

The Reality of the Japanese Legal System for Cross-Border Insolvency

~Driven by Fear of Universalism~

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I. INTRODUCTION AND BACKGROUND

A. Introduction

“Japan has adopted the United Nations Commission on International Trade Law (hereinafter “UNCITRAL”) Model Law on Cross-Border Insolvency (hereinafter “Model Law”).”¹

Most of the papers, articles, and treatises explaining the current status of cross-border insolvency systems usually have a very short description about Japan, resembling the phrase above.² Also, on Japan’s side, many Japanese scholars and drafters of the related Japanese laws have announced that Japan accepted most of the thrusts of the Model Law and enacted insolvency laws based on the Model Law.³ As a result of the enactment of these laws and the announcement that Japan reached, or even went beyond, the world standard in the field of cross-border insolvency,⁴ debates and discussions aiming for further improvement of Japan’s cross-border insolvency system seem to be rare.

In fact, in 2001, Japan underwent a total reform of insolvency law and redrafted the laws on cross-border insolvency based on the Model Law.⁵ Nevertheless, as Professor Bob Wessels

¹ U. N. COMM’N ON INT’L TRADE LAW, THE MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Doc. A/52/17, U.N. Sales No. E.99.V.3 (1999) [hereinafter MODEL LAW].

² See, e.g., ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 872 (6th ed. 2008), John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA J. OF INT’L L. 935, 960 (2005).

³ E.g., Kazuhiko Yamamoto, *New Japanese Legislation on Cross-border Insolvency As Compared with the UNCITRAL the Model Law*, 11 INT’L INSOLV. REV. 67, 95 (2002), Takuya Miyama, *Kokusai Tosan Hosei no Seibi ni kansuru Horitsu no Gaiyo [Outline of Act on Maintenance of Legal System on Transnational Bankruptcy]*, 1194 JURISUTO 41, 42 (2001).

⁴ See Takuya Miyama, et al., *Gaikokutosanshoritetsuzuki no Shoninenjo nikansuru Horitsu oyobi Kaisei Minji Soshoho no Gaiyo (1) [Outline of Law on Recognition and Assistance of a Foreign Insolvency Proceeding and Revised Civil Rehabilitation Law (1)]*, 1599 KINYU HOMU JIJO 58, 58 (2001).

⁵ See, e.g., Junichi Matsushita, *Comprehensive Reform of Japanese Personal Insolvency Law*, 7 Theoretical Inq. L. 555, 556 (2006), Kazuhiko Yamamoto, *Gaikokutosansyoritetsuzuki no*

points out, “[d]espite being based on the Model Law, there are some striking differences” between Japan’s insolvency laws and the Model Law.⁶ Similarly, Japanese scholar Professor Junichi Matsushita also demonstrates that “[the law] is basically modeled after the UNCITRAL Model Law on Cross-Border Insolvency, although the text of the law differed considerably from that of the Model Law.”⁷

The fundamental question of this paper is: Although Japan’s insolvency laws are in fact based on the Model Law, has Japan genuinely “adopted” the Model Law? In depth study seems to indicate that it has not.

B. Background

There is no disputing that Japan’s legal system for cross-border insolvency had been extremely backward and out of date until the total reform of the laws in 2001.⁸ Until the 2001 reform, Japan persisted in “extreme territorialism” for cross-border insolvency, and this had been causing a number of problems.⁹

In 2001, finally, responding to the strong criticism from both inside and outside of the country, Japan made a radical reform by revising laws and enacting new laws based on the

Syoninenjoho nitsuite (1) [Regarding Law on Recognition and Assistance for a Foreign Insolvency Proceeding], 1194 JURISUTO 56, 56 (2001), Junichi Matsushita, et al., *Zadankai – Aratana Kokusai Tosan Hoseika no Syoronten (3) [Panel Discussion – Issues of the New Legal System for Transnational Bankruptcy (3)]*, 1611 KINYU HOMU JIJO 79, 79-81 (2001).

⁶ Bob Wessels, *Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the US and Great Britain? It Certainly Will!*, 4-5 available at http://www.bobwessels.nl/download/will_uncitral.pdf.

⁷ Matsushita, *supra* note 5, at 556.

⁸ See, e.g., Junichi Matsushita, *Present and Future Status of Japanese International Insolvency Law*, 33 TEX. INT’L L. J. 71, 75, Yamamoto, *supra* 3, at 67, Hideyuki Sakai, *Kaisha Kose Tetsuzuki to Kaigaisisan, Kaigaieigyosho [Corporation Reorganization Proceeding and Foreign Assets / Foreign Offices]*, 866 HANREI TAIMUZU 38, 38 (1995).

⁹ For the example of these actual problems, see *infra* Part II Section B first Subsection. See also *infra* note 31.

Model Law. As a result, many felt that the Japanese legal system for cross-border insolvency had become the “top-level” in the world¹⁰ or the “front-runner” in the field of cross-border insolvency.¹¹ These opinions might be true at the point of the publication, since, at this point, other developed countries have not yet enacted cross-border insolvency laws based on the Model Law.

Looking closely at the provisions of Japanese laws on cross-border insolvency, however, particularly at the “striking differences”¹² between Japanese laws and the Model Law, raises strong doubts as to whether Japan truly accepted the thrust of the Model Law. Japan has very conservatively modified or completely rejected an important part of the Model Law. Furthermore, since this new cross-border insolvency system is not frequently used,¹³ the issues which were left to be solved by the accumulation of the cases and experiences are still not resolved.

C. The Aim of This Paper

In this paper, I want to explore and describe Japan’s objective status on cross-border insolvency and the conditions and causes for this status. For this purpose, I will consider and analyze its current laws on cross-border insolvency as well as its legal history and culture. Then, I will try to provide a possible solution which would enable Japan to move towards further improvement of its cross-border insolvency system.

In Part II, I will briefly describe the legal history of cross-border insolvency in Japan, focusing on the traditional cross-border insolvency approach called “extreme territorialism,”

¹⁰ Junichi Matsushita, et al., *Zadankai – Aratana Kokusai Tosan Hoseika no Syoronten (1) [Panel Discussion – Issues of the New Legal System for Transnational Bankruptcy (1)]*, 1609 KINYU HOMU JIJO 6, 6 (2001).

¹¹ Matsushita, et al., *supra* note 10, at 17.

¹² Wessels, *supra* note 6, at 5.

¹³ As of May 2009, only 2 cases of recognition of foreign insolvency proceedings are published. See *infra* Part III Section A Subsection 8.

which closely relates to Japan's strong reluctance to adopt "universalism."¹⁴ In Part III, I will compare and analyze the provisions of current Japanese laws on cross-border insolvency with the provisions of the Model Law, and show how Japan modified or rejected the Model Law. In addition to the analysis of current written laws, I will consider whether there is room for an interpretive approach for recognition of foreign proceedings, which may have a large impact on the cross-border insolvency practice. These analyses will clearly show Japan's current status. Then, in Part IV, I will explain and analyze the conditions or causes for reaching this status and consider a possible solution for Japan to improve its system on cross-border insolvency.

II. Legal History of Cross-Border Insolvency in Japan

Japan had a unique past of maintaining "extreme territorialism" until the 2001 reform. This unique past is strongly connected to Japan's current attitude or, at least, Japan's reluctance in accepting the Model Law at the 2001 reform.

A. Extreme Territorialism

Japan's basic legal system for insolvency consists of three laws, the Bankruptcy Act,¹⁵ the Civil Rehabilitation Law,¹⁶ and the Corporation Reorganization Law.¹⁷¹⁸ As of 1999, these

¹⁴ Regarding definition of "territorialism," *see infra* Part II Section A.

¹⁵ *See* Hasanho [Bankruptcy Act], Law No. 75 of 2004 [hereinafter Bankruptcy Act]. The Bankruptcy Act provides an insolvency proceeding to liquidate any kind of entity. (Equivalent to Chapter 7 proceeding of US Bankruptcy Code.)

¹⁶ *See* Minji Saiseiho [Civil Rehabilitation Law], Law No. 255 of 1999 [hereinafter Civil Rehabilitation Law]. The Civil Rehabilitation Law provides an insolvency proceeding to reorganize any kind of entity, however it is particularly aimed at reorganizing small and medium-sized companies. (Equivalent to Chapter 11 proceeding of US Bankruptcy Code.)

¹⁷ *See* Kaisya Koseiho [Corporate Reorganization Law], Law No. 154 of 2002 [hereinafter Corporate Reorganization Law]. The Corporate Reorganization Law provides an insolvency proceeding to reorganize companies, in particular to reorganize large companies. (Similar to Chapter 11 proceeding of US Bankruptcy Code, but generally a trustee will be appointed.) The

three laws¹⁹ were adopting a traditional approach to cross-border insolvency, namely “territorialism,” which generally means that one country’s insolvency proceeding only reaches assets located in that country.^{20,21} Moreover, Japanese laws’ “territorialism” was in extremely pure form, to which no other country’s territorialism approach equals,²² and has been often described as “extreme territorialism.”²³

Generally, the extreme territorialism of Japanese insolvency laws was, in summary,

Corporate Reorganization Law has a stronger “stay” effect compared with the Civil Rehabilitation Law.

¹⁸ See, e.g., Matsushita, *supra* note 8, at 72-73, Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT’L ECON. L. 679, 702-18 (2000), Yasuhei Taniguchi, *International Bankruptcy and Japanese Law*, 23 STAN. J. INT’L L. 449, 450-55 (1987). These articles mention Kaisha Seiri [Corporate Arrangement] proceeding and Tokubetsu Seisan [Special Liquidation] proceeding in the Commercial Code of 1899 as another form of insolvency proceeding in Japan. However, the Corporation Arrangement proceeding was abandoned at the total revision of the Commercial Code in 2006, and the Special Liquidation proceeding is not frequently used because of its inconvenience (or the usefulness of the other proceedings). Therefore, I think it is appropriate to say, “Japanese insolvency system mainly consists of the above three insolvency proceedings.”

¹⁹ At this point, Wagiho [Composition Law] of 1922 was still in effect instead of the Civil Rehabilitation Law.

²⁰ Pottow, *supra* note 2, at 944-47. See also Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT’L L. 499, 513-14 (1991), Andrew Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179 (2000), Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 701-2, 742-43 (1999).

²¹ “Territorialism” is clearly stipulated in the Bankruptcy Act (before the 2001 revision) article 3, Composition Law article 11, Corporate Reorganization Law (before the 2001 revision) article 4.

²² Masaharu Kato, *Hasan Senkoku no Kokusaiteki Koryoku [International Effect of Declaration of Bankruptcy]*, 1 HASANHO KENKYU 303, 327, 330-31 (1912), Yoshimitsu Aoyama, *Tosan Tetsuzuki niokeru Zokuchishugi no Saikento [Reconsideration of Territorialism in Insolvency Proceedings]*, 25 MINJISOSHOMO ZASSHI 125, 145 (1979), Anderson, *supra* note 20 at 685. Even at the time of drafting, all drafters were aware of this extremeness of territorialism. See Kato, *supra* note 22, at 327, KENJIRO UME, HASANHOANGAISETSU [OVERVIEW OF DRAFT OF BANKRUPTCY ACT] 27-31 (1903).

²³ E.g., Junichi Matsushita, *Kokusai Tosan [International Insolvency]*, 172 BESSATSU JURISUTO 206, 206-7 (2004), Kato, *supra* note 22, at 327, Taniguchi, *supra* note 18, at 458, Lucian Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. LAW & ECON. 775, 787 (1999).

interpreted as follows:²⁴

- (i) Japanese insolvency proceedings only reach the debtor's assets located in Japan.
- (ii) The debtor may freely dispose of the assets located outside Japan, in spite of pending insolvency proceedings in Japan.
- (iii) Trustees appointed in insolvency proceedings have the power to control and dispose of a debtor's assets located in Japan, but do not have power to control and dispose of any asset outside Japan.
- (iv) Creditors may freely claim and execute on a debtor's assets located outside Japan, notwithstanding pending insolvency proceeding in Japan.
- (v) Proceedings against a debtor's foreign assets are not stayed, in spite of a pending insolvency proceeding in Japan.
- (vi) Proceedings in Japan against a debtor are not stayed in spite of a pending foreign insolvency proceeding or declaration of bankruptcy.
- (vii) Creditors may freely claim and execute on a debtor's assets located in Japan notwithstanding pending insolvency proceeding against a debtor in foreign countries.
- (viii) Debtor's assets which were, in fact, moved to outside Japan (even after the filing of insolvency proceeding in Japan) will become "assets located outside Japan" in above (ii)²⁵

The drafters and scholars at the time of enactment, including Professor Masaharu Kato (one of the main drafters of the Bankruptcy Act of 1922 and the leading scholar of the field at

²⁴ See Aoyama, *supra* note 22, at 131-38, YUKIO KAISE, KOKUSAI TOSANHO JOSETSU [INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW] 13-17 (1989).

²⁵ Aoyama, *supra* note 22, at 133, KAZUNORI ISHIGURO, KOKUSAI MINJI SOSHOHO [INTERNATIONAL CIVIL PROCEDURE] 294 (1996).

the time), explained as the reasons for introducing territorialism; (i) bankruptcy is generally nothing but an execution, and the power of execution, which is a part of the sovereign power, cannot reach to foreign countries as a matter of course; (ii) it is unclear whether foreign countries will recognize the declaration of bankruptcy in Japan; and (iii) even if the foreign country recognizes Japan's declaration of bankruptcy, there are no authorities to execute it for the Japanese bankruptcy trustee, and (iv) territorialism will lighten the burden of trustees and facilitate proceedings.²⁶

Moreover, a very important additional reason suggested by Professor Kato was that “although universalism²⁷ is appropriate notion as ideal, in an isolated island that is extremely far away from international market of Europe and US, like Japan, it will be expedient to commence insolvency proceeding to the assets that are located only in our country, and secure and achieve satisfaction easily and promptly from these assets.”²⁸

Although I will discuss this in detail in Part IV, what needs to be emphasized here is this last reasoning of the drafter of the former Bankruptcy Act, which states that Japan, classified in geographic terms as an “isolated island of the Far East,” is best suited to “territorialism” in its nature.

Until Japanese courts and scholars started to make strong efforts to interpret and loosen up these rigid territorial provisions and interpretations in the early 1980s, the practice (including negotiations among creditors and debtor, both domestic and foreign) had to be operated within these rigid rules and their problems.²⁹

²⁶ Kato, *supra* note 22, at 310-11, UME, *supra* note 22, at 27-28, Matsushita, *supra* note 8, at 73.

²⁷ Regarding the definition of “universalism,” *see infra*, Part II Section C second paragraph.

²⁸ MASAHARU KATO, HASANHO YORON [COMPENDIUM OF BANKRUPTCY LAW] 39 (1955), Aoyama, *supra* note 22, at 150.

²⁹ *See* Matsushita, *supra* note 8 at 75, Sakai, *supra* note 8 at 39, Anderson, *supra* note 18, at 734. Professor Matsushita explains common problems of territorialism as; (i) inequality among

B. Japanese Courts' Interpretive Efforts

One important case in the Canadian court involving a Japanese debtor and creditor, the “Issei Kisen” case,³⁰ changed the stream of the rigid territorial interpretation of Japanese insolvency laws. In this case, the debtor (Issei Kisen) had been under Corporation Reorganization Proceeding and to the extent of the claims against his assets located in Japan, all creditors had to follow the proceeding and not individually execute (the Corporation Reorganization Proceeding stipulates stay for all the execution of the mortgage). Nevertheless, one “purely” Japanese creditor (Orient Leasing Co., Ltd.) seized the debtor’s ship, which was anchored in a port of Hamilton, Canada, and sought to foreclose the mortgage that the creditor had on this ship, through the Canadian judicial process. Although the trustee appointed in Japan challenged this, objecting that such seizure and foreclosure was not permitted under Japanese law, the Canadian court considered Japan’s Corporation Reorganization Law and held that the effect of the law could not reach the assets outside Japan because of its territorialism provision. The court thus overruled the objection and granted permission for foreclosure sale.³¹ This

creditors, which might motive diligent creditors to grab the debtor’s assets situated in foreign countries, (ii) great inconvenience in the reorganization of an international company because the business of the debtor company will be divided at the borders, fatally destroying the going concern value of the company. These problems were gradually recognized at this point. See Matsushita *supra* note 8, at 75.

Moreover, Mr. Hideyuki Sakai, one of the leading attorneys in the field, explains practical problems such as when ships of Japanese maritime trade companies that had been under insolvency proceedings in Japan were “legally” seized outside Japan by the foreign creditors, the debtor (or the trustee of the debtor) had to make better payment to these foreign creditors than to other creditors in order to have these seized ships “released.” See Sakai, *supra* note 8, at 39.

³⁰ Orient Leasing Co., Ltd. v. The Ship “Kosei Maru,” 94 D.L.R. (3d) 658 (Fed. Ct. 1978). See Taniguchi, *supra* note 18, at 460-461, Anderson, *supra* note 18, at 736-39. Professor Taniguchi served as an expert witness in support of the trustee appointed in Japan. See Taniguchi, *supra* note 18, at 460.

³¹ See Taniguchi, *supra* note 18, at 460-61, Anderson, *supra* note 18, at 736-38, ISHIGURO, *supra* note 25, at 294-95, Sakai, *supra* note 8 at 39.

case's apparent and typical problem, which caused unfairness among creditors and spoiled reorganization proceedings, because of the extreme territorialism approach, shocked both scholars and practitioners in Japan, and it generated huge discussion about overcoming the problems of territorialism.³²

These discussions resulted in Japanese courts' interpretive efforts to loosen up the rigid territorialism.³³ Two remarkable cases resulted from this effort.³⁴

In the first case, heard in 1981, a Japanese court (Tokyo High Court) permitted a Swiss trustee's execution of the rights of a bankrupt Swiss company under their bankruptcy law.³⁵ This case was the first case in which the Japanese court recognized a foreign trustee appointed under foreign bankruptcy proceeding as "trustee" in Japanese court proceedings. It was evaluated as an "extremely important case which became a momentum to reconsider territorialism."³⁶

In the second remarkable case, which is consistent with the previous decision of the

³² See Taniguchi, *supra* note 18, at 461, ISHIGURO, *supra* note 25, at 294-96, Sakai, *supra* note 8, at 39-41.

³³ See Junichi Matsushita, *On Current International Insolvency Law in Japan*, 6 INT'L INSOLVENCY REV. 210, 214 (1997), Matsushita, *supra* note 8, at 75, Anderson, *supra* note 18, at 739.

³⁴ See Matsushita, *supra* note 33, at 214.

³⁵ 32 KAMINSHU 10, 994 HANREI JIHO 53 (Tokyo High Ct., Jan. 30, 1981). In detail, although the bankrupt Swiss company had the asset (registered trademark right) in Japan, it was attached provisional seizure by a Japanese creditor. Thus, the Swiss trustee filed to the Tokyo District Court with "trustee's name" for a relief lifting the provisional seizure by depositing money to the deposit office.

³⁶ See Yoshimitsu Aoyama, *Kokusai Tosan [International Insolvency]*, 133 BESSATSU JURISUTO 244, 244 (1995), Matsushita, *supra* note 33, at 215. Although this court's effort at loosening up the rigid territorialism approach was generally praised in Japan, there were some criticisms of the court's ambiguous logic in recognizing a foreign trustee in bankruptcy as trustee for a Japanese court proceedings. The court ruled that Swiss trustee's execution of a Swiss company's right is a kind of exercising obligee (bankrupt Swiss company)'s subrogation right. Scholars criticize the ruling however, saying that this court's reference does not explain anything, because the issue that had to be explained here was whether it was legally right or logical to recognize a foreign trustee as trustee for a Japanese proceeding, and this issue is a premise of the above subrogation right execution. See Aoyama, *supra* note 36, at 245, ISHIGURO, *supra* note 25, at 296-97.

Tokyo High Court, the Tokyo District Court approved the standing of a trustee who was appointed under Norwegian bankruptcy law for a bankrupt Norwegian company, to sue in the Japanese court.³⁷ What was more significant in this 1990 case was that the Japanese court straightforwardly referred to and interpreted Norwegian bankruptcy law and approved the Norwegian trustee's standing, reasoning that Norwegian bankruptcy law grants that right to the trustee. (Regarding this point in the previous Swiss company's case, the court did not clearly state whether Swiss bankruptcy proceeding itself is recognized or not.)³⁸

These Japanese courts' decisions and the efforts of scholars and practitioners encouraging those decisions successfully loosened up the traditional rigid territorialism to some extent.^{39,40} At the same time, however, the limitation of overcoming the problem only by

³⁷ 1422 HANREI JIHO 128 (Tokyo D. Ct., Sept. 26, 1991). See Matsushita, *supra* note 33, at 215, Matsushita, *supra* note 23, at 206, ISHIGURO, *supra* note 25 at 297, Sakai, *supra* note 8, at 40-41. In this case, the bankrupt Norwegian company's trustee in bankruptcy sued a Japanese company, 50% of whose outstanding shares were held by that bankrupt Norwegian company, for recession of the resolution of the shareholder's meeting because they had not sent appropriate notice of the shareholder meeting to the trustee.

³⁸ See ISHIGURO, *supra* note 25, at 297. Professor Ishiguro criticizes this decision, saying that the court did not refer to the territorialism provision of bankruptcy law at all and thus, this case increased the ambiguity of the logic of recognizing the foreign proceeding, which was established in forementioned Swiss case. See ISHIGURO, *supra* note 25, at 297.

³⁹ It should be noted here that, although these two landmark court decisions did somehow relax extreme territorialism, these decisions' value as precedent was not that wide.

Professor Matsushita explains that the reason for this is that both decisions have limited characteristics of (i) the domestic effects of foreign insolvency proceedings were in issue, (ii) recognized proceedings were those of the debtor's principle place of business, (iii) the purpose of the foreign trustees was to preserve the debtor's assets in Japan (no or modest disadvantage to domestic creditors), and (iv) the right in issue was not the one which is vested only in a trustee. See Matsushita, *supra* note 8, at 77.

⁴⁰ Regarding this trend at the time, however, I need to point out that not all courts were in the same stance. There was still a case that seemed to stay in extreme territorialism.

In 1983, Osaka District Court denied the effect of opening a bankruptcy proceeding on a debtor in Hong Kong (the defendant in the pending lawsuit in Japan) to the standing of the debtor as a defendant, because adjudication of the bankruptcy in Hong Kong was effective only within the territory where the adjudication has power to be executed. 516 HANREI TAIMUZU at 139 (Osaka D. Ct., Sept. 30, 1983). See Matsushita, *supra* note 8, at 76, Anderson, *supra* note 18, at 744, Taniguchi, *supra* note 18, at 472.

interpretation without revising the laws was becoming apparent, because the provisions of Japanese insolvency laws obviously stipulated rigid territorialism.⁴¹ As a result, even after these efforts of the courts, scholars, and practitioners, the Japanese legal system for cross-border insolvency continued to be strongly criticized both from inside and outside Japan as being the most backward and closed system among those of the developed countries.⁴²

C. Moving towards Universalism

Responding to this long struggle of scholars, courts, and practitioners and to severe criticism both from inside and outside of the country, the Japanese government finally decided to move towards radical reform of its cross-border insolvency system in 1996.⁴³

Professor Matsushita concludes, however, that this case's value as precedent for the issue of loosening territorialism was limited because, in this case, (i) the defendant was the party who moved to deny his standing to be sued, not his foreign trustee in Hong Kong (if the foreign trustee was the party asserting his position, the court's conclusion might be different) and (ii) thus, the court had to recognize the defendant's standing to avoid the unfair result of burdening the plaintiff with risks and costs of search for a foreign trustee to sue. *See Matsushita, supra* note 8, at 76.

Professor Taniguchi also comments about this case that because of the above reasons, this case can be justified and reconciled with the forementioned Swiss case. *See Taniguchi supra* note 18, at 472.

⁴¹ Matsushita, *supra* note 23, at 207, Taniguchi, *supra* note 18 at 462.

⁴² *See* Miyama, et al., *supra* note 4, at 61, KAZUHIKO YAMAMOTO, KOKUSAI TOSAN HOSEI [LEGAL SYSTEM FOR INTERNATIONAL INSOLVENCY] Hashigaki [Prologue] 2 (2002).

Professor Yamamoto, who attended the UNCITRAL conference as a representative of Japanese government, mentions that Japan was namely criticized in the conference for its continuing rigid territorialism. *See YAMAMOTO, supra* 42, at Hashigaki [Prologue] 1.

⁴³ At that time in Japan, not only the cross-border insolvency system but also the whole insolvency system was, in fact, out-of-date. Therefore, the Japanese government decided to implement comprehensive reform of its insolvency laws and established the Legislative Council on Insolvency Law under the Ministry of Justice (Legislative Council) and gave instructions to the council to complete the whole draft for the reform and provide it to the Japanese Diet of 2001. In this reform, establishing a new legal system for cross-border insolvency was one of the main issues. Matsushita, *supra* note 5, at 555-56, Junich Matsushita, *UNCITRAL the Model Law and the Comprehensive Reform of Japanese Insolvency*, in *LEGAL ASPECTS OF GLOBALIZATION* 151, 157-58 (2000), Miyama, et al., *supra* note 4, at 58-59.

Through this reform, Japan's legal system on cross-border insolvency at last abandoned "extreme territorialism" and enacted laws that are basically modeled after the UNCITRAL Model Law⁴⁴ and at least moved towards the Model Law's "universalism," which ultimately refers to "one law to control a bankrupt's worldwide assets, regardless of their location."⁴⁵

Although the first aim of the government was to reform the whole insolvency system, both by revising old law and enacting new laws at once in 2001, the bursting of the Japanese bubble economy and the resulting explosion in bankruptcy of small and medium sized companies caused the need for haste in enacting the Civil Rehabilitation Law,⁴⁶ which was enacted in 1999 (became effective in April 2000), prior to other reforms.⁴⁷

One interesting result of the speed of enactment was that Japan introduced outward "universalism" but left inward "territorialism" in the Civil Rehabilitation Law. In other words, Japan stipulated a universal effect of civil rehabilitation proceeding (it can reach debtor's assets located outside Japan), but left in a provision denying recognition of foreign insolvency proceeding (foreign insolvency proceeding against a debtor do not affect civil rehabilitation proceeding or a debtor's assets in Japan).⁴⁸ Accordingly, until Japan finally enacted the law establishing proceedings for recognition of foreign insolvency proceedings in 2000 (which

⁴⁴ Matsushita, *supra* note 5, at 556.

⁴⁵ Pottow, *supra* note 2, at 947. *See also* Westbrook, *supra* note 20, at 514-15, Guzman, *supra* note 20, at 2179, LoPucki, *supra* note 20, at 699-701, 704-6.

⁴⁶ Wagiho [Composition Law] of 1922, which mainly had been used for reorganization of small and medium sized companies, had several significant problems (such as having no mechanism for monitoring the execution of the reorganization plan, no secured creditor involvement or restrictions in the proceeding, etc.) and was unable to provide efficient reorganization systems for small and medium companies. *See* Kent Anderson, *Small Businesses Reorganizations: An Examination of Japan's Civil Rehabilitation Act Considering U.S. Policy Implications and Foreign Creditors' Practical Interests*, 75 AM. BANKR. L. J. 355, 362-63 (2001).

⁴⁷ Matsushita, *supra* note 43, at 157, Miyama, et al., *supra* note 4, at 58-59.

⁴⁸ Civil Rehabilitation Law art. 4 (generally no recognition of foreign insolvency proceedings), art. 38 para. 1 (universal effect provision). *See also* Matsushita, et al., *supra* note 5 at 80-81, Miyama, *supra* note 3, at 42 (2001).

became effective in April 2001), Japan's cross-border insolvency system had retained a reputation as being very imbalanced and infamous in the world of cross-border insolvency.⁴⁹

Ironically, these imbalanced and infamous provisions flurried the government and quickened the rest of the reform of the cross-border insolvency system.⁵⁰

The bills for the rest of the reform of cross-border insolvency passed the Japanese Diet very smoothly in November of 2000.^{51,52}

⁴⁹ Mr. Miyama emphasizes that the drafters tried to avoid this result and tried to enact the foreign insolvency proceeding recognition law at the same time, but they had to give up that aim because of the extremely urgent necessity of enacting the Civil Rehabilitation Law. Matsushita, et al., *supra* note 5, at 80-81, Miyama, *supra* note 3, at 47.

The minutes of Legislative Council also show that many members were concerned about introducing this imbalanced system and its infamous result, although no objection was made against the introduction in the end. *See* the minute of Legislative Council Second Division the 7th conference (Jan. 22, 1999) [hereinafter Second Division 7th conference] *available at* http://www.moj.go.jp/shingi1/shingi_990122-2.html (last visited February 2011), the minutes of Legislative Council First Division the 5th conference (Nov. 29, 1999) [hereinafter First Division 5th conference] *available at* http://www.moj.go.jp/shingi1/shingi_990129-1.html (last visited February 2011).

⁵⁰ *See* Matsushita, et al., *supra* note 5, at 81.

⁵¹ There was almost no negative discussion or objection against the bills, and they were approved by a unanimous vote both in Sangiin [the Upper House] and Shugiin [the Lower House of Japan]. *See* the minutes of Sangiin (Nov. 2, 7, 8, 2000) *available at* http://kokkai.ndl.go.jp/cgi-bin/KENSAKU/swk_srch.cgi?SESSION=9243&MODE=1 (last visited Feb. 2011), the minutes of Shugiin (Nov. 15, 17, 21, 2000) *available at* http://www.shugiin.go.jp/index.nsf/html/index_kaigiroku.htm (last visited Feb. 2011).

This smoothness may seem to contradict my discussion of Japan's reluctance to accept "universalism" in Part IV. This can be explained, however, by "bureaucrat-leading legislative" in Japan. Most of bills in Japan are submitted to the Diet by the Cabinet. Moreover, most of the lawmaking process is operated by bureaucrats behind the Cabinet. Bureaucrats draft the law and make thorough preparation by building consensus among interested politicians before bringing a bill to the Diet. Supposedly, in the case of the bills for cross-border insolvency, the bureaucrats built the consensus among the interested politicians before the Diet, and as a result, very smooth approval of the bill was achieved.

⁵² Some politicians believed that the enactment of the law for recognition of foreign insolvency proceedings should not result in disadvantage for employment related claims (e.g., salary, wages, severance pay, etc.) or employee's positions. Therefore, the Committee on Judicial Affairs of both Houses made a supplemental resolution to the bill approval that the government has to raise awareness and alertness that the recognition of foreign proceeding will not result in disadvantage of employment related claims and position of employees. *See* the minute of Sangiin Homuiinkai [the Upper House Committee on Judicial Affairs] (Nov. 7, 2000) *available at*

III. Current Legal System for Cross-Border Insolvency in Japan

The Japanese insolvency system mainly consists of three laws; the Bankruptcy Act, the Civil Rehabilitation Law and the Company Reorganization Law (hereinafter collectively “Main Laws”). In the 2001 reform, Japan revised all the Main Laws; abandoned the territorialism provision, and stipulated each proceeding’s universal effect (can reach debtors’ assets located outside Japan).⁵³

On the other hand, for recognition of foreign insolvency proceedings, the Japanese legislation decided not to stipulate provisions for foreign recognition in the Main Laws but to enact a new law that solely provides foreign recognition proceeding.⁵⁴ This new law was the “Law on Recognition and Assistance for a Foreign Insolvency Proceeding” (hereinafter “Recognition Law”).⁵⁵

As a consequence of this reform, Japan has generally been said to have “adopted the Model Law,”⁵⁶ and in fact the drafters of the laws and many of Japanese scholars repeatedly

http://kokkai.ndl.go.jp/cgi-bin/KENSAKU/swk_srch.cgi?SESSION=9243&MODE=1 (last visited Feb. 2011), the minute of Shugiin Homuinkai [the Lower House Committee on Judicial Affairs] (Nov. 17, 2000) *available at*

http://www.shugiin.go.jp/index.nsf/html/index_kaigiroku.htm (last visited Feb. 2011).

Although this supplemental resolution itself does not have binding effect to the courts’ decisions, it may give strong support for interpretations in a manner advantageous to employee or related claims at the point when the courts have to interpret the “public policy” provision. *See infra*, Part III Section A Subsection 4(d)

⁵³ Bankruptcy Act art. 3, Civil Rehabilitation Law art. 4, Corporate Reorganization Law art. 3.

⁵⁴ Professor Wessels lists this division of the laws related to cross-border insolvency as one of the “striking differences” of Japanese law from the Model Law. *See Wessels supra* note 6, at 5.

Mr. Miyama explained, as the reason for this decision, that this way would be practical since there may be foreign proceedings that are difficult to categorize to multiply preexisting proceedings. *See Miyama, et al., supra* note 4, at 62.

⁵⁵ *See Gaikokutosanshoritetsuzuki no Shonin Enjo nikansuru Horitsu* [Law on Recognition and Assistance for a Foreign Insolvency Proceeding], Law No. 129 of 2000 [hereinafter Recognition Law].

⁵⁶ Pottow, *supra* note 2, at 960, WARREN & WESTBROOK, *supra* note 2, at 872.

emphasized that these laws adhere to the Model Law and have no substantial difference from it.⁵⁷ Nevertheless, as Professor Wessels and Professor Matsushita have suggested, these Japanese laws actually have many provisions that significantly differ from the corresponding provisions of the Model Law and, more than that, have provisions that seem to depart from the thrust of the Model Law.

In this Part, I will thoroughly introduce and closely analyze provisions and their interpretations of the Main Laws and the Recognition Law that correspond to those of the Model Law, and will point out the differences that may have significant meaning to Japan's attitude towards the adoption of the Model Law and its "universalism."

A. Law on Recognition and Assistance for a Foreign Insolvency Proceeding

The Recognition Law was enacted at the 2001 reform in order to establish a totally new system for recognition of foreign insolvency proceeding in Japan. The law was drafted by the government officials (bureaucrats) based on the Model Law and therefore, it mainly consists of provisions that generally correspond to the provisions of the Model Law.⁵⁸

However, although the Recognition Law generally has provisions corresponds to those of the Model Law, many of them were largely modified from the originals. Furthermore, the Recognition Law does not stipulate several important provisions of the Model Law because the Japanese legislation simply did not accept those provisions. Accordingly, the Recognition Law significantly deviates from the important thrusts of the Model Law, and this deviation suggests

⁵⁷ Miyama, *supra* note 3, at 42, Miyama, et al, *supra* note 4, at 63-64, Yamamoto, *supra* note 3, at 95, Shinjiro Takagi, *Cross-Border Insolvency in Japan*, 32 INT'L BUS. LAW. 15, 17 (2004).

⁵⁸ However, because the Recognition Law provides only "recognition proceeding," some provisions of the Model Law that do not relate to "recognition proceeding" (such as, access to local courts (article 9 to 14), insolvency presumption (article 31), hotchpot rule (article 32), etc.) are stipulated in Main Laws, which will be discussed in next section (Part III Section B).

Japanese legislation's negative attitude towards "universalism."

1. Model Law's Aims in Preamble and Recognition Law's Cautious Attitude

The Model Law starts with a preamble that states; "The purpose of this law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of: (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; (b) greater legal certainty for trade and investment; (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including debtor; (d) protection and maximization of the value of the debtor's assets; and (e) facilitation of the rescue of financially troubled business, thereby protecting investment and preserving employment."

As Professor André J. Berends, who represented the Netherlands for the drafting of the Model Law and provided detailed and suggestive commentary to the Model Law, commented, although this preamble may have relatively little importance, it perhaps provides a summary of the aims of the Model Law.⁵⁹ Therefore, how Japanese legislation treated the preamble to the Model Law may show Japan's attitude behind the enactment of the Recognition Law.

Japanese laws usually do not provide a preamble.⁶⁰ The Recognition Law, however, puts its first provision as "Purpose" and introduces the purpose of the Recognition Law as; "This law delivers its purpose as, by providing recognition and assistance proceeding for a foreign proceeding which is commenced for the debtor who engages in cross-border

⁵⁹ See André J. Berends, *UNCITRAL the Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 323 (1998).

⁶⁰ A big exception for this is Japanese Constitutional Law, which is famous for its preamble.

economic activities, to appropriately achieve the effect of the foreign proceeding in Japan, and accordingly, implement internationally consistent liquidation of assets or economic rehabilitation of the debtor.”⁶¹

I want to point out that this provision rarely shares aims with the Model Law; it drops the important aim of (a) cooperation between local courts and foreign courts, which is listed very first in the preamble of the Model Law; it does not use positive words such as “fair,” “efficient,” “maximiz[e],” “facilitat[e]” in the Model Law and, instead, it only aims for “appropriate” and “internationally consistent” recognition. The first provision of the Recognition Law already seems to show Japanese legislation’s very cautious attitude towards recognition of foreign proceedings.

2. Unlimited Scope of Application

The Model Law’s first article stipulates “scope of application” and in paragraph 2 of the article, it provides flexibility to exclude certain types of entities, such as credit institutions and insurance companies, from the scope of the Model Law.

With regards to this article of the Model Law, the Recognition Law does not have any provision generally limiting its scope of application. I need to briefly note, however, that there is an opinion that foreign “bank” insolvency proceedings should be excluded from the scope of application by the interpretation of the law.⁶² On the other hand, other scholars think the Recognition Law does not exclude foreign bank insolvency proceedings from the

⁶¹ Recognition Law, *supra* note 55, art. 1.

⁶² See Takuya Shima, *Ginko Tosan niokeru Kokusai Tosanhoteki Kiritsu [Disciplinary Rules of International Insolvency in the Insolvency of the Banks]*, 6 FIN. SERV. AGENCY RESEARCH REV. 113, 129-130 (2010). Professor Shima explains its rationale that; bank insolvency proceedings usually have “non-private” nature because it is under strong supervision of the foreign authority; thus, these proceedings are out of the scope of the Recognition Law, which expects “private” insolvency proceedings as a premise of recognizable foreign proceedings.

scope.⁶³ Since no provision is stipulated, in spite of the Model Law's suggestion of exclusion of bank insolvency proceedings, it seems natural to conclude that the Recognition Law does not intend to limit its scope.

3. Significant Differences in Definitions

Definitions are provided in article 2 of both the Model Law and the Recognition Law, which show significant differences.

a. Foreign Proceeding

Even the most fundamental definition of "foreign proceeding" shows significant difference between the Model Law and the Recognition Law, and this difference suggests a clue to the Japanese legislation's true attitude.

The Model Law defines "foreign proceeding" in article 2 subparagraph (a) 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."

On the other hand, the Recognition Law article 2 paragraph 1 subparagraph (1) defines it as "a proceeding that is filed in a foreign country and corresponds to a bankruptcy proceeding, a civil rehabilitation proceeding, a corporate reorganization proceeding, or a

⁶³ See Tetsuro Morishita, *Kokusai Tosan to Ginko Tosan [International Insolvency and Insolvency of Banks]*, 3 KOKUSAI SHIHO NENPO 251 (2001). Professor Morishita explains, in addition to the lack of the exclusion in the law, that; the recognition proceeding is not approving the direct effect of foreign proceeding (but just providing relief or assistance measures to the extent that is necessary); therefore, the issue of conflict of sovereignty does not emerge.

See also, YAMAMOTO, *supra* note 42, at 29-30 (suggesting the same result by including bank's corporate reorganization proceeding to the definition of "domestic proceeding" of the Recognition Law, which has identical wording as "foreign proceeding" (see next subsection) and is used to coordinate with foreign proceedings)

special liquidation proceeding.”⁶⁴ What is significant here is that, although the notion of “foreign proceeding” is central to the cross-border insolvency proceeding,⁶⁵ the Recognition Law is not even trying to share the notion with the Model Law. In fact, the Recognition Law is scarcely defining “foreign proceeding” itself. Instead, it requires correspondence of foreign insolvency proceedings to Japanese local insolvency proceedings. Moreover, whether the foreign insolvency proceeding filed for recognition corresponds to one of the Japanese local insolvency proceedings depends on the Japanese judges’ discretion, because the Japanese insolvency laws lack provisions defining these proceedings.⁶⁶

For this point, Professor Kazuhiko Yamamoto, who was a representative of the Japanese government who attended UNCITRAL to draft the Model Law and also one of the members of the Legislative Council to draft the Recognition Law, predicts that Japanese judges will probably consult the factors that are indicated in the Model Law’s definition.⁶⁷ Nonetheless, when compared with the Model Law’s definition, more risk of uncertainty and volatility remains with the Recognition Law’s definition, which does not clearly express substantive factors and leaves determination of those factors to the judges.⁶⁸

⁶⁴ A bankruptcy proceeding, a civil rehabilitation proceeding, and a corporate reorganization proceeding respectively mean the insolvency proceeding of the Bankruptcy Act, that of the Civil Rehabilitation Law, and that of the Corporate Reorganization Law. Also, a special liquidation proceeding is a corporation liquidation proceeding prescribed in the Companies Act (article 510) that is applicable when the liquidating corporation has suspicion of insolvency, although special liquidation proceeding is not frequently used.

⁶⁵ Berends, *supra* note 59, at 328.

⁶⁶ Yamamoto, *supra* note 3, at 71.

⁶⁷ *Id.*

⁶⁸ With regard to this issue, Professor Yamamoto points out that “whether a foreign proceeding that does not prerequisite debtor’s insolvency (e.g., US bankruptcy proceeding) for its commencing will be recognized as ‘corresponds to Japanese local proceeding’ or not” will be a future crucial issue (because the Bankruptcy Act requires the debtor’s insolvency for the condition of proceeding). Professor Yamamoto states that the court should consider the applied proceeding as a whole and should not stick only to the conditions to commence the proceeding, and thus, the judges can regard that kind of proceeding as a recognizable proceeding. *See*

The definition of the Recognition Law suggests the Japanese legislation's very cautious and conservative attitudes towards recognizing foreign insolvency proceedings, which are; persisting to the preexisting frame of local proceedings; providing judges with large discretionary power to refuse recognition.

b. Foreign Main Proceeding and Foreign Non-Main Proceeding

The definition of "foreign main proceeding" and "foreign non-main proceeding" also differs in the Recognition Law and the Model Law.⁶⁹⁷⁰ These differences, however, will

Yamamoto, *supra* note 3 at 71. However, this is a perfect example of a risk of uncertainty and volatility of the Recognition Law's definition.

⁶⁹ The Recognition Law defines "foreign main proceeding" as "if the debtor engages in commercial business, a foreign proceeding taking place in the State where the debtor has the principle business office (or the principle place of business); if the debtor does not engage in commercial business or engages in commercial business but does not have any business office and if the debtor is an individual, a foreign proceeding taking place in the State where the debtor has his habitual residence; if the debtor does not engage in commercial business or engages in commercial business but does not have any business office and if the debtor is a legal body, a foreign proceeding taking place in the State where the debtor has its principle office." Recognition Law, *supra* note 55, art. 2 para. 1(2).

On the other hand, the Model Law simply defines as "a foreign proceeding taking place in the State where the debtor has the centre of main interests." MODEL LAW, *supra* note 1, art. 2(b).

The drafters of the Recognition Law decided to use the word "the principle business office" instead of "the centre of main interest" because the former word, which is used in the Code of Civil Procedure (e.g., article 4), is more familiar to the Japanese people. Importantly, the members of the Legislative Council agreed that "the principle business office" is generally interpreted substantively and flexibly, not sticking to the objective notion of "office," and therefore, it will not result in an essential difference from the Model Law's definition. *See* the minute of Second Division 7th conference, *supra* note 49, the minute of First Division 5th conference, *supra* note 49, Yamamoto, *supra* note 3, at 72.

⁷⁰ The Recognition Law defines "foreign non-main proceeding" as "a foreign proceeding other than a foreign main proceeding" while the Model Law defines "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." Recognition Law, *supra* note 55, art. 2 para. 1(3), MODEL LAW, *supra* note 1, art. 2(c).

The Model Law requires "establishment" while the Recognition Law does not. However, this does not result in a different outcome because the Recognition Law requires "domicile, residence, business office, or office in the State" ("business office" is similarly interpreted as "establishment." *See infra*, note 81) as a condition to file recognition of "foreign non-main proceeding." Recognition Law, *supra* note 55, art. 17(1). *See also* Yamamoto, *supra* note 3, at 72.

probably not result in critical problems. In the Model Law, whether the recognition of foreign proceeding will have very important effect of “automatic stay” or not depends upon interpretation of the definition of “foreign main proceeding” and “foreign non-main proceeding” and thus, these definitions are critically important.⁷¹ The Recognition Law, however, does not introduce an “automatic effect” of recognition of a “foreign main proceeding” as in the Model Law.⁷² Moreover, the Recognition Law ignores the Model Law’s “choice-of-law” rule for determining the range of the debtor’s assets that should be turned over for “foreign non-main proceeding.”⁷³ Therefore, the impact of the differences in these definitions will be very limited.^{74,75}

c. Foreign Representative

For the definitions of “foreign representative,” there are some differences in the expression but the outcome will probably be identical;⁷⁶ both definitions include a

⁷¹ Pottow, *supra* note 2, at 971, Matsushita *supra* note 43, at 153.

⁷² *See infra*, Part III Section A Subsection 5(a).

⁷³ *See infra*, Part III Section A Subsection 5(b)(H).

⁷⁴ These differences in definitions only matter in the case of concurrent proceedings because the Recognition Law gives a little priority to “foreign main proceeding.” *See infra*, Part III Section A Subsection 7(a), (b).

⁷⁵ Related to this difference, Professor Pottow emphasizes that “[t]aking these two provisions – automatic stay and turnover – together, the designation of a foreign proceeding as a ‘main proceeding’ captures the first theoretical pillar of universalism” because “[i]t is a content-neutral rule (the ‘centre of the debtor’s main interests’) that chooses the jurisdiction (the state of a ‘foreign main proceeding’) of presumptive entitlement to control the distribution of a debtor’s assets.” Pottow, *supra* note 2, at 965.

However, the Japanese legislation refused to introduce these two critical provisions and made the court’s determination of “foreign main proceeding” or “foreign non-main proceeding” almost meaningless. Therefore, according to Professor Pottow’s above description, Japan completely refused to accept the Model Law’s “universalism,” at least, in this aspect.

⁷⁶ The Model Law defines “foreign representative” as “a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization of the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding. MODEL LAW, *supra* note 1, art. 2(d). The Recognition Law defines, at first, “foreign representative” as “a person who is not the debtor and who is authorized to administer and dispose of the debtor’s assets under the foreign proceeding.” Then, it defines

representative formally appointed in the foreign proceedings as well as a debtor in possession (DIP) and a representative appointed on an interim basis.⁷⁷⁷⁸

d. Other Definitions

The Recognition Law (and the Main Laws) does not have provisions that define “foreign court” and “establishment,” as the Model Law does.⁷⁹ Regarding the definition of “foreign court,” Japan did not introduce the idea of “cooperation with foreign court” and therefore, that definition is not necessary.⁸⁰ With regards to the definition of “establishment,” the Recognition Law uses the word “business office,” which is more familiar to the Japanese people.⁸¹

4. Process for Recognition of Foreign Proceedings ~ Is the Gate for Recognition Open Widely Enough?

In this subsection, I will introduce and analyze the process for recognizing foreign proceedings under the Recognition Law. This process is modeled after that of the Model Law and, on the surface, it is very similar to the Model Law’s process. The Recognition Law has modified several points from the Model Law’s process, however, which in many cases

“foreign representative, etc.” as “the foreign representative if it is appointed under the foreign proceeding; the debtor if foreign representative is not appointed under the foreign proceeding.” (And, generally “foreign representative, etc.” is used in the provisions of the Recognition Law.)

⁷⁷ See Yamamoto, *supra* note 3 at 73, Takuya Miyama, et al., *Gaikoku Tosan Shori Tetsuzuki no Shonin Enjo nikansuru Horitsu oyobi Kaisei Minji Soshoho no Gaiyo (2) [Outline of Law on Recognition and Assistance of a Foreign Insolvency Proceeding and Revised Civil Rehabilitation Law (2)]*, 1600 KINYU HOMU JIJO 71, 73 (2001).

⁷⁸ For the sake of avoiding confusion, hereafter, this paper will use “foreign representative” as a word for both the Model Law and the Recognition Law that includes a representative formally appointed in foreign proceedings as well as DIP and a representative appointed on an interim basis.

⁷⁹ MODEL LAW, *supra* note 1, art. 2(e), (f).

⁸⁰ See *infra*, Part III Section B Subsection 2 (a).

⁸¹ Just as in the earlier discussion of “principle business office” (*see supra* note 69), “business office” (or sometimes translated as “place of business”) is also interpreted substantively and flexibly and therefore, the difference from the Model Law’s definition of “establishment” will probably be modest. Yamamoto, *supra* note 3, at 78.

results in enlarging the discretionary power of Japanese courts, including the power to reject recognition and the power to terminate recognition. As a consequence of these modifications, many provisions of the Recognition Law seem to conflict with the Model Law's thrusts.

a. Court to File for the Recognition Proceeding

The Recognition Law decided to concentrate the filings for foreign recognition cases in the Tokyo District Court by stipulating it as only court that has the jurisdiction of foreign recognition.⁸² The reasons for this decision are that; (i) foreign recognition proceeding is an extremely technical and specialized procedure; (ii) therefore, accumulation of knowledge and experience for the procedure is strongly necessary; (iii) moreover it seemed unlikely that there would be many cases for this proceeding.⁸³⁸⁴ This decision seems to be correct, because foreign recognition proceeding has been not frequently used since its establishment.⁸⁵ Also, this concentration probably meets the expectation of "competence" of the Model Law article 4.⁸⁶

b. Standing and Obligation of Filing for Recognition Proceeding

⁸² See Recognition Law, *supra* note 55, art. 4. Stipulating exclusive jurisdiction of Tokyo District Court is very rare in Japanese laws. Matsushita, et al., *supra* note 5 at 85.

⁸³ Matsushita, et al., *supra* note 5 at 85. See also the minute of the Legislative Council First Division the 10th conference [hereinafter First Division 10th conference] (Dec. 17, 1999) available at http://www.moj.go.jp/shingi1/shingi_991217-1.html (last visited February 2011).

⁸⁴ The Recognition Law, at the same time, gives the Tokyo District Court the discretionary power to transfer the recognition case to other district courts that are more closely related to the case if judge determines that will be appropriate. See Recognition Law, *supra* note 55, art. 5. This provision can ease the possible inconvenience of the concentration of cases to Tokyo District Court.

⁸⁵ See *infra*, Part III Section A Subsection 8.

⁸⁶ The Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency explains the purpose of article 4 as to increase the transparency and ease of use for the benefit of foreign representatives and foreign courts. See *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, para. 80, reprinted in 6 TUL. J. INT'L & COMP. L. 415 (1998) [hereinafter *Guide to Enactment*]. See also, Berends, *supra* note 59, at 335. Concentrating all recognition filing in the Tokyo District Court, which is located in the center of Japan's capital probably makes the filing process easier and clearer for the foreign representatives, and fits the Model Law's purpose.

With regard to filing for recognition of foreign proceeding, the Model Law and the Recognition Law both grant standing for filing only to a foreign representative.⁸⁷ As mentioned, “foreign representative” in both laws includes a representative appointed on an interim basis. However, although the Recognition Law allows a representative appointed on an interim basis to “file” for recognition, the law does not allow the court to “recognize” the foreign proceeding until that foreign proceeding has formally commenced in the foreign country where the proceeding is pending.⁸⁸ The Model Law does not have such a restriction.

One important obligation that accompanies filing of the foreign proceeding is a foreign representative’s obligation to provide requested information (e.g., the current status of the pending foreign proceeding) to the court.⁸⁹ The Model Law also stipulates the same kind of obligation.⁹⁰ While the Model Law limits this obligation to reporting certain substantial information,⁹¹ however, the Recognition Law does not set such a limit.⁹²

⁸⁷ MODEL LAW, *supra* note 1, arts. 2(d), 15 para. 1, Recognition Law, *supra* note 55, arts. 2 para. 1(7), (8), 17 para. 1. Foreign creditors do not have a right to file. *See Berends, supra* note 59, at 350-51.

⁸⁸ Recognition Law, *supra* note 55, art. 22 para. 1. However, the law allows the court to order interim measures until the foreign court formally commences the foreign proceeding. *See infra*, Part III Section A Subsection 6. *See also* Yamamoto, *supra* note 3 at 80, Matsushita, et al., *supra* note 5 at 89.

⁸⁹ *See* Recognition Law, *supra* note 55, art. 17 para. 3.

⁹⁰ *See* MODEL LAW, *supra* note 1, art. 18.

⁹¹ Professor Berends explains that because “[i]nsolvency practitioners were afraid that they would have to inform the court about even insignificant filings”, “the word “substantial” was inserted” to the Model Law article 18. Berends, *supra* note 59 at 356.

⁹² *See* Gaikokutosanshoritetsuzuki no Shoninenjo nikansuru Kisoku [Supreme Court Rule for Recognition and Assistance of a Foreign Insolvency Proceeding], Saikosaibansho Kisoku [Supreme Court Rule] No. 17 of 2000 [hereinafter Supreme Court Rule]. The Supreme Court Rule particularly lists items that need to be written on the recognition filing form, including; the outline of the case, current status and future presumption of the pending foreign proceeding; the content of reliefs under the Recognition Law that might be necessary in the future in the recognition proceeding; the outline of foreign law that prescribes the priority of debts in the pending foreign proceeding; certain limits of the power of foreign representative (if any); if

Moreover, the Recognition Law grants the court discretionary power to request any information it orders.⁹³ Therefore, this obligation may become much more burdensome to foreign representatives under the Recognition Law than under the Model Law.

Additionally, two other points regarding filing should be mentioned. Firstly, foreign representatives must provide advance payment of recognition proceeding costs to the court at the filing.⁹⁴ The court determines the amount of this advance payment. Thus, if the court sets the amount of the advance payment very high, this will work as a strong obstacle for the frequent use of the proceeding.⁹⁵ Secondly, the Recognition Law allows the court to order a foreign representative to appoint another representative from lawyers admitted in Japan.⁹⁶ Since Japanese is the only language used in judicial proceedings in Japan,⁹⁷ but Japanese is not a major world language, stipulating this provision may have been unavoidable in order to ensure appropriate communication between the court and the foreign representative. However, this court order may increase the cost and burden of the proceeding and may become another obstacle.⁹⁸

c. Requirement of Domicile, Residence, Business Office, or Office

Next, the Recognition Law article 17 paragraph 1 requires the debtor to have

debtor is doing business in Japan, certain information about the business (including information of labor union or employee of the debtor). Supreme Court Rule, *supra* note 92, arts. 13, 14.

⁹³ Recognition Law, *supra* note 55, art. 17 para. 3.

⁹⁴ Recognition Law, *supra* note 55, art. 20. The court shall dismiss the case if this advance payment is not paid. Recognition Law, *supra* note 55, art. 21(1).

⁹⁵ Professor Matsushita raised this concern. Mr. Miyama replied to Professor Matsushita that since the foreign representative has to state the content of relief(s) under the Recognition Law that the foreign representative has intent to require in the proceeding at the filing (*see supra*, note 92), the court will decide the amount of costs based on that statement. Therefore, this amount will probably be reasonable and rational amount. *See Matsushita, et al., supra* note 5 at 86.

⁹⁶ Recognition Law, *supra* note 55, art. 17 para. 4.

⁹⁷ Saibanshoho [Court Act], Law No. 59 of 1947, art. 74.

⁹⁸ Regarding to this possible problem, Mr. Miyama emphasizes that this order will be very exceptional. *See Matsushita, et al., supra* note 5, at 87-88.

“domicile, residence, business office, or office in the State where the petition for the foreign proceeding was filed” as a condition of filing.⁹⁹ This provision retains the meaning of the Recognition Law’s idea of framing the jurisdiction. Firstly, because there is no other provision that limits the jurisdiction by the debtor’s location and this provision does not limit recognizable proceeding to just the “foreign main proceeding,” the Recognition Law provides for possibility of recognition of “foreign non-main proceeding.” Secondly, although the Recognition Law’s definition of “foreign non-main proceeding” is broader than that of the Model Law (does not require “establishment” as the Model Law does¹⁰⁰), in the aspect of framing the jurisdiction, this provision’s requirement of the debtor’s location at the filing works almost exactly the same as requiring “establishment” in the definition of “foreign non-main proceeding” as the Model Law does.¹⁰¹

d. Public Policy Requirement

Both the Model Law and the Recognition Law allow the courts to refuse to recognize foreign proceeding on public policy grounds. The Model Law article 6 states, “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.” The Recognition Law stipulates in article 21 paragraph 3, “The court shall dismiss the application for recognition

⁹⁹ The foreign representative has to show this fact by prima facie evidence with filing. *See* Recognition Law, *supra* note 55, art. 19.

¹⁰⁰ The Model Law’s definition of “foreign non-main proceeding” requires “establishment,” which is defined as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.” *See* MODEL LAW, *supra* note 1, arts. 2(c), (f). *See also supra* note 81. The word “establishment” in the Model Law and the word “business office” of this provision’s requirement will probably be interpreted similarly. *See supra* note 81. *See also* Yamamoto, *supra* note 3 at 78.

¹⁰¹ After all, the range of recognizable foreign proceeding will probably be smaller than that of the Model Law because the Recognition Law further requires foreign proceedings’ correspondence to Japanese local proceedings in the definition of “foreign proceeding.” Recognition Law, *supra* note 55, art. 2 para. 1(a). *See also* Part III Section A Subsection 3(a).

of foreign proceeding if recognition of the foreign proceeding is contrary to the public policy.”

With regard to this requirement in the both laws, I need to mention two important differences. Firstly, the Recognition Law did not insert the word “manifestly” as the Model Law did. Although the “public policy” requirement always accompanies a risk of diminishing legal predictability, the word “manifestly” will usually work as a strong restriction for the judges to refuse a petition on public policy ground.¹⁰² Therefore, not inserting “manifestly” in the provision of the Recognition Law will result in much larger discretionary power of the judges and much larger risk of diminishing legal predictability than those of the Model Law. This seems to contradict to the thrust of the Model Law.¹⁰³

Secondly, Mr. Miyama, who was one of the drafters of the Recognition Law from the Japanese government, mentioned examples of foreign proceedings that may be refused on public policy ground as follows; (i) foreign proceedings that treat creditors advantageously or disadvantageously according to their nationality, religion, or ideology; (ii) foreign proceedings that treat local creditors and foreign creditors very differently.¹⁰⁴ In addition, the politicians of Japan made the forementioned supplemental resolution to the approval of the bill for the Recognition Law that “the government has to raise awareness and alertness to be sure that the recognition of foreign proceeding would not result in disadvantage to

¹⁰² The Guide to Enactment as well as Professor Berends strongly emphasize that this public policy exception should be interpreted restrictively. Therefore, to clarify this purpose, the drafters added the word “manifestly” to the expression of the provision. *Guide to Enactment* supra note 86, paras. 87-89, Berends, *supra* note 59, at 336.

¹⁰³ Professor Matsushita and Professor Yamamoto both seem concerned about this problem of the Recognition Law’s public policy exception and therefore, emphasized that the judges should interpret this “public policy” provision restrictively, even though the Recognition Law does not insert the word “manifestly.” See Yamamoto, *supra* note 3, at 78, Matsushita, et al., *supra* note 5, at 91.

¹⁰⁴ Matsushita, et al., *supra* note 5 at 90-91.

employment related claims or employee's position.”¹⁰⁵ Although this supplemental resolution does not have a binding effect on the court's decisions, I need to note that Japanese court will probably become very sensitive to the employment related rules of the foreign proceedings at the decision of recognition.

e. Other Negative Conditions

Furthermore, the Recognition Law lists several other “negative conditions,” which work as follows; if a foreign representative or foreign proceedings meet one of these negative conditions, the court must refuse to recognize the foreign proceeding.¹⁰⁶ The aforementioned public policy exception is one of these negative conditions.

The other negative conditions are (i) if the representative fails to pay the advance payment of the recognition proceeding costs,¹⁰⁷ (ii) if the foreign law manifestly stipulates that the effect of the foreign proceeding that is filed for recognition does not extend over the assets located in Japan,¹⁰⁸ (iii) if any recognition-assistance relief is manifestly not necessary for the foreign proceeding,¹⁰⁹ (iv) if the foreign representative significantly violated its obligation to provide necessary information to the court,¹¹⁰ and (v) if a petition for foreign recognition proceeding is manifestly filed in bad faith.¹¹¹

These negative conditions, except for the public policy exception, are not stipulated in the Model Law. Professor Yamamoto comments that the content of these negative conditions are self-evident, and thus, it is not substantively contrary to the purpose of the

¹⁰⁵ See *supra*, note 52.

¹⁰⁶ Recognition Law, *supra* note 55, art. 21.

¹⁰⁷ *Id.* para. 1.

¹⁰⁸ *Id.* para. 2.

¹⁰⁹ *Id.* para. 4.

¹¹⁰ Recognition Law, *supra* note 55, arts. 21 paras. 5, 17 paras. 3.

¹¹¹ Recognition Law, *supra* note 55, art. 21 para. 6.

Model Law.¹¹² My opinion is different. It is true that (i), (ii), and (iv) of above conditions are quite formal conditions and may be evaluated as “self-evident” (although there might be an opposite opinion). However, I think stipulating substantive negative conditions of (iii) and (v) clearly conflicts with the purpose of the Model Law. The Model Law states in article 17 Paragraph 1 that, if all formal conditions are met, the court “must” recognize the foreign proceeding and stipulates that the public policy exception is very exceptional.¹¹³ However, the above substantive negative conditions conflict with the Model Law’s purpose to not make the court consider substantive factors (except public policy) and to expedite the recognition decision. Moreover, in order to decide the necessity of relief for the foreign proceeding in above (iii), I think the Japanese court will have room to evaluate the merits of the foreign court’s decisions, which further conflicts with the Model Law’s purpose not to leave any room for those kinds of evaluation.¹¹⁴

f. The Court’s Decision of Recognition and Its Termination

Finally, under the Recognition Law, the court shall decide to recognize foreign proceeding if all conditions for recognition are met (including not fulfilling negative conditions).¹¹⁵ The Model Law also has a similar provision.¹¹⁶ However, as discussed in previous subsections, the Recognition Law’s entrance gate for recognition is, of course, open, but seems to be much narrower than that of the Model Law.

One other thing to mention here is that, while the Model Law requires the courts to make the decision of recognition “at the earliest possible time,” the Recognition Law does

¹¹² Yamamoto, *supra* note 3, at 78-79.

¹¹³ *Guide to Enactment*, *supra* note 86, paras. 87-89, 124-25. *See also* Berends, *supra* note 59, at 354, 336. Professor Berends remarks that this provision expresses “the core philosophy of the Model Law.”

¹¹⁴ *Guide to Enactment*, *supra* note 86, para. 125. *See also* Berends, *supra* note 59, at 354.

¹¹⁵ Recognition Law, *supra* note 55, art. 22.

¹¹⁶ MODEL LAW *supra* note 1, art. 17.

not introduce this requirement. Professor Yamamoto explained that the reason for this is that this kind of provision was too exceptional to stipulate in Japanese law.¹¹⁷ I agree that stipulating this kind of expression in Japanese law would be extremely exceptional. However, objectively, it must be noted that not introducing this kind of court's obligation but adding several aforementioned substantive factors or conditions for recognition will probably result in the delay of the court's decision, which in turn apparently contradicts the expedition of recognition decisions indicated in the Model Law.¹¹⁸

Additionally, regarding the recognition process, both the Model Law and the Recognition Law grant the recognition court the power to terminate the recognition.¹¹⁹ Both the Model Law and the Recognition Law allow the court to terminate the recognition when the grounds for granting recognition are fully or partially lacking or have ceased to exist. Again, the Recognition Law stipulates the additional grounds to terminate the recognition,¹²⁰ such as finding fulfillment of the aforementioned negative conditions for recognition,¹²¹ or the violation of procedural obligations of the foreign representative.¹²² These additional conditions to terminate recognition also widen the Japanese court's discretionary power and provide another option to escape from the recognition proceeding.

5. Effects of Recognition of a Foreign Proceeding ~ Strong Filter of Japanese Law

Professor Wessels singled two points out from the effects of recognition under the

¹¹⁷ Yamamoto, *supra* note 3, at 82.

¹¹⁸ Berends, *supra* note 59, at 354, 356.

¹¹⁹ MODEL LAW *supra* note 1, art. 17 para. 4, Recognition Law, *supra* note 55, art. 56 paras. 1, 2.

¹²⁰ Recognition Law, *supra* note 55, art. 56 paras. 1, 2.

¹²¹ Recognition Law, *supra* note 55, art. 56 para. 1(2). The Recognition Law sets the occurrence of this event as the mandatory termination of recognition.

¹²² Recognition Law, *supra* note 55, art. 56 para. 2 (2). The Recognition Law provides the occurrence this event as the discretionary termination of recognition.

Recognition Law as “striking differences [from the Model Law].” These points are; (i) no automatic effects of recognition and (ii) the process of granting discretionary relief (relief may be granted on the court’s own motion or at the request of the foreign representative as well as other interested parties).¹²³

The above two features are, truly, very significant differences of the Recognition Law from the Model Law. However, the differences are not limited to these two. There are many significant differences between the Recognition Law and the Model Law on the effects of recognition of foreign proceeding. These differences seem to suggest the intent of Japanese legislation, namely, to make the effect of recognition as modest as possible, and to put the effect under the control of the court to the extent possible; even while making the law appear as if it is based on the Model Law.

As a consequence of modifying the Model Law’s provisions with those intents, many of these differences on the effects of recognition conflict with the Model Law’s thrusts.

a. Automatic effects

Providing automatic effects of recognition of a foreign main proceeding is no doubt the core provision of the Model Law.¹²⁴ The Model Law article 20 paragraph 1 stipulates automatic stay of local individual proceedings and executions, and suspension of the debtor’s right to dispose of its assets upon recognition of foreign main proceeding.

However, Japan decided not to adopt this core provision. Under the Recognition Law, regardless of whether the foreign proceeding is “foreign main proceeding” or “foreign

¹²³ Wessels, *supra* note 6, at 4-5.

¹²⁴ Pottow, *supra* note 2, at 963-66. The Guide to Enactment paragraph 143 emphasizes that the approach of this provision reflects a basic principle underlying the Model Law. Professor Matsushita also describes these effects as “indispensable to ensure an orderly and fair resolution of cross-border insolvency cases.” See Matsushita, *supra* note 43, at 155. See also Berends, *supra* note 59, at 363-64.

non-main proceeding,” there is no automatic effect of recognition. Therefore, to obtain virtual effect or relief of the recognition, the judges’ further discretionary order is always necessary. The Japanese legislation seemed to reach this decision fearing that giving too strong effects of recognition would make judges too prudent and would result in delay of the recognition process, which is contrary to the Model Law’s purpose.¹²⁵ However, this problem should and can be solved by the court’s operational efforts and accumulation of experience. Moreover, in fact, not stipulating automatic effects may rather result in taking more time for deciding recognition because the judges will probably contemplate which relief is appropriate to order simultaneously with recognition decision.¹²⁶

b. Discretionary Relief upon Recognition of a Foreign Proceeding

The Model Law article 21 paragraph 1 provides several discretionary reliefs upon recognition of a foreign proceeding. Those are (i) stay of individual actions or proceedings,¹²⁷ (ii) stay of execution,¹²⁸ (iii) suspension of disposition of the assets,¹²⁹ (iv)

¹²⁵ See the minute of First Division 10th Conference, *supra* note 83. See also Yamamoto, *supra* note 3 at 83 (pointing the same reasoning).

¹²⁶ Professor Berends noted that the Model Law stipulated the automatic effects so that the court would not waste time by contemplating various forms of relief. See Berends, *supra* note 59, at 363-64. Japanese legislation and Professor Yamamoto thought the opposite. Regarding this issue, in two existing recognition cases (for the detail of the cases, *see intra*, Part III Section A Subsection 8), the court recognized the foreign proceeding and at the same time ordered relief (in one case, ordered the stay of executions and in the other, ordered the entrustment of administration). According to these two cases, the court in fact considered whether granting these orders were appropriate “before” the recognition decision. Therefore, although examples are too few to conclude, at least currently, Professor Berends’s note above seems to be correct.

¹²⁷ MODEL LAW, *supra* note 1, art. 21 para. 1(a). It provides the court’s power to stay the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities.

¹²⁸ MODEL LAW, *supra* note 1, art. 21 para. 1(b). It provides the court’s power to stay execution against the debtor’s assets.

¹²⁹ MODEL LAW, *supra* note 1, art. 21 para. 1(c). It provides the court’s power to suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor.

discovery of information,¹³⁰ (v) entrustment of the administration or realization of the assets,¹³¹ (vi) extension of provisional relief,¹³² and (vii) any additional relief that may be available under local laws.¹³³

(A) Process of Granting Discretionary Relief

Under the Model Law, the court may grant discretionary relief only “at the request of the foreign representative,” while under the Recognition Law the court may grant it “on the court’s own motion (in the absence of interested party’s request), or at the request of the foreign representative as well as other interested parties.”¹³⁴ It is important to mention that the expression of this Recognition Law’s article is identical to that of the provisions of Main Laws¹³⁵ which stipulate very similar reliefs in local insolvency proceedings.¹³⁶ The discussions in Legislative Council suggest that the drafters intended to draft the Recognition Law to be “balanced” with the local insolvency laws.¹³⁷ Therefore, probably, this provision of the Recognition Law was written to be identical to the provisions of the similar reliefs in

¹³⁰ MODEL LAW, *supra* note 1, art. 21 para. 1(d). It provides the court’s power to examine witnesses, to take evidence or to deliver information concerning the debtor’s assets, affairs, rights, obligations or liabilities.

¹³¹ MODEL LAW, *supra* note 1, 21 para. 1(e). It provides the court’s power to enforce entrustment of the administration or realization of all or part of the debtor’s assets located in the State to the foreign representative or another person designated by the court.

¹³² MODEL LAW, *supra* note 1, art. 21 para. 1(f). It provides the court’s power to extend provisional relief under the Model Law art. 19.

¹³³ MODEL LAW, *supra* note 1, art. 21 para. 1(g). However, the Recognition Law does not provide any additional relief.

¹³⁴ MODEL LAW, *supra* note 1, art. 21 par. 1, Recognition Law, *supra* note 55, art. 25 par. 1, art. 26, par. 1, art. 27 par. 1, art. 28 par. 1.

¹³⁵ Bankruptcy Act, Civil Rehabilitation Law, and Corporate Reorganization Law.

¹³⁶ *See, e.g.*, Bankruptcy Act art. 24 para. 1, Civil Rehabilitation Law art. 26 para. 1, Corporate Reorganization Law art. 24 para. 1. All of these provisions stipulate discretionary reliefs that are granted on the court’s own motion or at the request of interested party (including trustee, creditor, debtor, etc.).

¹³⁷ *See e.g.*, the minute of First Division 10th Conference, *supra* note 83. The drafters frequently referred to the Recognition Law’s “balance” with the Main Laws and also, comment that many of the expressions of Recognition Law are brought from those of the Main Laws.

the Main Laws, in order to balance with them. As a consequence, the court's discretionary power has become larger than the Model Law's expectation and, additionally, the foreign representative may be bothered by the inconsistent relief requests of other interested parties, such as general creditors of the debtor.

(B) Stay of Individual Actions or Proceedings

Corresponding to the Model Law's (i) stay of individual actions or proceedings, the Recognition Law provides the court's power to stay the "continuation" of individual actions and administrative proceedings concerning the debtor's assets.¹³⁸ However, it does not stipulate the stay of the "commencement" of the actions or proceedings. Moreover, with regard to "proceeding," it allows the court to stay "administrative proceedings" but not other proceedings, in particular arbitral proceedings.¹³⁹

(C) Stay of Execution

With regard to (ii) stay of execution of the Model Law, the Recognition Law stipulates the court's discretionary power to stay "continuation" of execution (of both general creditors and secured creditors).¹⁴⁰ As to the "commencement" of execution, the Recognition Law only allows the court to stay general creditor's commencement of execution but does not allow the court to stay that of secured creditors.¹⁴¹ Furthermore, the Recognition Law gives the court power to terminate the stayed execution of general

¹³⁸ See Recognition Law, *supra* note 55, art. 25 para. 1(1), (2)

¹³⁹ Professor Yamamoto reasons that these powers of staying the commencement of the actions or proceedings, and of staying arbitral proceeding are too strong and not necessarily indispensable. See Yamamoto, *supra* note 3 at 84.

Additionally, I want to suggest that another reason may be "balancing with the Main Laws." The similar reliefs stipulated in Main Laws also omit stay of commencement and stay of arbitral proceeding and the expressions of the Recognition Law's provision and that of the Main Laws are identical. See Bankruptcy Act art. 24 para. 1(3), (4), Civil Rehabilitation Law art. 26 para. 1(3), (4), Corporate Reorganization Law art. 24 para. 1(3), (4).

¹⁴⁰ Recognition Law, *supra* note 55, arts. 25 para. 1 (1), 27.

¹⁴¹ Recognition Law, *supra* note 55, art. 28.

creditors, but not that of secured creditors.¹⁴²¹⁴³

(D) Suspension of Disposition of the Assets

The Recognition Law gives the court discretionary power to suspend disposition of the debtor's assets, which is equivalent to the court's power stipulated in the Model Law.¹⁴⁴¹⁴⁵

(E) Discovery of Information

With regards to (iv) discretionary relief of discovery of information in the Model Law, the Recognition Law introduces a distinguishing system, which may be evaluated as, in fact, not adopting the Model Law. The Recognition Law does not introduce individual relief of discovery of information. Instead, the law stipulates discovery as a part of the entrustment order of the administration of the debtor's assets (which will be discussed in the next section).¹⁴⁶ The Recognition Law grants the power of information discovery to the "recognition representative," who is designated when the court orders the entrustment of administration of the debtor's assets.¹⁴⁷ A foreign representative can be designated as recognition representative but this depends on court's discretion. In the case where a foreign

¹⁴² Recognition Law, *supra* note 55, art. 25 para. 5.

¹⁴³ Although each Main Laws stipulates differently about the stay of execution, the idea of "balancing with the Main Laws" also worked here. The drafter clearly commented in the Legislative Council that these provisions were modeled after those of Civil Rehabilitation Law. See the minute of the Legislative Council the 20th Conference (Apr. 28, 2000) available at http://www.moj.go.jp/shingi1/shingi_000428-1.html (last visited Mar. 2011). See also Civil Rehabilitation Law art. 26 paras. 1(2), 3, arts. 27, 31.

¹⁴⁴ Recognition Law, *supra* note 55, art. 26.

¹⁴⁵ Ironically, Japanese legislation could stipulate this provision in the Recognition Law as identical with that of the Model Law because the Main Laws already had the provisions giving the court the same discretionary power. See Bankruptcy Act art. 28, Civil Rehabilitation Law art. 30, Corporate Reorganization Law art. 28.

¹⁴⁶ Recognition Law, *supra* note 55, arts. 32, 41.

¹⁴⁷ Recognition Law, *supra* note 55, art. 41. "Recognition representative" is "a person who is ordered, under article 32 paragraph 1, to administer debtor's operation of business and assets located in Japan." Recognition Law, *supra* note 55, art. 2 para. 1(9).

representative is not appointed as the recognition representative, however, even though the recognition representative has an obligation to make efforts to closely communicate and contact with the foreign representative to achieve the purpose of recognition proceeding,¹⁴⁸ the recognition representative does not have the obligation to provide all the information gathered through information discovery to the foreign representative. After all, this system gives the court an option to avoid the usage of discovery in a way that is inconsistent with the practice of Japan as a “civil law country” (but may be normal in the practice of common law countries) by considering who to appoint as recognition representative.

(F) Entrustment Order of the Administration of the Debtor’s Assets

Finally, as to (v), the entrustment order of the administration or realization of the debtor’s assets in the Model Law, the Recognition Law provides the court’s power to designate a “recognition representative” and to entrust the administration of the debtor’s assets to the recognition representative.¹⁴⁹ Since a foreign representative as well as a third person other than foreign representative can be designated as administrator under both laws, the effects of the relief will be almost identical between Recognition Law and the Model Law.¹⁵⁰

(G) Turnover of the Debtor’s Assets

Next, the Model Law article 21 paragraph 2 provides for the turnover of the debtor’s assets by stipulating the court’s order of entrusting the distribution of the debtor’s assets located in the State to the foreign representative or another person designated by the court if

¹⁴⁸ Supreme Court Rule, *supra* note 92, art. 32.

¹⁴⁹ Recognition Law, *supra* note 55, art. 32.

¹⁵⁰ One difference is that the Model Law describes the court’s entrustment order of the administration as well as “realization” in one provision while the Recognition Law requires additional court permission for realization in addition to the entrustment order. *See* MODEL LAW, *supra* note 1, art. 21 para. 1(e), Recognition Law, *supra* note 55, art. 32.

the court is satisfied that the interests of local creditors are adequately protected. (Additionally, article 21 paragraph 1 subparagraph (e), which was mentioned immediately above, is another provision for turnover of the assets.)

The Recognition Law prepares the turnover of debtor's assets solely by providing the aforementioned court's power to order the entrustment of administration of the debtor's assets to the recognition representative.¹⁵¹ Then, regarding realization and distribution, the Recognition Law additionally requires the recognition representative to obtain the court's prior approval.¹⁵² Also, in the case where the entrustment of administration is not ordered but the debtor's actions are stayed, the Recognition Law allows the court to list the debtor's actions and make the court's prior approval necessary for doing those listed actions.¹⁵³ The actions of the debtor or recognition representative without the court's prior approval are void unless a bona fide third party to the asset exists.¹⁵⁴

These provisions of both the Model Law and the Recognition Law basically contain similar "territorialism" aspects -- favorable safeguard of protecting local creditors' interest, which restricts turning over power that is necessary to achieve complete universalism.¹⁵⁵ Here again, however, the Recognition Law adds the court's discretionary power to list certain actions of the debtor or the foreign representative and to require the court's prior approval for those actions, which can be another broad restriction to turnover power.

¹⁵¹ Recognition Law, *supra* note 55, art. 32.

¹⁵² In addition to the entrustment order, the Recognition Law requires another court's permission for the disposition of the debtor's assets and the transportation of the assets to the outside of Japan by the recognition representative as well as for the other actions of the recognition representative which the court listed for prior approval. Recognition Law, *supra* note 55, art. 35 para. 1.

¹⁵³ The Recognition Law suggests disposition of the debtor's assets and transportation of the assets to the outside of Japan as typical examples to list. See Recognition Law, *supra* note 55, art. 31 para. 1.

¹⁵⁴ Recognition Law, *supra* note 55, art. 31 para. 3, art. 35 para. 3.

¹⁵⁵ See Pottow, *supra* note 2, at 966-68.

(H) Assets of the Non-Main Proceeding

The Model Law article 21 paragraph 3 provides the “choice-of-law” rule to decide the range of the debtor’s assets that should be turned over to “non-main proceeding.”¹⁵⁶ This provision contains an important essence of the Model Law’s universalism.¹⁵⁷ The Recognition Law, however, ignored this provision and stipulated that, generally, the range of the reliefs cover “the assets located in Japan.”¹⁵⁸ This way of stipulation may be simpler. However, at the same time, it results in a denial of the intent of the Model Law to pursue genuine order and fairness of distribution, by requiring a connection between assets and recognized foreign non-main proceedings.

c. Other Discretionary Reliefs or Measures

(A) General Provision for Protection of Creditors and Other Interested Persons

The Model Law article 22 stipulates that (i) the court to make sure the interests of the interested persons are adequately protected upon granting of relief (paragraph 1), (ii) the court’s power to subject relief to appropriate conditions (paragraph 2), and (iii) the right of foreign representative or a person affected by relief granted to move for modification or termination of the relief (paragraph 3). Although the Recognition Law does not particularly stipulate general provisions corresponding to above provisions of the Model Law, the Recognition Law already contains provisions or interpretations that probably satisfy the purpose of the Model Law in the above provisions, by and large.¹⁵⁹

¹⁵⁶ Berends, *supra* note 59, at 370-73, Pottow, *supra* note 2, at 963-66.

¹⁵⁷ See Pottow, *supra* note 2, at 963-66. See also *supra* Part III Section A Subsection 3(b).

¹⁵⁸ E.g., Recognition Law, *supra* note 55, art. 25 para. 1(1), art. 26 para. 1, art. 31 para. 1, art. 32 para. 1, art. 35 para. 1.

¹⁵⁹ Firstly, with regard to (i) the Model Law article 22 paragraph 1, this provision reminds the court of the very basic and general idea, which is the necessity of balancing various interests in ordering reliefs, and has a purpose to show legislators that the Model Law provides a satisfactory balance. Berends, *supra* note 59, at 373-74, Yamamoto, *supra* note 3, at 87. Therefore, it can be

(B) Standing for Paulian Action

The Model Law article 23 provides a foreign representative's standing to initiate the actions to avoid acts detrimental to creditors (sometime called "Paulian actions"). However, it remains silent about substantive rights that need to exist as a basis to bring the action, and it does not provide any solution for the problem of conflict of laws for that substantive right.¹⁶⁰

The drafters of the Recognition Law had hot and lengthy discussion on this issue and finally came to the decision "to remain completely silent about the issue" (even silent about standing).¹⁶¹ Regarding this decision, firstly, the Recognition Law is not denying this right and action of a foreign representative, and therefore, the drafters and many of the scholars

said that the court should do that kind of balancing of various interests before ordering reliefs as a matter of course, even without a corresponding provision in the Recognition Law.

Secondly, as to (ii) the Model Law article 22 paragraph 2, the Recognition Law does not expressly stipulate the court's power to subject relief to conditions. However, as suggested, putting aside good or bad, the law already gives the court several strong options to control or restrict the foreign representative, recognition representative, and other participants (typical examples are; not introducing automatic effects of recognition; granting power to list actions of the recognition representative for the court's prior approval; mandating the recognition representative report (See Recognition Law, *supra* note 55, art. 46)) and providing the court's discretionary power to modify or terminate the granted relief on its own motion (Recognition Law, *supra* note 55, art. 25 para. 4, art. 26 para. 4, art. 27 para. 5, art. 28 para. 3). Therefore, the Recognition Law can probably substantively achieve the Model Law's purpose without an expressly corresponding provision.

Finally, regarding (iii) the Model Law article 22 paragraph 3, the Recognition Law provides the provision that grants the court discretionary power to modify or terminate the relief. See Recognition Law, *supra* note 55, art. 25 para. 4, art. 26 para. 4, art. 27 para. 5, art. 28 para. 3. Although this provision does not explicitly provide who can apply, this kind of provision in insolvency laws is generally interpreted as giving "in fact" the affected parties standing to move for the modification or termination of the relief. *See* Yamamoto, *supra* note 3, at 88. *See also* TYUKAI HASANHO [COMMENTARY ON BANKRUPTCY ACT] (Hideo Saito, et al. eds., 3d ed. 1999) (providing this interpretation of Bankruptcy Act of 1922 art. 155 para. 2, which is exactly same expression of current Bankruptcy Act of 2004 and above listed provisions of the Recognition Law). Therefore, the Recognition Law at least in fact provides measures equivalent to that of the Model Law article 22 paragraph 3.

¹⁶⁰ *Guide to Enactment supra* note 86, para. 166.

¹⁶¹ Miyama, et al., *supra* note 4, at 64, Yamamoto, *supra* note 3, at 88.

agree that there is room for interpretation to approve the rights and action.¹⁶² Secondly, the Main Laws expressly provide a foreign representative standing to file for commencement of the local insolvency proceedings, and these proceedings clearly provide a system to avoid acts detrimental to creditors.¹⁶³ Thirdly, the Model Law itself understands the difficulty of stipulating standing for the actions but not providing substantive rights or rules of choice-of-law for those actions.¹⁶⁴ Therefore, I think the Recognition Law's above "silence" may be within acceptable range for achieving the Model Law's purpose, although this silence may be evaluated as one of indicia of Japan's conservativeness towards acceptance of the Model Law and universalism.¹⁶⁵

(C) Intervention in Local Proceedings

The Model Law article 24 provides a foreign representative's standing to intervene in any proceeding in which the debtor is a party, so that this kind of standing would not be denied because of lack of provision or contemplation.¹⁶⁶

The Recognition Law does not stipulate provision corresponding to this provision of the Model Law. Regarding this decision of the legislation, Japan's civil procedure permits standing for every interested party to intervene the pending proceeding if their interest will

¹⁶² Miyama, et al., *supra* note 4, at 64, Yamamoto *supra* note 3, at 88-89. This room for the interpretation to approve such rights and action may connect to the unsolved issue of whether the interpretive approach of "automatic recognition of foreign proceeding" is available after the enactment of the Recognition Law, because this interpretive approach will be one idea to bring this kind of rights and action without explicit provision in the Recognition Law. *See infra* Part III Section C.

¹⁶³ Bankruptcy Act art. 160, Civil Rehabilitation Law art. 127, Corporate Reorganization Law art. 86. *See also* Miyama, et al., *supra* note 4, at 64, Yamamoto, *supra* note 3, at 89.

¹⁶⁴ *Guide to Enactment supra* note 86, para. 167. The drafters and scholars repeatedly emphasized this technical difficulty of only stipulating standing. *See* Miyama, et al., *supra* note 4 at 64, Yamamoto *supra* note 3, at 89.

¹⁶⁵ This silence of the Recognition Law, in fact, may strongly prompt the foreign representative to open the local proceeding (and not to use the foreign recognition proceeding) that has clear system to avoid acts detrimental to creditors when necessity of those avoidances is predicted.

¹⁶⁶ *Guide to Enactment, supra* note 86, para. 168.

be legally affected by the consequence of the proceeding. Therefore, probably, the Model Law's purpose of this provision will be satisfied under the Recognition Law, even without additional provision in Recognition Law.¹⁶⁷¹⁶⁸

6. Provisional Relief before the Recognition of Foreign Proceeding

Finally, the provisional reliefs that may be granted in the period after filing, before the judge's recognition decision, should be mentioned. The Model Law article 19 prepares those provisional reliefs. Those are stay of execution, entrustment of the administration of the assets, suspension of disposition of the assets, discovery of information, and any additional relief that may be available under local laws. This is somewhat narrower than the list of discretionary reliefs that may be granted after recognition provided in the Model Law article 21, although these reliefs listed in this provision are not conclusive.¹⁶⁹ These reliefs may be granted if there is request by the foreign representative and the court finds these reliefs are urgently needed to protect the assets of the debtor or the interests of the creditors.¹⁷⁰

The Recognition Law also provides provisional reliefs before the recognition. They are stay of continuation of execution (including both execution of general creditors and secured creditors),¹⁷¹ stay of continuation of individual actions and administrative proceedings,¹⁷²

¹⁶⁷ See Yamamoto, *supra* note 3 at 89. See also Minjisoshoho [Code of Civil Procedure], Law No. 109 of 1996 [hereinafter Code of Civil Procedure], art. 42.

¹⁶⁸ Whether a foreign representative's interest is "legally-affected" by the pending proceeding will be one more step to permit foreign representative's standing to intervene. The concept of "legally affected" is determined by the extent of impact of the consequence of the pending proceeding to the interest of the party who applies to intervene. Once foreign proceeding is recognized, the court will probably recognize the foreign representative as a party who has interest legally affected by the consequence of the debtor's pending proceeding.

¹⁶⁹ Berends, *supra* note 59, at 359.

¹⁷⁰ MODEL LAW, *supra* note 1, art. 19 para. 1.

¹⁷¹ Recognition Law, *supra* note 55, art. 25 paras. 1 (1), 2, art. 27 paras. 1, 2. However, the Recognition Law does not allow stay of commencement of execution as a provisional relief. See

suspension of disposition of the assets,¹⁷³ and entrustment of the administration (including some sort of discovery of information) of the assets to the interim trustee.¹⁷⁴¹⁷⁵ The provisional reliefs listed in the Recognition Law are narrower than those of the Model Law but the characteristics, issues and possible criticisms of Japan's conservative decision here are almost exactly the same as those of the Model Law article 21 reliefs, which are already mentioned in this paper.¹⁷⁶

7. Concurrent Proceedings ~ Progressive or Backward?

Recognition Law, *supra* note 55, art. 28.

¹⁷² Recognition Law, *supra* note 55, art. 25, para. 1 (2), (3), para. 2.

¹⁷³ Recognition Law, *supra* note 55, art. 26 paras. 1, 2.

¹⁷⁴ Recognition Law, *supra* note 55, art. 51 para. 1. In this provisional relief, an “interim trustee” will be appointed for the entrustment of administration of assets instead of the “recognition representative.” An interim trustee’s role is almost same as that of the recognition representative (*See* Part III Section A Subsection 5(b)(F)), although modest differences, which come from interim trustee’s provisional nature, exist. The power of discovery of information is provided to interim trustee, which is identical to that of recognition representative. Recognition Law, *supra* note 55, art. 55, art. 41. *See also supra* Part III Section A Subsection 5(b)(E).

¹⁷⁵ Comparing these provisional reliefs with those of the Model Law reveals the following differences; (i) the Recognition Law allows the court to grant provisional reliefs on the court’s own motion (in the absence of interested party’s request), or at the request of the foreign representative as well as other interested parties; (ii) the Recognition Law list stays continuation of individual actions and administrative proceedings, while the Model Law drops the stay of individual actions or proceedings; (iii) the Recognition Law does not expressly require an element of “urgency” as a condition of granting provisional reliefs; (iv) in the Recognition Law, provisional reliefs will last even after the court’s recognition decision unless the court terminates them or the court rejects recognition of the foreign proceeding, while the Model Law’s provisional reliefs automatically terminates when the application for recognition is determined unless they are extended.

Regarding (i), *see supra* Part III Section A Subsection 5(b)(A).

Regarding (ii), since the Model Law’s list of provisional reliefs is not conclusive, this difference seems to have no conflict with the Model Law’s purpose.

Regarding (iii), the judges usually would be very cautious to order strong provisional measures, and thus, in practice this difference would probably be modest. *See* Yamamoto, *supra* note 3, at 81.

Regarding (iv), *see* Recognition Law art. 25 par. 2, 3, 4, art. 26 par. 2, 3, 4, art. 27 par. 2, 3, 5, art. 51 par. 3, 4, art. 24 par. 3, the Model Law art. 21 par. 1 subpar. (f).

¹⁷⁶ *See supra* Part III Section A Subsection 5(b)(A) to (F).

a. Coordination of a Local Proceeding and a Foreign Proceeding

The Model Law takes the stance of allowing concurrent proceedings. The Model Law article 28 permits the commencement of a concurrent local proceeding even after recognition of a foreign main proceeding.¹⁷⁷ Then, the Model Law article 29 provides rules for coordination of these concurrent proceedings by giving absolute priority to a local proceeding. It stipulates that any relief or effect based on recognition of a foreign proceeding must be consistent with that granted in the concurrent local proceeding. If it is not consistent with a local proceeding, it shall be modified or terminated. However, although article 29 confirms the local proceeding's pre-eminence, another significance of this provision is that the opening of concurrent local proceeding does not prevent or terminate the recognition of a foreign proceeding. This rule embodies the objectives of the Model Law that the foreign proceeding should be treated to the maximum extent favorable by the court in all circumstances.¹⁷⁸

Japanese insolvency laws (the Main Laws and the Recognition Law) permit the commencement of concurrent local insolvency proceedings and even recognition of foreign proceedings to the same debtor to almost the same extent of the Model Law.¹⁷⁹

¹⁷⁷ The only case where the Model Law does not permit the opening of a concurrent local proceeding is where that local proceeding is a foreign non-main proceeding and the debtor has no assets in the State. However, Professor Berends emphasizes that in order to avoid the detrimental result of opening a non-main proceeding in the State where the debtor only has assets, legislators should choose more restrictive rules for opening concurrent local proceeding, such as requiring the debtor to have an establishment in the State. Berends, *supra* note 59, at 384.

¹⁷⁸ *Guide to Enactment*, *supra* note 86, para. 189.

¹⁷⁹ Bankruptcy Act art. 4, Civil Rehabilitation Law art. 4, Corporate Reorganization Law art. 4. (Also, there is no provision that limits the opening of concurrent proceeding in the Recognition Law.) The first two of these articles provide that local insolvency proceedings for the debtor can be commenced when the debtor has business office, residence, domicile, or assets in Japan. On the other hand, Corporate Reorganization Law article 4 provides that corporate reorganization proceeding can be commenced when the debtor has a business office in Japan. As mentioned, "business office" is interpreted similarly to the interpretation of "establishment" in the Model Law. *See supra* note 81. Therefore, the Main Laws have a slightly more restricted rule for the commencement of the concurrent local proceeding than does the Model Law, which is (slightly)

However, for coordination between local proceedings and foreign proceedings, the Recognition Law takes an approach different from the Model Law.¹⁸⁰ It allows “only one proceeding run for one debtor.”¹⁸¹

The Recognition Law’s coordination rules are as follows:

- (i) It puts the priority on a local proceeding, and therefore, in general, only the local proceeding runs and the foreign proceeding stays;¹⁸²
- (ii) As an exception, however, the foreign proceeding runs and the local proceeding stays if the following conditions are met:
 - (I) The foreign proceeding is a “foreign main proceeding” (finally, determination of “foreign main proceeding” or not matters);
 - (II) Recognition of the foreign proceeding will be of benefit to the general interests of creditors (including creditors outside Japan); and
 - (III) The interests of local creditors will not be unjustly violated by recognition of the foreign proceeding;¹⁸³
- (iii) The stayed proceeding will be terminated if the running proceeding completes by distribution to creditors or approval of a reorganization plan;¹⁸⁴

more favorable to universalism.

¹⁸⁰ Professor Wessels points out this difference as another sample of “striking difference” of the Recognition Law from the Model Law. Wessels, *supra* note 6, at 5.

¹⁸¹ Professor Yamamoto suggests this principle is more familiar in civil law countries because these countries do not presuppose the broad discretion of the court. *See* Yamamoto, *supra* note 3, at 93, Kazuhiko Yamamoto, *Aratana Kokusai Tosan Hosei (5) [The New Legal System for International Insolvency]*, 704 NBL 62, 64(2001).

¹⁸² Recognition Law, *supra* note 55, arts. 57, 58, 59, 60. One small difference of article 57 is when a petition for the commencement of foreign recognition proceeding is filed after the local proceeding has commenced, that petition will be dismissed instead of stayed, unless above conditions of (I), (II) and (III) are met.

¹⁸³ Recognition Law, *supra* note 55, art. 57 paras. 1, 2, art. 58 para. 1, art. 59 para. 1 (i), art. 60 para. 1.

¹⁸⁴ Recognition Law, *supra* note 55, art. 61.

- (iv) If the running proceeding results in failure, the stayed proceeding starts to run again.

Regarding these rules, I think it is very important to note the following three points. Firstly, the Recognition Law's idea of "only one proceeding run for one debtor" apparently conflicts with the expressed purpose of the Model Law that the foreign proceeding should be treated to the maximum extent favorable by the court in all circumstances. Under the Recognition Law's rule, unless conditions (ii) (I) through (III) above are met, Japan's local insolvency proceedings will always have pre-eminence and the foreign proceeding will be stayed. As a matter of course, the stayed foreign proceeding will have no chance to obtain any relief unless it resumes by failure of local proceedings. Although Japan being a civil law country is given as a reason for not accepting the Model Law's rule, the Model Law provides quite simple and clear rules for the coordination of proceedings. Therefore, accepting the Model Law's rule and permitting multiple proceedings to run will not necessarily enlarge the court's discretionary power, which would be contrary to the intent of a civil law system.

Secondly, while the Model Law puts absolute priority on a local proceeding for coordination of concurrent proceedings,¹⁸⁵ the Recognition Law tries to leave open the possibility for the foreign proceeding to be the pre-eminent governing proceeding when that will be more appropriate and of benefit to the creditors in the situation, even when a concurrent local proceeding exists. I think this attitude is favorable to universalism and can be positively evaluated.¹⁸⁶

¹⁸⁵ Professor Pottow describes this as "the final nail in the coffin for a universalist interpretation of the Model Law" and "potentially fatal to universalism." Pottow, *supra* note 2, at 968.

¹⁸⁶ However, I need to note one more ironic view. The reason why Japan took progressive and universalism-favorable approach only for here can be explained as follows; if Japan gives absolute priority to Japanese local proceeding, the Recognition Law's rule will possibly result in staying the foreign main proceeding and running the Japanese local proceeding as foreign

Thirdly, however, the Recognition Law requires protection of “local creditors” (above (ii)(III)) as one condition for the foreign proceeding to be given pre-eminence. This time, this idea (putting local creditors in a better position than other creditors just because they are local creditors) conflicts with the Model Law’s philosophy of cross-border fairness.¹⁸⁷ Furthermore, if the court interprets this condition too sensitively, and recognizes small disadvantages to local creditors as “unjust violation of local creditors’ interest,” the result will be completely the same as giving absolute priority to local proceeding.¹⁸⁸

b. Coordination of Multiple Foreign Proceeding

Next, the Model Law article 30 gives coordination rules for the cases where two or more foreign recognition proceedings are concurrently filed. As a premise, the Model Law does not terminate foreign non-main proceedings even when a recognized foreign main proceeding exists, and thus allows concurrent foreign proceedings. It provides, however, for the absolute priority of a foreign main proceeding and stipulates that any relief or effect based on recognition of the foreign non-main proceeding must be consistent with that granted in the foreign main proceeding. If it is not consistent with the foreign main proceeding, it shall be modified or terminated. However, the Model Law does not provide a rule for coordination

non-main proceeding because Japan took the rule “only one proceeding run for one debtor” for concurrent proceedings. This result completely conflicts with the Model Law’s purpose and severe criticism against this kind of legislation would be unavoidable. Therefore, I assume, Japan reluctantly introduced this universalism-favorable approach.

¹⁸⁷ Berends, *supra* note 59, note 374, *Guide to Enactment*, *supra* note 86, para. 163.

¹⁸⁸ With regard to this condition’s interpretation, the drafter (Mr. Miyama) gave as an example of “unjust violation of local creditors’ interest” the case where the debtor has a number of debts to employees, which has priority in Japanese insolvency proceedings, and where the recognized foreign main proceeding does not have such a priority provision, and as a result of giving pre-eminence to the foreign main proceeding, distribution to those employees would be decreased. Takuya Miyama, et al., *Gaikoku Tosan Shori Tetsuzuki no Shonin Enjo nikansuru Horitsu oyobi Kaisei Minji Soshoho no Gaiyo (3)* [*Outline of Law on Recognition and Assistance of a Foreign Insolvency Proceeding and Revised Civil Rehabilitation Law (3)*], 1601 KINYU HOMU JIU 37, 39 (2001). This example will probably frequently be the case and seems to show that the drafters did not think of meeting this condition as exceptional.

between foreign non-main proceedings and leaves this issue to the court's discretion.¹⁸⁹

On the other hand, the Recognition Law persists “one running proceeding for one debtor” and provides the rule as follows:

- (i) It provides for the possibility of the commencement of two or more concurrent foreign recognition proceedings;¹⁹⁰
- (ii) The pre-existing recognized foreign non-main proceeding will be stayed if the foreign main proceeding is newly recognized;¹⁹¹
- (iii) The foreign non-main proceeding filed for recognition will be dismissed if the foreign main proceeding is already recognized;¹⁹²
- (iv) In the cases where two or more foreign non-main proceedings are filed for recognition proceeding, the court has the discretion to choose one foreign non-main proceeding that seems to be most favorable to general interests of creditors to run and the other foreign non-main proceeding(s) are to be dismissed or stayed;¹⁹³
- (v) The stayed proceeding will be terminated if the running proceeding completes by distribution to creditors or approval of a reorganization plan;¹⁹⁴
- (vi) If the running proceeding results in failure, the stayed proceeding starts to run again.

8. Cases under Current Legal System for Cross-Border Insolvency in Japan ~ Too Few and

¹⁸⁹ *Guide to Enactment, supra* 86, para. 193.

¹⁹⁰ Recognition Law, *supra* note 55, arts. 62, 63.

¹⁹¹ Recognition Law, *supra* note 55, art. 63 para. 1.

¹⁹² *Id.* (1).

¹⁹³ Recognition Law, *supra* note 55, art. 62 paras. 1 (2), 2, art. 63 para. 1.

¹⁹⁴ Recognition Law, *supra* note 55, art. 64.

Issues Left Unsolved

During and immediately after the enactment of the Recognition Law, the dominant prediction for the frequency of usage of the foreign recognition proceeding was “will not be frequently used,” although there were some predictions of quite the opposite.¹⁹⁵ This dominant prediction seems to be correct. According to some scholars’ survey, as of May 2009, when more than eight years had passed from the date when the Recognition Law went into effect, there were only two recognition cases that had been published.¹⁹⁶¹⁹⁷ Therefore, the aforementioned issues that were expected to be resolved through the accumulation of the cases and experiences remain unsolved. Nonetheless, as Professor Shoichi Tagashira points out, although use of the foreign recognition proceeding itself is quite rare, there are reports

¹⁹⁵ See the minute of First Division 10th Council, *supra* note 8, Matsushita, et al., *supra* note 5 at 85 (forecasting the proceeding is not frequently used). See also Junichi Matsushita, et al., *Zadankai – Aratana Kokusai Tosan Hoseika no Syoronten (4) [Panel Discussion – Issues of the New Legal System for Transnational Bankruptcy (4)]*, 1613 KINYU HOMU JIJO 64, 68 (2001) (predicting the proceeding may be used frequently. Also, Mr. Miyama’s comment shows there were both predictions among the drafters.)

¹⁹⁶ Shima, *supra* note 62, at 136 (surveyed until May 2009). See also Shoichi Tagashira, *Kokusai Tosan Hosei nitsuite [Regarding International Insolvency]*, 184 BESSATSU JURISUTO 208, 209 (2006) (surveyed until May 2006). The Recognition Law necessarily requires the court to publish via Kanpo (an official gazette) when there is decision of recognition. Recognition Law *supra* note 55, art. 8 para. 1, art. 23 para. 1.

¹⁹⁷ The first case was decided in 2003 for the recognition of involuntary liquidation proceeding filed in People’s Republic of China, Hong Kong High Court, the Court of First Instance. 3738 Kanpo 24 (2003) (not reported in case reports). In this case, “interim liquidators” appointed in China were appointed as “recognition representative” and the entrustment relief was granted. Professor Matsushita points that, although detailed facts of the case are not published, this decision may have resolved the issue of whether the court should decide the element of “commencement of the foreign proceeding” that is one condition of recognition formally or substantively (the court should decide substantively, not stick to the name of the proceeding), because recognition decision was granted while foreign representatives were still called “interim” liquidator. Junichi Matsushita, *Kokusai Tosan [International Bankruptcy]*, 185 BESSATSU JURISUTO 210, 211 (2007).

The second case was decided in 2007 for the recognition of US Bankruptcy Code Chapter 11 proceeding filed in the United States, Federal District Court of Hawaii. 4278 Kanpo 27 (not reported in case reports). In this case, relief of stay of execution was granted simultaneously to the decision of recognition. Matsushita *supra* at 211.

that the debtor and the creditor frequently consider the possibility of the usage of foreign recognition proceeding and its effect, at the negotiation, and therefore, it seems that the influence of the enactment of the Recognition Law to the cross-border insolvency practice of Japan still can be considered “significant.”¹⁹⁸

B. Cross-Border Insolvency System in Main Insolvency Laws

The Model Law has provisions that are essential for governing cross-border insolvency but that do not necessarily constitute foreign recognition proceeding. Those provisions are (i) access of foreign representatives and creditors to local courts (the Model Law Chapter II), (ii) cooperation with foreign courts and foreign representatives (Chapter IV), (iii) presumption of insolvency (article 31), and (iv) rule of payment in concurrent proceedings (article 32). Since the Recognition Law is a law solely establishing foreign recognition system in Japan, those Model Law’s provisions are more or less stipulated in the Main Laws (but not in the Recognition Law).

Regarding the Main Law’s corresponding provisions, most of them seem to be favorable to the Model Law’s purpose. However, very importantly, the Main Laws has dropped one of the most significant rules of the Model Law, which is the provision for cooperation between local courts and foreign courts. Moreover, the notification provision of the Model Law (article 14), which is embodying “universalism,” is unfavorably modified. Therefore, after all, also in here, it is difficult to conclude that Japan favorably accepted the Model Law’s main thrust.

1. Access of Foreign Representatives and Creditors to Japanese Courts ~ Modest Acceptance

¹⁹⁸ Tagashira, *supra* note 196, at 209.

The provisions for “access of foreign representatives and creditors to local courts,” which the Model Law provides in Chapter II (article 9 to 14), are mostly introduced by the Main Laws.

Firstly, the contents of the first two provisions of the Model Law Chapter II (article 9 “foreign representatives’ direct access to local court” and article 10 “limited jurisdiction”) are already introduced in Japanese insolvency system as a matter of course and thus, the Main Laws (and the Recognition Law) do not have corresponding provision.¹⁹⁹

Secondly, with regard to foreign representatives’ application to commence local insolvency proceedings (the Model Law article 11), the Main Laws accept filing to commence insolvency proceeding by foreign representatives when the conditions for commencing such proceedings are met, in a manner identical to that of the Model Law article 11.²⁰⁰

Thirdly, for participation of a foreign representative in a local insolvency proceeding (the Model Law Article 12),²⁰¹ the Main Laws provide the right for the representative to

¹⁹⁹ Article 9 of the Model Law is explained as it tries to remove obstacles of foreign representative’s direct access to the court, such as requiring particular license or consular action before the access. Berends, *supra* note 59, at 338-39, *Guide to Enactment*, *supra* note 86, para. 93. In Japan, the actions of foreign representatives are not interpreted as “action of the State” and therefore, direct access (the access without particular license or consular action) to Japanese courts are always accepted. See Kazuhiko Yamamoto, *Aratana Kokusai Tosan Hosei (2) [New Legal System for International Insolvency (2)]*, 699 NBL 44, 45 (2000).

Article 10 of the Model Law is stipulated to avoid allowing the enacting State to assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has appeared before the court. Berends, *supra* note 59, at 339-40, *Guide to Enactment*, *supra* note 86, para. 94. Japan does not have such a rule or interpretation and therefore, stipulating a provision in the Main Laws corresponding this provision of the Model Law was decided not to be necessary. Berends, *supra* note 59, at 339-40, *Guide to Enactment*, *supra* note 86, para. 94.

²⁰⁰ Bankruptcy Act art. 246 para. 1, Civil Rehabilitation Law art. 209 para. 1, Corporate Reorganization Law art. 244 para. 1.

²⁰¹ The purpose of this provision of the Model Law is to give the foreign representative “standing” to participate in local proceedings. Berends, *supra* note 59, at 342, *Guide to Enactment*, *supra* note 86, para. 100.

attend a creditors' meeting and to express his opinion,²⁰² the right to receive service of important procedural documents from the court if the foreign representative filed the petition to commence the proceedings,²⁰³ and the right to submit a rehabilitation or reorganization plan to a creditors' meeting for vote.²⁰⁴ Furthermore, the Main Laws do not deny other procedural powers of a foreign representative (e.g., may appeal, may be heard in the proceeding, etc.).²⁰⁵ Therefore, the Main Laws can be evaluated as providing foreign representatives "standing" as the Model Law requires.

Fourthly, as to access of foreign creditors to local insolvency proceedings (the Model Law Article 13), the Main Laws treat local creditors and foreign creditors equally in their proceeding,²⁰⁶ and moreover, the Main Laws never did have provisions to rank creditors' claims.²⁰⁷ Therefore, the Main Laws completely satisfy the purpose of the Model Law in this aspect.

Finally, with regard to notification to foreign creditors of a local proceeding (the Model Law Article 14), the Main Laws do not adopt an important part of the Model Law's requirement of "individual notice." The Model Law Article 14 requires individual notice with certain important information to the foreign creditors even if individual notice is not necessary

²⁰² Bankruptcy Act art. 246 para. 3, Civil Rehabilitation Law art. 209 para. 2, Corporate Reorganization Law art. 244 para. 2.

²⁰³ Bankruptcy Act art. 246 para. 4, Civil Rehabilitation Law art. 209 para. 4, Corporate Reorganization Law art. 244 para. 4.

²⁰⁴ Civil Rehabilitation Law art. 209 para. 3, Corporate Reorganization Law art. 244 para. 3.

²⁰⁵ Yamamoto, *supra* note 3, at 75.

²⁰⁶ Bankruptcy Act art. 3, Civil Rehabilitation Law art. 3, Corporate Reorganization Law art. 3. Regarding this point, Bankruptcy Act used to stipulate "reciprocity" provision that provides foreign creditors standing for the proceeding only when that foreign creditor's home country provides equivalent standing to Japanese creditors. However, this reciprocity provision was abandoned at 2001 reform.

²⁰⁷ However, the Main Laws give the debts to employees some priority at the payment. See Bankruptcy Act art. 149, Civil Rehabilitation Law art. 122 par. 1 (which refers to Civil Code's priority debts and the debts to employees is one kind of those priority debts), Corporate Reorganization Law art. 130.

for local creditors in the proceeding and, as Professor Pottow emphasizes, this provision symbolically shows the Model Law's stance and thrust of pushing towards world harmonization by mandating individual notice that may be beyond the local law's requirements.²⁰⁸ Regarding this provision, the Main Laws originally required the individual notice of the court's decision of commencing insolvency proceedings to the known creditors (including foreign creditors)²⁰⁹ and this notice includes information of a time period for filing claims.²¹⁰ Therefore, the Model Law's main purpose in this provision, which is providing information of the commencement of insolvency proceeding to the foreign creditors by individual notice,²¹¹ is at least satisfied. However, Japan refused to provide the individual notice and additional information to the foreign creditors that will be "beyond" the originally required notice for local creditors.²¹² Japan's decision in this is very typical and perfectly consistent with the aforementioned conservative modifications or rejections of the Model Law's provisions. One cannot avoid judging that Japan tried to introduce the provisions in as limited a form as possible.

2. Cooperation with Foreign Courts and Foreign Representatives ~ Impossible as a Civil Law Country?

The Model Law Chapter IV (Article 25 to 27) provides very important provisions for

²⁰⁸ Pottow, *supra* note 2 at 980-82.

²⁰⁹ Bankruptcy Act art. 32 para. 3 (1), Civil Rehabilitation Law art. 35 para. 3 (1), Corporate Reorganization Law art. 43 para. 3 (1).

²¹⁰ Bankruptcy Act art. 32 para. 1 (3), art. 31 para. 1 (1), Civil Rehabilitation Law art. 35 para. 1 (2), art. 34 para. 1, Corporate Reorganization Law art. 43 para. 1 (3), art. 42 para. 1.

²¹¹ Berends, *supra* note 59, at 348, *Guide to Enactment*, *supra* note 86, para. 106.

²¹² As to this point, Professor Yamamoto vindicates Japan's stance by alleging that once creditors know commencement of the proceeding, creditors should make efforts to get information about that proceeding and this principle is equally applicable to foreign creditors. Yamamoto, *supra* note 3 at 76-77.

the cooperation (i) between local courts and foreign courts or foreign representatives and (ii) between local representatives and foreign courts or foreign representatives. The Model Law names these cross-border cooperation provisions as “a core element of the Model Law” because these provisions will assist the world in overcoming the widespread problem of national laws, which is the lack of rules providing a legal basis for cooperation by local courts with foreign courts for cross-border insolvencies.²¹³ However, regrettably, the Japanese legislation completely dropped the provision for local courts to cooperate with foreign courts.²¹⁴ Since Japan is a civil law country, it is understandable that there might be a number of obstacles and resistance to introducing flexible and broad discretionary cross-border cooperation between Japanese courts and foreign courts. However, as discussed below, I think there were some ways to, at least partly, if not totally, accept this the Model Law’s core thrust and introduce provisions that provide Japanese courts the authority to cooperate with foreign courts.

a. Cooperation between Local Courts and Foreign Courts or Foreign Representatives

The Model Law article 25 paragraph 1 provides for the cooperation between local courts and foreign courts or foreign representatives, and paragraph 2 provides for the power of courts to communicate directly with foreign courts and foreign representatives. As mentioned, the Model Law emphasizes this as the “core” provision to overcome problems for cooperation on cross-border insolvency.²¹⁵ With regard to this provision, Professor Pottow points that the adoption of this type of cooperation provision in civil law jurisdictions is especially important because such power for cooperation may not be inherently recognized in those jurisdictions as

²¹³ *Guide to Enactment, supra* note 86, paras. 173, 174.

²¹⁴ Professor Wessels pointed this as one of five “striking differences” of Japanese laws from the Model Law listed in his paper. See Wessels, *supra* note 6, at 5.

²¹⁵ *Guide to Enactment, supra* note 86, para. 173.

in common law jurisdictions.²¹⁶

Nevertheless, Japan did not adopt this provision, not even a part of it. There is no corresponding provision in the Main Laws. Professor Kazuhiko Yamamoto, who was one of the members of the Legislative Council, explains the reason for this decision as follows: the cooperation between the insolvency representatives, who are usually more familiar with these kinds of international communications, will be more adequate and more efficient than that between local insolvency courts or judges; also, in fact, Japanese laws do not prohibit such cooperation of courts and judges even without explicit provision; therefore, Japanese legislators decided that stipulating corresponding provision of the Model Law Article 25 was not necessary.²¹⁷ However, Professor Matsushita has made a short and simple comment that seems to be much more convincing reasoning for this legislation's decision; “[Japanese legislation thought that,] in civil law countries, communicating between courts that are directly handling cases are unthinkable.”²¹⁸

By and large, there is no dispute that, when compared with the common law system, in the civil law system judges are more strictly tied to written law, and their actions must be minimal without explicit authorization of the law. However, there seems to be no reason to conclude that enacting written law that authorizes judges to communicate with foreign courts for achieving efficient and fair resolution of the pending cross-border cases is prohibited in civil law system.²¹⁹ Therefore, I conclude that Japan definitely had some way to stipulate at

²¹⁶ Pottow, *supra* note 2, at 961-62. Professor Berends also comments similarly regarding this provision. See Berends, *supra* note 59, at 379.

²¹⁷ Yamamoto, *supra* note 3, at 90.

²¹⁸ Junichi Matsushita, et al., *Zadankai – Aratana Kokusai Tosan Hoseika no Syoronten (2) [Panel Discussion – Issues of the New Legal System for Transnational Bankruptcy (2)]*, 1610 KINYU HOMU JIJO 64, 65 (2001).

²¹⁹ Regarding this point, Professor Matsushita states in his article, which was written before the enactment of the Recognition Law, that the lack of law that authorizes Japanese courts to

least a part of this provision of the Model Law for cross-border cooperation between Japanese courts and foreign courts.²²⁰ Not making these efforts to adopt this provision²²¹ and rejecting it by just reasoning “Japan is civil law country” should be criticized. Furthermore, as to the reasoning that cooperation between courts does not necessarily bring efficiency, although it may be true that in many cases cooperation between a local representative and a foreign representative will bring efficiency, past cross-border cases apparently show that there will be a number of cases where even just one direct communication between judges (which cannot be replaced by direct communication between representatives because of the differences in their positions and authority) saves considerable time and money of the parties.²²² Therefore, this reasoning cannot be a persuasive rationale for not accepting the Model Law’s provision.

b. Cooperation between Local Representatives and Foreign Courts or Foreign

cooperate with foreign courts was the one of the reasons that Japan did not have insolvency cases in which Japanese courts cooperated with foreign courts or foreign representatives directly. Professor Matsushita further states that he hopes that the framework for this cooperation would be enacted by Japan’s adoption of the Model Law. Matsushita, *supra* note 33, at 217.

It seems apparent that Professor Matsushita thought that Japan should (and can) enact the law to authorize Japanese courts to cooperate with foreign courts, even though Japan is a civil law country.

²²⁰ The Model Law itself understands that some sort of careful and appropriate safeguards for the cross-border cooperation and communication between courts may be necessary and this understanding is apparent in the words “to the extent possible.” See Berends, *supra* note 59 at 379-80. Japan certainly had a way to enact this cooperation by limiting cooperation and communication measures and timing to communicate.

²²¹ Although not all of the discussions in the legislative process are published, the minutes of Legislative Council and published comments and articles of the drafters do not show that this kind of effort to introduce courts’ cross-border cooperation system was made in the legislative process.

²²² See Jay Lawrence Westbrook, *International Judicial Negotiation*, 38 TEX. INT’L L. J. 567 (2003). In the paper, Professor Westbrook considered a number of past cases and clarified that there were a lot of cases where international judicial negotiation actually brought efficiency or probably brought efficiency if it took place. Among the example cases listed by Professor Westbrook, the case of YMB (*In re YMB Magnex Int’l, Inc.* 249 B.R. 402 (Bankr. E.D. Pa. 2000)) and the case of Remington (*Remington Rand Corp. – Del. v. Bus. Sys. Inc.*, 830 F.2d 1260 (3d Cir. 1987)) are the perfect examples of this. See *supra* at 581-82.

Representatives

The Model Law article 26 stipulates the cooperation between local insolvency representatives and foreign representatives or courts with an important goal similar to the one behind article 25; promoting efficiency through cross-border cooperation.²²³

Regarding this provision of the Model Law, the Main Laws provide for the cooperation between Japanese insolvency representatives and foreign representatives but does not provide the provision for cooperation between local representatives and foreign courts.²²⁴ Considering the coherent attitude of Japanese legislation, I negatively assume that the decision of this exclusion probably came from the idea that stipulating Japanese representatives' power to request cooperation and communication of foreign courts will reciprocally require stipulating the obligation of Japanese courts to cooperate and communicate with foreign representatives upon their request, and this obligation was unfavorable from the same reason as that of denial of cooperation between courts.²²⁵ If my negative assumption is correct, again, Japan's position on this point should be criticized.

c. Forms of Cooperation

The Model Law then lists the specific (but not conclusive) forms of cooperation

²²³ Berends, *supra* note 59, at 381.

²²⁴ Bankruptcy Act art. 245, Civil Rehabilitation Law art. 207, Corporate Reorganization Law art. 242. These provisions provide the power of the Japanese insolvency representatives to require foreign representatives necessary cooperation and information for a Japanese local proceeding. At the same time, these provisions stipulate the obligation of Japanese representatives to make efforts to provide foreign representatives necessary cooperation and information for the foreign proceeding.

²²⁵ Professor Yamamoto explains the reason for this legislation's decision as being the same as previous the decision of denying cooperation between Japanese courts and foreign courts, i.e. that providing cooperation between representatives will be sufficient. *See* Yamamoto, *supra* note 3, at 91. However, Professor Yamamoto also comments that "[the reason for not stipulating power to request cooperation of foreign courts] is to correspond with not explicitly stipulating Japanese courts' cooperation [to foreign representatives]" and this comment coincides with my assumption. *See* Yamamoto *supra* note 3, at 63.

established by article 25 and 26.²²⁶ The Main Laws do not list specific forms of cooperation but just ambiguously stipulate “provide necessary cooperation and information to the foreign representative.”²²⁷

3. Presumption of Insolvency ~ Pros and Cons of Broad Presumption

The Model Law 31 provides rebuttable presumption of “insolvency” of the debtor upon recognition of a foreign main proceeding. When the commencement of a local proceeding is urgently necessary for the protection of the local creditors, this presumption is particularly significant because requiring proof of insolvency may be burdensome and time-consuming but of little additional benefit.²²⁸ Moreover, Professor Pottow highlights another significance of this provision from the perspective of universalism; that this rule mandates a local state to accept a foreign state’s decision that the requirements of “protection-worthiness” have been met, which embodies universalism.²²⁹

Corresponding to this provision in the Model Law, Japanese laws introduced the presumption provision.²³⁰ However, this differs from the Model Law; firstly, the Main Laws’ presumption is that of “existence of the facts of the debtor that is condition to commence the insolvency proceedings,”²³¹ while the Model Law article 31 directly but only presumes

²²⁶ MODEL LAW, *supra* note 55, art. 27. The forms listed are (i) the appointment of a person or body to act at the direction of the court, (ii) communication of information, (iii) coordination of the administration and supervision of the debtor’s assets and affairs, (iv) approval or implementation of agreements by the court, and (v) coordination of concurrent proceedings.

²²⁷ Bankruptcy Act art. 245, Civil Rehabilitation Law art. 207, Corporate Reorganization Law art. 242.

²²⁸ *Guide to Enactment*, *supra* note 86, para. 197, Berends, *supra* note 59, at 393.

²²⁹ Pottow, *supra* note 2 at 978.

²³⁰ Bankruptcy Act art. 17, Civil Rehabilitation Law art. 208, Corporate Reorganization Law art. 243.

²³¹ *Id.* Japanese laws stipulated this way because two of the three main insolvency laws (Civil Rehabilitation Law and Corporate Reorganization Law) require “the probability of insolvency”

“insolvency” of the debtor.²³² Secondly, the Main Laws stipulate these presumptions as the effect of “the existence of a foreign proceeding,” while the Model Law presumes insolvency as the effect of “recognition” of the foreign proceeding. Thirdly, the Main Laws give these presumptions to “all foreign proceedings,” while the Model Law only provides the presumption to “foreign main proceeding.” These differences seem to have both pros and cons. The Main Laws’ way of presumption is perhaps simpler and makes commencement of local proceeding easier than that of the Model Law. However, the commencement of insolvency proceeding in a state other than the state where the debtor’s centre of main interest exists does not necessarily mean the debtor needs to be subject to Japan’s local insolvency proceeding,²³³ and in such a case, the commencement of Japanese local proceeding may result in confusion (success in rebuttal of presumption) or may even be a throat-cutting action to the debtor (effects, both legal and factual, of the commencement of Japanese insolvency proceeding may result in final damage to the debtor’s business operation).

4. Hotchpot Rule

The Model Law article 32 provides an important rule generally called “hotchpot rule,” which prohibits a creditor who has received part payment in respect of its claim in a foreign insolvency proceeding from receiving a payment for the same claim in a local proceeding 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. The purpose of this

or “the situation where the debtor’s payment of the debt will disable the continuation of its business” as condition for the commencement of the proceeding, but not “insolvency” itself. Civil Rehabilitation Law art. 21 para. 1, Corporate Reorganization Law art. 17 para. 1.

²³² *Guide to Enactment*, *supra* note 86, par. 195.

²³³ The Guide to Enactment gives this as a reason of not giving presumption to foreign non-main proceeding. *See id.*

provision is to achieve substantive fairness by avoiding 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 a different jurisdiction.²³⁴

By the 2001 reform of Japanese insolvency laws, all the Main Laws stipulated this hotchpot rule for the same purpose as the Model Law.²³⁵ However, there are two differences between the Main Laws and the Model Law. The first difference is that the Main Laws do not limit the form of part payment in foreign states²³⁶ while the Model Law limits to “payment in foreign insolvency proceeding.” The second difference is that the Main Laws limit payment “after the commencement of local insolvency proceeding.”²³⁷ while the Model Law does not stipulate such a limit. From the perspective of achieving substantive fairness among creditors all over the world, the first difference of the Main Laws itself can be positively evaluated since it does not limit the forms of unfair payment. The second difference, however, considerably limits the timing of those unfair payments to which this rule applies. Therefore, after all, the rule of the Main Laws probably covers most of the range of unfair payment covered by the corresponding rule of the Model Law (local proceeding will usually be commenced before the payment in foreign proceeding occurs), however the advantage of the Main Laws’ rule of broadening the form of payment will probably be moderate (the payment by the forms other than foreign proceeding may frequently occur before the commencement of the local proceeding).

²³⁴ *Guide to Enactment*, *supra* note 86, para. 198.

²³⁵ Bankruptcy Act arts. 109, 142, 201 paras. 4, Civil Rehabilitation Law art. 89, Corporate Reorganization Law art. 137.

²³⁶ Bankruptcy Act art. 109, Civil Rehabilitation Law art. 89 para. 1, Corporate Reorganization Law art. 137 para. 1.

²³⁷ *Id.*

C. Interpretive Approach of Automatic Recognition of Foreign Insolvency Proceedings

The enactment of the Recognition Law was truly remarkable in that it provided a tangible system for recognition of foreign insolvency proceedings to the legal field where very passionate but still abstract debates and theories were scattered all around. As a result of the enactment, the number of those debates apparently decreased. However, it is not clear whether the Recognition Law completely overturned those debates and theories, and absolutely excluded other interpretive approaches for recognition of foreign proceedings. Since whether this interpretive approach is excluded or not may largely affect the practice, I want to mention this issue in some detail.

Before the enactment of the Recognition Law, the scholars and the courts had been making efforts to overcome the problem of “extreme territorialism” of the insolvency laws at the time, and the important cases confirmed Japan’s direction of loosening territorialism and, at least in a part, accepting interpretive and automatic recognition of foreign proceedings.²³⁸ Moreover, at that period, Japanese scholars were discussing and trying to establish the theory one step further toward the automatic recognition of foreign insolvency proceeding by interpreting Japanese civil procedure.²³⁹ Although not all issues were resolved, the dominating theory at the time was that if the conditions for recognizing final and binding judgment of foreign courts stipulated in the Code of Civil Procedure²⁴⁰ are satisfied, the foreign insolvency

²³⁸ See *supra* Part II Section B.

²³⁹ Shima, *supra* note 62, at 132, Aoyama, *supra* note 36, at 244-45, ISHIGURO, *supra* note 25, at 294-99.

²⁴⁰ Code of Civil Procedure, *supra* note 167, art. 118 (former Code of Civil Procedure art. 200). These conditions are (i) the jurisdiction of the foreign court is recognized under laws or regulations or conventions or treaties, (ii) the defeated defendant has received a service of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service, (iii) the content of the judgment and the court proceedings are not contrary to public policy (of Japan), and (iv) a mutual guarantee exists.

proceeding would be automatically recognized.²⁴¹

Some scholars take the position that the enactment of the Recognition Law completely overturned the debates and theories of automatic recognition of foreign proceeding, and the cases that followed that dominating theory lost their value as precedent.²⁴² Professor Matsushita takes this position and explains the reason from a particular description of the Recognition Law's provision for the entrustment order.²⁴³ That provision stipulates that if the court grants the entrustment order, the debtor's power to administrate his business operation and assets in Japan "exclusively" belongs to recognition representative. Professor Matsushita states that this provision means (and indicates the law's intent for this provision) that until this entrustment order is granted, the debtor's power still "exclusively" belongs to the debtor (even if the recognition of the foreign proceeding and the appointment of the foreign representative in the recognition proceeding took place).²⁴⁴ If the intent of the law is as Professor Matsushita interpreted, there is no room for automatic recognition approach because this approach results in removal of at least some part of the debtor's power available in Japan to the foreign representative.

On the other hand, other scholars allege that the Recognition Law did not overturn the pre-existing debates and theories, and still leaves room for an interpretive approach of

²⁴¹ See Shima, *supra* note 62, at 132, Aoyama, *supra* note 36, at 157-59. See also Kaise, *supra* note 24, at 30-34.

²⁴² Matsushita, *supra* note 197 at 211, MAKOTO ITO, HASANHO / MINJI SAISEIHO [BANKRUPTCY ACT AND CIVIL REHABILITATION LAW] 188-91 (2d. ed., 2009). Although the reasoning is not provided, Professor Ito, who is one of the leading scholars in the field of bankruptcy in Japan, suggests that after the enactment of the Recognition Law, former interpretations and cases for automatic foreign recognition approach are no longer applicable. See Ito, *supra*, at 191.

²⁴³ Recognition Law, *supra* note 55, art. 32 para. 1, art. 34.

²⁴⁴ This interpretation will make the location of the power very clear and will prevent the split decision of the courts. Matsushita, *supra* note 197, at 211.

automatic recognition of foreign proceeding.²⁴⁵ These scholars reason that (i) the Recognition Law does not expressly deny the interpretive automatic recognition of foreign insolvency proceeding, (ii) the Model Law, which was consulted by the drafters of the Recognition Law, does not intend to displace pre-existing foreign recognition systems by its adoption,²⁴⁶ (iii) from the view of comparative law, insolvency assistance system (providing assistance for foreign proceeding without going through recognition proceeding) and the system for individual recognition of foreign proceeding are not necessarily irreconcilable,²⁴⁷ and (iv) there is a strong practical necessity of an automatic recognition system because whether the entrustment order under the Recognition Law will be granted and whether the foreign representative is appointed as a recognition representative in the entrustment order completely depend upon the court's discretion.²⁴⁸

It is understandable that there is practical necessity for an interpretive automatic recognition approach, because Japan took the foreign recognition system that gives the court very broad discretionary power. However, even if practical necessity is large, this fact cannot be the sole reason to interpret the law's intent and to conclude that the law did not have the intent to exclude interpretive automatic recognition. Also, as to the reasoning of above (i), (ii) and (iii), although they suggest that there is no critical reason to exclude interpretive automatic

²⁴⁵ See Shima, *supra* note 62 at 134, Kazunori Ishiguro, *Kokusaikazei to Teishokuho (Kokusaishiho) [International Taxation and Conflict of Laws (International Private Law)]*, BOEKI TO KANZEI, 2007 Nen 8 Gatsu Go [Issue of August 2007] at 81-84 (2007). Even in this theory, interpretations that directly contradict the provisions of the Recognition Law were overturned.

(For example, after the entrustment of administration of the debtor's assets is ordered, those powers to administer exclusively belong to recognition representative by the Recognition Law, and above interpretive automatic recognition approach will be not applicable even in this theory.)

²⁴⁶ Guide to Enactment particularly denies this intention. See *Guide to Enactment supra* note 86, para. 90.

²⁴⁷ See Yukio Kaise, 169-171. In this article, Professor Kaise did not clearly declare that he is taking the theory that "automatic recognition approach is not excluded by Recognition Law" but shows supportive view for that theory from the view of comparative law study.

²⁴⁸ See Shima, *supra* note 62, at 135, Ishiguro, *supra* note 245 at 81-83.

recognition, none of them provides positive rationale that the law still allows the interpretive approach.

In addition to Professor Matsushita's reasoning, which seems a loyal understanding of the explicit meaning of the provision, there were some discussions that suggest the drafters were thinking that after the enactment of the Recognition Law, only recognition proceeding should be used.²⁴⁹ These records seem to give strong support to the theory that the Recognition Law was intended to exclusively govern all the field of recognition of foreign insolvency proceedings (and therefore, interpretive approach is overturned and excluded).²⁵⁰ Therefore, although it is difficult to conclude at this point because of immaturity of this discussion, I think the theory that the Recognition Law excluded interpretive recognition approach is predominant.

IV. Analysis of Japan's Attitude on Cross-Border Insolvency and Suggestion of Possible

²⁴⁹ The minutes of the Legislative Council shows following conversations;

“[A]most all [of the members'] opinion was [not to take automatic recognition system but] to establish recognition proceeding and make the existence or non-existence of foreign proceedings' effects clear.” (Second Division 7th Conference)

“During the period of 2 years [when we do not have recognition system], if foreign lawyer comes and claims to recognize foreign recognition via Civil Procedure article 118 route, we might have to accept it.” (Second Division 7th Conference)

“I know there are some opinions in public to take automatic recognition system, I think it is better to establish recognition system and make uniformed processing. This will achieve safe trade.” (First Division 5th Conference)

Then, the drafter from the government brought the preliminary draft and commented “[In this pre-draft], we did not take an idea of automatic recognition but took the form of; [foreign proceeding have to] go through recognition decision and then its effect occurs.” (First Division 10th Conference). *See* the minute of Second Division 7th Conference, *supra* note 49, the minute of First Division 5th Conference, *supra* note 49, the minute of First Division 10th Conference, *supra* note 83.

²⁵⁰ Also, the aforementioned Japanese legislation's conservative attitudes to the recognition of foreign proceedings may be pointed out as another fact to assume Japanese legislators had a reason to exclude interpretive approach and govern all of this field by the protective Recognition Law.

Solutions

A. Analysis of Japan's Attitude ~ Fear of Universalism

Japan is generally listed as one of the countries that has adopted the Model Law. However, as discussed throughout the last part, Japan's insolvency laws are, in fact, significantly different from the Model Law in quite a number of points. Nonetheless, importantly, the Model Law, unlike a convention, does permit modifying or rejecting its provision(s) at the country's discretion at the time when the country adopts it.²⁵¹ Therefore, Japan should not be criticized simply by the fact that Japan did not introduce laws that exactly correspond to the Model Law.

However, the most important thing here is that, although modification(s) or rejection(s) of the Model Law at its adoption would never be illegal or a breach of any duty, the form of those modifications and rejections (e.g., which provision was modified or rejected, how it was modified, and what the reasons were for this modification or rejection) can be a "yardstick" of the adopting countries' attitude or vision towards cooperation on cross-border insolvency.

The following is the list of the differences between Japanese laws and the Model Law which seem to suggest Japan's attitude.

- (i) Japan stipulated the provision declaring the Recognition Law's purpose, which is much more moderate than that of the Model Law written in the preamble.
- (ii) Japan modified the definition of "foreign proceedings" of the Model Law article 2(a), limiting the recognizable foreign proceedings to the proceedings that correspond to Japanese local insolvency proceedings.
- (iii) Japan modified the expression of the Model Law's public policy exception provision (article 6) which makes it easier for the court to reject recognition than

²⁵¹ *Guide to Enactment*, *supra* note 86, para. 12, Berends, *supra* note 59, at 319-20. Professor Pottow analyzed that the Model Law's general success was made by this kind of incrementalism approach. *See* Pottow, *supra* note 2, at 984-88.

the Model Law's provision.

- (iv) Japan added a list of negative conditions for recognition that also broaden the power of the court to reject recognition.
- (v) Japan did not adopt the important part of the Model Law article 14, which requires the individual notice to the foreign representative "beyond" local insolvency laws' original requirement of notice.
- (vi) Japan gave the courts wider options to terminate the recognition proceeding than the Model Law article 17 paragraph 4.
- (vii) Japan did not adopt one of the core provisions of the Model Law article 20 paragraph 1, the automatic effect of recognition.
- (viii) Japan modified the Model Law article 21 paragraph 1(d)'s discovery of information relief so that Japanese courts can control the discovery.
- (ix) Japan stipulated that the court may grant discretionary relief on the court's own motion or at the request of every interested party, including those that are not necessarily foreign representatives.
- (x) Japan added one more restrictive step for turnover, requiring the court's prior approval for the certain actions, beyond that of the Model Law article 21 paragraph 2.
- (xi) Japan did not introduce the Model Law's rule (article 21 paragraph 3) that limits the range of assets to be turned over for foreign non-main proceeding.
- (xii) Japan did not introduce the Model Law's provision (article 23) to ensure standing for Paulian Action.
- (xiii) Japan completely dropped the Model Law article 25 that mandates the cooperation between local courts and foreign courts.

- (xiv) Japan did not adopt the part of the Model Law article 26 that stipulates the cooperation between local insolvency representatives and foreign courts.
- (xv) In the case of concurrent proceedings, Japan leaves a possibility for the foreign proceeding to be the governing proceeding (even if there is a Japanese local proceeding), while the Model Law article 29 gives local proceedings absolute priority.
- (xvi) Differing from the Model Law's rule for concurrent proceedings (article 28, 29, 30), Japan introduced the rule of "only one proceeding run for one debtor" that results in no relief available for stayed foreign proceeding.
- (xvii) Japan gives the court the discretionary power to order the foreign representative to appoint another representative from lawyers (in Japan) for easier communication and control (no corresponding provision in the Model Law).

Obviously, almost all of the above differences, which emerged because of the Japanese legislation's modification and rejection of the Model Law, show Japan's extremely negative attitude or reluctance towards recognition of foreign proceedings and cooperation in cross-border insolvency.²⁵²

The incentives for this extremely coherent negative attitude of the Japanese legislation can be explained from the normal incentives that the sovereign states have and which prevent the state from accepting universalism; "greed" and "pride," as named by Professor Pottow²⁵³

²⁵² The difference (xv) may be evaluated as more progressive provisions than corresponding provisions of the Model Law. However, as forementioned, the case where the foreign main proceedings govern the recognition proceeding may be very limited because the Recognition Law put restrictive and problematic condition to protect local creditors for this provision to be applicable. Moreover, according to the comment of the drafter, meeting this condition probably will not be exceptional. Therefore, its progressivity may be limited. *See supra* Part III Section A Subsection 7.

²⁵³ *See* John A. E. Pottow, *Greedy and Proud in International Bankruptcy: The Problems and*

However, when considering Japan's unique characteristics, I think it is more appropriate to name the incentive of the Japanese legislation's extreme resistance to universalism as "fear," rather than "greed" or "pride."

B. Reasons to "Fear"

The "fear" of universalism in the Japanese legislation can be understood from several factual situations which surrounded Japan at the time of establishing the recognition system. Those are (i) establishing completely new system, (ii) lack of time, (iii) long history of extreme territorialism, (iv) the nature of Japan as an isolated island country, and (v) extremely high language barrier.

Firstly, (i) establishing a completely new system, (ii) lack of time, and (iii) long history of extreme territorialism should be mentioned together. At the time, Japan had to jump into a completely new system which embodies universalism from the extreme opposite side of extreme territorialism. It is understandable that the plan for radical change to an important system of the country brought thousands of concerns that had to be resolved before its implementation. Then, the reason (ii) made this situation worse. As mentioned, at the time, Japan had to hurry in enacting the Civil Rehabilitation Law because of the burst of bubble economy and the boom of insolvency of small or middle sized companies. As a consequence of this enactment, Japan ended up having unfair provisions on cross-border insolvency. Being aware of this unfairness and the increasing notoriety among the international community, Japan was in an extreme hurry to enact

Proposed Solutions to "Local Interest", 104 MICH L. REV. 1899 (2006). Professor Pottow explains that, the sovereign state has two kinds of incentive that prevent from accepting universalism and these are (i) the incentive to maximize individual local creditors' profits ("greed") and (ii) the sovereign state's own incentive or interest in enforcing its own bankruptcy laws irrespective of local creditor benefit ("pride"). Regarding "greed," see Pottow, *supra* at 1905-24 (regarding "greed," see Pottow, *supra*, at 1905-14, regarding "pride," see Pottow, *supra*, at 1914-23).

a recognition system.²⁵⁴ Therefore, Japan could not have enough time to study, analyze, and resolve the above concerns before the establishment of the new system. It is natural that doing a completely new and radical thing without enough preparation would result in “fear.”²⁵⁵

Secondly, (iv) the nature of Japan as an isolated island country points to Japan’s strong compatibility with “territorialism.” As mentioned, the first Bankruptcy Act drafter, Professor Kato, already pointed this compatibility of Japan.²⁵⁶ Of course, as time went by, the situation surrounding Japan dramatically changed and Japan is now one of the countries actively participating in and in the middle of an active international market. However, the critical point with no solution is the fact that Japan has no neighboring country with its land connected. As small as the world gets by development of technology and the transportation system, nevertheless, there must be some disadvantage to Japan that makes Japan slower to adjust to cross-border cooperation than other countries that have neighboring countries and experiences of frequent and easy crossing of the country borders by land, as in many EU countries. Compatibility with territorialism nearly equals incompatibility with universalism or, at least, makes it difficult to get used to universalism. Japan seems to be still in this kind of backwardness in the cross-border cooperation and feels “fear.”

Thirdly, the fact that Japan has (v) an extremely high language barrier should be mentioned as a cause of Japan’s “fear” of universalism. This fact generally leads to the Japanese

²⁵⁴ See Part II Section C.

²⁵⁵ Professor Yamamoto sympathized with the Japanese legislation’s having this kind of feeling and the decision made by it by stating, “[with regard to the decision of not introducing automatic effects of recognition in Recognition Law,] it is understandable that Japan has to be very cautious because Japan lacks actual experiences of giving assistance to foreign proceedings, as some foreign countries already have, and Japan is a country that now establishing brand new legal system. Therefore, Japan has to ask for international understanding of this decision from this perspective.” Kazuhiko Yamamoto, *Aratana Kokusai Tosan Hosei (3) [The New Legal System for International Insolvency (3)]*, 701 NBL 48, 54 (2000)

²⁵⁶ KATO, *supra* note 28, at 39. See also *supra* Part II Section B.

people's reluctance to communicate with foreign people, but from the perspective of adoption of the Model Law, the fact particularly brings reluctance for "the cooperation of Japanese courts with foreign courts." Professor Westbrook listed "language" as first example of many difficulties of judicial negotiations and described it as "the most obvious impediment to direct communication" in judicial negotiation.²⁵⁷ Moreover, Professor Matsushita similarly listed "the language barrier" as first one of two apparent reasons why Japan has no insolvency case in which Japanese courts cooperate with foreign courts or foreign administrators directly.²⁵⁸ One of the reasons why Japanese people are not good at using foreign languages may be related to above (iv), geographically isolated island country. Unfortunately, I need to emphasize here that the Japanese people's language barrier is much higher than people other than the Japanese imagine.²⁵⁹ And, I think it is easy to imagine that very language-sensitive and very responsible work, such as judicial negotiation or cooperation, in a language that the one has little confidence in will be extremely fearful.

C. Suggestion of Possible Solution to Overcome "Fear"

Finally, I want to consider and suggest the possible solution for overcoming this "fear" in order to provide a tip for Japan to improve its current cross-border insolvency system and to

²⁵⁷ See Westbrook *supra* note 222, at 582.

²⁵⁸ See Matsushita, *supra* note 33 at 217.

²⁵⁹ A perfect example that shows the general English skills of Japanese people is the average score of Japanese at Test of English as Foreign Language (TOEFL), which average score of applicants of each native country are published. The average score of Japan is ranked 136th out of 157 countries. Moreover, shockingly the average score of "speaking section" (which weight 25% of total score) is 157th out of 157 countries (the data of 2009). See Test and Score Data Summary for TOEFL Internet-based and Paper-based Test (ETS ed., 2010) available at http://www.ets.org/Media/Research/pdf/test_score_data_summary_2009.pdf. Since types of applicants differ country-by-country, this result does not completely describe language skills of people involve in judicial proceedings of Japan. However, this shocking data quite objectively shows how high a language barrier exists in Japan.

move towards more progressive cross-border cooperation.

First of all, the aforementioned causes of fear (i), (ii), and (iii) will probably be mitigated simply by the lapse of time and the accumulation of experiences. It is self-evident that the concerns, which emerged because of lack of preparation, will definitely decrease by just getting used to it without having serious trouble. Although incomplete and not frequently used, Japan now has a system for recognition of foreign proceedings, and Japan is slowly accumulating experiences from it. Furthermore, importantly, the possibility of the occurrence of serious trouble is much smaller than for other cross-border matters, such as cross-border commerce. This is because cross-border insolvency is, in fact and in general, quite technical and a procedural process for the purpose of liquidation or reorganization of the debtor, and thus, the direction that the interests of involved parties point is roughly the same (e.g., enlarging the debtor's assets for distribution, achieving the debtor's reorganization to obtain smooth payments from the debtor under the reorganization plan) and severe conflicts are not so likely to happen. Therefore, even without providing any specific solution, probably, Japan has already mitigated at least a part of its fear by the lapse of almost 10 years from the enactment of the Recognition Law.

Next, overcoming the fear caused by (iv) the nature of Japan and (v) its language barrier is far more difficult than overcoming fear caused by (i), (ii), and (iii).

Here, I want to suggest that, in addition to the preexisting foreign recognition system under the Recognition Law, Japan should consider introducing another system for foreign recognition that uses the method of what Professor Pottow called "circumscription" of universalism.²⁶⁰ Professor Pottow explains that "circumscription" is a method to handle the enacting state's concern by excluding that concern from the application of a universalism system

²⁶⁰ See Pottow, *supra* note 253, at 1934-35.

and permit reliance on the territorialist default rules of comity to fill the gap.²⁶¹ Professor Pottow also provided one example of the ways of using circumscription suggested by Professor Westbrook; “limiting the application of universalism to large international organizations.”²⁶²

Although the surrounding situation of Japan may be a little different from that supposed by Professor Westbrook and Professor Pottow, I think this circumscription, in particular the way Professor Westbrook suggested, will certainly work to overcome Japan’s fear, which is even caused by above (iv) and (v), and at the same time, will push Japan somewhat further towards cross-border insolvency cooperation and universalism. Firstly, limiting the application of further universalism system to large multinational company will give strong prediction that the number of cases to file this proceeding will be quite limited²⁶³ and this prediction will mitigate all kinds of fear that the Japanese legislation and judges have. Secondly, although cases will not be many, fact and experience of introducing further universalism and not causing severe problems (again, as mentioned, the possibility of causing severe problem in insolvency cooperation is very small) will mitigate or even remove the fear and may give Japan confidence to go another step further. Finally and most importantly, in large multinational company’s cross-border insolvency case, probably, very experienced and competent lawyers with good language skills will be hired and, in fact, these lawyers can and probably will support the judges.²⁶⁴ Additionally, if the method of

²⁶¹ *See id.*

²⁶² *See id.*, Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH L. REV. 2276, 2298-99 (2000). Professor Westbrook suggests as follows; “we need not be concerned about universalism leaving too little room for local policies is that we have the option of applying an international regime only to companies of a certain size or a certain level of international activity. Limited application of a universalist regime only to large multinationals would permit local policies to be applied to local enterprises.”

²⁶³ Regarding this, currently, the number of recognition cases under Recognition Law came out to be also small. However, because of lack of experience and data, the drafters could not feel certain about how frequently recognition proceeding would be used at the time of enacting the Recognition Law. Therefore, fear did not decrease.

²⁶⁴ If the pending case is the lawsuit on cross-border matters where parties’ interests are strictly

circumscription is applied in Japan, foreign recognition system under the Recognition Law will be the default rule for the excluded cross-border cases. Therefore, the excluded cross-border cases are at least assured to enjoy modest universalism.

V. Conclusion

Considering “universalism” as the ideal of cross-border insolvency system, Japan’s current system is obviously incomplete. Moreover, after Japan established the system in 2001, many other countries enacted laws loyally following the Model Law and overtook Japan. However, the most important thing is, not the fact of Japanese system’s incompleteness or the fact that Japan is no longer “front-runner,” but for Japan to be aware of the objective status and incompleteness of Japanese system, to analyze the cause of this incompleteness, and to make an effort to move towards further improvement.

The close analysis of Japan’s system and the laws clearly shows that they are established under the Japanese legislation’s very cautious attitude toward the Model Law and its universalism. This time, in addition to the analysis of the laws, I further consulted Japan’s legal history, culture, geography, and language, and concluded that the ultimate cause of the legislation’s cautious attitude was “fear” of universalism.

If my conclusion is correct, however, that is not bad news. Everyone can overcome fear by thorough preparation and accumulation of experience. Almost 10 years have passed since Japan left the position of “extreme territorialism” by the enactment of the Recognition Law in 2001. Practice and experience on cross-border insolvency, considering the current recognition

opposed, it will be very difficult for the judges to accept support from the lawyers of each party. However, as mentioned, in insolvency cases, the conflict of interests will be usually modest and therefore, judges may be some extent flexible to accept support of the lawyers, particularly support with regard to language.

system as a premise, must be gradually accumulating. Therefore, I think it is a good time for Japan to review the past and the system, and to move towards improvement.

The legal field of cross-border insolvency still seems to be very immature. A great number of issues remain unsolved. This situation means that it is not too late for all countries, including Japan, to catch up with “front-runner” of the field and to achieve efficient cooperation with other countries.

I sincerely hope Japan will start new efforts to improve their current system for cross-border insolvency and move towards the ideal cooperation with the world.