

## 1. Summary on the New Japanese Legislation

### (1) History of legislation

The Japanese rule on cross-border insolvency had been severely criticized by many foreign lawyers<sup>1</sup>, because it had refused to recognize the effects of a foreign insolvency proceeding in Japan and also refused the effects of a local insolvency proceeding in foreign States<sup>2</sup>. Practitioners had made many efforts to moderate this strict rule in order to recognize in fact some limited cross-border effects of both foreign and local insolvency proceedings<sup>3</sup>. Scholars had undertaken studies to propose new express provisions that recognized cross-border insolvency effects<sup>4</sup>. However, amendment of the insolvency laws was not easily put on the legislative agenda for several reasons.

Nevertheless, the Japanese government decided at last to radically reform the insolvency legislation. One principal point of reform was declared by the government to be the problem of cross-border insolvency rule<sup>5</sup>. Then the work of reform was started in October 1996, while a new international standard on this problem had been just coming into existence, namely the project of the UNCITRAL model law<sup>6</sup>. The United Nations Commission on International Trade Law (UNCITRAL) that had been created in 1966 with a mandate to further the progressive harmonization and unification of the law of international trade decided to develop a legal instrument relating to cross-border insolvency and entrusted this work to the Working Group on Insolvency Law<sup>7</sup>. This Working Group, after four two-week sessions, proposed the draft text of the model law. The final negotiations on this draft text took place at Vienna during the thirtieth session of UNCITRAL and UNCITRAL adopted the Model Law on cross-border insolvency by consensus on 30 May 1997<sup>8</sup>. Japan was one of the 36 States that were members of UNCITRAL. Subsequently, the General Assembly of United Nations adopted Resolution 52/158 of 15 December 1997 in which it expressed its appreciation to UNCITRAL for completing and adopting the model law and it recommended to member States to give favourable consideration to the model law<sup>9</sup>.

A model law is a legislative text that is recommended to States for incorporation into their national law. In incorporating the text of the model law into its system, a State may modify or leave out some of its provisions. The flexibility inherent in a model law is particularly desirable in those cases when it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as a national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system, which is the case with the UNCITRAL Model Law on Cross-Border Insolvency. However, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the model law into their legal systems.

I think that this model law on cross-border insolvency is well enacted in spite of the rapidity of its enactment. We must recognize the difference between the convention and the national law. The EU Convention, now EU regulation, on Insolvency Proceedings that does not yet enter into effect makes more strict rules than the model law, par

example the recognition of a foreign proceeding in the EU Convention produces in principle the effects of the foreign proceeding. However, as a national law, we think that the more lax scheme suits its purpose, because we cannot predict which proceeding will be requested for recognition. In addition, the model law provides various ways of international cooperation, especially the way of recognition of a foreign proceeding and the way of cooperation to a foreign proceeding. This variety and flexibility of international cooperation fits to variety of the cross-border insolvency cases.

Therefore, we will be able to accept the fundamental structure of the model law, but there will be several points to be adapted to the Japanese law. We think that the model law is so much influenced by the common law approach in several points that it is difficult for us, civil law countries, to accept it to the letter. For example, the model law gives very broad scope of discretion to judges: this approach may be familiar to the common law judges, but it may cause confusion for the civil law judges. As we will explain later, most of the difference between the UNCITRAL model law and our new law results from such a technical reason.

The Japanese government was continuing the work of reform in order to adapt its insolvency law to the new international standard embodied in the model law. The first outcome resulting from this work was the Civil Rehabilitation Law (Minji-saisei ho) that was promulgated in December 1999 and that became effective in April 2000. In this law, we first had several provisions dealing with cross-border insolvency with the intention of cooperating with other jurisdictions (see, (2))<sup>10</sup>. The entire legislation on cross-border insolvency was postponed at that time, but the next opportunity soon came. As one of the next subjects of insolvency reform, this cross-border problem was designated as a problem of consumer insolvency. The government published the draft text on cross-border insolvency<sup>11</sup> in September 2000 and this draft was adopted by the Diet in November 2000. These laws are composed of two parts: the Law on Recognition of a Foreign Proceeding (Gaikoku-tosantetsuduki Shonin-Enjo ho) and the laws that introduce the cross-border provisions stipulated in the Civil Rehabilitation Law into the Bankruptcy Liquidation Law of 1922 (Hasan ho) and the Corporate Reorganization Law of 1952 (Kaisha-kosei ho) (we will refer for convenience to these laws as a whole as “new Japanese law”).

## (2) Summary of the new rule

Related to the system of recognition of a foreign proceeding, Japan adopted a scheme in which the court may recognize the proceeding by decision, in other words, Japan refused the automatic recognition scheme that, for example, the EU regulation on the cross-border insolvency<sup>12</sup> will adopt. As conditions for recognition, the new Japanese law mentions international jurisdiction of a foreign court, public order, etc. (see 4 (1)). The competence for recognition belongs exclusively to the Tokyo District Court, but after a decision for recognition, the transfer of the case to another court is possible. Only a foreign representative/DIP<sup>13</sup> has the standing to apply recognition. After the application, the court may order interim relief, such as staying the execution or prohibiting transfer of a debtor's assets. The decision of recognition itself does not have any automatic effect, but the court may order several

discretionary relief steps upon recognition, such as staying the continuation or commencing the execution or the action against a debtor, terminating the execution, prohibiting the transfer of assets, requiring permission from the court for taking over a debtor's assets, etc. In addition, the court may entrust the administration of debtor's assets to a foreign representative or another person designated by the court. It is generally acknowledged that a concurrent proceeding is taking place in Japan. However, Japan has adopted the principle of "only one proceeding operating for one debtor". If the court certifies that recognition of a foreign main proceeding will benefit the general interests of creditors and that it will not be opposed to the interests of local creditors, it is able to recognize the foreign main proceeding and stay the local proceeding. Between plural foreign proceedings, a main proceeding takes priority over a non-main proceeding: the court can recognize a main proceeding and order the stay of recognition-assistance proceeding of a non-main one.

Regarding cooperation between a local proceeding and a foreign proceeding, first of all Japan has abandoned the principle of territoriality. So far, Japanese law did not recognize the effects of a foreign insolvency proceeding within the country. By contrast, the effects of a Japanese proceeding did not have any cross-border effect, even if the foreign State was prepared to recognize such a proceeding. At present, as Japan prepares for recognizing a foreign proceeding (see (1)), its local proceedings have cross-border effects that may be recognized by a foreign State. In addition, Japan also provides the so-called hotchpotch rule<sup>14</sup>. In the case of concurrent proceedings that may generally take place under the new rule, we prepare the scheme of cooperation between a foreign representative and a local representative. As forms of cooperation, the law enumerates communication of information, permission for a foreign representative to represent foreign creditors (so-called cross-filing), etc. We also permit a foreign representative to apply the commencement of a local insolvency proceeding. Finally, we decided to abandon the principle of reciprocity and to guarantee the principle of non-discrimination without exception.

## 2. Definitions

### (1) Foreign Proceeding

UNCITRAL model law defines several terms specific to cross-border insolvency (Article.2). Article.2 (a) defines a "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".

New Japanese law on the recognition of a foreign proceeding has an Article that defines a "foreign proceeding"<sup>15</sup>. The Article defines a "foreign proceeding" as "a proceeding which corresponds to a Bankruptcy Liquidation proceeding, a Civil Rehabilitation proceeding, a Corporate Reorganization proceeding, a Corporate Readjustment proceeding or a Special Liquidation proceeding". This means that a recognizable foreign proceeding must correspond to one of five types of Japanese local insolvency proceedings.

When we compare this definition of Japanese law with that included in the model law, we can point out firstly

that these two definitions equally include an interim proceeding. The Japanese law, as we explain later, does not permit the court to commence a recognition-assistance proceeding for an interim foreign proceeding, but it is very important that our law still defines this proceeding as a foreign proceeding, because in consequence of that definition, even an interim foreign representative can apply a recognition-assistance proceeding and obtain interim relief before recognition.

As to contents of definition, the Japanese definition does not include any substantial factor, but it entrusts each judge to interpret what are essential factors of Japanese insolvency proceedings. Provided that our law defines “insolvency proceeding” nowhere, Japanese judges may probably consult the factors that the model law’s definition indicates. The future crucial issue will be if a foreign proceeding which does not prerequisite debtor’s insolvency, for example U.S. self-applied bankruptcy proceeding, corresponds to Japanese insolvency proceeding or not. I think that the recognizing court should estimate the applied proceeding as a whole and should not stick only to conditions to commence that proceeding. Therefore, the judge will be able to regard as “foreign proceeding” such a proceeding that does not make debtor’s insolvency a necessary condition for commencing, if the other factors of that proceeding are sufficient for our State to give any relief for assistance<sup>16</sup>.

## (2) Foreign Main Proceeding

Article.2 (b) of UNCITRAL model law defines “foreign main proceeding” as “a foreign proceeding taking place in the State where the debtor has the centre of its main interests”. Concerning recognition of a foreign proceeding, the model law presumes the debtor’s registered office (or habitual residence in the case of an individual) to be the centre of the debtor’s main interests (Article.16 par.3). Accordingly, when a debtor has its registered office in New York, the Japanese court to which recognition of the debtor’s U.S. insolvency proceeding is applied is authorized to presume this proceeding as a foreign main proceeding that produces the effects provided in Article.20.

New Japanese law on recognition of a foreign proceeding has the Article defining “foreign main proceeding”<sup>17</sup>. This Article defines “foreign main proceeding” as “a foreign proceeding which is applied, if a debtor is doing business, in the State where he has his main place of business, if a debtor is an individual and it is not doing business, in the State where he has his habitual residence, and if a debtor is a corporation and is not doing business, in the State where he has his main office ”.

Firstly, we must point out that the functions of these two definitions are very different, because the main proceeding of the model law produces several automatic effects, though our law does not know such automatic effects (see, 4(3)(a)). This definition is necessary in our law only for determining the way of coordination of concurrent proceedings. Nonetheless, these two definitions relatively resemble each other as regards that both of them are based upon substantial standard. Also in the Japanese definition, the court will be able to think a proceeding taking place in the State where a debtor’s substantial head-quarter exists, although its registered office seats in the other State<sup>18</sup>. Consequently, generally speaking, our law coincides with the definition of the model law.

### (3) Foreign Non-main Proceeding

Article.2 (c) of the model law defines “foreign non-main proceeding” as “a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this Article”. This definition is characteristic in the point that it is excluding proceedings taking place in a State where the debtor has no establishment, but has its assets only.

New Japanese law defines “foreign non-main proceeding” as “a foreign proceeding other than a foreign main proceeding”<sup>19</sup>. Therefore, it does not require the debtor’s establishment situated in a State where the foreign proceeding is taking place. We are able to explain this difference between two definitions by their functions. In the model law scheme, a foreign non-main proceeding is always eligible for recognition. But, in our law, every foreign non-main proceeding cannot be recognized. Our court can recognize only foreign non-main proceedings taking place in a State where a debtor’s place of business is seating (see, 4((1)a). I think that the definition of Japanese law is more simple and more practical than that of the model law, because according to that definition, all foreign proceedings are divided into foreign main proceeding and foreign non-main proceedings, while the model law’s definition need three concepts: foreign main proceedings, foreign non-main proceedings, and other foreign proceedings that are not recognizable in any case.

### (4) Foreign Representative

UNCITRAL model law Article.2 (d) defines “foreign representative “ as “a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”. This definition includes a debtor in possession (DIP), if he is authorized to administer his assets or affairs. It is very important to recognize the DIP-type proceeding for the international cooperation, because many countries have this type of proceeding today. Besides, a representative appointed on an interim basis may apply for recognition of his proceeding<sup>20</sup>. This rule is also important, because many local laws know such type of representatives.

The Japanese law on recognition has also a definition provision of a foreign representative<sup>21</sup>. But it has a definition provision of a foreign representative / DIP too<sup>22</sup>. In this Act, a foreign representative means “a person who is not debtor and who is authorized to dispose of and administer debtor’s assets in a State where the foreign proceeding was applied to commence”, and a foreign representative / DIP means “a foreign representative, when it is appointed in a State where the foreign proceeding was applied to commence, or a debtor in possession, when a foreign representative is not appointed”. Related to process of recognition, definition of a foreign representative / DIP is more important than that of a foreign representative, because important powers such as right of application or intervention is vested to a foreign representative / DIP (see 4(2)(b)).

Therefore, when we compare the definition of a foreign representative in the model law with that of a foreign

representative / DIP in our law, we can verify the coincidence of these two definitions. Firstly, both two definitions attach importance to the power of administering (or disposing of) debtor's assets. Secondly, a DIP is included in these both definitions. So, DIP may apply recognition of the foreign proceeding in these two laws. Finally, a person who is appointed on an interim basis may be also included in these definitions. The Japanese definition does not refer the case in which the foreign proceeding commenced, but the case in which "the foreign proceeding was applied to commence". Therefore, an interim representative may be also active in the Japanese court.

### 3. Access of Foreign Representatives and Creditors to National Courts

Concerning access of foreign representatives and foreign creditors to the local courts, UNCITRAL model law has the chapter 2 (from Article.9 to Article.14). Among these Articles, Article.9 (right of direct access) and Article.10 (limited jurisdiction) are not necessary for the Japanese law, because these rules were already accepted by our law<sup>23</sup>. Therefore, we have to investigate the other Articles as compared with our new law.

#### (1) Application by a foreign representative to commence a Japanese insolvency proceeding

Model law Article.11 stipulates that "A foreign representative is entitled to apply to commence a proceeding [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met". Many national laws, in enumerating persons who may request an insolvency proceeding, do not mention a foreign representative. This Article is designed to ensure that the foreign representative has standing for requesting the commencement of an insolvency proceeding. Also the Article makes it clear that a foreign representative has this right without prior recognition of a foreign proceeding because of urgent need of preserving the assets of the debtor<sup>24</sup>.

In the Japanese Civil Rehabilitation Act, Article.198 par.1 provides that "a foreign representative may apply to commence a rehabilitation proceeding regarding a debtor, if the conditions provided in the first part of Article.21 par.1 are met". The conditions provided in the first part of Article.21, par.1 are the conditions that are requested for creditors to apply a Civil Rehabilitation proceeding (the second part of this paragraph provides the conditions necessary for debtor's application). Namely, the Japanese law considers that a foreign representative may apply to commence an insolvency proceeding on behalf of the creditors who are participating to that foreign proceeding, so that the conditions for creditors' application are needed for the application by a foreign representative<sup>25</sup>. Such rule will be introduced to the other insolvency proceedings by the new legislation<sup>26</sup>. Consequently, this part of the model law will be perfectly introduced to the Japanese law.

#### (2) Participation of a foreign representative in a Japanese insolvency proceeding

Article.12 of model law provides that "upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor [identify laws of the enacting State relating to insolvency]". The purpose of this Article is to ensure that, when an insolvency proceeding concerning a debtor is taking place in the

enacting State, the foreign representative will be given procedural standing to make petitions, requests or submissions concerning issues such as preservation, realization or distribution of assets of the debtor or cooperation with the foreign proceeding<sup>27</sup>.

The Japanese Civil Rehabilitation Act allows in the Article.198 par.2 a foreign representative to attend at a creditors' meeting and to express his opinion there. Article.198 par.3 permits a foreign representative to submit a rehabilitation plan to a creditors' meeting for vote. Finally, Article.198 par.4 provides service of several procedural documents to a foreign representative who requested to commence that rehabilitation proceeding, in order for him to exercise his powers vested in this law. And now, our new legislation expands these powers of a foreign representative and notification to him into a Bankruptcy Liquidation and a Corporate Reorganization proceeding<sup>28</sup>.

The right of participation that is provided in the model law is an ambiguous concept. The guide to enactment explains that this Article "is limited to giving the foreign representative standing and does not vest the foreign representative with any specific powers of rights" and that this "Article does not specify the kinds of motions that the foreign representative might make"<sup>29</sup>. The Japanese law clarifies this right of participation and accomplishes the model law's purpose. In addition, this Japanese law does not deny the other procedural powers of a foreign representative. Therefore, for example, a foreign representative may appeal against a court decision, may be heard in the proceeding, or may peruse the documents presented for that proceeding. Finally, the Japanese law does not require recognition of the foreign proceeding before it permits the foreign representative to participate in the local proceeding. It shows a friendly attitude for an international cooperation of Japanese legislator<sup>30</sup>.

### (3) Access of foreign creditors to a national proceeding

Article.13 provides right of access of foreign creditors to the court of the enacting State. Par.1 of this Article declares the principle of non-discrimination. Namely, foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such a proceeding, should not be treated worse than local creditors. Par.2 of Article 13 provides an exception to the principle embodied in par.1. This paragraph makes it clear that the model law leaves intact the provisions of the local law on the ranking of claims in insolvency proceeding. Consequently, the enacting State can empty the meaning of non-discrimination principle by provisions giving the lowest ranking to foreign claims. However, par.2 establishes the minimum ranking for foreign claims: the rank of general unsecured claims. In other words, the enacting State is prohibited to subordinate foreign claims to local unsecured claims<sup>31</sup>.

Generally speaking, the Japanese insolvency law treats equally foreign creditors as local creditors, and it has not provision of exception concerning claims' ranking. Accordingly, the Japanese law is already suitable to the model law before the reform. The only problem relates to the Bankruptcy Liquidation Act. Article.2 of this Act provided the non-discrimination principle, but limited the application of this principle to the cases in which the law of the creditor's mother State treated the Japanese creditors equally with local creditors. This was the so-called principle of reciprocity. That is to say, if the creditor's home country did not adopt non-discrimination principle, he was rejected to participate in the Japanese bankruptcy proceeding. But, this principle of reciprocity was already out of date and was very much criticized in Japan. There are several reasons why the reciprocity principle has been criticized. Firstly, the reciprocity is not useful to harmonize the national laws according to the experience of the history. The model law itself is another way of more effective harmonization. Secondly, most of the creditors are private citizens or corporations who cannot influence over the legislative policy of their government. So, it is not fair to punish these creditors as a means to criticize

the policy of their government. Thirdly, the Civil Rehabilitation Act (art.4) and the Corporate Reorganization Act (art.4) already abandoned the principle of reciprocity and adopted the principle of non-discrimination. There is no reason to distinguish between these proceedings and bankruptcy liquidation proceeding. Therefore, our new law at last will abandon the reciprocity<sup>32</sup>, and in consequence, our law will be perfectly consistent with the model law.

#### (4) Notification to foreign creditors of a local proceeding

Article.14 par.1 of the model law provides that notification shall be given to the known foreign creditors, if it is to be given to local creditors. Concerning unknown foreign creditors, this paragraph refers to the court's power to order appropriate steps with a view to notification to these creditors. Par.2 of this Article declares the principle of individual notification. Namely, this paragraph requires individual notification for foreign creditors, even if such notification is not necessary for local creditors. By this principle, the model law wants to recover substantial equal treatment between foreign and local creditors. But, this principle has an exception that leaves discretion to the local court to decide otherwise in a particular case. Article.14 par.3 provides on the contents of notification. It requires that the notification to foreign creditors contains the time period and the place for filing claims, the necessity for secured creditors of filing their claims, and any other information required to be included in the notification to local creditors.<sup>33</sup>

The Japanese insolvency law was already treating foreign creditors equally with local creditors relating to notification even before the reform. On the other hand, when the law provides that public notice is sufficient, we don't have special rule only for foreign creditors. Article.14 par.2 of the model law just requires the special treatment of foreign creditors in such a case. However, the Japanese law always requires individual notification of the decision commencing an insolvency proceeding. Consequently, creditors always have the opportunity to know the commencement of the proceeding regarding their debtor. Once creditors know commencement of a proceeding, they should make efforts to get information about that proceeding. We consider that even foreign creditors must make necessary efforts to obtain information after individual notification of commencement of a proceeding reaches them. After all, the new Japanese law decides not to provide the special treatment of foreign creditors<sup>34</sup>. This decision does not seem to me to be inconsistent with the essential object of the model law.

### 4. Recognition of Foreign Proceeding

#### (1) Conditions for recognition

The new Japanese law on recognition of foreign proceeding requires several conditions for recognizing foreign proceedings ( in addition to the conditions mentioned below, it is not to say that a recognized proceeding must be a "foreign proceeding" defined in this law (see, 2 (1)). The most important conditions are that of jurisdiction and that of public order. However, the Japanese law provides several other conditions.

##### (a) Jurisdiction

The model law provides the condition of jurisdiction respectively for a foreign main proceeding and for a foreign non-main proceeding. While a foreign proceeding is recognized as a foreign main proceeding if it is taking place in the

State where the debtor has the centre of its main interests, it is recognized as a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of Article 2 in that foreign State (Article.17 par.2). Therefore, as to condition for recognition, the seat of an establishment is decisive. Article.2 of the model law defines “establishment” as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”. This broad definition seemed to be inspired by that of the European Union Convention on Insolvency Proceedings (now, EU Regulation on Insolvency Proceedings)<sup>35</sup>.

Our new law clearly requires as condition for recognition the jurisdiction of the State where the foreign proceeding is taking place. It considers that the State has jurisdiction to commence an insolvency proceeding regarding a debtor, if the latter has its domicile, residence, place of business or place of affairs in that State. Firstly, we can point out that this condition is identical with that of the model law in the meaning in which it does not limit recognizable proceedings to foreign main proceedings. The model law seems to follow the principle that concurrent proceedings are broadly permitted and it considers that cooperation between these proceedings is important. Such principle naturally makes recognition liberal notwithstanding “concurrent recognitions”. New Japanese law decided to obey to this model law’s principle<sup>36</sup>.

Secondly, our law is the same with the model law, as regards that it does not accept recognition of a foreign proceeding that is taking place in the State where there is not debtor’s establishment, but where only debtor’s assets exist. We think, equally with legislators of the model law, that only the seat of assets is not sufficient factor for showing relevancy between the debtor and the State where the insolvency proceeding of this debtor is taking place<sup>37</sup>.

Finally, we must examine whether “establishment” in the model law and “place of business” in our law are different concepts or not. Place of business is not expressly defined in the Japanese law, but it is generally considered to mean the place where all or part of business is independently controlled: place of business is practically determined and title or name of that place is not important for that determination. Therefore, for examination of place of business, we are able to take into consideration whether it is desirable to give assistance to that foreign proceeding or not. Practically speaking, it seems that there is not so much difference between these two concepts and that our law accepts the model law on the whole<sup>38</sup>.

#### (b) Public policy

Article.6 of the model law provides that “nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State”. In the model law, public policy exception is not limited to be condition for recognition, but it is understood as condition for any action governed by that law. The purpose of the expression “manifestly” is to emphasize that this exception should be interpreted restrictively and that this Article is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State<sup>39</sup>.

New Japanese Act on recognition of foreign proceedings provides that the court can refuse recognition of a foreign

proceeding if the result of recognition is contrary to the public policy or good customs in Japan. Strictly speaking, this provision which models after the public policy condition for recognition of a foreign judgment in the Code of civil procedure<sup>40</sup> is not consistent with that of the model law, particularly as regards that our law does not use the expression “manifestly”. However, the content of public policy is anyway ambiguous and the court has broad discretion to apply this exception. We hope that the Japanese court will not stick to trivial differences between an insolvency proceeding of Japan and that of a foreign State and that it will show its generosity in the international aspects<sup>41</sup>.

### (c) Other conditions

Our new law cites following cases as the negative conditions for recognition: (1) when a foreign representative does not in advance pay costs for the recognition-assistance proceeding in spite of order for payment by the court, (2) when the effects of the foreign proceeding are manifestly provided in that State’s law not to extend over the assets seated in our country, (3) when any relief on recognition is manifestly not necessary, (4) when a foreign representative who applied recognition does not execute his obligation of giving necessary information to the court, (5) when a foreign representative applied recognition manifestly in bad faith. These conditions are not expressly stipulated in the text of the model law, but it may be self-evident in that substance that these conditions are required. Accordingly we can say that these provisions of our law are not substantially contrary to the purpose of the model law<sup>42</sup>.

## (2) Process of Recognition

### (a) Competence for recognition

Article.4 of the model law stipulates that “the functions referred in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts, authority or authorities competent to perform those functions in the enacting State]”. The objective of this Article would be to increase the transparency and ease of use for the benefit of, in particular, foreign representatives and foreign creditors<sup>43</sup>.

New Japanese law provides that Tokyo district court is only competent for the case of recognition of a foreign proceeding<sup>44</sup>. However, it also stipulates that after decision of recognition, Tokyo district court may transfer the recognition-assistance case to the other district courts more closely related to that case<sup>45</sup>. This Article satisfies the transparency required by the model law and this concentration of competence will also afford benefit for foreign representatives or creditors, because of the transportation facilities of Tokyo as compared with other cities in Japan<sup>46</sup>.

### (b) Application for recognition

Article.15 par.1 provides that “a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed”. Article.2 (d) defines “foreign representative” as “a person or a body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”(see, 2(4)).

These Articles show that (1) the model law did not adopt the system of automatic recognition, but the system of recognition by judicial decisions, that (2) standing to apply recognition belongs only to a foreign representative, and that (3) a foreign representative appointed upon an interim basis may also apply recognition of an interim foreign proceeding<sup>47</sup>.

Firstly, new Japanese law adopts a judicial decision recognition system which is perfectly identical with that of the model law. Secondly, our law limits the standing of application of recognition to a foreign representative/DIP (see, 2 (4)). That is also identical with the rule of the model law. Finally, related to recognition of an interim proceeding, we can recognize some differences between our law and the model law. Namely, our law permits an interim representative to apply recognition, but nonetheless it does not permit the court to recognize an interim proceeding. At all, the court is only authorized to order interim measures before the foreign court formally commences the insolvency proceeding and that the foreign proceeding becomes recognizable. However, our law admits so broadly interim measures before recognition (see, (d)) that the practice resulted from it will not be so different from that intended in the model law as appearance<sup>48</sup>.

(c) Obligations accompanying an application, etc.

Japanese law imposes a foreign representative obligation to pay procedural costs in advance and obligation to present proofs about the place of business or the domicile of the debtor on the occasion of the application.<sup>49</sup> We consider that these obligations would be naturally imposed due only to the fact that he is requesting assistance from a foreign State, although the model law does not expressly stipulate these obligations in the text. Therefore, these obligations seem not to be inconsistent with purpose of the model law<sup>50</sup>.

Our law also imposes a foreign representative obligation of giving the court information requested by it, such as status of that proceeding<sup>51</sup>. This obligation of information is very important, because the court can correctly judge the necessity of each relief only on that information. The model law as well approves the necessity of that obligation by the Article.18 which provides that “from the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative’s appointment”.

Finally, the Japanese law permits the court to order a foreign representative to appoint another representative in Japan. This authority aims at the smooth communication between the Japanese court and the foreign representative with the aid of a middleman such as a Japanese lawyer. We can consider that such a ruling is rational and that it is inherent in the legislators’ discretion of each enacting State<sup>52</sup>.

(d) Temporary measures before recognition

Article.19 of the model law stipulates on relief that may be granted upon application for recognition of a foreign proceeding. This Article permits the court to grant relief of a provisional nature, such as staying execution, entrusting

the administration or realization of the debtor's assets, suspending the right to dispose of the debtor's assets, providing for the taking of evidence or the delivery of information, or granting any additional relief that may be available to a local trustee. Article.19 authorizes the court to grant at its discretion the type of relief that is usually available in collective insolvency proceedings in many States, but this discretionary relief is somewhat narrower than the relief upon recognition under Article.21. This Article is characteristic in the following points: (1) temporary measures prerequisite the application for recognition, (2) the standing to apply temporary measures belongs only to a foreign representative, (3) the relief must be urgently needed to protect the assets of the debtor or the interests of creditors, (4) the relief that would interfere with the administration of a foreign main proceeding may be refused by the court<sup>53</sup>.

The new Japanese law also permits the court to order temporary measures before the decision of recognition. The court can grant at its discretion following provisional relief: staying continuation of individual actions or executions, prohibiting to transfer the assets or to pay the debts, or entrusting the administration of debtor's assets and its business to an interim trustee. The scope of the court's discretion is narrower than that granted after recognition, because the measures such as staying commencement of executions (see (3)(b)) or annulling the stayed executions are not permitted to the court before recognition decision. (1) The relief granted in our law needs the application for recognition in the same way as the model law. (2) In our law, the interested persons other than the foreign representative can apply provisional measures. This broad standing for an interim order follows the rule in our local insolvency proceedings and it may make possible timely preservation of the debtor's assets. (3) Our law does not expressly require urgency as condition for provisional measures, but it will be practically required. (4) We do not take into consideration the existence of a main proceeding, because our law is ruling concurrent proceedings differently from the model law (see 6)<sup>54</sup>.

#### (e) Decision of recognition

As to the process of recognition, Article 17, par.3 obligates the court to decide on the application "at the earliest possible time". This obligation of the recognizing court reflects the concerns by insolvency practitioners over the delay of recognition process<sup>55</sup>. However, this type of provision is so much exceptional in the Japanese legislation<sup>56</sup> that it is very difficult to introduce such a rule into our new law. Nevertheless, according to the gist of the model law, the Japanese court should decide upon the application of recognition as early as possible.

Article.16 of the model law establishes presumptions that allow the court to expedite the evidentiary process<sup>57</sup>. That is concerned with the foreign proceeding or the foreign representative (par.1), the authenticity of documents (par.2), and the centre of debtor's main interests (par.3). The Japanese court already has inherent powers to assess the evidences and to decide upon its conviction. Therefore it is not necessary for us to stipulate such a provision<sup>58</sup>.

#### (f) Termination of recognition

Article.17 par.4 provides that "the provisions of Articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist".

This paragraph clarifies that the question of revisiting the decision of recognition is left to the procedural law of each enacting State. It provides that termination of recognition may result from change of circumstances after the decision (for example, the termination of the recognized foreign proceeding) or from discovery of new facts that evidence lacking of conditions for recognition<sup>59</sup>.

Our new law also stipulates that the court shall terminate recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist or that the recognized foreign proceeding terminated. In addition, it gives the court discretion of terminating the recognition-assistance process, if the foreign representative/DIP violated his procedural obligation, such as obligation of giving information to the court<sup>60</sup>. We consider that this discretionary termination power is grounded on the competence of the enacting State which can require at any way the foreign representative/DIP to execute his obligation provided in our law.

### (3) Effects of Recognition

#### (a) Automatic effects of recognition

The model law classifies effects of recognition between the automatic effects and the discretionary effects. The effects provided in Article 20 are not discretionary, but flow automatically from recognition of a foreign main proceeding, while relief under Article.21 is discretionary. Another difference between discretionary relief under Article.21 and the effects under Article.20 lies in the rule that discretionary relief may be issued in favour of main and non-main proceeding, while the automatic effects result only from a main proceeding. Such rule was compromise between, on the one hand, the States that wished strong effects of recognition with intent to extend effects of their local insolvency proceedings overseas for their local creditors and, on the other hand, the States that did not wish strong effects with intent to protect their local creditors from foreign representatives and foreign creditors. The model law limits automatic and strong effects only to a foreign main proceeding that would be in close connection with the debtor<sup>61</sup>.

New Japanese law does not provide automatic effects of recognition. That was a consequence of careful consideration after which we finally made decision to refuse automatic effects upon the following grounds. The most important reason for our decision is that if recognition of a foreign proceeding accompanied several automatic effects, the recognizing court would be so prudent in deciding on recognition that simple and rapid recognition process requested by the model law would become very difficult. Differently from the convention or the treaty, it is inevitable for the local law of an individual State to deal with every sort of foreign proceeding. Accordingly, the recognizing court which must consider the interests of local creditors would judge very carefully whether conditions for recognition are so fulfilled as to recognize automatic effects on recognition. This prudence and delay of recognition process will be too much contrary to the purpose of the model law. In consequence, we decided not to introduce automatic effects of recognition into our law<sup>62</sup>.

However, our law permits the court to recognize a foreign non-main proceeding along the line of the model law scheme, and, further more, to stay a local proceeding based on recognition of a foreign main proceeding under several

conditions. In spite of refusal of automatic effects, these systems as a whole will show our favorable attitude to the international cooperation in the case of cross-border insolvency. In addition, we hope that the court will practically take necessary and effective measures upon recognition as early as possible in a large number of usual recognition-assistance cases.

(b) Discretionary relief on recognition

(A) Stay of individual actions

Article.21 par.1 (a) of the model law provides that the court may, upon recognition of a foreign proceeding, stay “the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligation or liabilities”. This provision gives the court the discretionary power to stay not only actions in a court but also other proceedings, such as arbitral proceedings or administrative proceedings<sup>63</sup>.

New Japanese law also gives the recognizing court discretion of ordering the stay of continuation of individual actions and administrative proceedings concerning the debtor’s assets<sup>64</sup>. Our law does not permit the court to stay the commencement of these proceedings, because we think that such a strong power is not indispensable to preserve the debtor’s assets. Concerning the stay of arbitral proceedings, our law does not lay down express provision. We consider that it is now too immature to set up a rule on this problem<sup>65</sup> and that preservation of debtor’s assets is not fatally injured even without express text, if the execution proceeding upon an arbitration award can be stayed (the power of staying execution upon an arbitral award is not doubtful)<sup>66</sup>.

(B) Stay of execution

Article.21 par.1 (b) of the model law recognizes court’s power to stay execution against the debtor’s assets. This power is considered to cover not only the stay of execution by general creditors, but also the stay of execution by security creditors or even by tax creditors.

Our law permits the court to order stay of not only continuation but also commencement of execution against debtor’s assets<sup>67</sup>. Furthermore, it provides the court’s power to cancel the stayed execution<sup>68</sup>. If the garnishment on a checking account has already commenced before recognition and the stay of continuation of execution is ordered by the recognizing court, the foreign representative/DIP cannot still make good use of this account for the rehabilitation purpose of the debtor. Therefore we consider that the power of canceling execution is necessary for assisting effectively a foreign proceeding. Our law also recognizes power of the court to stay the continuation of security creditor’s execution<sup>69</sup>. However the fact that the foreign law ruling the foreign proceeding does not always recognize the priority of each security creditor requires that he can execute his security power in his State as effectively as possible. Accordingly Japanese law decides not to permit the court’s power to stay the commencement of security execution and to cancel execution. Upon the same reason, our law does not permit the court to stay execution by a tax creditor. The model law is tacitly allowing such a decision by ruling that, concerning automatic effects, the scope

of the stay is subject to the local rule (Article 20, par.2)<sup>70</sup>.

#### (C) Prohibition of disposing of a debtor's assets

Article 21, par.1 (c) of the model law recognizes the court's power of suspending "the right to transfer, encumber or otherwise dispose of any assets of the debtor". On the other hand, Japanese law stipulates that the court may order, related to debtor's assets, measures that are necessary to accomplish the purpose of recognition-assistance proceeding, such as prohibition of disposal of assets or payment of debts by the debtor<sup>71</sup>. This provision corresponds to the above-mentioned provision of the model law as far as it suspends debtor's right to dispose of its assets or to pay its debts. But, the scope of the provision of our law is broader than that of the model law as regards that it may be corresponding to any other appropriate relief which Article.21 par.1 of the model law provides. Namely, the list of Article.21 is not so exhaustive that the Article gives the court discretion to grant other relief needed in the circumstances of the case<sup>72</sup>. Consequently, our law permits room of discretion to the recognizing court in the same way as our local insolvency law gives broad discretion to the insolvency court<sup>73</sup>.

#### (D) Gathering of information

Article.21 par.1 (d) of the model law mentions as discretionary relief "providing for the examination of witness, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities". This Article resulted from the long discussion about the court's power of discovery of information. The States of Anglo-Saxon law, especially United States, required the foreign representative's strong power of gathering information concerning the debtor's assets, while the civil law countries refused the broad power of discovery because of worrying about its abuse. This Article is the results of compromise between two camps: it provides only possibility of gathering information without dealing with its subject. It makes it possible for civil law States to interpret this Article as requiring local court's intervention for gathering information by the foreign representative.

New Japanese law provides this power of gathering information not as power of a foreign representative, but as power of a recognition representative (concerning a recognition representative, see (E)). In addition, our law limits this direct power of examination only against the debtor and its interested parties<sup>74</sup>. With regard to real third parties, a recognition representative should follow usual procedural rules when he wants to gather information from them. These rules make it possible that if the court has reasonable doubts about the abuse of power of gathering information by a foreign representative, it can appoint another person than the foreign representative (such as a Japanese lawyer) as recognition representative. Even in this case, a recognition representative is obligated to cooperate closely with the foreign representative<sup>75</sup>. In consequence, the latter has the opportunity to gather indirectly information from the former, if he can show his good faith. All things considered, we can say that the new Japanese provision generally meets the demand of the model law<sup>76</sup>.

#### (E) Order of administration

Article.21 par.1 (e) of the model law lists as discretionary relief “entrusting the administration or realization of all assets located in this State to the foreign representative or another person designated by the court”. On the other hand, our law enumerates the order of administration as relief upon recognition. This provision empowers the court to appoint a recognition representative and to entrust him the administration of all assets of the debtor located in Japan. A recognition representative may be foreign representative/DIP or another person capable to perform his duty<sup>77</sup>.

Therefore, as cases of order of administration, we are able to suppose following three situations: (1) the case in which the court appoints a foreign representative as recognition representative, when the former was appointed in the foreign proceeding, (2) the case in which the court appoints a third person as recognition representative, when a foreign representative was appointed in the foreign proceeding, (3) the case in which the court appoints a third person as recognition representative, when a foreign representative was not appointed in the foreign proceeding, but a DIP has power of administrating his assets. Taking the purpose of international cooperation into consideration, the case (1) is certainly most desirable and may be most usual, but when it appears to be impossible to rely on a foreign representative, the case (2) or (3) is also accepted by the model law<sup>78</sup>. Consequently, our legislation follows the model law in this point, too.

#### (©) Turnover of assets

The turnover of the debtor’s local assets to a foreign representative is a very crucial issue in the cross-border insolvency case, because once the assets are carried out overseas, the sovereign power of the State does not reach them and the protection of local creditors’ interests becomes impossible. Therefore, the model law prepares the independent paragraph for this problem. Article.21 par.2 provides that “the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected”. This provision above all contains a safeguard for local creditors by requiring the satisfaction of the court for protecting their interests<sup>79</sup>.

Our law deals with this problem by listing of acts of the debtor or recognition representative that need the court’s approval in advance. Namely, the court, when it orders relief above-mentioned, may specify the acts such as disposition of debtor’s assets or its transportation to overseas, as acts that need the court’s approval before the acts. When the court approves the specified act, it should confirm that the interests of local creditors would not be unjustly violated. The act without the court’s approval is void<sup>80</sup>. This provision intends to protect local creditors’ interests in the same way as that of the model law. It seems to be broader than the rule of the model law as to the objects of court’s approval, but practically it is difficult to imagine the other acts needing the court’s approval than the disposition or take-over of debtor’s assets. Consequently, we can verify the sameness of both rules.<sup>81</sup>

(d) Protection of interested persons' interests

Article.22 par.1 of the model law stipulates that “in granting or denying relief under Article 19 or 21, or in modifying or terminating relief under paragraph 3 of this Article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected”. This provision aims to provide useful elements to guide the court in exercising its discretionary powers. In many cases, the affected creditors will be local creditors. Nevertheless, this Article does not limit protected interests only to local creditors, but also interests of any other person<sup>82</sup>. In consequence, the content of this Article becomes matter of course in a sense: the court must, at all times, take “the interests of interested persons” into consideration anyway. Therefore we can think that this Article is almost meaningless and that it is not necessary to prepare such an Article in our law<sup>83</sup>.

(e) Conditional relief

Article.22 par.2 of the model law provides that “the court may subject relief granted under Article 19 or 21 to conditions it considers appropriate”. The purpose of this rule is to make it possible that the court tailors the relief better, according to the situation of each case. The Japanese law does not expressly provide this conditional relief. However, our law gives the power of control of the foreign representative/DIP to the court, especially in the case of turn-over (see, ©). The court can also decide at its discretion the way of administering the assets of the debtor by a recognition representative. And the latter is obliged to submit periodical reports to the court. The court is expected to take appropriate measures or to terminate the relief (see (f)), considering information which it gathered. We can consider that this way of ruling is more adapted to civil law countries like us where the broad discretion related to the content of decision is not familiar to the court<sup>84</sup>.

(f) Modification or termination of relief

Article.22 par.3 of the model law provides that “the court may, at the request of the foreign representative or a person affected by relief granted under Article 19 or 21, or at its own motion, modify or terminate such relief”. This paragraph also aims to accommodate the relief once ordered to the change of situation. The feature of this provision is that it expressly gives standing to the persons who may be affected by the relief to request the court to modify or terminate it. Our law only provides that the court may modify or terminate its order. However, we generally interpret this provision as giving standing to the persons who are affected by the order to request its modification or termination and also standing to appeal as interested persons against the decision dismissing his request<sup>85</sup>. Therefore, our law substantially accepts the model law in this point.

(g) Actions to avoid acts detrimental to creditors

Article.23 of the model law provides about the so-called Paulian action. According to this Article, “upon recognition of a foreign proceeding, the foreign representative has standing to initiate” this type of action. The model law expressly

provides only that a foreign representative has “standing” and it does not aim to create any substantive right regarding such actions or to provide any solution involving conflict of laws. The effect of this provision is that the foreign representative is not prevented from initiating such actions by the sole fact that he is not insolvency administrator appointed in the enacting State. In spite of the narrowness of the scope of this Article, it is very important from practical standpoint, because the right to initiate this action is essential for protecting the integrity of the assets of a debtor<sup>86</sup>.

The Japanese insolvency laws also know this type of action<sup>87</sup>. However, the new Act on recognition of foreign proceedings does not prepare such an Article as Article.23 of the model law. Our new law keeps perfect silence about this problem. This silence has several reasons. Firstly, it is very difficult to provide an Article about the conflict of laws on this type of action, like the German new insolvency code (Insolvenzordnung) of 1994<sup>88</sup>. In Japan, the discussion about this problem is nearly just starting<sup>89</sup>. Therefore it is not adequate to unify the division of points of view on this problem as of today. Secondly, only providing standing of a foreign representative without solving the problem of conflict of laws is technically very difficult. Thirdly, even if we do not prepare the provision of standing, we may be able to affirm this standing by interpreting exiting rules. Our law of civil procedure affirms so broadly procedural standing (active legitimation) that we can say that the foreign representative is not prevented from initiating such actions by the sole fact that he is not insolvency administrator appointed by our court even without any additional provision. Therefore, the silence of our law does not mean that it denies this type of action by a foreign representative and the purpose of the model law, but it only means that the content of this Article of the model law is almost self-evident and it is not necessary to expressly stipulate this rule in the text<sup>90</sup>.

#### (h) Intervention in individual proceedings

Article.24 of the model law stipulates that “upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceeding in which the debtor is a party”. The purpose of this Article is explained to avoid the denial of standing to the foreign representative to intervene in proceedings merely because the procedural legislation may not have contemplated the foreign representative among those having such standing<sup>91</sup>.

Our new law does not prepare such an Article. We consider that this problem is purely problem of civil procedure. Then our law of civil procedure does not limit standing for intervention, but it permits every interested person to intervene in proceedings<sup>92</sup>. It means that any third party can naturally intervene in a proceeding, if the consequence of the proceeding will affect his legal interests. Therefore, we can avoid the result of denial of standing to the foreign representative to intervene in the individual proceeding without any additional provision<sup>93</sup>.

## 5. Cooperation with Foreign Courts and Representatives

Cooperation is another way of assistance to a foreign proceeding than recognition in the scheme of the model law. The model law firstly provides for cooperation between local courts and foreign courts or foreign representatives. It

secondly provides for cooperation between local representatives and foreign courts or foreign representatives. We deal with this problem in the order provided in the model law.

#### (1) Cooperation between local courts and foreign courts or foreign representatives

Article.25 par.1 of the model law provides that “the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a” local representative. Par.2 of this Article stipulates about the local court’s power of requesting cooperation. According to that paragraph, “the court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives”. The power of courts to communicate “directly” or to request information and assistance “directly” is explained to avoid use of time-consuming procedures such as letters rogatory. This competence is critical when the local courts consider that they should act for cooperation with urgency<sup>94</sup>.

Our new legislation does not adopt this type of cooperation. In this point, we must recognize that the Japanese law does not loyally comply with the request of the model law. The reason why we decided to take such attitude is as following. Firstly, in the case where the local insolvency proceeding regarding the debtor is not taking place, we doubt about the necessity of such type of cooperation. The most frequent and imaginable cases that need cooperation are the concurrent proceedings cases. We cannot well imagine the scene that would acutely need cooperation without commencing a local proceeding. For example, requesting general information about the system of Japanese insolvency proceedings will be a problem of judicial administration, rather than cooperation by the individual court. The Japanese legislators may consider that it is not adequate to provide this type of cooperation in the procedural law.

Secondly, in the case where a local insolvency proceeding regarding the debtor is taking place, indeed we can imagine the effective cooperation between the insolvency courts of both countries. But, in many cases, the cooperation between the insolvency representatives or DIPs may be more adequate and more efficient than that between the insolvency courts, because insolvency practitioners like lawyers or public accountants are more familiar with that type of international contact than judges. It will be sufficient that the court, if it judges it necessary, intervenes, supports or controls the representative’s activities. Such passive participation of the court may comply more precisely with the trend of our insolvency legislation which more and more limits the court’s intervention with the activities of representatives or DIPs. Furthermore our law does not refuse such cooperation even without such provision, but our court is understood to have inherent powers to cooperate with the foreign court, if it judges such cooperation necessary. The internationalization of our judicial system will in future make this type of cooperation much easier than today<sup>95</sup>.

#### (2) Cooperation between local representatives and foreign courts or foreign representatives

The model law stipulates about the rule on cooperation by a local representative that mirrors the rule on cooperation

by a local court. Article.26 par.1 of the model law provides that a local representative “shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives”. Par.2 of this Article stipulates about the local representative’s power of requiring cooperation. According to this paragraph, a local representative “is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives”. In addition, Article.27 enumerates the forms of cooperation, such as appointment of a person or body, communication of information, approval or implementation of agreements by the court, or coordination of concurrent proceedings.

New Japanese legislation regards cooperation by a local representative as very important, particularly because it is expected to compensate for the lack of the provision for cooperation by the court. Firstly, a local representative is provided to be able to require to a foreign representative the information or the cooperation that is necessary for a local proceeding of the debtor. Secondly, a local representative is obliged to make every possible effort to give to a foreign representative the information or the cooperation that is necessary for the smooth performance of a foreign proceeding of the debtor<sup>96</sup>.

Consequently, our law is consistent with the model law in providing the power of a local representative to require information and cooperation and its obligation to effort to give information and cooperation to a foreign representative. The Japanese rule is different from the model law rule in the point that the former mentions only a foreign representative as the other party of cooperation, whereas the latter also mentions a foreign court. This ruling of our law is based upon our considering that, in the case of concurrent proceedings, the cooperation between representatives of both proceedings is not only necessary but also sufficient, just in the same way as we consider the cooperation by a local court is not necessary.

As to the forms of cooperation, the model law is listing several forms, while our law mentions abstractly “necessary cooperation”. So far we have not had so many examples of cooperation with foreign proceedings that our legislators decided to leave concrete forms of cooperation to the invention by practice in future. However, the forms listed in the model law, especially so-called “protocols” between concurrent proceedings, seem to become important guide for our local courts and representatives to devise useful forms of cooperation from now on<sup>97</sup>.

## 6. Concurrent Proceedings

### (1) Possibility of concurrent proceedings

According to the radical doctrine for promoting complete international cooperation, a concurrent proceeding should be generally prohibited and a foreign main proceeding should always have worldwide effects. However, the recent legislations or conventions are regarded to take more flexible attitude toward concurrent proceedings<sup>98</sup>. The model law is not an exception. Article.28 of the model law stipulates that “after recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State”. This provision intends to make it clear that the concurrent proceeding is possible even

after recognition of a foreign main proceeding. As opposite interpretation of this Article, we can consider that the commencement of a concurrent proceeding is always possible, if recognition of a foreign proceeding does not exist or if only recognition of foreign non-main proceeding exists in the enacting State<sup>99</sup>.

The Japanese law generally permits a concurrent proceeding as well as the model law. When our court judges that this State has insolvency jurisdiction over the debtor, namely in the case where the latter has place of business, domicile, residence or some assets in Japan, it can always commence a local concurrent proceeding. It means that our law does not know the case in which we refuse to commence a local proceeding by reason of existence of a foreign proceeding regarding the same debtor. However, our new law on recognition provides the possibility to stay a local concurrent proceeding in particular circumstances as we will describe just later.

## (2) Coordination of local proceedings and foreign proceedings

Once we admit the possibility of commencement of a concurrent proceeding, the next problem is how to coordinate these concurrent proceedings. Relating to coordination of a local proceeding and a foreign proceeding, Article.29 of the model law deals with this problem. This Article adopts the principle of absolute priority of a local proceeding. In consequence, any relief or effect based on recognition of a foreign proceeding must be consistent with that based on a local proceeding. If it is inconsistent with a local proceeding, it shall be modified or terminated. However, recognition itself is not terminated if a local proceeding is taking place: a “concurrent” proceeding is possible to the letter.

Our new law is based upon the same way of thinking as the model law: a local proceeding takes priority over a foreign proceeding in principle. But, the concrete content of our rule is subtly different from that of the model law rule. Firstly, our new law approves the possibility of stay of a local proceeding upon the following conditions: (a) the foreign proceeding is a foreign main proceeding, (b) the interests of local creditors will not be seriously violated in that foreign proceeding and (c) the recognition of the foreign proceeding is of benefit to the general interests of all creditors<sup>100</sup>. In such a case, the court may stay a local proceeding even before recognition of a foreign proceeding<sup>101</sup> and it shall order the stay of a local proceeding when it recognizes a foreign main proceeding<sup>102</sup>. Then, the stayed local proceeding will be terminated if the recognized foreign proceeding terminates successfully: distribution to creditors or approval of a reorganization plan<sup>103</sup>. If the recognized foreign proceeding results in failure, the stayed local proceeding will be running again. This possibility of staying a local proceeding is noteworthy, for it is clear evidence that the Japanese law abandoned an isolation policy in the past and now it shows its favorable attitude towards the international cooperation surpassing the international standard of today embodied in the model law.

Secondly, these two rules are different in the way of coordinating a local proceeding and a foreign proceeding. The model law makes two proceedings run simultaneously and only coordinates the relief or the effect upon them, while our law admits only one proceeding to run for one debtor at one point of time. The former way of coordination seems to be familiar to the Anglo-Saxon legislators, because it presupposes the broad discretion of the court. For the civil law countries, like Japan, the principle of “one running proceeding for one debtor” seems to be so more simple and

familiar that the judges of these countries will be less confused than when we admit the possibility of parallel running of plural proceedings at the same time. We can explain such rule as indispensable arrangement of the model law for the civil law countries<sup>104</sup>.

### (3) Coordination of foreign proceedings

We can suppose the situation in which two or more foreign proceedings require to our court to recognize them at the same time. This situation necessitates the rule of coordination of plural foreign proceedings. Article.30 of the model law deals with this problem. This Article adopts the principle of absolute priority of a foreign main proceeding. In consequence, any relief or effect based on recognition of a foreign non-main proceeding must be consistent with that based on recognition of a foreign main proceeding. If it is inconsistent with a foreign main proceeding, it shall be modified or terminated. However, recognition of a foreign non-main proceeding itself is not terminated if a foreign main proceeding is recognized: “concurrent” recognition is always possible. Relating to coordination of more than two foreign non-main proceedings, the model law does not provide any rule, but leaves this problem to the discretion of the recognizing court.

Our new law perfectly adopts the rule of the model law. Firstly, we follow the principle of priority of a foreign main proceeding<sup>105</sup>. Secondly, we do not fix the general priority rule between foreign non-main proceedings and the court will determine case by case which proceeding is more favorable to the general interests of creditors<sup>106</sup>. Anyway, the court may stay the recognition-assistance proceeding even before the recognition of the other foreign proceeding<sup>107</sup> and it shall order the stay of the recognition-assistance proceeding when it recognizes the other foreign proceeding. <sup>108</sup>Then, the stayed proceeding will be terminated if the recognized foreign proceeding terminates successfully: distribution to creditors or approval of a reorganization plan<sup>109</sup>. If the recognized foreign proceeding results in failure, the stayed recognition-assistance proceeding will be running again.

### (4) Presumption of insolvency

Article.31 of the model law stipulates that “in the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent”. In jurisdictions where insolvency of the debtor is a condition for commencing insolvency proceedings, this Article establishes, upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor. This rule would have particular significance when proving insolvency as the prerequisite for an insolvency proceeding would be a time-consuming process and of little additional benefit bearing in mind that the debtor is already in an insolvency proceeding in the State where it has the centre of its main interests and the commencement of a local proceeding is urgently needed for the protection of local creditors<sup>110</sup>.

Our new law follows this model law rule in principle. It provides that when the foreign proceeding of a debtor has

already commenced, the existence of the fact that is a condition of commencing a local insolvency proceeding of the debtor is presumed<sup>111</sup>. We can point out three detailed disparities between these two rules. Firstly, the model law deals with only a foreign main proceeding, while our law permits presumption by a foreign non-main proceeding. Consequently, we broaden the possibility of presumption in order to protect interests of our local creditors and to increase convenience for a foreign representative. Secondly, the model law supposes the recognition of a foreign proceeding for this presumption, while our law is satisfied with only existence of a foreign proceeding. The latter rule will also result easy commencement of a local concurrent proceeding. Finally, the model law presumes “insolvency” of a debtor, while our law presumes the conditions of commencing an insolvency proceeding. Some of our insolvency laws permit an insolvency proceeding to commence before the insolvency of a debtor occurs<sup>112</sup>. Consequently, it is necessary for our law to presume the other conditions of insolvency proceedings than “insolvency” itself<sup>113</sup>.

#### (5) Coordination of payment

Article. 32 of the model law provides that “without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received”. This rule, sometimes referred to as the hotchpotch rule, is intended to avoid situations in which a creditor might obtain more favorable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. We have to pay attention to the fact that this Article does not affect the ranking of claims as established by the law of the enacting State and is solely intended to establish the equal treatment of creditors of the same class<sup>114</sup>.

The new Japanese law also stipulates this hotchpotch rule<sup>115</sup>. The intention of these provisions to establish the equal treatment of creditors of the same class by coordinating the payment in different jurisdictions is perfectly same as that of the model law. However, the rule in our law is a little different from that in the model law as to the scope of application of the rule. Firstly, the model law deals only with the payment in a foreign insolvency proceeding, while our law broadly deals with the other ways of payment, such as payment in an individual execution proceeding or voluntary payment by the debtor. In this point, the Japanese law aims at high-grade cooperation and more equal treatment of creditors. Secondly, the model law deals with the payment both before and after the commencement of a local proceeding, though our law deals with only the payment after the commencement of a local proceeding. This attitude of our law seems to be natural considering that the hotchpotch rule of our law is also applied to the payment out of the insolvency proceeding. In addition, taking into account the fact that it will be very rare that a local proceeding commences after the payment in a foreign proceeding has ended, we can appreciate that the rule of our law is not incompatible to the principle of the model law<sup>116</sup>.

## 7. Conclusions

We can conclude in the final analysis that our new legislation on the cross-border insolvency adopts in principle the rule of the model law on cross-border insolvency. Of course, there are several differences between our law and the model law, but these points are almost technical ones and the most important differences, such as the provision that makes every relief upon recognition discretionary or that adopts the principle of “one proceeding running for one debtor”, are not necessarily considered to conflict with the essential purpose of the model law. At least, we can assert that our State has given favourable consideration to the model law, as the General Assembly Resolution 52/158 of 15 Dec. 1997 recommended to all member States of United Nations. In addition, as the provision that permits the court to stay a local proceeding under several conditions or that adopts the rule of so-called cross-filing<sup>117</sup> shows precisely, the new Japanese legislation surpasses the international standard embodied in the model law in some points.

However, our law postponed several problems to the future legislation. Among these problems, we can firstly mention the problem of related companies as important. Almost all Japanese companies make a subsidiary company in a foreign country, when they engage in business there. If we are satisfied with the provisions that rule the cross-border insolvency case of one legal personality, we cannot exert a great influence on the real economic activities. It is technically very difficult to rule on the insolvency of related companies, but we will have to make every effort for the adequate legislation on this matter in future.

Secondly, we will have to deal with the problem of conflict of laws in the cross-border insolvency cases one day. We cannot stipulate about the standing of Paulien action in the model law this time, but every cross-border insolvency case will give rise to many and various conflict of laws problems. Legal problems that the practice will produce shall necessarily compel our legislators to face with these problems in near future.

Finally, we hope the Japanese judges and lawyers take into consideration the international character of this legislation. Article.8 of the model law stipulates that “in the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith”. Our law did not adopt this provision by technical reasons, but this way of thinking will be important even for interpreting our new law<sup>118</sup>. Finally we hope that this new legislation will be interpreted upon the mentality for the international cooperation and it will contribute toward resolving difficult cross-border insolvency problems more effectively and more fairly.

(Footnotes)

<sup>1</sup> See Shinichiro Takagi, *Tosanho no kaisei to unyo* (Shouji-houmu, 2000), p.74.

<sup>2</sup> Bankruptcy Law Article 3, Corporate Reorganization Law Article 4, Civil Rehabilitation Act Article 4.

<sup>3</sup> See for example, Court of Appeals of Tokyo judgment, January 30, 1981 (Hanrei-jihō 994, 53).

<sup>4</sup> See for example, Morio Takeshita, ed., *Kokusai-tosan ho* (Yuhikaku, 1991)(you will find the proposal for “preliminary draft of the international bankruptcy-related provisions in Japanese insolvency proceedings” in English from page 428 of this book).

<sup>5</sup> See Homu-sho minjikyoku sanjikansitu, *Tosan-hosei ni kansuru kaisei-kentōjiko* (Shoji-homu kenkyukai, 1997) Hosoku-setsumei, p.3.

<sup>6</sup> Related to the work of UNCITRAL about the model law on cross-border insolvency, see UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (United Nations, 1999), p. 20f.

<sup>7</sup> Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), pars.392 and 393.

<sup>8</sup> For the discussion, see the report of UNCITRAL on the work of its thirtieth session (Official Records of the General

Assembly, Fifty-second Session, Supplement No. 17 (A/52/17), pars.12-225).

<sup>9</sup> Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17), pars.220.

<sup>10</sup> Concerning these cross-border provisions in the Civil Rehabilitation Act, see Kazuhiko Yamamoto, *Minji-saisei tetsuduki to Kokusai-tosan*, *Kinyu-shoji hanrei* 1086, 121 (2000).

<sup>11</sup> Draft Text of the Act on Recognition-Assistance of a foreign insolvency proceeding which consisted of 69 Articles was submitted to the Diet, October 13, 2000.

<sup>12</sup> The EU regulation inherits the EU convention on this matter. On the draft of the EU regulation, see Official Journal of the European Community C.221/8 (3.8.1999). Concerning the EU convention, see, for example, F. Balz, *The Draft EC Convention on Bankruptcy Proceedings*, Vol.12, No.10 *ABI Journal* 24 (1994).

<sup>13</sup> On this definition, see 2 (4).

<sup>14</sup> On this rule, see 6 (5).

<sup>15</sup> Article 2, par.1, n.1.

<sup>16</sup> See Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (New Legislation on Cross-Border Insolvency), *NBL* 699, 49-50 (2000).

<sup>17</sup> Article2, par.1, n.2.

<sup>18</sup> This is the usual understanding, when we interpret the same concept in the Code of Civil Procedure which determines the general jurisdiction (see, for example, *Chushaku-Minjisosho-ho* (Commentaries on the Code of Civil Procedure) vol. 1 (1989, Yuhikaku), p.156). We can consider that this interpretation will apply to the interpretation of the same concept in the Law on Recognition of a Foreign Proceeding.

<sup>19</sup> Article 2, par.1, n.3.

See Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (2), *NBL* 699, 50-51 (2000).

<sup>20</sup> See UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (United Nations, 1999) (hereinafter referred as "Guide to Enactment"), par. 69.

<sup>21</sup> Article 2, par.1, n.7.

<sup>22</sup> Article 2, par.1, n.8.

<sup>23</sup> See Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (2), *NBL* 699, 45 (2000).

<sup>24</sup> See Guide to Enactment, pars. 97-99.

<sup>25</sup> Kazuhiko Yamamoto, *Minjisaisei-tetsuduki to Kokusaitosan*, *Kinyu-Shoji Hanrei* 1086, 125 (2000).

<sup>26</sup> Article 357-3, par.1 of *Hasan-ho*, Article.289-4 par.1 of *Kaisha-kosei ho*.

<sup>27</sup> Guide to Enactment, pars. 100-102.

<sup>28</sup> Article 357-3, pars.2-4 of *Hasan-ho*, Article 289-4, pars.2-4 of *Kaisha-kosei ho*.

<sup>29</sup> Guide to Enactment, par. 101.

<sup>30</sup> Kazuhiko Yamamoto, *Minjisaisei-tetsuduki to Kokusaitosan*, *Kinyu-shoji hanrei* 1086, 125-126 (2000).

<sup>31</sup> Guide to Enactment, pars. 103-105.

<sup>32</sup> The latter part of Article 2 was deleted by the new legislation. From now on, foreign persons or bodies have the same status in a bankruptcy liquidation proceeding as local persons or bodies without any exception.

<sup>33</sup> Guide to Enactment, pars. 106-111.

<sup>34</sup> Kazuhiko Yamamoto, *Aratana Tosanhosei* (2), *NBL* 699, 47-48 (2000).

<sup>35</sup> Article 2 (h) of EU Regulation provides "establishment shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods". See C221/11 of Official Journal of the European Community (3.8.1999).

<sup>36</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (2), *NBL* 699, 50 (2000).

<sup>37</sup> *Ibid.*, *NBL* 699, 50.

<sup>38</sup> *Ibid.*, *NBL* 699,51.

<sup>39</sup> Guide to Enactment, pars. 86-89.

<sup>40</sup> Article 118 of the Code of Civil Procedure mentions four conditions for recognizing foreign judgments (jurisdiction, adequate service to defendants, principle of reciprocity, and public order).

<sup>41</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (3), *NBL* 701,48 (2000).

<sup>42</sup> *Ibid.*, *NBL* 701,49.

<sup>43</sup> Guide to Enactment, pars. 79-81.

<sup>44</sup> Article 4 of Act on recognition of foreign proceedings.

<sup>45</sup> Article 5.

<sup>46</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (3), *NBL* 701,49-50 (2000).

<sup>47</sup> Guide to Enactment, par. 112.

<sup>48</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (3), *NBL* 701,50-51 (2000).

<sup>49</sup> Articles 19 and 20 of the Law on Recognition of Foreign Proceedings.

<sup>50</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (3), *NBL* 701,51 (2000).

- <sup>51</sup> Article 17, par.3 of the Act on recognition of foreign proceedings.
- <sup>52</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (3), NBL 701,51-52 (2000).
- <sup>53</sup> Guide to Enactment, pars. 135-140.
- <sup>54</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (3), NBL702,51-52 (2000).
- <sup>55</sup> Guide to Enactment, par.125.
- <sup>56</sup> Only the Public Office Election Law provides a timelimit of 100 days for the process of an election annulment (Article 213).
- <sup>57</sup> Guide to Enactment, pars. 122-123.
- <sup>58</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (3), NBL701,52-53 (2000).
- <sup>59</sup> Guide to Enactment, pars. 129-131.
- <sup>60</sup> Article 56 of the Law on Recognition of Foreign Proceedings.
- <sup>61</sup> For this fundamental scheme of the model law recognition system, see Guide to Enactment, pars. 32-34.
- <sup>62</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (3), NBL701,53-54 (2000).
- <sup>63</sup> Guide to Enactment, par. 145.
- <sup>64</sup> Article 25, par.1, n.2 and 3 of the Act on recognition of foreign proceedings.
- <sup>65</sup> For the discussion in Japan of this problem, see Yukio Kaise, *Chusai-keiyaku toujisyu no hasan*, Kaoru Matsuura and Yoshimitsu Aoyama, ed., *Gendai chusai-ho no ronten (Issues of Today on Arbitration)* (Yuhikaku, 1998), p.189f.
- <sup>66</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (4), NBL702,44-45 (2000).
- <sup>67</sup> Article 25, par.1 n.1 provides the stay of continuation of execution and Article 28 provides the general stay of commencement of execution.
- <sup>68</sup> Article 25, par.5.
- <sup>69</sup> Article 27.
- <sup>70</sup> On this problem, see Guide to Enactment, pars. 148-150.
- <sup>71</sup> Article 26 of the Law on Recognition of Foreign Proceedings.
- <sup>72</sup> Guide to Enactment, par.154.
- <sup>73</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (4), NBL 702,46 (2000).
- <sup>74</sup> Article 41 of the Act on recognition of foreign proceedings. This power is modeled after the power of local representatives to require the debtor or its interested party to explain the situation or to present documents (for example, Article 153 of the Bankruptcy Law)..
- <sup>75</sup> This rule will be included in the future Supreme Court Rule on recognition of foreign proceedings.
- <sup>76</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (4), NBL 702,46-47 (2000).
- <sup>77</sup> Articles 32-34 of the Law on Recognition of Foreign Proceedings.
- <sup>78</sup> Article 21, par.1 (e) of the model law clearly provides the possibility of entrusting the administration or realization of the debtor's assets to a "person designated by the court".
- <sup>79</sup> Guide to Enactment, par.157.
- <sup>80</sup> Article 31 (for the debtor) and Article 35 (for a recognition representative). However, the invalidity of this act cannot be applicable to a third party of *bonne fois* in order to protect the safety of business.
- <sup>81</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (4), NBL 702,48 (2000).
- <sup>82</sup> Guide to Enactment, pars. 162-163.
- <sup>83</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (4), NBL 702,48-49 (2000).
- <sup>84</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (4), NBL 702,49 (2000).
- <sup>85</sup> To the same provision of the Bankruptcy Law (Article 155, par.2), see Hideo Saito and others, eds., *Chukai Hasanho (gekan)*, pp.266-267.
- <sup>86</sup> Guide to Enactment, pars.165-167.
- <sup>87</sup> Article 72 of the Bankruptcy Law, Article 78 of Corporate Reorganization Law, Article 127 of the Civil Rehabilitation Law.
- <sup>88</sup> Article 102, par.2 of the enforcement law of insolvency code stipulates the rule of conflict of laws in the matter of the avoidance (*Anfechtung*).
- <sup>89</sup> On this problem, see, for example, Shinjiro Takagi, *Tosan-ho no kaisei to unyo (Reform and Practice of Insolvency Law)*, pp.1-40.
- <sup>90</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (4), NBL 702,49-50 (2000).
- <sup>91</sup> Guide to Enactment, pars. 168-172.
- <sup>92</sup> See Article 42 of the Code of Civil Procedure.
- <sup>93</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (4), NBL 702,50 (2000).
- <sup>94</sup> Guide to Enactment, par.179.
- <sup>95</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (4), NBL 702,50-51 (2000).
- <sup>96</sup> Article 196 of the Civil Rehabilitation Law, that will be introduced to the Bankruptcy Law (Article 357-2) and to the

Corporate Reorganization Law (Article 289-2) by the new legislation.

<sup>97</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (5), NBL 704,62-63 (2000).

<sup>98</sup> EU regulation indeed prohibits concurrent proceedings in principle, but it admits several important exceptions. Namely, the liquidation types of proceedings may be commenced after recognition of foreign main proceedings (see Article 27 of the EU Regulation).

<sup>99</sup> See Guide to Enactment, pars. 184-187.

<sup>100</sup> Article 57, par.1 of Law on Recognition of Foreign Proceedings.

<sup>101</sup> Article 58.

<sup>102</sup> Article 57, par.2.

<sup>103</sup> Article 61, par.1.

<sup>104</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (5), NBL 704,63-65 (2000).

<sup>105</sup> Article 62, par.1 n.1 of the Law on Recognition of Foreign Proceedings.

<sup>106</sup> Article 62, par.1 n.2.

<sup>107</sup> Article 63.

<sup>108</sup> Article 62, par.2.

<sup>109</sup> Article 64.

<sup>110</sup> Guide to Enactment, pars. 194-197.

<sup>111</sup> Article 197 of Civil Rehabilitation Law, that will be introduced to the Bankruptcy Law (Article 357-3) and to the Corporate Reorganization Law (Article 289-4) by the new legislation.

<sup>112</sup> Article 21, par.1 of the Civil Rehabilitation Law and Article 30, par.1 of the Corporate Reorganization Law provide as conditions for commencing a proceeding the probability that the insolvency will occur or the situation where the debtor cannot pay its debts without impeding the continuation of its business.

<sup>113</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (5), NBL 704,65-66 (2000).

<sup>114</sup> Guide to Enactment, pars. 198-200.

<sup>115</sup> Article 89 of Civil Rehabilitation Law, that will be introduced to the Bankruptcy Law (Article 265-2) and to the Corporate Reorganization Law (Article 118-2) by the new legislation (related to the Corporate Reorganization proceeding, security creditors also submit to the hotchpotch rule (Article 124-3)).

<sup>116</sup> Kazuhiko Yamamoto, *Aratana Kokusaitosan-hosei* (5), NBL 704,66-67 (2000).

<sup>117</sup> Article 199 of the Civil Rehabilitation Law permits foreign representatives to represent foreign creditors in local proceedings and also permits local representatives to represent local creditors in foreign proceedings. This rule models after Article 32, par.2 of the EU regulation and will be introduced to the Bankruptcy Law (Article 357-4) and to the Corporate Reorganization Law (Article 289-5).

<sup>118</sup> The UNCITRAL secretariat publishes abstracts of judicial decisions that interpret model laws under the Case Law on UNCITRAL Texts (CLOUT) information system by which harmonized interpretation of the model law will be facilitated. We hope future Japanese judges consult this system frequently, considering the international character of our cross-border insolvency legislation, when they will have to interpret these laws.