

(Victims enjoying the provision of conferment money: Article 3)

Victims enjoying the provision of conferment money are ones who experience a crime considered as enjoying the provision of conferment money or their general successors. The scope of the crime considered as enjoying the provision of conferment money is the act relative to confiscation and additional collection against the crime or in the course of the crime, and the act by means of taking advantage of the money the crime brings.

Editorial Notes:

It is true that the provision of conferment money for victims is desirable and necessary, but the vagueness of the concept of the crime considered as enjoying the provision of conferment money cannot be denied. The victims should be protected as much as the defendant. Thus, further discussion of the conception and so on is necessary.

6. Commercial Law

Company Law

Law No.86, July 26, 2005 (Effective on May 1, 2006)

Background:

The new Company Law was promulgated on July 26, 2005 and enforced on May 1, 2006. Since the Commercial Law was enacted in 1899, we have never experienced a more entire amendment of commercial law than in this time.

The new Company Law aims at the modernization of the legal system of the company in Japan and such a “modernization” has two aspects. At first, some formal aspects are modernized. The former complicated legal systems of the company were reorganized as a code of “the company law” and the notation of the provisions was simplified.

Second, the contents of the Company Law were modernized. The legislators of the Company Law explained that the new company law enacted in this time includes the provisions concerning the minimum protection of

the stakeholders and that a party shall decide how to treat them. The methods are adopted to arrange as flexible and neutral systems as possible, in order not to give companies and related persons unreasonable disadvantages and inconvenience. As a consequence, it is said that the company law has moved from “the law limiting the behavior of the company” to “the law assisting the sound activity of the company”.

As I mentioned above, since the company law was entirely changed in this time, in this paper, it will be difficult and almost impossible to refer to all the matters amended. So I will especially introduce the systems of the stock option, which have been remarkably amended since “*Heisei-era*” (from 1989) and comment on them. The features of the company law have transited from “pre-regulations” to “ex post facto remedies”, by a set of amendments to the commercial law in the “*Heisei-era*”. Concretely, we can exemplify the amendments of the issuance of the stock option (warrants, which are called “*Sinkabu-Yoyakuken*” in Japan). The commercial law before the “*Heisei-era*” did not allow the positive issuance of the stock options. Since 1997, the commercial law has been deregulated little by little and the creation of the warrants system in 2001 generally allowed the issuance of stock options.

The reason for the general allowance to issue stock options is that there is some need to develop and use various ways to raise the capital in order to escape from the long depression and to simplify the finance by the companies. However, it is doubtful whether there is some concrete practical need to finance by stock option. Because, it is desirable that stock options can be needed as a way of financing, the issuance of stock options seems to be allowed in general. So far, it is insisted that the issuance of stock options should not be generally permitted from the viewpoint of the protection of the existing shareholders and investors. Since, after the “*Heisei-era*”, the stock options can be evaluated by using the models to evaluate stock options (“option model”), the protection of the existing shareholders is no longer at issue if the stock options are issued at a fair price.

After the amendments of the Commercial Law in 2001, under the new Company Law, the warrants in themselves can be separately issued for the purpose of raising capital. In this paper, we will have a look at how the new Company Law regulates the issuance of the warrants, especially the prof-

itable issuance of the warrants. After that, we will consider some problems of the regulations concerning the issuance of the warrants.

Main Provisions:

1. The Profitable Issuance of the Warrants

Since the Commercial Law was amended in November, 2001, the board of directors has the authority to decide the issuance of a stock option, in the same way as the regulations on the issuance of new shares (Arts.240. para.1, & 247. para.2). Only when the warrants are issued profitably, the pre-resolution of the shareholder meeting is needed (Arts. 238. para.2 & 240. para.1).

The Decisions on Collection of the Warrants

Whenever the stock corporations collect those who undertake the warrants they issue, they must prescribe the following matters concerning the warrants (Art. 238. para.1);

“The contents and numbers of the warrants” (para.1 no.1)

“Not to require the payment of money in exchange for the warrants” (para.1 no.2)

“Except for the case of no.2, the amounts of the warrants and the way to calculate them” (para.1 no.3)

“Shareholders’ meeting must decide the matters of the collection of the warrants” (Art. 238. para.2)

“In the shareholders’ meeting in para.1, the board of directors must explain why they need to collect those who undertake the warrants on the condition in para.1 or at the price in para.2,” if;

“The arrangement not to require the payment of money applies to especially profitable conditions for those who undertake the warrants in para.2” (Art. 238. para.3 no.1)

“The amounts of money paid in para.3 apply to the especially profitable amounts” (Art. 238. para.3 no.2)

Furthermore, Art. 240. para.2 involves “special provisions concerning deciding the matters of collections of the warrants” and prescribes that the board of directors may resolve such a decision.

Now, I will explain the profitable issuance of the warrants. Generally speaking, the larger the economic profits that could be gained by exerting

the warrants increase (in other words, the larger the economic loss that could be caused to the existing shareholders increase), the larger the value of the warrants. Both the Commercial Law before the amendment in 2005 and the new Company Law will clarify how large the economic loss that could be caused is by calculating the value of the warrants and, even in the publicly held companies, leave to the shareholders' meeting whether they may issue the warrants or not when there are, to some extent, the differences between the economic losses and the amounts of the payment.

The problem is which option models, parameters and especially, volatilities should be selected, though. The different value of the warrants would be calculated by using the different option models. In this sense, the evaluation of the stock options is very obscure.

2. The unfair issuance of the warrants

Next, I will explain the unfair issuance of the warrants.

The issuance of warrants for the purpose of the maintenance of corporate control may be enjoined as a gross unfair issuance of the warrants. However, it is unclear if the measure to decide whether the issuance of the warrants in order not to raise the capital, such as the maintenance of the corporate control, applies to "the unfair issuance". In 2005, in re "Live door v. Nippon Broadcasting System", the Tokyo High Court held as follows; when there is a conflict of the managerial control, if the warrants were issued chiefly in order to dilute the specific shareholders' stakes or to maintain and ensure the managerial control of the incumbent manager or the specific shareholders supporting them, as a rule, such an issuance can be interpreted as "grossly unfair".

In fact, whether the issuance of the warrants is unfair will be individually decided in each concrete case.

Editorial Note:

In the amendment of the Commercial Law on November, 11, various kinds of ways to use the warrants were advocated by abolishing the limitation on the purpose of the issuance of the warrants and in practice, the number of uses of them has grown up gradually. The regulations and interpretations of the company law, however, have not sufficiently seemed

to cope with such circumstances. The reason is the bounds of the option models. The option models are so obscure that it is very difficult to calculate them exactly. It also means that it is difficult to decide how the issuance of the warrants will influence the share value. As a result, the issuance of the warrants may entrench on the property rights of the shareholders and negatively influence the pricing in the security market. But it must be kept in mind that since the obscurity of the option models does not always bring the result that they should not be used. Practically, it seems to be important for the lawyers, such as the judges and attorneys, to deliberately adopt the values of the stock options that other private institutions calculate, taking into the consideration the interests of the existing shareholders.

Finally, I will briefly refer to the unfair issuance of the warrants. The warrants issuance to defend takeovers is likely to apply to the unfair issuance. Recently, it has been strongly insisted that whether the management establish the mechanisms to prevent the arbitral defense for takeovers or whether the shareholders who are not involved in takeovers are caused damages should be decided from the viewpoint of the validity and rationality of the defense tactics.

7. Labor Law

Partial Amendments to the Equal Employment Opportunity Act and the Labor Standard Law

Law No. 82, June 21, 2006 (Effective on April 1, 2007)

Background:

Japan faces the advent of a society with a declining population accompanied by a rapid decline in the birth rate and a rapid increase in the aged population rate at the same time. So, Japan is seeking rapidly to realize an environment in society where individuals can utilize their competencies to the maximum.

Under these circumstances, in the area of employment, the importance of the facilitation of the actualization of such a society where individ-