

~~6.0~~ ~~Cross-CROSS~~ ~~Border-BORDER~~ ~~InsolvencyINSOLVENCY~~ – JAPAN

Formatted

Formatted: Bullets and Numbering

Hideyuki Sakai

~~6.1~~ Introduction

Formatted: Bullets and Numbering

The ~~Law Concerning Recognition of and Assistance toward~~ ~~Toward Foreign Insolvency Proceedings~~ Law on Recognition of and Assistance in Foreign Insolvency Proceedings (“LRAF”) and the Law to Amend a Portion of Civil Rehabilitation Law, etc. (“LACR”) were ~~both~~ enacted on November 21, 2000, and have ~~become been~~ in effect since April 1, 2001. ~~UNCITRAL had made the a~~ Model Law for ~~the~~ cross-border insolvency ~~context~~ in May 1997, and the general assembly of the United Nations ~~had~~ resolved that the Model Law be introduced to the member countries’ domestic laws. In accordance with such resolution, Mexico and some ~~another~~ countries<sup>2</sup> have already introduced the Model Law into ~~each their~~ local laws.

~~On the other hand~~ However, in Japan, the Bankruptcy Law and the Corporate Reorganization Law had adopted strict ~~territorialism~~ territoriality under which the effects of bankruptcy or corporate reorganization proceedings ~~that have~~ commenced in Japan ~~shall do not~~ extend to the assets located in foreign countries, and *vice versa*. Bankruptcy Code, Section 3, Corporate Reorganization Law (“Corp. Reorg. Law”), Section 4

Naturally, such ~~territoriality~~ territorialism has been criticized by the “users” of the proceedings, as well as international bankruptcy practitioners. It has ~~long~~ been long desired that internationally harmonized insolvency proceedings be introduced.

Under such circumstances, the Civil Rehabilitation Law (“CRL”), that was enacted in 1999 and has been in effect since April 1, 2000, adopted the universality principle with regard to the outbound effect of CRL proceedings, whereas the inward effect was left unchanged with the ~~territoriality~~ territorial principle.

CRL, Sections 4, 38.1-

The ~~LRAF~~ LRAF and LACR were enacted in order to abolish the rigid ~~territoriality~~ territorialism as well as to introduce the ~~proceedings~~ procedures to recognize foreign insolvency proceedings based upon the Model Law of UNCITRAL. By such amendments, it is broadly expected that the ~~Insolvency~~ insolvency proceedings of Japan will be able to be handled ~~with in~~ smooth cooperation and harmonization with foreign insolvency proceedings.

~~6.2~~ Outline of ~~LRAF~~ LRAF

Formatted: Bullets and Numbering

6.2.1 Recognition and Assistance

(a) Steps toward recognition and assistance

—~~The LRALRAF~~ does not grant any right or privilege to a foreign representative by his merely obtaining recognition of the foreign proceeding. The foreign representative must file a petition for appropriate assistance on a case by case basis, and obtain a court order for such assistance.

(b) Petition for recognition

—~~Foreign-A foreign~~ representatives (including a DIP) is entitled to file a petition for recognition of the relevant foreign insolvency proceeding. ~~LRALRAF~~, Section 17.1

The ~~Foreign-foreign~~ representative may file a petition for recognition of the foreign insolvency proceeding and also for ~~the-a~~ court order for assistance, even prior to the formal commencement of the foreign proceeding. ~~LRAF~~, Section 17.2

—(c) Recognition order

—The court will render ~~the-a~~ recognition order if it is convinced that the foreign insolvency proceeding is qualified for assistance within Japan. ~~LRALRAF~~, Section 22.1

In order for the foreign proceeding to ~~the-be~~ deemed qualified, the following requirements must be met:

- (1) The debtors' address, residence, or business or other office ~~ex~~sists in the country where the relevant foreign insolvency proceeding is pending. ~~LRALRAF~~, Section 17.1
- (2) Commencement of the foreign insolvency proceeding has been formally ordered. ~~LRALRAF~~, Section 22.1. ~~The petition must meet the requirements for recognition~~
- (3) ~~None of the following~~ There are no causes ~~of-for~~ rejection, ~~which could include the following-~~ exists:
  - (i) That the procedural deposit has not been deposited (~~LRALRAF~~, Section 21(1));
  - (ii) That it is clear under the foreign proceeding that the effect of such proceeding does not extend to ~~the-~~assets located within Japan (~~LRALRAF~~, Section 21(2));
  - (iii) That providing assistance toward the foreign proceeding violates the public order of ~~claim-Japan~~ (~~LRALRAF~~, Section 21(3));

- (iv) That it is clear that no assistance is necessary under ~~LRALRAF~~ for the foreign insolvency proceeding (~~LRALRAF~~ Section 21(4));
- (v) That the foreign representative has failed to make a report to the court ~~with-in~~ regard to the status of ~~the~~ development of the foreign insolvency proceeding, except where the violation is immaterial (~~LRALRAF~~ Section 21(5));
- (vi) That the petition has ~~clearly~~ been filed ~~clearly~~ for undue objectives or ~~with-in~~ bad faith. (~~LRALRAF~~ Section 21(6))

~~(d)~~(d) Assistance order

Where ~~the-a~~ recognition order has been rendered, the following assistance orders may be rendered in accordance with necessity.

- ~~(1)~~(1) ~~temporary suspension~~ order ~~of-against a~~ compulsory execution proceeding upon judgement, or ~~preliminary provisional~~ attachment or other injunction, lawsuit or administrative proceeding, with regard to the debtors' assets in Japan. ~~LRALRAF~~ Section 25.1
- ~~(2)~~(2) Cancellation order ~~of-against~~ compulsory execution proceedings - the ~~foregoing~~ proceedings may be cancelled depending upon necessity. ~~LRALRAF~~ Section 25.5
- ~~(3)~~(3) ~~temporary suspension~~ ~~ease-and-desist~~ order ~~of-against an~~ auction proceeding as foreclosure of a lien. ~~LRALRAF~~ Section 27.1
- ~~(4)~~(4) Prohibition order ~~of-against~~ compulsory execution - the court may, upon necessity, render ~~the-a~~ prohibition order ~~of-against~~ compulsory execution ~~against-in respect of any and of and/or all of all~~ the creditors. ~~LRALRAF~~ Section 28.1
- ~~(5)~~(5) Injunction prohibiting debtor from disposition of assets and payments - the court may render such orders and other appropriate orders. ~~LRALRAF~~ Section 26.1
- ~~(6)~~(6) Administration order - the court may, whenever ~~it~~ deems it necessary, at the petition of a party ~~with-in~~ interest or at its discretion, order that the debtors' business and assets within Japan be administered by a recognized trustee. ~~LRALRAF~~ Section 32.1. Where such administration order has been rendered, the power ~~and~~ authority to ~~administer the operation of the debtor~~ ~~manage the debtor's business and to dispose of its assets~~ within Japan, ~~and also the management and disposition of the assets of the debtor~~ shall be

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

exclusively ~~bested-vested with-in~~ the recognized trustee. ~~LRA/LRAF~~, Section 34.

~~(7)~~ ~~Preliminary-Provisional~~ administration order - the court may render ~~the a preliminary-provisional~~ administration order when it is convinced that there ~~are-is an emergent-emergency~~ necessity. ~~The preliminary-provisional~~ administration order, ~~which~~ grants power and ~~authorities-authority upon-to~~ the ~~preliminary-interim~~ trustee exclusively with regard to the ~~operation-business and assets~~ of the debtor, ~~for a within professional-commercial debtor as long as management and disposition of the assets occurs~~ within Japan. ~~LRA/LRAF~~, Section 51.1. This order may be granted only where this order is specifically required ~~in-order~~ to attain the goal ~~under the LRA/LRAF~~ of ~~the~~ recognition and assistance ~~LRA proceeding~~. The ~~preliminary-interim~~ trustee is required to obtain ~~a~~ specific court order where it wishes to conduct ~~such-any~~ transaction ~~are-that is~~ out of ~~the~~ ordinary course of business. ~~LRA/LRAF~~, Section 53.1

~~(e)~~ Disposition or outbound delivery of local assets

~~It is not always assure that the~~ The distribution of ~~the~~ assets ~~under the foreign insolvency proceedings may not always~~ be made in accordance with the same priority as the Japanese insolvency proceedings. ~~are-under the foreign insolvency proceedings~~. Accordingly, the court may, in order to protect local creditors, order that the DIP shall obtain the courts' approval for disposition or outbound delivery of the debtors assets within Japan. ~~LRA/LRAF~~, Section 31. Also, ~~a~~ recognized trustee must obtain ~~the~~ courts' approval to do the same thing. ~~LRA/LRAF~~, Section 35.

Formatted: Bullets and Numbering

~~(f)~~ Termination of ~~LRA/LRAF~~ proceeding

The ~~LRA/LRAF~~ proceeding shall terminate upon cancellation ~~of the~~ order of ~~the~~ recognition of the foreign insolvency proceeding. ~~LRA/LRAF~~, Section 56. Recognition shall be cancelled in the event that the foreign insolvency proceeding has terminated or the requirement for recognition ~~on-of~~ the foreign insolvency proceeding ~~are-is~~ found to be non-existent. The recognition of the foreign insolvency proceedings may ~~also~~ be cancelled in the event that ~~the~~ DIP or recognized trustee has disposed of, or delivered ~~outbound~~ out of Japan, the debtor's assets, ~~if the DIP or recognized trustee has violated the requirement for court approval to do so~~. ~~LRAF~~, Section 56.2

Formatted: Bullets and Numbering

~~6.2.3~~2.2 Harmonization of ~~LRA~~LRAF proceeding and other insolvency proceedings

Formatted: Bullets and Numbering

LRAF adopted the principle that ~~on~~a debtor shall be subject to only one insolvency proceeding. Thus, when a LRAF proceeding and a local insolvency proceeding, or two or more LRAF proceedings, are petitioned with regard to a debtor, such petitions shall be handled in accordance with the following principle:

~~(d)~~(a) Local insolvency proceeding shall prevail over LRAF proceeding, in general.

Formatted: Bullets and Numbering

~~(d)~~(b) ~~As its section.~~In the case where the LRAF proceeding is ~~for~~(1) for the foreign main proceeding\*, ~~and~~(2) providing assistance to such foreign insolvency proceeding conforms to the general interests of creditors, and (3) providing assistance to such foreign insolvency proceeding will not unduly impair the interests of creditors within Japan, LRAF proceeding shall prevail over local insolvency proceeding. LRAF, Sections 57 to 60:

Formatted: Bullets and Numbering

\* In the case of a commercial debtor, the foreign insolvency proceeding, that has been petitioned in such motion, where the debtor holds its main office of business. LRAF, Section 2. (2)

~~(d)~~(c) LRAF proceeding regarding in respect to the foreign main proceeding shall prevail over those with respect to a foreign non-main proceeding. LRAF, Sections 62, 63

Formatted: Bullets and Numbering

~~(d)~~(d) Between or among foreign non-main proceedings, the one that conforms to the general interests of creditors shall prevail over others. ~~LRA Section 62~~

Formatted: Bullets and Numbering

~~6.2.3~~ Outline of LACR

Formatted: Bullets and Numbering

~~6.1.3.1~~ Abandonment of ~~territoriality~~territorialism

Civil Rehabilitation Law has already abandoned ~~the~~outbound ~~territoriality~~territorialism since its enactment in 1999, and ~~in-effect~~sinceenforcement from April 1, 2000). By the enactment of LRAF and LACR, territoriality principle has been abandoned in relation to the inbound effect under CRL, and also in such insolvency proceedings as bankruptcy and corporate reorganization.

As a result, the effect of the bankruptcy proceeding now extends toward the debtor's assets located outside of Japan, and the ~~authorities~~authority of an interim trustee and ~~trustee~~trustee extends to ~~be~~the debtor's assets located

Bankruptcy ~~code~~ Code, ~~sections~~ Sections 3 (deleted), 6.1; ~~corporate~~ Corp. ~~orate~~ (deleted), 40.1, 53.

~~6.3.2.~~—Hotchpot rule ~~\_ section~~ Section 89 of CRL has already adopted the hotchpot rule, under which any recovery of a creditor, made by exercising its rights, from the debtor's assets located outside of Japan shall be credited against ~~the~~ payment under the CRL proceeding. The same rule has been introduced to bankruptcy and corporate reorganization proceedings. (~~Bankruptcy law~~ Bankruptcy Code, ~~Law sections~~ Sections 23-2, ~~182.6,~~ 265-2, 306-2, 326-2,; ~~Corp. orate~~ ~~organization~~ Reorganization, ~~law~~ Law, ~~sections~~ Sections 118-2, 124-3)

~~6.3.3.~~—International jurisdiction

It has been made clear that the Japanese court has ~~the~~ jurisdiction over an insolvency case, insofar as long as the debtor has either address, residence, business or other offices, or assets, in the case of a bankruptcy or of under CRL proceedings, or insofar as the debtor has its business offices, in the case of a corporate reorganization, or insofar as the debtor owns the business offices, within Japan. (~~Bankruptcy law~~ Bankruptcy Code, ~~Law section~~ Section 104-2, CRL ~~4.14-2;~~ ~~corporate~~ Corp. ~~orate~~ ~~reorganization~~ Reorg. ~~anization~~ law Law, 5-2)

~~6.3.4.~~—Special provisions for harmonization with foreign insolvency proceedings

CRL has already introduced various provisions in order to harmonize the CRL proceeding with foreign insolvency proceedings, and LACR introduced ~~the~~ similar provisions to the ~~bankruptcy~~ Bankruptcy law Law and ~~the~~ corporate Corporate ~~reorganization~~ Reorganization law Law.

~~(d)~~(a)—Trustees in bankruptcy and corporate reorganization proceedings are to cooperate with foreign trustees mutually. (~~Bankruptcy law~~ Bankruptcy Code, ~~Law section~~ Section 357-2; ~~corporate~~ Corp. ~~orate~~ ~~reorganization~~ Reorg. ~~anization~~ law Law, ~~section~~ Section 289-2)

~~(d)~~(b)—Causes ~~is~~ ~~off~~ commencement of bankruptcy and corporate ~~reorganization~~ proceedings are assumed, where a bankruptcy proceeding or any other insolvency proceeding, respectively, are is sending pending in a foreign countries country. Also, causes for commencement of corporate reorganization proceeding are assumed where any insolvency proceeding is pending in a foreign country. (~~Bankruptcy law~~ Bankruptcy Code, ~~Law~~

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

~~section-Section 131-2; corporate-Corp.orate reorganization-Reorg.anization~~

~~(d)(c)~~—Foreign trustees are vested with the right to file a petition for a local insolvency proceeding, and to attend the creditors meeting to express his/her opinion under the domestic insolvency proceedings. (~~Bankruptcy lawBankruptcy Code, Law section-Section 357-3~~; ~~corporate-Corp.orate reorganization-Reorg.anization law-Law, section-Section 289-4~~)

Formatted: Bullets and Numbering

~~(d)(d)~~—Trustees are entitled to participate in foreign insolvency proceedings on behalf of the creditors who are participating in the bankruptcy or corporate reorganization proceedings, and vice versa. (~~Bankruptcy lawBankruptcy Code, Law section-Section 357-4~~; ~~corporate-Corp.orate reorganization Reorg.anization law-Law, section-Section 289-5~~)

Formatted: Bullets and Numbering

Formatted

#### ~~6.3.5~~—Abandonment of mutuality

LACR eliminated ~~the proviso~~ to ~~bankruptcy-Bankruptcy law CodeLaw section Section 2~~ by ~~under~~ which ~~the bankruptcy law abolished~~ the mutuality principle ~~was applicable~~. ~~The section now provides that foreign parties has have the same status as Japanese parties in relation to the a bankruptcy~~. By eliminating the ~~proviso that had provided for mutuality requirements for such to maintain an equal footing for with the foreign parties~~, the new bankruptcy law provides ~~the~~ equal treatment to foreign parties regardless of ~~whether~~ such foreign party's home country provides ~~a foreign parties~~ national treatment ~~to a foreign party~~.

Formatted

Formatted

Law Offices of Hideyuki Sakai

9<sup>th</sup> Floor, Otemachi Tatemono Toranomon Bldg.

6-12 Toranomon 1-chome

Minato-ku, Tokyo 105-0001, Japan

Telephone: +81-3-3519-8321

Facsimile: +81-3-3519-8322

e-mail: sakai.h@sakailaw.com

Copyright © 2001 Hideyuki Sakai & C. Christian Jacobson

Formatted