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Abolition? or Permanent Legislation? Recent Discussions on the Corporate Restructuring Promotion Act*

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Abstract

The sixth Corporate Restructuring Promotion Act (CRPA) was re-enacted as a temporary law effective for five years on October 16, 2018. As an out-of-court debt restructuring scheme, CRPA procedure is governed by the principle of majority or super-majority, not unanimity. Thus, under the CRPA, the claims of the dissenting creditors are subject to a restructuring plan when the council of financial creditors adopts one. Dissenting financial creditors who do not wish to be bound by the resolution can demand that their claims should be purchased. If they do not exercise this right of appraisal, they must follow the restructuring plan, according to which they may be forced to extend additional financing to the distressed company.

Out-of-court restructuring schemes are still important because they can contribute to the early and preventive corporate restructuring. Furthermore, most distressed companies prefer out-of-court proceeding to a formal insolvency procedure supervised by the courts, because it can have a relatively minimal impact on the credit rating and trading reputation of the distressed company. CRPA procedure can also hinder the opportunistic behavior of creditors, which is the main problem of the workout procedure governed by the unanimity principle. The social harmfulness of the CRPA has not yet been proved. The CRPA increases the restructuring options from which the distressed companies can choose.

Therefore the CRPA should be maintained and made as a permanent law instead of being abolished, and some amendments do need to be added. To strengthen the fairness of the procedure and the private autonomy of creditors, a process of confirming restructuring plans governed by the courts should be introduced, and any additional financing should be left to the voluntary wills of the creditors. Finally, to promote new financing in the CRPA procedure, the protection of additional voluntary financiers should be reinforced.

KEY WORDS: Corporate Restructuring Promotion Act, court's adoption of restructuring plan, extending new credit, preventive restructuring, right of appraisal

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I. Introduction

There are three types of corporate restructuring schemes in Korea: 1) workout negotiation; 2) administrative proceedings under the Corporate Restructuring Promotion Act (CRPA); and 3) rehabilitation proceedings under the Debtor Rehabilitation and Bankruptcy Act (DRBA).

The CRPA was first enacted as a temporary law in 2001 during the aftermath of IMF shock in 1997, to effectively cope with the ongoing problems of restructuring distressed companies. Since then it has been abolished due to the expiration of its term and re-legislated as a temporary law with some amendments several times.[1] After the fifth iteration of the CRPA was abolished on June 30, 2018, the sixth version was re-enacted as a temporary law effective for five years from October 16, 2018. Every time the expiration date stipulated in the sunset provision of the CRPA approaches, the controversy about whether to repeal it or make it permanent resurfaces. Korean legislators unconvinced about either direction have repeatedly re-legislated the CRPA as a temporary law with some amendments, each time putting off making a definite decision for the future. Legislators thought that it would be desirable to maintain the status quo until the circumstances are ripe for a final decision with sufficient data. For this reason, a paradoxical phenomenon is now occurring in that the temporary law is coming close to becoming a permanent law in a real sense (after all, it has been in effect for more than 20 years). In order to resolve this paradox, the Korean Congress made the following subsidiary resolution when

1) The following table shows the brief history of the CRPA.

	date of enactment	period of enforcement
1st CRPA	2001. 8. 14.	2001. 9. 15. ~ 2005. 12. 31.
2nd CRPA	2007. 8. 3.	2007. 11. 4. ~ 2010. 12. 31.
3rd CRPA	2011. 5. 19.	2011. 5. 19. ~ 2013. 12. 31.
4th CRPA	2014. 1. 1.	2014. 1. 1. ~ 2015. 12. 31.
5th CRPA	2016. 3. 18.	2016. 3. 18. ~ 2018. 6. 30.
6th CRPA	2018. 10. 16.	2018. 10. 16. ~ 2023. 10. 16.

passing the sixth CRPA:[2)3)]

> "Within the period of the 20th National Assembly, the Financial Services Commission (FSC) shall assess the performances and utilities of the corporate restructuring system, and report to the standing committee under the Congress regarding the comprehensive implementation of the corporate restructuring system which includes *the unification into the DRBA, or the permanent legislation of the CRPA*, by collecting opinions of experts and related institutions about the corporate restructuring." (emphasis added)

Accordingly, the FSC has organized a taskforce that includes experts on the CRPA, and a comprehensive discussion on the Act is currently underway. I think it is necessary and timely to introduce this recent discussion for the following reasons. Until now the CRPA has played an important role in restructuring large companies, sometimes with good results (see, for example, Hyundai Engineering & Construction, Hynix, and SK networks), but it has also been criticized.[4)] In Korea, large-scale enterprises in financial distress tend to use out-of-court restructuring

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2) *See* the homepage of National Assembly of Korea, http://likms.assembly.go.kr/bill/billDetail.do?billId= PRC_S1S8Z0B8B2A8D1D0W4E8D3U3A6E2G7.

3) When passing the fourth CRPA, the Congress made the subsidiary resolution that the Financial Services Commission shall make a legislative proposal for permanent legislation of the CRPA by 31 December, 2014. *See* http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_H1X3Z1P2E2Y3N1L4H5U7N2Y1S3C7E7. Accordingly, the legislative bills which made the CRPA a permanent law with considerable and important improvements was proposed on 11 May, 2015. However, this proposal was not accepted while the fifth CRPA as a temporary law was enacted, which was made with a great deal of reference to the original proposal. *See* http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_Z1N5V0A5R1E1M1Q6X0I 6S3P3J1O3K8; http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_O1N6Z0Z2L1X8J1Y6N0Z3H 2J4L5K1K5.

4) Jun Sung-In, *Sijangchinhwajeok Gieopgujojojeonggwa Gwanchigeumyung Cheongsaneul Wihan Jeongchaekbanghyang [Policy Direction for Market-Friendly Restructuring and Liquidation of Government-Controlled Finance]*, presentation paper for Conference held on 18 June, 2018 about the CRPA, 21-26. (downloadable at https://issuu.com/pain2c/docs/20180618_____); Kim Jae-Hyung, *Gieopgujojojeong Chokjinbeobui Munjejeomgwa Gaeseonbanghyang [The Problems of CRPA and Direction for Its Improvement]*, 45 *Business Finance Law*, 53-66 (2011).

system first,[5] and there are few cases in which large companies have rebounded following court-supervised insolvency proceedings. Apart from whether this phenomenon is desirable, out-of-court restructuring processes account for a significant percentage of our corporate restructuring system. Therefore, whether to abolish the CRPA or not is an important issue affecting the overall structure of the Korean insolvency system. It may also have a considerable impact on Korea's corporate insolvency practices.

In Part II the general characteristics of the CRPA procedure in comparison with workout and rehabilitation proceedings under the DRBA will be discussed. The main contents of the recently enacted sixth CRPA and the common features and differences between it and DRBA procedure will be explained in Parts III. In Parts IV and V, the pros and cons of the CRPA will be analyzed and a desirable future for the CRPA will be proposed.

II. General Characteristics of the CRPA Procedure: Hybrid Workout

A workout is a procedure to resolve the financial distress of a debtor company by the creditors and the debtor reaching a voluntary agreement designed to restructure the debt (for example, by extending the original maturity date, reducing or exempting the debt, a debt-equity swap, etc.)

5) Recently between the two out-of-court restructuring schemes, distressed companies seem to prefer work-out to the CRPA procedure. Around 15 companies rated as companies with a sign of financial distress (C-rated companies) by the main creditor banks, only 5~6 companies applied for the CRPA procedure. Kim Seok-Ki, *Wokeuaut Gieopdeurui Hyeonhwang Mit Sisajeom [Current Circumstances and Implications of Workout Companies]*, The Korea Institute of Finance (2018).

Year	2009	2010	2011	2012	2013	2014	2015	2016	2017
A	70	44	16	22	30	17	18	15	15
B	64	37	12	12	18	5	11	5	6
B/A (%)	91	84	75	55	47	29	61	33	40

A : number of the C-rated companies out of the companies which are regularly monitored by the main creditor bank

B : number of the companies which applied for the CRPA procedure

outside the court-supervised insolvency proceedings. A workout agreement is a kind of contract, and thus debt restructuring can only be feasible with the mutual consent of the contract parties—the debtor and the creditors. Creditors who do not want to restructure their claims will not consent to a workout agreement, so their claims cannot be subject to restructuring. In short, workouts are governed by the principle of unanimity.

Rehabilitation proceedings under the DRBA are the formal insolvency process supervised by the court. In principle, the representative director of the debtor company is appointed the administrator under DRBA proceedings. A rehabilitation plan, which may contain various methods of debt restructuring, is usually made by the administrator and can be adopted at a stakeholders' meeting, which comprises creditors and shareholders. This resolution procedure is based on the principle of a majority or super-majority, not unanimity. The rehabilitation plan takes effect when the court authorizes it. Even if a rehabilitation plan is rejected at the stakeholders' meeting, the court can authorize it under certain requirements (a cramdown).

Administrative proceedings under the CRPA lie somewhere between a workout and rehabilitation proceedings under the DRBA. The CRPA procedure is an out-of-court debt restructuring scheme led by creditors, and thus has something in common with workouts. In other words, the CRPA procedure is rooted in the ability of a debtor company and its creditors to reach a private agreement. However, this procedure is governed by the principle of a majority or super-majority, not unanimity. Under the CRPA, the claims of the dissenting creditors may be subject to the restructuring plan without the court's approval, if the council of financial creditors adopts the plan. In this sense the CRPA procedure may be called a workout procedure backed up by mandatory law, or a hybrid workout.[6] This scheme addresses the shortcomings of the workout system

6) But there is an opinion that the CRPA procedure is not a voluntary restructuring process but a structured debt restructuring process based on detailed regulations and guidelines. Oh Soo-Geun, *Gieopgujojojeong Chokjinbeobui Unyeongwiltae(2007-2013)-e Daehan Siljeungyeongu [An Emprical Study On Realities of Implementation of CRPA]*, 16-1 Gyeongjebeobyeongu (2017). Considering the actualities of the restructuring practices, this opinion might hit the point. Like boilerplate terms as institutionalized contract terms, the

based on the unanimity principle. In workout negotiations, every single creditor has veto power and incentives to hold out and behave opportunistically for pursuing his or her own interests. Therefore, it may take a lot of time and money to conclude a workout plan. The CRPA makes the debt restructuring procedure faster and smoother while retaining the advantages of workout over the court insolvency system, particularly "flexibility" and "efficiency." Due to its intermediate character, however, the CRPA procedure also has some of the same problems as the workout and the court insolvency system. It can be even more disadvantageous and unfair to minor dissenting creditors compared to the court insolvency system,[7] and it can also be time-consuming and expensive compared to the workout procedure based on the voluntary unanimity of creditors. It may not be possible to achieve the two goals of efficiency and fairness at the same time in debt restructuring; in some cases neither goal is achievable, which leads some to argue that it is better to repeal a stop-gap system such as the CRPA procedure. The main reason for the controversy over the CRPA is that its intermediate character, halfway between a workout scheme and a mandatory legal procedure, makes it a double-edged sword.

III. The Main Contents of the Sixth CRPA

In this section I would like to introduce the main contents of the sixth CRPA and compare them to those of the DRBA.

1. The Scope of Application

1) Debtors

The sixth CRPA applies to all distressed enterprises regardless of the size of their debt, except for public institutions, certain banks and financial companies, and enterprises established under foreign law (CRPA Art. 2 subpara. 6). Previous CRPAs (the first through the fourth) were only applicable in cases where the enterprise was indebted to the financial

CRPA procedure is a kind of institutionalized workout system.

7) *See* IV. 2. 1) of this article.

institutions defined by the CRPA for more than KRW 50 billion. However, there has been criticism that there is no reason to make any difference in the application of the CRPA depending on the size of a company's debt; it has also been argued that the standard amount of KRW 50 billion was not set on a rational basis, but was merely an arbitrary criterion. As a result, the scope of the CRPA was expanded to all companies in the fifth CRPA. However, according to the Presidential Decree of the sixth CRPA (No. 29677, DATE Apr. 2, 2019, Art. 4, para. 2, subpara. 3) , a principal creditor bank can skip the credit risk assessment for any company with a credit exposure of less than KRW 5 billion, and any company not subject to such a risk assessment is also automatically exempted from the application of the CRPA.

Rehabilitation proceedings under the DRBA are in principle applicable to all types of insolvent debtors, including enterprises, public institutions, financial institutions, and foreign companies.

2) Creditors

The administrative procedure under the sixth CRPA is basically binding on all financial creditors (individuals or institutions, secured or unsecured), including foreign financial creditors, regardless of the amount of their claims. However, it does not apply to trade creditors and non-financial creditors. All financial creditors are in principle obligated to participate in administrative proceedings: They are members of the council of financial creditors (CRPA Art. 22), which has the authority to decide debts restructuring plan (CRPA Arts. 23, 24). However, the principal creditor bank can decide not to invite certain financial creditors (e.g., non-business creditors or financial creditors with small claims) to the first meeting of the council of financial creditors to achieve a quick and efficient restructuring (CRPA Art. 9, para. 5). Nevertheless, if a creditor who was not invited to the first meeting wishes to attend the meeting and thereby be bound by the restructuring plan, that creditor is allowed to attend (CRPA Art. 9, para. 6). In addition, the council of financial creditors can decide to exclude certain financial creditors from the application of the restructuring plan (CRPA Art. 23, para. 1, subpara. 3). In this case, the excluded creditors are not allowed to participate in the administrative proceeding.

The first through the fourth versions of the CRPA only applied to

certain specified financial creditors licensed under Korean law. Therefore, non-eligible creditors, such as foreign financial creditors and other creditors (e.g., pension funds, mutual aid associations) continued to retain their full claim amount and were not subject to any obligation under the resolution of the council of financial creditors. Under the fifth CRPA, however, the issue of unconstitutionality—an infringement of the principle of equality—was raised because the claims of certain financial creditors subject to the CRPA were treated unfavorably compared to those of other creditors, and such discrimination was argued to be unreasonable and arbitrary. In the fifth CPRA the scope of Act was therefore expanded to all financial creditors.

The DRBA rehabilitation proceedings are applied to all types of creditors. The creditors included in the rehabilitation plan are bound by this plan, and any claim not accepted by the DRBA or included in the rehabilitation plan can no longer be enforced against the debtor by the creditors.

Under the CRPA, the enterprise can continue to deal with the trade creditors and pay liabilities for them freely, because under the CRPA administrative plans are not binding on trade creditors.[8] Under the DRBA all (pre-petition) creditors are bound by the rehabilitation process, so in principle the administrator cannot pay liabilities for the creditors freely before the court authorizes the rehabilitation plan. In exceptional cases the administrator may redeem the debts, but only with the permission of the court. However, some pre-petition claims of trade creditors are classified as administrative claims (DRBA Art. 179, para. 1, subparas. 8–2) and can be repaid freely by the administrator from the insolvency estate (Insolvenzmasse) regardless of the rehabilitation plan.

8) When a big construction company enters into the CRPA procedure, most of the trade creditors of this construction company are small-scale and volatile subcontractors which are easily exposed to the insolvency risk of the big contractor. In this situation, the financial support and sacrifice of the financial creditors under the CRPA which are mainly the big banks or institutions can contribute to the prevention of the chain-reaction bankruptcy of the small-scale subcontractors. In other words, the wealth of financial creditors can be transferred ex-post to the trade creditors under the CRPA procedure for preventing bigger social losses.

2. Triggering Circumstances

According to the CRPA, main creditor banks should periodically evaluate the credit risks of their enterprises (CRPA Art. 4, para. 1). If an enterprise is found to be showing signs of financial distress, the bank should notify that enterprise of this fact and the reasons for it (CRPA Art. 5, para. 1):[9] The enterprise may then apply for the opening of administration proceedings under the CRPA (CRPA Art. 5, para. 2).

The opening of rehabilitation proceedings under the DRBA requires a finding of one of the following circumstances: 1) The debtor is no longer able to fulfill his or her financial obligations, which have come due without any serious hindrance to the continuation of his or her business; or 2) the debtor is likely to meet the requirements for bankruptcy proceedings.[10] Debtors can file to initiate rehabilitation proceedings when either of these two conditions are met, but creditors or shareholders can file only if they meet the second condition.

Signs of financial distress means any circumstances in which the enterprise is not able to fulfill its obligation in the normal course of business, such as repaying a loan borrowed from financial creditors without additional cash input from another source, in addition to ordinary borrowings (CRPA Art. 2, subpara. 7). A sign of financial distress is a similar concept to the situation that constitutes grounds for opening rehabilitation proceedings under the DRBA. However, the former concept may be broader, because a distressed company that can obtain an

9) Can the main bank bear liability for damages to the enterprise or other creditors of the enterprise, if the bank neglects the assessment or notification? There may be controversy about this issue. But tentatively I think that the main bank can only be liable to shareholders or creditors of the bank himself or herself for his or her own negligence, neither to the enterprise nor to the other creditors of the enterprise. Basically the representative director of the enterprise should know the detailed conditions of the enterprise and be responsible for the late restructuring to the creditors of the enterprise. *See* Lee Eun-Jai, *2016 Gieopgujojojeong Chokjinbeobui Juyo Naeyong [Major Contents of 2016 CRPA]*, 81 Business Finance Law, 13 (2017).

10) There are two grounds for the opening of the bankruptcy proceedings, ① inability to pay debts, and ② over-indebtedness (balance-sheet bankruptcy). Over-indebtedness constitutes the ground to open the bankruptcy proceedings only for legal person as a debtor, not natural person.

additional or exceptional loan can still qualify for the CRPA procedure but not for the DRBA procedure. The main bank in such a case also has some discretion in judging whether the enterprise is in financial distress, because the bank itself can decide to make an additional loan to the company upon its own rational business judgment. "A sign of financial distress" is therefore a more flexible concept than the requirement for the commencement of the rehabilitation process under the DRBA, and it is thus possible to restructure the debts of the distressed company according to the CRPA at an early stage. In other words, by establishing regular credit risk assessments and the early warning system, preventive restructuring and the avoidance of corporate bankruptcy is feasible under the CRPA.[11] An enterprise that receives notice from a bank is free to decide not to apply for administrative or rehabilitative proceedings under the CRPA or the DRBA, but if it fails to do so without just cause, the main creditor bank must take necessary measures to prevent the destabilization of financial markets by the credit risk of that enterprise (CRPA Art. 7). The notified enterprise may also file an objection against the main bank within 14 days from the date it received the notice of the bank (CRPA Art. 6, para. 1). However, the substantial meaning of this right to object may not be significant, because in such a case the enterprise would no longer have a way to challenge the bank's evaluation if its objection is dismissed.

11) But in actualities this early-warning system may not work well, because neither party – the main bank nor the debtor company – has sufficient incentives to rely on the CRPA procedure actively. Basically debt restructuring is a painful process for both the debtor and the creditors. The debtor company may have to fire workers, and the directors of the company may be dismissed and liable for their bad management. The CEO of the distressed company is not willing to be interfered with the management by creditors. And the creditors may have to accept the reduction of their claims. The executive director of the creditor company in charge of the decision about the previous loans may be held responsible for this non-performing loans. Although it is expected that they may suffer much more losses in the far future without immediate restructuring, they may prefer to stay still in fear of small risks likely to come in front of them immediately with debt restructuring. This is a kind of *myopic bias*. Moreover at the earlier stage, there exist much more uncertainties over the future of the distressed company and the overall economic situations, and many people tend to think that the distressed company can recover again without CRPA procedure (*optimism bias*). All these things can hinder timely and preventive restructuring. For promoting the creditor to take a positive action for restructuring, the sixth CRPA stipulates that financial institutions of slight negligence shall be in principle exempt from the administrative penalty (CRPA art. 34).

3. Stays against Creditor Collection Actions

A stay against creditor collection actions is an instrument that temporarily prevents creditors from enforcing their claims. It is essential for successful debt restructuring; without it, all individual creditors will try to obtain the repayment of their claims as soon as possible, thus rendering the debtor company's painstaking efforts to restructure futile due to a resulting lack of liquidity. Under the CRPA, after a debtor company files for a joint administrative proceeding, the council of financial creditors must decide whether to commence a joint administrative proceeding (CRPA Art. 9, para. 1). When the main creditor bank notifies the other financial creditors that the first meeting of the council to determine whether to commence the joint procedure is to be convened, it may request that financial creditors suspend the exercise of their financial claims until the meeting is concluded (CRPA Art. 9, para. 3). During the first meeting the council of financial creditors can decide to commence joint proceedings and suspend the exercise of financial claims for a maximum of four months from the date of the commencement of the joint administrative proceeding (CRPA Art. 11, paras. 1, 2).

Under the DRBA, prior to the opening of the rehabilitation procedures the court can order the temporary suspension of proceedings initiated by creditors if an application is filed to commence rehabilitation procedures. And an enforcement process initiated by individual insolvency creditors is suspended from the time the court orders the commencement of rehabilitation procedures.

Under the DRBA any individual enforcement process that continued in violation of a court order is in principle null and void *ab initio*, whereas under the CRPA mandatory enforcement by financial creditors that continues despite the main bank's request or the resolution of financial creditors is not void per se. The main bank can only claim for restitution (CRPA Art. 9, para. 4), and the council can claim for damages against the financial creditor who violated its resolution. These differences are results arise, because the CRPA procedure shares some of the characteristics of a workout, which is in principle a private agreement between creditors and the debtor.

4. The Procedure of Making a Restructuring Plan

Once the joint administrative proceeding under the CRPA begins, the principal creditor bank should create a restructuring plan, taking into consideration the results of the due diligence review on assets and liabilities of the distressed company conducted by professional institutions (CRPA Art. 13, para. 1) and consulting with the distressed company. Any such restructuring plan must include a scheme for allocating losses to the parties significantly responsible for the financial distress of the company (CRPA Art. 13, para. 1), and may include the following features: 1) adjustment of the financial claims; 2) providing new credit; and 3) a self-improvement plan for the company under joint administrative proceedings (CRPA Art. 13, para. 2).

The principal bank should submit the restructuring plan to the council of financial creditors, which then has the choice to adopt the plan by consent of those financial creditors who hold at least three quarters of the total amount of financial claims. If a single financial creditor holds more than three quarters of the total amount, the consent of at least two-fifths of all financial creditors in the council, including the former single creditor, is required for the resolution of the council[12] (CRPA Art. 24, para. 2; Art. 23, para. 1, subpara. 4). The debt adjustment (extension of the original maturity date, or reduction or exemption of the debt) according to the restructuring plan becomes effective from the time that the company is informed of the council's resolution (CRPA Art. 17, para. 3). After the resolution, the council should make an arrangement with the debtor company under a joint administrative proceeding upon the implementation of the restructuring plan (CRPA Art. 14, para. 1).

Under the DRBA, a rehabilitation plan may be prepared early, prior to the opening of the rehabilitation procedure (a pre-packaged plan). Creditors who hold claims amounting to at least the half of a debtor's total obligations or a debtor who obtains the consent of such creditors can submit a rehabilitation plan to the court in advance, even at the same time

12) According to this requirement, any single creditor is prohibited from taking unilateral action in the course of making restructuring plan.

as filing the application for insolvency. When rehabilitation proceedings start, an administrator is appointed by the court and a stakeholders' meeting is held soon after. The administrator does not have to submit his or her own rehabilitation plan if the court permits it, and creditors can agree to the pre-packaged plan in advance before the stakeholders' meeting is held. Once the stakeholders adopt the prepared plan, the court can authorize and implement it promptly. The rehabilitation plan takes effect upon the authorization of the court.

The procedure of making a restructuring plan under the CRPA is similar to that of making and authorizing a pre-packaged plan under the DRBA in that creditors are mainly involved in making such plans, and the promptness and efficiency of the procedure are emphasized. However, there is a significant difference between these two procedures in that the court is not involved in making and implementing the restructuring plan at all under the CRPA.

5. Additional Financing Commitment: Restructuring Loans

Providing fresh money is the key to successfully rehabilitating a company suffering from financial distress. The council of financial creditors can decide to provide additional credit to the distressed company, and the restructuring plan can include financial creditors' commitment to provide new credit. The resolution of the council of financial creditors binds all of its members. In principle, new loans are provided in proportion to the amounts of the claims made by the financial creditors (CRPA Art. 18, para. 1). If any member who does not wish to lend extra money votes against the resolution, he or she can claim for purchasing his or her financial claims against the main bank and other consenting creditors. If the member does not exercise this right of appraisal, he or she shall be deemed to have consented to the resolution of the council even if he or she votes against it (CRPA Art. 27, para. 1) and shall be bound by the plan, although the resolution of the council cannot replace the loan contract itself between the debtor and the creditor. The debtor company can demand additional credit from the financial creditors only after the loan contract between the distressed company and the financial creditors bound by the resolution of the council is concluded (CRPA Art. 18, para. 4). When the creditors do not

actively participate in negotiations with the debtor and the loan contract is not concluded due to their reluctance, they may be liable for damages based upon the breach of the implied duty of good faith and fair dealing to the debtor company. The council of financial creditors can also resolve to impose a penalty on creditors who do not follow the resolution regarding additional financing (CRPA Art. 23, para. 1, subpara. 9). The council can also determine in advance how to apportion the losses suffered by the creditors who provide the new loan among the creditors who do not provide the new loan, if the council resolves to provide additional credit (CRPA Art. 18, para. 3).[13)]

Such restructuring loans may enjoy a preferential right to be repaid, subordinate to secured loans but prior to the claims of other financial creditors on the council (CRPA Art. 18, para. 2), but this restructuring privilege is incomplete for the following reasons. First, a lender can assert priority over other financial creditors who are members of the council but not over secured creditors or trade creditors. Second, if an out-of-court restructuring trial fails and the distressed company goes into rehabilitation or bankruptcy proceedings under the DRBA, such priority can no longer be maintained. The restructuring finance provider's relative priority over other financial creditors can be maintained under the rehabilitation proceeding only if all of the financial creditors concerned enter into a contract regarding such relative subordination (DRBA Art. 193, para. 3).[14)]

Under the DRBA proceedings, claims for funds borrowed by the administrator in order to manage the debtor's business after the

13) Can the resolution of the council replace the loss apportionment contract between the financial creditors? There might be some debate on this matter. I think the council's resolution itself may be the loss apportionment contract between the creditor who provides new credit and the creditor who does not, if the terms of the resolution is sufficiently definite on the essential issues about the loss apportionment (the grounds, ways, amount of the loss shared). According to my opinion, the creditors who provided further loan may claim for the specific performance of the duty under the council's resolution against the creditors who did not provide new credit.

14) Depending on the individual and specific circumstances, can we acknowledge *the implied subordination contract* among financial creditors who participated in the CRPA procedure? I think that acknowledging such implied terms in the insolvency process is not desirable, because it can undermine the certainty and stability of insolvency process and engender frequent legal disputes.

rehabilitation procedures commence, or by the debtor with the permission of the court after the application is filed, are classified as administrative claims and guaranteed priority (DRBA Art. 179, para. 1, subparas. 5, 12). Such financing providers are also granted top priority among other administrative claimants (DRBA Art. 180, para. 7). In actual insolvency practices, however, such post-petition financing to the debtor company is not frequently observed, despite these privileges. Creditors are reluctant to extend additional credit and the main methods of debt restructuring under the DRBA proceeding are the debt-equity swap or the reduction and exemption of the debt. This is because many companies that go into a DRBA rehabilitation procedure have already gone through a workout or CRPA procedure before and the out-of-court restructuring effort failed. Companies in rehabilitation proceedings are likely to be in a worse situation than those undergoing a CRPA procedure; as a consequence, many companies that go into rehabilitation proceedings are likely to be found to be irrecoverable from the viewpoint of financial creditors. This problem is mainly due to the current insolvency practices or business customs of financial creditors (workout first, DRBA second), not to the flaws of the legal systems themselves.[15)]

6. Opposing Creditors' Right to Appraisal

If a financial creditor dissents from a council's resolution to commence joint management, make a corporate improvement plan, adjust the financial claims, extend additional credit, etc., that creditor, who presumably does not wish to be bound by the resolution, can demand that the remaining consenting creditors buy out his or her claims (CRPA Art. 27, para. 1). The purchase price shall be determined by an agreement between the dissenting and consenting creditors, and should be at least as high as the value that the dissenting creditors will get when the company is liquidated (liquidation value: CRPA Art. 27, para. 3). If no agreement is reached with regard to the purchase price, either the dissenting or the

15) However, the current DRBA also has some problems too. The super-priority of the post-petition finance provider extinguishes if the company goes into the bankruptcy proceeding. This loophole needs to be amended to activate post-petition financing.

consenting creditors may file a petition for mediation by the Mediation Committee (CRPA Art. 27, para. 5). If any participant in the mediation objects to the decision of the Mediation Committee, he or she is entitled to petition the court to amend the decision (CRPA Art. 32, para. 3). In other words, the court has the final authority to determine the purchase price, if there is a disagreement about the price of the claims. If the dissenting creditors and consenting creditors reach an agreement, they can have the distressed company under the CRPA procedure—or the third party—purchase the claims of the dissenting creditors (CRPA Art. 27 para. 4). However, in most cases distressed companies cannot afford to buy such claims. As a result, consenting creditors are likely to bear the additional burden of buying the claims in addition to providing new loans. Unwilling consenting creditors who do not have enough money may be forced to buy the claims.

Under the DRBA procedure, the dissenting creditors do not have a right to an appraisal, but before authorizing the rehabilitation plan the court should examine whether a proposed plan is fair and equitable and guarantees at least the liquidation value to the insolvency creditors. A screening process such as this, conducted by the court, protects the interests of the dissenting creditors.

7. Judicial Review

Under the CRPA procedure, financial creditors or a distressed company can file suit to revoke the resolution of the council of financial creditors with the court if the resolution has procedural defects such as violation of the CRPA clauses about convening a council meeting or the voting methods used in such a meeting (CRPA Art. 25, para. 1); they may also file a suit to revoke a resolution of the council on the adjustment of financial claims or additional financing if said resolution has a substantial defect such as a violation of the CRPA clauses regarding the fair and equitable adjustment of financial claims or fair loss apportionment among financial creditors (CRPA Art. 25, para. 2).

As was discussed in Part III 6. above, the CRPA allows for judicial recourse to determine the purchase price of dissenting creditors' claims, but

it mandates the prior recourse to mediation by the Mediation Committee.[16] Creditors can therefore only file suit against this mediation decision with the court.

Under DRBA proceedings, creditors can file an immediate appeal against the court's decision on whether to authorize the rehabilitation plan if the decision or the plan has a procedural or substantial flaw. Creditors who dissent to the rehabilitation plan do not have the right to exit the DRBA procedure except to voluntarily sell their claims; therefore DRBA does not have a judicial screening system for the purchase price of dissenting creditors' claims.

8. Contractual Relationships: Executory Contracts

The CRPA does not have provisions for executory contracts, so under the CRPA procedure a distressed company cannot terminate an executory contract that turns out to be unprofitable. When the termination of a long-term and unprofitable contract is essential for the successful restructuring of the distressed company, it is better to go into rehabilitation proceedings under the DRBA in which the administrator can terminate the executory contract with the court's appoval.[17]

Some contracts may have a termination clause (*ipso facto* clause) that allows the one party to terminate the contract if the other party applies for the CRPA procedure. It is unusual for parties to a contract to want to

16) The Mediation Committee is comprised of seven members, each of whom is appointed by the Chief Justice of Supreme Court, the President of Korean Bar Association, the President of Korean Insurance Association, the President of the Korean Institute of Certified Public Accountants, the Chairman of the Korea Chamber of Commerce and Industry, and the Chairman of the Korea Federation of Banks respectively (CRPA Art. 29, para.2. and the Presidential Decree of the CRPA, Presidential Decree No. 29677, DATE Apr. 2, 2019, Art. 14, para. 1).

17) Under the CRPA procedure, the distressed company cannot terminate long-term and unprofitable contract unilaterally but can only reject the performance of contractual obligations. According to the Korean Civil Code, contractual creditors can claim for enforcing specific performance against the defaulting debtor. Therefore, under the CRPA procedure, trade creditors can claim for enforcing specific performance against the distressed company which cannot terminate the contract unilaterally. When trade creditors demand the compensation for damages, they are not bound by the CRPA procedure and thus can freely claim for enforcing it against the distressed company.

maintain their contractual relationship to another party in financial distress, because the distressed party may not be able to fulfill his or her contractual obligations in the near future. However, the exit of an individual from a contractual relationship based on the termination clause may endanger the efficient restructuring of the distressed company. An *ipso facto* clause, which allows the termination of the executory contract if the insolvency proceeding is initiated or filed for, may be rendered null and void in consideration of the purpose of the insolvency proceedings and the mandatory aspect of the insolvency law.[18] However, the termination clause under the CRPA procedure is likely to be valid, because under the non-insolvency stage, where the early and preventive restructuring is available, more weight needs to be put on the freedom of contract, the principle of private autonomy, and the binding force of the contract than under the mandatory, formal insolvency stage. In this respect, the CRPA procedure has some weaknesses with regard to efficient corporate restructuring compared to the DRBA procedure.

IV. The Pros and Cons of the CRPA

The pros and cons of the CRPA that have been discussed so far can be summarized as follows.

1. Advantages

1) Promptness, Flexibility, and Predictability

The CRPA procedure may be faster and more flexible than the formal, mandatory insolvency procedure. Unlike rehabilitation proceedings under the DRBA, only a limited scope of creditors—financial creditors—can participate in making the restructuring plan. To make the process faster, the

18) The Korean Supreme Court ruled that an insolvency termination clause is, in principle, valid (Supreme Court [S. Ct.], 2005Da38263, Sept. 6, 2007). However, this decision did not deal with the executory contract. Therefore, the matter of the validity of an insolvency termination clause in executory contract is still left undecided in Korean judicial precedents. For recent literature on this matter, *see* Kwon Young-Joon, *Dosanhaejijohang-ui Hyoryeok [The Validity of an Ipso Facto Clause]*, 25-2 BIGYOSABEOB, 749 (2018).

main creditor bank is entitled to narrow the scope of financial creditors eligible to participate in the CRPA procedure. The proceeding is then run at the initiative of the main bank, without needing the approval of the court. The ways of or requirements for convening, opening, and conducting a meeting of the financial creditors are simpler than those of formal insolvency proceedings. Financial creditors can insert various clauses into a corporate improvement plan (e.g., penalty clauses for the CEO of the distressed company) with the consent of the debtor company. Moreover, financial creditors need not worry if the court will approve their decisions or agreements. Creditors' opinions can be reflected more easily and directly through the council of financial creditors compared to the formal insolvency procedure. Under DRBA proceedings, a creditors council should also be established, but the council's authority is confined to offering non-binding opinions to the administrator or the court; insolvency proceedings are basically run by the administrator under the supervision of the court.

2) Continuing Business with Trade Creditors

Another big advantage of the CRPA procedure is that a distressed company can continue its normal and ordinary business with trade creditors as before. The same distressed companies might not be able to continue their ordinary business if they go into rehabilitation procedures under the DRBA instead of using the CRPA process; many trading partners of a distressed company may not want to keep doing business if it files for a rehabilitation procedure under the DRBA. *The stigma effect of the formal insolvency proceedings is still widespread in Korea*. When a debtor applies for insolvency, creditors become more anxious that they will not be able to collect on their claims and trading partners of the distressed company become more reluctant to make a new, post-petition contract with the company. For example, when a construction company or shipbuilding company goes into rehabilitation procedures, it becomes more difficult for the debtor company to secure a new construction or shipbuilding contract than before. Under the CRPA process, however, most distressed companies can continue the ordinary course of their business and maintain proper liquidity.

3) Extending New Credit

The CRPA has a very unique provision regarding the additional credit commitment of financial creditors. Based on the council's resolution and the loan contract between the debtor and the financial creditor, additional financing is often provided under the CRPA procedure. Financial creditors who do not want to provide another loan may be forced to do so by the resolution of the council. Though there may be some limits on the legal methods used to force financial creditors to take this step, most financial creditors bound by the CRPA cannot help but follow the resolution of the council. If they do not want to extend credit, they have only one choice: to exercise the right of appraisal and cease to be a financial creditor of the company, thereby exiting the restructuring procedure.

The DRBA, on the other hand, has no provision to force an insolvent company's creditors into further financing. and as discussed above in Part III.5, post-petition financing is not frequently provided under rehabilitation proceedings. Instead, the exemption of the debt in the DRBA plan is more frequently used than in the CRPA plan.[19)]

2. Weaknesses

1) Unfairness and Weak Judicial Control

The most serious problem with the CRPA is the risk of unfairness of its restructuring plan and process, particularly the unfairness of the procedure being unilaterally led by the main creditor bank[20)] and unfair treatment

19) The Korea Institute of Finance & Insolvency Law Center of Ewha Women's University, *Gieopgujojojeong Chokjinbeob Sangsibeobjehwa Bang-an [Ways for Enacting CRPA as a Permanent Law]*, 42-45 (2014) (downloadable at http://www.prism.go.kr/homepage/entire/retrieveEntireDetail.do;jsessionid=D68FDD698F1CA3D0BE4D088511AEA126.node02?cond_research_name=&cond_research_start_date=&cond_research_end_date=&research_id=1160100-201500003&pageIndex=19&leftMenuLevel=160). According to the survey data, in the CRPA procedure the cut back on the interest rate is usually implemented, but not on the principal of the financial debt.

20) For example, when the main creditor bank requests financial creditors to suspend the exercise of their financial claims until the end of the first meeting of the council (Art. 9, para. 3 of the CRPA), dissenting creditors do not have the right to appeal against such request. Only when the main bank demands - based on the resolution of the creditors' council - for the restitution of reimbursement which was received by dissenting creditors in violation of his

among financial creditors. This issue is related to the weak judicial control over the CRPA procedure. Promptness, flexibility, and predictability are advantages of the CRPA procedure from the viewpoint of the main bank, but these features are less favorable to dissenting creditors and other financial creditors who do not want to make further loans or any other financial expenditures because the CRPA provides insufficient protection to them. In so far as the CRPA is not based on the unanimity principle, it should also take fairness into consideration and provide sufficient protection to minor financial creditors whose opinions are not fully reflected in the course of the CRPA procedure. In this sense, the *mandatory purchasing scheme as to dissenting creditors' claims and forcing the financial creditors into additional financing seems problematic*.

Guaranteeing at least the liquidation value to the dissenting creditors for the purchase price of their claims may be insufficient protection for dissenting creditors. They may want to remain as financial creditors even if they do not agree with the council's decision. Furthermore, the real value of their claims may be higher than the liquidation value, as the distressed company, as a going concern, is likely to rebound soon after the debt restructuring is complete. It can be desirable for minor creditors who dissent to the debt adjustment under the restructuring plan to be bound by this plan, as a means of preventing individual opportunistic behavior. This is the basic reason why collective and mandatory proceedings are useful for the insolvency law, but it seems difficult to justify *depriving these creditors of their claims* by paying them only the liquidation value thereof.[21] The benefits of not having to provide further loans bound by the restructuring plan cannot justify such disadvantages. Consenting creditors have decided to extend new credit just because they thought that the additional financing would be more beneficial to the distressed company, and thus finally themselves too, than what would have happened if they had not provided

request (Art. 9, para. 4 of the CRPA), dissenting creditors may file a petition for the mediation by the Mediation Committee (Art. 29, para. 5, subpara. 5 of the CRPA). However, I think it might be simple and appropriate to introduce the *judicial appeal process* against the bank's request for temporary stay, on dissenting creditors' application.

21) From the viewpoint of consenting creditors, it is also problematic that unwilling consenting creditors who do not have enough cash should be forced to buy the claims of dissenting creditors.

additional credit. Consenting creditors who give additional loans are not doing unprofitable business nor giving a free gift for the sake of the distressed company: They are giving, and should give, a further loan for their own future profits. Therefore, as to new financing, dissenting creditors should be considered imprudent actors who missed the opportunity to maximize their own profits or minimize their own losses, not opportunists from the viewpoint of consenting creditors. We should impose penalty on opportunists, not on imprudent actors. Imposing a penalty just because of new credit is not extended thus cannot be justified. To promote the additional loan, it might be desirable to give top priority to the new financier (providing a "carrot"),[22] but it is questionable to impose a penalty on those who did not provide new credit (using a "stick"). Without sanction, the new investment that is essential for the distressed company might fall short. However, in principle the additional financing should be left to the voluntary will of the creditors in the financial market,[23] and such shortage should thereby be tolerated.[24] In a similar vein, it may be fairer and equitable that dissenting creditors be treated the same as consenting creditors (with regard to their non-secured claims, except for new financing)[25] in the restructuring plan if all other things are equal, instead of being forced to withdraw from the plan.

2) Government Intervention

Since its first enactment, the CRPA has been steadily criticized for its

22) I think that the introduction of the clause into the CRPA needs to be examined, which guarantees - in the formal insolvency process - the top priority to the creditors who gave additional loan in the CRPA process for promoting additional loan.

23) *See* Lee Eun-Jai, *supra* note 9, at 19-20.

24) If the additional financing has a real good chance of being successful, the consenting creditors will try to fill in this shortfall through their additional loan or borrowing more money from the third party. If the expected recovery rate of the additional loan is not high, the additional financing should not be provided forcibly. In such cases, it might be desirable that the distressed companies go into the liquidation process rather than the rehabilitation process. However, when such companies still need to be maintained in order to prevent big social losses from the liquidation (unemployment, regional recession etc.), government intervention may be desirable. Then, government intervention should be implemented thorough tax benefits, public funds etc. not forcing unwilling private banks to give additional loan.

25) Surely, the consenting creditors' priority about new financing should be preserved.

ability to be used as a tool for government intervention in corporate restructuring.[26] Such intervention may hinder voluntary decision-making by financial creditors and impede the growth of the private equity fund and mergers and acquisitions markets for sake of a continuous and preventive restructuring system. Financial supervisory authority can substantially influence such judgments whether or not the company concerned is showing signs of financial distress under the CRPA, although the CRPA grants the main creditor bank the authority to assess the credit risks of the distressed company. Because the bankruptcy of big companies can create significant social problems, which are burdensome and troubling to politicians, the government may use supervisory authorities to put pressure on banks or other financial institutions to over-maintain big companies. This creates a risk that companies that should be liquidated will continue to exist at the expense of financial creditors or public funds solely for political reasons ("zombie companies").

3) Imperfect Disclosure of Relevant Information

The joint administrative procedure under the CRPA is run at the initiative of the main bank concerned and other financial creditors. Therefore, other interested parties excluded from the council of financial creditors (workers, non-financial creditors, shareholders, and prospective investors) may not be able to easily access relevant information about the debt restructuring. Even among the members of the council of financial creditors, the relevant information in the main bank may not be sufficiently disclosed to other financial creditors. Accordingly, the credit assessment of the company and decisions about the debt restructuring can be made arbitrarily and with government interference. The risks of moral hazard of the debtor company and the main bank can become greater under the implicit collusion between the debtor company and the main bank.

However, the public disclosure of relevant information about the restructuring plan also entails some risks. Like formal insolvency proceedings, it can create unnecessary stigma. Secrecy can also sometimes be an important factor for successful mergers and acquisitions, so balancing

26) Oh Soo-Geun, Dosanbeob-ui Ihae [Understanding Insolvency Law], 351-352 (2008).

between these conflicting interests is desirable. In my opinion, the problem of imperfect disclosure should be handled through the legal liability of the representative director of the debtor company or the main bank, not through the introduction of a general clause about information disclosure into the CRPA, because the scheme of the liability for damages is more suitable and flexible for balancing and fine-tuning conflicting interests. The CRPA also has a post-disclosure system that requires the main bank to disclose the results of any assessment of the administrative procedure of the CRPA that has been going on for the preceding three years (CRPA Art. 16, para. 2). This clause ensures the transparency of the CRPA process to some extent.

4) Other Defects Compared to the DRBA

As observed above (Part III), the CRPA procedure has defects compared to the DRBA procedure in some specified circumstances. The claims of non-financial creditors are not subject to debt restructuring, so when the ratio of non-financial debts is large, the CRPA procedure is not suitable for efficient debt restructuring. Neither does the CRPA procedure work well when the ratio of individual financial creditors is large. In this case, negotiations among all financial creditors become more difficult than negotiations among institutional creditors. Nevertheless, the main bank cannot exclude such individual creditors from the council, because their claims constitute a large percentage of the total financial claims and the adjustment of their claims is essential for successful restructuring. In such cases the DRBA procedure may be more suitable. Furthermore, under the CRPA procedure a distressed company does not have the right to terminate unprofitable executory contracts, so when terminating a contract is essential for rehabilitating a distressed company, that company should choose DRBA proceedings.

V. A Desirable Future for the CRPA

What would a desirable future for the CRPA look like? Has this temporary law accomplished its historical tasks and now reached the end of its life, or should we make it permanent law because it is a useful tool for

out-of-court corporate restructuring? I think the answer is simple and straightforward. If the CRPA is socially harmful, we should abolish it; if it is not, we should keep it. But what if it is uncertain that the CRPA is harmful? It is a matter of making a decision under uncertainty. In such a case we need not reduce the number of our options *unless such option is proved to be socially harmful by the empirical studies*. The CRPA increases the restructuring options available to distressed companies. Rational and sophisticated companies can choose the most suitable option for themselves; the more choices they have, the more likely they are to make a better choice, *unless the additional options hinder the rational choice of the distressed companies (e.g. the social harmfulness of the CRPA)*. Most of the empirical studies about the CRPA procedure[27] have evaluated its performance positively, but some have come to the opposite conclusion[28] or have avoided giving an immediate answer. These studies have tried to compare only the total combined outcomes of the CRPA and the DRBA procedure into which *different companies* went, but the exact social losses caused by the CRPA are difficult to determine using this research method. We need to confirm whether the companies under the CRPA would have been better off if they had chosen the DRBA process instead. To achieve more exact evaluations, external factors outside the institution itself (i.e. the law) need to be excluded or equalized. For example, to evaluate the exact performances of the CRPA and DRBA systems, we should assume that under the DRBA proceeding *the same* company would have received *the same* new financing as it would under the actual CRPA proceeding and compare the *hypothetical* results under the DRBA with the actual results under the CRPA. Unfortunately, however, to my knowledge no such elaborate and thorough empirical studies have yet been conducted. In such circumstances—the social harmfulness of the CRPA has not yet been proved—we need not go so far as to abolish the CRPA. If there are flaws in the CRPA that are just a matter of its utility, not social harmfulness, amending them will be

27) *See* The Korea Institute of Finance & Insolvency Law Center of Ewha Women's University, *supra* note 19, at 15-45; Oh Soo-Geun, *supra* note 6, at 182-193.

28) Park Sang-In, presentation paper for a Conference on the CRPA: *Gichokbeob Ilmoldorae-e Ttareun Chinsijangjeok Bangsigeuroeui Jeonhwan Mosaek [Seeking a Transformation to Market-Friendly Restructuring after the Expiration of the temporary CRPA]*, 29-33 (June. 18, 2018). (transcript downloadable at https://issuu.com/pain2c/docs/20180618_____).

sufficient. Some of these problems might not be linked to the law itself, but to the people who use and implement the law. For example, the government intervention problem is a matter of social customs or disciplines rather than a matter of the law, and can thus be handled by interested parties actively filing a lawsuit.[29] In this sense we would be going too far if we abolished the CRPA just to ameliorate this problem.

It is also questionable that early & preventive restructuring and sufficient additional financing are feasible under a DRBA pre-packaged plan. Due to the stigma effect of formal insolvency proceedings, the representative director may be reluctant to file for a commencement of insolvency procedure, and creditors may also be reluctant to give additional loans to the distressed companies. It would be too hasty to repeal the out-of-court restructuring option before fully examining such stigma effects.

According to the results of a 2014 poll conducted by the Korean Institute of Finance on companies that were evaluated by a main bank as a showing at least one sign of financial distress in the preceding five years and their subcontractors, most of the subjects of the survey (around 90 percent of the respondents) preferred the CRPA procedure to that of the DRBA and evaluated the CRPA procedure positively.[30] If distressed companies admit the utility of the CRPA[31] and fear of going straight into formal insolvency

29) When banks extend new finance unreasonably under the government's pressure, or intervene in the management of a distressed company unduly, the shareholders of such banks need to claim compensation actively against the director of the banks. Also the stakeholders of the distressed company need to claim actively for the liability of shadow directors influencing the business of the distressed companies against the banks. Under this mechanism, the incentives of the players in the corporate restructuring will be less distorted by the government intervention or non-economic, irrational motivations.

30) The Korea Institute of Finance & Insolvency Law Center of Ewha Women's University, *supra* note 19, at 56-59.

31) However I am not sure if the CRPA will play an important role in the restructuring of distressed companies in the future as before. It may or may not. Nowadays financial creditors have become more diversified. In addition not only debt restructuring but business restructuring – productivity increase, organizational restructuring etc. - is also essential for a successful corporate restructuring. The main target of the CRPA procedure is making the debt restructuring procedure to be led by large financial institutions. When there are many diversified financial creditors, the CRPA procedure may not work well. Furthermore financial creditors are not experts in business restructuring, so it might be better to sell their claims to

procedure without going through the CRPA first, it is desirable to adopt a pragmatic position and pursue progressive reform rather radical change. We should not throw the baby out with the bathwater.

Along with making the CRPA a permanent law, however, some amendments must be added. First of all, a judicial screening system for the restructuring plan is needed.[32] As long as the CRPA procedure is valid on the basis of the majority or super-majority principle, the fair and equitable protection of dissenting creditors should also be seriously considered. With regard to judging what constitutes a fair and equitable result among the conflicting parties, the court is most well-equipped and experienced. We can think of two types of judicial screening, prior approval system and post approval system. In a prior approval system, the restructuring plan would take effect when the court approves it; in a post-approval system, the restructuring plan will take effect when the council adopts it, but dissenting creditors can appeal to the court. When prompt restructuring is of crucial importance or the legal relationships are not complex, as is the case with small enterprises, a post-approval system might be more desirable. It could be argued, by way of rebuttal, that such amendments might eliminate the merits of the CRPA—predictability, flexibility and promptness—and render it useless. But if we adopt the post-approval system, those merits could be maintained to some extent. So far as the unanimity principle does not govern the CRPA procedure, some decrease in flexibility and promptness for the sake of the fair protection of dissenting creditors cannot be avoided.

The clause about the creditors' obligation to extend new finance should be abolished. So far as the fair protection of dissenting creditors is guaranteed by the court, we need not force them to withdraw from the restructuring procedure and the consenting creditors to purchase their claims. Any such amendment could also contribute to controlling abuses of the CRPA, particularly excessive use for maintaining unpromising zombie

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the more sophisticated Private Equity Fund as soon as possible for successful restructuring rather than using the CRPA procedure. However it is not a matter as to abolish the CRPA or make it a permanent law.

32) Han Min, *Gieopgujojojeong Chokjinbeob-ui Jaeipbeobgwa Gaeseongwaje [The Reenactment and Future Challenges of the CRPA]*, 92 Business Finance Law, 113-116 (2018).

companies based on political, non-economic motivations. However, protections for the voluntary additional financiers should be reinforced. To promote voluntary additional loans in the CRPA process, the introduction of the clause into the CRPA needs to be examined, which guarantees that additional financiers in formal insolvency procedures have top priority.

If we introduce the court's control system to the CRPA procedure, the CRPA procedure and DRBA pre-packaged plans will more strongly resemble each other. Under the current insolvency practices, a distressed company may still prefer an out-of-court procedure to a pre-packaged plan because informal workouts have relatively minimal impacts on debtors' credit rating and trading reputation. When a company files for insolvency, the bank usually recognizes the allowance for bad debts at 100%, but in a workout procedure (including that provided in the CRPA) the bank usually recognizes approximately 50 percent or less. The debtor company also has a greater chance of obtaining financing under an informal workout, which also allows it to maintain its previous contractual relationships with trade creditors. Moreover, after filing for a rehabilitation plan under the DRBA, the stocks of the concerned company is designated stocks for administration in the KOSPI or KOSDAQ market, and investors have difficulty in trading the stocks of such companies. In workout procedures, however, such a designation is not made. Nevertheless, such asymmetrical practices between the workout and the formal insolvency process need to be reconciled, because there is no reason to discriminate between these two procedures so remarkably. Given an equal starting point, the CRPA and DRBA procedures can compete with and complement each other. Under the CRPA with court approval system, an insolvency court can have more chances and opportunities to develop professional abilities in corporate restructuring and develop the DRBA procedure accordingly. It may try to implement commercial practices and realities into the DRBA procedure and communicate with other experts more actively to ensure its social necessity and significance. The CRPA with a court-governed post-approval system still has advantages over the DRBA in that it can be initiated earlier[33] and implemented more smoothly[34] and rapidly, but it also has disadvantages in

33) *See* III. 2. of this article.

34) *See* IV. 1. 2) of this article.

that it may make it difficult to achieve thorough and sufficient debt restructuring and prevents debtors from terminating inefficient long-term contracts unilaterally.[35] Taking into account these advantages and disadvantages, distressed companies are free to choose the procedure that works best for them.

VI. Concluding Remarks

Early and preventive action is crucial to successfully restructuring distressed companies. The value of financially distressed companies as a going concern; like melting ice cubes, they can seriously decline and melt away once exposed to the heat of potential insolvency. For early and preventive restructuring, out-of-court procedures (a workout or the CRPA procedure) may work better than the formal insolvency procedure supervised by the court.

The CRPA may be suitable for early and preventive restructuring because it provides an early warning system in the form of the main bank periodically assessing companies' credit risk. Therefore, the CRPA in principle should be maintained as an options for restructuring financial debts and enacted as a permanent law, but it does need some amendments to strengthen the fairness of the procedure and the private autonomy of creditors, such as prior or post-confirmation of restructuring plans by the court and the removal of clauses about dissenting creditors' right of appraisal and creditors' duty of new financing. By competing with and complementing each other the CRPA procedure and the pre-packaged plan under the DRBA could evolve into a more efficient and equitable restructuring system.

35) *See* IV. 2. 4) of this article.