CHAPTER 20

RECOGNITION OF INSOLVENCY EFFECTS OF A FOREIGN INSOLVENCY PROCEEDING: FOCUSING ON THE EFFECT OF DISCHARGE

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I INTRODUCTION

A Discharge as One of the Core Insolvency Effects

The discharge of a debtor's debts in respect of pre-insolvency claims[1] is one of the core insolvency effects of an insolvency proceeding regardless of whether it is a rehabilitation proceeding or a liquidation proceeding.

In a rehabilitation proceeding under the Debtor Rehabilitation and Bankruptcy Act ("DRBA") of the Republic of Korea ("Korea"), which is used mainly for rehabilitation of insolvent business entities, the pre-insolvency claims of creditors and the rights of equity holders shall be restructured pursuant to the rehabilitation plan affirmed by the resolution of the interested parties and approved by the court order.[2] The liabilities of the debtor for those pre-insolvency claims which have not been recognised in the rehabilitation plan shall be discharged, and the rights of the equity holders which have not been recognised in the rehabilitation plan shall be extinguished.[3] By such restructuring of the claims and rights, as accompanied by

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1 The term "pre-insolvency claims" here means claims which arose from a cause that existed before commencement of an insolvency proceeding and are subject to the insolvency proceeding.

2 DRBA, Article 252.

3 Id., Article 251.

the discharge or extinguishment of all or a part of the debts or equity interests, as the case may be, the rehabilitation of a debtor or its business, which is the object of the rehabilitation proceedings, can be achieved.

In a bankruptcy proceeding under the DRBA, which is an insolvent liquidation proceeding, a debtor, who is a natural person, can be discharged from his or her liabilities for the pre-insolvency claims (other than certain claims, such as a tax claim) upon obtaining a discharge order from the court.[4] By such discharge, an opportunity for a fresh start is granted to insolvent natural persons.[5] In the case where the debtor is a corporation, since the corporation ceases to exist upon completion of the liquidation under the bankruptcy proceeding, the concept of a discharge is inapplicable.

There is a question as to what is discharged. Under Korean law, a debt conceptually consists of "indebtedness (*chae-moo*)" and "liabilities (*chaek-im*)."[6] In the case of a rehabilitation proceeding under the DRBA, according to the precedent of the Korean Supreme Court, the liabilities of the debtor shall be discharged by virtue of the court-approved rehabilitation plan; however, the indebtedness remains.[7] Then, what would be the implication if "indebtedness" is not extinguished? The most meaningful implication would be the following example: for instance, if the trustee (or, after the rehabilitation proceeding is successfully closed, the debtor) voluntarily pays the discharged debt, the trustee or the debtor is not entitled to claim that such payment be restituted by alleging unjust enrichment. As such, the term "indebtedness" in this context means an indebtedness that cannot be enforced by the creditor, but may be voluntarily paid by the debtor. In sum, as a result of the "liabilities" being discharged, the claim for such liabilities cannot be compulsorily enforced under Korean law.[8] The same analysis would

4 Id., Articles 556, 564 and 566.

5 The DRBA offers another insolvency proceeding for rehabilitation of natural persons, which is similar to Chapter 13 proceedings under the U.S. Bankruptcy Code. The discharge granted to the individual debtors under such rehabilitation proceedings is, in general, identical to the discharge granted to the individual debtors under the bankruptcy proceedings of the DRBA. Therefore, this article does not separately discuss such individual's rehabilitation proceedings.

6 The meanings which the author attempts to convey by using the terms "indebtedness" and "liabilities" may not have the same meanings which are assigned to such terms under the laws of other states.

7 Supreme Court judgment dated July 24, case no. 2001 2001da3122.

8 Practice Study Association of the Seoul Central District Court's Bankruptcy Panel *Insolvency Proceedings and Litigation and Enforcement Procedures* (Pakyoungsa, 2011) (in Korean) at 101.

apply to the discharge of an insolvent natural person's debt in the bankruptcy proceeding under the DRBA.

One of the key attributes of an insolvency proceeding is that an insolvency proceeding is a "collective proceeding" in which substantially all of the stakeholders as well as the assets and liabilities of the debtor are dealt with. Under the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"),[9] it is understood that for a foreign insolvency proceeding to qualify for recognition and relief under the Model Law, it must be a collective proceeding because the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding.[10] Therefore, the discharge which follows restructuring and/or liquidation under an insolvency proceeding constitutes a core element in a collective compromise effected through the insolvency proceeding.

B Scope of Discussions in this Article

1 Law applicable in an insolvency proceeding

According to the choice of law rules recommended by the UNCITRAL Legislative Guide on Insolvency Law, in an insolvency proceeding, in principle, treatment of, and limits and restrictions to rights and claims in an insolvency proceeding (ie insolvency effects) are governed by the law of a state where the insolvency proceeding takes place (*lex fori concursus*), while the validity and effectiveness of a right and a claim before considering such insolvency effects is governed by the law designated as the applicable law pursuant to the conflict of laws rules (or the private international law) of such forum state.[11] As such, the law applicable in or relating to an insolvency proceeding as to the effect of the discharge is the law of the *lex fori concursus*.[12]

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9 UNCITRAL Model Law on Cross-Border Insolvency (1997) available at <www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>.

10 The Model Law, Article 2(a); UNCITRAL *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (2013)* (available at <www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>) (hereinafter, "Guide to Enactment") at para. 69 and 70.

11 UNCITRAL *Legislative Guide on Insolvency Law (2004)* (available at <www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>) (hereinafter, "Legislative Guide") at Part II, para. 82.

12 Legislative Guide, above n 11, at Part II, Recommendation 31(s).

2 Issues arising from cross-border enforcement of discharge – a hypothetical case

In the context of a cross-border enforcement of an insolvency proceeding, however, the discharge effected by or relating to an insolvency proceeding in the forum state would not be automatically recognised by a court in another state merely by applying the *lex fori concursus.*

At the 4th annual symposium of the East Asian Association of Insolvency and Restructuring (EAAIR) held in Seoul, Korea in November, 2012,[13] the following hypothetical case (the "Hypothetical Case") was presented to the panellists from China, Japan and Korea at the session for cross-border insolvency:[14]

> A debtor "D", who resides in the United States, failed in his business and filed for a Chapter 11 proceeding in the U.S. The plan was subsequently confirmed. A creditor "C1" who has citizenship of your country (China, Japan or Korea) received notices of the filing for the Chapter 11 proceeding and the filing of proof of claims, but did not file a proof of its claim in the U.S. Thus, the claim of C1 was not recognised in the confirmed plan of D, and D was discharged from his liabilities for the claim of C1. D owns assets in your country. Based on its claim against D, C1 is preparing for the petition for a bankruptcy proceeding (an insolvent liquidation proceeding) in a court of your country where the assets of D are located.

In a number of questions raised under the above Hypothetical Case, the following question was included: "would the court of your country commence the bankruptcy proceeding filed by C1 based on its claim against D?" The essence of this question is whether the discharge effected in the forum state would extend to another state. The above question may be rephrased with the following general question: "after the successful close of an insolvency proceeding in the forum state, if a creditor attempts to exercise a discharged claim in another state, could the debtor or any other interested party prohibit or deny the exercise of the discharged claim by such creditor?"

3 Scope of discussions

Recently, Working Group V (Insolvency Law) of the UNCITRAL has commenced its deliberations on the development of a model law or model

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13 For more information on the EAAIR, see the EAAIR website at <www.eaa-ir.com/activities.html>.

14 Chiyong Rim "Cross-border insolvency - a hypothetical case" in *Proceeding - The 4th Annual Symposium of East Asian Association of Insolvency and Restructuring* (in Korean) at 75.

legislative provisions for recognition and enforcement of 'insolvency-derived judgments' beginning at its 46th session held in Vienna in December, 2014. This new topic was perceived by the members of Working Group V to be an important area for which no explicit guidance was contained in the Model Law.[15] Working Group V continues its discussions on such topic along with its deliberations on other remaining topics from the pre-existing mandates.[16] A court decision which effectuates the discharge would be included in the broader category of 'insolvency-related' or 'insolvency derived' judgments; however, determining the additional types of judgments which may fall in such category and reconciling the measures for recognition and enforcement of such judgments with the cross-border insolvency regime under the current Model Law would be a challenging and complex task.

Given the important function of the discharge, particularly in the context of cross-border insolvency, this article focuses on the recognition of the effect of a foreign discharge. This article discusses whether and how the discharge effected in the forum state would be recognised and enforced in another state under the current cross-border insolvency regimes. Then, this article suggests some basic ideas on the measures which may be considered in order to enhance harmonization in the cross-border recognition of the effect of a discharge.

II RELIEF AVAILABLE UNDER THE MODEL LAW

A Mandatory Relief

Article 20, Paragraph 1 of the Model Law provides mandatory relief which is automatically granted upon recognition of a foreign main proceeding[17] as follows:

Article 20. Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding,

15 *Annotated Provisional Agenda for The Forty-Sixth Session of Working Group V (Insolvency Law)* A/CN.9/WG.V/WP.123 (2014), at para 8.

16 Other remaining topics include, among others, 'facilitating the cross-border insolvency of multinational enterprise group' and 'obligations of directors of enterprise group companies in the period approaching insolvency.' See Id., paras. 6 and 7.

17 "Foreign main proceeding" means a foreign proceeding taking place in the state where the debtor has the centre of its main interests. See Article 2(c) of the Model Law. In July 2013, the UNCITRAL Guide to Enactment was revised to clarify, among others, the meaning of the centre of main interests (COMI) and the time for determining the COMI.

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The automatic relief under Article 20 is necessary to allow steps to be taken to organise an orderly and fair cross-border insolvency proceeding, and recognition under the Model Law has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State.[18]

B Discretionary Relief

In addition to the mandatory relief under Article 20, the Model Law authorises the court to grant additional discretionary relief with respect to a foreign main or non-main proceeding[19] after recognition of such proceeding as follows:[20]

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

   (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;

   (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;

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18 *Guide to Enactment*, above n 10, at para. 178.

19 'Foreign non-main proceeding' means a foreign proceeding, other than a foreign main proceeding, taking place in a state where the debtor has an establishment as defined in the Model Law Article 2(c).

20 *Guide to Enactment*, above n 10, at para. 189.

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;

(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

The types of relief set forth in Article 21, Paragraph 1 of the Model Law are typical of the relief which is most frequently granted in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting state and needed in the circumstances of the case.[21] Other than the mandatory relief granted for a foreign main proceeding, the scope and nature of additional discretionary relief that may be granted in respect of a foreign main or non-main proceeding as well as the extent of the court's discretion may vary depending upon the local laws of the enacting states.

C Limitation of Relief under the Model Law

Cross-border recognition and enforcement of the insolvency effects deriving from a foreign insolvency proceeding could be achieved mostly by obtaining recognition and relief in respect of such foreign insolvency proceeding from a court in another enacting state under the Model Law. It appears, however, that the Model Law offers mainly procedural measures which support a foreign insolvency proceeding and that the relief would not be available to recognise and enforce substantive law matters (such as a discharge) involving the foreign insolvency proceeding unless additional relief has been adopted for such purpose by the law of the enacting state as envisaged by Article 21, Paragraph 1(g) of the Model Law.

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21 Id., at para. 189.

Further, as the interests and the authority of a representative of a foreign non-main proceeding are narrower than those of a representative of a foreign main proceeding who normally seeks to gain control over all assets of the insolvent debtor, Article 21, Paragraph 3 of the Model Law requires that relief granted to a foreign non-main proceeding be limited to assets that are to be administered in such non-main proceeding.[22] Therefore, even where the effect of a foreign discharge is recognised in the enacting state by relief under Article 21, Paragraph 1(g) of the Model Law, such recognition would be given only in respect of a foreign main proceeding.

III KOREAN LAW ANALYSIS OF THE HYPOTHETICAL CASE

A Korea's Adoption of the Model Law

Korea adopted legislation based on the Model Law by including provisions on cross-border insolvency in the DRBA, a consolidated insolvency law which became effective in April 2006.[23] Under the DRBA, Korean courts shall provide recognition and relief with respect to a foreign insolvency proceeding subject to the satisfaction of the requirements stipulated in the DRBA, which are similar, but not identical to those under the Model Law. Thus far, there are several precedents where the Korean courts granted recognition and relief for foreign insolvency proceedings.[24] Further, the precedents where Korean insolvency proceedings commenced under the DRBA were recognised and enforced outside of Korea are being accumulated.

B Procedures and Requirements for Recognition of a Foreign Discharge

As the DRBA discarded the principle of territoriality under the previous insolvency laws and adopted the so-called modified principle of universality, it is generally understood that the effect of a foreign discharge would be recognised in Korea. As to how a foreign discharge can be recognised in Korea, however, scholarly views are split. According to one scholarly view (the "first scholarly

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22 Id., at para. 193.

23 The DRBA, a new consolidated insolvency law, became effective in April 2006. For details on cross-border insolvency under the DRBA, see Soogeun Oh "An Overview of the New Korean Insolvency Law" (2007) 16 Norton Journal of Bankruptcy Law and Practice 5 and Chiyong Rim "South Korea Section" in Look Chan Ho (ed) *Cross- Border Insolvency: A Commentary on the UNCITRAL Model Law* (3rd ed., 2012) at 421-435.

24 Relief orders granted by the Korean court were primarily court orders which are almost identical to mandatory relief granted under Article 20 of the Model Law. It appears that there was no case where the appointment of a cross-border insolvency administrator or turning over the debtor's assets to a foreign insolvency proceeding occurred.

view"), the effect of a foreign discharge can be recognised in Korea by obtaining recognition and relief from the court under the cross-border insolvency provisions of the DRBA.[25] Another scholarly view (the "second scholarly view"), however, takes a position that the recognition of a foreign discharge must be made pursuant to the provisions of the Civil Procedures Code concerning the recognition of a foreign court's ordinary judgment because relief available under the DRBA addresses only procedural measures to support a foreign insolvency proceeding and relief which disposes of a substantive law matter (such as a discharge) is not available under the DRBA.[26] The recent decision of the Korean Supreme Court, as discussed in Part IIIC below, took the same view as the second scholarly view.

1 Relief under the DRBA

Under Article 636, Paragraph 1 of the DRBA, simultaneously with, or after recognition of a foreign insolvency proceeding, the court may, at the request of an interested party or at its discretion, grant certain relief which includes (i) relief identical to the mandatory relief under Article 20 of the Model Law, (ii) the appointment of a cross-border insolvency administrator and (iii) 'any other relief which is necessary to preserve the debtor's business and assets or to protect the interests of creditors.' Therefore, the question here is whether the court may grant relief which recognises the effect of a foreign discharge based on the above provision of the DRBA referring to 'any other relief' in (iii) above.

Under the DRBA, as discussed in Part IA above, a discharge by or relating to a domestic insolvency proceeding is effected by a court's approval order for a rehabilitation plan (in the case of a rehabilitation proceeding) or a court's discharge order (in the case of an insolvency liquidation proceeding).

The first scholarly view mentioned in Part IIIB above takes an affirmative position on the above question – namely, the position that the recognition can be granted pursuant to the said provision of the DRBA. This view may have a merit from the perspectives of harmonization of cross-border insolvency regimes and is more consistent in the treatment of the insolvency effects of a foreign insolvency proceeding; however, it has weakness in that if the foreign insolvency proceeding is closed and there is no longer a representative of the foreign insolvency proceeding, relief under the DRBA would no longer be available for recognition of a foreign discharge unless the foreign insolvency proceeding can be re-opened for

25 Kwang Hyun Suk *Private International Law and International Litigation* V (Pakyoungsa, 2012) (in Korean) at 547-548.

26 Chiyong Rim *Study on Bankruptcy Law 3* (Pakyoungsa, 2010) (in Korean) at 287-288.

cross-border recognition. On the other hand, the second scholarly view and the Supreme Court decision take a negative view on the above question for reasons set forth in Part IIIC below.

2 Recognition of a foreign court's ordinary judgment under the Civil Procedures Code

Pursuant to Article 217 of the Korean Civil Procedures Code, in order for a foreign judgment to be recognised in Korea, such judgment must meet all of the following requirements:[27]

(i) such judgment was finally and conclusively given by a court having valid jurisdiction in accordance with the international jurisdiction principles under Korean law and applicable treaties;

(ii) the defendant was duly served with service of process (otherwise than by publication or similar means) in sufficient time to enable the defendant to prepare its defence in conformity with the laws of the state where the judgment was rendered (or, in conformity with the laws of Korea if it were made to the defendant in Korea) or responded to the action without being served with process;

(iii) recognition of such judgment is not contrary to the public policy of Korea; and

(iv) judgments of the courts of Korea are accorded reciprocal treatment under the laws of such foreign state.

Under the previous insolvency laws which adopted the principle of territoriality, the effect of a foreign discharge could not extend to Korea, and therefore, it was unnecessary to consider the above provision in the context of recognition of a discharge effected by a foreign court decision. Currently, under the modified principle of universality adopted by the DRBA and according to the Supreme Court precedent mentioned in Part IIIC below, recognition of a foreign court decision on the discharge shall be made in accordance with the above provision. If, however, a foreign discharge is made by operation of law, not by a court order, the above provision cannot be used and there would be no measure for recognition of such foreign discharge in Korea unless the relief under the cross-border provisions of

27 Items (i) through (iv) above are a part of the typical legal opinion issued by Korean counsels with respect to cross-border commercial transactions. The author appreciates the Law Offices of Kim & Chang for kindly providing a sample wording to the author for reference.

the DRBA could be used as suggested by the first scholarly view mentioned in Part IIIB above.

C Recent Decision of the Korean Supreme Court

In a recent decision of the Supreme Court of Korea in respect of a case similar to the Hypothetical Case,[28] the Supreme Court held, in summary, (i) that the recognition and relief under the cross-border insolvency provisions of the DRBA are procedural supports for a foreign insolvency proceeding and are not measures which change creditors' claims in substantive law respects, (ii) that as a court's discharge order involves determination on the existence of a claim under the substantive laws, it would be proper to resolve a dispute on the effect of a discharge through individual legal proceedings to which the debtor and a relevant creditor are parties, and (iii) that accordingly, even if a discharge is effected in the course of a foreign insolvency proceeding, recognition of the foreign court's decision on a discharge should not be different from recognition of an ordinary court judgment.[29]

D Analysis of the Hypothetical Case

If the said Supreme Court decision is applied to the Hypothetical Case, the U.S. bankruptcy court's order confirming the plan would be considered a foreign court judgment and thus, in order for the discharge effected in the U.S. to be recognised in Korea, such order should meet the requirements for recognition for a foreign judgment under the Civil Procedures Code as set forth in Part IIIB2 above. In the Hypothetical Case, the court having jurisdiction over the bankruptcy filing for the debtor "D" (or, if applicable, any other legal proceedings between the debtor "D" and the creditor "C1") will determine whether to recognise the U.S. discharge order. In this regard, it would be irrelevant whether the Chapter 11 proceeding under the U.S. Bankruptcy Code was pending at the time of recognition. In general, as discussed below, it would not be easy to meet all the requirements for recognition of a foreign judgment under the Civil Procedures Code and further, due to the ambiguities in interpretation of the statutory provisions and the lack of court precedents, there are legal uncertainties in assessing the possibility that a foreign court's decision on a discharge may be recognised pursuant to the Civil Procedures Code.

28 Supreme Court decision dated March 25, 2010 (case no: 2009Ma1600)

29 Chiyong Rim, above n 23, at 428-429; Eunjai Lee "Review of the Cross-Border Insolvency Case – Korea", in *Proceeding - The 4th Annual Symposium of East Asian Association of Insolvency and Restructuring* (in Korean) at 109.

1 Jurisdiction

If a foreign court had a substantial connection with a relevant party to, or a subject matter of a dispute, such court would have a valid international jurisdiction under Korean law.[30] In the Hypothetical Case, it is likely that the U.S. bankruptcy court had a valid international jurisdiction which is required for recognition of the discharge order of the U.S. bankruptcy court in Korea although the above-mentioned decision of the Supreme Court did not address this particular point.

2 Service of process

As seen in Part IIIB2 above and according to the prevailing scholarly view, if a service of process is made in Korea, it must be made in accordance with Korean law (including an international treaty). Therefore, in the Hypothetical Case, if the notices to the debtor "D" under the U.S. Bankruptcy Code were made to "D" in Korea and such notices were not made in conformity with Korean law, the requirement for a valid service of process would not be met.[31] There is a suggestion that in order to procure the conformity with the requirement for a valid service of process, it may be considered obtaining the Korean court's relief by which the Korean court sends the notices to the relevant parties for the benefit of a foreign insolvency proceeding.[32] It is not clear whether this view will be accepted by Korean courts.

3 Public policy

In the above-referenced Supreme Court decision, the Supreme Court held that the recognition of a foreign discharge order may be denied (i) if the procedures for such discharge order are contrary to the public policy of Korea (eg, infringement of a relevant creditor's right to participate in the foreign insolvency proceeding) or (ii) the result of recognising a foreign discharge order would be contrary to the public policy of Korea (eg, such recognition would improperly prejudice the interests of creditors). Due to the lack of a court precedent on point, in the Hypothetical Case, it is not clear in what circumstances the discharge in the U.S may be denied by the Korean court on the ground of such public policy.

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30 Private International Law of Korea, Article 2.

31 Eunjai Lee, above n 29, at 110-111 (in the answers provided to the Hypothetical Case under Korean law, Eunjai Lee, the Korean panellist, took such a view).

32 Id. at 111 (in the answers provided to the Hypothetical Case under Korean law, Eunjai Lee, the Korean panellist, made such suggestion).

4 Reciprocity

There are a number of precedents where rehabilitation proceedings of Korea were recognised and relief measures were granted in the U.S, and in particular, there was at least one precedent where a U.S. bankruptcy court granted a permanent injunction to enforce the effect of the rehabilitation plan for the Korean debtor in the U.S. under Chapter 15 of the U.S. Bankruptcy Code (enacting the Model Law in the U.S.).[33] Therefore, in the Hypothetical Case, the requirement for the reciprocity would be met in connection with recognition of a foreign discharge.

IV COMPARATIVE REVIEW OF INSOLVENCY REGIMES OF OTHER STATES

A Recent Outbound Cross-Border Insolvency Cases Involving a Korean Shipping Company[34]

A Korean shipping company having its head office in Korea and engaging in the overseas shipping business filed a petition for a rehabilitation proceeding with the Seoul Central District Court of Korea, which proceeded as follows:

- the debtor petitioned for commencement of a rehabilitation proceeding and the court issued a preservation order: February 6, 2009
- the court issued the comprehensive stay order: February 16, 2009
- the court issued the commencement order: March 6, 2009
- the period for reporting and verification of claims expired: May 15, 2009
- the rehabilitation plan was affirmed at the interested parties' meeting and confirmed by the court's approval order: February 5, 2010.

The debtor company needed protection for the vessels which it was operating overseas. Further, as all of the charter parties were governed by English law and subject to arbitration in London, it was necessary to stay arbitration proceedings which were pending or may be initiated in the future.

33 See the U.S. Court precedent introduced in Part IVA1 of this paper below.

34 *In re Samsun Logixs* (Seoul Central District Court, case no: 2009 Hoehap 24). The introduction of this case here relied on Chul Man Kim "Recognition of Korean Rehabilitation Proceedings in Foreign Jurisdictions – A study of Samsun Logix case" (May 2011) 2(1) Korean Journal of Insolvency Law (in Korean) at 257-265.

1 *Recognition and relief obtained in the states which adopted the Model Law*

(a) Typical relief available under the Model Law

In March, 2009 after commencement of the Korean rehabilitation proceeding, the trustee of the Korean rehabilitation proceeding filed petitions for recognition and relief with the competent courts of the United Kingdom, the U.S. and Australia, respectively, and obtained recognition as a foreign main proceeding as well as automatic mandatory relief and certain additional discretionary relief under the provisions of their respective insolvency laws (enacting the Model Law).[35] All such relief were measures to support procedural aspects of the Korean rehabilitation proceeding. Although the debtor did not own any assets and its vessels were not scheduled to use ports of the U.K, the Korean trustee filed for such recognition and relief to obtain the court's stay order with respect to the present and future arbitration proceedings relating to charter parties. The English court made it clear that the additional relief had the effect of such stay.

(b) Permanent injunction ordered by a U.S. court for the discharge of debts in the U.S.

On May 10, 2010 after the rehabilitation plan for the debtor was confirmed by the Korean court, the bankruptcy court of the U.S. issued a permanent injunction order to discharge the debtor from its pre-insolvency debts, by which (i) enforcement of, and an action for creditors' claims in the U.S. shall be permanently stayed, and (ii) any and all disputes on such injunction shall be subject to the jurisdiction of the U.S. courts, while any and all disputes on the interpretation of the rehabilitation plan shall be subject to the jurisdiction of Korean courts. Before rendering such permanent injunction, the U.S. court held hearings every one or two months to review whether to recognise the effect of the Korean rehabilitation plan in the U.S. In addition, the U.S. court ordered that Korean counsel as well as U.S. counsel for the debtor and creditors participate in such hearings in person or by a conference call and make an oral presentation at the hearings with respect to the progress of the Korean rehabilitation proceedings, the consents of creditors to the rehabilitation plan, an appeal against the Korean court's approval order for the rehabilitation plan, etc. after first submitting affidavits on such matters to the court.

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35 Such insolvency laws are Cross-Border Insolvency Regulation 2006 of the Great Britain, Chapter 15 of the U.S. Bankruptcy Code and the Corporation Act 2001 of Australia.

2 Recognition and enforcement of a Korean insolvency proceeding in the states which have not adopted the Model Law

In March 2009, the Korean trustee also petitioned for recognition and enforcement of the commencement order issued by the Korean court, in states which have not adopted the Model Law, respectively, in Belgium, China and Singapore. In Belgium, the trustee obtained a recognition order from the court. However, since neither (i) the subsequent petition for cancellation of the attachment levied on the debtor's vessel nor (ii) the petition for stay of an auction for such vessel was accepted by the Belgian court, the Korean trustee could not stop such auction. In China, the Korean trustee petitioned for recognition of the commencement order issued by the Korean court; however, the petition was rejected. It appears that recognition of a foreign judgment was rarely made by Chinese courts and the requirements for recognition of a foreign judgment relating to an insolvency proceeding were not yet clear enough. In Singapore, the Korean trustee obtained recognition of the commencement order issued by the Korean court under a unique condition that the rehabilitation plan for the debtor be affirmed by the class of creditors comprised solely of Singaporean creditors.

B Recognition of a Foreign Discharge in the States which have Adopted the Model Law

1 Japan

Japan enacted the "Act on Recognition of and Assistance in Foreign Insolvency Proceedings" (the "Act") based on the Model Law. Although there is no court precedent on point, according to the prevailing scholarly view, recognition of a foreign discharge should be effected by recognition of a foreign judgment under the Civil Procedure Code of Japan, not by recognition and relief under the Act. In this regard, it is unclear whether the notices given under the U.S. Bankruptcy Code in the Hypothetical Case would constitute valid services of process for the purpose of recognition of a foreign judgment under the Japanese Civil Procedure Code.[36] Therefore, in the Hypothetical Case, it is doubtful that the discharge effected in the U.S. can be recognised pursuant to the provisions of the Civil Procedure Code of Japan. In fact, there was a case, where a Japanese company filed for a US Chapter 11 proceeding in Hawaii in 2005 and obtained from a Japanese court recognition and certain relief with respect to the Chapter 11 proceeding pursuant to the Act in 2006. Thereafter, a concern was raised as to whether the plan confirmed under the

36 Yosuke Kanegae "Cross-Border Insolvency – a Hypothetical Case" in *Proceeding - The 4th Annual Symposium of East Asian Association of Insolvency and Restructuring* (in Korean) at 80-81.

Chapter 11 proceeding would have effect in Japan and the debtor company subsequently filed a separate corporate reorganisation proceeding in Japan in 2007 in parallel with the Chapter 11 proceeding.[37]

2 United Kingdom

Recently, in Rubin,[38] where the key issue was (i) whether the recognition and enforcement of a judgment given in the course of an insolvency proceeding (eg, transaction avoidance proceedings) were subject to the traditional common law rules governing the recognition of *in personam* and *in rem* judgments or (ii) whether different rules applied to insolvency judgments,[39] the Supreme Court of the U.K. took the following positions:

> The court found that different rules did not apply and that the Cross-Border Insolvency Regulation 2006 (enacting the Model Law in Great Britain) did not provide for recognition and enforcement of foreign judgments against third parties. In regard to the latter, the court said that *it would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 of the Model Law were concerned with procedural matters* and while there was no doubt they should be given a purposive interpretation and be widely construed in the light of the objects of the Model Law, the court said there was nothing to suggest that they applied to the recognition and enforcement of foreign judgments against third parties. The court went on to observe that the Model Law was not designed to provide for the reciprocal enforcement of judgments.[40]
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> [The italics were made by the author for emphasis.]

As a result, among others, the following concerns have been raised: (i) the Supreme Court's decision in *Rubin* may extend to court decisions on rehabilitation

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37 Id., at 81; Shin Abe, Japan section in *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* 288 (Look Chan Ho 3rd ed., 2012).

38 *Rubin v Eurofinance SA and New Cap Reinsurance Corp. (in Liquidation) v. AE Grant,* [2012] UKSC 46.

39 UN Commission on International Trade Law, Case Law on UNCITRAL Texts (CLOUT) case no. 1270, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/856/31/PDF/V1385631.pdf?OpenElement>. In *Rubin*, where a monetary judgment was rendered against third party individuals (other than the debtor) by a U.S. bankruptcy court relating to a U.S. Chapter 11 proceeding, the representatives of the U.S. Chapter 11 proceedings petitioned a court of the U.K. for recognition of the U.S. Chapter 11 proceeding and for relief to enforce such judgment pursuant to Cross-Border Insolvency Regulation 2006.

40 Above n 39.

plan, compositions and discharge,[41] and (ii) a debtor and creditors may need to initiate a separate bankruptcy proceeding where the assets are located.[42]

3 United States

In a Chapter 11 proceeding, upon confirmation of the plan the debtor shall, subject to certain exceptions, be discharged from its debts pursuant to section 1141 of the U.S. Bankruptcy Code. In a Chapter 7 proceeding, a discharge shall, subject to certain exception, be granted by the court pursuant to section 727 of the Bankruptcy Code. Under section 542(a) of the Bankruptcy Code, a discharge functions essentially as an injunction against further pursuit of pre-petition claims.[43] A foreign representative, who seeks assistance from a U.S. court for recognition of a discharge effected by the rehabilitation plan, can seek a permanent injunction from the U.S. bankruptcy court pursuant to section 1521 or 1507 of the Bankruptcy Code in order to bar creditors from enforcing their claims. There were precedents where the U.S. bankruptcy courts granted such permanent injunctions under Chapter 15 of the Bankruptcy Code to enforce reorganisation orders of foreign courts that include the discharge.[44] In the Hypothetical Case, if the creditor "C1" was subject to personal jurisdiction in the United States, by analogy with the automatic stay cases, it is probable that the U.S. courts would impose sanctions on such a creditor who attempts to collect outside the United States debts discharged in the main proceeding in the United States.[45]

C Recognition of a Foreign Discharge in the States which have not Adopted the Model Law

In the states which have not adopted the Model Law, recognition of a discharge order issued by a foreign court would likely be recognised pursuant to the procedures and requirements for recognition of a foreign judgment. In the

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41 Gordon Stewart "The Recent recognition and enforcement of foreign insolvency derived judgments Rubin" *Fourth UNCITRAL International Insolvency Law Colloquium* (Vienna, 16-18 December 2013) available at <www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013-papers.html>.

42 David L. Barrack and Beret L. Flom "U.K. Court's Impact on Cross-Border Insolvency Land Scape" (April 2013) Am. Bankr. Inst. J. at 52, 54.

43 Jay Lawrence Westbrook "Chapter 15 and Discharge" (2005) 13 American Bankruptcy Institute Law Review 503 at 506 and 511.

44 See Part IVA1 of this paper above; also see Vitro, *S.A.B. de C.V. v. ACP Master, Ltd.* (*In re Vitro, S.A.B. de C.V.*), 473 B.R. 117, 121-122 (Bankr. N.D. Tex. 2012); *In re Metcafe & Mansfield Alt. Invs.,* 421 B.R. 684, 697 (both cases involved enforcement of the plan against a third party creditor who was not the debtor).

45 Jay Lawrence Westbrook, above n 43, at 513.

Hypothetical Case, it is not clear whether the discharge effected in the U.S. would be recognised in China since there are not sufficient precedents yet.

D EU Insolvency Regulation[46]

Under the European Insolvency Regulation ("EIR"), (i) judgments concerning the course and closure of insolvency proceedings (including compositions approved by a court) and (ii) judgments deriving directly from the insolvency proceedings and which are closely linked with them (which would include a judgment concerning a discharge of residual debts, among others) shall be recognised by a member country without further formalities if such judgments are handed down by a competent court whose judgment concerning the opening of proceedings is recognised under the EIR.[47] However, in a secondary proceeding, restrictions of creditors' rights, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets which are not covered by such secondary proceeding without consent of all the creditors having an interest.[48]

E Analysis of the Hypothetical Case

As to recognition of a foreign discharge, it appears that virtually all insolvency regimes discussed above (other than Chapter 15 of the U.S. Bankruptcy Code and the EIR) apply their respective local rules (rules under the civil procedure law or the private international law, etc.) for recognition of a foreign court's ordinary judgment whether or not they have adopted legislation based on the Model Law.

V CONCLUSION - IMPROVEMENTS REQUIRED

From the perspectives of harmonizing cross-border insolvency regimes, recognition of a foreign discharge pursuant to the procedures for recognition of a foreign court's ordinary judgment would likely raise the following problems, among others. Local law requirements for recognition of a foreign court's judgment would be different from those for recognition of a foreign insolvency proceeding under the Model Law, and therefore, cross-border recognition of the effect of a

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46 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. With respect to insolvency proceedings opened after 26 June 2017, the new EU Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings) will apply.

47 EIR, Article 25(1); Klaus Pannen (ed.) *European Insolvency Regulation* (De Gruyter Recht, 2007) at 374-377; Alexander Klauser "Enforcement of Insolvency-Derived Judgments - The Approach of the European Insolvency Regulation" *Fourth UNCITRAL International Insolvency Law Colloquium* (Vienna, 16-18 December 2013) <www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013-papers.html>.

48 EIR, Articles 17 and 34(2); Klaus Pannen (ed), above n 47, at 322-323, 497-499.

discharge, which is one of the core insolvency effects, would be governed by different rules outside of the Model Law. Further, in order to secure legal certainty in the discharge of its debts, the debtor may be inclined to separately file for a local insolvency proceeding in parallel with a foreign main proceeding rather than relying on cross-border recognition and relief available for such foreign proceeding under the Model Law.

In order to better achieve harmonization of cross-border insolvency regimes pursued by the Model Law, it would be desirable to develop the Model Law or model legislative provisions concerning the procedures and requirements for recognition of the discharge effected by or relating to a foreign main proceeding. For those states which have adopted the Model Law, it may be considered amending Article 21 of the Model Law to clearly provide for new relief for the recognition of a foreign discharge effected by or relating to a foreign main proceeding.[49] In addition, some additional measures need to be considered for the benefit of a foreign main proceeding which has been already closed at the time when such relief is sought. If there is no foreign insolvency proceeding pending, there would be no representative of a foreign insolvency proceeding who may file for such relief. Therefore, the following may be considered (i) including in the Model Law, another form of relief which may be sought by the debtor or any other interested party after the close of a foreign main proceeding, or (ii) adopting model legislative provisions that may be used outside of the Model Law in the case where the foreign main proceeding has been closed.

In developing such new measures, it would be necessary to consider whether and to what extent the current requirements for recognition of a foreign court's ordinary judgment (eg, jurisdiction, service of process, public policy, reciprocity, etc) can be reconciled in the Model Law, while maintaining a balance between the interests of stakeholders and the integrity of the modified universalism.[50]

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49 Gordon Stewart, above n 41 (It is suggested that Article 21 of the Model Law be amended in order to make it clear that the discretionary relief the court can grant in aid of foreign insolvency proceedings includes the ability to recognise and enforce an "insolvency derived" judgment of a foreign insolvency proceeding).

50 Jay Lawrence Westbrook, above n 43, at 517 (Professor Westbrook raises the following major questions, for further review, relating to the cross-border enforcement of a foreign discharge: (i) what law applies to the remedy, (ii) whether a foreign discharge should be recognised as *res judicata* or the remedy under Chapter 15 of the U.S. Bankruptcy Code should be the sole basis for enforcement of a foreign discharge, (iii) whether some different standards should be applied to the discharge of debts owed by natural persons, and (iv) standards for the public policy as an exception to recognition).