and to achieve great judicial efficiency. They are the Ministry of Court Administration, the Judicial Research and Training Institute, the Training Institute for Court Clerks, and the Supreme Court Library.

5.3.2. The High Court

The high courts are intermediate courts with appellate jurisdiction over judgments or rulings rendered by panels of three judges sitting at trial courts such as district courts, the family court, and the administrative court. The high courts are located in five major cities in Korea: Seoul, Busan, Daegu, Gwangju and Daejeon. The cases before the high courts are heard by a panel of three judges, which is called a division.

5.3.3. The District Court

The district courts are located in Seoul and twelve other major cities, most of which are provincial capitals. The district court also has jurisdiction over various non-contentious cases, such as the reorganization or liquidation of business corporations, and the registration of real property or corporate matters. Bankruptcy proceedings also come under the district courts' jurisdiction. Usually, a single judge presides over a district court trial. However, three judges, collectively referred to as a collegiate division, are required to sit certain categories of cases, including those deemed important and worthy of more deliberate discussion.⁴²

5.4 Court Operations

In accordance with the policy of maintaining an independent judiciary, the Supreme Court is vested with responsibility for judicial administration and the power to establish its regulations. There are several administrative entities, such as the Supreme Court Justices' Council, the Ministry of Court Administration, the Judicial Research and Training Institute, the Training Institute for Court Clerks, and the Supreme Court Library.

The Supreme Court Justices' Council consists of 13 justices and the chief justice, who also presides. The council considers the appointment of the lower court judges, the establishment of the Supreme Court rules and regulations, budget requests, the expenditure of reserve funds, the settlement of accounts, and other matters considered to be of particular importance and referred to it by the chief justice. A council

resolution cannot be passed in the absence of a quorum of two-thirds of all justices; to pass, the resolution must receive the consent of a majority of the members present.

The Ministry of Court Administration was established by the Supreme Court to oversee its general administrative affairs. The ministry handles such matters as the fundamental planning of national judicial administration, the computerization of the judiciary, the continuing education of judges, personnel management, the finances and accounting of the courts, the supervision of the registries of real property, corporations and family relations, and the conduct of the judicial clerks and the marshals. It also conducts research on legal questions, and provides statistical analyses. The chief justice appoints the minister from among the justices and the deputy minister from among the judges with the rank of at least a chief judge of a district court.⁴³

5.5 Appellate process

5.5.1. In general

The judgment by a single judge on any question of fact or law may be appealed to the appellate division of the district court. An appeal against the judgment of a panel of three district court judges is lodged with a high court. Appeals against the rulings or judgments of either the high court or the appellate division of the district court must be filed with the Supreme Court, which will only hear questions of law.⁴⁴

5.5.2. In Insolvency procedures

All insolvency cases, other than consumer liquidation cases, are dealt with by the a panel of three judges of the district court's bankruptcy division. If there is an appeal, the high court hears it. If there is an appeal in a consumer liquidation case, the appellate division of the district court hears it.

There is a crucial difference in appellate process between the bankruptcy procedure and the corporate reorganization procedure. In the corporate reorganization procedure, an appeal is allowed only when the Corporate Reorganization Act provides for the possibility of an appeal. With bankruptcy procedure, on the other hand, all decisions of the court are subject to appeal, unless the Bankruptcy Act specifically prohibits appeal against a certain decision.

5.6 Institutional Integrity

5.6.1. Judge: Appointment, Tenure and age limit, Guarantee of Status

The chief justice is appointed by the president with the consent of the National Assembly. The justices of the Supreme Court are also appointed by the president, upon the recommendation of the chief justice and with the consent of the National Assembly. The judges of the lower courts are appointed by the chief justice with the consent of the Supreme Court Justices' Council. To be appointed as a judge, an individual must first be nominated to serve as an apprentice judge for two years. If the appointee has had a career as a lawyer for two or more years, the period of apprenticeship may be shortened or waived.

Although the tenure of judges is set by law at ten years, they usually serve consecutive terms. The Supreme Court justices may also serve consecutive terms, but their tenure is six years. However, the chief justice is not allowed to serve more than one term (i.e., six years). By law, the chief justice is required to retire from office at the age of 70, the justices of the Supreme Court at age 65, and all other judges at age 63.

To insure that judges are subordinate to no other agency of the state, the personal status of judges is legally guaranteed as follows.⁴⁵

Dismissal of Judges from Office:

No judge may be dismissed from office, except by impeachment or criminal punishment.

Disciplinary Action against Judges:

No judge may be suspended from office, have a reduction in salary, or otherwise be disciplined except through a disciplinary action by the Judicial Disciplinary Committee of the Supreme Court.

Political Neutrality of Judges:

The political activities of judges are restricted as part of the policy of requiring officials to maintain political neutrality.

The Supreme Court wrote the *Judicial Ethics Code*, which sets out behavioral guidelines for judges in various contexts. Recently, the Anti-Corruption Act was enacted, and the Anti-Corruption Committee promulgated model guidelines which are quite concrete and specific. The Supreme Court is updating the *Judicial Ethics Code* in compliance with the model guidelines.

5.6.2. Regarding Insolvency Procedures

Recognizing the importance and complexity of this area of law, the court is trying to make insolvency procedure more transparent and consistent. This not only benefits the interested parties, but the court as well, in that the more transparent and consistent the bankruptcy procedure is, the more credibility will be accorded to the court.

The Supreme Court of Korea issued the *Corporate Reorganization Case Management Rules* in 1992 and updates them as necessary. The *Rules* set out important systems, like the method of calculating the liquidation value and going-concern value, supervision over the operations of the debtor company, amortization of shares of the old management, and the like.

The bankruptcy division of Seoul district court has been making internal ordinances since 1999. Since then, many internal regulations have been issued, such as the *Standards for Appointment and Supervision of a Trustee*, the *Periodic Review of the Situation of a Debtor Company*, the *Manual of Company Reports*, the *Standards for the Range of Monetary Transactions Subject to Court Permission*, *Merger & Acquisition Guidelines*, the *Standards for Reporting the Situation of Subsidiary Companies*, et cetera.

6.0 REGULATORY FRAMEWORK FOR INSOLVENCY

Korea does not have a system like the U.S. Trustee. Instead, a management committee can be established by the district courts.

7.0 CROSS-BORDER INSOLVENCY

7.1. Status of Foreigners in Bankruptcy or Reorganization

The Bankruptcy Act recognizes aliens and foreign corporations as having the same status as a Koreans, but *only if* a Korean national or a Korean corporation in that foreign country would enjoy the same status as a domestic corporation of the foreign country. (BA Art. 2). Therefore, based on reciprocity and equality under international comity, an alien may file a petition for involuntary bankruptcy in Korea or file a proof of claim, just as a Korean national would.

The corporate reorganization proceedings, however, do not depend on the principle of reciprocity. The Corporate Reorganization Act provides that aliens or foreign corporations hold a status equivalent to that of a Korean national or juristic person. (CRA Art.3).

7.2 Participation by Foreign Creditors

If an alien files a petition with a Korean court for voluntary or involuntary bankruptcy, or takes part in a pending bankruptcy proceeding by filing a proof of claim, the court will require the alien to prove citizenship and that the legal rights under the alien's local law are the same as under Korean law.⁴⁶ If either a foreign creditor or a local creditor has a claim valued in foreign currency, the claim must be converted into Korean currency at the exchange rate applicable at the time of commencement of the action. (BA Art.17, CRA Art.117).

In *Re Edgar F. Kaiser, Jr.*⁴⁷ a foreign creditor appealed against the bankruptcy court's confirmation order, which asserted that Kaiser's claim was based on compensatory damages for breach of contract to build a yacht. The appellant objected, because its claims were to be paid from the sixth to ninth years according to the plan, whereas other local trade claims were to be paid from the first to the second years of the plan. This distinction was alleged to be unfair, since according to the plan, claims arising under lease agreements were to be paid in the first year. The Supreme Court held that, although the characters of the claims were different (since the appellant's claim was for compensatory damages and the other claims were trade claims), the disparity in treatment was too great. Consequently, the Court found that the plan was not legitimate, because it breached the rule of fair treatment.

7.3 Liquidation of Foreign Branch of Bank or Security Company

There are special provisions regarding the liquidation of the foreign branch of a bank or stock brokerage firm. If any branch or agent of a foreign financial institution is liquidated or declared bankrupt, its assets, capital stock, reserves, and other surplus will be appropriated with preference for local nationals and aliens who reside in Korea. [Banking Act, Art.62(2)]. If a domestic branch office or other business office of a foreign securities company goes into liquidation or becomes bankrupt, its domestic assets will be appropriated preferentially to fulfill obligations to persons who were party to a securities transaction with the company and who resided in Korea at the time of the transaction. In such a case, the scope of the foreign company's domestic holdings and assets will be determined by the relevant presidential decree. [Securities and Exchange Act Art. 28-2(5)]

7.4. Recognition of Foreign Bankruptcy Proceedings

7.4.1 Principle of Territorialism Applies

Neither a liquidation proceeding nor a reorganization proceeding commenced outside Korea is effective with respect to property of the debtor situated in Korea. Conversely, liquidation or reorganization proceedings commenced in the territory of Korea are not effective with respect to property located outside Korea. (CRA Art. 4). Korean bankruptcy laws do not provide any mechanism for recognizing foreign bankruptcy proceedings. Consequently, there is no concept of ancillary administration like that under U.S. Bankruptcy Code article 304.

However, if a debtor is adjudicated bankrupt by a foreign court before a petition is filed by or against the debtor in Korea, the petitioner is not required to present evidence of a cause of bankruptcy. (BA Art.127). The burden of proof as to the cause of bankruptcy is shifted by the foreign court's adjudication.

7.4.2. Rights of Trustee of Foreign Bankruptcy Proceeding

One lower court has tried to relax this strict territorialism. The Seoul district court held that Bankruptcy Act article 3(2) does not negate the authority of a trustee appointed by a foreign court to manage and dispose of the properties of debtor. The nature and the scope of the foreign trustee's power must be examined in accordance with the laws of the foreign country; and the foreign trustee may only exert his authority over property situated in Korea in accordance with Korean law. Hence, a claim against a foreign trustee could be lawful, but not against a foreign debtor.⁴⁸

In a contrary ruling, the Seoul district court held that an adjudication of bankruptcy rendered by a Japanese district court did not affect the legal status of the plaintiff in Korea. Therefore, the lawsuit filed in the Seoul District Court by the representative liquidator of the company and not by the trustee of the company was lawful.⁴⁹ Practitioners preferred the above-mentioned earlier decision by the Seoul district court on the grounds of comity.⁵⁰ In 2002, the same court followed the earlier precedent again.⁵¹ However, no decision has been made at the appellate court level regarding this issue.

7.5 Requirement of Equalization

Because jurisdiction for Korean bankruptcy law is based solely on strict geographical considerations, there is no requirement for equalization. That is, there is no requirement that a creditor, who obtained more rights abroad than he would have locally, to return the excess to the local bankrupt estate; nor is a creditor enjoined from forum shopping abroad.

7.6 Effect of Foreign Discharges

Korean bankruptcy laws do not recognize foreign bankruptcy proceedings, and the legal status of a bankrupt is very different in Korea than it is in some other countries, such as the United States. Thus, it could be expected that the court in Korea might not recognize the discharge in bankruptcy allowed by a U.S. bankruptcy court.

Since the object of the corporate reorganization proceedings is limited to corporations, a U.S. plan might not be recognized in Korea as regards a discharge effected under chapter 13 of the U. S. Bankruptcy Code or as regards a partnership under chapter 11 of the U. S. Code.⁵²

7.7 Situs of Intangible Assets

Article 3(3) of the Bankruptcy Act and article 4(2) of the Corporate Reorganization Act state that any claim pursued to judgment under the Civil Procedure Act will be regarded as existing solely within Korea. For a creditor to pursue a claim to judgment, the Korean court must 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 place of business in Korea.⁵³

8.0 PROPOSED OR PENDING LEGISLATION

Although not yet officially endorsed, the legislative goal of the new draft is to produce an insolvency law that is easy to use, hard to cheat, and restructuring friendly. It makes a single rehabilitation procedure out of the corporate reorganization procedure and the composition procedure, which are currently separate. Bankruptcy procedure is by and large intact as in the current Bankruptcy Act. Special consideration has been given to consumer bankruptcy and cross-border insolvency. Composed of 658 articles, the new draft has five chapters:

1. General provisions
2. Rehabilitation procedure
3. Bankruptcy procedure
4. Individual rehabilitation procedure
5. Cross-border insolvency procedure

Each procedure has its own entryway, so applicants may choose the procedure they want. It is possible to transfer from one procedure to another.

8.1 Rehabilitation Procedure

To encourage early entry into the rehabilitation procedure, the new draft makes some important changes. Although it maintains the trustee system instead of adopting a debtor-in-possession system, it enlarges upon the possibilities for incumbent management to maintain control over the firm.

The draft also relaxes the economic test. Under the draft, the economic test is applied strictly only when the court approves the reorganization plan. The court provides mandatory bankruptcy adjudication only when the rehabilitation case is discontinued after approval of the plan. The automatic stay, however, has not been adopted.

8.2 Individual Rehabilitation Procedure

Applicants for the individual rehabilitation procedure should have regular income. After examining the financial situation, the court can approve a rescheduled payment plan directly, without the consent of creditors. The payment plan, which can last as long as five years, should provide creditors with more than

what they would have received in a liquidation. Upon the successful implementation of the plan, the debtor is discharged completely. This scheme has nevertheless been sharply criticized.

8.3 Cross-Border Insolvency Procedure

The new draft bases its cross-border insolvency procedure on the UNCITRAL model law. It discards the principle of territoriality.⁵⁴

As mentioned above, the situation with Korean insolvency law is somewhat like that in the U.S. before their bankruptcy code was enacted in 1978, at least with respect to the rehabilitation procedure. Unification of composition and corporate reorganization, and introduction of the DIP system, are under discussion. In the draft, composition and corporate reorganization is amalgamated, but the combined procedure is modeled after the corporate reorganization side, which is a strong form of rehabilitation. The DIP system has not been adopted. These adjustments reflect the uncertainty and lack of consensus. However, this situation might be considered quite natural if we recollect that the unification of composition and corporate reorganization took 40 years even in the United States. The real bankruptcy experience of Korea actually began in 1997 with the economic crisis. Since then, Korea has been learning a lot from its experience, albeit at a high price. Korea also knows that there is still long way to go.

By Jaewan Park
Judge, Seoul District Court

¹ Chiyong Rim, *Korean Insolvency System*, in the *Norton Annual Survey of Bankruptcy Law 2003*, at 609 (West publishing, 2003). For more detailed description, please refer to Chiyong Rim, *Collier International Business Insolvency Guide*, Vol. 3, Chapter 30, Korea (LexisNexis, 2002). The author gratefully acknowledges Judge Rim's generosity in allowing him to quote excerpts from the Judge's interim paper. The author also expresses his appreciation that Professor Soogeun Oh and Ilchong Nam allowed him to quote excerpts from their works as well (see *infra*).

² Soogeun Oh, Presentation, *Drafting of New Insolvency Law for Korea 2-3* (Forum on Insolvency Risk Management, the World Bank, Washington, DC, Jan. 28-29, 2003) (copy available from the author or from the World Bank).

³ Youngmoo Kim & Thomas H. McGowan, *Taking of Security over Movable Property*, in *Introduction To The Law And Legal System Of Korea* 461 (Kyoung Mun Sa 1983).

⁴ *Id.* at 462

⁵ *Id.*

⁶ Hyosoon Nam, *Civil Code Art. 363*, in *Minbub Joohae VII* 103-106 (Bak Young Sa, 2001).

⁷ Kim & McGowan, *supra* n.3, at 464.

⁸ Gyeiwon Jeon, *Mortgage recognized by Special Laws*, in *Minbub Joohae VII* 241-263 (Bak Young Sa, 2001).

⁹ Kim & McGowan, *supra* n. 3, at 469-472.

¹⁰ Rim, *Korean Insolvency System*, *supra* n.1, at 7-8.

¹¹ *Id.* at 9-10.

¹² The Supreme Court 1963. 9. 12. 63nu84 (Jip 11(2)hang 69).

¹³ Ilchong Nam, Soogeun Oh, & Joon-Kyoung Kim, *Country Report for Korea*, in *Insolvency Systems In Asia 200* (OECD Publications, France 2001).

¹⁴ Rim, *Korean Insolvency System*, *supra* n.1, at 14-15

¹⁵ Ilchong Nam & Soogeun Oh, *Bankruptcy Of Large Firms And Exit Mechanisms In Korea* 68-69 (Korea Development Institute, 2000).

¹⁶ Rim, *Korean Insolvency System*, *supra* n.1, at 4.

¹⁷ *Id.* at 31.

¹⁸ Nam & Oh, *supra* n.15, at 47.

¹⁹ Rim, *Korean Insolvency System*, *supra* n.1, at 17

²⁰ Nam & Oh, *supra* n. 15, at 43-44.

²¹ *Id.* at 45.

²² *Id.* at 43-44.

²³ *Id.* at 42.

²⁴ Rim, *Korean Insolvency System*, *supra* n.1, at 36-37.

²⁵ Nam & Oh, *supra* n. 15, at 48.

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- ²⁶ Rim, *Korean Insolvency System*, *supra* n.1, at 36.
- ²⁷ *Id.* at 37.
- ²⁸ Nam & Oh, *supra* n. 15, at 52.
- ²⁹ Rim, *Korean Insolvency System*, *supra* n.1, at 38.
- ³⁰ Nam & Oh, *supra* n. 15, at 50.
- ³¹ Rim, *Korean Insolvency System*, *supra* n.1, at 39.
- ³² Nam, Oh, & Kim, *supra* n. 13, at 195.
- ³³ Rim, *Korean Insolvency System*, *supra* n.1, at 27.
- ³⁴ Nam, Oh, & Kim, *supra* n. 13, at 196.
- ³⁵ Nam & Oh, *supra* n. 15, at 60.
- ³⁶ *Id.* at 60-61.
- ³⁷ *Id.* at 62.
- ³⁸ *Id.* at 63.
- ³⁹ *Id.*
- ⁴⁰ Oh, *supra* n.2, at 7.
- ⁴¹ *Id.*
- ⁴² Ministry of Court Administration, *The Judicial System Of Korea*, 15-18 (Ministry of Court Administration 1997).
- ⁴³ *Id.* at 22-24.
- ⁴⁴ *Id.* at 30.
- ⁴⁵ *Id.* at 22.
- ⁴⁶ *Introduction to the Law and Legal System of Korea* 933 (Sanghyun Song, ed., Kyung Mun Publishing Co. 1983).
- ⁴⁷ The Supreme Court 1992.6.15, 92 gue 10 (Kong 1992, 2219).
- ⁴⁸ The Seoul District Court 1996.6.28, 96 gahap 27402 (Hajip 1996, vol. 1, 329). Paulo Gucci, a well-known Italian designer and businessman, filed a chapter 7 petition and a trustee was appointed by the Bankruptcy Court for the Southern District of New York. The trustee of the estate was sued in the Korean court by a Korean plaintiff due to the dispute arising under his patent right, which registered in Korea.
- ⁴⁹ The Seoul District Court 1998.6.11, 96 gahap 91175.
- ⁵⁰ See Jun Park, *Some Problems on International Insolvencies* in *The Study on Civil Precedents* 589, 603, vol. 16 (1994).
- ⁵¹ The Seoul District Court 2002.9.4, 2001 gahap 79063.
- ⁵² Chaehong Rim & Changhoon Paik, *1 Corporate Reorganization Law* 129-130 (1998).
- ⁵³ *Id.* at 129; Rim, *Korean Insolvency System*, *supra* n.1, at 44-47.
- ⁵⁴ Oh, *supra* n.2, at 6-8.