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# GUIDE TO JAPANESE CROSS-BORDER INSOLVENCY LAW

*Hideo Horikoshi\**

## I. INTRODUCTION

**I**N recent years, legislators in Japan have enacted and amended Japanese cross-border insolvency law to deal with insolvency matters of business enterprises that conduct international business. One of the most significant legislation to Japanese insolvency law was the enactment of the Law on Recognition and Assistance of a Foreign Proceeding (*gaikoku tosan syonin enjo ho*, Recognition Law) in 2000, which adopts the Model Law on Cross-Border Insolvency (Model Law)<sup>1</sup> as promulgated by the United Nations Commission on International Trade Law (UNCITRAL).<sup>2</sup> Although the Recognition Law adopted the fundamental structure of the Model Law, there are several differences between the two.<sup>3</sup> The Model Law is greatly influenced by the common law approach, whereas the Japanese Recognition Law adopts a civil law approach.<sup>4</sup> As there are such differences, it is important to analyze not only the Model Law but also Japan's insolvency law and the Recognition Law itself, in

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1. UNCITRAL Model Law on Cross-Border Insolvency, *Report of the United Nations Commission on International Trade Law on the Work of its Thirtieth Session*, U.N. GAOR, 52d Sess., Supp. No. 17, Annex I, U.N. Doc. A/52/17 (1997) [hereinafter Model Law], available at <http://www.uncitral.org/en-index.htm> (last visited Aug. 10, 2003).
2. Japan, Mexico, and Eritrea have adopted the Model Law. South Africa has enacted a modified version. The American version of the Model Law is pending adoption as a new Chapter 15 of the United States Bankruptcy Code, a proposal that has been part of every version of the pending bankruptcy legislation. See Jay Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 9, 12-15, 28 (Winter 2002); Report by Dan Glosband on the pending adaptation of the UNCITRAL Model Law into United States Legislation (with the text of the proposed legislation), available at [http://www.iiiglobal.org/international/cross\\_border/United\\_States\\_Daniel%20Glosband.pdf](http://www.iiiglobal.org/international/cross_border/United_States_Daniel%20Glosband.pdf) (last visited Feb. 2004).
3. Kazuhiko Yamamoto, *New Japanese Legislation on Cross-Border Insolvency as Compared with the UNCITRAL Model Law*, available at <http://www.iiiglobal.org/country/japan/legislation.pdf> (last visited Sept. 7, 2003).
4. For example, the Model Law gives very broad discretion to judges, which civil law judges do not enjoy. *Id.*

order for international companies to understand the cross-border insolvency system in Japan. The purpose of this article is to (1) introduce Japan's insolvency law and (2) examine Japanese cross-border insolvency law for business enterprises doing business in both Japan and foreign countries, especially the United States.

## II. JAPANESE INSOLVENCY LAW

### A. GENERAL

There are five insolvency proceedings in Japan: (1) bankruptcy (*hasan*) under the Bankruptcy Law (*hasan ho*); (2) special liquidation (*tokubetsu seisan*) under the Commercial Code (*sho ho*); (3) corporate reorganization (*kaisha kosei*) under the Corporate Reorganization Law (*kaisha kosei ho*); (4) civil rehabilitation (*minji saisei*) under the Civil Rehabilitation Law (*minji saisei ho*); and (5) corporate arrangement (*kaisha seiri*) under the Commercial Code. Bankruptcy and special liquidation are liquidation proceedings (*seisan gata tetsuduki*). Civil rehabilitation, corporate arrangement, and corporate reorganization are reorganization proceedings (*kosei gata tetsuduki*).<sup>5</sup> This article discusses overview and analysis of the three more commonly utilized proceedings in Japan: bankruptcy, civil rehabilitation, and corporate reorganization.

### B. BANKRUPTCY

Bankruptcy is the proceeding in which an insolvent debtor's assets are liquidated and the proceeds are distributed to creditors. The proceeding is for both individuals and business entities. The Bankruptcy Law enacted in 1922 was originated by German law and adopted the U.S. concept of a discharge in 1952.

A bankruptcy proceeding is commenced when the court grants a petition from a debtor or a creditor to initiate such a proceeding.<sup>6</sup> The court-appointed bankruptcy trustee has authority to dispose of the debtor's assets.<sup>7</sup> Once the bankruptcy proceeding is initiated, disposal of the debtor's assets by unsecured creditors is prohibited.<sup>8</sup> On the other hand, the rights of secured creditors are not impaired by the proceeding.<sup>9</sup>

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5. Hideo Horikoshi, *Corporate Reorganization Law Revisions in Japan*, in KAISHA KOSEI TETSUDUKI NO SUBETE (2003).

6. Hasan Ho [Bankruptcy Law], Law No. 71 of 1922, arts. 1, 126, 127, 132.

7. *Id.* art. 7.

8. *Id.* art. 16. In insolvency proceedings in Japan, creditors can execute on the debtor's assets subsequent to filing the petition but prior to the actual commencement of an insolvency proceeding (gap period). Conversely, creditors' actions against the debtor's estates are automatically stayed when the petition is filed to the Bankruptcy Court under the U.S. Bankruptcy Code. 11 U.S.C.S. § 362 (2003). Therefore, Japanese debtors often seek a prohibition order (*chushi meirei*) from the court to stop certain execution on assets by creditors during the gap period. See Horikoshi, *supra* note 5.

9. Bankruptcy Law, arts. 92, 95.

The authorities of the trustee are as follows: (1) to investigate and object to claims submitted by creditors; (2) to terminate contracts and/or agreements between the debtor and third parties; (3) to avoid fraudulent transfers of the debtor's property interest; (4) to sell the assets of the debtor; and (5) to pay dividends to creditors. After the trustee pays distributions, the court shall order the bankruptcy proceeding terminated. If the debtor is a corporation, it is automatically dissolved after the bankruptcy proceeding is terminated.

### C. CIVIL REHABILITATION

The Civil Rehabilitation Law, enacted in 1999, was influenced by Chapter 11 of the U.S. Bankruptcy Code.<sup>10</sup> The purpose of the civil rehabilitation proceeding is to determine a rehabilitation plan for an insolvent debtor.<sup>11</sup>

A civil rehabilitation proceeding is commenced when the court grants the petition to initiate the proceeding filed by a debtor or creditors.<sup>12</sup> The debtor in possession (DIP) continues its business and disposes of its affairs under the supervision of the court.<sup>13</sup> As in a bankruptcy proceeding, execution of the debtor's assets by unsecured creditors is prohibited once the civil rehabilitation proceeding is initiated,<sup>14</sup> whereas the rights of secured creditors generally are not impaired.<sup>15</sup>

The DIP examines proofs of claim and objects in writing to the claims. The DIP must prepare a proposed rehabilitation plan and submit it to the court.<sup>16</sup> When the plan is accepted by a majority of creditors and approved by the court, it comes into effect and is binding on all creditors.<sup>17</sup> If necessary, the DIP can sell its business before a proposed plan is confirmed.<sup>18</sup> In practice, a sale of the business in civil rehabilitation proceeding is common.

### D. CORPORATE REORGANIZATION

Enacted in 1952, the Corporate Reorganization Law was greatly influenced by Chapter 10 of the U.S. Bankruptcy Act (1938).<sup>19</sup> Similar to the

10. 11 U.S.C.S. (2003).

11. Both individuals and business entities can utilize the civil rehabilitation proceeding.

12. Minji Saisei Ho [Civil Rehabilitation Law], Law No. 225 of 1999, arts 21, 33. A debtor need not be solvent in order to initiate a civil rehabilitation proceeding. The conditions with regard to a debtor's financial situation to initiate a civil rehabilitation proceeding are more relaxed than those to initiate a bankruptcy proceeding. Therefore, this proceeding can be used to prevent the debtor from filing a bankruptcy proceeding.

13. *Id.* arts. 38, 41. If necessary, the court may appoint examiners and/or trustees to supervise the DIP's management and operations. *Id.* arts. 54, 62.

14. *Id.* arts. 39, 40.

15. *Id.* art. 53.

16. *Id.* art. 163.

17. *Id.* arts. 172-2, 174, 176.

18. *Id.* art. 42.

19. Bankruptcy Act of 1938, Ch. 10.

U.S. Bankruptcy Act, the purpose of a corporate reorganization proceeding is to allow an insolvent debtor corporation to file and confirm a reorganization plan, thereby reorganizing its business.<sup>20</sup>

A corporate reorganization proceeding is commenced when the court grants the petition to initiate the proceeding filed by a debtor corporation, or filed by creditors or shareholders satisfying certain conditions under the Corporate Reorganization Law.<sup>21</sup> The trustee is appointed by the court when the proceeding is initiated and has authority to manage the business and dispose of the assets of the debtor corporation.<sup>22</sup> Once the proceeding is initiated, execution of the debtor's assets by unsecured creditors is prohibited.<sup>23</sup> Contrary to a bankruptcy proceeding and a civil rehabilitation proceeding, the rights of secured creditors are impaired so that they cannot enforce their liens on security interests in the debtor corporation's assets.<sup>24</sup>

The trustee continues to manage the business of the debtor corporation, examines proofs of claim, and prepares a proposed reorganization plan. When the proposed plan is accepted by the classes of parties (such as creditors and shareholders), and approved by the court, the plan becomes effective and is binding on all parties.<sup>25</sup> Once the plan becomes effective, the debtor corporation will consummate the plan under the supervision of the court. Under the plan, the debtor corporation frequently reduces its capital and issues new shares, and sells part of its businesses to third parties.

The corporate reorganization proceeding is strictly regulated, more time-consuming, and more expensive than any other insolvency proceeding. Because the Corporate Reorganization Law had not been amended since 1957, several rules were outdated and failed to match the demands of business entities in Japan. As a result, the corporate reorganization

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20. The corporate reorganization proceeding is available to only corporations. The Corporate Reorganization Law has many rules designed to reorganize a large corporation.

21. *Kaisha Kosei Ho* [Corporate Reorganization Law], Law No. 154 of 2002, art. 17, 41. A corporate reorganization proceeding can be filed by a creditor who has a claim in the amount of more than one tenth (1/10) of the capital of the debtor corporation or a shareholder holding more than one tenth (1/10) of all shares of a debtor corporation and is entitled to vote at the shareholders meeting. *Id.* art. 17. Because a debtor corporation is not required to be insolvent in order to initiate a corporate reorganization proceeding, this proceeding can also be used to prevent the debtor from filing a bankruptcy proceeding.

22. *Id.* arts. 67, 72. Once the proceeding is initiated, the representative of directors loses authority to operate the company and the trustee is responsible to continue the businesses of the debtor corporation as its representative. For the reorganization to succeed, it is important for the trustee to be well acquainted with the debtor corporation's businesses and to search for companies that will support the debtor corporation. It is a general practice in Japan that two trustees are appointed by the court in a corporate reorganization proceeding. One is an attorney responsible for handling legal matters, while the other is a business expert responsible for handling business matters. *See* Horikoshi, *supra* note 5.

23. *Id.* art. 50.

24. *Id.*

25. *Id.* arts. 196, 199, 201.

proceeding has not been used much. In an effort to make the proceeding easier, quicker, and more reasonable for parties to use, the Corporate Reorganization Law was largely amended in December 2002.<sup>26</sup>

#### E. RELATIONSHIP BETWEEN CORPORATE REORGANIZATION AND CIVIL REHABILITATION

As mentioned above, both the civil rehabilitation proceeding and the corporate reorganization proceeding are designed to restructure businesses of a debtor. In general, civil rehabilitation is designed for small and medium-sized business entities, while the corporate reorganization is designed for large-sized corporations. Because more than 90 percent of business entities in Japan are formed as corporations, some large corporations have successfully reorganized themselves by utilizing the civil rehabilitation proceeding. Despite its original design, the civil rehabilitation proceeding can be used to restructure a large corporation as well as small entities.

It is also important to note that the differences between the two proceedings were minimized after the Corporate Reorganization Law was amended in December 2002. The following points should be considered when determining which proceeding is more appropriate for a company: (1) whether creditors prefer the business to be managed either by the current directors as DIPs or by a business expert as a trustee; and (2) whether it is necessary to impair the rights of secured creditors.<sup>27</sup>

### III. SUMMARY OF JAPANESE CROSS-BORDER INSOLVENCY LAW

#### A. LAW RESOURCES

Rules on Japanese cross-border insolvency are codified in the Recognition Law, the Bankruptcy Law, the Civil Rehabilitation Law, and the Corporate Reorganization Law.<sup>28</sup> The rules on cross-border insolvency in the Bankruptcy Law, the Civil Rehabilitation Law, and the Corporate Reorganization Law were amended in 2000 (the amended laws and related laws are referred to collectively hereinafter as the Amended Law).<sup>29</sup>

#### B. ABOLITION OF TERRITORIALISM

Former Japanese law on cross-border insolvency (Former Law) adopted the principle of territorialism.<sup>30</sup> Under this principle, the Former

26. See Horikoshi, *supra* note 5.

27. *Id.*

28. TAKUYA FUKAYAMA, *NEW INTERNATIONAL INSOLVENCY LAW (Atarashii Kokusai Tosan Hosei)* 7-10 (2001).

29. *Id.*

30. See MORIO TAKESHITA, *INTERNATIONAL INSOLVENCY LAW (Kokusai Tosan Ho)* 53-54 (1991). Traditionally, there were two theoretical approaches to cross-border insolvency: territorialism and universalism. Territorialism justified seizing local as-

Law refused to recognize the effects of a Japanese insolvency proceeding to foreign countries, and likewise refused to recognize the effects of a foreign insolvency proceeding in Japan.<sup>31</sup> As a result, it was difficult for the trustee of the bankruptcy estates to exercise control over the debtor's assets in foreign countries. Domestic and foreign scholars and practitioners criticized that the Former Law was (1) unfair in prohibiting some creditors from executing the debtor's assets in Japan, while other creditors could execute the debtor's assets abroad, and (2) not designed to handle insolvencies arising out of the increasing number of international investments and transactions.<sup>32</sup>

The Amended Law, however, abolished such territorialism. First, the Amended Law recognizes the effects of Japanese insolvency proceedings in foreign countries, which means the trustee of the bankruptcy estates can control the debtor's assets in foreign countries. Second, the Amended Law prohibits a creditor from receiving partial payment of its claim in both foreign and domestic countries, so long as the payment to the other creditors is proportionately less than the creditor has already received. This avoids situations in which a creditor might obtain more favorable treatment than the other creditors of the same class by obtaining payment of the same claim in foreign proceedings.<sup>33</sup> In addition, under the Recognition Law, the Japanese court may recognize the effects of a foreign insolvency proceeding in certain circumstances.

### C. RIGHTS AND DUTIES OF FOREIGN DEBTOR AND CREDITORS IN A JAPANESE INSOLVENCY PROCEEDING

Reciprocity was a requirement in the Former Law. In other words, a Japanese bankruptcy court could refuse to recognize the rights and duties of a foreign debtor and creditors in a Japanese insolvency proceeding if the foreign country refused to recognize the rights and duties of a Japanese debtor and creditors in the foreign proceeding. Most foreign countries, however, do not require such reciprocity. Therefore, the Amended Law abolished this requirement as well.<sup>34</sup>

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sets and distributing them to the creditors in a local proceeding with little concern for the overall result for the company or for creditors outside the domestic jurisdiction. Conversely, universalism identifies bankruptcy as a collective proceeding that must extend to all of a debtor's assets and all the stakeholders wherever they are located. See ELIZABETH WARREN & JAY WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS*, 979 (4th ed. 2001).

31. See Yamamoto, *supra* note 3.

32. *Id.* See also TAKESHITA, *supra* note 30, at 53-56.

33. Bankruptcy Law, arts. 23-2, 182, 265-2; Civil Rehabilitation Law, art. 89; Corporate Reorganization Law, art. 137; *cf.* Model Law on Cross-Border Insolvency, art. 32. This rule is referred to as the "hotchpotch rule." See Yamamoto, *supra* note 3.

34. Bankruptcy Law, art. 2; Civil Rehabilitation Law, art. 3; Corporate Reorganization Law, art. 3.

D. ELIGIBILITY REQUIREMENTS FOR FOREIGN DEBTOR OR  
CREDITORS TO FILE FOR AN INSOLVENCY PROCEEDING  
IN JAPAN

Contrary to the U.S. Bankruptcy Code, the Former Law did not contain an eligibility requirement for a foreign debtor to file a Japanese insolvency proceeding.<sup>35</sup> In the Amended Law that abolished territorialism, however, eligibility requirements are codified on the basis of the majority view on this issue in Japan.<sup>36</sup> To qualify for relief under the Bankruptcy Law or the Civil Rehabilitation Law, each debtor must have a domicile, a place of business, or property in Japan.<sup>37</sup> To qualify for relief under the Corporate Reorganization Law, each debtor corporation must have a place of business in Japan.<sup>38</sup> The requirements to file for the corporate reorganization proceeding are more strict than those of the bankruptcy proceeding and the civil rehabilitation proceeding because a debtor must have a place of business in Japan; property is not sufficient. Such strict eligibility requirements are justified because the corporate reorganization is an insolvency proceeding designed for a large corporation, and the proceeding will have significant effects on parties (*i.e.* impairing the rights of secured creditors, unlike the bankruptcy proceeding and the civil rehabilitation proceeding). Even if an insolvency proceeding is pending in a foreign country, it is still possible for the foreign debtor or creditors to file for an insolvency proceeding in Japan if certain conditions are met. The Amended Law generally permits such concurrent insolvency proceedings.<sup>39</sup>

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35. FUKAYAMA, *supra* note 28, at 381. To qualify for relief under the U.S. Bankruptcy Code, each debtor must have a domicile, a place of business or property in the United States. 11 U.S.C. § 109 (2000); See Kyung S. Lee & Maxim B. Litvak, *Eligibility of a Foreign Debtor to File a Full Bankruptcy Case in the United States and Applicable Limitations*, International and Cross-Border Insolvency Issues in the Pacific Rim Committee on Business Bankruptcy of American Bar Association (1999), available at <http://www.abanet.org/buslaw/library/spr99.html> (last visited Sept. 2, 2003).
36. FUKAYAMA, *supra* note 28, at 381. In Japan this issue has been discussed as the name of international jurisdiction (*kokusai kankatsu*).
37. Bankruptcy Law, art. 104-2; Civil Rehabilitation Law, art. 4. Claims that can be litigated in Japanese civil court under the Code of Civil Procedure of Japan are deemed to be property in Japan. *Id.* In the United States, some courts take a broad view of "property." One court has even concluded that a foreign debtor is eligible to file its bankruptcy petition under the U.S. Bankruptcy Code to the extent that, before the petition was filed, retainers had been paid to bankruptcy counsel in the United States. See *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000). There is no such case law in Japan.
38. Corporate Reorganization Law, art. 4.
39. Where the home-country court has pending a full-fledged bankruptcy proceeding under its law and foreign courts have full bankruptcy cases pending involving the same company, the proceedings are referred to as "parallel proceedings" or "concurrent proceedings." See WARREN & WESTBROOK, *supra* note 30, at 981.



E. RECOGNITION AND ASSISTANCE OF A FOREIGN  
INSOLVENCY PROCEEDING

1. *General Overview*

To deal with cross-border insolvency cases fairly and appropriately, the Recognition Law permits Japanese courts to defer to an insolvency proceeding in foreign countries and to cooperate with foreign courts by enjoining actions against a debtor or its assets in Japan. The mechanism for this cooperation is an “ancillary proceeding” brought by a foreign insolvency representative for these purposes.<sup>40</sup> The Recognition Law is modeled after the Model Law but adopts rules subject to the Japanese law as mentioned above.

2. *Procedures*

To obtain a recognition and assistance proceeding of the foreign insolvency proceeding in Japan, the representative of a foreign insolvency proceeding, such as the trustee or DIP, must file a petition and make a deposit for expenses with the Tokyo District Court in Japan.<sup>41</sup> The foreign insolvency representative must submit proof that the debtor has a residence, domicile, office or establishment in the foreign country where the petition for the foreign insolvency proceeding was filed.<sup>42</sup> If the conditions to recognize the foreign insolvency proceeding are met, the Japanese court will order recognition of the foreign insolvency proceeding in Japan. After the recognition the Japanese court may grant the parties’ petitions to enter relief that aids the foreign insolvency proceeding, such as enjoining any action against the debtor and its property and/or preventing the enforcement of any judgment against the debtor.

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40. The U.S. Bankruptcy Code also adopts this kind of ancillary proceeding. See 11 U.S.C. § 304 (2000). According to Professor Matsushita, with regard to the legal effects of a foreign insolvency proceeding, there are two types of approaches: (1) recognition approach (“the decision of a foreign court opening a foreign proceeding is recognized and the legal effects of the decision are supposed to be determined basically by the foreign law”); and (2) ancillary proceeding approach (“relief available to a foreign representative is provided in the U.S. law independent from the foreign law”). U.S. Bankruptcy Code adopts an “ancillary proceeding approach.” 11 U.S.C. § 304. The Model Law can be regarded as adopting an “ancillary proceeding approach” rather than a “recognition approach” (although the word “recognition” is used in articles 20 and 21 of the Model Law) because article 20(2) provides that the scope and the modification or termination of the stay are subject to the laws of each enacting state, and also because article 21(a)-(f) lists discretionary relief upon recognition of a foreign proceeding. Junichi Matsushita, *Present and Future Status of Japanese International Insolvency Law*, 33 *TEX. INT’L L.J.* 71, 80-81 (Winter 1998). On the basis of these criteria, the Recognition Law can be regarded as adopting an “ancillary proceeding approach” even though the word “recognition” is used in the Recognition Law. *Id.* n.41.

41. Junichi Matsushita & Stacey Steele, *Tentative Translation of Law Relating to Recognition and Assistance for Foreign Insolvency Proceedings*, Law No. 129 of 2000, arts. 4, 17, [hereinafter Recognition Law], available at <http://www.moj.go.jp/ENGLISH/CIAB/ltr01-1.html> (last visited Aug. 15, 2003).

42. *Id.* art. 19.

### 3. Conditions to Recognize a Foreign Insolvency Proceeding

In determining whether to recognize a foreign proceeding under the Recognition Law, the Japanese court will consider several factors, including:

- (1) whether the foreign insolvency proceeding has no effect with respect to the debtor's assets located in Japan;
- (2) whether recognition of the foreign insolvency proceeding is contrary to the public order or good public morals in Japan; and
- (3) whether the petition was made unfaithfully or based on an unfair purpose.<sup>43</sup>

The most important factor considered by the Japanese court is whether the foreign insolvency proceeding is contrary to the public order or good public morals in Japan. There is no insolvency case law on this issue. This factor, however, is analogous to the condition to enforce a foreign judgment in Japan as stipulated in article 118(3) of Code of Civil Procedure.<sup>44</sup> With regard to article 118(3), the Supreme Court of Japan ruled that: (1) a judgment for actual damages by a U.S. court is in conformity

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43. With regard to the conditions to recognize a foreign insolvency proceeding, article 21 of the Recognition Law provides as follows:

In a case corresponding to any of the following items, the court must dismiss a petition for recognition of a foreign insolvency proceeding:

if the advance amount of the costs for the recognition and assistance proceeding has not been paid;

if it is clear that the foreign insolvency proceeding will not have an effect on the assets of the debtor which are located within Japan;

if the assistance measures pursuant to the next chapter in respect of that foreign insolvency proceeding are against public order or good public morals in Japan;

if it is clear that it is not necessary to grant recognition measures pursuant to the next chapter in respect of that foreign insolvency proceeding;

if the foreign trustee etc violates article 17(3) in respect that foreign insolvency proceeding. Provided that this does not apply if that violation is of a minor degree; or

if it is clear that the petition was made based on an unfair purpose, or the petition was not made faithfully.

*Id.* art. 21.

44. Yamamoto, *supra* note 3. Article 118 of the Code of Civil Procedure provides as follows:

A final and binding judgment of a foreign court shall be valid only upon the fulfillment of all of the following conditions:

- (1) the foreign court's jurisdiction is allowed by laws and ordinances or by treaty;
- (2) the defeated defendant has received service (except for service by publication of notice or any similar means) of summons or any other necessary orders to commence procedures or has responded in the action without receiving service thereof;
- (3) the contents of the judgment and procedures of the litigation are not contrary to the public order or morals of Japan; and
- (4) there is reciprocity.

Minji Soshō Ho [Code of Civil Procedure], Law No.109 of 1996, art. 118. See HOSOKAI, CODE AND REGULATION OF CIVIL PROCEDURE OF JAPAN (*Nihon No Minji Soshō Ho Do Kisoku*) 104-106 (1999).

with Japanese public policy, but (2) a judgment for punitive damages by a U.S. court is contrary to Japanese public policy.<sup>45</sup> Therefore, where a foreign insolvency proceeding is commenced because of the debtor's liability for punitive damages, a petition for recognition of the foreign insolvency proceeding in Japan shall be dismissed because it is deemed contrary to public policy under the Recognition Law.<sup>46</sup>

Note that relief under the Recognition Law is available only if a foreign insolvency proceeding is pending in a foreign country.<sup>47</sup> Under section 301 of the U.S. Bankruptcy Code, the commencement of a voluntary case under the U.S. Bankruptcy Code constitutes an automatic order for relief, thereby triggering the enforcement of the automatic stay.<sup>48</sup> Because of the automatic order for relief, the commencement of a voluntary U.S. bankruptcy case (with the attendant automatic stay) qualifies as "the commencement of the foreign proceeding" under the Recognition Law even though the U.S. court does not (and need not) order a commencement to the proceeding.<sup>49</sup> Further, reciprocity is not a requirement. A Japanese bankruptcy court may recognize a foreign proceeding even though courts of the foreign proceeding may refuse to recognize Japanese insolvency proceedings.

A Japanese court will dismiss a petition for recognition of a foreign insolvency proceeding if a Japanese insolvency proceeding, such as bankruptcy, civil rehabilitation or corporate reorganization, is initiated with respect to the same debtor, unless all of the following conditions are met: (1) the foreign insolvency proceeding is a main proceeding; (2) it is in the general interests of the creditors to take assistance measures pursuant to Chapter 3 of the Recognition Law in respect to the foreign insolvency proceeding; and (3) there is no likelihood of the interest of Japanese creditors being unreasonably prejudiced if the court grants assistance measures pursuant to Chapter 3 of the Recognition Law in respect to the foreign proceeding.<sup>50</sup>

#### 4. *Effects of Recognition*

The Recognition Law does not provide for automatic relief upon recognition of a foreign proceeding, but instead permits the court, in its discretion, to provide relief to the debtor or its assets in Japan.<sup>51</sup> The court

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45. Minji Hanketsu Syu, 51-6-2573 (Supreme Court, July 11, 1997), available at <http://courtdomino2.courts.go.jp> (last visited Aug. 15, 2003).

46. FUKAYAMA, *supra* note 28, at 136.

47. Matsushita & Steele, *supra* note 41, art. 17, 22.

48. 11 U.S.C. § 301

49. FUKAYAMA, *supra* note 28, at 146-47.

50. See Matsushita & Steele, *supra* note 41, art. 57.

51. The Model Law provides automatic effects of recognition. Section 1, article 20 provides as follows:

1. Upon recognition of a foreign proceeding that is a foreign main proceeding,
  - (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

may, on the petition of an interested person or on its own motion, enter an order to:

- (1) stay certain proceedings such as (A) a proceeding for compulsory execution, provisional attachment or disposition against the debtor's assets in Japan, or (B) a litigation proceeding regarding the debtor's assets in Japan, either at the same time as making a ruling to recognize a foreign insolvency proceeding or after making that ruling;
- (2) prohibit (A) disposition regarding the debtor's business and assets in Japan, or (B) payments to creditors;
- (3) stay an official auction proceeding aimed at enforcing a security interest in existence against an asset of the debtor;
- (4) prohibit compulsory execution against a debtor's assets by any creditors; or
- (5) manage the debtor's business and assets in Japan by a recognition trustee.<sup>52</sup>

If the Recognition Law were to provide for automatic relief upon recognition of a foreign proceeding, the Japanese court would have to very carefully consider whether to grant recognition because of the potential effects on the interests of local creditors. The court's consideration of these issues would delay a decision. As a result, the Recognition Law

- (b) Execution against the debtor's assets is stayed; and
- (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

Model Law, art. 20.

On the other hand, under article 21 of the Model Law, upon recognition of a foreign proceeding, "where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief." Model Law, art. 21. Like the Recognition Law, the U.S. Bankruptcy Code does not provide for automatic relief upon recognition of a foreign proceeding, but instead permits the court, in its discretion, to provide relief to the debtor or its assets in the United States. Section 304 (a)-(b) of the U.S. Bankruptcy Code provides:

- (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
- (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may-
  - (1) enjoin the commencement or continuation of-
    - (A) any action against-
      - (i) a debtor with respect to property involved in such foreign proceeding; or
      - (ii) such property; or
    - (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
  - (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
  - (3) order other appropriate relief.

11 U.S.C.S. § 304(a)-(b).

52. See Matsushita & Steele, *supra* note 41, arts. 25, 26, 27, 28, 32.

does not adopt automatic relief upon recognition.<sup>53</sup> Conversely, the Recognition Law provides only procedural rules concerning cross-border insolvency. There is no rule on choice of law with regard to avoidance powers, setoffs or the right to reject executory contracts.<sup>54</sup>

#### F. CONCURRENT INSOLVENCY PROCEEDING

As mentioned above, even if a foreign insolvency proceeding for a debtor is pending outside Japan, a Japanese insolvency proceeding for the same debtor can be commenced under the Bankruptcy Law and the Civil Rehabilitation Law if the debtor has a place of business or property in Japan or under the Corporate Reorganization Law if the debtor has a place of business in Japan.<sup>55</sup>

The Amended Law contains the following rules on such concurrent insolvency proceedings:

- (1) the trustee or DIP in Japan shall attempt to cooperate with the foreign insolvency representatives and give necessary information to them so that they may handle the foreign insolvency proceedings appropriately;<sup>56</sup>
- (2) in the absence of proof to the contrary, the existence of a foreign insolvency proceeding concerning the debtor is proof that there is a condition to commence an insolvency proceeding in Japan;<sup>57</sup>
- (3) the foreign insolvency representative may file a petition to commence an insolvency proceeding in Japan;<sup>58</sup> and
- (4) the foreign insolvency representative is permitted to represent creditors of a foreign insolvency proceeding and file proofs of claim for them in an insolvency proceeding in Japan.<sup>59</sup>

#### IV. CASE STUDIES ON JAPANESE CROSS-BORDER INSOLVENCY LAW

This section examines two typical cross-border insolvency cases on the basis of the analyses mentioned above.

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53. Yamamoto, *supra* note 3.

54. *See* Model Law, art. 23. *See also* FUKAYAMA, *supra* note 28, at 21-24.

55. Yamamoto, *supra* note 3.

56. Bankruptcy Law, art. 357-2; Civil Rehabilitation Law, art. 207; Corporate Reorganization Law, art. 242; *cf.* Model Law, arts. 25, 26, 27.

57. Bankruptcy Law, art. 131-2; Civil Rehabilitation Law, art. 208; Corporate Reorganization Law, art. 243; *cf.* Model Law, art. 31.

58. Bankruptcy Law, art. 357-3; Civil Rehabilitation Law, art. 209; Corporate Reorganization Law, art. 244.

59. Bankruptcy Law, art. 357-4; Civil Rehabilitation Law, art. 210; Corporate Reorganization Law, art. 245.

A. CASE 1: BANKRUPTCY PROCEEDING FOR A JAPANESE CORPORATION HAVING A PROPERTY IN THE UNITED STATES

1. *Fact Pattern*

The Japanese court granted the petition by X Corp., an insolvent Japanese corporation, to initiate a bankruptcy proceeding, and appointed Mr. T as bankruptcy trustee under the Bankruptcy Law of Japan. X Corp. has real estate but no business office in Dallas, Texas, U.S.A. Y Corp., a Japanese corporation, and Z Corp., a U.S. corporation, are creditors of X Corp. Y Corp. and Z Corp. are foreclosing on the real estate of X Corp. in the United States.

2. *Analysis*

a. As to Mr. T

Mr. T shall control the assets of X Corp. that exist when the bankruptcy proceeding is commenced. This power extends to the assets of the debtor in foreign countries (abolition of territorialism). The effect of the bankruptcy proceeding in Japan, however, does not automatically extend to the execution by Y Corp. and Z Corp. on the real estate in the United States because U.S. law governs the real estate located in the United States. Therefore, the executions by Y Corp. and Z Corp. are not automatically stayed by X Corp.'s bankruptcy declaration in the Japanese court. To stay the executions by Y Corp. and Z Corp. against the real estate of X Corp., Mr. T may file a petition in the United States for ancillary relief under section 304 of the U.S. Bankruptcy Code.<sup>60</sup>

Also, Mr. T may file a petition for a Chapter 7 proceeding under the U.S. Bankruptcy Code. When Mr. T files a Chapter 7 petition, the executions by Y Corp. and Z Corp. are automatically stayed under section 362 of the U.S. Bankruptcy Code.<sup>61</sup> In this concurrent insolvency proceeding, Mr. T must cooperate with the Chapter 7 trustee, communicate with him, and give him any necessary information to enable the Chapter 7 trustee to fulfill his obligation (under the U.S. Bankruptcy Code) to liquidate the debtor's assets and distribute the proceeds to creditors.<sup>62</sup>

b. As to Y Corp. and Z Corp.

Y Corp. and Z Corp. can file proofs of claim with the Japanese court in a Japanese bankruptcy proceeding. A foreign creditor such as Z Corp. must file the proof of claim with a Japanese translation of the proof of claim.<sup>63</sup>

After filing proofs of claim with the court in Japan, if Y Corp. or Z Corp. received partial payment with respect to each of their claims by executing on the real estate of X Corp. in the United States, neither of

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60. 11 U.S.C. § 304.

61. 11 U.S.C.S. § 362 (2003).

62. Bankruptcy Law, art. 357-2.

63. *Id.* art.108.

them may receive a payment for their respective claims in the Japanese bankruptcy proceeding if the payment to the other creditors is proportionately less than Y Corp. or Z Corp. has already received.<sup>64</sup>

B. CASE 2: CHAPTER 11 PROCEEDING FOR A U.S. COMPANY HAVING  
A PROPERTY IN JAPAN

1. *Fact Pattern*

A Corp., a U.S. Corporation, commences a Chapter 11 reorganization proceeding in the U.S. Bankruptcy Court. A Corp. does not have a business office in Japan, but has real estate in Osaka, Japan. B Corp., a creditor of A Corp., is executing against the real estate of A Corp. in Japan.

2. *Analysis*

As the DIP, A Corp. can file a petition for either a bankruptcy proceeding or a civil rehabilitation proceeding with the bankruptcy department of the Osaka District Court because A Corp. has property in Japan.<sup>65</sup> In the absence of proof to the contrary, the existence of the Chapter 11 proceeding of A Corp. is proof that there is a condition for A Corp. to commence an insolvency proceeding in Japan.<sup>66</sup> Unlike the automatic stay under section 362 of the U.S. Bankruptcy Code, under Japanese insolvency laws, B Corp.'s execution against A Corp.'s property in Japan is not automatically stayed. When A Corp. files its Japanese insolvency proceeding, however, it may simultaneously petition the Japanese court for a prohibition order (*chushi meirei*) to stop certain executions against A Corp.'s property. Also, when the court initiates the insolvency proceeding, the execution by B Corp. is stayed. In this concurrent insolvency proceeding, the trustee or DIP of A Corp. in Japan shall cooperate with the DIP of A Corp. in the United States.<sup>67</sup> On the other hand, A Corp., as a DIP, cannot file a petition for the corporate reorganization proceeding in Japan because A Corp. does not have a business office in Japan.<sup>68</sup>

The effect of the automatic stay under the Chapter 11 proceeding in the United States does not automatically extend to the execution by B Corp. against the real estate of A Corp. in Osaka. As a DIP, however, A Corp. can file a petition to initiate a recognition and assistance proceeding with the Tokyo District Court, requesting recognition the Chapter 11 proceeding and a stay of the execution by B Corp.<sup>69</sup>

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64. *Id.* art. 265-2.

65. Bankruptcy Law, arts. 104-2, 357-3; Civil Rehabilitation Law, arts. 4, 209.

66. Bankruptcy Law, art. 131-2; Civil Rehabilitation Law, art. 208.

67. Bankruptcy Law, art. 357-2; Civil Rehabilitation Law, art. 207.

68. Corporate Reorganization Law, art. 4.

69. Matsushita & Steele, *supra* note 41, arts. 4, 17.

## V. CONCLUSION

There is not much case law in Japan on cross-border insolvency matters, especially on the issue of whether certain foreign insolvency proceedings can be recognized in Japan under the Recognition Law. Given that the new Japanese cross-border insolvency law contains many rules that are based on rules from the Model Law, it should become easier for foreign business enterprises to predict how to deal with cross-border insolvency matters under Japanese law.





# **Comment**

