The Insolvency Review: Japan

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Insolvency law, policy and procedure

Introduction

In essence, for in-court insolvency proceedings, Japanese insolvency law recognises four types of procedures, each of which is governed by separate legislation and can be categorised into one of two general types, depending on whether the aim of the proceedings is to liquidate a debtor (liquidation-type proceedings) or rehabilitate a debtor (rehabilitation-type proceedings). The general and common form of the liquidation-type proceedings is bankruptcy proceedings under the Bankruptcy Act. The purpose of bankruptcy proceeding is to liquidate the company by converting its assets into cash and distributing the cash to creditors in a fair and equitable manner (i.e., on a pro rata basis). Bankruptcy proceedings are usually used only when none of the other insolvency proceedings are viable. The special liquidation proceedings under the Companies Act is the other type of liquidation proceedings, which can only be used by stock corporations and has different characteristics from the bankruptcy proceedings in several aspects such as the special liquidation proceedings not having the claim determination process unlike the bankruptcy proceedings. The rehabilitation-type proceedings consist of civil rehabilitation proceedings under the Civil Rehabilitation Act and corporate reorganisation proceedings under the Corporate Reorganisation Act. Civil rehabilitation proceedings apply to all types of companies including stock corporations, partnerships, and limited liability companies whereas corporate reorganisation proceedings are only open to stock corporations. International insolvency law is dealt with by conflict of laws rules in the relevant insolvency legislation and by the Act on Recognition of and Assistance for Foreign Insolvency Proceedings.

Consumer insolvency is not governed by separate rules but a consumer in Japan has the opportunity to apply for insolvency themselves, while at the same time availing of the provisions on release and discharge from residual debt in the Bankruptcy Act. The Civil Rehabilitation Act contains rules on consumer rehabilitation.

Finally, an increasing number of financial restructuring cases have been recently handled out of court in Japan rather than filing for in-court restructurings.

Insolvency metrics

In comparison with the immediate aftermath of the financial crisis in 2008, the number of bankruptcy and civil rehabilitation cases in Japan had been consistently seeing a downward trend until the covid-19 pandemic. Statistics published by the courts suggest that the number of bankruptcy cases in each year from 2014 to 2018 generally ranged from 70,000 to 80,000 cases while the cases in 2009 reached more than 135,000. This is the same with civil rehabilitation cases, where the number of civil rehabilitation cases in each year from 2014 to 2018 was within 200 cases whereas more than 650 cases were filed in 2009. That being said, in 2020, almost all industries are experiencing a sea change in the face of the pandemic, which will presumably lead to a substantially greater number of those cases.

Plenary insolvency proceedings

i Bankruptcy proceedings

Bankruptcy proceedings are the key legal mechanism to handle an insolvency case in Japan and are aimed at liquidating the debtor's assets and distributing the proceeds evenly among creditors. This is applicable to natural and legal persons alike. In addition, it also offers natural persons the opportunity to apply for release and discharge from residual debt. The bankruptcy proceedings can be traced back to German influences.

ii Grounds for commencement and jurisdiction

The grounds for commencing bankruptcy proceedings are insolvency, and for legal entities, in addition, over-indebtedness. Insolvency is legally defined as the debtor's general and continuous inability to pay its debts when due and payable. Over-indebtedness is legally defined as the condition in which a debtor is unable to pay its debts in full with its property.

As a general rule, bankruptcy proceedings are only commenced upon application. The right to file an application is held by the debtor and creditor and in the case of legal entities, their directors and officers.

A bankruptcy case is subject to the jurisdiction of the district court that has jurisdiction over the location of the debtor's principal business office if the debtor engages in commercial business. Notwithstanding this general rule, if there are 500 or more creditors who hold bankruptcy claims, a petition for commencement of bankruptcy proceedings may also be filed with the central district court with jurisdiction over the location of the high court that has jurisdiction over the location of the court with jurisdiction. For example, if a debtor's principle business office is located in Yokohama city, the debtor with 500 or more creditors may file for bankruptcy with the Kanagawa District Court, which covers Yokohama city, and may also file with the Tokyo District Court because the high court of the Kanagawa District Court is the Tokyo High Court, which is located in Tokyo over which the Tokyo District Court has jurisdiction. Further, if there are 1,000 or more creditors, a petition for commencement of bankruptcy proceedings may also be filed with the Tokyo District Court or the Osaka District Court.

iii Temporary restraining order before proceedings are commenced

The court can issue a temporary restraining order after an application is filed. Specifically, the court issues an order on prohibition on satisfaction and disposal of assets. In addition, it is also permitted to appoint a temporary administrator, to whom the powers to manage and dispose of the debtor's assets are transferred, and to issue an interim order to halt certain enforcement proceedings. In special cases the court can order an extensive ban on all enforcement measures. That said, contrary to civil rehabilitation proceedings and corporate reorganisation proceedings, it is practically rare in bankruptcy proceedings that the court will grant a temporary restraining order because the period from the filing of a motion to commence bankruptcy proceedings until the court's order to commence bankruptcy proceedings is typically relatively short and, therefore, a temporary restraining order is not required.

iv Effects of the commencement of proceedings

The court issues an order to commence the proceedings, if it finds grounds for commencing bankruptcy proceedings as stated above and no cause for which it may dismiss the motion (e.g., a motion filed in bad faith). On issuance of the commencement order, the debtor's assets as of the commencement of bankruptcy proceedings constitute the bankruptcy estate. The power to administer and dispose of the bankruptcy estate is vested exclusively in the bankruptcy trustee appointed by the court. The bankruptcy estate even includes assets that are located abroad. Where certain assets do not belong to the bankruptcy estate, in particular where they are owned by third parties, the Bankruptcy Act recognises a right of segregation. Measures taken against this estate, such as enforcement measures or interim measures are thus no longer permitted, with even measures that have been commenced becoming stayed.

The bankruptcy estate is liquidated by the bankruptcy trustee to make distributions for bankruptcy claims, that is, the claims whose grounds lie before the commencement order. The claims can only be satisfied in the course of the bankruptcy proceedings.

v Bankruptcy claims

Categories of claims

Claims are categorised in bankruptcy proceedings and are essentially broken down into three categories: bankruptcy claims, claims on the estate and right to separate satisfaction.

Bankruptcy claims are to be asserted only in bankruptcy proceedings. Each holder of bankruptcy claims need to file a proof of bankruptcy claim to be eligible for receiving distribution. Within the category of bankruptcy claims themselves, a distinction is drawn between senior claims, general claims and subordinated claims. Preferred bankruptcy claims, most notably employees' salary and wage claims, are senior to general bankruptcy claims. Subordinated bankruptcy claims, which are subordinate to general bankruptcy claims, primarily consist of damages and compensation claims that materialise because of non-performance or default after bankruptcy proceedings are commenced.

Bankruptcy claims are distinct from claims on the estate, which can generally be asserted without prejudice to, or irrespective of, bankruptcy proceedings and therefore will be paid in preference to bankruptcy claims. Claims on the estate primarily include court fees and costs, the bankruptcy trustee's remuneration and his or her out-of-pocket expenses, and counter-performance claims in the event of executory contracts being continued following the commencement of the proceedings.

The Bankruptcy Act also recognises rights to separate satisfaction for secured creditors who hold special statutory liens granted under the relevant law, pledges or mortgages against the property that belongs to the bankruptcy estate. Rights to separate satisfaction also cover atypical security rights such as a security transfer and retention of title. Similarly, the mechanism of set-off gives a creditor another opportunity for debt recovery. Generally, rights to separate satisfaction and set-off can both be exercised outside of bankruptcy proceedings.

Filing, approval and determination of claims

In the commence order, the court sets a deadline by which creditors with bankruptcy claims must file their proofs of bankruptcy claims. To receive a distribution from the bankruptcy estate, any creditor holding bankruptcy claims other than those classified as claims on the estate is required to file with the court a proof of bankruptcy claim identifying the cause for, and the amount of, the claim by the deadline. The amount of the claim, including contingent claim, is calculated at the time of commencement of bankruptcy proceedings. After the deadline expires a claim that is subsequently filed can only be taken into account if grounds for missing the deadline is not attributable to the relevant creditor and the creditor files a proof of bankruptcy claim within one month after such ground ceases to exist. At the same time the court sets a deadline by which the bankruptcy trustee, the filed bankruptcy creditors or the bankrupt debtor must raise objections in writing against the claims filed.

Any proof of bankrupty claim duly filed will be assessed by the bankruptcy trustee as designated by the court. The bankruptcy trustee upon assessment will decide whether to approve or disapprove each proof of bankrutpcy claim. Any creditor who filed its own proof of bankruptcy claim is also entitled to object to a specific proof of bankruptcy claim filed by another bankrutpcy creditor during the investigation period set by the court. A bankruptcy claim admitted by the bankruptcy trustee and not objected to by any creditor is determined as set forth in the filed proof of claim. If the bankruptcy trustee or any creditor objects to the validity or the amount of a specific proof of bankruptcy claim, such bankruptcy claim will be determined by the court upon the creditor whose claim is objected to filing a petition seeking the bankruptcy court's claim determination process, which is built in bankruptcy proceedings to make rapid claim determination. The claim determination made by the bankruptcy court can be appealed against.

Meeting of creditors

A meeting of creditors is usually set by the court when issuing a commencement order. At a creditors meeting, the bankruptcy trustee usually explains to the creditors attending there the status of administration, liquidation and distribution of the bankruptcy estate.

vi Administration, liquidation and distribution of the estate

Administration of the estate

The Bankruptcy Act stipulates that the appointment of a bankruptcy trustee is mandatory, with the powers to administer and dispose of the bankruptcy estate. The bankruptcy trustee has far-reaching powers to determine the pool of assets, and is then subsequently under an obligation to prepare a list of assets and a balance sheet and to hand these documents over to the court.

Termination and continuation of contractual agreements following the start of the proceedings

In the case of bilateral agreements that have not yet been full performed by both sides by the time of commencement of bankruptcy proceedings (executory contract), the bankruptcy trustee can assume or terminate an executory contract. As bankruptcy proceedings are liquidation-type proceedings, it is quite rare that the bankruptcy trustee assume an executory contract except for cases where it sees the need to continue the debtor's business during a temporary period of time after the commencement. If it assumes an executory contract, the other party to the contract can claim the counter-performance owed in return as a claim on the estate. If it terminates an executory contract, the other party to the contract can demand damages, in their capacity as a creditor holding a bankruptcy claim, and restitution of the counter-performance already rendered by them, in their capacity as a creditor holding a claim on the estate. For executory contracts for continuous performance, the performing party cannot refuse to continue to render performance to the bankrupt on grounds that the performance rendered prior to commencement of the proceedings has not yet been paid. However, claims relating to performance rendered after the commencement application is made are recognised as claims on the estate.

Avoidance

Avoidance consists of avoidance for prejudicial acts and preference. Avoidance for prejudicial acts is possible for actions that the bankrupt takes with the intention of harming creditors. However, this only applies where the recipient of performance was on notice of the bankrupt's intentions. Actions taken by the bankrupt after suspending payments, becoming insolvent or filing the bankruptcy application are subject to preference. However, there is protection for a bona fide third party here as well. Finally, any gratuitous performance rendered by the debtor without receipt of valuable consideration in the six-month period prior to suspension of payments or to the filing of the bankruptcy application is also subject to avoidance for gratuitous acts. No protection of bona fide recipients is provided here. Under certain circumstances, avoidance can also be exercised against third parties on to whom the bankrupt's goods, services or money has been passed, particularly if these parties were on notice regarding the grounds for avoidance.

Liquidation of the estate

The bankruptcy trustee liquidates the assets belonging to the bankruptcy estate under the supervision of the court and the creditors. For this purpose the bankruptcy trustee continues to operate the bankrupt's business, where appropriate and with the court's permission. The bankruptcy trustee requires the prior consent of the court for a range of key measures. These include, but are not limited to, the sale of land or the business as a whole.

Distribution of the estate

After liquidation of the assets in the bankruptcy estate the bankruptcy trustee must make the final distribution. This involves compiling a distribution schedule that states the specific monetary sum to be distributed, the list of the individual bankruptcy creditors, and their claim amounts. Distribution of funds is prorated to the amount of the claims determined through the claim determination process as described above.

vii Conclusion of the bankruptcy proceedings

The court concludes the bankruptcy proceedings by issuing an appropriate order when the bankruptcy trustee has performed the final distribution, has fulfilled their reporting duties, and no objections have been raised. The proceedings are concluded upon publication of this order. Legal entities cease to exist where they no longer hold any assets. In the case of natural persons, the debtor's powers to manage and dispose of assets is revived. Enforcement by a bankruptcy creditor also becomes possible again, unless a natural person is released from his or her residual debt.

viii Release and discharge from residual debt

General

The rules on release and discharge from residual debt (*menseki*) were introduced back in 1952, but were scarcely enforced until the 1970s. This was because consumer loans were uncommon and taking out a loan or credit had the potential to result in reputational losses in the corporate world. However, this was all changed by the rapid surge in consumer credit institutions during the period of strong economic growth and the increasing number of credit card users. Today, the mechanism of the release and discharge from residual debt under the Bankruptcy Act has established itself as an integral part of consumer insolvency, alongside consumer restructuring under the Civil Rehabilitation Act.

Application and preclusionary grounds

A natural person has the option of applying to be released and discharged from their residual debt. They can choose between the various types of proceedings for consumer insolvency; there are no rules stating or providing that a release and discharge from residual debt is subsidiary to consumer restructuring under the Civil Rehabilitation Act. The application for formal legal release and discharge from residual debt is to be filed upon commencement of the bankruptcy proceedings, at the earliest, and one month after the commencement order gains legal force, at the latest; an extension is possible in certain circumstances. Where a natural person makes an application for commencement of bankruptcy proceedings, there is an assumption that an application for formal legal release and discharge from residual debt will also be filed at the same time.

As long as there are no grounds precluding such a formal release and discharge, an application for formal legal release and discharge from residual debt will be granted. In particular, there are grounds precluding a formal release and discharge where the bankrupt conceals their own assets or reduces their value with malicious intent or files for a release and discharge where the mandatory seven years have not yet passed since the point a previous release and discharge order gained legal force. However, even where one of the preclusionary grounds is present, the court has the discretion to order that the debtor be formally released from their residual debt and listens to the view of the bankruptcy trustee for such debtor before exercising the discretion.

Effects of the release and discharge

The release and discharge takes effect upon issuance of the appropriate court order. The largely prevailing opinion is that the liabilities are converted into unenforceable defunct obligations. The release can only be effected in relation to liabilities arising from claims whose grounds existed at the time the commencement order is issued. Certain liabilities are excluded from the scope of the release, namely tax liabilities, monetary penalties and fines, liabilities under damages claims resulting from wilful misconduct or acts arising from gross negligence in the case of personal injury. Liabilities arising from employment relationships and claims to child maintenance are also excluded from the scope.

ix Restitution

The commencement of bankruptcy proceedings places certain legal restrictions on the bankrupt. Lawyers, accountants, auditors and tax consultants are not permitted to carry out their profession. The bankrupt is precluded from holding the legal position of guardian or executor. These restrictions can be taken away again by means of the mechanism of restitution. This

occurs either per se by operation of law, or for instance as soon as the decision on release and discharge from residual debt gains legal force, or upon expiry of a period of 10 years following commencement of the bankruptcy procedure, or after conducting court proceedings in line with a relevant application. Given that, in most cases, the release and discharge from residual debt is granted, the mechanism of restitution inherent in release and discharge from residual debt is the standard case in practice here.

Special liquidation proceedings

An insolvency case can also be resolved by way of special liquidation proceedings, and thus, as with bankruptcy proceedings, by liquidating the debtor's assets and distributing the proceeds evenly among creditors. However, the proceedings are governed by special rules on the liquidation proceedings in the Companies Act and in deviation from the bankruptcy proceedings, can only be applied to the liquidation of stock corporations. The proceedings only begin following termination by resolution of the shareholders at a general meeting and shall be commenced where:

a. there is a suspicion of over-indebtedness (meaning the condition in which a debtor is unable to pay its debts in full with its property); or
b. there exist circumstances prejudicial to the implementation of the ordinary liquidation.

Special liquidation proceedings give more leeway than bankruptcy proceedings because the liquidator, who is normally the former managing director, can effect satisfaction of the claims by means of an agreement with creditors acting through the meeting of creditors. The agreement is formed by a creditor resolution being passed at the meeting of creditors, which is subsequently approved by the court. A majority of the creditors present at the meeting and two-thirds of the claim sum is required to pass the resolution. Unlike bankruptcy proceedings, neither claim filing or claim determination process nor the right of avoidance is implemented in special liquidation proceedings and accordingly the proceedings do not fit into cases where a certain claim is disputed and needs the court's determination or avoidance action is necessary.

Civil rehabilitation proceedings

Civil rehabilitation proceedings are Rehabilitaton-Type Proceedings introduced on 1 April 2000, which apply to all types of companies including corporations (*kabushiki kaisha*), partnerships, and limited liability companies. The aim of civil rehabilitation proceedings is to turn around the debtor's business based on a 'rehabilitation plan', which restructures the pre-commencement debts. Civil rehabilitation proceedings are often referred to as debtor-in-possession (DIP) proceedings. In general, the management of a debtor as a debtor-in-possession will continue to operate the debtor's business, being overseen by a supervisor appointed by the court. It is rare for the court to appoint a rehabilitation trustee in civil rehabilitation proceedings whereas the statute allows. While they were initially intended to apply to small or medium-sized companies, civil rehabilitation proceedings have also been used to restructure some large-sized companies that would otherwise have chosen corporate reorganisation proceedings. Along with its rules on commercial debtors, the Civil Rehabilitation Act also caters for consumer restructuring.

i Grounds for commencement and jurisdiction

The ground for commencing civil rehabilitation proceedings is (1) that there is a risk that a fact constituting the grounds for commencement of bankruptcy proceedings (as mentioned above) would occur to a debtor[2] or (2) that a debtor is unable to pay all of its due and payable debts without causing significant hindrance to the continuation of the debtor's business. Civil rehabilitation proceedings can only be commenced upon application by the debtor or by the creditors, with the only grounds open to creditors to effect commencement being the risk of grounds for bankruptcy. Local district courts have exclusive jurisdiction.

ii Temporary restraining order

Civil rehabilitation proceedings neither have the concept of automatic stay nor automatically commence with the filing of the motion. Until issuing an order to commence civil rehabilitation proceedings, upon request, the court can issue a temporary restraining order, including adjourning or setting aside enforcement proceedings or court proceedings. In addition, the court can also generally prohibit enforcement proceedings and under special circumstances even adjourn or set aside proceedings for exercising security rights. The court, simultaneously with the grant of a temporary restraining order, also usually orders that a supervisor be retained. In the order to retain a supervisor, the court lists the debtor's activities that must be approved by the supervisor, which includes disposal of the debtor's assets (including creating a security interest on the debtor's assets) and DIP financing. The purpose of retaining a supervisor, together with a temporary restraining order, is to prevent the debtor's assets from being lost or collected by any creditor.

iii Effects of the commencement of proceedings

In civil rehabilitation proceedings, the debtor continues to operate their business after commencement of the proceedings and retains the right to manage and administer their assets. The pre-commencement directors are responsible for turning around the debtor's business under the supervision of a court-appointed supervisor. DIP is aimed at speeding up the proceedings and

giving the debtor an incentive to file an application at an early stage. Only in exceptional cases will an rehabilitation trustee be appointed here. Instead, as stated above, a supervisor is commonly appointed by the court.

Upon commencement of the proceedings measures taken in relation to the restructuring assets, such as enforcement measures or interim measures are thus no longer permitted, with any measures that have been commenced becoming stayed. From the debtor's perspective, the commencement of proceedings triggers a prohibition on satisfaction for all claims generally against the debtor, the grounds for which pre-existed the commencement of the proceedings. However, there is an important exception that the court can issue an order to allow the debtor to pay pre-commencement claims (typically, trade claims) if the court determines that:

a. their respective claims are small (smallness requirement); and
b. not paying to them would cause significant hindrance to debtor's business continuation (criticality requirement).

The justification behind here is to maximise the overall recovery for all creditors by keeping the business value of the debtor through paying these claims. In particular, although depending on the liquidity of the debtor, trade creditors that are critical to maintain the business value of the debtor would be paid because they would otherwise cease ordinary course of business with the debtor, which would damage the going concern value of the debtor.

iv Rehabilitation claims

Categories of claims

Claims are also categorised in the context of civil law restructuring proceedings and essentially broken down into common benefit claims, claims with general priority, rehabilitation claims and rights to separate satisfaction.

Common benefit claims and claims with general priority must be fulfilled independently of the proceedings. Common benefit claims include:

a. expenses or remuneration for the supervisor and debtor's counsel;
b. claims of the counterparty in the event the debtor elects to assume an executory contract; and
c. costs and expenses, charges, debts, among others, incurred as a result of a debtor's business after the commencement of civil rehabilitation proceedings (e.g., DIP financing)

Claims with general priority are those claims that are secured by a general statutory lien or accorded any other priority under the relevant law, which typically include wages of employees and certain tax claims.

General unsecured claims in civil rehabilitation proceedings are known as rehabilitation claims,that is, pecuniary claims against the debtor, the grounds for which existed prior to the commencement of the proceedings.

The Civil Rehabilitation Act recognises rights to separate satisfaction for secured creditors who hold special statutory liens granted under the relevant law, pledge and mortgages. Set-off by the creditor is also catered for in a similar way. They can exercise their rights independently of civil rehabilitation proceedings, as much as creditors of common benefit claims and claims with general priority can.

In relation to rights to separate satisfaction, the Civil Rehabilitation Act provide for options to restrict exercising rights to separate satisfaction to help rehabilitate a debtor. Specifically the court can issue a stay order to adjourn enforcement proceedings to realise rights to separate satisfaction for a certain period of time (typically three months under the practice of the Tokyo District Court). The prerequisite is that this is in line with the general interests of creditors and does not place the affected secured creditor holding the right to separate satisfaction at risk of incurring unreasonable loss or damage.

An extinguishment request can be used to extinguish the security right in relation to assets that are indispensable for the continuation of the business but encumbered by security rights and thus could be covered by rights to separate satisfaction, with payment for the extinguishment of an amount equivalent to the current market value to the person holding the right to separate satisfaction. In their application, the debtor must justify the indispensable nature of the item and state its value. Where the court grants the application, the security right is then extinguished in return for payment of the amount stated. The secured creditor affected could request what are known as appraisal proceedings in order to arrive at a higher sum. In such a case, the court retains an expert for appraisal.

Filing, approval and determination of claims

The procedures for filing a proof of rehabilitation claim in civil rehabilitation proceedings are almost the same as those in bankruptcy proceedings. Any creditor who has claims other than those classified as common benefit claim must file with the court a proof of claim within the filing period as determined by the court in order to be entitled to the voting right over a

rehabilitation plan and the right to repayment or refund under the plan. This also applies to creditors that hold a right to separate satisfaction. They must state the deficiency amount that is not anticipated to be covered by exercising the security right. As with bankruptcy proceedings, if a creditor misses this deadline for reasons outside of their responsibility and control, they can lodge the claim within one month of the point at which the grounds preventing them from doing so cease to apply. Lodging the claim is precluded if an order to refer the draft rehabilitation plan to creditors voting has been issued by the court. By the deadline set by the court, the debtor must file with the court a recognition report in which the debtor approves or disapprove each proof of rehabilitation claim filed by each creditor and, even if not filed, each claim known to the debtor. If no disapproval is made by the debtor and no objection is made by other creditors, such claims are deemed determined. Claims that have neither been lodged nor entered in the debtor's recognition report generally lapse upon approval of the rehabilitation plan.

The creditors' meeting and creditors' committee

The creditors' meeting and creditors' committee have the task of representing the creditors' interests in the proceedings and to supervise the debtor in the continuation of the business. All meetings of creditors are facultative. Along with the power to express their view to the debtor and the court, the powers of the creditors via the mechanism of the creditors' meeting are limited to consultation powers regarding the rehabilitation plan except for creditors meeting for voting on the rehabilitation plan. The creditors' committee should take on all such tasks of creditors' meeting that appear not to be suitable for plenary sessions. The committee must consist of at least three creditors, with the majority of creditors having to approve its activities and it must represent the interests of the creditors as a whole. Its powers are essentially limited to expressing its view to the debtor and the court. Practically speaking, a creditors' committee has rarely been formed in civil rehabilitation proceedings.

v Restructuring debts and rehabilitation plan

Managing and administering the debtor's assets

Civil rehabilitation proceedings are normally conducted by the debtor themselves that must conduct the administration of assets and the rehabilitation proceedings in a just and fair manner. An infringement of this duty can result in claims to damages and to the appointment of a rehabilitation trustee. The appointment of such rehabilitation trustee is only contemplated where the continuation of the business and the administration of the assets by the debtor would appear to be inappropriate to a particularly high degree.

In addition, the Civil Rehabilitation Act also allows for the appointment of a supervisor or an examiner, in order to supervise the debtor or review certain facts and circumstances. The appointment of a supervisor is the standard practice. The supervisor holds investigative rights and is also subject to reporting obligations, meaning that the additional appointment of an examiner is superfluous in most cases. Therefore, an examiner is only appointed in very seldom cases; for example, where the restructuring proceedings are commenced upon an application by the creditors.

A corollary of proceedings being conducted by the debtor is that the court also has a number of powers it can mostly use on an *ex officio* basis. In particular, it can specify acts that require prior consent before they can be carried out by the debtor. This normally includes disposing of assets, taking out loans or credit, terminating executory contracts and bringing any lawsuits, but if a supervisor is appointed, these consent rights are delegated to the supervisor in the order issued by the court to appoint him or her.

Termination and continuation of contractual agreements following the commencement of proceedings

There are provisions under the Civil Rehabilitation Act that are applicable to executory contracts, and to continuing obligations, which correspond to those applicable to bankruptcy proceedings.

Avoidance

The Civil Rehabilitation Act provides for basically the same statutes as the Bankruptcy Act does with respect to avoidance actions. Acts (apart from providing collateral and acts resulting in the extinguishment of liabilities; see below) carried out by the debtor in the knowledge that they would cause loss or damage to creditors and acts that cause loss or damage to creditors without such knowledge and that are carried out after the suspension of payments or after applying for the commencement of proceedings are all subject to avoidance. However, in both cases a third party that does not know the actual facts and circumstances is protected. Acts of asset disposal carried out by the debtor in return for the payment of a reasonable purchase price are only subject to avoidance where there was a risk of the creditors suffering loss or harm, the act of disposal was in line with the debtor's intentions and the recipient knew of these intentions.

In the event collateral is supplied or of an act that results in a liability being extinguished, avoidance is generally only possible where the act took place after the debtor became insolvent (meaning being generally and continuously unable to pay its debts when due and payable) or after the application to commence the proceedings was filed. However, where the debtor was not

under a performance obligation or not at this point, then the act is still subject to avoidance if it was carried out within a period of 30 days prior to the debtor becoming insolvent. However, a bona fide recipient is afforded protection in all cases.

Any gratuitous performance rendered by the debtor after suspension of payments or in the six-month period prior to suspension of payments is always subject to avoidance.

Rehabilitation plan and implementation

The proceedings are directed at preparing a rehabilitation plan that will be approved by the majority of creditors involved and confirmed by the court. As a general rule, the debtor must submit a draft plan to the court within the period prescribed by the court. And every creditor who filed a proof of rehabilitation claim is also entitled to do so. Approval of the draft plan requires a majority of creditors, both from the perspective of the number of creditors voting on the matter and from the perspective of the total sum of the rehabilitation claims that were lodged.

A rehabilitation plan makes provisions for the modification of rehabilitation claims and the satisfaction of common benefit claims and claims with general priority. Typical modifications include reduction (haircut) and deferral, with a deferral only being possible for a maximum of 10 years. When modifying rehabilitation claims, all creditors should generally be treated equally. Differentiations are permitted where:

a. any rehabilitation creditors who will suffer detriment has provided consent; or
b. equity will not be undermined even if the plan otherwise provides for small rehabilitation claims (e.g., payment in full to small creditors for the purpose of administrative convenience) or any other difference in treatment of rehabilitation creditors (e.g., subordinating claims to recourse by parent guarantors or intercompany shareholder claims).

Any modification to the pre-commencement claims needs to meet the principle of ensuring liquidation values, which requires that the recovery in civil rehabilitation proceedings be higher than that in bankruptcy proceedings.

After the proposed plan is approved by the majority of creditors, the court issues an order to confirm the plan unless it finds, among other things, that the plan is unlikely to be completed or that the plan is contrary to law, including the principle of equal treatment and ensuring liquidation values. The approved and confirmed plan becomes effective upon the confirmation order becoming final and binding, and the debtor will be released from the pre-commencement debts as provided for in the plan. The rehabilitation plan is implemented by the debtor themselves. A rehabilitation debtor can emerge from civil rehabilitation proceedings, among other things, when the plan has been successfully implemented or when three years have passed since the court's confirmation of the plan. Conversely, the court issues an order to discontinue civil rehabilitation proceedings, with a motion from the debtor or supervisor or at its discretion, if it becomes obvious that the plan is unlikely to be completed. Any creditor holding claims of at least one-tenth of the total amount of all unpaid claims provided for in the plan may move to revoke the plan if all or part of its claims are or is not paid, as the case may be. Once civil rehabilitation proceedings are discontinued or the plan is revoked, the proceedings will be converted into bankruptcy proceedings.

vi Section 42 Business Transfer

Similar to Section 363 sales under the US Bankruptcy Code, an increasing trend in civil rehabilitation proceedings is for substantially all of the debtor's assets to be sold to a buyer prior to the proposal of a rehabilitation plan. With the court's permission, a rehabilitation debtor may execute the sale of substantially all of the debtor's assets prior to proposing a rehabilitation plan. A buyer will obtain the debtor's assets sold, but with liens on them, if any. Under Japanese law, creditors may not credit bid for the debtor's assets. In civil rehabilitation proceedings, it has been sometimes seen that a debtor files a motion to commence the proceedings along with an arrangement with a buyer under which the debtor will sell its business to the buyer prior to the proposal of a rehabilitation plan. This is called 'pre-arranged' or 'pre-negotiated' civil rehabilitation proceedings.

vii Standard timeline

The Tokyo District Court published a standard timeline for civil rehabilitation proceedings as described here for reference purposes, although timelines of actual cases vary on a case-by-case basis.

Procedural event	Days from filing the petition
A debtor filing the petition	0 day
The court issuing the commencement order	1 week

Procedural event	Days from filing the petition
The deadline of filing proofs of rehabilitation claim	1 month and 1 week
The deadline for filing a summary of rehabilitation plan	2 months and 1week
The deadline for the debtor filing an recognition report on filed proofs of rehabilitation claim	2 months and 1 week
The deadline for proposing a rehabilitation plan	3 months
The court issuing an order to convene creditors meeting for voting on the plan	3 months and 1 week
Creditors' voting and plan confirmation	5 months

viii Civil rehabilitation proceedings for consumers

A consumer in a situation of insolvency has the option of apply for consumer rehabilitation under the Civil Rehabilitation Act. In this context, the consumer can choose between the various types of proceedings, that is, consumer rehabilitation proceedings and bankruptcy proceedings to seek release and discharge from residual debt.

Consumer rehabilitation does not enjoy priority over bankruptcy proceedings that allow bankrupt consumers to release and discharge from residual debt. However, for consumer rehabilitation it is necessary that continuing and recurring income is to be expected and that the rehabilitation claims do not exceed an amount of ¥50 million, with claims arising out of loans for home ownership not being included in the calculation.

Upon commencement of the proceedings debtor consumer is prohibited from satisfying claims, with the consumer having to satisfy the claims in accordance with a rehabilitation plan. The plan must provide for payment in instalments at intervals of a maximum of three months and a payment period generally of three years and is not permitted to breach the rules on the minimum sum to be satisfied. The minimum sum to be satisfied is regulated by legislation using a declining scale and is set at ¥1 million in cases of small claims and, in cases of larger claims of ¥30 million of more, it is set at 10 per cent of the sum for the claim. The proceedings are concluded by a resolution of the rehabilitation creditors and by the court providing its approval for the rehabilitation plan.

Corporate reorganisation proceedings

i General

Corporate reorganisation proceedings are limited to stock corporations. In practice, they have been only considered in large restructuring cases due to the considerable administrative workload they entail. However, the structures are similar to civil rehabilitation proceedings. Therefore, only the points of corporate reorganisation proceedings that materially differ from civil rehabilitation proceedings shall be described.

ii Grounds for commencement and jurisdiction

As with civil rehabilitation proceedings, the ground for commencing proceedings is that there is a risk that a fact constituting the grounds for commencement of bankruptcy proceedings would occur to a debtor or that a debtor is unable to pay all of its due and payable debts without causing significant hindrance to the continuation of the debtor's business. In contrast to the Civil Rehabilitation Act, the right to file an application is not limited to the debtor and its creditors. Other shareholders are also entitled to file. However, creditors are only allowed to file an application if the entire amount of their claims constitutes at least one-tenth of the company's share capital. For shareholder applications, it is necessary for them to hold at least one-tenth of all voting rights. Local district courts have jurisdiction.

iii Temporary restraining order

The court generally can issue the same temporary restraining orders available to it that are also provided for in the Civil Rehabilitation Act. That said, given that the Corporate Reorganisation Act does not recognise the right to separate satisfaction unlike the Civil Rehabilitation Act and therefore secured creditors are not allowed to enforce their security interests outside of

the proceedings, a temporary restraining order under the Corporate Reorganisation Act can include prohibition on exercise of security interests. A provisional administrator is generally appointed in proceedings under the Corporate Reorganisation Act.

iv Effects of the commencement of proceedings

Upon commencement of corporate reorganisation proceedings, the power to administer and dispose of the debtor's assets and to operate the debtor's business is exclusively vested in a reorganisation trustee appointed by the court. The provisional administrator appointed by the court upon the filing motion usually becomes a reorganisation trustee upon commencement of corporate reorganisation proceedings. Under certain limited cases, the Tokyo District Court allows the debtor or its legal counsel to assume the reorganisation trustee, thereby virtually achieving the DIP proceedings similar to civil rehabilitation proceedings.

v Responsibilities and position of the procedural bodies

In corporate reorganisation proceedings, a reorganisation trustee must be appointed and it assumes administrative and representative powers. The reorganisation trustee is the central figure of the proceedings. Its responsibilities and powers largely correspond to those of a trustee under the Civil Rehabilitation Act or the Bankruptcy Act.

Creditors' committees are also allowed to be established under the Corporate Reorganisation Act. In line with the inclusion of secured creditors and shareholders in proceedings, these groups can each form independent committees that work in parallel with the same powers. The requirements for the approval of a committee formed of interested parties are materially identical to those under the Civil Rehabilitation Act. The court-approved creditors committee is entitled to be actively involved in the restructuring of a debtor's business. For example, the creditors committee may request a reorganisation trustee to report on the restructuring of the debtor's business, and may present its own opinion. The expense for the creditors committee is reimbursed if the court finds that the committee contributed to ensuring the reorganisation of the debtor. Nonetheless, it is still rare for the creditors committee to be formed in corporate reorganisation proceedings.

vi Secured creditors

Contrary to bankruptcy proceedings and civil rehabilitation proceedings, secured creditors are included in proceedings as an independent interest class as what are called secured reorganisation creditors. As they have no right to separate satisfaction, they may not foreclose on the collateral outside of the corporate reorganisation proceedings. The full amount of the claim corresponding to its security interest is not necessarily treated as a secured reorganisation claim; only the amount of the claim that is covered by the fair value of the collateral at the time of commencement of the corporate reorganisation proceedings is treated as a secured reorganisation claim, and the remaining amount that is unsecured by the collateral is treated as a reorganisation claim (general unsecured claim). To evaluate the fair value of the collateral, which will be conducted through the claim determination process similar to that under civil rehabilitation proceedings, has a great significance. Namely, a secured creditor files a proof of claim identifying the fair value of the collateral. If the reorganisation trustee or any of the other creditors object to the amount of such fair value, the court, upon a motion of the secured creditor to determine the fair value of the collateral, will determine the fair value based on an appraisal of a court-retained appraiser. As a result, a creditor that has a claim with security interest may have two classes of claims – a secured reorganisation claim and a reorganisation claim – in a reorganisation plan depending on the amount covered by the fair value of the collateral. As part of the principle of ensuring liquidation values, a reorganisation plan may not provide for any amendment to a secured reorganisation claim whose amount in the plan becomes lower than the fair value of the collateral. In addition, the Corporate Reorganisation Act also regulates what is known as an extinguishment request. The requirements and procedures for this are virtually identical to those under the Civil Rehabilitation Act. However, one important difference is that unlike civil rehabilitation proceedings the sum payable for the forfeiture is not immediately paid to the affected secured reorganisation creditor. The reorganisation plan determines what payments they receive.

vii Reorganisation plan and implementation

The reorganisation plan under the Corporate Reorganisation Act contains further-reaching provisions that those under the Civil Rehabilitation Act. Along with the modification of rights, there must in particular be provision made for the future composition of the company bodies and the measures for raising the requisite means. Furthermore, provisions can be made for restructurings under stock corporation law. In practice, a 100 per cent capital reduction mostly occurs with a subsequent capital increase by a new investor. Different classes (e.g., secured reorganisation creditors, unsecured reorganisation creditors and shareholders) must be treated differently according to their priority when their rights are modified. They must be treated equally within the same class.

As a general rule, the reorganisation plan is produced by the reorganisation trustee, but the restructuring company itself as well as creditors and shareholders are also entitled to do so. The draft plan must be submitted within a year following the judicial commencement order. The parties to the proceedings will vote in separate classes comprising parties with comparable rights. The most important groups are unsecured reorganisation creditors, secured reorganisation creditors and shareholders. For the class of unsecured reorganisation creditors, approval must be obtained for more than half of the total size of their claims. For

the class of secured reorganisation creditors, an approval ratio of between two-thirds and nine-tenths of the total size of their claims is necessary under certain circumstances depending on how the plan haircuts their claims. For the class of shareholders a majority of votes is sufficient; provided, however, that shareholders do not have voting rights on the plan in cases of the debtor's over-indebtedness. Unlike civil rehabilitation proceedings, no head account requirement is needed in the proceedings. If the plan is approved by the creditor classes (subject to a dissenting class being crammed down), the court decides whether to confirm the approved plan. The confirmation order is issued if the reorganisation plan, among other things, satisfies the statutory provisions; it appears possible to implement, its content is fair and equitable and it ensures the recovery of liquidation values. A reorganised company can emerge from corporate reorganisation proceedings when: (1) the plan has been successfully implemented; (2) the plan has thus far been, and is likely to continue to be, performed without default, and at least two-thirds the claims under the plan have been paid; or (3) it is certain that the plan will be implemented even if all the requirements of (2) above have not been met. Conversely, the court may issue an order to discontinue corporate reorganisation proceedings, with or without a motion from the reorganisation trustee, if it becomes obvious that the plan is unlikely to be completed. In such case, the court will convert corporate reorganisation proceedings to bankruptcy proceedings.

viii Standard timeline

The Tokyo District Court published a standard timeline for corporate reorganisation proceedings as described here for reference purposes, although the court also published a shortened timeline and timelines of actual cases vary on a case-by-case basis.

Procedural event	Days from filing the petition
A debtor filing the petition	0 day
The court issuing temporary restraining order	0 day
The court issuing commencement order	1 month
The deadline of filing a proof of reorganisation claim	3 months
The deadline for the trustee filing an recognition report on filed proofs of reorganisation claim	6 months
The deadline for proposing a draft reorganisation plan	10 months
Plan confirmation	12 months

Ancillary insolvency proceedings

i General

All insolvency proceedings also cover assets situated abroad; the strict territoriality principle does not apply. In return, assets situated in Japan can be included in foreign proceedings. However, this is only possible under certain conditions, which must be established in judicial recognition proceedings. Beyond the recognition of foreign proceedings, the Act on Recognition of and Assistance for Foreign Insolvency Proceedings governs what measures can be used to support the performance of proceedings in Japan.

ii Recognition proceedings

Following the ratification by the Japanese government of UNCITRAL Model Law on Cross-Border Insolvency, the Act on Recognition of and Assistance for Foreign Insolvency Proceedings was enacted as of 1 April 2001, to coordinate the liquidation or rehabilitation of debtors that are engaged in international business activities and subject to insolvency proceedings commenced in jurisdictions other than Japan.

Fundamentally, only the foreign insolvency administrator can apply for the recognition of foreign insolvency proceedings. However, if the foreign proceedings leave the debtor with the power to administer and dispose of its assets, then it is also entitled to file an application. The district court in Tokyo has central jurisdiction for all recognition proceedings.

The foreign proceedings must be 'insolvency proceedings'. This is the case if the proceedings settle the debtor's liabilities as a whole, provide for judicial oversight and aim to achieve either liquidation or restructuring. This is undoubtedly the case for German insolvency proceedings. Furthermore, under Japanese law, the foreign court must have international jurisdiction; that is, the debtor must have its place of residence, habitual residence or a permanent establishment in this country.

Among other reasons, the recognition application must be rejected if the foreign proceedings under their domestic law does not cover assets situated in Japan or if they violate the ordre public or public morality. Other reasons for rejection concern the conflict between foreign proceedings and Japanese insolvency proceedings which have already commenced. In this case, the Japanese proceedings generally take precedence. The foreign proceedings can only be recognised if they are commenced in the country in which the debtor has its principal establishment, the order for supportive actions corresponds with the creditors' general interests and there is no concern that recognition in Japan will have a disproportionately deleterious effect on the interests of the creditors.

iii Protective measures

Following recognition, the court can take protective measures, in particular it can interrupt Japanese insolvency proceedings and secure assets belonging to the debtor. Moreover, the court can appoint a lawyer to represent the foreign insolvency administrator in Japan for the purposes of the recognition proceedings.

iv Assistance

The recognition order has no automatic effects, but rather serves as the basis for individual assistance measures which the court orders at its discretion. Of significance is the power to interrupt or cancel enforcement proceedings and disputes of all kinds which concern the debtor's assets in Japan. Moreover, the court can issue the debtor with a ban on disposals and performance, prohibit the exercise of security rights and specify actions for which the debtor requires its prior consent in order to perform. Finally, the court can revoke the debtor's administrative power and transfer it to the foreign insolvency administrator or to a specially appointed Japanese trustee.

v Amendment to Japanese insolvency law

In response to the enactment of the Act on Recognition of and Assistance for Foreign Insolvency Proceedings, an amendment to Japanese insolvency law was also made to incorporate the following concepts:

a. under the principle of national treatment, a foreign entity incorporated under the laws of a foreign jurisdiction is granted the same status as a Japanese entity in the Japanese insolvency proceedings;
b. if an insolvency proceeding is commenced in a foreign jurisdiction with respect to a debtor, the presumption will be that a valid cause exists for commencement of Japan insolvency proceedings;
c. if there are insolvency proceedings concurrently pending in more than two jurisdictions, the Japanese trustee may ask a trustee in the foreign insolvency proceeding to cooperate and provide such information as is required to properly carry out the Japan insolvency proceeding, and vice versa; and
d. the trustee in the foreign insolvency proceeding may file a motion to commence the Japanese insolvency proceeding which corresponds to such foreign insolvency proceeding.

The foreign trustee is entitled to present its own opinion at the creditors' meeting and to file a rehabilitation or reorganisation plan with the court. Further, the foreign trustee may, in its capacity as a representative representing those creditors who have filed proof of claims in their foreign insolvency proceedings but who have not done so in the Japanese insolvency proceedings, participate in the Japanese insolvency proceeding, and this applies to the Japanese trustee in the foreign jurisdiction in the same manner.

Trends

i General

A distressed debtor commonly and recently seeks to reach a negotiated agreement with its creditors outside the court to avoid statutory insolvency proceedings. It is generally perceived by restructuring practitioners that an out-of-court restructuring or workout is preferable to statutory insolvency proceedings to preserve a debtor's going-concern value and reduce the costs for restructuring. Out-of-court workout, by its nature, is not backed up by any statute or procedural rules as it doesn't relate to 'in-court' restructuring but it is beneficial for both debtors and creditors if workout procedures can be standardised to facilitate out-of-court workout and from this perspective a standardised out-of-court workout scheme called the 'Turnaround Alternative Dispute Resolution (ADR)' was introduced and has been commonly used in Japan.

ii Turnaround ADR

Turnaround ADR was introduced in 2008 through an amendment to the Act on Special Measures for Industrial Revitalization and Innovation (currently the Act on Strengthening Industrial Competitiveness) to facilitate financial restructuring of a debtor outside the court at an earlier stage. Turnaround ADR is designed to help facilitate negotiations between a distressed debtor and its financial creditors under mediators licensed by the Ministry of Economy, Trade and Industry and the Ministry of Justice. The Japanese Association of Turnaround Professionals (JATP) is the only licensed organisation that can mediate Turnaround ADR cases thus far. The general information of the JATP is available at **http://turnaround.jp**.

Turnaround ADR can be defined by several important aspects. First, by its nature as out-of-court workout, no court is involved in the process. Instead, usually three disinterested, experienced mediators chosen by the JATP preside over the whole process, by scrutinising a restructuring plan made by a debtor and chairing multiple creditors meetings. Second, as opposed to in-court restructuring, only financial creditors, typically banks, get involved in the process. After the standstill is agreed on by participating financial creditors as stated below, a debtor is not required to pay loan principals during the turnaround ADR process, which can stabilise the debtor's liquidity during the process. However, a debtor can, and is also expected to, pay trade creditors in the ordinary course of business and operate the business in the same way as before to keep the going-concern value. Third, contrary to in-court, turnaround ADR proceeds in secret except for some cases involving listed companies. This confidentiality can minimise potential deterioration of a debtor's business through public disclosure. Fourth, and most importantly, a debtor needs unanimous consent from all participating banks to cut a deal, which is practically the biggest challenge when going along with turnaround ADR. No majority voting is implemented here.

After the debtor makes a formal application to the JATP and the JATP accepts it, the debtor and JATP sends a 'standstill' notice in their joint names to the financial creditors whom the debtor wants to involve in turnaround ADR. The standstill notice is a unilateral notice sent from the debtor and the JATP to ask financial creditors to refrain from collecting loan principals even due and payable by, among other things, exercising set-off, requiring collateral or guarantee, receiving payment, enforcing their security interest, and filing a petition for compulsory execution, provisional attachment or any insolvency proceedings. The standstill notice expires at the time of the first creditors' meeting, as explained below, but with the creditors' consent, it is usually extended until the third creditors' meeting. The standstill notice is not generally deemed to be default.

There are three types of creditors' meetings that are held under turnaround ADR. At the first creditors' meeting, three mediators chosen by the JATP are approved by participating financial creditors if they are satisfied with those mediators supervising the process. Also, at the first creditors' meeting, the notice of standstill sent by a debtor needs to be confirmed by participating financial creditors and they decide when the standstill will expire. In almost all cases, participating financial creditors agree to extend the period of standstill until the end of the third meeting. Then, at the second meeting, the debtor will propose the plan details to participating financial creditors. The mediators scrutinise the plan details from an objective viewpoint and submit a report to participating financial creditors on how fair and economically reasonable the mediators think the plan is. Upon receiving the report, participating financial creditors think of whether to accept the plan and at the third meeting there are final votes on the plan. If all of them vote for the plan, the plan is approved and the debtor will execute it accordingly. But if any of them voted against the plan, turnaround ADR ends in failure. The debtor has two alternatives if any of them objects to the plan. The first is to use in-court 'special mediation' proceeding presided over by a judge to reach a consensus with respect to the dissenting creditor but the dissenting creditor is not compelled to accept the plan. The second is to file for in-court insolvency proceedings – civil rehabilitation proceedings or corporate reorganisation proceedings.

Footnotes

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[2] For more details on the grounds for bankruptcy, see the section on bankruptcy proceedings.

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