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EDITORIAL

Inauguration of the 'East Asian Association of Insolvency and Restructuring' and Recent Developments on Restructuring Schemes in Western Developed Countries

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Upon request from the Ministry of Economy, Industry and Trade (MEIT) of Japan, Nomura Institute of Capital Markets Research and I conducted research on *Business Restructuring Related Matters in Foreign Countries* interviewing experts including famous lawyers, judges, consultants and other professionals in the United States of America, the United Kingdom, Germany and France, then subsequently submitted a report to the MEIT on February 2011. Through the aforementioned research, we found that schemes and practices for rapid restructuring of ailing enterprises at early stages have been reformed dramatically to a large extent in these countries since the beginning of the 21st century.

For example, in the **United States**, Chapter 11 of the Bankruptcy Code has been the most useful tool to reorganise troubled companies since its enactment in 1978 (as amended in 2005 most recently) and a pre-negotiated or pre-arranged Chapter 11 process is now very popular in that a debtor and major financial creditors negotiate on the draft reorganisation plan and agree upon the plan in advance of the filing of petition for the Chapter 11 in order to conclude the process as soon as possible. Moreover, soon after beginning the process, the debtor company may sell its ongoing business with its assets or transfer it to a new owner by means of a Section 363 sale combined with or without stalking horse bidding. The new owner who purchased the debtor's business and business assets – which are free and clear from any encumbrance – starts its operation without intervention by a court, US Trustee, creditors or other former stakeholders. This can be seen in the recent GM case in 2009.

In the **United Kingdom** (England and Wales), successive law reforms regarding business reorganisation have been made since the beginning of this century to expedite business restructuring. Most recently, pre-pack administration, in which a debtor company and its major creditors negotiate on a proposed draft reorganisation plan that seeks to find a prospective buyer prior to appointment of an administrator, is becoming popular. The administrator, who must be a licensed insolvency practitioner, may conclude and execute a contract to sell the debtor's business and its assets to the buyer soon after appointment made by the board of directors of the debtor company. The administration is an insolvency proceeding under the Insolvency Act. An administrator may also be appointed by a court, a debtor or a floating charge holder.

In **Germany**, the Insolvency Plan proceedings for reorganisation of troubled corporations provided in the Insolvency Law of 1994 (which became effective in 1999) has been rarely used due to various reasons. The Federal Government publicised the draft Law named 'Law to Further Accelerate Company Reorganisation' in August 2010, and the draft law is expected to be adopted and become law by the end of 2011. The law is going to facilitate self-administration proceedings and an appointment of an administrator recommended by a debtor and creditors. These reforms may be useful for filing of a prepackaged plan at an earlier stage. The law will also enable shareholders' rights in insolvency plan proceedings to be changed and impaired and is expected to be helpful for debt equity swaps which should be conducted out of insolvency proceedings so far.

In **France**, a special administration (*mandataire ad hoc*) and a conciliation proceeding, in which an administrator or conciliator appointed by a commercial court consults and discusses with a debtor and its creditors about how to prevent bankruptcy, have been widely used since law reforms made in 1994 and 1984 respectively. In addition to these proceedings, the reformed Commercial Code of 2005 created a safeguard proceeding. Upon application of a debtor company, a commercial court appoints a judicial administrator to administer the proceeding. When the proceeding is undertaken, any collection efforts by creditors are stayed by moratorium. The debtor and the administrator jointly draft a reorganisation plan and it can be accepted if creditors who hold more than 75% of debts in value of all classes of creditors agree. Once the accepted plan is approved by the commercial court, the plan becomes effective. More than one class of creditors may be organised: a class consisting of trade creditors or financial creditors. The Reformed Commercial Code that was enacted in 2010 and is effective since March 2011 provides for an accelerated financial safeguard

proceeding which is to affect financial creditors only by means of debts forgiveness and debt equity swaps without impairing trade creditors' rights.

On the other hand, in East Asian countries including **China, Korea and Japan** whose economic size may be equivalent roughly to the US and EU, remarkable developments on insolvency laws and schemes have been made from the beginning of this Century and we three countries' experts cooperated to establish the 'East Asian Association of Insolvency and Restructuring', whose website is <eaa-ir.com/index.html>, to brush up mutually these three countries' restructuring practices to make them transparent and reasonable economically. The First China-Korea-Japan Symposium was held in Seoul in 2009 and the Second Symposium took place in Beijing in 2010. The EAAIR was inaugurated in July 2011 and we are going to have the third Symposium this coming October in Tokyo. We are ambitious enough to develop our restructuring practices to be compatible with the Western world.

Postscript

'The Guidelines to Reduce Debt Burdens Owed to Financial Institutions by Individual Victims Suffered from the Huge Earthquake and Tsunami Assaulted Eastern Japan and Resultant Explosion of Fukushima Nuclear Power Plant' was agreed and adopted by relevant organisations on 15 July 2011. I was Chair of Drafting Committee of the Guidelines and may assume some important role to operate the Guidelines which will be effective on and after 22 August 2011. I would like to express my great appreciation for numerous assistance, support and encouragement provided by my friends, colleagues, organisations and governments from overseas including African countries and I am sure that Japan will recover in the near future despite its political instability.

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