

Legal Framework of Cross-Border Insolvency in Japan

- Ancillary Proceeding for Foreign Insolvency Proceedings -

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Japan is one of the first countries to enact legislation enabling recognition of and provision of assistance in foreign insolvency proceedings pursuant to the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"). This Newsletter outlines the key differences between the relevant Japanese legislation and the Model Law, and lists the foreign proceedings that have received recognition and assistance from the Tokyo District Court.

Q1. What are the key differences between Model Law and RAFIP?

The "Act on Recognition of and Assistance for Foreign Insolvency Proceedings" (the "RAFIP") was enacted in Japan to enable the Tokyo District Court (the "TDC")¹ to recognize and provide assistance in respect of foreign insolvency proceedings in Japan. Although the RAFIP contains most of the key functions found in the Model Law on provision of assistance in foreign insolvency proceedings, there exist some differences between the two. The following chart sets forth some of the main differences.

Subject	Model Law	RAFIP
(i) Legal Effects of Recognition	<ul style="list-style-type: none"> ✓ Automatic relief will be given for foreign main proceedings. ✓ Discretionary relief is available for foreign non-main proceedings. 	<ul style="list-style-type: none"> ✓ Recognition is the prerequisite for assistance and relief. ✓ Assistance and relief will be provided at the court's discretion regardless of the foreign main proceedings or non-main proceedings.

¹ The TDC has exclusive jurisdiction over recognition and assistance cases in Japan under Article 4 of the RAFIP.

(ii) Relationship between recognition proceedings and domestic proceedings (i.e., Japanese plenary insolvency proceedings, such as Civil Rehabilitation and Corporate Reorganization proceedings)	✓ Both proceedings can exist concurrently.	<ul style="list-style-type: none"> ✓ Cannot co-exist under the principle of “one proceeding for one debtor”. ✓ If the foreign insolvency proceeding (i.e., the non-Japanese proceeding) is the foreign main proceeding, the Japanese proceeding will likely be suspended if such suspension benefits creditors in general and does not harm creditors' interests in Japan.
(iii) Court-to-court communication and cooperation	✓ Article 25 of the Model Law provides for court-to-court cooperation and court-to-trustee cooperation.	✓ No provision. (Provisions on cooperation with foreign trustees are embedded in Japanese insolvency laws.)

Notwithstanding the Japanese legal system (under which no automatic relief for foreign main proceedings is available, and all assistance for foreign insolvency proceedings is subject to judicial discretion), the TDC has generally provided assistance to foreign trustees and DIPs immediately after the recognition of the relevant foreign proceeding. This is because debtors are generally able to hold prior consultation with the TDC, which enables the TDC to carefully review cases in advance.

Q2. What type of assistance and relief will be provided under RAFIP?

The RAFIP provides for two main types of relief. First, enforcement by creditors is restricted through prohibitions on enforcement, suspension of lawsuits, and similar measures. Second, the power of debtors to dispose of assets in Japan is restricted through the need for appointment of recognition trustees and similar requirements.

Under current practice, if the foreign insolvency proceeding is a DIP-type proceeding (such as proceedings under Chapter 11 in the U.S.), the TDC would generally issue an order to restrict enforcement by creditors. Pursuant to Article 28 of the RAFIP, such orders typically take the form of a prohibition against compulsory execution ("Stay Order").

On the other hand, if the foreign insolvency proceeding is a trustee-type proceeding (such as proceedings under Hong Kong insolvency laws), the TDC would, pursuant to Article 32 of the RAFIP, generally issue an order to restrict the powers of the debtor through the appointment of a trustee ("Administration Order"). The trustee has the power to administer the debtor's business and assets in Japan, although the approval of the TDC is required before selling or disposing of the debtor's assets in Japan (Article 35 of the RAFIP).

The RAFIP does not enable assistance to be provided for purposes of giving effect to various court orders issued in the foreign insolvency proceedings, such as orders for the discharge of debts, avoidance of asset transfers and the like.

Q3. How many cases are there where an order of the TDC under the RAFIP was rendered?

As of April, 2017, there have been 15 cases in which the TDC has rendered an Administration Order and/or Stay Order. These are set forth in the following table.

Assistance from the TDC has also been provided in the following cases, based on the type of foreign proceedings involved.

	Debtor (foreign proceeding)	Date of Order	Type of Assistance
1	Jinro (Hong Kong) International Ltd. (Hong Kong)	November 11, 2003	Administration Order
2	Azabu Building (the U.S.)	February 3, 2006	Stay Order
3	Lehman Brothers Asia Holdings Ltd. (Hong Kong)	June 1, 2009	Administration Order
4	Lehman Brothers Asia Capital Company (Hong Kong)	September 30, 2009	Administration Order
5	Lehman Brothers Commercial Corporation Asia Limited (Hong Kong)	September 30, 2009	Administration Order
6	Lehman Brothers Securities Asia Limited (Hong Kong)	September 30, 2009	Administration Order
7	Korea Line (South Korea)	February 28, 2011	Administration Order & Stay Order
8	Alitalia – Linee Aeree Italiane SPA (Italy)	March 9, 2011	Administration Order
9	think 3 Inc (the U.S.) (<i>Italy</i>)	August 11, 2011	Stay Order
10	Samho Shipping (South Korea)	September 21, 2011	Stay Order

11	STX Pan Ocean (South Korea)	July 4, 2013	Administration Order & Stay Order
12	Song Won PCS (South Korea)	December 12, 2013	Administration Order
13	Terrafix Suedafrika (South Africa)	July 31, 2014	Administration Order
14	Daebo International Shipping Company (South Korea)	March 9, 2015	Stay Order
15	Hanjin Shipping (South Korea)	September 5, 2016	Stay Order

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