11 Rehabilitating Korea's corporate insolvency regime, 1992–2007

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In 2005, Korea comprehensively revised insolvency laws that had been in effect since the 1960s. These far-reaching reforms brought to culmination both a domestic impetus for change that had gathered pace during the 1990s and urgent international pressures for reform in the wake of the Asian financial crisis. We employ this case to explore the interchange between the global and the local, the intersection between Korean trajectories and international pressures for reform.

An intensive case study presents a necessary foundation on which to construct convincing answers to key questions of national law reforms in a global context. We propose that a valuable methodology for appraising the interplay of the global and local is to proceed systematically, in a single area of law, through four possible permutations of global–local encounters.

First, the null hypothesis, as social scientists style it, of global impact should be that the global has impinged on the local not at all. Here, we should entertain the plausible theory that legal change has deep indigenous roots that are not readily shaken loose. From the side of legal history, this hypothesis takes seriously the cultural embeddedness of legal families. It anticipates the "transplant effect" of failed grafting of laws nurtured in other soils.[1] From the side of historical institutionalism, this hypothesis is consistent with the powerful inertial effect of path dependency—that the conditions of an institution's founding, and the expectations, interests, and structures that come to sustain it, constrain any kind of change, not least that from alien legal soil.[2]

A second hypothesis, the mirror of the first, will be that global legal norms[3] inevitably penetrate deeply into any national laws, the more so if a domain of law is salient to global markets. Hyper-globalizers variously propose that a combination of market power, pressure on nation-states to integrate into the global economy, the impact of multinational corporations, and the manifest benefits of local conformity to global standards will bring rapid adaptation of the local to the global.[4] Hence, we should expect swift national responses by rational lawmakers to global standards in direct proportion to a country's integration into global markets. Of course, the stronger a commitment to this view, the less respect is given to the inertial conditions of a country's distinctive history and legal institutions that are imbued with history's lingering grip.

A third, and intermediate, proposition does not discount global influences, but it expects them to be resisted, attenuated, and unevenly adopted.[5] Globalization is

a negotiated process that relies heavily on intermediaries, its fates closely linked to the relative balance of power between global and local actors. Its structural and discursive penetration of a country's laws depends on a wide variety of factors, some domestic, some international, with the result that its eventual impact on a country's legal practice remains highly indeterminate.[6] Indeed, it is easy to overestimate the impact of global influences because national policymakers may adopt practices not to conform to global standards but because domestic reforms have a functional affinity with domestic needs.

A fourth permutation of the global–local engagement helps to set the limits of global impact. We can expect situations, and indeed must find instances, where global pressures have been rejected. Unlike the first hypothesis, this is less a case of legal development following its domestic path relatively unmindful of foreign influences. It is rather a case of direct or perceptible global influences that are recognized for what they are, appraised by national policymakers, and repudiated.

In an account of legal change, we can expect that these four configurations of the global and local can exist side-by-side, even in a single domain of law. In fact, we shall show that, within insolvency law itself, there are examples of each configuration. Insolvency law at this time therefore melds at least four distinct trajectories of reforms that continue to unfold in dynamic and not always predictable ways. In order to explicate these interweaving patterns of legal change, however, it is critical to make a distinction between two manifestations of the local. Drawing on a broader theory of legal change in a global context,[7] we distinguish between the politics of enactment and the politics of implementation. The politics of enactment involve putting formal law (statutes, cases, regulations, presidential decrees) on the books. They are the point at which maximal international pressure is likely to be most effective, particularly on presidential decrees and statutory reforms. The politics of implementation involve the translation of formal law into practice. They are the point at which local actors, from government regulators to professionals and regulated subjects, are able to redress any asymmetry of power between the global and the local. This is deeply embedded in local conditions and is thus most difficult for global agents of change to penetrate. Pushing back on globalization can be found most ubiquitously in the phase of implementation. But it is also the most difficult to observe and thus to record. It is for this reason, among others, that estimates of globalization tend to be overestimates. Without knowing how broadly, deeply, and with what impact the global has penetrated the local,[8] we do not know the resiliency and imperviousness of national streams of practice.

Our chapter tackles these issues in three steps. First, we illustrate four configurations of insolvency reforms since the early 1990s: those developed domestically; those where there were global pressures and local acceptance; those where global norms initially brought rejection, and then eventual acceptance; and a case where global norms were explicitly rejected. Second, we reflect analytically on these reforms by tracking forms of global influence, by demonstrating Korea's capacities to manage various degrees and types of pressure, and the politics of the state

and professions that were interwoven through these patterns of change. Third, we conclude with some general theoretical questions that continue to require attention in Korea and elsewhere if we are to comprehend the interplay of local and global politics in commercial law reform.

Korean insolvency reforms

Overview

The broad arc of Korean insolvency reforms since the early 1990s occurs in three sites of lawmaking: statutory reforms through the National Assembly; agreements among market actors brokered by the Ministry of Finance and Economy; and cases and regulations from the Korean Supreme Court and local district courts (Table 11.1). The sweep of reforms begins domestically, becomes tightly engaged with the International Monetary Fund (IMF) and the World Bank after the 1997 crisis, and slowly returns to domestic priorities after the retreat of international financial institutions after 2003–4.[9]

From the 1960s until 2005, bankruptcy in Korea was governed by three statutes—the Corporate Reorganization Act, the Composition Act, and the Bankruptcy Act—all enacted in 1962. In fact, however, the three statutes were rarely used. Corporate restructurings, mergers, and liquidations were handled administratively, most notably for major corporations by the Economic Planning Board and Blue House (Korea's Presidential office), which had driven Korea's state development model of economic growth. From 1990 to 1996, for instance, as economic difficulties started to emerge in the domestic economy, the number of companies that availed themselves of the Corporate Reorganization Act totaled only 42 in 1990, 80 in 1991, 101 in 1992, 71 in 1993, 86 in 1994, 104 in 1995, and 79 in 1996.[10]

Beginning in 1992, the Supreme Court responded to domestic criticism of political influence in bankruptcies, excessive delay, and low recovery rates for creditors by issuing guidelines intended to make reorganizations cleaner, faster, and more effective. On the eve of the crisis, as corporate failures loomed in large numbers, the Ministry of Finance and Economy (MOFE) pushed through an agreement among banks, the Anti-*Budoo* Accord, which permitted the issuer, the debtor company, to continue bank transactions even though it had insufficient funds to pay the promissory note or checks. Moreover, to forestall a chain reaction of company failures, MOFE pressed banks to work with other banks to provide or extend cooperative loans that would solve firms' liquidity problems.

In the wake of the crisis, which hit Korea in late 1997, MOFE, in consultation with the international financial institutions (IFIs), undertook two important administrative steps. In the first, colloquially styled the "Big Deals," it appears the government quietly pressed many of the largest *chaebol* (large, often family-owned conglomerates) to enter into a series of mergers, presumably to reduce competition and to shore up weak firms. This would also forestall huge bankruptcies that would limit losses to greatly weakened banks that were carrying huge non-performing loan portfolios.

Table 11.1 Sites of lawmaking on corporate insolvency reforms, 1992–2007

	Legislature	*Government ministries*	*Courts*
1992			1992 Supreme Court Guideline on Corporate Reorganization Proceeding1996 Revised Supreme Court Guideline on Corporate Reorganization Proceeding
1996			
1997		Anti-Budoo agreement (18 April 1997)Big Deals (1997–98)	
1998	Amendments to Corporate Reorganization Act (CRA), Composition Act (CA), Bankruptcy Act (BA)	Workout Accord (28 June 1998)	
1999	CRA amendments		Established Insolvency Division (March 1999)
2000	CA/BA amendments (Part of 1999 packet carried over into new year)		
2001	CRA amendments (pre-pack) Corporate Promotion Restructuring Act	Creditor Banks Agreement	
2002			
2003	Comprehensive draft submitted to National Assembly		
2004	Revised bill sent again	Workout Agreement for Small and Medium Enterprises	
2005	Comprehensive Act		
2006	Corporate Restructuring Promotion Act		Supreme Court Regulation on DRBA
2007			

DRBA, Debtor Rehabilitation and Bankruptcy Act.

Source: Terence Halliday and Soogeun Oh, 'A Recursive Theory of National Lawmaking: Site-Switching in Korean Corporate Insolvency Reforms, 1992–2007', Working Paper, American Bar Foundation and Ewha Woman's University.

In the second, MOFE and the IFIs agreed on a set of measures that would compel 210 domestic financial institutions to adopt practices under a framework of "Workout Accords." Banks were to target more than 100 weakened firms and develop workout plans with financial institutions that would be formalized in Memorandums of Understanding. MOFE styled this as Korea's equivalent to the much admired London Approach for financial restructurings that was pioneered

by Britain's Bank of England. The Accords were premised partly on a desire to keep cases away from the courts.

In 1998, the government took a further step by pushing through a statutory amendment to increase the efficiency of corporate reorganizations. Based on a formula developed before the crisis at the Korea Development Institute, this measure sought to compel judges to decide whether or not companies were eligible for reorganization based on a bright-line "economic criterion test" that much reduced judges' discretion. As this coincided with the IFIs' interests in increasing the transparency of judicial decision-making, and compelled judges to take the hard decision of liquidating companies, it was done with IFI approval. Another statutory amendment followed in 1999 that was intended to expedite court proceedings. Rather than permit months for judges to decide whether insolvency cases should be accepted by the courts, the amendment compelled judges to make a decision on commencement of a case within one month, a decision that had a striking effect on reducing the time from filing to commencement.

From 2001 to 2004, the government introduced several measures to facilitate out-of-court workouts. The 2001 Corporate Reorganization Act Amendment set out provisions that would encourage domestic banks to undertake private workouts between creditors and debtors that would be taken to courts for their binding stamp of authority. A 2001 Corporate Restructuring Promotion Act sought to formalize and elaborate on the earlier Workout Accord. As its focus was on very large firms, it was followed in 2004 by a Workout Agreement for Small and Medium Businesses that was administered by the Financial Supervisory Service (FSS). Somewhat unexpectedly, the Corporate Restructuring Promotion Act was re-enacted in 2007 for another five years. The collective effect of all these Acts was a continuing push by skeptical economic technocrats in MOFE to keep cases away from the courts. The grounds, it seemed, were twofold. On the one hand, MOFE wanted to maintain its power over the destiny of major corporations. On the other hand, the economists doubted that a court-based process could efficiently and effectively preside over corporate reorganizations. The 2007 re-enactment of the Corporate Restructuring Promotion Act seemed to express this continuing reservation about court capacity.

The Debtor Rehabilitation and Bankruptcy Act, 2005

At the height of the crisis, the IFIs obtained a commitment from the government of Korea that it would consolidate its three insolvency laws into one comprehensive statute.[11] While the commitment was never formalized into a condition of IFI loans, the IFIs continued to press the issue once the dust settled after the most urgent reforms in 1998 and 1999. In 1999, the Ministry of Justice initiated a project to assist the reform of Korea's insolvency laws. Consulting law firms in Korea, Singapore, and the US entered discussions in 2000 to advise on a comprehensive reform of insolvency law under the auspices of the World Bank Technical Assistance Loan Program (TALP) project.[12] Around twenty aspects of corporate reorganization were put on the agenda. The final report, submitted in 2000, became the basis for the enactment of a new insolvency law.

Even though the government launched a deliberative process for consideration of the reforms, controversies continued over the legitimacy of new legislation. Most lawyers, especially judges, expressed strong criticism of such a comprehensive revision of laws in the wake of so many amendments to insolvency law since the crisis. But some industry sectors saw it as an opportunity to make the law more responsive to debtors. Creditor institutions did not resist change, probably because they did not want to offend the MOFE, which was leading the legislative initiative. It is not surprising that the parties to the reforms quarreled over the pace of deliberation. For lawyers, who were reluctant reformers, everything moved too quickly; for the government, and the MOFE in particular, the drafting dragged unnecessarily.

The deliberation committee had its first meeting in May 2001. Less than a year later, in March 2002, it issued a statement of principles for the consolidated insolvency law, which contained both the structure of the new act and conclusions on major issues. Drafting of the bill began in March 2002 and was completed by October 2002. The drafting committee needed more time to polish more than 600 articles, but the government pushed hard to enact a law during the term of the current President as one of his principal legislative achievements. After public hearings and review by the Ministry of Legislation, the bill was sent to the National Assembly on 21 February 2003, four days before the new president was inaugurated on 25 February 2003.

Except for some congressmen interested in personal bankruptcy proceedings, the National Assembly was not eager to deliberate over the bill. As the National Assembly was scheduled to be dissolved on 29 May 2004, the bill would automatically be discarded if not enacted. Given the growing severity of consumer bankruptcies, the governing political party decided to extract that part of the bill and enact the Individual Debtor Rehabilitation Act on 2 March 2004.

The new government, established in 2003, was nevertheless keen to enact the consolidated insolvency bill. After amendments to some troublesome provisions, a revised insolvency bill was sent to the National Assembly on 11 November 2004. When the Judiciary Committee asked for related government agencies to comment on the draft bill, the Supreme Court alone sent proposals for amendment on some ninety-seven issues. Talks between the Ministry of Justice, the Judiciary Committee, and the Supreme Court finally succeeded in agreement on a single revised bill. After its hearings, the Judiciary Committee amended several controversial provisions by deleting arbitration procedures in individual rehabilitation proceedings,[13] shortening the maximum period of repayment in individual rehabilitation proceedings,[14] and conferring on a foreign insolvency representative the authority to file a petition for the insolvency proceeding only after recognition.[15] The law was enacted in March 2005 and came into effect on 1 April 2006.

Configurations of change

To disentangle the global from the local in commercial lawmaking requires a methodology that systematically varies the origins and outcomes of law reform. We

selected four areas of insolvency law that illustrate alternative trajectories of change: (1) instances where global pressure brought local acceptance (expediency of proceedings and judicial transparency); (2) cases where global norms were greeted by local rejection (automatic stay, specialized court); (3) examples of global norms that were initially resisted but eventually accepted (debtor-in-possession); and (4) an instance where legal innovations were developed domestically in response to international contexts (payment and settlement system).

1. Global pressure, local convergence

Global pressures can be exerted upon national policymakers in very different ways.[16] We contrast two forms of leverage. In the first, international financial institutions (IMF, World Bank) took advantage of the financial emergency that confronted Korea during the 1998 crisis to exercise economic coercion. Among other demands, they directed this coercion toward an increase in efficiency and expediency in corporate reorganization proceedings. In the second, an international governance organization, the United Nations Commission on International Trade Law (UNCITRAL) relied upon modeling and persuasion. Through a deliberative process that involved representatives of the world's nations and leading organizations of experts, UNCITRAL developed a Model Law on Cross-Border Insolvencies, which it urged member nations to adopt.

a. Expediency in judicial proceedings

Concerns about delay in Korean corporate reorganizations extended back to the 1980s. Under Korean law, debtors and creditors could apply to the court for commencement of a reorganization proceeding, but it would take the court six to ten months or longer to make a substantive determination if indeed a company was eligible for the court protection. As in most jurisdictions, such delay created uncertainty in markets, undermined confidence in companies and their management, and provided a wide opening through which fraud and other efforts to minimize loss by creditors could effectively nullify the very object of reorganization itself. However, critics of the process and even judges had few ideas about how to solve the problem, partly because they assumed that such delays were due to the inevitable inefficiency of judicial procedure and partly because they were not serious about addressing the problem.

The crisis changed the attitudes of both sides completely. Rising numbers of failing companies in insolvency proceedings and delays in processing them drew public criticism of the judiciary and the government. This placed the inefficiency of insolvency proceedings firmly on the national agenda. In 1998, through amendments to the Corporate Reorganization Act, the Ministry of Justice sought to speed up reorganization proceedings by putting a time limit on certain procedures. They required that a provisional preservative order had to be issued within fourteen days from the date of application, the receiver was obliged to submit a reorganization plan within four months of the final date of the filing of claims, and

the reorganization plan needed to obtain approval within one year of the date of commencement.

Nevertheless, these revisions were insufficient to bring an immediate end to delays in reorganization proceedings. Parties-in-interest did not see much change in the speed of proceedings. They wanted to know why corporate reorganization proceedings did not commence as soon as possible. To them, the lag between application and a court commencement order was too significant. IFIs too pressed for further revisions. Saving companies, insisted the IFIs, required rapid decisions and quick action.[17]

In response, the government of Korea pushed through reforms in 1999 that required that commencement of proceedings be decided within one month of the date of application. As such a short period of time did not permit the court to undertake substantive tests as to whether a debtor firm was eligible for the reorganization, the courts' scope of examination for the commencement of a reorganization proceeding was limited to procedural formalities such as the proper use of forms and the payment of fees. As a result of the 1999 amendments, most cases were commenced less than one month from the application. It was a big change. The forceful entry of the IMF and World Bank on to the local stage produced a shift in the understanding of insolvency rules.

b. Cross-border cases

In the case of cross-border insolvencies, the expression of global norms took quite a different form. Whereas the IFIs took an ad hoc approach to Korean reforms, seeking to apply their experiences from other national emergencies to Korea's particular case, UNCITRAL developed a set of explicit procedures, which it formalized and urged upon all countries. UNCITRAL confronted not a national emergency but a generic problem increasingly common with multinational corporations. Whereas a corporate insolvency can be handled in a relatively orderly and coherent manner in a single jurisdiction where all creditors are subject to the same court authority, a corporate failure of a multinational involves the coordination of creditors and their competing claims over multiple jurisdictions. Courts may compete for jurisdiction. Courts are also inclined to favor creditors resident within their jurisdictions over creditors outside their jurisdiction. As a result, not only is value frequently lost to creditors in a liquidation, but the prospect of a multijurisdictional rehabilitation becomes all the more challenging, if not impossible. UNCITRAL sought to solve this problem by developing a model law that laid out the procedures for cross-border corporate insolvency.[18]

Like other countries, Korea, too, had struggled with cross-border cases. Yet few options existed for their solution. While, in general, Korean reformers looked to US bankruptcy law and practice, because the US had most experience in rehabilitative insolvency laws, Article 304 of the US Bankruptcy Code, which dealt with multijurisdictional bankruptcies, was not a great help. As a broadly drafted section of the legislation, it relied on judicial development for specification and development. But for Korean reformers, this presented a formidable challenge. To

confidently digest and analyze a large body of judge-made law from a variety of US courts placed an undue burden on lawmakers.

UNCITRAL's Model Law provided precisely the clear statutory provisions needed by Korean reformers. It was persuasive because it was in code law form. It had previously been adopted and tested in other countries, such as Mexico and Japan, and therefore provided some evidentiary base for its effectiveness. Moreover, it quickly became clear that other major regional and global economies, including Australia and the US, were planning to adopt it. As a result, in its comprehensive reform of bankruptcy statutes, Korea also adopted, with small modifications, the Model Law. It did so principally upon its merits and the functional necessity for such a cross-jurisdictional regulatory order. But it undoubtedly did not hurt that the primary sources of international norms in insolvency—UNCITRAL, IMF, World Bank, and the US—also concurred.

2. Global norms, local rejection

a. The automatic stay

Corporate insolvency laws conventionally distinguish between the time of filing of an insolvency case and the commencement or acceptance of the case by a court. In most countries, as in Korea before the crisis, long delays between application and commencement can allow a great deal of activity that can hinder reorganizations or distract management from turning the company around. In a few countries, most notably the US, a provision called the automatic stay immediately forecloses all actions by creditors against the debtor at the moment of filing.

An automatic stay means that creditors are prohibited from exercising their claims from the time when a debtor applies for bankruptcy. If automatic stay exists, the insolvency proceeding commences immediately upon the debtor's application without any further court decision. Adopted initially in the 1978 Bankruptcy Code of the United States, most other countries have not followed suit. Rather, an insolvency proceeding commences when the court makes a decision to grant an insolvency application. At the point of the court's commencement decision, creditors are "stayed" or stopped from enforcing their claims. Most countries actively consider whether to adopt the automatic stay when they revise their insolvency law because it will change the balance of power between a debtor and their creditors. It is a powerful weapon to a debtor, as it can stop an attack by creditors simply by filing an application.

In international lawmaking, the automatic stay has been controversial. While it favors debtors and forestalls many preferential transactions that might occur between application and commencement, it also reduces judicial discretion on this issue to a formality and hampers creditors who may be scrambling to protect their assets. Moreover, in some countries, including Korea, the automatic stay can conflict with other provisions in civil procedure law. For that reason, UNCITRAL's Legislative Guide on Insolvency Law, adopted by the UN in 2004, encourages use of the automatic stay to facilitate reorganization, but it does not make it mandatory for national lawmakers.

Before the crisis, the automatic stay was not given any consideration by Korean reformers, although they were aware of its significance for US bankruptcy law. In part, it was not taken seriously because there seemed to be no urgency to do so, but in part, it was also resisted because the sudden blockage of all claims by creditors upon the debtor's application for insolvency proceedings could not be imagined in commercial practice. The law reformers from the World Bank and IMF, however, urged the Korean government to adopt the automatic stay in order to accelerate proceedings. This injunction, halting actions by creditors the moment the petition for commencement was filed, would replace the dual procedure of petitioning and subsequently obtaining a commencement order with a more immediate procedure to open reorganization proceedings. Financial creditors were opposed to this idea, vigorously asserting that the automatic stay would only become an exit for debtors seeking to violate the Control of Illegal Checks Act.[19] Emotionally, the idea of being restricted from exercising their rights upon the debtor's application for insolvency was difficult to accept for creditors. Judges also thought it impractical. Moreover, studies on potential side-effects of the automatic stay were non-existent and it had few proponents in Korea. Even if the IFI recommendations were to be followed, reformers in Korea had too little understanding of how it worked in practice to risk incorporating it in the law. For all these reasons, Korean reformers resisted pressures to adopt it.

Nonetheless, over the next several years, changing domestic circumstances also changed opinions about the value of an automatic stay for Korea. We have seen that reforms that took effect in 2000 reduced the gap between application and commencement to one month. Courts gave provisional protection orders within two to three days of application and strictly applied the one-month rule thereafter. As the gap between filing and commencement was already reduced to two to three days after 2000, creditors gradually realized that the automatic stay was not such a hardship and their emotional resistance to it eroded away. Resistance by creditors was further reduced by the passage of the Debtor Rehabilitation and Bankruptcy Act (DRBA) in 2005 as they observed the functioning in practice of a two- to three-day gap. As reformers have also come to understand the functioning of the automatic stay more fully, and to appreciate its potential efficiencies in reorganizations, the climate for reform has changed, so much so that, if there were to be a round of amendments to the insolvency law, it appears likely that changed domestic orientations would support the inclusion of the automatic stay in Korea's insolvency regime. However, to solve the problem would still require a resolution of criminal problems linked to check clearing.

b. A specialized insolvency court

Some countries, including the US and Thailand, have specialized insolvency courts, which have exclusive jurisdiction over insolvency cases. They are recommended by IFIs because specialized insolvency courts can provide the expertise necessary for handling insolvency cases that ordinary courts do not have. The specialized insolvency court became an important issue in Korea because the creation of a new court would be costly and influence overall judicial structure.

When the IFIs arrived in Seoul at the height of the crisis, they made a quick judgment that Korea's insolvency system lacked the capacity to handle large numbers of consequential corporate reorganizations because its judges were inadequately trained and specialized. The IFIs' solution? To insist that the government of Korea establish a specialized insolvency court along the lines of the US Bankruptcy Court system.[20]

This proposal met fierce domestic opposition from all sides of the legal complex. In Korea, judges were characteristically rotated among courts every two to three years. Even specialized chambers, such as the Administrative Court and the Patent Court, kept judges only for the length of their usual rotation. To separate a specialized court from the normal court system would require a major restructuring of the judiciary and a shift from a model of the broadly experienced generalist judge to a specialist judge.[21] Moreover, the Supreme Court doubted that a specialized insolvency court would have enough cases to justify specialization over the longer term. The total number of cases under all three insolvency laws in 1997 was less than 500; by 1998, at the height of the crisis, this climbed toward 1,300; and by 1999 was back to less than 1,000 cases. Moreover, the government budget office believed that the cost of creating specialized courts would be prohibitive.

Instead of adopting a separate insolvency court, the Supreme Court chose instead to establish insolvency divisions that would exclusively handle insolvency cases. Leading judges were assigned to the insolvency division of the Seoul District Court to hear insolvency cases. They worked vigorously to establish a model that influenced other divisions nationwide. The insolvency division is now viewed as reliable and equipped with appropriate levels of knowledge and skill. Ironically enough, however, the recent rise in the number of insolvency cases has opened up new and more favorable inclinations from the court and the government toward the possibility of the establishment of a specialized insolvency court.

3. Global norms, local contestation, eventual acceptance: receivers and debtors-in-possession

In insolvency proceedings, the world's legal systems divide over which parties should be in control of a company once it enters reorganization. The overwhelming majority of countries remove authority from the company's management and vest it in an official who may be a private professional (variously labeled a receiver, an insolvency practitioner, a lawyer, an accountant) or a government official. Usually, these insolvency representatives are supervised by courts and creditors' committees. In a minority of countries, most notably the US, the managers that took the company into insolvency can continue to manage it. This is justified on several grounds. One is that it removes a disincentive for managers to file for bankruptcy. Who is likely to file if he or she knows they will be immediately replaced or superseded? Another is that the current managers know the company best and are thus well placed to turn it around with the protections of insolvency law.

This issue was hotly debated after the crisis. Until 1992, in practice, the incumbent management was apt to be appointed as the receiver by the court in corporate

reorganization proceedings. But an avalanche of problems resulted from such practice. The inherent conflict between interested parties resulted in fraudulent activities of the management and, furthermore, the corporate restructuring process became inadequate and dysfunctional. Facing such problems, in 1996, the Supreme Court enacted a guideline (Supreme Court Guideline on Corporate Reorganization Proceeding) containing restrictions on the participation of the management of the firm prior to insolvency. Management was replaced in insolvency reorganizations.

While the IFIs did not press strongly for debtor-in-possession in the months following the crisis, the issue was put firmly on the domestic agenda by a distinguished Korean corporate lawyer, Y.S. Park, who was integrally involved in drafting teams for the several post-crisis law reforms. As a result of his involvement in the 1999 World Bank-funded TALP project, its preliminary report proposed that current management should be appointed as the receiver. The proposal generated fierce exchanges among parties to the reforms. Some lawyers strongly supported the idea because it would provide debtors with an incentive to file early for insolvency protection. As debtor-in-possession also puts the initiative for filing in the hands of debtors, and gives managers continuing power, industry groups added their support.

Judges, in contrast, were hostile to the idea. In 2000, for instance, the Central District Court of Seoul alone was handling more than 200 reorganization cases. The court could not imagine its ability to effectively monitor managers who were not selected by the court. And without effective monitoring, courts laid themselves open to the unwelcome accusation that receiver-managers were engaged in fraud or other loose practices that would rebound in criticism directed at the judiciary. Maximizing value mattered less to judges than protecting themselves from harsh public censure. In a workshop discussing the preliminary report of the project, the court representative made sure that the criticisms of the chief judge of the Insolvency Division of the Seoul District Court were delivered clearly. Giving the former management responsibility for the insolvent company, he said, was unthinkable, illicit, and absurd.

Opponents from creditor financial institutions obtained support from MOFE, which shared the views of the court. Keeping managers in control of their companies would facilitate cheating and create a moral hazard in favor of managers, a fear that dominated an alternative criterion that might be of greater concern to financial interests, namely the maximization of a firm's value which could be achieved by debtor-in-possession.

The argument continued even during the process of drafting the new, comprehensive bill. It was brought to a tentative conclusion in 2002 when the drafters prepared two separate options in the drafted bills: one stated that the incumbent management could act as the receiver; the other permitted an independent third party to act as the receiver. It was a policy choice by the government as to which would prevail. The difference between the options was not substantive, considering that both options left a possibility for either the incumbent management or a third party to become the receiver in exceptional circumstances.

However, as time passed, the courts' opposition became less vigorous. Courts gained confidence in their ability to control receivers. The management process became more transparent and the danger of cheating diminished. Courts also placed increasing emphasis on maximizing the value of the underlying business, an objective better served by permitting managers to act as their own receivers. By 2003, the courts had moved to a position somewhere between flat rejection and reluctant acceptance.

Two other developments changed the attitudes of the courts and the government. Courts became more and more concerned about the gradual decrease in the number of cases that were being filed, and they therefore became more amenable to incentives that would encourage early application. This recognition led the government to accept that incumbent management could act as receivers. Abolition of the composition procedure in which the incumbent management maintained its office gave more weight to the opinion that stressed the need for statutory grounds on cases in which the court is allowed to not appoint the receiver at all, i.e., small and medium enterprise insolvency cases. In 2003, the government inserted such a clause in the bill. The new law, Debtor Rehabilitation and Bankruptcy Act (DRBA), mandates the court to appoint the current management as the receiver in principle, but also stipulates cases in which the court is allowed not to appoint a receiver at all.[22]

In 2006, the courts went even further. The appearance of competition worked as a factor that changed the court's attitude toward the receiver. In 1998, the Korean government had established the so-called workout program that opened the door to non-judicial proceedings for ailing large firms. This diversion of cases from the courts compelled judges to consider how they might combat their loss of major cases to private workouts. In February 2006, just before DRBA came into effect, the Insolvency Division of the Seoul District Court invited insolvency lawyers from eight major law firms to a meeting at which they were told that the court would allow incumbent management to hold its office in rehabilitation cases.

This inspired the court to induce firms to use judicial proceedings by laying down a Supreme Court Rule in 2006 that expanded the range of cases in which the court is allowed not to appoint a receiver at all, including for listed companies.[23] As a result, even a big listed firm could go through the rehabilitation proceeding without a receiver under the DRBA.

In sum, in order to maintain a competitive advantage in a "market" for alternative ways of reorganizing companies, the Supreme Court took steps to encourage managers to file with courts without the fear that they would be removed from day-to-day control of their companies. This move, however, would not have been possible without a maturing of the insolvency bench itself as well as the broadening and deepening of the pool of lawyers with expertise in reorganizations. All these shifts also ultimately depended upon the progressive adoption of the overriding goal of maximizing the value of assets in insolvency for the benefit of creditors and debtors alike. The final result is that the US model has been progressively adopted in practice. The court appoints incumbent management as the receiver in most cases and appoints no receiver at all in about 20–30 percent of insolvency cases.

4. Global context, domestic innovation

Closeout netting is the mechanism that terminates all existing contracts among debtors and their creditors, calculates what is to be paid, pays the settled amounts, and closes out the legal relationship among the parties. It is used in financial transactions, usually among financial institutions. It was first adopted to deal with derivatives but is now widely used in various types of financial contracts. As financial transactions have sharply increased globally, international financial investors have sought a secure structure that can protect their contracts from insolvency rules. Closeout netting is the solution they found.

The International Swap Dealers' Association (ISDA) showed great interest in whether closeout netting was legally permissible in the process of insolvency in Korea. A decision handed by a district court[24] assumed that the closeout netting clause was valid, but practicing lawyers hesitated to advise whether closeout netting provisions in derivatives transactions were ensured.

In February 2003, attention was drawn to a Supreme Court decision that ruled that the act of enforcing the right of pledge after the commencement of reorganization proceedings was subject to the right of avoidance. In other words, a court could reverse the enforcement of the security.[25] The decision triggered intricate discussions over the applicability of insolvency law, especially in relation to the payment and settlement system for financial transactions.

After the decision, the ISDA directly approached the Ministry of Finance and Economy and the Ministry of Justice, and asked them to exclude closeout netting from the application of insolvency laws. The government agreed. It understood that, if the enforceability of closeout netting was left without any statutory grounds, Korea might face disadvantages in conducting international financial transactions in the future. Many academic experts also agreed. As a result, in 2003, a clause stipulating this exception was included in the 2003 Insolvency Bill and later enacted in a different form in 2005.

During the process of revising the Insolvency Bill in 2004,[26] the government faced additional requests related to the scope of exclusion from the application of insolvency laws. *Dambo*[27] call transactions were one of the first issues that the government confronted. A concept contrived in the development of the Korean financial market, a *dambo* call transaction refers to call transactions between financial institutions with security attached. Unlike traditional call transactions, which do not need security of any kind, demanding security for call transactions involving financial institutions with low credit became a common practice in Korea. Futures brokers who conducted these transactions insisted on an exception that included *dambo* call transactions, assisted later on by the Korea Securities Depository.[28] Experts acknowledged the need to ensure the finality of payment of *dambo* call transactions in spite of the distinction from derivative financial transactions, considering that they were conducted through the clearance and settlement system instituted by the Korea Securities Depository.

A second demand came from the Bank of Korea regarding the currency payment and settlement system. The Bank of Korea asked the government to legislate

an exception regarding the currency payment and settlement system. The issue needed to be dealt with because the CLS bank (Continuous Linked Settlement Bank International), which the Bank of Korea at the time was seeking to join, required a substantive enactment that excluded the foreign exchange payment and settlement system from domestic insolvency laws. This decision was difficult to reach, and discussions were extended to the admissibility of the demand, as studies were unavailable on the necessity of the finality of payment in relation to the currency payment and settlement system.

A third demand was submitted by the Korea Securities Exchange regarding the clearance and settlement system in the securities market. After the experience of witnessing security brokers who become insolvent in 1998, experts understood the necessity of guaranteeing the finality of payment in case security brokers went bankrupt. The government and National Assembly, in contrast, found the idea hard to follow.

The legal scholar responsible for the revision project recognized that two tasks needed to be achieved in order to solve the problem.[29] The primary task, in light of the common objective to ensure finality of payment, was to create a single provision embodying the three kinds of transactions—the currency payment and settlement system of the Bank of Korea, the clearance and settlement system of securities and transaction of the securities market, and qualified financial transactions including derivative financial transactions. A secondary task was to hold workshops and seminars to promote understanding of unfamiliar concepts and legal theories and furthermore to gain the consent of the government, the court, the National Assembly, and lawyers. Article 120 of the DRBA, which ensures the finality of payment, is the final result of such efforts. Article 120 is the first enactment worldwide that has worked out the problem of the finality of payment in a single provision.[30]

Analysis

With these case studies in hand, we return to the reforms with an analytic eye and explore some of their theoretical elements.

Manifestations of the global

While it is clear that Korean insolvency reforms had a domestic trajectory, they all unfolded in a global context. That context, however, must be carefully disentangled because the constraints of its influence vary considerably depending on the nature of threads that linked the global to the local. We discern several threads.

First, Korean insolvency statutes enacted in the 1960s drew heavily on Japanese statutes. While Japan's insolvency statutes drew on other civil law countries, notably Germany and Austria, its corporate reorganization law derives from US bankruptcy law. That legal derivation, coupled with Korea's close economic, security, and educational links with the US since the Korean War, make it unsurprising that, as Korea's economy developed, a younger generation of Korean insolvency

scholars looked to US bankruptcy law and practice for inspiration. This they did before any foreign constraints or without particular demands from IFIs or IOs.

Second, Korea itself has been an economically upwardly mobile country for decades. Its upward mobility, however, is not simply a matter of rising gross national product (GNP) or gross domestic product (GDP). While Korea rightly celebrated its admission into the organization for Economic Co-operation and Development (OECD), a club of rich nations, in the mid-1990s, Koreans calibrate their achievements in education, science, technology, and other areas by their international standing. The chair of a panel at a recent conference hosted by the prestigious Korea Development Institute proudly observed that all the Korean economists on the panel had doctorates from the University of Chicago's Economics Department, a comment with the unstated corollary that it is the most prominent department in the world, at least by the metric of current faculty who are Nobel Laureates. This vignette signifies a wider phenomenon—Korean institutions frequently orient their reforms to standards and practices to magnetic centers of global prestige. As an official from an influential IFI observed about the insolvency reforms, it was much more effective to persuade Korean lawmakers that their law fell below global standards than to try and exert crude financial pressures for change. As a result, Korean officials and Korean scholars orient themselves to global status indicators. In the insolvency field, these include the US, which is a normative leader in the international shift toward a rehabilitative ideal in insolvency regimes, and arguably the most prominent single global actor in the global norm-making of multilateral international organizations, such as the World Bank and, in the area of trade law, UNCITRAL.

Third, much of the foreign influence on Korean insolvency laws occurs diffusely through academic and professional epistemic communities. A small number of Korean academics and officials are closely integrated into international networks of insolvency specialists.[31] Leading law professors studied in the US, Japan, and Europe. Prominent Korean scholars participate in international professional associations, such as a recent International Bar Association world conference in Singapore. Korean specialists, judges, and law professors were integral to the global norm-making enterprises of the World Bank and UNCITRAL in the field of insolvency law. Korean academics and practitioners participate in the OECD's Forums on Asian Insolvency Law, which bring together scholars and practitioners across Asia and the world to Seoul and other Asian capitals.[32] Korean commercial lawyers come back from advanced degree courses overseas and a year or two of foreign practice with exposure to various insolvency regimes. The numbers of participating lawyers, scholars, and academics in the area of insolvency are quite small, but they are strategically placed within Korean reform circles to act as intermediaries between global and local reformist impulses.

Fourth, there is a quasi-functional element to the Korean law reforms that are adaptive to a wider embedding economic environment. The closeout netting impact on the insolvency legislation demonstrates that, as the Korean financial system became progressively more tightly integrated into global clearing systems, Korea had to find a mechanism that would conform to the global norms that

regulate the clearing of financial transactions. Korea's solution was innovative. The functional problem that the legal innovation solved, however, was dictated by a global financial imperative.

It is in these contexts that the fifth and most dramatic form of foreign interventions must be situated. At the height of the financial crisis, the IMF and World Bank legal teams made explicit demands upon Korea to create a more effective insolvency system. Several of these were written into letters of intent from the government of Korea to the IMF. Others, such as the commitment to integrate three insolvency laws into one, were made subject to certain understandings. Beyond the formal conditions, for the most part, IFIs relied upon persuasion because their officials believed that the Korean government would respond in good faith and this will to reform would be reflected in a capacity to effect change.

We may therefore understand the influence of non-domestic forces on Korea as a combination of two sets of circumstances. The first were economic, legal, and academic conditions that created a general conduciveness towards legal changes that would simultaneously solve domestic problems and conform more closely to the global norms best exemplified by the US. The second were the precipitating events of the financial crisis, which certainly hastened and broadened the scope of reforms that had previously been envisaged by Korean lawmakers. It is no accident that the bulk of reforms occurred after the crisis, nor that the central tendency of reforms moved toward the US model and the global norms over which it had a disproportionate influence. As late as 2003, the IMF released an Article IV appraisal of Korea's economy that chided Korean lawmakers for not making further progress on consolidation of their laws, implicitly comparing them with US law before its three bankruptcy acts were unified in a single bankruptcy code.

Domestic politics

Let us now change the angle of orientation and appraise the Korean reforms from their domestic perspective. Here, too, however, we must broaden the context because insolvency politics have now been studied in numbers of countries and it is instructive to discover whether Korea conforms to patterns observed elsewhere.

In principle, all parties to commerce should have an interest in insolvency law: managers and owners; producers and consumers; creditors and debtors; trade creditors/suppliers and financial creditors; the state and private actors; and professionals. There are private interests in insolvency just as there are also public interests. But bargaining over the rules of the insolvency game is not merely a macrocosm of private interest negotiation. The "meta bargaining" over the rules that govern everyday bargaining has its own logic.[33] In most countries, the spectrum of actors involved in meta bargaining is a subset of those involved in everyday liquidations and reorganizations. Three differences are immediately obvious. First, there are problems of collective action in political mobilization, which characteristically work against trade creditors and small businesses. Second, the low probability of insolvency for any given business, coupled with a general aversion by business people to discussing corporate failure, produces a worldwide phenomenon

that generally results in the absence of owners and managers from lawmaking in this field. Third, while civil society groups and non-governmental organizations (NGOs) sometimes mobilize for individual bankruptcies, they are seldom involved in corporate lawmaking. Finally, in most countries and circumstances, insolvency politics are remote from public interest. They are seen to be technical and difficult subjects where specialists are best equipped to make decisions. This technical quality of insolvency reforms therefore generally produces a bias away from broader participation and offers professions, in particular, disproportionate influence. The question then arises as to what biases are introduced by the technical politics of an area of law that in fact has significant distributional implications.

To assay systematically the degree of bias in public participation in Korea's insolvency reforms, we have identified all the domestic and international actors who mobilized on any of the five issue areas discussed above (see Table 11.2), from which we draw several general conclusions.

First, several groups of actors are constant across all issue areas. In every case, the MOFE, the Ministry of Justice, and the judiciary are actively involved in a variety of capacities—initiating reforms, taking responsibility for drafting of legislation, liaising with IFIs, negotiating with each other, managing the scope and direction of public participation. In every case, the legal complex[34] is also actively involved. The Korean case reinforces findings elsewhere that insolvency reforms are mediated, and sometimes dominated, by professionals—lawyers, judges, legal academics—who stand at the crossroads of public participation and government responsibility. Governments rely on these experts to filter foreign experiences, norms, and pressures and to adapt general policy concerns (e.g., the expediency of insolvency proceedings) to national circumstances. As insolvency law is thought to be technical and complex, this potentially privileges the technical authority of the legal complex.

Second, there are actors who are issue specific. Some are surprising. For instance, the legislature—the National Assembly—was not engaged on every issue, in part because some issues, such as a specialized insolvency court or the automatic stay, were debated and handled inside the legal complex, through exchanges among private lawyers, academics, and judges. Through its rule-making and advisory powers, the courts can operate independently of executive and legislative agencies. While the legislature always consulted with the courts, the obverse did not occur. It may also be surprising to observe that after the crisis IFIs were not universally involved in every issue area although their broad policy preferences are reflected in the general orientations of Korea's reforms. In part, direct IFI intervention was restrained for two reasons. On the one hand, as the years unfolded beyond the crisis, and Korea's economy rapidly regained its equilibrium, IFI leverage decreased until it amounted only to persuasion. On the other hand, IFI officials generally believed Korean policymakers to be responsive to international norms and thus did not require the degree of pressure IFI officials were inclined to exert in less responsive countries.

We observe also that two other forms of international influence are issue specific rather than generic, although in different ways. The TALP consultation funded by

Table 11.2 Actors in Korean insolvency reforms, 1992–2007

Actors	*Management control in insolvency*	*Specialized insolvency court*	*Expediency and transparency*	*Automatic stay*	*Payment and settlement system*
Supreme Court	Y	Y	Y	Y	Y
MOFE	Y	Y	Y	Y	Y
Ministry of Justice	Y	Y	Y	Y	Y
National Assembly / Judiciary Committee	Y		Y		Y
Korea Development Institute		Y	Y		
Lawyers: insolvency specialists	Y	Y	Y	Y	Y
Law firms					
Korea Bar Association			Y	Y	
Drafting team	Y	Y	Y	Y	Y
Insolvency law study group	Y	Y	Y	Y	Y
Law professionals	Y	Y	Y	Y	Y
Foreign lawyers in Korean practice	Y	Y	Y		
Central Bank/Bank of Korea					Y
Korea Securities Exchange					Y
Korea Bankers Association	Y		Y	Y	
Korea Federation of Industry	Y		Y	Y	
SME organization				Y	
IFIs		Y	Y	Y	Y
UNCITRAL	Y			Y	Y
ISDA					Y
Foreign private consultations (TALP)	Y	Y		Y	

SME, small and medium-sized enterprise; IFI, international financial institution; UNCITRAL, United Nations Commission on International Trade Law; ISDA, International Swap Dealers' Association.
Y, engaged in lawmaking on an issue.

the World Bank was bounded temporally, beginning in 1999 and informing revisions of statutory law through 2003. It therefore had nothing to say to the expediency and transparency reforms of 1998 and 1999, nor to the later emerging issues of financial closeout and netting. UNCITRAL's Legislative Guide had a more diffuse impact. While the Guide itself was not adopted by the UN General Assembly until late 2004, the chief drafter of Korea's comprehensive insolvency legislation, Professor Soogeun Oh, was also Korea's official delegate to UNCITRAL. He participated in all UNCITRAL discussions and was thereby thoroughly informed about currents of expert and national opinion on every principal area of substantive and procedural insolvency law. Moreover, the Ministry of Justice and Judiciary Committee of the National Assembly asked him to compare the prospective Korean legislation in relation to UNCITRAL's Legislative Guide. It can be said that no feature of Korea's insolvency law is inconsistent with either explicit recommendations or permitted variations in the UNCITRAL Legislative Guide.

Third, Table 11.2 also reveals what is common to insolvency politics in other advanced economies. The banking industry and big business are given places at the table. Their representatives were on the formal drafting committee of the comprehensive reforms. They are less privy to technical reforms being discussed inside the legal complex and potentially formalized by the courts. In contrast, trade creditors and small business have no direct representation and, at best, have their interests treated either through lawyers speaking on their behalf or by legislators who are sensitive to the concerns of these particular constituencies.

In Korea, a revision committee for a certain law reform is usually formed by the Ministry of Justice. The Ministry of Justice selects experts, usually academics, and representatives from interested groups. To minimize the possibility of resistance at later stages, the Ministry tends to call upon the groups most likely to be outspoken. In the reform of insolvency law in South Korea, trade associations, labor unions, or civil society agents did not play a meaningful role. The Korea Federation of Industry (an association of large firms) and Korean Bank Association were each asked to send a representative on behalf of debtors and creditors respectively. Although some interested groups, including an organization for small and medium-sized industry, showed interest in participation in the Committee, they were not invited because of limitations on the size of the committee. Later, an organization for small and medium-sized industry made a written policy suggestion, which was reviewed by the committee. Only a few interested groups submitted any suggestions. The principal problem was that the people from invited interest groups were not experts in the field. Even though they were invited to the Committee, it was not certain whether they argued successfully for their interests. Further, to gain consensus and support among interest groups, the first draft of the bill was publicly announced and the call for the comments was made.

Among these actors, we can observe several fault lines that cut across the political landscape. The first arises out of professional epistemologies.[35] As augurs of the financial crisis loomed, and in its subsequent ripples, economists and lawyers differed sharply over the diagnosis of the problems and the prescriptions that would remedy them. Economists believed that law, lawyers, and judges stood

in the way of efficient processing of cases and certain liquidation of companies that had no hope of rehabilitation. For instance, in response to a perceived failure of judges to take the hard decision to liquidate companies, economists at the Korean Development Institute designed an "economic criterion test" that would mandate liquidation, thereby reducing judicial discretion. At MOFE's behest, this was enacted in the initial wave of 1998 amendments. More generally, economists at MOFE thought of law as an instrumental lever that might recalibrate markets somewhat analogously to interest rates adjusted by central banks.

Lawyers, in contrast, disagreed both with the diagnosis that the failures of Korea's bankruptcy system should be laid at the door of lawyers and judges, and with the prescription that frequent statutory amendments could quickly produce a new and more satisfactory legal "equilibrium." For the legal complex, many problems arose from the failure of the banking sector to function responsibly, to make loans on financial rather than non-economic criteria, to monitor loans, and to resist governmental interference. The law does not function as a lever that can be pulled to obtain a quick and certain result. Every amendment introduces uncertainties and indeterminacy.

This divide in disciplinary analysis substantially corresponded with a second fault line that put MOFE at odds with the Ministry of Justice. Korea's astonishing path to economic development had been substantially guided by the sophisticated technocrats in MOFE and its predecessor agencies. When major companies got into trouble, government agencies had long been accustomed to solving their problems administratively. Sometimes, banks were compelled by the government to lend more or change the terms of their loans. At other times, takeovers by stronger companies were forced upon weaker companies. In contrast to MOFE, the Ministry of Justice was a weak cousin in the government. Its purview was narrow and its powers limited. MOFE officials looked upon their Justice counterparts from a historically conditioned position of superiority. In part, this derived from considerable skepticism among economist technocrats that law had the capacity to regulate markets without their guiding hand. This tension revealed itself repeatedly in competition between the two ministries over which would take the leadership in responsibility for insolvency reforms—and which would therefore shape the content of the law itself.

The IFIs did not have a direct channel to the Ministry of Justice. As the Ministry of Justice had nothing to ask the IFIs to do for it, the IFIs were strangers to the Ministry of Justice. It did not take IFIs as working partners, nor was it clever enough to use IFIs as free mercenaries. For the most part, IFIs seemed to be influenced by the information provided by MOFE, to which they were closer in any event.

A fault line also existed between MOFE and the courts. In Korea's remarkable rise from a third- to a first-world economy, the courts had played a constrained role. Up to and beyond the crisis, MOFE officials doubted that courts had the expertise or the probity to manage restructurings of large numbers of enterprises, especially those that were industry leaders. From their vantage point, MOFE officials observed judges who were slow, sometimes corrupt, often incompetent,

and too often inefficient. From the opposite viewpoint, judges saw officials who had little real idea of what law could do, and who wanted little competition for regulation of the economy.

In this triad of intragovernmental competition, the Ministry of Justice and the courts had their own rivalries. In Korea's fierce competition for entry into the legal professions, on average, the highest ranking lawyers went into the judiciary, and the next rank was recruited to the public prosecutor's office. But actual power in the legal system resided not with judges but with prosecutors. Moreover, prosecutors exercised a measure of public leadership because many social problems brought prosecutors to the fore, not least corruption among politicians. Yet, while prosecutors complained about judges, the latter frequently criticized the former for the ways in which they handled cases.

The crisis compelled judges to look at themselves in a new light. Before the crisis, judges lived in an isolated and bounded world. They did not exercise public leadership, and there were few opportunities for them to be concerned or blamed about major social interests. Blame might be leveled at a single decision, but judges did not attract the attention of the public nor its threats.

The crisis changed this blinkered orientation. Courts came to see that they were handling cases that had an influence on the entire country. But as they stepped out on to the public stage, they were also more exposed to public critique, for instance on how efficiently they handled corporate restructuring. They began to comprehend an institutional interest in the national matrix of power, to view themselves as potential contenders in the national power elite. At the same time, the private market for senior retired judges was also constricting as the private profession expanded. Their career interests therefore aligned more fully with institutional development. As private career opportunities shut down, public institutional interests opened up. Now, judges began to show an interest in enlarging the regulatory pie and their control over it, just as they were also happy to see the domain of private legal services expand. In sociological terms, they envisaged expanding their "jurisdictional rights" over more extensive and more consequential terrain in the economic landscape.

Something of a fault line also existed between MOFE and the bankers on the one side, and lawyers and judges on the other. Korea's financial industry had been closely controlled by the government, so much so that foreign consultants questioned whether a viable private banking system had fully matured before the crisis.[36] After the crisis, as the government moved swiftly to stabilize the banking system, government regulators effectively became major stockholders in many banks, thereby effectively retaining a strong role in their governance. At the very time, therefore, that IFIs were preaching privatization, the government hand remained quietly in place behind many leading financial institutions. MOFE and the private financial sector preferred to find fault in the insolvency system in others, not themselves. Across the fault line, many private lawyers and legal academics resented finger-pointing that laid insolvency woes at the door of the legal system when it seemed obvious to them that bankers bore more than their share of responsibility. As we have seen, on several issues, financial creditors aligned themselves against lawyers and judges, not to mention debtors.

Conclusion

From 1992 until the present, the Korean insolvency system went through multiple cycles of reforms. In the years following the crisis, these came rapidly, and for a time, annually. These cycles may be understood as recursive, alternation of activity between enactment and implementation, between law-on-the-books and law-in-action.[37] These cycles should be characterized as neither domestic nor global. To varying degrees, they involve an admixture of both. The Korean reforms reflect three patterns of lawmaking activities: (1) cycles of substantially domestic lawmaking in a global context; (2) iterations of global norm-making that have national consequences; and (3) the mutual engagement of global norm-making and domestic reforms.

Recursive lawmaking is driven forward by several mechanisms, each of which is apparent in Korean insolvency reforms. Lawmaking, by its very nature, is *indeterminate*, opening up uncertainty of meanings and outcomes, producing inconsistencies within and between areas of law, and often revealing gaps that can be exploited in practice. Much of the struggle over a reduction in judicial discretion through an economic criterion test was intended by economists to reduce indeterminacy, but its results were perverse and required further rounds of lawmaking to forestall the unintended consequences.

Cycles of reform are often driven forward by *mismatch* between actors in practice and those in lawmaking. While we have not been able to expand upon this here, a notable case in point occurred when MOFE, over the objections of lawyers, sought to create a pre-packaged form of corporate workout[38] that courts would conform to without full judicial proceedings. As lawyers were heard but not heeded in this reform, they effectively nullified it by refusing to use it in practice on the grounds that it was impractical.

Contradictions also get internalized in law reforms when conflicting parties to reforms are unable to produce a real political settlement. Instead, the law builds in inherently contradictory tendencies that make it unstable in practice. We observe an example in the relationship between the IFIs and the courts in Korea. On the one hand, the IFIs were ideologically committed to the devolution of state regulatory powers to markets with the correlative emergence of courts as primary arenas for market restructuring. Yet IFI relationships in Korea were much stronger with MOFE than with the Ministry of Justice. They were therefore torn between listening to MOFE's insistence that courts were not yet ready to handle heavy responsibilities for market regulation and their own instincts that lawyers and courts, properly developed, were a better site for economic dispute settlement and corporate rehabilitation.

Finally, lawmaking invariably involves *diagnostic disputes*. In Korea, these tended to be systematic epistemologies borne by competing professions. It is noticeable that economistic diagnoses vied for ascendancy in the late 1990s but, after they were discredited by unsuccessful reforms, the government increasingly relied on the legal complex for its diagnosis of weaknesses in the system and for the prescriptions that would remedy them. Some strains of diagnostic tension also

existed between IFIs and domestic reformers, the former relying on evaluations that pointed to solutions that adhered to global norms, whereas the latter produced solutions they believed appropriate for the particularity of Korea's own situation.

The settling of reform cycles in Korea and elsewhere depends on the resolution of these four mechanisms. Until indeterminacy is narrowed, contradictions are resolved in political agreements, actor mismatch is acknowledged as an impediment to implementation, and diagnostic struggles are revealed for their prescriptive consequences, cycles of reform are likely to recur with all the instability and uncertainty that they produce in law and markets. The more fully lawmaking is embedded in global contexts, the more difficult this may be to manage in domestic lawmaking, especially in a financial crisis where international actors may be at their strongest.

If domestic law reforms cannot be explained without understanding the dynamics of recursivity, neither can the insolvency reforms in Korea be understood without situating them in a wider struggle.

Korea's insolvency reforms were not only about insolvency. They are about the restructuring of the Korean state *vis-à-vis* the market.[39] We have alluded to the dominant role of the finance ministries and agencies in leading Korea's state development model of economic growth.[40] By the mid-1990s, however, both Korean and foreign analysts concurred that this model might have run its course.[41] The crisis gave IFIs fuel to preach the gospel of privatization, just as it also demonstrated to lawyers, judges, and courts that they might emerge from under the shadow of the powerful executive agencies that had steered the economy.

The insolvency reforms were yet another arena in which the restructuring of the state worked itself out, ironically enough, in this case, over the restructuring of corporations that had been enabled by the state. For the courts to shoulder responsibility for major corporate reorganizations, it required that MOFE pull back from its activist meddling in corporate affairs. That MOFE was reluctant to do so can be seen in several respects. From 1998 to the present, MOFE sought to construct ad hoc agreements, out-of-court arrangements, and even an out-of-court procedure based on a statute (the Corporate Restructuring Promotion Act), all of which were intended either to relieve pressure on the courts or to keep economic power away from the courts, depending on where one's sympathies lay.

The drama of commercial law reforms in Asian countries must therefore be seen for the magnitude of its stakes. In the insolvency domain, and other areas of commercial law, the stakes are not only to do with law and markets. They reach to the structure and functions of the state itself, the extent to which it will steer or drive the market, the degree to which executive agencies will yield power to courts, and the manner in which governance will devolve elsewhere in society.[42] In Korea, all the major parties to insolvency reforms recognized that these were the stakes behind the legal change. At once, they brought into the same arena of conflict competing professions, differing epistemologies of institutional regulation, changing career trajectories and opportunities, shifts in jurisdiction over areas of work and, most importantly, shifts in power to manage not only companies but economies.

It is also appropriate to ask how representative bankruptcy law was of commercial law reform more generally in Korea. Was its relation to the global typical or

atypical of other areas of economic law, most particularly the Commercial Code? In fact, bankruptcy law was exceptional in its exposure to global influences. More than any other area of commercial law, it came under simultaneous domestic and foreign pressure. Almost at the same time as the bankruptcy reforms, the Commercial Code was amended many times.[43] The series of reforms in the Commercial Code, however, were initiated by local scholars in 1995 without any pressure from IFIs. Even after the crisis in the late 1990s, the demand from IFIs focused only on the rights of shareholders and the liability of directors, which were thoroughly discussed in academic circles long before the crisis. Hence, the interaction of foreign pressure and domestic pushback are distinctive to bankruptcy law.

We conclude with an observation or two about the metaphor that informs this book. "Pushing against" globalization has the merit that it questions the implicit premise of hyper-globalizers that legal change emanates predominantly from the global center. Yet this metaphor itself is premised on a dynamic of action versus reaction—that one party (a global actor) is pushing for something, while another party (a domestic lawmaker) is pushing back. Insofar as that dynamic resists the easy slide to inexorability that stalks some theories of globalization,[44] this is a useful corrective.

Nonetheless, we should remain alert to other dynamics. For instance, Dezalay and Garth,[45] among others, have shown that national law reforms often involve domestic actors who seek global allies in order to compensate for their political weakness at home. "Palace wars" get internationalized. We might therefore expect that Korean judges would welcome the ideology espoused by IFIs that devolves greater powers to courts and judges,[46] just as Indonesian reformers welcomed the IMF's bold effort to create a viable, competent, powerful, and independent commercial court. Rather than "pushing back," domestic reformers "pull" global actors into the local fray.

Or we might consider another metaphor altogether. Globalization of law could be seen as a general raising of temperature around an issue. Countries experience a common heating up of attention to insolvency, often for reasons that are common to them all. Their engagement with the issue may be informed through epistemic communities that span frontiers and bridge divides between advanced and developing economies. Their own bankers and corporations alert local lawmakers to problems they must solve as they encounter similar problems inside their countries to those manifest elsewhere, or they must have ways to deal with commercial relationships that cross borders. Sometimes, countries manage to insulate parts of their legal system from this overall rise in temperature. As often as not, however, a common movement takes place so imperceptibly that its currents can scarcely be discerned. Flows of ideas, networks of scholars, international organizations of professionals, and transnational links of legislators and judges might be captured by images that "pushing" and "pulling" might not fully connote.

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