

Japanese MLA's Reply to the Questionnaire on Cross-border Insolvency

August 10, 2012

SECTION I

Part 1

1. Japan's Act on Recognition of and Assistance for Foreign Insolvency Proceedings was enacted based on the UNCITRAL Model Law on Cross-Border Insolvency.

The main differences between the Model Law and the Act on Recognition of and Assistance for Foreign Insolvency Proceedings are as follows:

- (1) The recognition of main proceedings according to the act does not have an automatic effect. A decision concerning recognition is needed to provide assistance to foreign insolvency proceedings.
 - (2) The act has no provision for a direct communication between a Japanese court and a foreign court in a case of concurrent insolvency.
 - (3) The act does not allow for recognition proceedings and domestic insolvency proceedings to be concurrent.
2. With respect to bankruptcy, civil rehabilitation, and corporate reorganization procedures as well as recognition assistance proceedings, a foreigner or a foreign corporation has the same status as a Japanese or a Japanese corporation (see Section 3 of the Bankruptcy Act, Section 3 of the Civil Rehabilitation Act, and Section 3 of the Act on Recognition of and Assistance for Foreign Insolvency Proceedings). Japanese laws allow a creditor to file for the commencement of the insolvency proceeding, and these laws are generally interpreted to include foreign creditors. A foreign administrator may file for bankruptcy in Japan (see Section 246 paragraph 1 of the Bankruptcy Act and others). At the time of such filing, no recognition of the foreign insolvency proceedings is needed.

Furthermore, a creditor is given the right to protest against a decision on the commencement of insolvency proceedings through an immediate appeal, and it is

generally interpreted that such a “creditor” includes foreign creditors.

3. In his or her capacity, a foreign insolvency administrator is not naturally subject to supervision by a Japanese court. The Act on Recognition of and Assistance for Foreign Insolvency Proceedings did not adopt the automatic recognition system concerning the effects of foreign insolvency proceedings.

However, when a foreign administrator is appointed as a recognition administrator, in accordance with the Act on Recognition of and Assistance for Foreign Insolvency Proceedings, he or she will become subject to supervision by a Japanese court.

4. Japanese laws do not have a procedure to transfer claims held by an insolvent ship operator to anyone other than an administrator.
5. A court supervises an administrator (see Section 75 paragraph 1 of the Bankruptcy Act, Section 57 paragraph 1 and Section 78 of the Civil Rehabilitation Act, and Section 68 paragraph 1 of the Corporate Reorganization Act). The administrator shall report matters related to insolvency proceedings to the court (see Section 157 paragraph 2 of the Bankruptcy Act, Section 125 paragraph 2 of the Civil Rehabilitation Act, and Section 84 paragraph 2 of the Corporate Reorganization Act).

When the administrator is acting insufficiently, the court may discharge him or her through the petition of a stakeholder (including foreign creditors) or on the court’s own motion (see Section 75 paragraph 2 of the Bankruptcy Act, Section 57 paragraph 2 and Section 78 of the Civil Rehabilitation Act, and Section 68 paragraph 2 of the Corporate Reorganization Act).

Because an administrator in insolvency proceedings is already under the supervision of a court, the court will not issue a supervisory order again.

6. An administrator bears a duty to practice diligence in dealing with stakeholders, including foreign creditors. When the administrator breaches this duty, he or she may bear the obligation of compensating the stakeholders for damages (see Section 85 paragraph 2 of the Bankruptcy Act, Section 60 paragraph 2 and Section 78 of the Civil Rehabilitation Act, and Section 80 paragraph 2 of the Corporate

Reorganization Act). Legal proceedings against an administrator are pursued by a general civil action.

7. Japanese laws have no system for private receivers. If you are referring to an out-of-court workout by a private receiver, Japanese laws do not provide a means to seek the supervision of a court in relation to the workout.

As stated in our reply to the second question, a foreign creditor may file for the commencement of insolvency proceedings in accordance with Japanese laws.

Part 2

8. There is no difference in the scope of jurisdiction. All assets held by a debtor at the time of the commencement of the bankruptcy procedure are incorporated into a bankruptcy estate whether they are located inside Japan or not (see Section 34 paragraph 1 of the Bankruptcy Act). The right held by an administrator or a rehabilitation debtor to manage and dispose assets in a corporate reorganization procedure or a civil rehabilitation procedure will also be applied to the assets located outside Japan (see Section 72 paragraph 1 of the Corporate Reorganization Act and Sections 38 and 66 of the Civil Rehabilitation Act). However, this means that the Japanese laws adopted a standpoint that the effect of insolvency proceedings in Japan applies to assets located outside the country, but how the effect will be applied is left to the domestic laws of the foreign country (whether they adopt an automatic recognition system or need recognition proceedings).

As long as the asset is owned by an insolvent debtor, there is no difference in effect whether a ship is registered in Japan or in a foreign country. However, the effect does not naturally apply to flags of convenience with different registers regarding ownership.

Meanwhile, when the ship is owned by a subsidiary of a debtor, the effect of the commencement of insolvency proceedings of the parent company will not apply to the subsidiary.

Part 3

9. A petitioner of insolvency proceedings needs to submit a list of known creditors to a court (see Section 20 paragraph 2 of the Bankruptcy Act, Section 14 paragraph 1 item 1 of the Bankruptcy Rule, Section 14 paragraph 1 item 3 of the Civil Rehabilitation Rule, and Section 13 paragraph 1 item 5 of the Corporate Reorganization Rule).

The decision on the commencement of insolvency proceedings is publicly announced on an official gazette (see Section 32 paragraph 1 of the Bankruptcy Act, Section 35 paragraph 1 of the Civil Rehabilitation Act, and Section 43 paragraph 1 of the Corporate Reorganization Act).

10. A known creditor, whether domestic or foreign, will be given a notice regarding the decision on the commencement of the bankruptcy procedure (see Section 32 paragraph 3 item 1 of the Bankruptcy Act, Section 35 paragraph 3 item 1 of the Civil Rehabilitation Act, and Section 43 paragraph 3 item 1 of the Corporate Reorganization Act). However, in Japanese laws, the person who gives the notice is a court clerk instead of an administrator (for each notice, an administrator may do the delivery at the request of the court clerk). Because the notice is not a service, it is sufficient to deliver it by any admissible and reasonable means, usually by mailing.
11. The notice includes a claim filing period. The claim filing period is generally set forth from two weeks or later and within four months, calculating from the date of the decision on the commencement of the bankruptcy procedure in general cases, but it is set forth from four weeks or later and within four months when a foreign creditor (a creditor who has an address or a sales branch outside Japan) is involved (see Section 20 paragraph 1 item 1 of the Bankruptcy Rule and others). Therefore, care is taken to secure the filing of claims by foreign creditors.
12. In the case of bankruptcy of a corporation, there is no need to register a domestically registered vessel on a decision on the commencement of bankruptcy (because the bankruptcy registration to the corporate registry reveals the bankruptcy), and no notice has to be sent to a registrar.

During bankruptcy of an individual ship owner, to register the commencement of the bankruptcy procedure on his or her domestic vessel, it is necessary for the court clerk to make the commission of registration to a vessel's registrar (see Section 258

paragraph 1 item 2 of the Bankruptcy Act). However, in business practice, it is very rare that the registration of bankruptcy is made on a vessel at the time of bankruptcy of an individual.

During bankruptcy of a corporation, when an interim order is made on a domestic vessel it owns, it is necessary to register the interim order (see Section 259 of the Bankruptcy Act). The same applies in civil rehabilitation and corporate reorganization (see Section 12 paragraph 1 of the Civil Rehabilitation Act and Section 260 of the Corporate Reorganization Act). However, because the period from when the interim order is made until the decision of commencement is generally short, this registration is also rare in business practice.

13. There is no legal need for such a notice.
14. With respect to a claim for which the filing might not be done before or on the due date of general investigation because of an event that is not the responsibility of the bankruptcy creditor, the claim may be filed only within one month after the event ceases to exist (see Section 112 of the Bankruptcy Act). In civil rehabilitation and corporate reorganization procedures, a claim for which the filing might not be done during the set period due to an event that is not attributable to the creditor may be notified only within one month after the event ceases to exist (see Section 95 of the Civil Rehabilitation Act and Section 139 of the Corporate Reorganization Act). Based on the delayed filing of a claim, the creditor may receive a prorated payment from the assets of a debtor.

Part 4

15. The content of the substantive law of a claim is subject to the conflicting rules in *lex fori*. With respect to a maritime lien, the lien is subject to the laws of a place where its object is located (see Section 13 paragraph 1 of the Act on General Rules for Application of Laws). This principle will unchangeably apply in principle once insolvency proceedings are commenced.
16. There is no difference in the handling of foreign and domestic claims. Also, there is no system of *action in rem* in Japan.

17. It depends on the governing law on the claim held by the creditor, and the contents of rights set forth in the substantive law as the governing law are respected. Japanese laws do not provide for such rights as indicated in your example.
18. Because Japan enacted its arbitration law based on the UNCITRAL Model Law, foreign arbitral awards will be automatically recognized unless there are specific points for rejection. If foreign arbitral awards are recognized in this way, it means that the existence of claims is verified. To this extent, there is no difference in the recognition.
19. There is no special rule for the procedures when a state-owned enterprise becomes insolvent. In that case, general insolvency proceedings will be applied.

Part 5

20. In the Japanese insolvency laws, there is no provision that prohibits the acts of a foreign administrator stated in your question. However, if such acts are regarded as the exercise of jurisdiction of the foreign court, such acts are not permitted in Japan.
21. As mentioned above, foreign insolvency proceedings may be recognized in Japan by the Act on Recognition of and Assistance for Foreign Insolvency Proceedings that was enacted based on the UNCITRAL Model Law.
22. The filing of recognition of foreign insolvency proceedings in Japan may be made by a foreign administrator or, if there is no administrator, by the debtor (see Section 2 paragraph 1 item 8 of the Act on Recognition of and Assistance for Foreign Insolvency Proceedings). When such filing is made, there is no need to do so by a letter of request issued by a foreign bankruptcy tribunal.
23. The main requirements for the recognition of foreign insolvency proceedings in Japan are as follows:
 - (1) The debtor has an address, a residence, a business office, or an office in the country where the foreign insolvency proceedings commenced (see Section 17 paragraph 1 of the Act on Recognition of and Assistance for Foreign Insolvency Proceedings).

- (2) The foreign insolvency proceedings have an extraterritorial effect (see Section 21 paragraph 2 of the Act on Recognition of and Assistance for Foreign Insolvency Proceedings).
 - (3) Rendering assistance measures to the foreign insolvency proceedings does not contravene the public order and morals in Japan (see Section 21 paragraph 3 of the Act on Recognition of and Assistance for Foreign Insolvency Proceedings).
24. According to the Act on Recognition of and Assistance for Foreign Insolvency Proceedings, only a foreign administrator or, if there is no administrator, the debtor (see Section 2 paragraph 1 item 8 of the Act on Recognition of and Assistance for Foreign Insolvency Proceedings) may file for the recognition. When such filing is made, the court shall examine the requirements stated in the reply to question 23 and will decide if these requirements are met.
- A Japanese court is not allowed to file for the recognition. Meanwhile, a foreign court may not file for the recognition of foreign insolvency proceedings.
25. As stated in our reply to question 24, only a foreign administrator may file for the recognition of foreign insolvency proceedings. A Japanese administrator is not allowed to file, and there is no provision that a Japanese administrator may request such assistance in the courts of Japan.
26. If there is an agreement a ship owner will transfer his or her vessel along with the charter contracts when he or she experiences financial troubles and the agreement was entered before he or she encounters financial trouble, and when the ship owner actually falls in financial troubles, the court will consider the effect of the agreement in principle during the insolvency proceedings. However, if the requirements of general avoidance are exceptionally met, the court will not enforce the agreement.
27. When the same debtor is involved in both domestic insolvency proceeding and foreign insolvency proceeding, there are provisions on the cooperation between administrators (see Section 245 of the Bankruptcy Act and others). On the other hand, unlike the Model Law, there is no provision concerning a direct communication between the courts. This rule is applicable to all Japanese insolvency proceedings, including maritime insolvency.

28. Japan is not party to such agreements.

Part 6

29. There is no provision that is pointed out to be revised in insolvency laws related to the international maritime bankruptcy.

SECTION II

Part 7

30. A ship operator who is governed by the laws of Japan is subject to insolvency laws that are generally applied. On the other hand, a vessel registered in Japan itself does not become the object of insolvency proceedings.
31. Not applicable (N/A).
32. Insolvency laws will apply regardless of the value of a debtor's assets. There is no simplified procedure when the amount of a debtor's assets is small.
33. Rights to commence insolvency proceedings are the same, regardless of whether a debtor is a natural person or a legal entity, and whether a debtor is a ship operator or not.
34. There are no differences in insolvency proceedings. In Japanese laws, it is a principle that general creditors can look at all of the debtor's assets.
35. A local court with general jurisdiction, which has jurisdiction on the debtor's domicile or business office, is commonly a court that is competent on the debtor's general location. In Japan, there is no specific court that has jurisdiction on insolvency cases.
36. The bankruptcy procedure for a legal entity commences when a debtor is generally and continuously in a state where he or she is "unable to pay debts due" or when he or she admits not being able to fully pay his or her debts even by appropriating all his or her assets ("over-indebted") (see Section 2 paragraph 11, Section 15, and Section 16 of the Bankruptcy Act). Furthermore, when insolvency proceedings that correspond to the Japanese bankruptcy procedure have commenced in a foreign country, it is presumed that there is a ground for the commencement of bankruptcy

procedure in Japan (see Section 17 of the Bankruptcy Act).

The bankruptcy procedure for a natural person commences only when he is “unable to pay debts due” (different from a legal entity, being “over-indebted” is not the ground of the commencement of the bankruptcy procedure for a natural person).

Civil rehabilitation and corporate reorganization procedures commence when there is a threat that a ground of the commencement of bankruptcy (“unable to pay debts due” or “over-indebted”) may arise, or when there is a threat of causing a significant trouble to the operation of a business even if the debts due are paid (see Section 21 of the Civil Rehabilitation Act and Section 17 of the Corporate Reorganization Act). In addition, when there are foreign insolvency proceedings for a debtor, it is presumed that there are grounds for the commencement of civil rehabilitation and corporate reorganization (see Section 208 of the Civil Rehabilitation Act and Section 243 of the Corporate Reorganization Act).

37. If a debtor is a foreign ship operator who has assets in Japan, the grounds of the commencement of insolvency proceedings are the same as in other general cases.
38. When a creditor files for the commencement of insolvency proceedings, general insolvency laws will apply regardless of whether the debtor is a ship operator or not.

A creditor may file for the commencement of bankruptcy procedure or civil rehabilitation procedure against a debtor. At such a time, as requirements for the filing, the creditor shall provide *prima facie* evidence for the existence of his or her claim against the debtor and the ground of the commencement of bankruptcy (the debtor’s inability to pay debts due or being over-indebted) or the ground of the commencement of civil rehabilitation (a threat of being unable to pay debts due or being over-indebted) (see Section 18 of the Bankruptcy Act and Section 21 paragraph 2 and Section 23 paragraph 2 of the Civil Rehabilitation Act).

A creditor whose claim amounts to over or equal to one-tenth of the capital amount of a company may file for the commencement of the corporate reorganization procedure. At such a time, the creditor shall provide *prima facie* evidence for the amount of his or her claim to the debtor and the grounds of the commencement of corporate reorganization procedure (a threat of being unable to pay debts due or

being over-indebted) (see Section 17 paragraph 2 item 1 and Section 20 paragraph 2 of the Corporate Reorganization Act).

It is necessary to prove the ground of the commencement of each procedure so that a court may decide the commencement of insolvency proceedings.

39. No.

40. Against the decision on the commencement of insolvency proceedings based on the filing by a creditor, a debtor as a ship operator may protest through an immediate appeal (see Section 33 paragraph 1 of the Bankruptcy Act, Section 36 paragraph 1 of the Civil Rehabilitation Act, and Section 44 paragraph 1 of the Corporate Reorganization Act). The reasons for the appeal are that there is no evidence of the cause of the commencement of insolvency proceedings and that the conditions of the commencement of insolvency proceedings (see Section 30 paragraph 1 of the Bankruptcy Act, Section 25 of the Civil Rehabilitation Act, and Section 41 paragraph 1 of the Corporate Reorganization Act) are not met.

41. A debtor himself may file for insolvency proceedings (see Section 18 paragraph 1 of the Bankruptcy Act, Section 21 paragraph 1 of the Civil Rehabilitation Act, and Section 17 paragraph 1 of the Corporate Reorganization Act). In the business practice, there are many cases in which debtors themselves do the filing.

The grounds of commencement are the same for the bankruptcy procedure, but for civil rehabilitation and corporate reorganization procedures, the grounds of commencement are mitigated in the case of a filing by a debtor rather than a filing by a creditor. Concretely speaking, at a time of filing by a debtor, civil rehabilitation and corporate reorganization procedures may commence when a significant trouble is brought to the ongoing operation of a business even if debts due are paid (see Section 21 paragraph 1's latter part and Section 17 paragraph 1 item 2 of the Corporate Reorganization Act).

42. Against the decision on the commencement of insolvency proceedings based on a debtor's filing, a creditor (including a worker who has an outstanding wage) may protest through an immediate appeal. The reasons for the appeal are that there is no evidence of the ground of commencement of insolvency proceedings and that the

conditions for the commencement of insolvency proceedings (see Section 30 paragraph 1 of the Bankruptcy Act, Section 25 of the Civil Rehabilitation Act, and Section 41 paragraph 1 of the Corporate Reorganization Act) are not met.

Against the above, public authority or shareholders may not protest through immediate appeals.

43. Irrespective of the period of prescription of each maritime claim, a bankruptcy court decides the claim filing period on case-by-case basis when it decides the commencement of insolvency proceedings. In the case of the bankruptcy procedure, the court decides on the claim filing period by its own discretion from two weeks or later and within four months, calculating from the decision day of the commencement of the bankruptcy procedure (when there is a known bankruptcy creditor who has no address, residence, sales office, or office in Japan, from four weeks or later and within four months), taking the number of creditors and other factors into consideration (see Section 20 paragraph 1 item 1 of the Bankruptcy Rule). There are similar provisions for civil rehabilitation and corporate reorganization procedures (see Section 18 paragraph 1 item 1 of the Civil Rehabilitation Rule and Section 19 paragraph 1 item 1 of the Corporate Reorganization Rule).

44. An insolvency administrator may carry on business as usual with the permission of the court (see Section 36 of the Bankruptcy Act). A civil rehabilitation debtor or an administrator in the civil rehabilitation procedure or the corporate reorganization procedure may naturally carry on the business of a debtor (see Section 38 paragraph 1 and Section 66 of the Civil Rehabilitation Act and Section 72 paragraph 1 of the Corporate Reorganization Act).

An insolvency administrator, a civil rehabilitation debtor, or an administrator in the civil rehabilitation procedure or the corporate reorganization procedure may choose to perform or terminate an executory contract (see Section 53 paragraph 1 of the Bankruptcy Act, Section 49 paragraph 1 of the Civil Rehabilitation Act, and Section 61 paragraph 1 of the Corporate Reorganization Act).

45. An insolvency administrator, a civil rehabilitation debtor, or an administrator in the civil rehabilitation procedure or the corporate reorganization procedure may choose to perform or terminate an executory contract (see Section 53 paragraph 1 of the

Bankruptcy Act, Section 49 paragraph 1 of the Civil Rehabilitation Act, and Section 61 paragraph 1 of the Corporate Reorganization Act).

46. When a person purchases a ship from an insolvent ship owner, the purchaser may not receive the transfer of transportation contracts and contracts with the ship's crew and an administrator has no such legal authority, except when agreements with the other parties to the contracts or with all crew members are reached individually and concretely.

Part 8

47. The acceleration clause for a debtor (a creditor may immediately claim the full payment of the debts) when the debtor's financial conditions are aggravated is generally interpreted to be valid between a creditor and a debtor. Meanwhile, by the commencement of the bankruptcy procedure, a debtor is naturally subject to acceleration (see Section 137 paragraph 1 of the Civil Act).

48. The acceleration clause is effective whether the creditor is Japanese or a foreigner.

Part 9

49. Although the priority of claims or the rights of separate satisfaction may be different depending on the types of claims or creditors, there is no difference in the application itself of insolvency laws. A ship mortgagee is treated as a holder of the rights of separate satisfaction, whether he or she is a financial institution or another corporation, and there is no difference in the method of exercising his or her right.

50. A ship mortgagee, a ship lien holder [see Section 842 of the Commercial Act, Section 19 paragraph 1 of the Committee on State Government Affairs (COSGA), Section 95 paragraph 1 of the Act Relating to the Limitation of the Liability of Ship Owner etc., and Section 40 paragraph 1 of the Act on Liability for Oil Pollution Damage], and others are able to exercise their rights outside the procedures as holders of the rights of separate satisfaction. If the commencement of insolvency proceedings has been decided, there is no change in their priority.

In addition to a ship lien, a labor claim has a status of a claim on the estate or a

preferential bankruptcy claim in the bankruptcy procedure (see Section 149 and Section 98 paragraph 1 of the Bankruptcy Act and Section 308 of the Civil Act).

51. When a ship owner who files for the procedure for the limitation of the liability of a ship owner is already subject to a bankruptcy proceeding, the filing of the procedure for the limitation of the liability will be dismissed (see Section 24 of the act related to the Limitation of the Liability of a Ship Owner, etc.) When the filing of the bankruptcy proceeding and the filing of the procedure for the limitation of the liability of a ship owner are done simultaneously, the court may, at the request of a stakeholder or on its own motion, order the suspension of the procedure for the limitation of the liability of a ship owner until the court decides on the filing of the bankruptcy (see Section 24 paragraph 1 item 5 of the Bankrupt Act). Once the procedure for the limitation of the liability commences and the decision on the commencement of the bankruptcy procedure is made for the debtor afterward, the procedure for the limitation of the liability will not be naturally abolished. However, when there is a threat that bankruptcy creditors are significantly damaged by the ongoing procedure for the limitation of the liability, based on a petition by an insolvency administrator, the court that is competent on the limitation procedure will abolish the procedure for the limitation of the liability (see Section 84 of the act related to the Limitation of the Liability of a Ship Owner, etc.) and will incorporate the procedure for the limitation of the liability into the bankruptcy procedure (see Section 264 of the Bankruptcy Act). However, when there is a public announcement of a dividend's table in the bankruptcy procedure or in the procedure for the limitation of the liability, the court may no longer abolish the procedure for the limitation of the liability.

In contrast, if a decision on the commencement of the civil rehabilitation procedure or the corporate reorganization procedure is made, the procedure for the limitation of the liability will not be influenced by the decision.

Part 10

52. A debtor, including an insolvent ship operator, may file the commencement of the civil rehabilitation procedure and may submit a civil rehabilitation plan with the content of a partial discharge of civil rehabilitation claims. When the debtor is a stock company, it may file the commencement of the civil rehabilitation procedure.

53. In the out-of-court workout, the debtor may agree with some creditors and may prepare a reconstruction plan. There are many cases in which debtors agree with financial institutions to prepare reconstruction plans and to carry on the payment of full amounts to commercial creditors for a period until the establishment of the reconstruction plans. It is not necessary to prepare a reconstruction plan in the out-of-court workout under the supervision of a court, and the agreement of all creditors is not necessary.

54. A reconstruction plan made by a debtor agreeing with some creditors has no binding effect to legally impose disadvantages on creditors who did not agree.

55. N/A

56. It depends on the types of insolvency proceedings. In the civil rehabilitation procedure, security interest is handled as rights of separate satisfaction, may be individually exercised outside civil rehabilitation proceedings, and is not subject to civil rehabilitation proceedings. In contrast, in the corporate reorganization procedure, the enforcement of security interest is naturally prohibited by the commencement of the procedure, and a secured creditor preferentially receives payment according to a reorganization plan.

57. Even if a liquidation proceeding has commenced for a certain debtor, the debtor may file the civil rehabilitation procedure or the corporate reorganization procedure. At such a time, when the court judges that the civil rehabilitation procedure or the corporate reorganization procedure is more favorable to creditors than the liquidation proceeding, the court decides on the commencement of the civil rehabilitation procedure or the corporate reorganization procedure.

58. There is no system of receivership in Japanese laws.

59. N/A