

Japanese Cross-Border Insolvency Law and Comments on US Chapter 15

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The Law on Recognition of and Assistance in Foreign Insolvency Proceedings (hereinafter cited as "LRAF") was enacted in November 2000 and became effective in April, 2001. The LRAF was enacted based mostly on the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter cited as "Model Law"). The provisions of the LRAF are not exactly the same as the Model Law in that they amend some of the provisions included in the Model Law, wherever necessary, to be compatible with the entire Japanese legal systems. However, I believe the LRAF adopts the same concepts as the Model Law in substance so that the provisions of the LRAF are not contradictory to those of the Model Law. Rather, some provisions in the LRAF are more open to foreign insolvency proceedings than the Model Law. The differences between the LRAF and the Model Law are summarized as follows.

1 Differences between the Model Law and the Japanese Law

According to the LRAF, the recognition order of a foreign main proceeding does not have any **automatic effect** in itself, but the court may order several reliefs at the same time or after issuing the recognition order at the request of a foreign representative and/or other interested parties or its own motion. The reliefs include stay or prohibition on execution or enforcement procedure, stay of action of any kind, stay of enforcement of secured rights and other appropriate reliefs. The court also may order the debtor not to dispose of its assets and prohibit any payments to its creditors. Moreover, the court may cancel the stayed execution and enforcement proceedings enabling the use of attached assets to continue the debtor's business, which is beyond the Model Law.

The court may appoint a "**recognition trustee**" who has all the powers to

possess and dispose of the debtor's assets and operate its business at the request of the recognized foreign representative and/or other interested parties or its own motion upon the recognition order. It is expected that the recognized foreign representatives will be appointed as the recognition trustees by the court in most cases. The Model Law is silent on the matter of whether a foreign representative is able to **turnover the debtor's assets to foreign countries**. But the LRAF explicitly provides that the court may authorize the recognition trustee to take the above action if the court is satisfied that interests of local creditors are not unduly injured.

The LRAF does not, in principal, admit **concurrent recognition proceedings** when a domestic insolvency proceeding on the same debtor is pending in Japan. But in exceptional cases, despite a pending domestic proceeding, a court may recognize the foreign main proceeding if the court finds that the recognition of the foreign proceeding is more beneficial to creditors generally and the interests of local creditors are not unduly injured in the foreign main proceeding compared to continuing the domestic pending case.

Although the LRAF does not provide for **direct communications between the Japanese courts and the foreign court**, it does not prohibit court-to-court direct communications either.

Although the LRAF is silent on the standing of foreign representatives in **avoiding preference and fraudulent conveyance** in Japan, it does not deny the capability of foreign representatives to exercise an avoiding power. Moreover, the Japanese courts will unlikely to dismiss the avoiding actions brought by foreign representatives only because of a lack of a clear provision that admits the standing of doing so. But the **conflict of laws or private international laws** may still be controversial.

2 Differences between US Chapter 15 and the Japanese Law

As the Chapter 15 adopts almost all provisions of the Model Law, most of the above-mentioned differences between the Model Law and the Japanese Law also apply to those between the American and Japanese Laws.

Section 1523(a) of Chapter 15 provides that, upon recognition of a foreign proceeding, the foreign representative has a standing **in a case concerning the debtor pending under another chapter of this title** to initiate actions under sections 522, 544, 545, 547, 548, 550, 553 and 724(a). By inserting the terms "in a case concerning the debtor pending under another chapter of this title", the American law clarifies that, when a foreign representative is going to avail him/herself the powerful American

avoiding powers, he/she has to file a petition to commence a concurrent proceeding in the United States under Section 1528. Consequently, Section 1523(a) resolves the conflict of laws problem that remain unsettled by the Model Law at the same time. This is one of the big merits of the Chapter 15.

3 Comment on the extraterritorial effects of Chapter 15 proceedings

For the comments on the extraterritorial effects of the concurrent proceeding provided by Section 1528, please see pages 1-3 of my another paper for this meeting. The exceptions to extend extraterritorial jurisdictions provided by Section 1528 are broader than those of Article 28 of the Model Law by inserting the term **“to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter”** instead of the term “to other assets of the debtor that, under the law of this States, should be administered in that proceeding” in the Model Law. The U.S. Bankruptcy judges should exercise their broad jurisdictional power conservatively without intruding foreign main proceedings even when they think their intended intervention are fair and equitable. Please see also my comments on Yukos and Maruko cases included my another paper aforementioned.

4 Cases recognized and assisted by the Japanese Law (LRAF)

Only two cases were filed with Tokyo District Court (hereinafter “TDC”) which has exclusive jurisdiction over LRAF cases to request recognition and assistance by the LRAF since the law became effective in 2001.

An interim liquidator of the Hong Kong subsidiary of the Jinro, a well-known Korean distiller, filed a petition for recognition with the Court. The Hong Kong subsidiary owned the whole issued stocks of its Japanese subsidiary. The Court appointed the Hong Kong liquidator as the recognition trustee in Japan. The trustee sold the ownership of the Japanese subsidiary and the proceeds of the sale were included in the estate of the Hong Kong liquidation proceeding.

The debtor in possession of the Azabu Building, whose head quarter was located in Tokyo and one of the branches was in Hawaii, filed a petition for Chapter 11 with the Bankruptcy Court in Honolulu; the DIP filed a petition for the LRAF proceeding with the TDC to preserve its assets of bank deposits enjoining creditors to garnish the bank accounts. The TDC issued a comprehensive stay order prohibiting any collection efforts which would be made by creditors.

I don't know the exact reason why the LRAF has been rarely used. The recognition assistance proceeding is an inbound proceeding which is expected to be utilized by foreign representatives, so that it might be the case that the foreign representatives do not need the assistances which would be provided by the LRAF. Official English translation of the full text of Japanese Law Relating to Recognition and Assistance for Foreign Insolvency Proceedings is available at www.moj.go.jp