Korean practice on the recognition of discharge orders rendered in foreign insolvency proceedings

Focusing on the Supreme Court of Korea Judgment 2009-Ma-1600 and subsequent lower court practice

Kim Young-Seok

Abstract:

UNCITRAL adopted the Model Law on Cross-Border Insolvency (MLCBI) in 1997, thereby establishing the contemporary framework for cross-border insolvency practice, but the MLCBI does not define a clear position on what 'a foreign proceeding' mean and how far relief can cover, which caused conflicts of practice over the scope of the MLCBI. The US court have interpreted the scope very widely whereas the UK courts have taken a narrow stance in applying the MLCBI based on traditional doctrines such as the Gibbs Rule and Dicey Rule. In response to these conflicts, UNCITRAL resolved this problem by newly adopting the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) in 2018, establishing a smooth procedure for the recognition and enforcement of insolvency-related judgments constituting components of foreign proceedings rather than the proceeding itself.

Meanwhile, UNCITRAL identified the Supreme Court of Korea Judgment 2009-Ma-1600 Judgment, together with the *Rubin* case, as reflecting a position inconsistent with the principle of universalism and the objectives of cross-border insolvency The bigger problem is that lower courts in the Republic of Korea appear to have misunderstood the meaning of the Supreme Court Judgment one more step further. Although the 2009-Ma-1600 Judgment is open to criticism, it is possible to accept and understand the conclusion, considering the necessity to protect the expectation of the debtor who trusted the Territorialism under the former Law, which was in effect when the foreign proceeding was in progress.

However, the lower courts appear to have interpreted the Supreme Court's judgment as endorsing a generally passive stance toward the recognition of discharge orders rendered in foreign proceedings, thereby con-

tributing to a trend that runs counter to the principle of universalism. This represents an apparent return to territorialism and indicates the need for doctrinal and legislative reconsideration.

Ultimately, the most fundamental solution would be the adoption of the MLIJ and the corresponding revision of the Korean Insolvency Law, namely the Debtor Rehabilitation and Bankruptcy Act (DRBA), in order to address uncertainties that have persisted under the MLCBI framework. Looking forward, the MLIJ should be implemented in harmony with the MLCBI, and continued research on international instruments, including European Insolvency Regulation (EIR), will remain essential to achieving that objective.

Keywords: Cross-Border Insolvency, MLCBI, MLIJ, Insolvency-Related Judgments, Recognition and Enforcement of foreign judgments, Gibbs Rule, Dicey Rule, Rubin Case, European Insolvency Regulation

A. Introduction

I. Conflicts of practice over the MLCBI

Nearly twenty-five years have passed since UNCITRAL adopted the Model Law on Cross-Border Insolvency (hereinafter 'MLCBI'). During this period, major jurisdictions have incorporated the MLCBI into their domestic legal systems and established cross-border insolvency frameworks designed to recognize and support foreign insolvency proceedings (hereinafter 'foreign proceedings'). However, UNCITRAL did not take a clear position regarding what constitutes a 'foreign proceeding' for purposes of recognition, and how far the relief under the MLCBI may cover. As a result, divergent practices have emerged among major jurisdictions concerning the scope of application of the MLCBI.

US courts have interpreted the MLCBI broadly, adopting an approach under which relief may encompass the recognition and enforcement of plan confirmation orders or discharge orders rendered in foreign proceedings. On the other hand, UK courts have interpreted the scope of the MLCBI narrowly, maintaining that relief under the MLCBI is confined principally to procedural assistance and does not extend to the recognition and enforcement of substantive insolvency-related judgments. Consequently, significant difference has emerged between the practice of Chapter 15 of the

United States Bankruptcy Code and that under the United Kingdom's 2006 Cross-Border Insolvency Regulations.

The UK's comparatively restrictive position is grounded in the long-established principles such as the Gibbs Rule[1] and Dicey Rule,[2] both of which were reaffirmed by the Supreme Court of the UK in *Rubin* case.[3] Under this framework, the obligations governed by UK law may generally be adjusted or discharged only through UK insolvency proceedings, and insolvency representatives are often compelled to commence avoidance actions before UK courts when the opposing party resides within the UK, due to concerns regarding the enforceability of foreign avoidance judgments. Such an approach has been criticized as inconsistent with the principle of universalism which underlies modern cross-border insolvency law.

II. Establishment of the MLIJ to resolve these conflicts

In response to these conflicts, UNCITRAL adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (hereinafter 'MLIJ') in 2018. The MLIJ was developed with reference to the structural framework of the EU Insolvency Regulation (hereinafter 'EIR'),

1 The Gibbs Rule is a legal principle according to which the adjustment of debts (including their reduction or discharge) established in foreign insolvency proceedings is not effective in respect of debts governed by English law in the United Kingdom. For a discussion of the Gibbs Rule from a Korean perspective, see Kim, *Korea Private International Law Journal* 28(1) (2022), 81, at 105.

2 The Dicey Rules are systematically organized body of common law rules formulated by the renowned English jurist A. V. Dicey. The rule relevant to this article is Rule 43 (formerly Rule 36). Rule 43 provides that a foreign judgment *in personam* may be recognized and enforced in the United Kingdom where the judgment debtor (1) was present in the foreign country at the time the proceedings were instituted; (ii) was a claimant or counterclaimed in the foreign proceedings; (iii) submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings; or (iv) agreed, prior to the commencement of the proceedings, to submit to the jurisdiction of that court in respect of the subject matter of the proceedings. For further details, see Collins / Harris (eds.), *Dicey, Morris and Collins on the Conflict of Laws*, para. 14R-054. For a Korean perspective on the Dicey Rules, see Kim, *Korea Private International Law Journal* 28(1) (2022), 81, at 132.

3 The Supreme Court of the UK, 24. 10. 2012 – [2012] UKSC 46 – *Rubin and another (Respondents) v Eurofinance SA and others (Appellants).*

which recognizes and enforces individual judgments arising from insolvency proceedings, rather than the proceedings itself.[4]

More specifically, the MLIJ defines the concept of 'Insolvency-Related Judgments' (hereinafter 'IRJs') (Art. 2(d)),[5] and gives effect to the IRJs rendered by foreign courts in the enacting State where: (1) it is enforceable in the originating State, and (2) it is not against the public policy of enacting State (Art. 7, 13,) unless it does fall under the refusal reasons stipulated in the MLIJ (Art. 14).

In other words, the MLIJ seeks to facilitate the smooth recognition and enforcement of foreign IRJs by limiting the grounds upon which an enacting State may refuse recognition or enforcement. Notably, the MLIJ does not impose stringent policy-based requirements such as reciprocity, which commonly applies to the recognition and enforcement of foreign civil or commercial judgments.[6] Consequently, an enacting State is not required to assess whether the originating State has historically adopted a favourable approach toward the recognition and enforcement of judgments rendered by the enacting State.

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4 Unlike the MLCBI, the EIR classifies judgments rendered in insolvency proceedings into several categories and prescribes different requirements for their recognition and enforcement. For further details, see Bork / van Zwieten / Oberhammer, Art. 32 mn. 32.01 et seq. For a Korean perspective on the EIR, see Kim, *Korea Private International Law Journal* 21(2) (2015), 285, at 324. For a detailed account of the drafting and discussion process of the MLIJ, see Han, *Seoul National University Business, Finance and Law* (BFL) 81 (2017), 90, at 94.

5 The UNCITRAL *Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (2018), para. 60 et seq., identifies six types of the IRJs; however, this categorization is not exhaustive. In other words, judgments not falling within the six identified categories may also qualify as the IRJs. The determination of the criteria for identifying whether a judgment constitutes an IRJ is expected to become one of the central issues in future cross-border insolvency practice.

6 Traditionally, reciprocity has been regarded as one of the most challenging requirements for the recognition and enforcement of foreign judgments. Korean courts occasionally faced situations where they were unable to recognize and enforce foreign judgments due to the absence of clear evidence that the foreign jurisdiction would accord reciprocal treatment to Korean judgments, even where recognition and enforcement appeared desirable. In this regard, it is particularly encouraging that Korea has recently established a reciprocal relationship with China in the field of civil and commercial judgments.

III. Scope of discussion

The Republic of Korea (hereinafter 'Korea'), which adopted the MLCBI through the Chapter Ⅴ (Cross-Border Insolvency) of the Debtor Rehabilitation and Bankruptcy Act (hereinafter 'DRBA'), has likewise encountered these conflicts of practice. During the drafting process the MLIJ, UNCITRAL identified the Supreme Court of Korea's Judgment 2009-Ma-1600 (hereinafter 'Supreme Court Judgment',) together with *Rubin*, as an example of jurisprudence that limited the practical scope of the MLCBI and contributed to divergences in cross-border insolvency practice.

A more significant concern, however, lies in the manner in which lower Korean courts have interpreted the Supreme Court Judgment Although the Supreme Court Judgment has been subject to substantial criticism, its conclusion may nevertheless be understood in light of the exceptional circumstances surrounding the case and the need to protect the legitimate expectations of creditor who had relied upon the territorial approach embodied in the legal framework then in force. However, lower courts seem to have interpreted the judgment as endorsing a generally cautious or passive approach toward the recognition of discharge orders rendered in foreign insolvency proceedings, thereby contributing to a renewed inclination toward territorialism.

Accordingly, the most fundamental solution would be to address uncertainties that have persisted under the MLCBI framework through the adoption of the MLIJ and drawing upon the practice developed under the EIR, upon which the MLIJ was substantially modelled.[7] However, as it remains uncertain when revisions to the DRBA may occur, this article focuses on an examination of the Supreme Court Judgment and subsequent lower court rulings.

7 Commonwealth jurisdictions such as Australia and Singapore have in recent years expressed criticism of the Gibbs Rule, suggesting a greater openness to the adoption of the MLIJ then previously anticipated. Judicial decisions reflecting such criticism include *In re Bulong Nickel Proprietary* Ltd [2002] WASC 126, 42 ACSR 52 (Supreme Court of Western Australia, 17 May 2002), and *Pacific Andes Resources Development Ltd* [2016] SGHC 210 (Singapore High Court, 27 September 2016).

B. Review of the Supreme Court judgment (2009-Ma-1600)

The Supreme Court Judgment has already been extensively discussed in many Korean articles[8] under the names of 'Todd OH case' or 'Kohap case.' The central issue concerned whether or not a discharge order rendered by a U.S. Bankruptcy Court has taken effect in Korea. In this case, a discharge order, the nature of which is a judgment affecting creditors generally and collectively, was subject of recognition.[9] In this respect, this case differs from *Rubin*, where the judgment sought to be recognized and enforced was an avoidance judgment rendered in an adversary proceeding.

I. Factual background

1. Procedural history

The procedural history of this case may be divided into four stages.

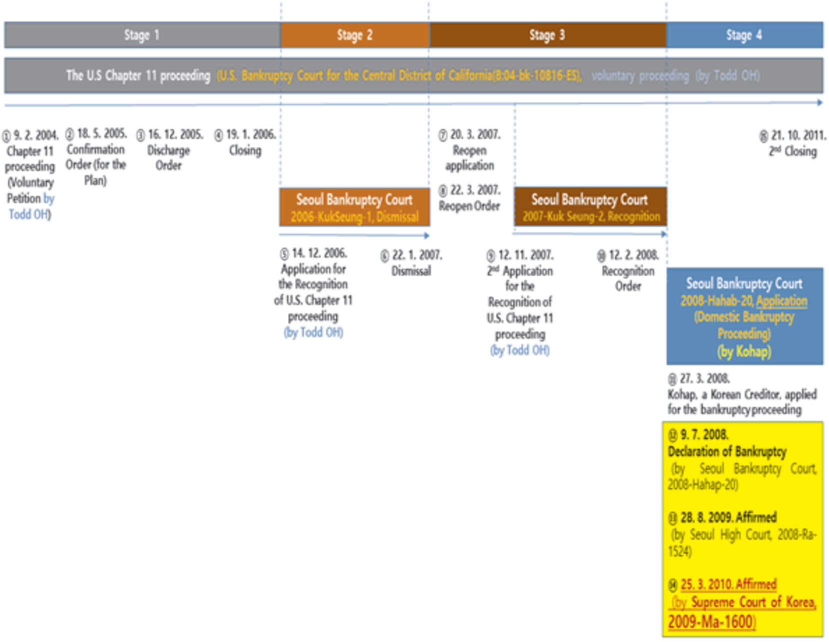
1) Stage One
   Individual debtor Todd OH applied for a Chapter 11 proceeding before the U.S. Bankruptcy Court for the Central District of California. A plan confirmation order and a discharge order were rendered in the Chapter 11 proceeding, following which the Chapter 11 proceeding was closed.
2) Stage Two
   Todd OH subsequently applied for the recognition of the Chapter 11 proceeding before the Seoul Bankruptcy Court.[10] However, the application was dismissed (2006-KukSeung-1) on the ground that the Chapter 11 proceeding had already been closed and was no longer pending at the time the application for recognition was filed

8 Lim, *Seoul National University Business, Finance and Law* (BFL) 38 (2009), 95, at 110; Suk, in: Publishing Committee for Commemorating Prof. Yang Chang-Soo's 70th Birthday (eds.), *Civil Law of Self-Determinism and Justice*, 2021, 555, at 555.

9 Discharge orders or plan confirmation orders generally affect the interests of creditors and stakeholders collectively, distinguishing them from judgments rendered in adversary proceedings, which affect only the rights and obligations of the opposing parties. For further discussion, see Suk, *International Transactions and Law* 33 (2021), 1, at 6.

10 Todd OH applied for the recognition of a U.S. Chapter 11 proceeding under the Chapter V of the DRBA (implementing the MLCBI). From the perspective of the EIR framework, this application may be understood as corresponding to a request for recognition of the opening judgment commencing Chapter 11 proceedings.

3) Stage Three
   Todd Oh thereafter applied to reopen the Chapter 11 proceeding and obtained a reopening order from the U.S. Bankruptcy Court for the Central District of California. Following the reopening, he again sought recognition of the Chapter 11 proceeding before the Seoul Bankruptcy Court and successfully obtained a recognition order (2007-KukSeung-2).
4) Stage Four
   Notwithstanding the recognition of the U.S. Chapter 11 proceeding in Korea, a separate bankruptcy petition (2008-HaHab-20) was subsequently filed in Korea by Kohap, a Korean creditor that had not participated in the U.S. Chapter 11 proceeding. The factual background of the case is summarized in Table below.



The progress of Supreme Court judgment (2009-Ma-1600)

As shown in the Table above, the Supreme Court Judgment arose at Stage Four, and the central issue was whether Kohap, a creditor that had not participated in the Chapter 11 proceeding, could nonetheless exercise its rights as a creditor in Korea, where the 'foreign proceeding' had been recognized in Korea and a discharge order had been rendered in the foreign proceeding. If the discharge order were regarded as effective in Korea, the Korean bankruptcy petition would necessarily have to be dismissed, since Kohap would no longer retain creditor status not only in the U.S. but also in Korea.[11]

2. Order at issue: discharge order, not confirmation order

Since the debtor, Todd OH, was an individual, discharge from debt could arise only through a discharge order pursuant to Sec. 1141(d)(5) of the U.S. Bankruptcy Code, not a plan confirmation order.[12] This differs from the Chapter 11 proceeding involving non-individual debtors, such as corporations or limited liability companies, where discharge generally takes effect upon confirmation of the reorganization plan

This structure bears some resemblance to Korea's General Rehabilitation proceedings (DRBA Chapter Ⅱ) applicable to individual debtors,[13] under which discharge does not take effect immediately upon confirmation of the rehabilitation order but only after all claims have been repaid in accordance with the plan. Although the DRBA does not prescribe a detailed statutory mechanism governing this issue, Korean practice addresses the matter by specifying in the plan that discharge shall become effective upon completion of the required repayments. By contrast, the U.S. Bankruptcy

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11 Art. 294(1) of the DRBA provides that 'a creditor or debtor may file a petition for bankruptcy proceedings.' This provision allows creditors to initiate bankruptcy proceedings against a debtor where the debtor does not voluntarily commence such proceedings. For details regarding Korean practice, see Lee, Art. 294–304, in: Kwon, Soon-Il (ed.), *Debtor Rehabilitation and Bankruptcy Act III* (2021), 764, at 783.

12 In principle, debt adjustment becomes effective upon confirmation of a reorganization plan under the Sec. 1141(a) of the U.S. Bankruptcy Code. By contrast, individual debtors are discharged from their debts only upon the issuance of a separate discharge order by the bankruptcy court.

13 General Rehabilitation proceedings (DRBA Chapter Ⅱ, similar to U.S. Chapter 11) for individuals are distinct from the Individual Rehabilitation proceedings (DRBA Chapter Ⅳ, similar to U.S. Chapter 13). Under Korea law, individuals with secured debt not exceeding KRW 1.5 billion (approximately USD1million) and unsecured debt not exceeding KRW 1 billion (approximately USD 670,000) may choose between these two rehabilitation regimes. By contrast, individuals whose debts exceed those thresholds are limited to General Rehabilitation proceeding. For further discussion of the differences between the two procedures, see Seoul Bankruptcy Court Working Group *Individual Insolvency Practice*, 439 et seq.

Code resolves this issue through legislation. Accordingly, Todd OH, as an individual Chapter 11 debtor, obtained discharge only through the discharge order rendered on December 16, 2005 [see Annex],[14] rather than through the plan confirmation order itself.

Nevertheless, the Supreme Court Judgment (2009-Ma-1600) appears to have proceeded on the premise that discharge became effective directly upon confirmation of the plan and therefore framed the issue principally in terms of the recognition of the 'plan confirmation order' rather than the discharge order. However, in this article, both orders are examined together, given that each constitutes a judicial determination producing general and collective effects upon creditors.

II. Principal holdings of the Supreme Court judgment

As shown in Table above, the court of first instance (Seoul Bankruptcy Court 2008-HaHab-20) held that Kohap retained a claim against Todd OH in Korea and accordingly granted Kohap's petition for domestic bankruptcy proceedings against Todd OH, thereby creating parallel proceedings alongside the Chapter 11 proceedings. Todd OH's appeal against the judgment was dismissed by the appellate court (Seoul High Court 2008-Ra-1524), which affirmed the judgment of the first instance court. The Supreme Court of Korea likewise adopted the same position in the Supreme Court Judgment (2009-Ma-1600).

The Supreme Court of Korea concluded that, at least under the circumstances of this case, the discharge order rendered in the Chapter 11 proceeding produced legal effects only with creditors within the U.S. and therefore

14 U.S. Bankruptcy Court for the Central District of California, *In re Todd OH, aka Won Kyung Oh*, Case No. SA 04-10816 (RA), ECF Doc. No. 181 (16 December 2015). It should be noted, however, that a discharge order under the U.S. Bankruptcy Code does not have affect non-dischargeable debts prescribed in Sec. 523 of the U.S. Bankruptcy Code, which constitutes one of the most significant differences from Korean practice. This is because the DRBA provisions concerning non-dischargeable debts, such as the Art. 566 in Individual Bankruptcy proceeding (=US Chapter 7 proceeding) and the Art. 625 in Individual Rehabilitation proceeding (=US Chapter 13 proceeding) do not apply to General Rehabilitation proceeding (=US Chapter 11 proceeding) for individuals.

did not extinguish Kohap's claim in Korea. The principal holdings of the Supreme Court Judgment may be summarized as follows:[15]

Supreme Court of Korea Judgment 2009-Ma-1600 (25 March 2009)

[3] The **relief** contemplated under the DRBA is intended to enable foreign representatives to secure assets located in Korea for purposes of distribution and repayment in foreign insolvency proceedings and to formulate or implement restructuring or liquidation plans. Such relief includes:
1) stays of actions concerning the debtor's business and assets located in Korea; and
2) prohibitions or stays of compulsory execution, security exercises, and preservation measures.
Because such relief constitutes **procedural support**, it does **not** extend to **substantively altering or extinguishing debts**, including by granting effect in Korea to discharge orders or plan confirmation orders rendered in foreign proceedings.

[4] **Discharge orders or plan confirmation orders** (hereinafter 'the Orders') rendered by foreign courts concern the existence and scope of claims under substantive law. Accordingly, the debt-adjustment effects by such Orders amount to substantive modification of obligations **between debtors and creditors** rather than merely procedural relief. Recognition of the Orders is therefore more appropriately resolved as an issue arising **between the debtor and creditors on an individual basis**. Even where such Orders are rendered in foreign proceedings, granting their effects in Korea is not materially different from recognizing foreign civil or commercial judgments pursuant to Art. 217 of the Korean Civil Procedure Act (hereinafter 'CPA'). Consequently, recognition of the Orders rendered by foreign courts should be governed **not** by **relief provisions** under the DRBA, but rather by **the Art. 217 of the CPA.**[16]

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15 There is no official English translation of the Supreme Court Judgment. The translation reproduced below has therefore been prepared by the author and includes limited modifications to the original wording where necessary for clarity and readability.

16 In principle, a foreign judgment is effective only within the jurisdiction in which it is rendered, and whether such judgment will be recognized or enforced domestically depends on the law of the recognizing and enforcing State. In this regard, Art. 217(1) of the CPA sets forth four requirements for the recognition of foreign judgments: (1) jurisdiction; (2) proper service (excluding service by public notice or comparable

[5] Recognition of the Orders rendered by foreign courts requires that the effects of such recognition not violate public policy of Korea (CPA, Art. 217(1)(3)[17]). Specifically, the public policy requirement may not be satisfied where:
(a) the Orders were rendered through **proceedings that failed to adequately protect Korean creditors' rights to participate in foreign proceedings**;
(b) **the substantive content of the Orders** is inconsistent with fundamental principles of Korea; or
(c) **the concrete consequences** of recognition would infringe upon the rights or legitimate interests of Korean creditors.

[6] In the present case, recognition of **the discharge order** rendered by the U.S. Bankruptcy Court **would violate** the legitimate expectations of Korean creditors who **relied upon the territorial approach** embodied in the former Company Reorganization Act[18](Repealed by the Art. 2 of the Annex to the DRBA), which remained applicable in Korea during the pendency of the U.S. Chapter 11 proceeding._Specifically, recognition of the discharge order **would undermine Kohap's expectation of obtaining repayment** through the compulsory execution against domestic assets or through domestic bankruptcy proceedings **grounded in the territorial principle**. Accordingly, the **concrete consequences** of recognizing the discharge order **would be contrary to public policy**, and accordingly the discharge order rendered by the U.S. Bankruptcy Court could not be recognized due to failure to satisfy Art. 217(1)(3) of the CPA'

In other words, the Supreme Court of Korea reasoned that the recognition and enforcement of judgments producing substantive changes in or extinguishment of debts and liabilities cannot be addressed through relief

forms of service); (3) public policy; and (4) reciprocity. For further discussion, see Kim, *Seoul Law Journal* 63(3) (2022), 241, at 247.

17 The relevant provision was originally designated as Art. 217(3). However, the author indicates it as 217(1)(3) for ease of reference because the article has become 217(1)(3) following the amendment to the CPA by Act No. 12587 of 20 May 2014.

18 The former insolvency legislation, namely the Company Reorganization Act, was based on the principle of territorialism and provided that (1) insolvency proceedings commenced in Korea were effective only with respect to the debtor's assets located in Korea, and (2) foreign insolvency proceedings had no effect on debtor's assets located in Korea. By contrast, the DRBA, which is based on the principle of universalism, departed from this traditionally restrictive approach, although it does not operate retroactively. For further discussion, see Kim, Master's thesis (2012), 3 et seq.

under the DRBA, because such relief is confined to procedural assistance. Accordingly, whether foreign discharge orders or plan confirmation orders should be recognized in Korea must be determined by reference to the requirements governing the recognition and enforcement of foreign civil and commercial judgments under the Art. 217 of the CPA, with particular emphasis on the public policy requirement. From this perspective, the Court considered it necessary to protect the legitimate expectations of Kohap, a Korean domestic creditor, which had relied upon the territorial approach embodied in the former Company Reorganization Act.

This line of reasoning bears significant resemblance to that adopted by the *Rubin* Judgment of the Supreme Court of the United Kingdom, which was decided approximately two years after the Supreme Court Judgment (2009-Ma-1600). Nevertheless certain aspects of the Supreme Court Judgment remain difficult to accept, on some issues, particularly when viewed in light of the attitude of the MLIJ adopted in 2018. The following sections therefore examine these issues in sequence.

III. Review

1. Whether relief under the DRBA is limited to procedural matters

The Supreme Court Judgment held that relief under the DRBA is confined to procedural matters. However, this position can no longer be maintained without reconsideration, particularly in light of the approach reflected in the MLIJ. Art. X of the MLIJ[19] expressly permits enacting States to provide that 'relief under the MLCBI includes the recognition and enforcement of a judgment,' Thereby endorsing a broader understanding of the scope of relief available under the MLCBI. Admittedly, this reflects UNCITRAL's

19 The MLIJ proposes two alternative legislative approaches: (1) adoption of the Model Law in its entirety, including its provisions defining IRJs and setting forth grounds for refusing recognition and enforcement; and (2) adoption of a single provision, namely Article X, which provides as follows (underlining and emphasis added by the author): **Article X** (Recognition of an insolvency-related judgment under [insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency Notwithstanding any prior interpretation to the contrary, **the relief available under** [insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency] **includes** recognition and enforcement of a judgment'

subsequent interpretation of the MLCBI rather than the express intent of Korean lawmakers in enacting Chapter Ⅴ of the DRBA.

Nevertheless, several considerations support a broader interpretation of relief under the DRBA.

First, the DRBA Chapter Ⅴ was enacted with the objective of establishing a standardized and internationally harmonized framework for the efficient administration of cross-border insolvency proceedings, consistent with the underlying purposes of the MLCBI.

Second, the MLIJ was adopted in response to conflicts of practice that emerged under the MLCBI, including concerns exemplified by the Supreme Court Judgment discussed above. Therefore, acceptance of the broader interpretive approach reflected ibn the MLIJ may contribute to strengthening mutual confidence and predictability in relations with foreign creditors and other interested parties.

Third, most importantly, the experience of the U.S. Bankruptcy Court[20] demonstrates that a broader understanding of relief under Chapter 15 (MLCBI) has frequently facilitated efficient restructuring and enhanced protection of stakeholders' interests. Such an approach enables debtors to concentrate on rehabilitation or restructuring efforts without unnecessary fragmentation and therefore supports the effective administration of cross-border insolvency proceedings.

From this perspective, recognition and enforcement of at least 'judgments rendered in foreign insolvency proceedings', not necessarily judgments arising from all forms of foreign litigation, may appropriately fall within the scope of relief under the DRBA, particularly under the Art. 636①(5) of the DRBA, a catch-all clause.[21]

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20 The US Bankruptcy Court have recognized foreign plan confirmation orders from the United Kingdom (*Avanti, Lehman Brothers International Europe*), Canada *(US Steel Canada, Metcalfe, Sino-Forest*), France (*CGG*), Brazil (*Rede Energia, OI Brazil Energia*), Croatia *(Agrokor*) through relief under Chapter 15 of the U.S. Bankruptcy Code. For further discussion of these cases, see Kim, (2022), 26 et seq.

21 Art. 636(1)(5) of the DRBA, reproduced below, corresponds to Art. 21(a) of the MLCBI (underlining and emphasis added by the author).
Article 636 (Relief for foreign proceedings) (1) The court may issue <u>**relief** falling under any of the following subparagraphs</u> in order to protect the foreign debtor's business and properties or the creditors' profits at the time that it recognizes the foreign proceeding or after the recognition on its own motion:
1. The stay of a lawsuit involving the debtor's business and properties and any administrative proceedings.

Nevertheless adoption of this broader approach under Korean law would require reconsideration of Supreme Court precedent. In particular, the Supreme Court of Korea would need to revisit the Judgment2009-Ma-1600, through an en banc proceeding pursuant to the Art. 7①(3) of the Court Organization Act.[22] Such a process may prove procedurally burdensome and could results in delays, as an appropriate case capable of presenting the issue would first need to arise and proceed through the appellate court before reaching the Supreme Court of Korea.

2 . Whether a discharge order constitutes a judgment rendered in an adversarial proceeding

The Supreme Court Judgment treated a discharge order as a judgment resolving disputes concerning debts and liabilities between a debtor and individual creditor and therefore reasoned that recognition of such order should be addressed on an individual basis between opposing parties. However, this characterization appears difficult to reconcile with Art. 14(f)(i) of the MLIJ and the UNCITRAL Guide to Enactment of the MLIJ, both of which states that plan confirmation orders or discharge orders are not merely judgments resolving bilateral disputes between individual parties but are judicial determinations that directly and collectively affect the interests of creditors in general.[23]

If the DRBA were to be interpreted in accordance with this broader approach, a debtor who has obtained a foreign discharge order would not be required to repeatedly invoke and prove, in each individual action,

2. The prohibition or stay of the compulsory execution with respect to the debtor's business and properties, the auction for exercise of security rights, and the provisional seizure or preliminary injunction, etc.
3. Prohibition of the debtor's payment or of the disposal of the debtor's properties.
4. The appointment of Cross-Border Insolvency Administrator.
5. **Other dispositions** necessary to preserve the debtor's business and properties and to protect the profits of creditors.

22 Art. 7(1)(3) of the Court Organization Act provides that a case shall be deliberated and decided by more than two-thirds of all Supreme Court Justices '[w]here it is deemed necessary to depart from the Supreme Court of Korea's prior interpretation of the Constitution, statutes, orders, or rules.'

23 Suk, in: Publishing Committee for Commemorating Prof. Yang Chang-Soo's 70th Birthday (eds.), *Civil Law of Self-Determinism and Justice* (2021), 555, at 569, likewise argues that the Supreme Court judgment misunderstood the nature of the plan confirmation order.

satisfaction of the requirements for recognition and enforcement under Art. 217 of the CPA. Rather, it would be sufficient first to obtain recognition of foreign proceeding and subsequently seek relief granting domestic effect to the discharge order. Once such relief is granted by the Seoul Bankruptcy Court,[24] the resulting order could then be submitted as evidence in subsequent individual civil proceedings.

Establishment of such a practice would offer several advantages. (1) First of all, it would reduce the risk of inconsistent civil judgments concerning the same recognition requirements, which might otherwise vary depending upon the allegations and evidence presented in individual litigation. (2) Secondly, it would allow civil courts to concentrate upon substantive questions, such as whether particular claims are dischargeable, rather than revisiting the threshold issue of recognition of the discharge order itself. Such an allocation of functions would likely prove more efficient and institutionally desirable not only for the courts but also for debtors and other interested parties.

3. Whether it is appropriate to refuse recognition of a duly-established discharge order based upon Its 'specific result'

The Supreme Court Judgment acknowledged that the discharge order had been 'duly established' in the U.S. Chapter 11 proceeding, but nevertheless concluded that recognition of the order would produce a 'specific result' contrary to public policy. To be specific, the Court emphasized that the former Company Reorganization Act, which embodied a territorial approach, remained in force during the pendency of the U.S. proceeding and that Kohap, relying upon that territorial framework, had not participated in the U.S. Chapter 11 proceeding. Accordingly, the Court considered it necessary to protect Kohap's expectations notwithstanding the subsequent enactment of the DRBA and its adoption of a more universal approach.[25]

Nevertheless, several considerations cast doubt upon the persuasiveness of this conclusion. First, the U.S. Bankruptcy Court afforded Kohap a suf-

24 Pursuant to Art. 630 of the DRBA, the Seoul Bankruptcy Court has exclusive jurisdiction over cross-border insolvency matters, including the recognition of foreign proceedings and the granting of relief in relation to such proceedings.

25 Oh, *Supreme Court of Korea Judgment Explanation* 83 (2010), 604, at 650.

ficient opportunity to participate in the Chapter 11 proceeding through appropriate notification procedures pursuant to the U.S. Bankruptcy Code.[26]

Second, despite having notice of the pending proceeding, Kohap deliberately chose not to participate, apparently preferring to pursue recovery through execution against the debtor's domestic assets or through domestic insolvency proceeding.

Third, while the Supreme Court Judgment effectively protected Kohap's reliance upon territorialism, it did so at the potential expense of equal treatment among creditors, including both foreign creditors and domestic creditors who participated in or accepted the effects of the discharge order.

Fourth, the Supreme Court Judgment arguably affords disproportionate protection to Kohap alone and risks complicating the legal relationships among stakeholders who did not challenge the discharge order, by reopening issues that had already been resolved through the foreign proceedings.

In short, refusal to recognize a duly established discharge order on the basis of its 'specific result' should arguably require more exceptional circumstances, particularly where the discharge order was established in accordance with procedural fairness and due process under the foreign law. Such refusal may be justified where it is necessary to preserve equitable treatment among creditors or to prevent manifest unfairness. It remains open to question , however, whether the present case rises to that level.[27] Kohap's reliance upon territorialism particularly where it voluntarily elected not to participate in the Chapter 11 proceeding with the purpose of pursuing domestically advantageous remedies 'legal at the time, but unjusti-

26 According to the Service List, Kohap was included with its domestic address and appears to have been duly served and notified in the U.S. proceedings. Other domestic creditors were likewise included in the list, excerpts of which are captured below:

Chun-Yong, Choi Byoung Green Town 511-1605 Do-Nong-Dong 2-1, Nam-Yang-Ju-Si Gyung-Gi-Do, Korea, 00 00000	Kohap Inc. Han-Wha Bldg., 11th Floor #1 Jang-Gyo-Dang, Jung-Gu Seoul, Korea	Korean Government Nam-Dae-Mun Se- Mu-So (Se-Won-Guan-Ri) Jeo-Dong 1 GA, Jung-Gu Seoul, Korea,
Lee & Ko (Kwang-Jang) Posco Center West Bldg. 16th Floor 892, Dae-Chi-4-Dong, Gang-Nam-Gu Seoul, Korea, 00 00000	My Oy Kwon Esq TAE JI BLDG 2ND FL 1706 9 Seo Cho Dong Seo Cho Gu SEOUL KOREA, 00 00000	Yong Bin Yim ECS & Partners Attn: Eun Change Yong 15F Union Steel Building 890, Daechi-dong, Kangnm-lcu Seoul, Korea

27 Korean courts have refused recognition or enforcement of foreign civil and commercial judgments awarding excessive punitive damages or otherwise violating fundamental domestic principles on the basis of Art. 217(1)(3) of the CPA (public policy). For further discussion, see Suk, *International Civil Procedure: Private International Law (Procedures)* (2012), 373 et seq.

fied,'[28] does not necessarily appear more deserving of protection than the broader objectives of insolvency proceedings, including collective administration and equitable treatment of creditors.

Art. 14(f) of the MLIJ reflects a similar understanding by identifying, as a ground for refusal, circumstances in which 'the interests of creditors and other interested persons were not adequately protected in the proceeding in which the judgment was issued.' It is evident that discharge orders or plan confirmation orders fall within the category of judgments materially affecting the rights of creditors generally. In other words, where creditors were not afforded a fair chance to participate in foreign proceedings, refusal to recognize discharge or confirmation orders may be justified. However, once creditors have been given adequate notice and a fair opportunity to participate, refusal of recognition should ordinarily remain exceptional. Likewise, where Art. X of the MLIJ is adopted, courts should exercise caution in refusing relief granting domestic effect to such orders under the Art. 7 of the MLIJ (public policy).

C. Lower court practice

I. Lower courts' expansive reading of the Supreme Court judgment (2009-Ma-1600)

The Supreme Court Judgment conveyed the view that discharge orders or plan confirmation orders rendered in foreign proceedings should be treated like civil or commercial foreign judgments, and the orders may be denied where such orders seriously prejudice domestic creditors or undermine legitimate expectations deserving protection. In subsequent practice, however, lower courts appear to have developed a tendency toward restrictive recognition of foreign discharge and confirmations orders. A recurring pattern may be observed where creditor [A] files a lawsuit against [B] seeking for performance of a loan or commercial claims, and [B] raises as a defence the existence of a discharge order or plan confirmation order in foreign insolvency proceedings. In many such cases, lower courts have declined to recognize the foreign orders absent particular compelling circumstances.

This trend suggests that the Supreme Court of Korea Judgment have been interpreted more broadly than originally intended, particularly

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28 Kohap sought to obtain preferential satisfaction through individual compulsory execution against Todd OH's domestic assets.

through expansive reliance upon public policy considerations. As discussed above, however, the Supreme Court Judgment arose under highly exceptional circumstances involving a domestic creditor that had relied upon the territorial framework preserved under the former Company Reorganization Act. Accordingly, the Supreme Court Judgment should not necessarily be understood as reflecting a generally restrictive or passive approach toward the recognition and enforcement of foreign discharge or confirmation orders. Rather, it may be more appropriately viewed as a case-specific determination grounded in unusual transitional circumstances.

II. Lower courts judgments showing a restrictive approach toward recognition of discharge orders

1. Seoul Central District Court 2018-Na-11861

In this case, the plaintiff (hereinafter '[P]'), having sold goods without receiving payment from the defendant (hereinafter '[D]'), sought recovery of the purchase price from D, an individual debtor. D defended that he had previously obtained a discharge order from the U.S. Bankruptcy Court for the Central District of California.[29] However, the court of first instance (Seoul Central District Court 2017-GaDan-19119) determined that P had not received adequate notice of the U.S. proceeding, emphasizing that P had not been included in the list of creditors. On this basis, the court concluded that recognition of the discharge order in Korea would be contrary to public policy. Additionally, the court reasoned that P's claim had not been discharged in any event, because the discharge order itself expressly provided that 'some debts which the debtors did not properly list is not discharged,' and P's claim had not been included among the listed claims.

On appeal, the Seoul Central District Court (2018-Na-11861) affirmed the first instance court's judgment rejecting D's defence, and the judgment became final without further challenge. The conclusion reached by the courts is understandable to the extent that P was not sufficiently afforded a meaningful opportunity to participate in the U.S. proceeding. In other words the concern related not merely to the recognition of the discharge order itself but to the procedural integrity underlying the issuance of that order.

29 It is unclear from the judgment alone whether the proceeding was commenced under Chapter 7 or Chapter 13 of the U.S. Bankruptcy Code.

Nevertheless, further examination of Sec. 523(a)(3)(A) of the U.S. Bankruptcy Code would have been desirable. That provision states that 'debts neither listed nor scheduled' may nevertheless be discharged where the relevant creditor had notice or actual knowledge of the insolvency case in sufficient time to protect its interests.[30] Accordingly, if P in fact possessed notice or actual knowledge of D's U.S. proceeding within an appropriate period, P could arguably be regarded as a creditor who voluntarily elected not to participate despite having been afforded a sufficient opportunity to do so-an approach analogous to Kohap's position in the Supreme Court Judgment. Under such circumstances, P's claim might properly be regarded as discharged under U.S. Bankruptcy Code, and recognition of that discharge would not necessarily offend public policy because no legitimate reliance interest comparable to that in the Supreme Court Judgment would be present. Of course, this conclusion is on the premise that the legal effects of discharge order are governed by the U.S. Bankruptcy Code as the *lex fori concursus* of the foreign insolvency proceeding. Such an approach finds meaningful support in Supreme Court of Korea 2012-Da-104526, 104533 Judgment, which recognized that '*lex fori concursus* governs matters relating to the typical legal effects of insolvency proceedings'

2. Suwon High Court 2021-Na-18913

In this case, P sought repayment of a loan against D, an individual debtor who had obtained a discharge order in a Chapter 7 proceeding before the U.S. Bankruptcy Court for the District of Connecticut. The court of first instance (Suwon District Court 2020-GaHap-22127) acknowledged that D had listed 'the debt owed to P' in the schedule of creditors and that P had received notice of the discharge order issued by the U.S. Bankruptcy Court. Nevertheless, the court concluded that the requirements of Art. 217(1)(2) of the CPA had not been satisfied and therefore rejected D's defence based on the discharge order.

The court reasoned as follows. First, the notice served upon P related only to the final stage of Chapter 7 proceeding. Second, there was insufficient evidence demonstrating that P had received notice of the proceedings from the initial stages. Third, P's children, who were listed as co-recipients of the

30 Chapter 7 proceedings may raise a number of practical and legal issues, including situations involving no-asset debtors. For further discussion, see Schuenemann (2017), at 1.

relevant notice, appeared to have resided at a different address during the pendency of the Chapter 7 proceeding. On these grounds, the court concluded that it could not be sufficiently established that documents concerning the discharge order had been served upon P within a time adequate to enable a proper defence. On appeal, the Suwon High Court (2021-Na-18913) upheld the first instance judgment, and the judgment became final without further.

However, several aspects of the case merit closer examination. First, because P had already been included in the schedule and service list of the Chapter 7 proceeding, it may reasonably presumed that relevant documents had been served upon P from the initial stages of the proceeding. Second, even assuming otherwise, P retained an opportunity to object to or challenge the discharge order after receiving notice of the discharge order itself, , but elected not to do so[31] Third, and perhaps most significantly, P resided in the U.S. rather than Korea at the time the relevant notice was received and therefore faced no practical or geographical impediment to participate in the Chapter 7 proceeding. Fourth, service upon P, a U.S. resident, conducted by the U.S. Bankruptcy Court in accordance with the U.S. Bankruptcy Code should generally be regarded as procedurally legitimate under general rule of private international law.[32] From this perspective, it may be argued that the relevant documents were served with sufficient notice and within adequate time to enable the preparation of a defence.[33]

III. Lower courts adopting a more forward-looking approach

1. Incheon District Court 2016-Na-13185

In this case, P, an assignee who had acquired a loan claim against D (an individual debtor) from A (the original creditor and assignor) sought repayment from D, who had been discharged from Japanese bankruptcy

31 The notice above also specified the deadline for creditors to object to the discharge, during which period creditors could challenge the discharge by commencing 'adversary proceedings' against the debtor.

32 The validity of service is to be determined in accordance with the law of State in which the judgment was rendered. For further discussion, see Suk, *International Civil Procedure: Private International Law (Procedures)* (2012), 353.

33 The address does not appear to have been incorrectly recorded, as P acknowledged having received notice of the discharge order itself.

proceeding. Notably, the court of first instance (Incheon District Court 2015-GaSo-105752,) concluded that the discharge order rendered by the Japanese bankruptcy court satisfied all requirements under Art. 217(1) of the CPA and therefore dismissed P's claim on the basis of recognition of the foreign discharge order. The court reasoned that recognition of discharge order precluded the assertion of the discharged claim through individual litigation outside the bankruptcy proceeding. To date, this appears to be the only identified lower-court judgment recognizing the effect of a foreign discharge order in Korea.[34]

More specifically, the court found that A, the assignor, had been included in the schedule of creditors in the Japanese bankruptcy proceeding, and had participated in the proceeding after receiving relevant notices prior to assignment of the claim to P. The court further determined that no circumstances existed that would render recognition contrary to public policy.

Accordingly, the court dismissed P's claim, and the judgment was affirmed on appeal by the appellate court (Incheon District Court 2016-Na-13185,) becoming final without further challenge. This case is particularly noteworthy because it accords with the objectives of the cross-border insolvency system and represents a departure from the relatively restrictive atmosphere that emerged among lower courts following the Supreme Court Judgment (2009-Ma-1600). It is possible that the courts adopted a comparatively receptive approach in part because the foreign proceeding originated in Japan, a jurisdiction geographically proximate to Korea and possessing a legal system sharing certain structural similarities with Korean insolvency law. While such considerations remain speculative, they may nevertheless help explain the courts' comparatively accommodating stance.

2. Seoul Central District Court 2016-GaHap-2074 (a position comparable to Art. X of the MLIJ)

In this case, P, an assignee who had acquired a damage claim against D (an individual debtor) from A (the original creditor, assignor), filed a lawsuit against D. D, however, had been discharged in the proceeding of the U.S.

34 Following the Supreme Court Judgment, this case applied the CPA and nevertheless recognized a discharge order rendered in Japanese bankruptcy proceedings. The decision may therefore be viewed as having reached, in practical terms, a result functionally consistent with the approach contemplated by the MLIJ.

Bankruptcy Court for the Central District of California.[35] Although the court of instance court (Seoul Central District Court 2016-GaHap-2074) ultimately rejected D's defence like many other lower courts above, its reasoning is particularly noteworthy.

Unlike the Supreme Court Judgment (2009-Ma-1600), which treated recognition of discharge orders as a matter to be processed through the recognition and enforcement framework applicable to foreign civil or commercial judgment's recognition or enforcement procedure, the court (Seoul Central District Court 2016-GaHap-2074) reasoned that domestic effect should instead be granted through relief under Chapter Ⅴ of the DRBA, namely Korea's implementation of the MLCBI. The court rejected D's defence on the ground that:

(1) the foreign proceeding itself had not been recognized in Korea; and (2) no relief had been granted recognizing or giving effect to the foreign discharge order. The relevant portion of the judgment states as follows:

> A discharge order rendered in foreign proceedings does not automatically produce legal effects in Korea where neither recognition of the foreign proceeding nor relief supporting the discharge order has been granted pursuant to the Art. 631, 632, 636 of the DRBA. Accordingly, debtors discharged in foreign proceedings continue to retain authority to manage and dispose of their assets in Korea, and creditors likewise retain the ability to pursue individual execution absent such recognition and relief.
>
> In the present case, for the discharge order rendered by the U.S. Bankruptcy Court for the Central District of California to produce legal effects in Korea, recognition of foreign proceedings and relief granting effect to the discharge order under the DRBA were both required. Because no such decisions had been rendered, D's defence cannot be accepted.

This reasoning is broadly consistent with the practice of the U.S. Bankruptcy Courts, that address recognition and enforcement of discharge orders through relief under the U.S. Bankruptcy Code as well as with the policy orientation reflected in Art. X of the MLIJ. Although the precise intention of the court cannot be known with certainty, the decision may be understood as reflecting deliberate departure from the framework established in

35 It is unclear from the judgment alone whether the proceeding was commenced under Chapter 7 or Chapter 13 of the U.S. Bankruptcy Code.

Supreme Court Judgment (2009-Ma-1600). Such an interpretation is plausible given the approach of the Judgment did not fully accommodate the objectives of existing cross-border insolvency system. Notably, no appeal was filed against the judgment.

3. Seoul Central District Court 2018-GaDan-5167140

This case is noteworthy because, it raises interesting issues relating to the operation of the cross-border insolvency system, although it does not concern a discharge order directly. P, an insurer, entered into a performance guarantee insurance contract with D, a German corporation. Following the occurrence of an insured event, P paid the insurance proceeds to the insured party (Korean Railroad Corporation). Pursuant to a contractual indemnity clause allowing recovery against D following payment to the insured, P subsequently sought reimbursement from D However, D, argued that the lawsuit should be stayed because preliminary insolvency proceedings had been commenced against D before the Munich Bankruptcy Court (Germany) and a stay of compulsory execution had been ordered in connection with those proceedings.

The first-instance court (Seoul Central District Court 2018-GaDan-5167140) did not describe the German insolvency proceedings in detail, making it difficult to determine precisely which provisions of the German Insolvency Act (*Insolvenzordnung*) governed the relevant decisions. Presumably, the Munich Bankruptcy Court may have appointed a provisional insolvency administrator (*vorläufiger Maßnahmen*) pursuant to the Sec. 21(2)(1) of the German Insolvency Act.[36]

Against this background, the court rejected D's argument and upheld P's claim, reasoning that:

> 'Even if insolvency proceedings for D have commenced in Germany, litigation against D does not automatically become stayed in Korea, unless a Korean court recognizes the foreign proceedings and grants relief staying the litigation in support of those proceedings.' No appeal was filed against the judgment.

The court's reasoning reflects an accurate understanding of the recognition-and-relief structure governing foreign insolvency proceedings under

36 For a Korean translation of the German Insolvency Act and related commentary, see Kim (2019), 32 et seq.

the MLCBI framework implemented through the DRBA. Of particular importance, the MLIJ excludes from the definition of IRJs judgments producing merely temporary or provisional effects, and instead leaves such matters to be governed by the existing MLCBI regime.

Accordingly, the first-instance court's conclusion would remain persuasive even if the MLIJ were formally adopted and incorporated into the DRBA. In other words, the appointment of a provisional administrator by the German court would not fall within the scope of the MLIJ.Rather, the foreign representative would still be required to seek:(1) recognition of the German insolvency proceedings; and (2) relief staying litigation against D under the Art. 635(1) or 636(1)(1) of the DRBA. This case therefore provides a useful illustration that the cross-border insolvency framework established by the MLCBI will continue to retain practical significance even in a legal system that adopts the MLIJ.

IV. Review – the need to avoid a return to territorialism

Regardless of the precise meaning of Supreme Court Judgment (2009-Ma-1600,) lower courts in Korea appear to have understood the Judgment as reflecting a generally restrictive approach toward the recognition and enforcement of discharge and plan confirmation orders. Although the reasoning varies across individual cases, the overall tendency of lower court practice (with only limited exceptions) has not favoured granting effect to discharge orders rendered in foreign insolvency proceedings. Such an approach may be regarded as comparatively restrictive and insufficiently aligned with contemporary international developments seeking to move beyond territorialism in cross-border insolvency

Certainly, refusal to recognize foreign discharge orders may be justified where domestic creditors were not afforded adequate notice of foreign proceedings prior to issuance of the discharge order. In such circumstances, the concern lies not merely in the substantive effect of the discharge order itself but in defects affecting the procedure through which the order was established. This rationale accords with the Art. 14(f) of the MLIJ, which permits refusal where the interests of creditors and other interested persons were not adequately protected in the proceedings in which the judgment was rendered.

By contrast, it is necessary to be cautious in refusing the recognition or enforcement of foreign discharge orders on the basis of 'specific result.'

Excessively broad reliance upon public policy risk destabilizing the legal status of stakeholders who participated in foreign proceedings and may ultimately undermine equitable treatment among creditors.

Furthermore, assessment of the procedure through which a discharge order was established should not depend exclusively upon whether domestic creditors subjectively possessed actual knowledge of the foreign proceedings. Rather, substantial weight should also be given to whether the proceedings were conducted in accordance with the procedural requirements of the foreign law governing those proceedings.

This concern may be illustrated through Korean rehabilitation practice itself. During the rehabilitation proceedings of Hanjin Shipping Company under Chapter Ⅱ of the DRBA,[37] the trustee utilized 'public notice'[38] in lieu of individualized service or notification because accurate addresses of all foreign creditors could not be identified. Suppose certain foreign creditors were later to argue that a plan confirmation order involving debt adjustment should not be recognized merely because they had not become fully aware of the progress of the Korean Rehabilitation proceeding. If such arguments were accepted without any limitation in the name of public policy, Hanjin Shipping Company might continue to bear liabilities toward particular foreign creditors in certain jurisdictions, thereby leaving open the possibility of individual enforcement against the debtor's assets abroad despite the confirmation order.[39]

Such a result would pose a serious threat to the effectiveness of a restructuring plan designed to restore the debtor's business operations and financial stability, enabling the debtor to resume commercial activity free from the risk of fragmented enforcement actions across multiple jurisdictions.[40]

37 As noted above, General Rehabilitation Proceeding under the DRBA are broadly comparable to Chapter 11 proceedings under the U.S. Bankruptcy Code.

38 Where the DRBA requires both service and public notice, service may not be substituted by public notice, although service may otherwise be dispensed with at the court's discretion. Nevertheless, in cases involving a large number of foreign creditors and stakeholders, broader use of public notice may be necessary. For further discussion of Korean rules on service and public notice, see Sim, Art. 8–33, in: Kwon, Soon-Il (ed.), *Debtor Rehabilitation and Bankruptcy Act I* (2021), 200, at 208.

39 For further discussion of the Hanjin Shipping case, see Kim, *Korean Yearbook of International Law* (KYIL) 4 (2016), 101, at 111.

40 Ships and aircraft, although legally treated in certain respects as immovable property, remain highly mobile and are frequently located outside the State in which insolvency proceedings are commenced. Shipping companies and airlines are therefore particularly likely to encounter such issues. For further discussion, see Kim, *Supreme Court*

Therefore, excessive emphasis upon creditors' actual awareness of foreign proceedings risks undermining the very objectives of the insolvency law. Accordingly, whether foreign proceedings were conducted in accordance with the procedural law governing those proceedings should itself constitute an important consideration in evaluating alleged violations of public policy.

D. Conclusion

I. Significance of Supreme Court judgment (2009-Ma-1600)

As demonstrated by the Supreme Court Judgment (2009-Ma-1600,) Cross-Border Insolvency practice of Korea possesses a sophisticated doctrinal foundation that merits greater attention within comparative and international insolvency scholarship.[41]

Admittedly, the Judgment may be open to criticism in its characterization of discharge orders and plan conformation orders. The Orders produce collective effects upon creditors generally rather than merely resolving bilateral disputes. Nevertheless, the Judgment retains considerable significance because it was among the earliest judicial decisions worldwide to engage directly with the nature of relief under the MLCBI and its relationship to the recognition and enforcement framework governing foreign judgments.[42] Compared with the United Kingdom Supreme Court's decision in *Rubin*, the Judgment has attracted relatively limited international attention, due in part to differences in economic influence and in part to linguistic barriers affecting access to Korean jurisprudence.

Law Journal of Korea 8 (2018), 23, at 33. Similar issues may arise in group insolvency situations where one affiliate possesses such assets. For a Korean perspective on the EIR's treatment of group insolvency, see Kim, *Seoul National University Business, Finance and Law* (BFL) 81 (2017), 128, at 128. UNCITRAL likewise adopted the *Model Law on Enterprise Group Insolvency* in 2019.

41 The Seoul Bankruptcy Court has successfully cooperated with numerous foreign courts in cross-border insolvency matters. For further discussion, see Kim, *Korean Yearbook of International Law* (KYIL) 5 (2017), 189, at 198.

42 The Supreme Court Judgment was rendered two years and seven months prior to the *Rubin* judgment.

II. The need to improve lower-court practice of lower concerning foreign discharge orders

Whatever criticisms may be directed toward Supreme Court Judgment, the subsequent development of lower-court practice appears to warrant reconsideration. The Supreme Court of Korea did not necessarily intend to establish a generally restrictive framework for recognition and enforcement of foreign discharge orders. Yet, in practice, lower courts have often approached with excessive caution, sometimes refusing recognition where foreign proceedings had been conducted in accordance with applicable foreign law but domestic creditors lacked actual knowledge of the proceedings.

Such an approach is difficult to reconcile with both the objectives of cross-border insolvency law grounded in universalism and the private international law principle of, *lex fori concursus*.

Moreover, this restrictive tendency appears difficult to harmonize with another important judgment of the Supreme Court of Korea (2017-Da-257746 En banc),[43] which broadly interpreted the meaning of 'service' under the Art. 217(1), respecting international comity and cooperation between countries in the judicial process. Above all, an excessively restrictive approach toward recognition of foreign discharge orders may ultimately undermine the effectiveness of discharge orders rendered in Korean Bankruptcy Court. As exemplified in the case of Hanjin Shipping Company, lower courts practice might provide excuses for foreign creditors to hinder the effective and efficient restructuring of domestic debtors.

III. The need to introduce the MLIJ

Finally, Korea should give serious consideration to adopting the MLIJ and improving practices that have remained uncertain under the existing DRBA framework implementing the MLCBI.[44] Although not directly addressed

43 This judgment held that a particular form of substituted service, namely, service effected upon a person maintaining a close personal relationship with the recipient, constitutes valid service satisfying Art. 217(1)(2) of the CPA. The judgment reflects a shift in the Supreme Court of Korea's approach from a traditionally restrictive position toward a more recognition-friendly stance aimed at facilitating the recognition and enforcement of foreign judgments. For further discussion, see Kim, *Seoul Law Journal* 63(3) (2022), 241, at 262.

44 For further discussion, see Kim (2022), 265.

in this article, the MLIJ has attracted increasing scholarly and practical attention, particularly in the U.S., where a growing body of literature has advocated its adoption[45] Likewise, commentators in Commonwealth jurisdictions, such as Australia and Singapore, have recently questioned the continued appropriateness of the Gibbs Rule established in the U.K.,[46] and some scholars have argued that the U.K. itself, whose jurisprudence helped precipitate the creation of the MLIJ, should take the lead in adopting the instrument.[47] Given the likelihood that additional jurisdictions will adopt the MLIJ in the coming years, early incorporation of the MLIJ into the DRBA would place Korea in a favourable position to contribute meaningfully to the future development of cross-border insolvency practice and policy.

Adoption of the MLIJ would not necessarily create conflict with other international instruments that Korea may join in the future, including the Convention on Choice of Court Agreements (2005) and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019). Both conventions generally exclude insolvency matters from their scope of application,[48] thereby preserving an independent regulatory space for the Model Law governing IRJs. Nevertheless, further examination of the relationship between these instruments remains necessary. The Hague Conventions generally adopt an approach excluding only judgments 'directly related'[49] to insolvency, while the precise meaning and scope of that formulation remain subject to continuing debate.

In this respect, the jurisprudence of the Court of Justice of the European Union concerning the EIR, particularly its interpretation of the phrase

45 For a leading contribution reflecting the U.S. approach, see Pottow, *Michigan Journal of International Law* 40(3) (2019), 479, at 479.

46 For recent criticism of the Gibbs Rule, see Ho, para. 4-093. Particularly noteworthy is the proposal to use COMI (Centre of Main Interests) as the connecting factor for determining the law governing debt adjustment, while preserving the contractual foundation underlying the Gibbs Rule. For further discussion, see Sachdev, *American Bankruptcy Law Journal* 93 (2019), 343, at 373. For a broader discussion of COMI from a Korean perspective, see Kim, Master's thesis (2012), 127 et seq.

47 Churchill Jr., *Brooklyn Journal of International Law* 46(1) (2020), 215, at 215.

48 Kim (2022), 176.

49 Regarding the 2005 Convention on Choice of Court Agreements, see Hartley / Dogauchi, para. 56. Regarding the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, see Garcimartín / Saumier, para. 49.

'judgments deriving directly from the insolvency proceedings and which are closely linked with them,'[50] may provide valuable guidance.[51]

In contemporary commercial society, it is increasingly common for both corporations or individuals to hold assets abroad, engage in cross-border business activities, and establish legal relationships with foreign creditors. Cross-border insolvency is therefore no longer an exceptional issue but one that modern legal systems must routinely anticipate and address. What debtors ultimately want to achieve through insolvency proceedings is the debt adjustment through plan confirmation orders or discharge orders. Those objectives can be fully realized only where foreign proceedings and the IRJs are recognized and enforced in a coherent and predictable manner across jurisdictions. Accordingly, greater attention should now be directed toward the harmonious operation of the MLCBI and the timely adoption of the MLIJ.

50 Art. 32(1), second paragraph, of the EIR.

51 For example, avoidance actions are regarded as actions deriving directly from insolvency proceedings and closely linked to them pursuant to Recital 35 of the EIR. However, the CJEU held that avoidance actions brought by a third party who had acquired the claim from the insolvency representative do not fall within this category because they are pursued not for the benefit of creditors generally but solely for the benefit of the assignee (*F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'*, Case C-213/10, ECLI:EU:C:2012:215, para. 49, judgment of 19 April 2012). For additional CJEU decisions concerning this issue, see Bork / van Zwieten / Oberhammer, Art. 32 mn. 32.14 et seq. For a Korean perspective on these CJEU decisions, see Kim, Doctoral thesis (2022), 195 et seq.

Annex

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United States Bankruptcy Court
Central District Of California

411 West Fourth Street, Suite 2030 Santa Ana, CA 92701-4593

DISCHARGE OF DEBTOR

DEBTOR(S) INFORMATION:
Todd Oh
SSN: xxx-xx-6273
EIN: N/A
aka WON KYUNG OH, aka WON K OH, aka WON K. OH, aka KYUNG OH WON, aka WON KYUNG, ...

47 Oak View Drive
Aliso Viejo, CA 92656

BANKRUPTCY NO. 8:04-bk-10816-RA
CHAPTER 11

A petition commencing a case under Title 11, United States Code, was filed by or against the debtor named above on February 9, 2004 and no complaint objecting to the discharge of the debtor was filed within the time fixed by the Court **(or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained). Therefore,**

IT IS ORDERED THAT:

1) The debtor has no personal liability for debts discharged under 11 U.S.C. Section 727 (or) 1141 (or) 1228 (or) 1328, except those debts determined by order of a court with competent jurisdiction not to be discharged pursuant to 11 U.S.C. Section 523;

2) Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any debts discharged under 11 U.S.C. Section 727 (or) 1141 (or) 1228 (or) 1328, except those debts determined by order of a court with competent jurisdiction not to be discharged; and

3) All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by this order are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the debtor.

The Discharge Order rendered by the US Bankruptcy Court in relation to the Supreme Court of Korea Judgment(2009-Ma-1600)

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