# Working draft for the interim report of points at issue on the Civil Code (law of obligations) reform (1)

## Part I. Demand for Performance

### 1. Necessity to stipulate a provision on the power to demand performance

The Working Group proposes that, aside from the provision on enforcement of performance (Article 414 of the Civil Code), a provision is stipulated to confirm that the obligee has the basic power such as the power to demand performance or the power to file an action to confirm his or her claim in court against the obligor such as by stipulation of a provision to the effect that the obligor can demand the obligee voluntary performance.

【*See*: Material No.5-1, Part I, 1; Material No.5-2, Part I, 2 (Japanese ONLY)】

### 2. Treatment of Article 414 (enforcement of performance)

The Working Group proposes further deliberation on whether there exists any provision to delete among each paragraph of Article 414 of the Civil Code because of its procedural nature, after confirming the policy that, among provisions on enforcement of performance, substantive rules should be set forth in the Civil Code whereas procedural rules should be set forth in procedural law such as the Civil Execution Act, etc.

On this occasion, the Working Group also proposes deliberation in the direction that, when it is difficult to distinguish whether a provision is substantive or procedural, a general provision is stipulated in the Civil Code which forms a bridge between the substantive law and the procedural law in a form not to obstruct detailed provisions being stipulated in the procedural law. In addition, the Working Group proposes further deliberation that a provision which lists the methods of enforcement is stipulated in the Civil Code as a concrete example of such a general provision.

Further, the Working Group proposes deliberation in the direction to set forth provisions on enforcement of performance in Part Three Obligation of the Civil Code as to a matter of placement of provisions.

【*See*: Material No.5-1, Part I, 2; Material No.5-2, Part I, 2 and (Related issues)(Japanese ONLY)】

### 3. Right to demand subsequent completion of performance

As to a general provision on the right to demand subsequent completion of performance when the obligee has made an incomplete performance, the Working Group proposes further deliberation from the viewpoint whether a meaningful provision can be stipulated based on the progress of examination of the provisions of

each contract rule which individually and concretely stipulate rights of the obligee granted due to incomplete performance.

【*See*: Material No.5-1, Part I, 3; Material No.5-2, Part I, 3 (Japanese ONLY)】

**4. Limitation of the right to demand performance**

The Working Group proposes further deliberation in the direction that a provision on limitation of the right to demand performance is stipulated and its standard for decision includes comprehensive considerations of the purpose of the contract, which is the standard within the contract, and conventional wisdom or transactional notion of society, which is the standard outside the contract.

The Working Group also proposes further deliberation on concrete grounds to limit the right to demand performance taking the grounds for limitation under the principle of faith and trust into consideration.

【*See*: Material No.5-1, Part I, 4; Material No.5-2, Part I, 4 and (Related issues)(Japanese ONLY)】

**5. Grounds to limit the right to demand subsequent completion of performance**

The Working Group proposes further deliberation of the necessity to stipulate the special grounds for limitation of the right to demand subsequent completion of performance, based on the progress of examination on the right of subsequent completion (Part VI, 1) and the progress of examination of the provisions on each contract rule which individually and concretely stipulate rights of the obligee granted due to incomplete performance (Material No.15-1), and in view of the circumstances such as diversity of the methods of completion and the burden of the obligee due to demanding subsequent completion before claiming damages.

【*See*: Material No.5-1, Part I, 4(Related issues); Material No.5-2, Part I, (Related issues)(Japanese ONLY)】

**Part II. Damages Caused by Non-performance of an Obligation**

**1. Materialization and clarification of "If an obligor fails to perform consistent with the purpose of its obligation" (Article 415 of the Civil Code)**

**(1) Required mode of non-performance to claim compensation due to impossibility of performance (the latter part of Article 415)**

The Working Group proposes further deliberation in the direction of clearly stipulating the case law theory which includes, as concrete contents of the requirements under "in cases it has become impossible to perform due to reasons attributable to the obligor" (the latter part of Article 415 of the Civil Code), not only cases of physical impossibility but also cases of legal impossibility, keeping the relationship with the grounds for limitation of the right to demand performance in mind.

【*See*: Material No.5-1, Part II, 2(1); Material No.5-2, Part II, 2(1)(Japanese ONLY)】

**(2) Procedural requisites for damages against the obligor in delay of performance**

The Working Group proposes that the obligee can demand compensation without cancellation of the contract if the obligee demands the obligor who delays in performance to perform his or her obligation within a reasonable period and such period has lapsed (*see,* Article 541 of the Civil Code).

【*See*: Material No.5-1, Part II, 2(2); Material No.5-2, Part II, 2(2)(Japanese ONLY)】

**(3) Prerequisites for delay of performance of an obligation with unspecified due date (Art.412)**

The Working Group proposes that, as prerequisites for delay of performance of an obligation with unspecified due date, in addition that the obligor becomes aware of the arrival of the time limit (Article 412 (2) of the Civil Code) it is enough if the obligee sends a notice on the arrival of the due date to the obligor and the notice has reached to the obligor.

In addition, the Working Group proposes deliberation of the appropriateness of the case law theory that the obligation of damages due to tort becomes delay of performance simultaneously with the occurrence of the damage and the necessity of stipulating a provision to that effect.

【*See*: Material No.5-1, Part II, 2(3); Material No.5-2, Part II, 2(3)(Japanese ONLY)】

**(4) Refusal of performance before the due date**

As to making the situation that the obligor eventually and determinately refuses performance of his or her obligation before the due date (refusal of performance before the due date) as one condition to form the right to claim compensatory damages, the Working Group proposes further deliberation of how the concrete requirements should be and what kind of effects other than compensatory damages should accrue due to such situation, keeping the possible threat risk that the obligee may receive unjustifiable interests in mind.

【*See*: Material No.5-1, Part II, 2(4); Material No.5-2, Part II, 2(4)(Japanese ONLY)】

**(5) Damages due to delay and impossibility of subsequent completion of performance**

As to the prerequisite for damages in lieu of subsequent completion in cases where the obligor who is demanded subsequent completion delays to do so or it is impossible to perform subsequent completion, the Working Group proposes further deliberation from the viewpoint of whether it is possible to establish appropriate prerequisites with the considerations of diversity of the methods of subsequent

completion along with examination of warranty under each contract rule.

【*See*: Material No.5-1, Part II, 2(5); Material No.5-2, Part II, 2(5)(Japanese ONLY)】

**(6) Treatment of the former part of Article 415 of the Civil Code**

The Working Group proposes that a comprehensive requirement such as “If an obligor fails to perform consistent with the purpose of its obligation” (the former part of Article 415 of the Civil Code) is maintained even when materialization and clarification of requirements for damages due to non-performance of an obligation is sought by stipulation of provisions.

【*See*: Material No.5-1, Part II, 2(6); Material No.5-2, Part II, 2(6)(Japanese ONLY)】

## 2. About “reasons attributable to the obligor” (the latter part of Article 415 of the Civil Code)

**(1) Scope of application of “reasons attributable to the obligor”**

The Working Group proposes review of Article 415 of the Civil Code in relation to the point that the requirement of “reasons attributable to the obligor” is currently set forth only in the latter sentence of the article. The Working Group proposes revision of the article in the direction of putting the case law theory in the statutory form which applies the same requirement to non-performance of obligations in general.

【*See*: Material No.5-1, Part II, 3(1); Material No.5-2, Part II, 3(1)(Japanese ONLY)】

**(2) Meaning and the way of stipulation of “reasons attributable to the obligor”**

Upon confirming the recognition that case law does not necessarily adopts the principle of negligence liability concerning the ground to impose liability for damages due to non-performance of obligations, the Working Group proposes further deliberation on the issue of whether it is appropriate to make the binding effect of contracts the ground for imposing such liability.

As to the wording of “reasons attributable to the obligor,” the Working Group proposes further deliberation from the viewpoint whether it is possible to replace this language into a more suitable wording or whether such replacement is appropriate in relation to the ground for imposing liability for damages due to non-performance. In doing so, the Working Group proposes deliberation taking account of how change of the wording gives an influence to transaction practice, court practice, provisions on statutory claims under the Civil Code, and provisions in other laws and regulations.

【*See*: Material No.5-1, Part II, 3(2); Material No.5-2, Part II, 3(2)(Japanese ONLY)】

**(3) Treatment of impossibility of performance due to reasons not attributable to the obligor after delay of performance due to reasons attributable to the obligor**

The Working Group proposes putting the case law theory in the statutory form which, when impossibility of performance due to reasons not attributable to the obligor occurs after delay of performance due to reasons attributable to the obligor, a claim of compensatory damages is admissible as long as there is a causal relationship between the delay of the performance and the impossibility of performance.

【*See*: Material No.5-1, Part II, 3(3); Material No.5-2, Part II, 3(3)(Japanese ONLY)】

**3. Scope of damages (Article 416 of the Civil Code)**

**(1) Way of stipulation on the scope of damages**

As to Article 416 of the Civil Code which stipulates the scope of damages, the Working Group proposes further deliberation on the advisability of clarifying the provision on the scope of damages through arranging the concrete rules guided from the view of case law and court practice, the theory of legally sufficient cause, and the foreseeability rules (the protected scope theory and the contractual interests theory).

【*See*: Material No.5-1, Part II, 4(1); Material No.5-2, Part II, 4(1)(Japanese ONLY)】

**(2) Actor and time of foreseeing (Article 416 (2) of the Civil Code)**

The Working Group proposes further deliberation on the actor of foreseeing along with the deliberation of above (1) taking account of the view of court practice which deems the obligor the actor, and another view which deems both parties the actor as well as the view which proposes to establish rules based on the attribute of contractual parties.

As to the time of foreseeing, the Working Group also proposes further deliberation, along with the deliberation of above (1), on the view of court practice which deems the time of non-performance the time of foreseeing and another view which deems the time of forming the contract as a general rule, taking account of the necessity to prevent unjust expansion of injury

【*See*: Material No.5-1, Part II, 4(2); Material No.5-2, Part II, 4(2)(Japanese ONLY)】

**(3) Object of foreseeing (Article 416 (2) of the Civil Code)**

As to issue that whether the object of foreseeing is “circumstances” or “damage”, if it becomes “damage”, the Working Group proposes further deliberation on whether the “damage” includes the amount of damages taking account of adoption of the foreseeability rule in the scope of damages and the relationship between the issue of the scope of damages and the issue of calculation of the amount of damages.

【*See*: Material No.5-1, Part II, 4(2)(related issues); Material No.5-2, Part II, 4(2)(related

issues)(Japanese ONLY)】

(4) **Necessity of special provisions on the scope of damages in the case of** non-performance of an obligation with intention or gross negligence

As to special provisions on the scope of damages in the case of non-performance of an obligation with intention or gross negligence, taking the basic stance that such rules are unnecessary, the Working Group proposes further deliberation on whether it is necessary to stipulate a provision of which required conditions are limited to the malicious intention to betray the other party and the intention to harm the other party.

【*See*: Material No.5-1, Part II, 4(2)(related issues); Material No.5-2, Part II, 4(2)(related issues)(Japanese ONLY)】

**(5) Provision on general principle of the standard time for calculating the amount of damages and the calculation rule of the amount of damages**

The Working Group proposes further deliberation on putting various case law theories on calculation of the amount of damages into the statutory form, arranging the relationship with the issue on the scope of damages and the issue of the required condition to cancel the contract based on non-performance of the obligation, from the viewpoint whether it is appropriate to stipulate a general principle expecting the case where the price of the thing is compensated based on these case law theories.

【*See*: Material No.5-1, Part II, 4(3)(4)(5)(related issues); Material No.5-2, Part II, 4(3)(4)(5)(related issues)(Japanese ONLY)】

## 4. Comparative Negligence (Article 418 of the Civil Code)

### (1) Conditions

As to the scope of application of comparative negligence (Article 418 of the Civil Code), there are case law and interpretation of theory that it includes not only when the obligee is negligent in occurrence of non-performance of obligations but also when the obligee is negligent in occurrence and expansion of the damage. Based on this case law and interpretation of theory, the Working Group proposes further deliberation in the direction to putting this understanding into statutory form. On this occasion, the Working Group also proposes deliberation on the issue whether the idea of the duty to mitigate damage should be introduced taking account of the relationship with the debate on the ground to impose responsibility of damages due to non-performance of obligations (Part II, 2 (2) above).

In addition, the Working Group proposes deliberation on the necessity of the legal theory to limit comparative negligence in case of non-performance of obligations due to the obligor’s intention or gross negligence, and the necessity of the provision to the effect that the obligee can claim compensation of expenses accrued in order to

prevent occurrence or expansion of damage against the obligor.

【*See*: Material No.5-1, Part II, 5(1); Material No.5-2, Part II, 5(1) (Japanese ONLY)】

**(2) Effects**

Along with the discussion on the issue of conditions (above (1)), the Working Group proposes further deliberation on whether the effect of comparative negligence should be modified from mandatory to discretionary.

【*See*: Material No.5-1, Part II, 5(2); Material No.5-2, Part II, 5(2) (Japanese ONLY)】

**5. Profit and loss set-offs**

The Working Group proposes to put profit and loss set-offs which are employed in court practice into statutory form.

【*See*: Material No.5-1, Part II, 6; Material No.5-2, Part II, 6 (Japanese ONLY)】

**6. Special provisions for monetary debt (Article 419 of the Civil Code)**

**(1) Special provisions for conditions: exemption due to force majeure**

The Working Group proposes further deliberation on the view which, on the premise that there is a room to grant exemption as to non-performance of monetary obligation, proposes to delete Article 419 (3) and to grant exemption of monetary debt based on the general rules of non-performance of obligations, and the view which proposes to remain the special provisions for monetary debt and to grant exemption only due to force majeure.

【*See*: Material No.5-1, Part II, 7(1); Material No.5-2, Part II, 7(1) (Japanese ONLY)】

**(2) Special provisions on effects: compensation of damages with the interest rate exceeding statutory interest rate**

As to the view that a compensation claim for damages with the interest rate exceeding statutory interest rate in case of non-performance of monetary obligations should be admissible, it is pointed out that there is a possibility that the obligor owes excessive liability in case where the obligor is a consumer or small or medium enterprise. Based on this indication, the Working Group proposes further deliberation on appropriateness of the case law theory which generally denies a compensation claim for damages with the exceeding interest rate.

【*See*: Material No.5-1, Part II, 7(1); Material No.5-2, Part II, 7(1) (Japanese ONLY)】

**7. Necessity of the provision limiting the effect of waiver clause over the liability of non-performance of obligations**

The Working Group proposes deliberation on the necessity to stipulate a provision limiting the effect of waiver clause over the liability of non-performance of obligations,

taking account of the relationship with the regulation of unfair terms (Material No.13-1, Part I) and the relationship with the special provisions disclaiming warranty (Article 572 of the Civil Code).

**Part III. Cancellation of contracts**

**1. Arrangement of requirements for forms of non-performance of obligations as a ground of cancellation (Article 541-543 of the Civil Code)**

**(1) Necessity to limit "where on of the parties does not perform his or her obligations" in Article 541 of the Civil Code and "If performance has become impossible, in whole or in part" in Article 543 of the Civil Code**

As to forms of non-performance of obligations among the conditions for cancellation due to non-performance, case law and theory denies cancellation due to violation of an incidental obligation or slight partial impossibility. Based on this, the Working Group proposes further deliberation in the direction of putting this case law theory into statutory form.

On this occasion, the Working Group proposes further deliberation on the following issues.

(i) As to the conditions to deny cancellation in the above case law theory, there are a view which relies on the degree of non-performance such as "serious non-performance" and a view which relies on the kind of obligations such as "incidental obligation." The Working Group proposes further deliberation of these views.

(ii) When the degree of non-performance is employed as a criterion to deny cancellation in the discussion above (i), there are proposals of concrete wording of the conditions such as "slight non-performance", "not serious non-performance of a contractual obligation", and "it is still possible to achieve the purpose of the contract." The Working Group proposes further deliberation on this issue as well.

(iii) The Working Group proposes further deliberation on whether the obligee or obligor should owe the burden of proof on the conditions to deny cancellation due to non-performance under above (i) and (ii).

(iv) The Working Group proposes further deliberation on the conditions to grant cancellation without giving a demand notice in light of the view that it is granted when there is serious non-performance focusing on the degree of non-performance, the view that it is granted when giving a demand notice is meaningless regardless of the degree of non-performance, and the view that it is granted when there is non-performance of a primary obligation and that non-performance has made impossible to achieve the purpose of the contract.

(v) If the degree of non-performance becomes at issue under the discussion of (i) to (iv) above, the Working Group proposes further deliberation on whether the obligor's conduct after non-performance should be taken account in making such decision.

(vi) As to the relationship between cancellation with a demand notice and cancellation without a demand notice, the Working Group proposes further deliberation on the view that cancellation with a demand notice should be the general rule and each type of cancellation should be independently stipulated, in light of considering the contents of the justifying principle of cancellation with a demand notice and its sameness and differences with the justifying principle of cancellation without a demand notice.

(vii) With the consideration that cancellation can give disadvantages to the obligor, the Working Group proposes further deliberation that the conditions of cancellation includes considerations on the obligee's circumstances to accept such disadvantages, along with the issue discussed in 2 below (Necessity of "due to reasons not attributable to the obligor").

【*See*: Material No.5-1, Part III, 2(1)(2); Material No.5-2, Part III, 2(1)(2) (Japanese ONLY)】

**(2) Cancellation due to incomplete performance**

The Working Group proposes further deliberation on whether to stipulate the general provision on cancellation due to incomplete performance, along with the general provision on cancellation due to non-performance (above (1)) and provisions on warranty in sales (Material No.15-1, II, 2).

【*See*: Material No.5-1, Part III, 2(3); Material No.5-2, Part III, 2(3) (Japanese ONLY)】

**(3) Refusal of performance before the due date**

As to the issue of whether the obligor's determinate and eventual refusal of performance before the due date should be one condition for forming the right of cancellation, the Working Group proposes further deliberation on concrete condition setting such as whether a demand notice is necessary, or whether it should be clearly stated in the provision that it is necessary that refusal of performance is such a degree of causing serious non-performance, taking account of consistency with the general conditions of cancellation due to non-performance of obligations (above (1)) and the relationship with the issue of compensatory claims due to refusal of performance (above II, 1 (4)).

【*See*: Material No.5-1, Part III, 2(4); Material No.5-2, Part III, 2(4) (Japanese ONLY)】

**(4) Necessity of a comprehensive provision for cancellation due to non-performance of an obligation**

The Working Group proposes to maintain the comprehensive condition of “in cases where one of the parties does not perform his/her liability” (Article 541 of the Civil Code) even when we would decide to pursue materialization and clarification of conditions of cancellation under (1) through (3) above.

【*See*: Material No.5-1, Part III, 3(2); Material No.5-2, Part III, 3(2) (Japanese ONLY)】

**2. Necessity of “due to reasons not attributable to the obligor” (Article 543 of the Civil Code)**

As to the issue of whether reasons attributable to the obligor is unnecessary as a condition for cancellation, the Working Group proposes further deliberation including whether condition setting to consider circumstances that the obligor should accept disadvantages due to cancellation should be stipulated, taking account of the necessity to maintain the system of risk burden and the meaning to secure consecutiveness with the current law.

【*See*: Material No.5-1, Part III, 3(3); Material No.5-2, Part III, 3(3) (Japanese ONLY)】

**3. Effect of cancellation based on non-performance of an obligation (Article 545 of the Civil Code)**

**(1) Treatment of the right to demand performance through cancellation**

The Working Group proposes that, regardless of the debate on the legal nature of the effect of cancellation, a provision is stipulated that parties to a contract becomes unable to demand performance due to cancellation of the contract as a basic effect of cancellation.

【*See*: Material No.5-1, Part III, 4(1)(related issues); Material No.5-2, Part III, 4(1)(related issues) (Japanese ONLY)】

**(2) Scope of the duty of restoration through cancellation (Article 545 (2) of the Civil Code)**

The Working Group proposes further deliberation on concrete contents of a provision in the direction to reflect case law and legal theory into the provision that, on the duty of restoration through cancellation, the duty to return things other than money includes the duty to return any fruit or benefit through use.

On this occasion, the Working Group proposes deliberation of the following issues as well: ① Necessity of a provision on the duty of restoration in cases where cancellation has the effect only to the future; ② The way of treatment and necessity of a provision in cases where the value of the subject matter under the duty of

restoration has become decreased due to the lapse of time; ③ The way of treatment and necessity of a provision to adjust the scope of the duty of restoration based on the mode of non-performance which resulted in cancellation, subjective elements of the obligor, and the background which non-performance occurred; ④ Necessity of a provision to enable treatment to divide both parties' burden of restoration based on the degree of contribution of both parties to the cause of non-performance; ⑤ Contents and necessity of a provision of the duty of restoration of an obligation of which the contents includes only the obligor's conduct (*nasu saimu*); ⑥ Necessity of a provision on the ground to limit the duty of restoration in relation to the issue of the ground to limit the claim for performance (above I, 4); ⑦ Necessity of a special provision in cases when a consumer owes the duty of restoration.

【*See*: Material No.5-1, Part III, 4(2); Material No.5-2, Part III, 4(2) (Japanese ONLY)】

**(3) Treatment of cases where the subject matter of restoration is lost or damaged**

As to the necessity of a provision stipulating treatment of cases where the subject matter of restoration is lost or damaged, the Working Group proposes further deliberation on whether a useful provision can be stipulated through consideration of consistency with the stance that the provision on the ground to limit a claim for performance can be applicable to this occasion and appropriateness of the view that grants the duty to return value in lieu of restoring the subject matter to the extent of the value of counter-performance, taking account of the consistency with the issue on the scope of the duty to return in case of deliberation has made based on an ineffective contract (Material No. 13-1, II, 3(2)).

【*See*: Material No.5-1, Part III, 4(3); Material No.5-2, Part III, 4(3) (Japanese ONLY)】

**4. Extinguishment of the right to cancellation by acts of the right holder (Article 548 of the Civil Code)**

The Working Group proposes that on Article 548 of the Civil Code, the right of cancellation is not extinguished when the right holder processed or altered the subject matter of the contract without knowing the existence of the right of cancellation.

【*See*: Material No.5-1, Part III, 5; Material No.5-2, Part III, 5 (Japanese ONLY)】

**5. Cancellation of multiple contracts**

As to the necessity of a provision on occasions where cancellation of the whole multiple contracts is admissible based on non-performance of an obligation under one of these contracts, the Working Group proposes further deliberation of concrete condition setting paying attention to regulating not only when these contracts are formed between the same parties but also when they are formed among various

different parties, taking account of the consistency with the issue on nullity of juridical acts among multiple parties (Material No.13-1, II, 2(1)).

【*See*: Material No.5-1, Part III, 6; Material No.5-2, Part III, 6 (Japanese ONLY)】

**6. Necessity of special provision on revocation of manifestation of intention of cancellation under labor contracts**

The Working Group proposes deliberation of the necessity of a provision that, in labor contracts, a labor can revoke manifestation of intention of cancellation for a certain period of time even when the labor has made such manifestation of intention.

**Part IV. Assumption of risk (Articles 534 to 536 of the Civil Code)**

**1. Limitation of the scope of application of the Obligee Principle (Art.534 of the Civil Code)**

Article 534 (1) of the Civil Code provides that, in cases where the purpose of a bilateral contract is the creation or transfer of real rights regarding specified things, if the things have been lost or damaged due to reasons not attributable to the obligor, such loss or damage shall fall on the obligee. The Working Group proposes further deliberation, upon confirming to review in the direction to limit the applicable scope of this provision, on the concrete scope of application taking account of the consistency with the issue of the provision on the limitation to exercise cancellation of sales contracts in case when the Working Group concludes that cancellation does not require the reason attributable to the obligor (Material No.15-1, Part III, 5 (2)).

【*See*: Material No.5-1, Part IV, 2; Material No.5-2, Part IV, 2 (Japanese ONLY)】

**2. The relationship between cancellation based on non-performance of an obligation and assumption of risk**

If the Working Group concludes that cancellation due to non-performance of an obligation does not prerequisite the reason attributable to the obligor, the scope of application for cancellation through non-performance and the scope of application for assumption of risk overlap with each other. The Working Group proposes further deliberation on how to treat this problem taking account of various issues (e.g., if the system were unified to cancellation, adjustment of necessary cases where special provisions based on the idea of assumption of risk are necessary, necessity of provisions to adjust interests when temporary impossibility of performance occurs during a continuing contract, and necessity to review provisions on the right to demand performance to maintain the right of cancellation and the ground for extinguishment of the right to cancellation.

【*See*: Material No.5-1, Part IV, 3; Material No.5-2, Part IV, 3 (Japanese ONLY)】

### 3. Treatment of Article 536 (2)

Regardless of the conclusion on the review of the relationship between cancellation based on non-performance of an obligation and assumption of risk, the Working Group proposes to maintain substantial regulations provided in Article 536 (2) of the Civil Code. On that basis, the Working Group proposes further deliberation on concrete method of provision and the contents of provision such as whether this regulation should be set forth as a general regulation or an individual regulatory provision corresponding to specialties of each type of contractual form.

In addition, the Working Group proposes further deliberation about the review of Articles 535 and 547 of the Civil Code along with the review of the relationship between cancellation based on non-performance of an obligation and assumption of risk.

【*See*: Material No.5-1, Part IV, 3 (related issues); Material No.5-2, Part IV, 3 (related issues)(Japanese ONLY)】

## Part V. Delay in acceptance (Article 413 of the Civil Code)

### 1. Materialization and clarification of effects

As to the effects of delay in acceptance which are accepted without dispute in case law and theory, the Working Group proposes further deliberation in the direction of clearly stipulating concrete contents of such effects in the text of law.

On this occasion, the Working Group also proposes further deliberation on the issue of whether it is necessary to grant forfeiture of the interest of time for the opposing obligation as an effect of delay in acceptance in connection with the issue of the effect of refusal of performance before due date (above II, 1(4) and III, 1 (3)) and treatment of Article 536 (2) of the Civil Code (above IV, 3).

【*See*: Material No.5-1, Part V, 2; Material No.5-2, Part V, 2 (Japanese ONLY)】

### 2. Advisability of a claim for damages and cancellation

The Working Group proposes further deliberation on whether a provision should be stipulated, as an effect of delay in acceptance, to the effect that if an obligee breaches the duty of acceptance which the obligee owes based on an agreement or the principle of fair and trust, the obligor obtains the right to damages or the right of cancellation of the contract, taking account of the practical necessity of such a provision and possible occurrence of negative effect.

In addition, the Working Group proposes further deliberation on the issue of whether a provision of compulsory acceptance based on an agreement should be stipulated in connection with deliberation on requirements and effects of delay in acceptance.

【*See*: Material No.5-1, Part V, 3; Material No.5-2, Part V, 3 (Japanese ONLY)】

## Part VI. Other new provisions

### 1. Right of subsequent completion

As to whether a provision granting the right of subsequent completion of the obligor should be established, the Working Group proposes further deliberation from the viewpoint of whether the right of subsequent completion is appropriate as a system to protect the obligor's interest of subsequent completion, along with concretely clarifying the contents which can be claimed with the right of subsequent completion and occasions where such right may be necessary.

【*See*: Material No.5-1, Part VI, 1; Material No.5-2, Part VI, 1 (Japanese ONLY)】

### 2. Liability of the obligor when non-performance of the obligation occurred owing to an action of a third party

As to liability of the obligor when non-performance of the obligation occurred owing to an action of a third party whom the obligor used to perform the obligation, the Working Group proposes further deliberation on what kind of regulation is appropriate, taking account of the view which, classifying the types of third parties, proposes to stipulate the requirements corresponding to each type, and the view which proposes to decide liability of the obligor based on how far the content of the obligor's obligation involves his or her liability as to an action of a third party without setting requirements based on classification of the types of third parties.

【*See*: Material No.5-1, Part VI, 2; Material No.5-2, Part VI, 2 (Japanese ONLY)】

### 3. Right to demand compensation in lieu

The Working Group proposes further deliberation as to the necessity to stipulate a provision on the right to demand compensation in lieu and the scope of application in case of setting forth such a provision, taking account of the relationship with the right of reimbursement which the obligee obtains from non-performance of the obligation and the necessity of stipulating the provision on the right to demand compensation in lieu corresponding to types of contracts.

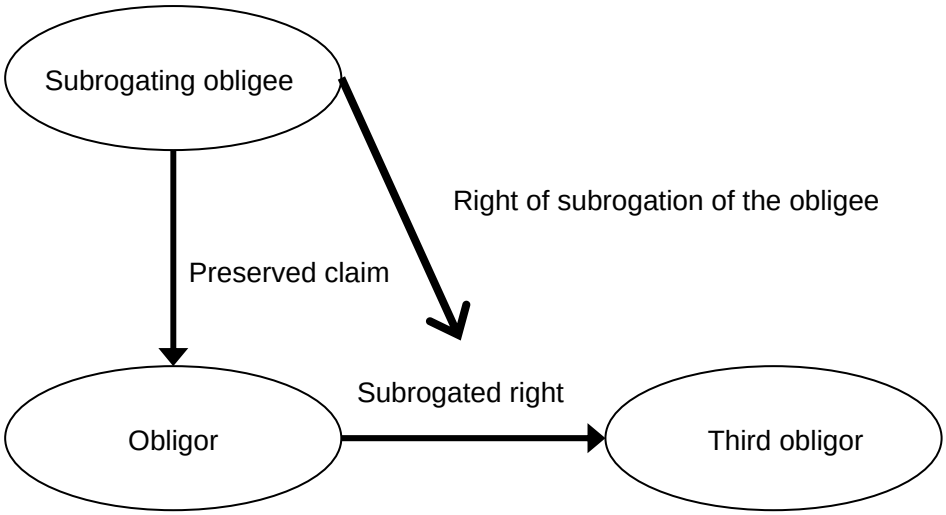
【*See*: Material No.5-1, Part VI, 3; Material No.5-2, Part VI, 3 (Japanese ONLY)】

## Part VII. Right of subrogation of the obligee

[Note] In this "Part I. Rights of subrogation of the obligee," the following terms are used:

"Subrogating obligee" :The obligee exercising the right of subrogation
"Obligor" :The obligor of the preserved claim which the subrogating obligee possesses
"Third obligor" :The opposing party to the right which the subrogating

obligee exercises subrogation (subrogated right)




**1. Classification of "subrogation right in the original form" and "subrogation right in a diversion form"**

It is stated that the right of subrogation by the obligee is in essence the system that the subrogating obligee preserves nonexempt property of the obligor and prepares for execution (subrogation right in the original form). However, in reality this system is utilized as a method to realize non-monetary claim (specific claim) without any relation to preserving nonexempt property (subrogation right in a diversion form). Accordingly, the Working Group proposes further deliberation in the direction to establish provisions which distinguish both forms as necessary because it is expected that they are applied to different occasions.

【*See*: Material No.7-1, Part I, 1 (related issues); Material No.7-2, Part I, 1 (related issues) (Japanese ONLY)】

**2. How subrogation right in the original form should be**

**(1) Necessity of the system of subrogation right in the original form**

Case law grants the subrogating obligee to demand the third obligor to directly deliver the money which is the subject matter of the subrogated right to the subrogating obligee. Based on this, the subrogating obligee can collect claims without obtaining the title of debt through offsetting the obligation to return received money to the obligor by the preserved claim, which is simpler than attaching the obligor's claim. (This is called "prioritized payment in effect.") On the other hand, there are the civil execution system (compulsory execution system) as a system to collect claims and the civil preservation system (attachment system) as a system to preserve nonexempt property of the obligor. Facing the fact that these systems and the subrogation right in the original form exist in parallel, there is a view that there is

no necessity to preserve the system of the subrogation right in the original form. However, the subrogation right in the original form has a function which cannot be substituted by the systems of civil execution and attachment, and therefore the Working Group proposes further deliberation in the direction to preserve it.

【*See*: Material No.7-1, Part I, 2 (1); Material No.7-2, Part I, 1, 2(1) (Japanese ONLY)】

**(2) Advisability of the function of collecting claims (prioritized payment in effect)**

While there is an opinion that the function of collecting claims (prioritized payment in effect) under the subrogation right in the original form should not be permissible, there is another opinion that we have to be careful on denying this function. Based on these opinions, the Working Group proposes further deliberation on this issue.

【*See*: Material No.7-1, Part I, 2 (2); Material No.7-2, Part I, 1, 2(2) (Japanese ONLY)】

**3. System design for subrogation right in the original form**

**(1) Method to deny the function to collect claims (prioritized payment in effect)**

If we adopt the view that the function to collect claims (prioritized payment in effect) under the subrogation right in the original form should be denied, there is a question that how the concrete method (scheme) for such view should be. As to this effect, the Working Group proposes further deliberation including the possible methods such as a method that the subrogating obligee is prohibited or limited from demanding direct payment of money from the third obligor, and another method that, allowing direct payment of money to the subrogating obligee, prohibits from offsetting the obligation to return that money to the obligor by the preserved claim.

In addition, when a subrogated right is a right to deliver a thing other than money, there arises issues of whether the subrogating obligee can request direct delivery to him/her and what is the requirement to allow such direct delivery. The Working Group proposes further deliberation on these issues as well.

【*See*: Material No.7-1, Part I, 3 (1) and (related issues); Material No.7-2, Part I, 1, 3(1) and (related issues)(Japanese ONLY)】

**(2) Scope which the obligee can exercise the subrogation right**

Case law limits the scope which the obligee can exercise the subrogated right to the amount of the preserved claim where the subrogating obligee exercises the right of subrogation over monetary claim based on the subrogation right in the original form. The Working Group proposes further deliberation, in cases where the function of collecting claims (prioritized payment in effect) under the subrogation right in the original form is to be denied, whether the subrogating obligee can exercise his or her subrogated right regardless of the scope of the amount of the preserved claim, which

is different from the stated case law above.

【*See*: Material No.7-1, Part I, 3 (2)】

**(3) Necessity of preservation (the requirement of insolvency)**

As to the requirement to exercise the subrogation right in the original form, both case law and generally accepted theory understand that “in order to preserve his/her own claim” under Article 423 (1) of the Civil Code (necessity of preservation) means that the obligor’s resources are insufficient to pay his or her whole obligation (insolvency). The Working Group proposes further deliberation on whether this requirement of insolvency should be concretely stipulated in the text of law.

In relating to this issue, the Working Group also proposes further deliberation on, in cases where the subrogating obligee exercises subrogation of the right to apply for real property registration for the purpose of obtaining compulsory execution over the real property, whether special treatment such as insolvency of the obligor is not necessary should be adopted.

【*See*: Material No.7-1, Part I, 3 (3) and (4)】

**4. How the subrogation right in a diversion form should be**

**(1) How the ground provision should be**

If we decide to establish independent provisions for the subrogation right in a diversion form indifferently from the subrogation right in the original form, it is necessary to consider how the ground provision should be. The Working Group proposes further deliberation on this issue including the methods such as establishing provisions independently for relevant original scopes for established occasions where the diversion form is used, and establishing a ground provision which can be generally applied to use of the subrogation right in a diversion form.

【*See*: Material No.7-1, Part I, 4 (1)】

**(2) General requirement of diversion**

If a general ground provision is stipulated on the subrogation right in a diversion form, it is necessary to consider general requirements for diversion which are applicable to various diversion cases. As to this point, the Working Group proposes further deliberation by referring to case law which stated that “when the obligee exercises subrogation of the right of the obligor under Article 423 of the Civil Code, a relationship is necessary that the obligor enjoys some interests through exercise of the right and the right of the obligee is preserved through that interests.”

【*See*: Material No.7-1, Part I, 4 (2)】

**(3) Admissibility of direct payment to the surrogating obligee and its requirement**

When a subrogated right is the right to request to deliver money or other thing, there also arises issues whether, in case of the subrogation right in a diversion form, the subrogating obligee can request direct delivery and if it is admissible, what is the requirement to allow such direct delivery. The Working Group proposes further deliberation on these issues as well.

【*See*: Material No.7-1, Part I, 4 (2)(related issue)】

**5. Clarification of provisions on requirements and effects**

**(1) Requirement on preserved claims and subrogated rights**

As to the requirement on preserved claims, the Working Group proposes further deliberation in the direction that the subrogation right of the obligee cannot be exercised, in addition to cases where the preserved claim has not yet due (Article 423 (2) of the Civil Code), when the preserved claim is the claim which the obligee cannot demand performance through filing an action or satisfy through execution.

In addition, the Working Group also proposes further deliberation in the direction that, as a requirement on subrogated rights, exercise of subrogation is barred over the rights, in addition to the rights which are exclusive and personal to the obligor, which attachment is prohibited.

【*See*: Material No.7-1, Part I, 5 (1)】

**(2) Necessity to notify to the obligor**

The Working Group proposes further deliberation on whether notification to the obligor should be required as a requirement to allow exercising the right of subrogation of the obligee in order to secure the opportunity to exercise the subrogated right by the obligor himself/herself as well as giving the opportunity to contest existence of the preserved claim by the obligor.

In addition, the Working Group also proposes further deliberation on, if notification to the obligor is required, time of notification and effects of violating the duty of notification.

【*See*: Material No.7-1, Part I, 5 (2)】

**(3) Effect of notification to the obligor**

Case law decides that, when the obligor receives notification of exercising the right of subrogation by the subrogating obligee, the obligor cannot file his or her own action or dispose the right. However, there is criticism that the status of the obligor or the third obligor becomes unstable by non-judicial notice limiting the obligor's right of disposition. Accordingly, the Working Group proposes further deliberation in the

direction that notification to the obligor does not cause any limitation of the right of disposition of the obligor.

【*See*: Material No.7-1, Part I, 5 (2)(related issue)】

**(4) Duty of care of a good manager**

The Working Group proposes further deliberation in the direction that the subrogating obligee owes the duty of care of a good manager in exercising the subrogating right.

【*See*: Material No.7-1, Part I, 5 (3)】

**(5) The right to demand compensation of expenses**

The Working Group proposes further deliberation on whether the subrogating obligor can claim compensation of expenses to the obligor if the subrogating obligee spends necessary expenses in order to exercise the subrogation right.

In addition, if this right of claiming compensation of expenses is stipulated in the text of law, the Working Group proposes further deliberation on whether such provision should also clearly state that general lien on common-area charge is granted on this compensation claim.

【*See*: Material No.7-1, Part I, 5 (4)】

**6. Status of the third obligor**

**(1) Assertion of defense**

While case law and generally accepted theory understand that the third obligor can assert to the subrogating obligee defenses which the third obligor possesses vis-à-vis the obligor, the Working Group proposes further deliberation in the direction of clarifying this in the text of law.

In addition, the Working Group also proposes further deliberation on whether the third obligor can assert to the subrogating obligee original defenses which the third obligor possesses vis-à-vis the subrogating obligee, including whether such issue should be clearly stated in the text of law.

【*See*: Material No.7-1, Part I, 6 (1) and (related issues)】

**(2) Expansion of the ground for deposit**

From the aspect to reduce burden of the third obligor who owes the duty to deliver the subject matter of the subrogated right, the Working Group proposes further deliberation on whether the ground for deposit of such subject matter should be expanded so that the third obligor can deposit the thing under certain occasions such as the subrogation right of the obligee is exercised outside of court.

【*See*: Material No.7-1, Part I, 6 (2)】

**(3) Competing claims among rights of subrogation of multiple obligees**

As to occasions where a judgment ordering delivery of money or other thing to multiple subrogating obligees is finalized, the Working Group proposes further deliberation on whether the third obligor is exempted from the obligation if he or she performs the obligation to one of these obligees.

【*See*: Material No.7-1, Part I, 6 (3)】

**7. Subrogation actions by the obligee**

**(1) Necessity of provisions**

As to the necessity of special procedural provisions on subrogation actions by the obligee, the Working Group proposes further deliberation in the direction to stipulate provisions within a necessary scope based on the result of deliberation of issues stated above 6.

【*See*: Material No.7-1, Part I, 7】

**(2) Participation of the obligor in subrogation action by the obligee**

If provisions on subrogation actions by the obligee are to be stipulated, the Working Group proposes further deliberation on whether notification of an action from the subrogating obligee to the obligor is required from the aspect of securing due process for the obligor.

【*See*: Material No.7-1, Part I, 7(1)】

**(3) Limitation of disposition by the obligor**

If provisions on subrogation actions by the obligee are to be stipulated, the Working Group proposes further deliberation on whether limitation on the obligor to exercise or dispose subrogated right should be imposed after the obligor receives notification of an action, from the aspect of preventing filing of subrogation action by the obligee becomes waste of effort.

【*See*: Material No.7-1, Part I, 7(2)】

**(4) Treatment of cases where the subrogated right is attached after subrogation action by the obligee is filed**

As to cases where another obligee attaches the subrogated right and files an action to claim payment (action for collection) after a subrogation action by the obligee is filed, case law states that even if an action to attach the subrogated right is filed by another obligee, the authority to exercise subrogation right of the subrogating obligee is not extinguished and the court can approve both actions through consolidating both claims. When provisions on the subrogation action by the obligee are to be stipulated,

the Working Group proposes further deliberation in the direction that, different from this case law, attachment is prioritized (and continuance of proceeding of the subrogation action is not allowed).

In relating to this, the Working Group also proposes further deliberation on treatment of the subrogation action of the obligee which is bared to continue due to the subrogated right is attached.

【*See*: Material No.7-1, Part I, 7(3) and related issue】

**(5) Intervention**

If provisions on subrogation actions by the obligee are to be stipulated, the Working Group proposes further deliberation in the direction of clarifying in the text of law that the obligor and other obligees can intervene in the subrogation action by the obligee.

【*See*: Material No.7-1, Part I, 7(4)】

**8. Subrogation in a judicial proceeding (Article 423(2) of the Civil Code)**

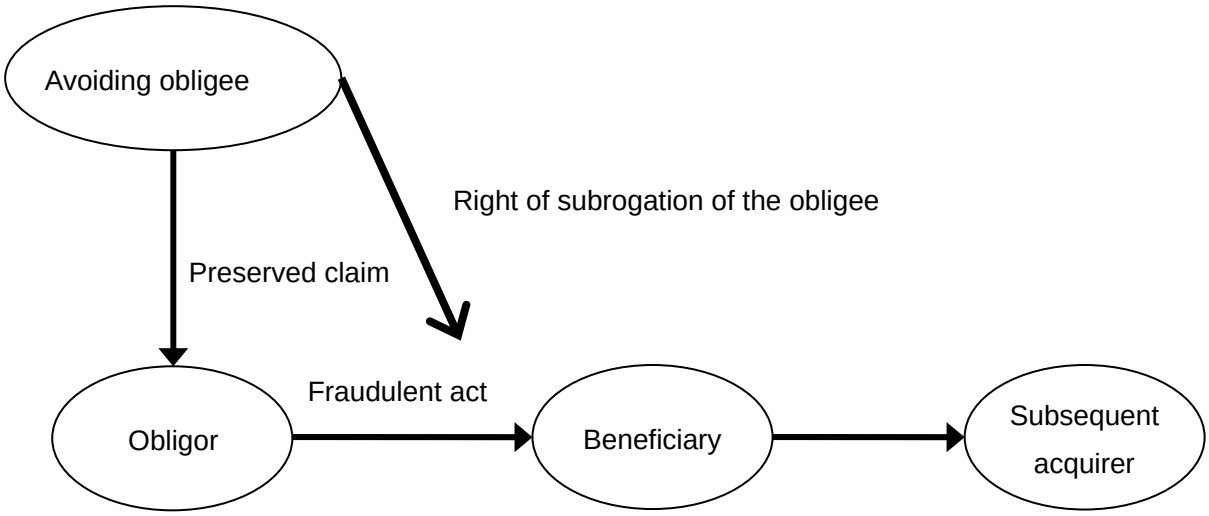
The Working Group proposes further deliberation on whether the system of subrogation in a judicial proceeding should be abolished or not.

【*See*: Material No.7-1, Part I, 8】

## Part VIII. Right to Request Avoidance of Fraudulent Acts

[Note] In this “Part VIII. Right to request avoidance of fraudulent acts,” the following terms are used:

| | |
|---|---|
| “Avoiding obligee” | :The obligee exercising the right of avoidance |
| “Obligor” | :The obligor of the preserved claim which the avoiding obligee possesses |
| “Beneficiary” | :The opposing party of the act of the obligor (fraudulent act) |
| “Subsequent acquirer” | :The party who acquires the subject matter of the fraudulent act from the beneficiary (including acquirers succeeding from the subsequent acquirer) |




**1. Legal nature of the right to request avoidance of fraudulent acts and how the action to request avoidance of fraudulent act should be**

(1) Method to recover nonexempt property of the obligor

It is stated that the case law understands the right to request avoidance of fraudulent acts (*hereinafter* "RRAFA") as a system requesting the court to avoid fraudulent acts of the obligor and to recover the missing property based on this avoidance (Eclectic theory), and the effect of avoidance arises only between the avoiding obligee and the beneficiary or the subsequent acquire, but not the obligor (relative avoidance). As to this decision, it is pointed out that this understanding cannot theoretically explain the fact that the missing property is returned to the obligor and the returned immovable property is subject to execution as nonexempt property of the obligor. Therefore, some theorists strongly argue that it is not necessary to actually recover missing property from the beneficiary or the subsequent acquirer in order to preserve nonexempt property and the missing property under avoidance should be treated as nonexempt property of the obligor leaving it with the possession of the beneficiary or the subsequent acquirer (Responsibility theory). In reviewing provisions on the RRAFA, the Working Group proposes further deliberation in the direction of overcoming independent problems of the case law theory (ecletic theory) taking account of the discussion of responsibility theory.

【*See*: Material No.7-1, Part II, 2(1); Material No.7-2, Part II, 2(1) (Japanese ONLY)】

**(2) The status of the obligee under an action for avoidance of a fraudulent act**

In order to overcome theoretical problems resulting from that the effect of avoidance does not reach the obligor (relative avoidance under case law), the Working Group proposes further deliberation on the methods such as, in filing an action for avoidance of a fraudulent act, not only the beneficiary or the subsequent acquire but also the obligor is required to become a defendant, or notification of the

action to the obligor is required.

In addition, if the obligor is to become defendant, the Working Group also proposes further deliberation on whether joinder of an action for payment against the obligor is required or not.

【*See*: Material No.7-1, Part II, 2(2) and (related issues); Material No.7-2, Part II, 2(2) and (related issues) (Japanese ONLY)】

**(3) Treatment of cases where multiple actions for avoidance of a fraudulent act are filed**

On the condition that the effect of avoidance reaches the obligor, the Working Group proposes further deliberation in occasions where multiple actions for avoidance of a fraudulent act which request avoidance of the same fraudulent act, as to how to secure unity of the contents of judgments, and how regulation should be when multiple obligees request delivery of missing property to himself or herself.

【*See*: Material No.7-1, Part II, 2(2) (related issues); Material No.7-2, Part II, 2(2) (related issues) (Japanese ONLY)】

**2. Review of a provision on requirements**

**(1) Clarification of provisions on requirements**

**a. Requirement on preserved claims**

The Working Group proposes further deliberation on whether, as to the requirements on preserved claims, it is required that preserved claim accrues before the fraudulent act, taking account of the relationship with the effect of avoidance of a fraudulent act (below 3 (2)).

In addition, the Working Group also proposes further deliberation on whether, when the preserved claim does not have a binding power, the obligee cannot exercise the RRAFA.

【*See*: Material No.7-1, Part II, 3(1) a; Material No.7-2, Part II, 3(1)a (Japanese ONLY)】

**b. Requirement of insolvency**

While it is understood that “prejudice the obligee” of “any juristic act which an obligor commits knowing that it will prejudice the obligee” (CC Art.424 (1)) means that there arises a threat of lack of nonexempt property of the obligor through the act of the obligor (requirement of insolvency), the Working Group proposes further deliberation on whether this requirement of insolvency should be clearly stated in the text of law.

【*See*: Material No.7-1, Part II, 3(1) b; Material No.7-2, Part II, 3(1)b (Japanese ONLY)】

**c. Subject of avoidance**

While Article 424 (1) stipulates that “juristic act” can be avoided if it is made by an

obligor knowing that it would prejudice the obligee, it is understood that any act other than juristic act can be the subject of avoidance. Accordingly, the Working Group proposes further deliberation in the direction to replace the text “juristic act” into “act.”

【*See*: Material No.7-1, Part II, 3(2)(related issue); Material No.7-2, Part II, 3(2)(related issue) (Japanese ONLY)】

**(2) Consistency with the requirements of the right of avoidance under the Insolvency Law**

Reforms of the Bankruptcy Act etc. in 2004 adopted the concept of unable to pay as a requirement of the time to exercise avoidance of an unfair act. Accordingly, there arises a situation that the scope of acts subject to avoidance is wider in the RRAFA, which is used at ordinary times, than in the avoidance right under the insolvency law where equality of obligees is emphasized (Reverse phenomenon). Based on this situation, the Working Group proposes further deliberation on whether the requirements of the RRAFA should be reformed so that they are consistent with the requirements of the right of avoidance of an unfair act under the insolvency law.

In addition, the Working Group also proposes further deliberation on whether a provision which stipulates general requirements of avoidance of fraudulent act (corresponding to Article 424 (1) of the Civil Code) should be maintained or not when requirements of the RRAFA are reformed in the same way as the requirements of the right of avoidance of an unfair act which are categorized based on the subject of avoidance.

【*See*: Material No.7-1, Part II, 3(2)(related issue); Material No.7-2, Part II, 3(2)(related issue) (Japanese ONLY)】

**a. Acts to extinguish an obligation**

Case law says on the RRAFA that, as to payment to a part of the obligees among acts to extinguish an obligation, it forms a fraudulent act if payment is made with an intention to harm other obligees in collusion with a specific obligee, and as to substitute payment to a part of the obligees, it forms a fraudulent act if the obligor has an intention to provide prioritized satisfaction to the only specific obligees with the knowledge that it would prejudice other obligees in collusion with the obligor regardless of the price of the subject matter. If we reform the requirements of the RRAFA so that they are consistent with the requirements of the right of avoidance under the insolvency law, the Working Group proposes further deliberations on concrete requirements for avoidance of the acts to extinguish an obligation, specifically targeting the following proposals: (1) the Proposal that acts to extinguish an obligation by the obligor should not be the object of the RRAFA except the value paid to the obligee is larger than the amount of an obligation extinguished (excessive

substitute payment); (2) the Proposal that the object of the RRAFA should be limited to non-obligatory acts which were conducted with an intention to provide prioritized satisfaction to the only specific obligees in collision with such obligees and excessive substitute payment; and (3) the Proposal that the requirements which is the same as the requirements of the right of avoidance under the insolvency law should be established.

【*See*: Material No.7-1, Part II, 3(2)a and (related issue); Material No.7-2, Part II, 3(2) a and (related issue) (Japanese ONLY)】

**b. Act to provide security for an existing obligation**

Case law says that provision of security for an existing obligation to a part of obligees can form a fraudulent act because it gives prioritized payment to the obligees and harms other obligees. If we reform the requirements of the RRAFA so that they are consistent with the requirements of the right of avoidance under the insolvency law, the Working Group proposes further deliberations on concrete requirements for avoidance of the act to provide security for an existing obligation, specifically targeting the following proposals: (1) the Proposal that an act to provide security for an existing obligation should not be the object of RRAFA; (2) the Proposal that an act to provide security for an existing obligation should not be the object of RRAFA, except it is a non-obligatory act made with an intention to provide prioritized satisfaction to the only specific obligees in collision with such obligees; (3) the Proposal that the requirements which is the same as the requirements of avoidance of provision of security (Article 162 of the Bankruptcy Act) should be established.

【*See*: Material No.7-1, Part II, 3(2)b; Material No.7-2, Part II, 3(2) b (Japanese ONLY)】

**c. Acts to dispose properties with reasonable value**

Case law says on acts to dispose properties such as immovable properties with reasonable value that an act to exchange immovable property, which has high value as joint security for obligees, to money, which is easy to use and hide, can form a fraudulent act because the act can substantially reduce joint security for obligees. If we reform the requirements of the RRAFA so that they are consistent with the requirements of the right of avoidance under the insolvency law, the Working Group proposes further deliberations on whether the requirements which is the same as the requirements of avoidance of acts of disposition of properties with reasonable value (Article 161 of the Bankruptcy Act) should be established as the requirements for avoidance of acts to dispose properties with reasonable value.

【*See*: Material No.7-1, Part II, 3(2) c; Material No.7-2, Part II, 3(2) c (Japanese ONLY)】

**d. Acts of simultaneous exchange**

With regard to so-called acts of simultaneous exchange such as newly borrowing money providing security, case law says that such act does not form a fraudulent act if it is reasonable considering the purpose and the motivation of borrowing and the value of secured objective. If we reform the requirements of the RRAFA so that they are consistent with the requirements of the right of avoidance under the insolvency law, the Working Group proposes further deliberation on whether the requirements which is the same as the requirements of avoidance of acts of disposition of properties with reasonable value (Article 161 of the Bankruptcy Act) should be established as the requirements for avoidance of acts of simultaneous exchange because under the Bankruptcy Act, the act of simultaneous exchange is avoidable with the same requirements for the act of disposition of properties with reasonable value.

【*See*: Material No.7-1, Part II, 3(2) d; Material No.7-2, Part II, 3(2) d (Japanese ONLY)】

**e. Gratuitous acts**

If we reform the requirements of the RRAFA so that they are consistent with the requirements of the right of avoidance under the insolvency law, the Working Group proposes further deliberation on whether the requirements which is same as the requirements of avoidance for gratuitous acts (Article 160 (3) of the Bankruptcy Act) as the requirements to avoid gratuitous transfer of properties, sale of properties with unreasonably low prices, and an act to owe an obligation without value (gratuitous acts).

【*See*: Material No.7-1, Part II, 3(2) e; Material No.7-2, Part II, 3(2) e (Japanese ONLY)】

**f. Acts to obtain requirements of perfection**

Case law on acts to obtain requirements of perfection states that it is inappropriate to grant use of the RRAFA over only the act to obtain requirements of perfection. Thus, the Working Group proposes further deliberation on whether acts to obtain requirements of perfection should be the object of avoidance of fraudulent acts, and if they should, whether the requirements for avoidance of such acts should be the same as the requirements to avoid acts to obtain requirements of perfection (Article 164 of the Bankruptcy Act), even if we reform the requirements of the RRAFA so that they are consistent with the requirements of the right of avoidance under the insolvency law.

【*See*: Material No.7-1, Part II, 3(2) f; Material No.7-2, Part II, 3(2) f (Japanese ONLY)】

**g. Requirements of the right to request avoidance of a fraudulent act against a subsequent acquirer**

While the current Civil Code Article 424 (1) proviso requires knowledge of a subsequent acquire about “the fact that the obligee is to be prejudiced” as a

requirement to exercise the RRAFA over the subsequent acquire, the case law states that even if the beneficiary did not have such knowledge, the RRAFA over the subsequent acquire is available if the subsequent acquire had such knowledge. If we reform the requirements of the RRAFA so that they are consistent with the requirements of the right of avoidance under the insolvency law, the Working Group proposes further deliberation on whether the requirements which is the same as the requirements of avoidance for the subsequent acquire (Article 170 of the Bankruptcy Act) should be established as the requirement for the RRAFA over the subsequent acquire.

On this occasion, the Working Group also proposes further deliberation on whether it is required that the beneficially and all subsequent acquires know “the fact that the obligee is to be prejudiced”, rather than requiring the subsequent acquire knows about the existence of a ground for avoidance over the predecessor (in such case, it is also required that the subsequent acquire knows existence of subjective requirements of the prior acquire), and whether a special provision is necessary to govern the case where the subsequent acquire obtains the property through a gratuitous act.

【*See*: Material No.7-1, Part II, 3(2) g and (related issue); Material No.7-2, Part II, 3(2) g and (related issue) (Japanese ONLY)】

**h. Succession of an act for avoidance of a fraudulent act**

Even if provisions on requirements of the RRAFA are carefully reviewed with due considerations to consistency with the requirements of the avoidance right under the Bankruptcy Act, it is possible that the scope of acts subject to avoidance is wider in the RRAFA, which is used at ordinary times, than in the avoidance right under the insolvency law where equality of obligees is emphasized. (Reverse phenomenon)

Article 45 of the Bankruptcy Act provides succession of the proceedings by the trustee in bankruptcy when the action to request avoidance of fraudulent act brought by a bankruptcy creditor or a bankruptcy trustee was pending at the time of initiating the bankruptcy proceeding. If the problem that the scope of acts subject to avoidance is wider in the RRAFA than in the avoidance right under the insolvency law (reverse phenomenon) were to remain, among succeeded proceedings of the action to request avoidance of fraudulent acts, the part which exceeds the object of the avoidance right under the Bankruptcy Act cannot be treated as an action of avoidance. Accordingly, the Working Group proposes further deliberation on whether the bankruptcy trustee can continue proceedings as an action to request avoidance of fraudulent act.

【*See*: Material No.7-1, Part II, 3(2) h and (related issue); Material No.7-2, Part II, 3(2) h and (related issue) (Japanese ONLY)】

### 3. Review of a provision on effects

#### (1) Appropriateness of the function to collect debts (prioritized payment in effect)

Case law grants the avoiding obligee to request the beneficiary or the subsequent acquire to deliver money to be returned directly to the avoiding obligee himself. Based on this, the avoiding obligee is able to satisfy own claim prior to the beneficiary or other obligors in fact through offsetting the obligation to return the received money to the obligor and the preserved claim. The Working Group proposes further deliberation on whether the function to collect claims like this (prioritized payment in effect) should be denied or limited taking account of the viewpoint that it gives motivation to exercise the RRAFA.

In addition, if we decide to deny or limit the function of debt collection of the RRAFA, the Working Group proposes further deliberation on concrete method (framework) to do so.

【*See*: Material No.7-1, Part II, 4(1), (2) and (related issue); Material No.7-2, Part II, 4(1) (2) and (related issue) (Japanese ONLY)】

#### (2) Scope of avoidance

The case law states that the avoiding obligee can avoid a fraudulent act to the extent of the amount of his claim when the amount of preserved claim is smaller than the amount of property which is the subject matter of the fraudulent act and that property is divisible. If we decide to deny or limit the function of debt collection of the RRAFA, the Working Group proposes further deliberation on whether the avoiding obligee can avoid the fraudulent act which is not limited to the scope of the amount of the preserved claim.

【*See*: Material No.7-1, Part II, 4(3); Material No.7-2, Part II, 4(3) (Japanese ONLY)】

#### (3) Method to recover missing property

If we adopt the understanding that the legal nature of the RRAFA is to avoid a fraudulent act and to request recovery of missing property based on avoidance (eclectic theory), the Working Group proposes further deliberation on whether provisions on concrete method to recover missing property based on whether the property is able to register, or whether the property is money or other movable thing, or a claim.

Also, case law rules that the method to recover missing property should be return of the original thing as a general rule, and if it is impossible or extremely difficult, it can be compensation of the value. Thus, ff we decide to deny or limit the function of debt collection of the RRAFA, the Working Group proposes further deliberation, the Working Group proposes further deliberation on whether this should be clarified in the

text of law, taking account of the issue of the time when the value is calculated.

【*See*: Material No.7-1, Part II, 4(4), a-e; Material No.7-2, Part II, 4(4) a-e (Japanese ONLY)】

**(4) The right to demand compensation of expenses**

The Working Group proposes further deliberation on whether the avoiding obligee can demand the obligor to compensate expenses if the obligee spent necessary cost in exercising the RRAFA.

【*See*: Material No.7-1, Part II, 4(5); Material No.7-2, Part II, 4(5) (Japanese ONLY)】

**(5) Status of the beneficiary and subsequent acquirers**

**a. Recovery of claims of the beneficiary where an act to extinguish obligation is avoided**

Case law rules that the claim of the beneficiary is recovered when an act that payment or substitute payment was made from the obligor to the beneficiary is avoided. If we decide to include acts to extinguish obligations into the object of the RRAFA (*see,* above 2 (2) a), the Working Group proposes further deliberation on whether the effect that the claim of the beneficiary is recovered should be clearly stated in the text of law.

【*See*: Material No.7-1, Part II, 4(6)a; Material No.7-2, Part II, 4(6)a (Japanese ONLY)】

**b. Compensation of the value of payment in return by the beneficiary**

Under the current law, it is understood that, when the beneficiary returns obtained property to the obligor through the avoiding obligee exercising the RRAFA, the beneficiary cannot request the obligor to return payment in return immediately even if the beneficiary delivers some value in return when receiving the property, and the beneficiary can request the obligor to return unjust enrichment only when the avoiding obligee satisfies all preserved claims in fact. However, under the Bankruptcy Act, payment in return by the beneficiary is treated as the bankruptcy estate as a general rule. In order to make consistency with this rule under the Bankruptcy Act, the Working Group proposes further deliberation on, when the beneficiary makes payment in return for the avoided fraudulent act, whether the beneficiary is able to request recovery for that payment in return or compensation for the value giving preference to the avoiding obligee or other obligees.

In addition, if we decide to grant the beneficiary the prioritized right to claim compensation of the value, the Working Group proposes further deliberation on priority with the right to demand compensation of expenses by the avoiding obligee (*see,* (4) above).

【*See*: Material No.7-1, Part II, 4(6)b and (related issue); Material No.7-2, Part II, 4(6)b

and (related issue)(Japanese ONLY)】

**c. Payment in return by a subsequent acquirer**

Under the current law, it is understood that, when the subsequent acquire returns property obtained from predecessor through the avoiding obligee exercising the RRAFA, the subsequent acquire cannot request to return payment in return immediately even if the subsequent acquire delivers some value in return to the predecessor when receiving the property, and the subsequent acquire can request the obligor to return unjust enrichment only when the avoiding obligee satisfies all preserved claims in fact. However, if we decide to grant the beneficiary the prioritized right to claim compensation of the value (*see,* b above), the Working Group proposes further deliberation on whether the subsequent acquire is also entitled to preferentially collect the value of payment in return made to the predecessor, from the viewpoint of keeping balance with such treatment over the beneficiary.

【*See*: Material No.7-1, Part II, 4(6)c; Material No.7-2, Part II, 4(6)c(Japanese ONLY)】

**4. Exercise period of the right to request avoidance of fraudulent act (CC Art.426)**

The Working Group proposes further deliberation on the exercise period of the RRAFA based on the result of the review of the system of extinctive prescription.

【*See*: Material No.7-1, Part II, 5; Material No.7-2, Part II, 5(Japanese ONLY)】

**Part IX. Claims and Obligations of Multiple Parties (excluding guarantee obligation)**

**1. In cases of multiple obligors**

**(1) Divisible obligations**

Article 427 of the current Civil Code provides on divisible obligations that each obligor has the equally proportionate obligations unless any other intention is manifested. However, it is understood that this provision regulates the external relations (the relation with the obligee), not the internal relations (the relation among obligors). Accordingly, the Working Group proposes further deliberation in the direction of clarifying this effect in the text of law.

【*See*: Material No.8-1, Part I, 2(1); Material No.8-2, Part I, 2(1)(Japanese ONLY)】

**(2) Joint and several obligations**

**A. Requirements**

**(a) Joint and severable obligations by manifestation of intent (Article 432 of the Civil Code**

Article 432 of the Civil Code only provides the effect of “If more than one

person bears a joint and several obligation" and it does not clearly state the requirements for forming joint and several obligations. In general, it is understood that a joint and several obligation is formed not only through provision of law but also based on manifestation of intent of related parties. Accordingly, the Working Group proposes further deliberation in the direction to clarify this effect in the text of law.

【*See*: Material No.8-1, Part I, 2(2)a; Material No.8-2, Part I, 2(2)a(Japanese ONLY)】

**(b) Generalization of Article 511 (1) of the Commercial Code**

Article 511 (1) of the Commercial Code provides "When several persons owe an obligation through a commercial transaction for one of these persons or all, each person owes the obligation jointly and severally." The Working Group proposes further deliberation on, referring to this provision, whether formation of joint and several obligations should be widely granted if multiple parties owe an obligation through single action as a general civil rule, including the necessity of requirements to limit such formation to business-related transactions.

【*See*: Material No.8-1, Part I, 2(2)a (related issues); Material No.8-2, Part I, 2(2)a(related issues)(Japanese ONLY)】

**B. Effects of circumstances accruing to one of joint and several obligors**

While the current Civil Code adopts the principle of relative effect as a general rule as to whether the effects of circumstances accruing to one of joint and several obligors reach the rest of obligors (Article 440 of the Civil Code), it provides absolute effects for many circumstances (Articles 434 to 439 of the Civil Code). As to the fact that the law grants many grounds for absolute effects, it is pointed out that there are occasions where a part of provisions on the grounds for absolute effect is not applicable such as the obligation of damages which joint tort feasors owe (Article 719 of the Civil Code), and that this fact functions to the direction of weakening the function of security of joint and several obligations by scattering the risk of insolvency of the obligors and thus opposes to the intention of general obligees. Based on these views, the Working Group proposes further deliberation on whether the grounds for absolute effect should be reformed, taking account of properly adjusting interests among the obligee and joint and severable obligors.

【*See*: Material No.8-1, Part I, 2(2)b; Material No.8-2, Part I, 2(2)b(Japanese ONLY)】

**(a) Request for performance (Article 434 of the Civil Code)**

Article 434 of the current Civil Code provides absolute effects with respect to a request for performance made to one of joint and several obligors. The Working Group proposes further deliberation on this provision targeting the proposals such

as that a request of performance should not cause absolute effects, and that the occasions that cause absolute effects should be limited, from the viewpoint to avoid unexpected damage of joint and several obligors who do not receive the request.

【*See*: Material No.8-1, Part I, 2(2)b(a); Material No.8-2, Part I, 2(2)b(a)(Japanese ONLY)】

**(b) Release of an obligation (Article 437 of the Civil Code)**

Article 437 of the current Civil Code provides that a release of an obligation effected for one joint and several obligor is also effective for the benefit of other joint and several obligors to the extent of the portion of the obligation which is borne by such joint and several obligor. The Working Group proposes further deliberation on whether the effect of such release should be made only relative.

【*See*: Material No.8-1, Part I, 2(2)b(b); Material No.8-2, Part I, 2(2)b(b)(Japanese ONLY)】

**(c) Novation (Article 435 of the Civil Code)**

Article 435 of the current Civil Code provides that if there is any novation between one joint and several obligor and the obligee, the claim shall be extinguished for the benefit of all joint and several obligors. The Working Group proposes further deliberation on whether the effect of such novation should be made only relative.

【*See*: Material No.8-1, Part I, 2(2)b(c); Material No.8-2, Part I, 2(2)b(c)(Japanese ONLY)】

**(d) Completion of prescription (Article 439 of the Civil Code)**

Article 439 of the current Civil Code provides that if the prescription is completed with respect to one joint and several obligor, that effect is absolute to the extent of the portion of the obligation borne by other joint and several obligors. The Working Group proposes further deliberation on whether the effect of completion of prescription for one joint and several obligor should be made relative.

【*See*: Material No.8-1, Part I, 2(2)b(d); Material No.8-2, Part I, 2(2)b(d)(Japanese ONLY)】

**(e) Invocation of the right of setoff by other joint and several obligors (Article 436 (2) of the Civil Code)**

Case law rules that, based on Article 436 (2) of the Civil Code, a joint and several obligor can manifest intention of setoff employing a claim which is possessed by another joint and several obligor. However, it is pointed that this conclusion is inappropriate because it means that among joint and several obligors everyone can dispose other person's claims. Accordingly, the Working Group proposes further deliberation on treatment of occasions where one joint and several obligor has the right of setoff, targeting the proposals such as that the rest of joint and several obligors can refuse payment to the extent of the obligation which is

owed by the joint and several obligor who has the right of setoff, and that the rest of joint and several obligors cannot refuse payment.

【*See*: Material No.8-1, Part I, 2(2)b(e); Material No.8-2, Part I, 2(2)b(e)(Japanese ONLY)】

**(f) Commencement of bankruptcy procedures (Article 441 of the Civil Code)**

Article 441 of the current Civil Code provides that when some or all joint and several obligors have become subject to the ruling of the commencement of bankruptcy procedures, the obligee may participate in the distribution of each bankruptcy estate with respect to the entire amount of his or her claim. Article 104 (1) of the Bankruptcy Act governs participation to bankruptcy procedures where there are several persons who owe the duty to perform entire obligations, and there is no occasion where Article 441 of the Civil Code is applied in practice. Accordingly, the Working Group proposes further deliberation in the direction to delete this provision.

【*See*: Material No.8-1, Part I, 2(2)b(f); Material No.8-2, Part I, 2(2)b(f)(Japanese ONLY)】

**C. Reimbursement**

**(a) Reimbursement in case of partial performance (Article 442 of the Civil Code)**

Case law rules that even when one joint and several obligor makes performance which is less than the obligation which he or she owes, that joint and several obligor has the right of reimbursement vis-à-vis other joint and several obligors corresponding to respective proportion of their obligations. Accordingly, the Working Group proposes further deliberation on whether this effect should be clearly stated in the text of law.

【*See*: Material No.8-1, Part I, 2(2)c(a); Material No.8-2, Part I, 2(2)c(a)(Japanese ONLY)】

**(b) Reimbursement in cases of substitute performance or novation (Article 442 of the Civil Code)**

The Working Group proposes further deliberation on whether, when one joint and several obligor has performed an obligation through substitute performance or an obligation after novation, he or she can claim reimbursement vis-à-vis other joint and several obligors to the extent of the amount which he or she performed based on proportion of obligations which respective joint and several obligors owe.

【*See*: Material No.8-1, Part I, 2(2)c(a)(related issue); Material No.8-2, Part I, 2(2)c(a)(related issue)(Japanese ONLY)】

**(c) Duty to notice among joint and several obligors (Article 443 of the Civil Code)**

As to the provision of Article 443 of the Civil Code which provides the duty to notice in advance or thereafter among joint and several obligors, it is pointed out that it is too severe to impose such duty when the joint and several obligor cannot know existence of other joint and several obligors. Accordingly, the Working Group proposes further deliberation on whether the duty to notice is exempted under such conditions.

【*See*: Material No.8-1, Part I, 2(2)c(b)(related issue); Material No.8-2, Part I, 2(2)c(b)(related issue)(Japanese ONLY)】

**(d) Duty to notice in advance (Article 443 (1) of the Civil Code)**

While the purpose of Article 443 (1) of the Civil Code is to impose on the joint and several obligor who seeks to exercise the right of reimbursement an obligation to give prior notice to the other joint and several obligors, there is a criticism that it is not appropriate to impose such duty of prior notice because joint and several obligors are in the position that they have to make payment immediately after the due date has come. Accordingly, the Working Group proposes further deliberation on whether this duty of giving prior notice should be abolished.

【*See*: Material No.8-1, Part I, 2(2)c(b); Material No.8-2, Part I, 2(2)c(b)(Japanese ONLY)】

**(e) Reimbursement in cases where an obligor does not have the sufficient final resources (first clause of Article 444 of the Civil Code)**

Case law rules that, when all joint and several obligors who owe some obligations do not have sufficient resources, if one of joint and several obligors who do not owe any obligation has made payment, the person seeking reimbursement and other obligors who have financial resources should equally share the burden. Accordingly, the Working Group proposes further deliberation on whether this effect should be clearly stated in the text of law.

【*See*: Material No.8-1, Part I, 2(2)c(c); Material No.8-2, Part I, 2(2)c(c)(Japanese ONLY)】

**(f) Exemption from joint and several obligations (Article 445 of the Civil Code)**

Article 445 of the current Civil Code provides that in cases any one joint and several obligor is exempted from the joint and several obligation, if there is any person among other joint and several obligors who does not have sufficient financial resources to pay the obligation, the obligee should owe the part of obligation which was supposed to be owed by the obligor exempted among the obligation that the person without resources cannot make payment. As to this provision, it is pointed out that it is a general intention of the obligee who exempted one obligor’s joint and

several obligation to owe the internal burden of joint and several obligors and thus it should be deleted. The Working Group proposes further deliberation to the direction of deleting this provision.

【*See*: Material No.8-1, Part I, 2(2)c(d); Material No.8-2, Part I, 2(2)c(d)(Japanese ONLY)】

**(g) Presumptive provision of the proportion of obligation owed among obligors**

In order to prevent disputes on reimbursement among joint and several obligors, the Working Group proposes further deliberation on whether a presumptive provision should be stipulated on the proportion of obligation owed among joint and several obligors.

**(3) Indivisible obligations**

If we decide to reduce the grounds generating absolute effects under joint and several obligations, the Working Group proposes further deliberation on whether to make arrangement in a way that the purpose of indivisible obligations is indivisible payment only (indivisible obligation by its nature), and the purpose of joint and several obligations is divisible payment only.

On that occasion, the Working Group also proposes further deliberation on whether it is admissible to make a special agreement to the effect that, if the purpose of the claim of indivisible obligation becomes divisible, the indivisible obligation becomes not a divisible obligation but a joint and several obligation.

【*See*: Material No.8-1, Part I, 2(3) and (related issue); Material No.8-2, Part I, 2(3) and (related issue)(Japanese ONLY)】

**2. In cases of multiple obligees**

**(1) Divisible claims**

Article 427 of the current Civil Code provides on divisible claims that unless any other intention is manifested, each obligee shall have the equally proportionate rights. It is understood that this provision regulates the external relations (the relation with the obligor), not the internal relations (the relation among obligees). Accordingly, the Working Group proposes further deliberation on whether this effect should be clearly stated in the text of law.

【*See*: Material No.8-1, Part I, 3(1); Material No.8-2, Part I, 3(1)(Japanese ONLY)】

**(2) Indivisible claims – effect of circumstances which arises with respect to one of indivisible obligees (Article 429(1) of the Civil Code)**

Article 429 (1) of the current Civil Code provides that even in cases where there is a novation or release between one indivisible obligee and the obligor, other indivisible

obligees may request the obligor to tender the entire performance, however, the benefit which would have been allocated to the abovementioned one indivisible obligee if he/she did not lose his/her right must be reimbursed to the obligor. There is a view that this provision is also applied to the cases of merger or substitute performance. Accordingly, the Working Group proposes further deliberation on whether this provision is applied to the occasions where there is a merger or substitute performance between one indivisible obligee and the obligor.

【*See*: Material No.8-1, Part I, 3(2); Material No.8-2, Part I, 3(2)(Japanese ONLY)】

**(3) Joint and severable claims**

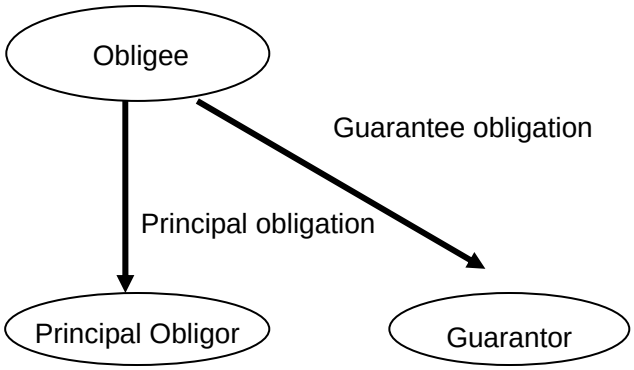
While there is no clear provision in the current Civil Code, there is a view that recognizes the concept of joint and several claims as to the rights of the principal and the agent vis-à-vis the sub-agent (Article 107(2) of the Civil Code) or the rights of the lessor and the lessee vis-à-vis the sub-lessee (Article 613 of the Civil Code). Accordingly, the Working Group proposes further deliberation on whether a new provision should be stipulated on joint and several claims.

【*See*: Material No.8-1, Part I, 3(3) and (related issue); Material No.8-2, Part I, 3(3) and (related issue)(Japanese ONLY)】

**3. Others (collective or total possession of claims or obligations)**

The Working Group proposes deliberation on whether a new provision should be stipulated on the occasion where there accrues the relationship of collective possession or total possession of claims or obligations.

## Part X. Guarantee Obligations




**1. Formation of guarantee obligation**

**(1) Formation of guarantee obligation through a contract between the principal obligor and the guarantor**

The Working Group proposes further deliberation on whether formation of

guarantee obligation is granted through a contract between the principal obligor and the guarantor (guarantee assumption contract) in addition to a contract between the obligee and the guarantor (guarantee contract).

【*See*: Material No.8-1, Part 2, 2(1); Material No.8-2, Part 2, 2(1) (Japanese ONLY)】

**(2) Measures to protect guarantors in concluding a guarantee contract**

From the aspect of protecting guarantors in concluding a guarantee contract, there are opinions to impose an obligation on the obligee to give the guarantor explanation which is sufficient for the guarantor to understand the meaning of a guarantee contract, or to provide information on financial condition of the principal obligor to the guarantor. The Working Group proposes further deliberation on these opinions taking account of the relationship with duty of explanation and the duty of providing information in general which are not limited to guarantee (*see,* Material No.11-2, Part ii, 3) and the duty of confidentiality of the obligee on credit record of the principal obligor.

【*See*: Material No.8-1, Part 2, 2(2); Material No.8-2, Part 2, 2(2) (Japanese ONLY)】

**(3) How protection of guarantors should be after concluding a guarantee contract?**

There are various proposals as a measure to expand protection of guarantors after concluding a guarantee contract. Examples are a proposal to impose on the obligee an obligation to give notice to the guarantor about the condition of payment by the principal obligor, or a proposal that when the principal obligor who obtains an agreement on an installment plan loses the benefit of time, the guarantor should be given an opportunity to maintain the benefit of time. The Working Group proposes further deliberation on whether to introduce these measures.

【*See*: Material No.8-1, Part 2, 2(2)(related issues); Material No.8-2, Part 2, 2(2)(related issues)(Japanese ONLY)】

**2. Appurtenant nature and supplement nature of guarantee obligations**

Article 448 of the Civil Code provides that if the content of the burden of a guarantor is more onerous than that of the principal obligor (either in its subject or its form), the burden of the guarantor is reduced to the extent of the principal obligation. With regard to this provision, the Working Group proposes further deliberation on whether it should be clearly stated in the text of law that, even if the content of the principal obligation is accumulated after conclusion of the guarantee contract, there arises no effect over the guarantee obligation.

Further, as to the nature of guarantee obligations, while there are Article 448 on its appurtenant nature of the content of guarantee obligations and Article 452 and 453 on

its supplement nature, many are left to interpretation in fact. The Working Group proposes further deliberation on whether to establish clear provisions these natures of guarantee obligation.

【*See*: Material No.8-1, Part 2, 2(3) and (related issues); Material No.8-2, Part 2, 2(3) and (related issues)(Japanese ONLY)】

**3. Defenses of guarantors**

**(1) Defenses which is inherent in guarantors – defenses of demand and reference**

**A. Necessity of the defense of demand (Article 452 of the Civil Code)**

As to the system of defense of demand, while there is an opinion that this should be abolished because it is impractical as a system of protecting guarantors in one hand, there is, in another hand, an opinion that status quo should not be changed in the direction of weakening protection of guarantors. The Working Group proposes further deliberation on the necessity of the defense of demand.

【*See*: Material No.8-1, Part 2, 4(1)A; Material No.8-2, Part 2, 4(1)A (Japanese ONLY)】

**B. Duty of timely execution**

Article 455 of the current Civil Code provides that if the obligee, who was exercised the defense of demand or reference, fails to demand or to levy execution and is subsequently unable to obtain full performance from the principal obligor, the guarantor is relieved of liability to the extent that the obligee would have received performance if the obligee had immediately demanded or levied execution. There is an opinion that, from the aspect of expanding the purpose of this provision, this article should be reformed to a provision which is generally applicable to occasions where performance from the principal obligor is decreased because the obligee failed to timely levy execution against the property of the principal obligor. The Working Group proposes further deliberation on this opinion.

In addition, the Working Group proposes deliberation on, if a provision on the duty of timely execution is to be established, whether such provision should be applied to joint and several guarantee.

【*See*: Material No.8-1, Part 2, 4(1)B; Material No.8-2, Part 2, 4(1)B (Japanese ONLY)】

**(2) Defenses which the principal obligor possesses (Article 457 of the Civil Code)**

Article 457 of the current Civil Code provides that a guarantor may raise a defense vis-à-vis the obligee by setting off any claim which the principal obligor may have vis-à-vis the obligee. There is an opinion that this provision should be reformed to a provision stating that a guarantor is able only to refuse performance only to the extent

the principal obligation is extinguished through set-off. The Working Group proposes further deliberation on this opinion.

In addition, the current Civil Code has only a provision on occasions where the principal obligor has the right of set-off vis-à-vis the obligee. Accordingly, the Working Group proposes further deliberation on whether to stipulate a provision on occasions where the principal obligor has other kinds of defenses vis-à-vis the obligee.

【*See*: Material No.8-1, Part 2, 4(2) and (related issues); Material No.8-2, Part 2, 4(2) and (related issues)(Japanese ONLY)】

**4. Guarantors' right to obtain reimbursement**

**(1) The right to obtain reimbursement of an entrusted guarantor (Article 459 of the Civil Code)**

Where an entrusted guarantor extinguishes the principal obligation through performance before the due date, such conduct may involve something different from the purpose of entrustment. Accordingly, there is an opinion that the right to obtain reimbursement afterwards of the entrusted guarantor in such occasion should be the same as the guarantor not entrusted (Article 462 (1) of the Civil Code rather than that of the entrusted guarantor (Article 450 (1) of the Civil Code9. The Working Group proposes further deliberation on this opinion.

【*See*: Material No.8-1, Part 2, 5(1); Material No.8-2, Part 2, 5(1) (Japanese ONLY)】

**(2) The right to obtain reimbursement in advance of an entrusted guarantor (Articles 460, 461 of the Civil Code)**

If a provision on the duty of timely execution is to be established (*see,* 3 (1)B above), the Working Group proposes further deliberation on whether Article 460 which provides that an entrusted guarantor may exercise the right to obtain reimbursement in advance vis-à-vis the principal obligor should be maintained.

【*See*: Material No.8-1, Part 2, 5(2); Material No.8-2, Part 2, 5(2) (Japanese ONLY)】

**(3) The duty to give notice of an entrusted guarantor (Article 463 of the Civil Code)**

Article 463 which provides the duty to give notice of the guarantor is mutatis mutandis application of Article 443 which provides the duty to give notice of a joint and several obligor. If the obligation to give notice in advance of a joint and several obligor is to be abolished (*see,* IX, 1 (2) C(d) above), the Working Group proposes further deliberation in the direction of abolishing the duty to give notice in advance of the entrusted guarantor as well.

【*See*: Material No.8-1, Part 2, 5(3); Material No.8-2, Part 2, 5(3) (Japanese ONLY)】

**(4) The duty to notice of a guarantor not entrusted (CC Article 463)**

The purpose of the duty to give notice in advance of the guarantor (Article 463, 443 of the Civil Code) is to give the principal obligor who has defenses vis-à-vis the obligee a chance to assert such defenses. However, the scope of the right to obtain reimbursement of a guarantor not entrusted is limited to “the extent the principal obligor was enriched at the time of such performance of the obligation” (Article 462 (1)) or “the extent the principal obligor is actually enriched” (Article 462 (2)) from the beginning, and if the principal obligor has defenses against the obligee, performance for such obligation is excluded from “the extent the principal obligor is actually enriched” and thus the significance of the duty to give notice in advance is little. Accordingly, the Working Group proposes further deliberation on whether to abolish the duty to give notice in advance of a guarantor.

【*See*: Material No.8-1, Part 2, 5(4); Material No.8-2, Part 2, 5(4) (Japanese ONLY)】

**5. Joint guarantee – interests of divisibility**

Article 456 of the current Civil Code provides that where there are more than two guarantors owe a guarantee obligation (joint guarantee), each joint guarantor owes equally proportionate guarantee obligation only (interests of divisibility) as a general rule. The Working Group proposes further deliberation on whether this provision should be reformed in a way that does not grant interests of divisibility but each joint guarantor guarantees all amount of the obligation (guaranteeing jointly and severally).

**6. Joint and several guarantee**

**(1) How the system of joint and several guarantee should be**

Joint and several guarantors are in a position which is more disadvantageous than general guarantors considering the points that it is understood that they do not have the defenses of demand and reference, and the interest of divisibility. Accordingly, it is pointed out that current system of joint and several guarantee is problematic from the viewpoint of protecting guarantors. The Working Group proposes further deliberation on the measures to expand protection of joint and several guarantor.

【*See*: Material No.8-1, Part 2, 6(1); Material No.8-2, Part 2, 6(1) (Japanese ONLY)】

**(2) Effect of circumstances which arises with respect to a joint and several guarantor – demand of performance**

The Working Group proposes further deliberation on whether it is necessary to reform the current rule that the effect of demand of performance vis-à-vis a joint and several guarantor reaches the principal obligor (Articles 458 and 434 of the Civil Code).

## 7. Revolving guarantee

### (1) Expansion of the scope of application of provisions

The 2004 revision of the Civil Code reformed on revolving guarantee, limiting the scope of its principal obligation to those contracts involving an obligation which is incurred as a result of the transaction of lending money or accepting discount of a negotiable instrument (such as loan obligation) (contract for revolving guarantee for loans), and stipulated new provisions protecting a guarantor from assuming unexpectedly excessive responsibility (Articles 465-2 to 465-5 of the Civil Code). However, from the viewpoint of expanding protection of guarantors, there is an opinion that the scope of application of provisions which were newly established in the 2004 revision should be expanded into revolving guarantee which does not include loan obligation in the scope of principal obligation.

【*See*: Material No.8-1, Part 2, 8; Material No.8-2, Part 2, 8 (Japanese ONLY)】

### (2) Clarification of regulation on revolving guarantee

The Working Group proposes further deliberation on whether so-called the right of special cancellation which is granted by case law should be clearly stated in the text of law. In addition, the Working Group also proposes deliberation on how the associate nature of guarantee obligation should be when a part of principal obligation of which the principal is not yet fixed is transferred.

Further, the Working Group proposes deliberation on review of the Fidelity Guarantee Act, along with review of provisions on revolving guarantee.

【*See*: Material No.8-1, Part 2, 8; Material No.8-2, Part 2, 8 (Japanese ONLY)】

## 8. Others

### (1) Regulation of guarantee contract based on the types of principal obligation

There is a proposal that guarantee contract should be made null and void targeting such as individual guarantee in which the principal obligor is a consumer or guarantee of a third party other than businessperson in which the principal obligor is a business. The Working Group proposes deliberation on this proposal taking account of a possible threat that such regulation may regulate one which is practically useful and whether it is possible to appropriately draw a line of the scope of guarantee contract which should be made null and void.

### (2) Deliberation on the system which is similar to guarantee

There is a proposal that a clear provision should be established as to those which are similar to guarantee contract but with no appurtenant nature, such as compensation contract. The Working Group proposes deliberation on this proposal considering that there are issues such as how to define that type of contract.