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KOREA'S NEWLY ENACTED UNIFIED BANKRUPTCY ACT: THE ROLE OF THE NEW ACT IN FACILITATING (OR DISCOURAGING) THE TRANSFER OF CORPORATE CONTROL

Haksoo Ko*

Korea recently enacted the Unified Bankruptcy Act. It aims to streamline existing bankruptcy procedure by consolidating various statutes governing bankruptcy into a single statute. Prior to the current enactment, when a company was in distress, it could restructure itself and continue its operation through corporate reorganization or through composition and, during the reorganization procedure, the incumbent manager was often discharged. Under the new statute, a single type of rehabilitation proceeding is available for a distressed company and the incumbent manager is generally retained as the receiver. This article reviews the current bankruptcy regime in Korea and argues that this change has a risk of being used as an entrenchment device for incumbent managers. In a country where control transfer rarely takes place, the transfer of corporate control would become even more difficult. Further, this article argues that in order to ameliorate this risk, it would be desirable to require a sales process once a distressed company is in corporate bankruptcy proceedings.

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I. INTRODUCTION

A new bankruptcy act was enacted in Korea in 2005 and became effective April 1, 2006. Entitled the Act Concerning Debtor Rehabilitation and Bankruptcy (the "Unified Bankruptcy Act"),[1] the statute purports to streamline existing laws and regulations governing corporate and personal bankruptcies in Korea. Prior to the enactment, various laws and regulations were applicable to personal and corporate bankruptcies and, at times, *ad hoc* measures were used outside of formal court procedures.[2] Three different types of corporate bankruptcy procedures were available under the Corporate Reorganization Act, the Composition Act, and the Liquidation Act. Under this regime, a company in distress could either be reorganized and continue its operation, or be liquidated. When a distressed company chose to continue its business, it could restructure itself through corporate reorganization proceedings or composition proceedings.[3] A significant difference between corporate reorganization and composition was that, in the case of corporate reorganization, the incumbent manager was usually discharged during the process of court-supervised proceedings, while the incumbent manager was

1. *Chaemuja hwesaeng mit pasane kwanhan bopryul* [the Act Concerning Debtor Rehabilitation and Bankruptcy], Law No. 7895 (effective Apr. 1, 2006).

2. Prior to the legislation of the Unified Bankruptcy Act, major statutes governing bankruptcies included the Corporate Reorganization Act, the Composition Act, the Liquidation Act, and the Act Concerning the Rehabilitation of Personal Debtors. In some respect, the current legislation is a consolidation or amalgamation of these statutes. Other than the procedures proscribed in these statutes, non-formal measures were often used to deal with insolvency situations. Non-formal measures were frequently used in particular immediately after the 1997 financial crisis, in an effort to deal with a massive number of insolvencies expeditiously and efficiently. Many of these measures were called "workouts," and they were used with the government's initiative and with minimal involvement of the court.

3. For a short explanation of the corporate reorganization procedure and the composition procedure, and the differences between the two types of procedures, *see* Investment in Korea: Guide to Korean Laws and Regulations 197-98 (Korea Ministry of Justice, 1999).

not discharged when a distressed company went through composition proceedings.[4]

With the introduction of the Unified Bankruptcy Act, certain major changes were made to the existing bankruptcy law system. Perhaps the most significant change is the consolidation of the corporate reorganization and composition procedures into the corporate rehabilitation procedure under a single statute. Corporate rehabilitation and corporate reorganization procedure are similar in many ways.[5] Composition procedure was criticized for granting simple debt forgiveness to insolvent debtors without requiring any meaningful restructuring on the part of insolvent debtors. Now, under the Unified Bankruptcy Act, a company in distress may either go through corporate rehabilitation proceedings or be liquidated. One of the most significant features of corporate rehabilitation proceedings is that the incumbent manager of a distressed company is allowed to maintain his/her position after the company enters into bankruptcy proceedings. Under the previous regime of corporate reorganization proceedings, the manager of an insolvent company was forced to resign and a restructuring specialist was appointed by the court to serve as a receiver-interim manager.

An important ramification of this change in legislation is that bankruptcy proceedings may no longer function as a device to discipline the corporate managers of a company who are responsible for the company's distress and may not facilitate the transfer of corporate control. Unless the court imposes a separate measure to discharge corporate managers who are responsible for the distress, incumbent managers are likely to retain their management positions. This could be especially problematic in Korea since, at many Korean companies there is no meaningful separation between management and control, and corporate managers are often controlling shareholders.[6] If the court does not require changes in management when a company is in bankruptcy proceedings, it could mean no change of corporate control since, in many instances, there are practically no internal or external mechanisms to discharge the incumbent manager. This problem arises from the weakness of the corporate governance mechanism in Korea, which allows controlling shareholders to exercise control even with a small percentage of shares. If a

4. This is perhaps due to the fact that composition was originally designed as a simple debt restructuring scheme for small corporate debtors, while corporate reorganization involved relatively complex coordination and collaboration among many different creditors for the reorganization of large corporate debt claims.

5. *See infra* Section II.1. for an explanation of the corporate rehabilitation procedure.

6. *See infra* Section III for the corporate ownership structure in Korea.

proper governance mechanism were in place, an incumbent manager could be discharged by the shareholders or other constituents of the distressed company, even when the court does not require dismissal.[7] In the United States for instance, while the incumbent manager does not lose control and instead plays an important role during an initial stage of bankruptcy proceedings, many of the incumbent managers are subject to market discipline and may have to resign to take responsibility for poor management.[8] In Korea on the other hand, with no proper governance mechanism, lenient treatments of the shareholders of a distressed corporation may simply mean the exoneration of poor management.

This article reviews important features of the Unified Bankruptcy Act and argues that, in view of corporate ownership structure and the weak corporate governance mechanisms in Korea, various methods and mechanisms should be explored to make bankruptcy proceedings serve as a disciplinary device for corporate management. In particular, it is argued that the court should require distressed companies to engage in a sales process during the company's formal bankruptcy proceedings. As a general matter, major functions of corporate bankruptcy include: (1) imposing a penalty for debt service failure by forcing liquidation, and (2) reducing the social costs of business failure.[9] The sale of

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7. Different economies have different ways to discipline and monitor managers. In Japan or Germany, where capital markets are less well developed than in the United States and where the role of banks and major creditors is perhaps more important, the role of monitoring management has traditionally been performed by banks, and evidence indicates management is as frequently asked to take responsibility for corporate performance as in the United States. After examining factors determining appointments of outside directors in Japanese corporations, Kaplan and Minton conclude that the role of banks and corporate shareholders is significant in performing monitoring and disciplinary functions. Steven N. Kaplan & Bernadette A. Minton, *Appointments of Outsiders to Japanese Boards: Determinants and Implications for Managers*, 36 J. FIN. ECON. 225 (1994). Regarding Germany, Kaplan also reports that management turnover is closely related to individual company's stock performance. Steven N. Kaplan, *Top Executives, Turnover, and Firm Performance in Germany*, 10 J. L. ECON. & ORG. 142 (1994).

8. In the U.S., monitoring and possibly punishing the incumbent management is mostly done outside the bankruptcy system, by shareholders and other corporate constituents. After investigating management turnover in financially distressed U.S.-listed companies between 1979 and 1984, Gilson finds that managers were replaced 52% of the times and these managers suffered personal costs by, for instance, failing to find employment opportunities at other listed companies for 3 years on average. Stuart C. Gilson, *Management Turnover and Financial Distress*, 25 J. FIN. ECON. 241 (1989). Similarly, Gilson reports that, after the restructuring of U.S.-listed companies under distress, only 46% of board members and 43% of CEOs maintained their positions. Stuart C. Gilson, *Bankruptcy, Board, Bank, and Blockholders*, 27 J. FIN. ECON. 355 (1990).

9. Frank H. Easterbrook, *Is Corporate Bankruptcy Efficient?*, 27 J. FIN. ECON. 411, 411 (1990).

a distressed company would easily serve both of these functions. A forced sale or liquidation would be a cost-effective and market-friendly way of dealing with distressed companies and, more importantly from the perspective of corporate governance, the decision whether to punish the incumbent manager would be made by market participants rather than by courts.

In the following section of this article, important features of the Unified Bankruptcy Act as well as the general corporate bankruptcy system in Korea are explained. Then the ownership structures of Korean companies are examined, showing that the pyramidal ownership structure and cross holdings of equity shares widely used by many Korean companies allow controlling shareholders to exert control even with a small percentage of share ownership. The final section argues that, in view of the court practices concerning corporate bankruptcy and of the general corporate ownership structure, forced sales of distressed companies should be a mandatory step during the formal bankruptcy proceedings.

II. AN OVERVIEW OF THE UNIFIED BANKRUPTCY ACT

Under the Unified Bankruptcy Act a company facing financial distress may file for corporate rehabilitation.[10] Through the court-supervised corporate rehabilitation procedure, debt restructuring and other concessions are made by the creditors of the distressed company, and the company is allowed to continue its operation as a going concern. If corporate rehabilitation proves not to be a viable option due to serious economic distress, the company is forced to liquidate their assets. An important role of bankruptcy law is to facilitate coordination among the company's creditors and other stakeholders. Also, it is hoped that the companies that are in serious economic distress are screened out from the companies that are experiencing temporary financial distress.[11] In the case of the latter, bankruptcy law

10. As noted, the corporate rehabilitation procedure is in many respects similar to the corporate reorganization procedure, which was administered prior to the current legislation pursuant to the Corporate Reorganization Act. During the legislative process of consolidating existing statutory bankruptcy schemes, it appears that the intent was to abolish the composition procedure while leaving most of the key features of the corporate reorganization procedure under a different name of the corporate rehabilitation procedure. *See* Su-Keun Oh, *Lessons and Prospects of the Unified Bankruptcy Act (I)* [*tonghapdosangbope kwajewa jonmang (I)*], 85 JUSTICE 5 (2005).

11. Financial distress is a situation under which a company is temporarily unable to repay its debts, while economic distress is a situation under which a company does not have a long-term prospect of repaying its debts. This distinction is conceptually important since a strong argument can be made from an efficiency point of

would provide an important coordination mechanism to induce the companies in distress to restructure themselves so they can regain vitality. On the other hand, liquidation, in principle, is a simple measure to sell a distressed company, in whole or in parts, and distribute the proceeds to its creditors and other stakeholders.

1. Corporate Rehabilitation

Corporate rehabilitation is a procedure available for a company facing financial distress.[12] It aims at normalizing the business of a financially distressed but economically viable company by coordinating the interests of shareholders, creditors, and other interested parties. If the procedure works properly, companies that are under financial distress continue to operate, typically with debt rescheduling and other restructurings. On the other hand, companies that are under economic distress would be liquidated.

The procedure for corporate rehabilitation begins with a filing. Filing is normally done by the management of the debtor company but other stakeholders of the company are also allowed to file, including creditors and shareholders holding a value worth more than ten percent of the company's equity shares. At the time of the filing, the debtor company may also file for a stay order of its debts and other obligations.[13] If the application for a stay order is accepted, payments of debts are suspended and the creditors are not allowed to attach the assets of the company or engage in other preservative measures.

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view that a company in financial distress should be revived with, if needed, certain debt rescheduling and that, on the other hand, a company in economic distress should be liquidated.

12. Prior to the current legislation, corporate reorganization was available only to joint stock companies or *jusikhoesa*. This limitation disappeared in the Unified Bankruptcy Act and now any corporate entity may file for corporate rehabilitation.

13. In the U.S., a stay is automatic, thus it is called an automatic stay, while in Korea, a stay is not automatic. For an explanation of the U.S. automatic stay, *see* Douglas G. Baird, Elements of Bankruptcy 207-24 (4th ed. 2006). In Korea, a separate stay order is issued upon application for such an order or based on the court's discretion. Unified Bankruptcy Act art. 43. A purported rationale for requiring a separate order is that, while the court would generally be expected to issue a stay order upon receiving an application, the mere fact that the court will review the application before issuing a stay order would deter a debtor company from filing such application prematurely simply to avoid pressures from creditors and to delay payment of its debt obligations. This stay order is a comprehensive order in the sense that it prohibits all secured and unsecured creditors from exercising their rights for foreclosure against the debtor company's assets. Previously, the stay order was not comprehensive and a stay order was issued on a case-by-case basis separately for individual debts and obligations. Unified Bankruptcy Act arts. 45-47.

Once the court formally commences corporate rehabilitation proceedings, a creditors' committee is created and a receiver is appointed. A main mandate of the creditors' committee is monitoring the operation of the company during the bankruptcy procedure, and several explicit provisions were added in the Unified Bankruptcy Act to bolster the role of the creditors' committee.[14] And, at the time when the court makes a decision to formally commence corporate rehabilitation proceedings, a receiver is appointed. The receiver performs various functions throughout the procedure, serving as a general manager and administrator for the debtor company.[15] Prior to the enactment of the Unified Bankruptcy Act, the court practice was to dismiss the incumbent manager of the debtor company and to choose a receiver among independent, third-party candidates.[16] With the enactment of the Unified Bankruptcy Act, the incumbent manager of the debtor company is expected to be appointed as a receiver.[17] This is a significant change. The major rationale for introducing this change was to encourage the incumbent manager of a debtor company to file for corporate rehabilitation at an early stage and to be able to fully utilize the business know-how and experiences of the incumbent manager during bankruptcy proceedings.[18] Since this change, replacing corporate managers during bankruptcy proceeding has become much more difficult.[19]

The receiver plays a crucial role during rehabilitation proceedings, preparing a rehabilitation plan and serving as a general

14. The role of the creditors' committee is strengthened under the Unified Bankruptcy Act. For instance, the creditors' committee is given a right to nominate the receiver and the auditor for the debtor company. The creditor's committee may also demand due diligence concerning the operation of the company after a rehabilitation plan is approved. Unified Bankruptcy Act arts. 20-22.

15. Court approvals are nonetheless necessary for significant corporate decisions. Subject to court approvals for significant corporate decisions, the receiver takes charge over the company's general operation and the management of the company's property. Unified Bankruptcy Act arts. 56 & 61. The receiver also has a general mandate to prepare reports concerning the company's operation and its asset status, to be submitted to the courts and to the meetings of interested parties. Unified Bankruptcy Act arts. 220 & 224.

16. Duck-Yong Kim, *Issues in Commencing Bankruptcy Reorganization Proceedings [hwesajongrijolcha gaesie isseoseoeui munjaejom] in* LECTURES IN BANKRUPTCY LAW *[dosanbop gangeui]* 432-38 (Hyo-Soon Nam & Jae-Hyung Kim eds., 2005).

17. Unified Bankruptcy Act art. 74.2.

18. Bankruptcy Practice Research Group, Bankruptcy Division, Seoul Central District Court, 1 PRACTICES IN REHABILITATION CASES *[hwesaeng sagon silmu sang]* 175-76 (2006).

19. As further explained in *infra* Section III, this change bolsters the argument that once a company is in corporate rehabilitation proceedings, it should be required to engage in a sales process and that the receiver should be given a mandate to prepare and execute this sales process in an expedient, efficient and transparent manner.

manager of the company.[20] The rehabilitation plan, which should be prepared within a four-month period from the commencement of the rehabilitation procedure, would include the amount of debts to be written off, a new schedule for debt repayments, a plan for capital restructuring, and a plan for issuing new shares.[21] The plan is a key determinant of the future viability of the company and, once the plan is approved and the company revives, stakes in the revitalized company are distributed pursuant to the plan. Thus the plan also functions as a key determinant of the ultimate allocation of future stakes of the revived company. Preparation of the plan often involves extensive negotiation among stakeholders, and, under the Unified Bankruptcy Act, the role of the creditors' committee is particularly emphasized, ensuring that the interests of creditors are better reflected in the rehabilitation plan.[22]

Previously, the court also appointed an examiner whose main task was to review the economic value of the company and analyze whether the going concern value of the company was greater than its liquidation value. The going concern value is calculated by discounting future cash flows of the company, while the liquidation value is calculated by assessing the value of the total assets of the company if the assets are sold under current market conditions.[23] Under the Unified Bankruptcy Act, there is no statutory examiner who would calculate the going concern value and the liquidation value of a distressed company. However, the court may still exercise its discretion and have these values calculated for reference. If the liquidation value is greater than the going concern value, the court may determine not to proceed with the rehabilitation procedure and require liquidation of corporate assets instead.

In preparing the rehabilitation plan, selling the company, in whole or in parts, can be considered as an option. In particular,

20. Other interested parties, including creditors and shareholders, are also allowed to submit competing reorganization plans. Unified Bankruptcy Act art. 221.

21. Unified Bankruptcy Act art. 220. In approving the plan, voting is required from (1) 3/4 of the debt amount claimed by secured creditors (or, 4/5 if the plan was proposed by a party other than the receiver), (2) 2/3 of the debt amount claimed by unsecured creditors, and (3) 1/2 of the equity shares held by shareholders. Unified Bankruptcy Act art. 237.

22. *See supra* note 14.

23. If a company's going concern value is greater than its liquidation value, it can be argued that it would be more efficient to make an arrangement for the company's continued operation. On the other hand, if liquidation value is greater than going concern value, the company should perhaps be liquidated. While this argument is conceptually appealing, in practice, it is not easy to calculate and compare the going concern value and the liquidation value since, among other things the calculation of the going concern value depends on many assumptions such as the assumption of the company's future revenues and future interest rates.

in the Unified Bankruptcy Act, several explicit provisions were added to facilitate mergers and acquisitions involving the debtor company. For instance, the debtor company is statutorily required to supply requisite corporate information to a potential buyer of the company or of its assets.[24] Also, the court may allow sales of important assets or divisions even before a rehabilitation plan is approved.[25] Further, a planned sale of a company's assets or divisions may explicitly be included in the rehabilitation plan.[26] Once the rehabilitation plan is approved, the receiver executes the plan and manages the company in the interim under the court's supervision.

2. Liquidation

If a company is unable to repay its debts, it may have to file for liquidation.[27] Upon receiving the filing, the court determines whether to allow the commencement of formal proceedings for liquidation. Once the court determines to commence liquidation proceedings, the debtor's assets are transferred to the bankruptcy estate and a trustee is appointed. The trustee then takes control over the bankruptcy estate and assumes the responsibility of conducting the liquidation under the court's supervision.

With the appointment of the receiver, the incumbent management relinquishes its control over the company to the trustee. A stay order of claims typically accompanies the court's decision to allow for liquidation proceedings. With the order in force, an investigation is made as to the status of the debtor's obligations. Once the investigation is finished, the method and timing of liquidation is determined. The whole procedure is complete once the company's assets are liquidated and the proceeds are distributed to creditors, *pro rata* depending on their statutory priorities.

3. Some Facts

Although laws regulating bankruptcy have been in place since 1962, partly due to the corporate ownership structure in Korea, formal bankruptcy procedures were rarely invoked until the mid-1990s.[28] In many cases, top decision-makers of Korean companies were family members of their companies' founders rather than business management professionals. Even when

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24. Unified Bankruptcy Act art. 57.
25. Unified Bankruptcy Act art. 62.
26. Unified Bankruptcy Act art. 222.
27. The court may, upon receiving such filing or even without the filing, issue an order for liquidation. Unified Bankruptcy Act art. 6.
28. The Corporate Reorganization Act, the Composition Act, and the Liquidation Act were all first enacted in 1962, with Law No. 1214, Law No. 997, and Law No. 998, respectively.

their companies were in distress, these manager-owners tried to avoid filing for bankruptcy protection to avoid dismissal from their management positions and loss of their controlling shares.[29] The government also regularly bailed out big companies in key industries. In the mid-1990s, the number of bankruptcy filings began to increase. While initially corporate reorganization was favored, this trend changed abruptly and the court began to demand the removal of owners of the distressed companies from management. Initially it was presumed that composition was a special type of procedure available only for small companies, but after several trials by insolvent companies, it became clear that the court would not necessarily consider the size of the debtor company in determining eligibility. As a result, as Table 1 shows, composition suddenly became a favored avenue for distressed companies after 1997. The 1997 Asian financial crisis caused a dramatic increase in the number of filings for bankruptcy protection though in recent years the number of cases has again subsided.

As the court accumulated experiences handling bankruptcy cases, various problems arose.[30] A commonly-heard criticism was that bankruptcy protection was often used as a device to delay servicing debts when they become due.[31] It was argued that because managers of distressed companies normally maintained their control, bankruptcy protection only either helped the debtor company maintain the status quo against claims of creditors or was used as a bargaining tool to get concessions from creditors.[32] The level of concessions that were expected from

29. Additional reasons for avoiding bankruptcy filings may include the fear of public and social stigma attached to a bankruptcy filing, and the signaling impact to potential investors, lenders, customers and the like, which would make future borrowing and other business activities more expensive.

30. *See, e.g.*, Hyung-Doo Kim, *Problems from Bankruptcy Procedure Practices [dosanjulcha silmu unyoungsange munjejom] in* LECTURES IN BANKRUPTCY LAW *[dosanbop gangeui]* 136 (Hyo-Soon Nam & Jae-Hyung Kim eds., 2005). It lists five problem areas: (1) lack of a monitoring function performed by creditors regarding the debtor company's operation, (2) lack of incentives granted to debtor companies, (3) lack of flexibility in applying the legal bankruptcy procedure, (4) need to clarify the court's role in certain areas, and (5) jurisdiction and other issues that are not perfectly clear in the areas of international bankruptcy. *Id.* at 179-90.

31. The courts' attitude has been in flux, partly due the consideration of various factors, including public interests. Sometimes courts took it for granted that creditors would have to make concessions, and creditors were often criticized for seeking repayments of their debts in full. At other times, other factors such as bankruptcy's impact on the regional economy, distressed companies' business areas, and distressed companies' ownership structures were considered. *See* Do-Sung Choi & Hun-Ryul Ji, CORPORATE REORGANIZATION SYSTEM *[hwesa jungri jedo]* 84-87 (1998).

32. For instance, the initial restructuring plan for Jinro, which makes a popular Korean hard liquor called *soju* and which filed for bankruptcy protection in 1997,

TABLE 1: BANKRUPTCY FILINGS

	Corp. Reorganization	Composition	Liquidation
1983	47	0	18
1984	52	2	12
1985	40	2	11
1986	26	0	26
1987	30	0	20
1988	26	0	21
1989	27	2	37
1990	15	0	27
1991	64	0	16
1992	87	0	14
1993	45	0	26
1994	68	0	18
1995	79	13	12
1996	52	9	18
1997	132	322	38
1998	148	728	467
1999	37	140	733
2000	32	78	461
2001	31	51	842
2002	28	29	1443
2003	38	48	4159
2004	35	81	12479

Source: Judicial Yearbook, various issues.

creditors was also very high, and perhaps contributed to the repeal of composition proceedings in the current legislation.[33]

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included the suspension of the repayment of debts until 2003 and other concessions from the creditors. Initially, the company filed for composition proceedings, and the incumbent management could maintain its control without having to go through significant internal restructuring. *See South Korean Bankruptcy: Death, Where is Thy Sting?*, ECONOMIST, Jul. 17, 1999, at 59. It was only in 2003 that a new judgment was made that the company would have to go through corporate reorganization proceedings. The incumbent management was discharged after the judgment was made and, finally, it was sold to a third-party consortium in 2005. It took almost ten years from the initial insolvency until the final sale of the company and, obviously, various types of wasteful inefficiencies were incurred during the period.

33. The following terms were reported to be typical in negotiations for composition proceedings in 1998:

1. Debts owed to non-financial institutions:
    1. The whole amount of the principal shall be paid back in installments over five years.

Although composition proceedings were repealed under the Unified Bankruptcy Act, the incumbent manager of a distressed company is still likely to retain control as the receiver under corporate rehabilitation proceedings.[34] This may have a significant implication regarding the likelihood of observing a transfer of corporate control in Korea. In Korea, it is difficult to challenge control rights due to the concentrated ownership structure and, without the court's mandate during bankruptcy proceedings, change in that control is highly unlikely to take place. In the following section, corporate ownership structure in Korea is examined in greater detail and the new bankruptcy regime is reviewed in this light.

III. CORPORATE OWNERSHIP STRUCTURE: PYRAMIDAL SYSTEM AND CROSS-HOLDINGS

A key feature of a modern corporation is the separation of ownership and control. To this day, however, complete separation does not appear to be standard in many parts of the world. Rather, partial separation of ownership and control is more commonly observed.[35] While outside investors are often allowed to own a substantial amount of equity shares, they are given few opportunities to participate in management decisions. Instead,

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    2. All interest payments, whether they are past due or to arise in the future, shall be forgiven.
2. Debts owed to financial institutions, not secured by collateral:
    1. The whole amount of the principal shall be paid back in installments over five years.
    2. The interest rate shall be reduced to eight percent and all interest payments shall not be made until the fourth and fifth years from the filing for composition.
3. Debts owed to financial institutions, secured by collateral:
    1. The whole amount of the principal shall be paid back in installments over five years.
    2. If the agreed-upon interest rate is higher than ten percent, such rate shall be reduced to ten percent and if the rate is ten percent or lower, it shall remain the same. All interest payments shall not be made until the fourth and fifth years from the filing for composition.

See Kwang-Joong Kwon, *Practices in Corporate Reorganization, Composition and Liquidation Cases* [*hwesajongri, hwaeui, mit pasan sagon silmu*], 257 HUMAN RIGHTS & JUSTICE [*inkwon kwa jongeui*] 29 (1998). Note also that more concessions from creditor banks were generally offered in corporate reorganizations. Considering that, in early 1998 (right after the financial crisis), the benchmark interest rate of 3-year corporate bonds was close to 30%, the interest rate of 10% or lower was indeed a huge windfall for distressed companies.

34. Prior to the current legislation, during corporate reorganization proceedings, the receiver was appointed from among third-party independent candidates. And some courts, including the Seoul District Court, maintained a roster of potential receivers.

35. Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

after allowing for outside investors, controlling shareholders usually continue to maintain their managerial control without facing any significant risk of losing it. Thus, while some degree of ownership dispersion among institutional and individual shareholders is observed in many economies, typically, controlling shareholders or families are still easily identifiable as well.[36]

Korea is no exception in this regard. Control over *chaebol* groups is concentrated in individuals who typically own less than 5% of the shares in the groups of companies they control.[37] In most cases, these individuals are founders themselves or family members of the founders. The pyramidal system and cross-holding of shares among affiliated companies of a same group appears to be the main apparatus enabling these shareholders to maintain their control, despite many outside shareholders.[38] Through a complex combination of arrangements, these shareholders have been able to maintain their managerial control while owning only a small fraction of the total shares outstanding. In the following section, a simple scheme is presented to

36. In Korea, the term "owners" is used for these controlling shareholders and, for each major *chaebol* group, these controlling shareholders are easily identifiable. For an explanation of *chaebol*, *see infra* note 37. In this article, managers (of Korean companies) mean these owners who are also controlling shareholders of their companies.

37. A *chaebol* group is a collection of companies normally controlled by a single individual or a family. A group itself is not a legal entity and the chairman of a group may not even assume a formal role as a corporate officer, while exerting control over individual companies belonging to the group. There is a plethora of differing opinions regarding the role that *chaebol* plays in the Korean economy. This article does not try to analyze the role of *chaebol* companies in the economy and does not attempt to reach a normative judgment. Also, while this article analyzes the ownership structure of *chaebol*, it does not take a particular position as to whether the existence of owners or controlling shareholders is inefficient *per se*. For a recent rendering of an argument advocating corporate governance reform in Korea, see Jeong Seo, *Who Will Control Frankenstein? The Korean Chaebol's Corporate Governance*, 14 CARDOZO J. INT'L & COMP. L. 21 (2006).

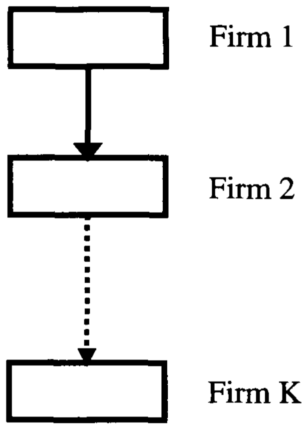
38. With pyramidal systems and cross-holdings, a main agency problem becomes the one between controlling shareholders and the rest of the shareholders. This is in contrast to the agency problem between managers and shareholders, which is often mentioned as the most significant problem in the context of separation of management and control. A systematic analysis of the maintenance of corporate control using pyramidal ownership structure and cross-shareholdings was perhaps first tried in Lucian Bebchuk, Reinier Kraakman, & George Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP 445 (R. Morck ed., 2000). Regarding the agency problems, three major types can be identified: (1) agency problems between shareholders and managers; (2) agency problems between controlling shareholders and minority shareholders; (3) agency problems between the company itself (or its managers) and other stakeholders such as creditors and customers. *See* Henry Hansmann and Reinier Kraakman, *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW 21-22 (R. Kraakman, P. Davies, H. Hansmann, G. Hertig, K. Hopt, H. Kanda & E. Rock eds., 2004).

describe the mechanics of this pyramidal system and cross-holdings. Then, actual corporate ownership structure is reviewed. This review is focused on the ownership structure of the Samsung Group, one of the largest *chaebol* groups in Korea.

1. PYRAMIDAL SYSTEM AND CROSS-HOLDING

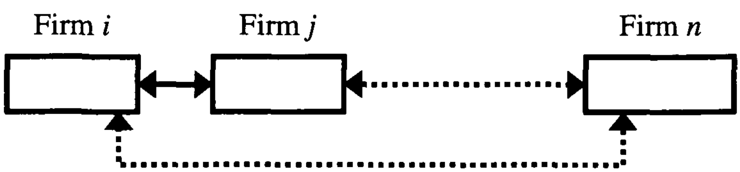
The simplest form of pyramidal system of corporate control is a vertical chain of subsidiaries controlled by a single holding company. In Figure 1, for instance, Firm 1 owns 50% or more of Firm 2's equity shares and exercises control over Firm 2, and Firm 2 owns 50% or more of Firm 3's shares, which allows Firm 1 to exercise control over Firm 3 with the *de facto* ownership of 25% of shares.

FIGURE 1: PYRAMIDAL SYSTEM



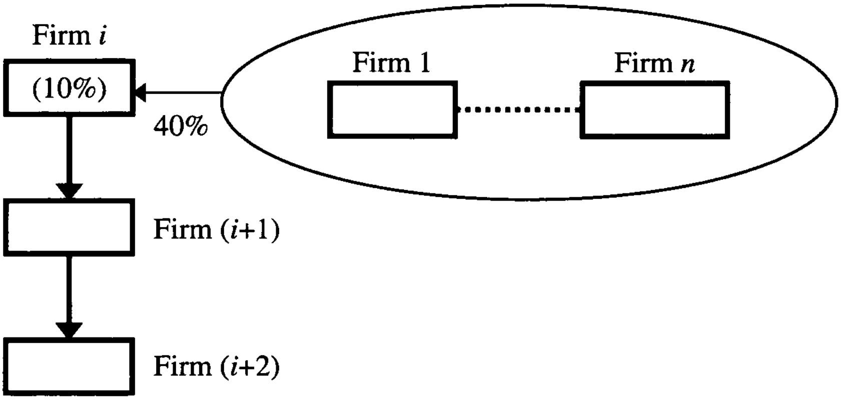
Cross-holdings, on the other hand, refer to horizontal, mutual shareholdings of affiliated companies of the same group. As indicated in Figure 2, Firm *i* and Firm *j* are in the same group and mutually hold equity shares of each other, and other group companies are linked by a chain of mutual shareholdings among themselves.

FIGURE 2: CROSS-HOLDINGS



Perhaps the most accurate rendering of the situation combines aspects of both the pyramid system and cross-holdings, resulting in a complicated cobweb of ownership. In order to understand how these mechanisms can be used together, consider a simple mixture of pyramidal system and cross-holdings, as described in Figure 3 below. Assume that, for a company affiliated with a *chaebol* group (called Firm *i*), the rest of the group companies collectively hold 40% of its equity shares. Then, for a group-affiliated insider, the control over Firm *i* can be obtained with 10% equity shares since, together with 40% shares held by the rest of the group companies, the shareholder with 10% shares can exercise control with *de facto* 50% shares. Further, control over other companies downstream in the pyramidal system can be obtained automatically by virtue of having control over Firm *i* (assuming that Firm *i* maintains 50% or more of equity shares of Firm (*i*+1)).

FIGURE 3: EXAMPLE OF PYRAMID SYSTEM AND CROSS-HOLDING



2. Some Facts in Korea

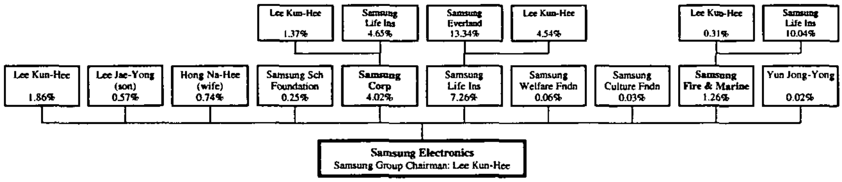
Obviously, the real situation is much more complex than the description in the previous subsection, and each *chaebol* group has a different ownership structure. Notwithstanding real and complex differences, however, a controlling shareholder (or a controlling family) can easily be identified for each *chaebol* group and the use of the pyramid system and cross-holding of shares is commonly observed.[39] To illustrate, Figure 4 shows the

39. For these *chaebol* groups, as a result of this complex ownership structure, there is a significant gap between the cash flow rights and the voting rights that are given to the members of the controlling family, and the Korea Fair Trade Commission each year calculates such gap and announces indexes showing the gap.

ownership structure of Samsung Electronics, a flagship company of the Samsung Group.[40]

As shown in Figure 4, Lee Kun-Hee, the group chairman and son of the group founder Lee Byung Chul, holds a considerable amount of shares in Samsung Electronics, in addition to the shares held by his wife and son. Still, the sum of the shares held by his family members amounts only to 3.37% and falls far short of the amount needed to be a majority shareholder. Additional shares needed for his control, however, come from other affiliated companies, which, as a whole, constitute a controlling shareholder group of Samsung Electronics. In particular, the largest shareholder of Samsung Electronics is Samsung Life Insurance, a non-public company controlled by the Lee family. The second largest shareholder of Samsung Electronics is Samsung Corporation whose largest shareholder is also Samsung Life Insurance.

FIGURE 4: OWNERSHIP STRUCTURE OF SAMSUNG ELECTRONICS*



Note: Percentage indicates shareholdings. For instance, Chairman Lee Kun-Hee personally holds 1.86% equity shares of Samsung Electronics.
* Listed companies are bold-faced.

Sources: Annual & Quarterly Reports of Samsung Group Companies (2005; 2006); Company websites; Newspaper reports.

Samsung Electronics also functions as a major shareholder of many other group-affiliated companies, as depicted in Figure 5. Many of these companies in turn hold shares of various companies that are affiliated with the Samsung Group. For instance, Samsung Electronics is the largest shareholder of Samsung SDI, holding 19.7% of the shares. Samsung SDI in turn owns 7.2% of the shares of Samsung Corporation, which is the second-largest shareholder of Samsung Electronics. Also, Samsung Electronics holds 46.9% of the shares of Samsung Card, which in turn owns 25.6% of the shares of Samsung Everland. Samsung Everland is

40. Complete rendering is not possible since only some of the Samsung Group companies are public and are subject to disclosure requirements. According to the Korea Fair Trade Commission, as of August 2006, Samsung has 59 affiliated companies. Korea Fair Trade Commission, STATUS OF THE COMPANIES BELONGING TO GROUPS THAT ARE SUBJECT TO LIMITATION ON MUTUAL SHAREHOLDINGS [*sangho chulja jehan gieop jipdandeunge sosok hwesa hyunhwang*] (Aug. 1, 2006). Explanation of the Samsung Group companies in this article is drawn from the information that is publicly available.

a non-public company which is controlled by Lee Jae-Yong, son of Chairman Lee Kun-Hee and which is used by Lee Jae-Yong as a vehicle in exercising his control over various Samsung Group companies. This structure shows that pyramidal system and cross-holdings are extensively used, which ultimately enable the Lee family to exercise control over all of the Samsung Group companies.[41] This way, the Lee family maintains their control with ownership of only 0.8% of the shares of the Samsung Group companies, and the percentage of Samsung Group company shares that are cross-owned by other group-affiliated companies amount to 49.8% in whole.[42] Figure 6 is a schematic diagram showing how pyramidal ownership structure and cross-holdings are used among major Samsung Group companies.[43]

In terms of the general ownership structure, Samsung is not an exceptional case. Most of the *chaebol* groups have controlling shareholders who exert control over their group companies with ownership of a small percentage of shares. The Korea Fair Trade Commission reports that, of the 38 large *chaebol* groups that it monitors, on average, members of controlling families own 4.94% of shares of group-affiliated companies and these group-affiliated companies mutually own 46.28% of shares of each other.[44] Complex combinations of the pyramidal share ownership structure and cross-holdings are a common characteristic and an important apparatus allowing controlling shareholder owners to maintain their control.

IV. THE UNIFIED BANKRUPTCY ACT TO FOSTER THE TRANSFER OF CORPORATE CONTROL?

Given the complex cobweb of the ownership structure, it is indeed fairly rare to observe an involuntary change of corporate

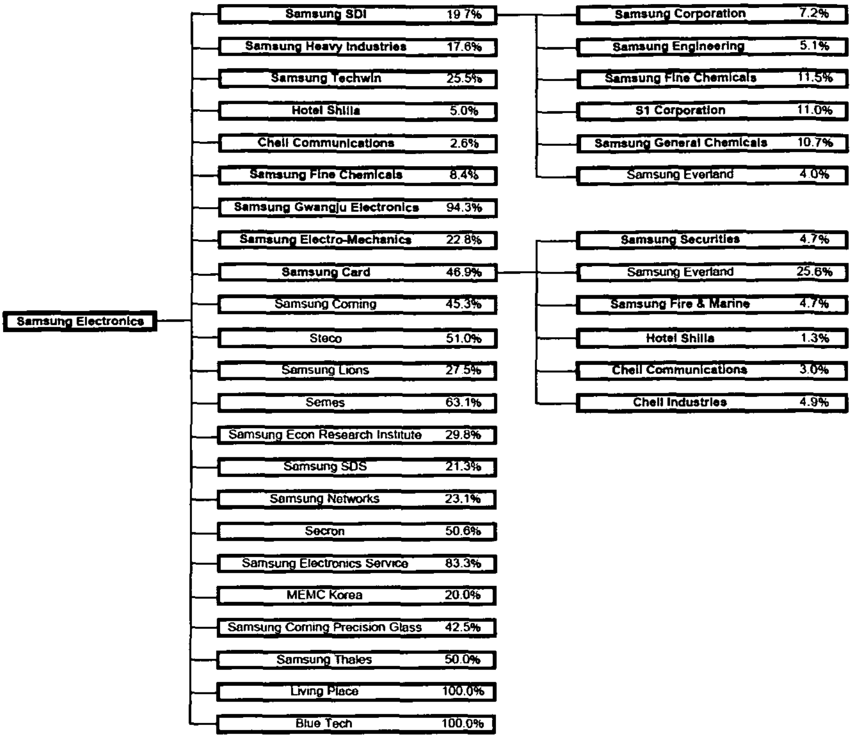
41. However, their control is not without limit. In Korea, minority shareholders often play a significant role in monitoring business activities of a company. In particular, although not without controversy, the role of People's Solidarity for Participatory Democracy has been significant. *See* Curtis J. Milhaupt, *Nonprofit Organizations as Investor Protection: Economic Theory and Evidence from East Asia*, 29 YALE J. INT'L L. 169 (2004). Also, foreign investors sometimes exert efforts to implement corporate governance reforms and other measures to enhance shareholder value. *See, e.g.*, Laura Santini, *New York Investor Brings Activist Strategy to Asia*, ASIAN WALL ST. J., Aug. 11, 2003, at 17.

42. Press Release, Korea Fair Trade Commission 2005 Information Disclosure Regarding the Ownership Structure of Large Business Groups [*'05nyon daegiop jipdane soyugujoe kwanhan jungbogonggae*] (July 13, 2005).

43. Figure 6 shows the ownership structure only among major Samsung Group companies. A complete figure with all the Samsung Group companies would be much more complex (and depicting the complete ownership structure in a single figure may not even be possible).

44. *Id.*

FIGURE 5: MAJOR HOLDINGS OF SAMSUNG ELECTRONICS*



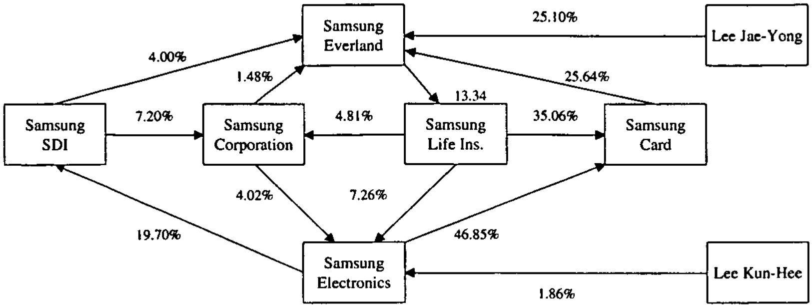
* Listed companies are bold-faced.
Note: Percentage indicates shareholdings. Samsung Electronics, for instance, holds 19.7% of shares of Samsung SDI.
Sources: Annual & Quarterly Reports of Samsung Group Companies (2005; 2006); Company websites; Newspaper reports.

control in Korea.[45] Prior to the enactment of the Unified Bankruptcy Act, control and ownership change during the process of court-supervised bankruptcy proceedings was rare. When such change took place, oftentimes it was only once the court made it a standard practice to dismiss incumbent management and required cancellation of the equity shares held by the controlling shareholders.

Under the Unified Bankruptcy Act, however, management and control change does not normally occur during the process of bankruptcy proceedings. As noted in Section II above, unless special circumstances exist, the incumbent manager of a distressed company will usually be appointed as a receiver during

45. In recent years, there have been several attempts for hostile takeovers. However, these attempts for takeovers usually involved disputes among family members who are descendants of the founder of the same group. Attempts for hostile takeovers by third-party investors are still exceedingly rare in Korea.

FIGURE 6: OWNERSHIP STRUCTURE OF SAMSUNG GROUP COMPANIES (PART)



Sources: Annual & Quarterly Reports of Samsung Group Companies (2005; 2006); Company websites; Various newspaper reports.

the process of bankruptcy proceedings. This means that corporate managers are now able to file for corporate bankruptcy without the fear of losing their management position or control. While this gives incentives to file at an early stage of distress before the value of the distressed company deteriorates further, there is a grave risk that corporate rehabilitation procedures may be used by the incumbent management as an entrenchment device, helping them consolidate their control after debt restructurings.

This risk is particularly severe in Korea because at many Korean companies, there is no monitoring and disciplinary mechanism to punish poor management decisions made by the senior incumbent manager-controlling shareholder. With no separation of ownership and control, there are no internal mechanisms that function as meaningful disciplinary devices for corporate governance at many companies. It is true that, recently, efforts have been made to bolster the mechanism for corporate governance. For instance, at least one quarter of the directors of a public company are now required to be independent directors.[46] Also, independent directors are expected to assume an active role in various aspects of corporate decision-making, although there is no conclusive evidence indicating that independent directors as a whole add to the value of a company.[47]

Nonetheless, there has been no incidence of top management replacement reported in Korea that was initiated by the

46. Securities and Exchange Act art. 191.16.

47. Foreign investors are sometimes the most vocal outside investors and often serve as independent directors. For instance, as part of their efforts to enhance shareholder values, Carl Icahn and certain other foreign investors of KT&G demanded that a foreign investor be appointed as a director of the company, which was accepted. It is not clear yet, however, precisely what role this outside investor intends to play and how KT&G will respond. *See infra* note 48.

board of directors against the will of controlling shareholders. Indeed, such replacement would be all but impossible without obtaining consent from the controlling shareholders under the current ownership structure of large companies in Korea. Likewise, while certain minority shareholder groups have played a significant role in recent years in monitoring important management decisions, their roles are limited.[48] Also, the absence of the market for corporate control implies that capital markets would not function as an outside monitoring and disciplinary device.[49] This means the lack of a mechanism, internal or external to a company, that would function as a serious threat to control rights when poor management decisions are made. As a result, it is rare to observe a transfer of control rights for large companies in Korea, except when mandated by the court or, under some limited circumstances, by their creditors or by the government.[50]

The significance of the problems related to the lack of monitoring and disciplinary mechanisms may be better understood in a comparative context. In the United States, once a company falls under distress and files for court protection, the court allows incumbent management to continue in management positions. However, shareholders may decide to punish incumbent management for poor performance and, as a result, management changes do take place frequently after a company enters into bankruptcy

48. Significant investor groups include certain foreign investor groups, and the most headline-grabbing so far have been Sovereign Asset Management, a Dubai-based investment fund, and an investor group represented by Carl Icahn. Sovereign Asset Management waged a high-profile and ultimately unsuccessful battle to oust the chairman of SK Corp., an oil refinery. Carl Icahn demanded major corporate restructurings against KT&G, a privatized tobacco company and threatened engaging in a full-blown tender offer against the company. Anna Fifield, *South Koreans Wary of Foreign 'Sharks': Carl Icahn's Bid for KT&G has Sparked Controversy over the Ownership of the Country's Assets by Outside Investors*, FIN. TIMES, Mar. 17, 2006, at 25; Jung-A Song, *Icahn Moves to Make Hostile Bid for KT&G*, FIN. TIMES, May 27, 2006, at 21. There were attempts for hostile takeover by domestic investors as well. However, as noted, they were mostly related to disputes among the family members of controlling shareholders concerning their control rights.

49. *See supra* note 45 and accompanying text. If there is a market for corporate control, the mere possibility of losing corporate control would serve to discipline corporate managers.

50. Easterbrook & Fischel list three mechanisms to provide proper incentives to managers: (1) a functioning employment market for corporate mangers; (2) the threat of sale of corporate control; and (3) competition in product markets. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 91-93 (1991). With the ownership of *chaebol* companies, none of these mechanisms would provide incentives to *chaebol* owners since their role in their group companies are perpetual (and no employment market for them exists); there is no threat of losing control so long as they maintain their ownership structure; and competitive pressures from the product markets may not be severe because often they maintain monopolistic or oligopolistic positions in the markets in which they participate.

proceedings.[51] The corporate governance role of shareholders is crucial in the United States and, if this role can be carried out when needed without hindrance, it may make the court's disciplinary role unnecessary during the process of bankruptcy proceedings. If, however, the internal governance mechanism is not in place, the principle of debtor in possession may practically mean the protection of the interests of the incumbent management against the interests of outside shareholders and creditors. Thus, being equipped with proper disciplining mechanisms would be a prerequisite before allowing incumbent management to continue to retain its control. Additionally, routinely granting concessions and waivers with regard to servicing debt obligations would weaken the role of debts as a commitment device.[52] When this factor is added, there would be a grave risk that management's incentives could be skewed further.[53]

Prior to the enactment of the Unified Bankruptcy Act, the court fulfilled a corporate governance function by exercising its discretion and often discharged the manager-controlling shareholder once a corporate reorganization proceeding formally commenced.[54] Without this disciplinary role played by the court and without the possibility that the market will punish mismanagement, the incumbent manager may well be inclined to use the corporate bankruptcy procedures simply to gain concessions from creditors and to consolidate his or her control.

In order to ameliorate this problem, there should be a credible threat that poor management decisions will be punished and that control rights may be deprived during the process of bankruptcy proceedings. By law or by court practice, the incumbent manager should be discharged unless it is shown that the com-

51. *See supra* note 8.

52. One of the functions of debt is to provide efficient incentives for corporate managers. That is, debt's fixed obligations would remove funds from management's control and would instead allow corporate managers to bond themselves against engaging in inefficient investment activities. *See* Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. PAPERS & PROC. 323 (1986). With routine concessions, it would not be possible to achieve this role of debt, which is to provide efficient incentives and to serve as a commitment device.

53. Managers of larger companies with a large amount of debts in place would have incentives to engage in risky investment activities even if the level of expected return from the investment is sub-optimal. Further, these incentives are stronger when there are personal benefits these managers can extract. *See* RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 517-19 (6th ed., 2000).

54. In the Unified Bankruptcy Act, the incumbent manager may be discharged if there is grave mismanagement. This is, however, an exception and, unless it is shown that such an exceptional situation exists, the default rule is to allow the incumbent manager to continue to serve as a manager-receiver of the distressed company. Unified Bankruptcy Act art. 74.

pany's distress is financial and that the incumbent manager is better positioned than any other alternative managers to revitalize the company. If the distress is not financial in nature and is instead an economic distress the company should be liquidated. Even when it is determined to revive the company, if the incumbent manager is not shown to be the best among potential managers, the incumbent manager should be discharged.

There is a relatively simple and market-friendly way to determine whether the company should be revived and whether the incumbent manager should ultimately be discharged: go through a bidding process to sell the distressed company.[55] Assuming that a fair and transparent process is ensured by the court, the incumbent manager should be allowed to participate, perhaps with the backing of third-party outside investors. If the investor group which includes the incumbent manager proves to be the winning bidder, that would imply that the incumbent manager could persuade the members of this investor group that the company is in temporal financial distress and that the incumbent manager is in a good position to revitalize the company.[56] If, on the other hand, the incumbent manager is unable to participate in the bidding process, it would imply that he or she could not persuade investors to put their faith in the company or its management. In such a case, the company would be sold to investors who do not have a relationship with the incumbent manager and who would then determine the best manager to run the company independently.[57] Control would therefore be determined by the market, alleviating the court's burden of making a judgment as to the value of the company and the possibility of facing a challenge concerning the court's capability of making such a judgment.[58]

55. See materials quoted in MARK J. ROE, CORPORATE REORGANIZATION AND BANKRUPTCY 577-606 (2000) for market-friendly ways of corporate reorganization.

56. This assumes that the incumbent manager's know-how and other company-specific knowledge and skill is a significant factor affecting investors' valuation of the company and that, without this factor, potential investors' valuation of the company would not vary too much.

57. The incumbent manager may be re-appointed by these investors. Thus, in a sense, the incumbent manager is given opportunities twice, first during the initial bidding stage and second after the winning bid is announced. That is, even if the incumbent manager did not belong to the group of winning investors, the winning bidder may subsequently re-employ the incumbent manager. Note also that, under this mechanism, no separate decision has to be made as to whether liquidation would be necessary. The winning bidder can choose to sell the company piecemeal.

58. Sale of a distressed company is also consistent with what has been argued in the literature by certain scholars including Lucian Bebchuk and Oliver Hart. *See*, Lucian A. Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988); Philippe Aghion, Oliver Hart & John Moore, *The Economics of Bankruptcy Reform*, 8 J.L. ECON. & ORG. 523 (1992); OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE 156-185 (1995). An important advantage of a sales approach is that there will not be a need for the court to engage in an evalua-

A common rationale suggested for allowing the incumbent manager to retain his or her management position is that, otherwise, the incumbent manager would not have a proper incentive to file for bankruptcy proceedings and would instead try to delay filing as long as possible, incurring costs from the delay. However, if bidding becomes a mandatory part of bankruptcy proceedings, delayed filing would lower the value of the company and make it difficult for the incumbent manager to persuade potential investors to participate in the bidding process.[59] For the incumbent manager, the lack of interests among outside investors would mean less chance of retaining his or her control and would discourage the incumbent manager from unduly delaying filing for bankruptcy proceedings. Thus the incumbent manager may be better able to maintain his or her control by filing early.

Prior to the current legislation, in fact it had been the general court practice to engage in a sales process after a distressed company had entered into formal bankruptcy proceedings.[60] In particular, the Seoul District Court, which handles the largest number of corporate bankruptcy in Korea, had made it a standard practice to engage in a sales process as part of the overall bankruptcy proceedings of a distressed company.[61] It would be desirable to continue this practice through a competitive bidding process in order to make corporate bankruptcy proceedings function as a disciplinary device. It would be particularly desirable under the Unified Bankruptcy Act since in principle the incumbent manager is allowed to retain his or her position and a sales process may well be the only method for imposing punishment for poor management. Requiring a sales process served some de-

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tion process as to whether the going concern value exceeds the liquidation value. The valuation issue can easily be contentious, and it may unduly delay the progression of the overall bankruptcy process. In principle, those who value the company most highly will and should take control, and this would include the incumbent management.

59. This is based on the assumption that, unless certain legal measures are taken, the value of a company will continue to deteriorate when it is on the brink of bankruptcy. About the costs of corporate bankruptcy, see Michelle J. White, *The Costs of Corporate Bankruptcy: A U.S.-European Comparison*, *in* CORPORATE BANKRUPTCY: ECONOMIC AND LEGAL PERSPECTIVES 467 (Jagdeep S. Bhandari & Lawrence A. Weiss eds., 1996).

60. Bankruptcy Practice Research Group, Bankruptcy Division, Seoul Central District Court, 2 PRACTICES IN REHABILITATION CASES [*hwesaeng sagon silmu ha*] 155-57 (2006); Ji-Ho Sohn, *Practices in Corporate Reorganization Procedure* [*hwesajongri jolchae silmu*], *in* LECTURES IN BANKRUPTCY LAW [*dosanbop gangeui*] 660, 668-69 (Hyo-Soon Nam & Jae-Hyung Kim eds., 2005); Je-Jong Lee, *Mergers and Acquisitions During Corporate Reorganization Proceedings* [*hwesajongri jolchaesoeui M&A*], 352 HUMAN RIGHTS & JUSTICE [*inkwon kwa jongeui*] 64 (2005).

61. Bankruptcy Practice Research Group, *supra* note 60. Seoul District Court handles approximately one third of the country's total bankruptcy cases. *See* Hyung-Doo Kim, *supra* note 30, at 142, 152.

sirable functions prior to the enactment of the Unified Bankruptcy Act by, for instance, assisting the stakeholders and the court in the process of finding the investor who had the highest valuation of the company. With the Unified Bankruptcy Act, it is now even more important to engage in a sales process.

V. CONCLUSION

The recent enactment of the Unified Bankruptcy Act is a result of efforts to streamline the relevant laws and regulations and to have a unified statute that would be uniformly applicable to corporate and personal bankruptcy. It was long-overdue and is a welcome development. There is, however, room for improvements through court practices when implementing this new statute. Given the corporate ownership structure in Korea and its institutional environment, there is a risk that the bankruptcy procedure could be used by the manager-controlling shareholder as an entrenchment device. In order to ameliorate this risk, the court should require engaging in a sales process once a distressed company enters into bankruptcy proceedings.