CROSS-BORDER BANKRUPTCY
JAPANESE REPORT

Koji Takeuchi*

Introduction

The first modern Japanese law of insolvency was modelled after French Law and created by a German scholar, whose ideas drew upon mercantilist and suspension of payment doctrines in bankruptcy.[1] Thereafter, bankruptcy (*Tosan* or *Hasan*) and composition with creditors (*Wagi*) laws were effected under the primary influence of the German legal system.[2] Original provisions concerning liquidation and reorganization were included within the corporate law sections[3] of the Commercial Code. The synthesis of various laws of reorganization culminated, after World War Two, in the reception of the American law governing corporate reorganization (*Kaisha Kosei*).[4] Consequently, there is an enormous variety of proceedings, means, and potential parties to be involved in insolvency proceedings. The modern Japanese law of insolvency makes itself an exception among legal systems in that a synthesis of several substantively different legislative enactments has been created. The present situation, of noticeable gaps in the rights and remedies available among such enactments depending on which law is invoked, has been accepted without much question, and is regarded as the result of Japan's choice to integrate differing laws into one civil code system. Under the Japanese system, the highest position among the various sources of the law is accorded to statutes, as containing principles representing the nation's general will, which are to be applied using deductive reasoning, it being understood that they carry greater weight than judicial precedent.[5]

The jurisdictional foundation of Japanese international insolvency is its extremely (puristic) territorialist principles, set out in the aforementioned statutes. As we shall

* Attorney at Law, Japan

observe later in this paper, various inherent contradictions between these statutes and economic realities in international insolvency may well be regarded as the price for legal stability to be enjoyed under the doctrine of statutory preeminence. Speaking upon the Law of Insolvency within the Japanese economy, even if one were to confidently acknowledge Japan's economic success in the world's economy, many of the former weaknesses of the Japanese economy stand uncorrected, and business failures for structural or managerial reasons remain. While free market principles function, conservation of capital and workplace through the exercise of social and industrial policies has been designed simultaneously. Consequently, despite the legendary antipathy towards litigation felt by the Japanese people, there is, compared to general litigation, a relatively high level of interest in bankruptcy-related court proceedings as occasioned by the ample opportunities for participation. International bankruptcy is an area to which this interest has been directed, as some official comments have come to be made.[6]

This report is required to play an important role, within a greater modern current, in that it examines and reports upon the Japanese law of international insolvency. I fear I have not been able to discharge this obligation, but I hope, nonetheless, that participants in this Symposium will show their patience in accepting this report.

A. General Domestic Proceedings (apart from the hypothetical, assuming a purely domestic matter)

1. Taking Japan as Country A, in the case where Enterprise X has absolutely no foreign elements, what procedures can Enterprise X and its creditors take in Country A to address the insolvency situation?

(1) Should Enterprise X (a Japanese Kabushiki Kaisha limited company) plan to reorganize in Japan, provided it is cognizant that the rights of stockholders are completely subordinated to ordinary claims, and that the right to administer assets and management thereof is completely transferred to a third party administrative function (the trustee or, prior to the decision to open an insolvency proceedings, the administrator for the preservation of the estate), Enterprise X could take advantage of the corporate reorganization procedures established in the Corporate Reorganization Law ("Corporate Reorganization") as the most appropriate procedure for business reorganization. If there is strong adherence in the management to the rights of stockholders and the rights to administer its property, and if there is adequate capital and profitability to justify the preserving of those rights, Enterprise X may utilize the procedures of corporate arrangement established by the Commercial Code ("Commercial Code Arrangement"), or composition under the Law of Composition ("Wagi" or "Composition") (note that under these procedures, the secured creditors' right to proceed against the collateral will not be impaired). On the other hand, if the dismantling of Enterprise X is inevitable, bankruptcy procedures under the Bankruptcy Code ("Bankruptcy") and winding up under the Commercial Code ("Winding Up") are available. Winding up will be converted to special winding up proceedings where the debtor is shown to be insolvent or the reasons for conversion such as a majority rule over a minority opposition exist ("Special Winding Up"). A foreign company, ceasing to do business or being ordered to discoatimse its business, will be dissolved under winding up procedures to be commenced by the court. As there is no obligation to petition for bankruptcy adjudication unless one

is found to be insolvent in winding up procedures, out-of-court workouts are available for purposes of both liquidation and rehabilitation (although Japan is to accumulate case law on workouts).

(2) Under Corporate Reorganization, creditors holding not less than 10% of capital as well as stockholders owning not less than 10% of the total number of issued shares in Enterprise X have petition rights.[7] Under Bankruptcy, creditors (regardless of the number and the amount owed), Enterprise X and X's managing director all have petition rights.[8]

2. Is the exercise of individual rights against Enterprise X or its property directly influenced by the procedures that can be taken under Question 1? Is any such influence due to the entry of a separate judicial order?

Under Corporate Reorganization and Bankruptcy, insolvency proceedings do not open automatically upon the submission of a petition. Rather, the insolvency proceedings commence only after a hearing and upon an order to open such proceedings. In addition, individual remedies are prohibited as the result of an order which commences the proceeding (the "Order"). The period from the petition until the Order is made may be brief, but may, depending on each case, also take from three to six months. During this period, prohibition against individual creditor remedies is the issue upon the court's own motion or upon a petition by a party in interest with respect to specific individual action.[9] Collection in fact and non-legal actions are not generally addressed by such orders.[10] Even were a creditor to undertake individual remedies, to the extent not expressly forbidden by law or by order, the court is not empowered with contempt power with which to impose restraint on such creditors.

B. Effect on Foreign Countries (assuming a matter involving foreign elements, as in the hypothetical situation; sections C,D and E below assume the same) (also assuming in section B that the reporter's country is Country A)

3. In Country A, what are the fundamental rules relating to insolvency proceedings jurisdiction for Enterprise X?

The following discussion unless otherwise indicated refers only to Corporate Reorganization and Bankruptcy.

There are specific rules referring to jurisdiction within the Japanese statutes. In Bankruptcy, the court may take jurisdiction over the debtor when the debtor's principal place of business or major business location is in its territorial jurisdiction[11] or, if the debtor has its principal place of business or its major business location outside of Japan,[12] when the debtor's major business location is in Japan, or when the debtors' assets are located in its jurisdiction[13] (subject matter jurisdiction always lies in the District Court).[14] These statutory provisions are generally provisions relating to determination of venue rather than that of international bankruptcy jurisdiction, following an analogy to the same kind of statutory provisions in the Civil Procedure Law. Consequently, if we borrow this general concept concerning jurisdiction over civil litigation and its admitted inference to international civil litigation, we would assume that Japanese international bankruptcy jurisdiction holds when bankruptcy jurisdiction, in whichever domestic court, is acknowledged under those venue provisions.[15] Thus, it is clear that parallel international bankruptcies should be no surprise to the legislators. On the other hand, a minority, although a minority with growing support, argues for exclusive jurisdiction of courts based upon the center of the debtor's business, reasoning that good reasons,

including efficiency of proceedings and equity in the perspective of international allocation of judiciary, should determine jurisdiction apart from statutory provisions.[16]

4. Are Country B creditors afforded special treatment as compared with that accorded Country A creditors in presenting their opinions or participating in the proceedings?

Foreign creditors, merely by holding such status, are not prejudiced in their treatment vis-à-vis Japanese creditors in Japanese insolvency proceedings. The standing of foreign creditors under Corporate Reorganization is already statutorily clear by a complete equality and only in Bankruptcy is there reservation of the principle of mutuality.[17] The weight of authority is that the remaining provisions in the Bankruptcy law calling for mutuality[18] are to be construed as a formulaic mutuality (i.e. that a Japanese creditor should be treated the same as local creditors),[19] or that such provisions should be disregarded in practice.[20] And, in actual practice, foreign creditors are sometimes accorded better treatment than their Japanese counterparts as in the cases of *Sapporo Toyopet* (1981) and *Osaka Shoken Shinyo* (1981).[21]

5. Does the effect of Country A's insolvency proceedings extend to the property of Enterprise X or to Enterprise X itself in Country B? In other words:
(a) According to the law of Country A, are Country A creditors permitted to exercise individual rights in Country B?
(b) According to the law of Country A, are Country B creditors permitted to exercise individual rights in Country B?

(1) Japan's statutory insolvency law is based upon the so-called territorial principle in its purest form (i.e. in both domestic and foreign application).[22] Both Korea and Taiwan seem to rely upon the same principle.[23] There is ample documentation for the proposition that the legislators in Japan intended to adopt this territorial principle.[24] Therefore, traditional case law and theory reflect and realize this principle of territorialism. One clear result is that the Japanese trustee receives no authority to litigate in Country B, having neither the power to dispose of assets located in Country B, nor to impede the exercise of individual rights by Japanese or foreign creditors in Country B against assets located in Country B.[25] At best, as against the debtor (or its representative), the trustee has the power to order that assets located in Country B be removed to Japan, to require that a responsible employee delegate the power of disposition of such assets in Country B, or to assert that the above effects be extended to assets that had been transferred from Country B to Japan (Country A) after insolvency proceedings had been initiated.[26] As a result of remarkable economic achievements made by Japan, the flow of its capital into foreign countries, a growing amount of foreign capital entering into the Japanese market, and the increasing number of corporate insolvencies, we have come to realize the inequity among similarly-situated creditors, and the void in the law of insolvency, and have come to question the wisdom of territorialism. Encouragement of limited construction, and further, of revision and amendment of territorialist statutes, has become conspicuous in the three spheres of law: case law, academic opinion, and practice in the courts. This revisionist movement has been significantly fruitful so far, and it seems to have reached a point where it is accepted even as a fixed theory of interpretation of such provisions.

(2) In one case ("Case I"), (and in which Question 5 was asked in the converse) which fall under the facts of Question 7, a Japanese court permitted a foreign trustee (Swiss) to litigate the rights of a foreign debtor (a Swiss corporation) in Japan as against the attachment of its Japanese trademark by a Japanese creditor, holding that

the trustee was entitled to exercise in Japan on behalf of the debtor all of the debtor's rights which may have been disseised of the debtor to the lawstee under the law of the foreign jurisdiction.[27] In another case ("Case I-A"), a court following Case I ruled that a foreign representative as a shareholder may petition for a revocation of a shareholders meeting resolution made in contravention of Japanese Commercial Code.[27-A] Accordingly, we can draw inferences from the foregoing to answer Question 5.

(3) Academic opinions requiring dynamic construction of the territorial principle seem to have blossomed since 1975, although the degrees of suggested construction and the grounds therefor naturally vary among them. They may be summarized as follows:

a) One opinion inclines strongly towards the universalism and unity doctrine, and argues that Japanese insolvency judgment should be effected, including its comprehensive power of execution (including the right to manage assets and to prohibit individual remedies) in foreign countries, by means of an executory judgment or without any formality, where such judgment is ordered by a court exercising jurisdiction based upon the center of the debtor's business.[28] b) One opinion, while admitting concurrent bankruptcies, states that the effects upon foreign assets located in a foreign country be presumed where foreign countries recognize such effects.[29] c) One opinion states that the right to manage assets should be recognized, but only to the extent that they do not impede the individual remedies taken by foreign creditors not participating in Japanese proceedings;[30] d) One opinion which states that the rights to manage assets be recognized without the right to prohibit remedies, and that individual remedies taken in conflict with such rights over assets shall not result in any unlawful enrichment although a question of fraudulent conveyance or preference may arise, subjecting the creditor to the hotchpot rule which denies distribution to that creditor within the jurisdiction until other creditors become entitled to the same rate of distribution,[31] and e) One opinion which states that the trustee's rights to recover assets from abroad, including the right to require cooperation from the debtor, should be recognized, and that any individual remedy taken by a Japanese creditor shall constitute unjust enrichment.[32]

If we take the common factors of each of these opinions together we find that the trustee's direct or indirect (through the debtor) power of administration and disposal against assets held overseas should be recognized, that the comprehensive power of execution should be negated to the extent that it prohibits individual execution against assets held overseas (except for cases where such effects are acknowledged by foreign courts), and that individual remedies taken by domestic creditors should be readjusted through application of the preference, unjust enrichment and hotchpot rules.

However, the above distinction is a mere synthesis of common factors. Therefore, whether the effective and fulfilling administration of an insolvency estate faced with imminent threat of piecemeal execution is to be accomplished, and whether fairness, equity and successful reorganization are to be attained, still remain to be issues. Incidentally, a draft revision of the essential points in statutes relating to Japanese international insolvency ("Revision Outline") has recently been presented by a group of scholars, guided by the notion of universalism.[33] The Revised Outline comprises the following points: a) Domestic insolvency proceedings will have extraterritorial effects, and both the trustee's power of administration and the comprehensive power of execution over foreign assets shall extend to assets abroad, provided that the proceedings are based upon the jurisdiction (principal jurisdiction) over the center of the debtor's business; b) the trustee has the responsibility of administration and/or disposal of the foreign assets; c) cooperation may be requested from foreign courts; and d) a creditor, having taken individual remedies in contravention of the above, shall be subject to disgorgement of the benefit as an unjust enrichment.

According to the Revised Outline, it is clear that certain effects of insolvency

proceedings filed in Japan involving Enterprise X would automatically extend to Country B. Consequently, neither an individual execution taken by creditors in Japan or in a foreign country against foreign assets (in Country B) owned by Enterprise X, nor against Enterprise X, would be permitted.

(4) Practitioners, comprising judges and trustees (usually attorneys), are more positively pursuing and effecting the goals of the universalist doctrine. Efforts to amend territorialism made by those practitioners have become increasingly notable since 1975. Reflection on the progress of such "law as practice" enables us to discern several different evolutionary stages. Stage I involved the trustee's self-constrained administration and disposal in a foreign country in having had to endure and defend against attacks initiated by advantageously-placed creditors (both domestic and foreign) against the foreign assets, and usually ended by settling for solutions. Stage II involved a debtor's request for assistance from foreign courts and then its attempt to defend and obtain protection for foreign assets. The request stretched to enjoining all creditor actions. Stage III (present) involves a highly sophisticated degree of recovery and preservation of foreign assets, utilizing to the fullest extent available foreign bankruptcy systems to effect the goals of the Japanese trustee.

Examples of large-scale international insolvency cases from Stage I are: *Koyama Kaiun* (1975),[34] *Terukuni Kaiun* (1975),[35] *Eiko Business Machine* (1975),[36] *Petri Camera* (1977),[37] and *Issei Kisen* (1978).[38] From Stage II: *Osawa Shokai* (1984),[39] *Riccar* (1984),[40] *Sobu Tsusho* (1985),[41] *Sanko Kisen* (1986).[42] From Stage III: *Maruko* (1991),[43] *Urban* (1991),[44] *SCA* (1991),[45] and *Ken International* (1992).[46] A summary of each stage follows.

During Stage I, the Bankruptcy or Reorganization estate in Japan suffered attacks, such as attachments filed in various regions against vessels used by shipping companies. However, those filing attachments were mostly domestic creditors or their foreign affiliates. This Stage represented a period in which economic realities continuously projected legal questions to be solved.

Stage II was notable for the vigorous activities in foreign countries by Japanese trustees who won various approvals of power from the court, such as having administrative expenses allowed by the court from the estate, and also for the successful results therefrom. One noteworthy occurrence was the petition and order given to the *Sanko Kisen* trustee in ancillary proceedings under the U.S. Federal Bankruptcy Code.

During Stage III, some radical changes have taken place, including the following: a) appointments of additional trustees solely for the purpose of administering and disposing of foreign assets; b) successful petitions for exequatur for the recognition of a bankruptcy judgment in foreign countries; c) a high degree of Corporate Reorganization legal techniques utilizing, for example, parallel petitions under full Chapter 11 (U.S. reorganization) together with joint administration of U.S. subsidiaries; and d) a sophisticated application of law in aid of liquidation Bankruptcy which utilized parallel petitions under full Chapter 11 (reorganization), aiming at an advantageous application of the U.S. preference and discovery provisions.[47] Thus, as one can well observe from Stage III cases, in practice Japanese territorialism has shifted essentially to the universalism.

6. Are the effects described in question 5 to be understood as:

(a) the consequence of legislation intended to extend Country A's laws to foreign countries;

(b) the effect of Country A judicial action (with effect equivalent to that of a formal court judgment);

(c) the consequence of a creditor's submitting to the personal or in rem jurisdiction of courts of Country A;

(d) the consequence of Country A law having been chosen as Enterprise X's governing law in accordance with private international law; or

(e) the consequence of some other reason?

The proposition supporting the foreign effects of Japanese insolvency proceedings, as discussed in Question 5, is the notion that a foreign judgment is entitled to full recognition and that insolvency proceedings can be viewed as one judgment or as a series of judgments (or, at least through an analogy to judgments) to carry out the inherent purposes of such proceedings.[48] A minority view is that an insolvency proceeding is merely an execution, but this view tends to result in territorialist conceptions.[49] The Anglo-American concept of assignment is not widely accepted.[50] An explanation deriving from personal jurisdiction and in rem jurisdiction is only accepted by a minority.[51] A theory of Japanese private international law will select the law of the company by application of good reasons to govern those matters as incorporation, organization, management and dissolution, and based upon this theory there are ample reasons to support the conclusion that effects arising from the law of the company by other forums be recognized.[52]

C. The Domestic Effect of Foreign Proceedings (assuming that the reportert's country is Country B)

7. Does the effect of Country A insolvency proceedings extend to Enterprise X's property or to Enterprise X itself in Country B? In other words:

(a) According to the law of Country B, are Country A creditors permitted to exercise individual rights in Country B,

(b) According to the law of Country B, are Country B creditors permitted to exercise individual rights in Country B?

(1) Case I, as introduced in the answer to Question 5, is of importance in that it represented a major shift in the course of Japanese court's approach to the territorialism. However, the real issue in that case was not whether individual creditor remedies should be disallowed, but rather, whether a foreign insolvency representative's power over Japanese Country B assets was to be recognized. The court answered in the affirmative. With respect to another issue of whether an execution judgment could be obtained, Case I's holding presupposed that such judgment was not required (it is still not clear whether an execution judgment on a foreign insolvency adjudication is statutorily recognizable as falling within Japanese procedural law for recognition of foreign judgements in general or whether it is a creative device to be established by court of bankruptcy not provided for in the statutes, but derived from academic opinions or case law). The foregoing analysis applies completely to Case I-A. Case II, which on time line sits between Case I and Case I-A, involved an individual debtor of Indian nationality that was declared bankrupt in Hong Kong.[53] His banking creditor filed a complaint against the debtor in Japan on overdrafted accounts both in Hong Kong and in Japan. The court there held that the debtor, notwithstanding the bankruptcy, had the capacity to defend the case because of the Japanese territorial principle (the banking creditor seems to have known of the Hong Kong representative, but it is suspected that it feared such trustee's interference; from the judgment itself it is not clear whether the debtor's center of business was located in India or Hong Kong).

(2) If we turn to academic opinions, logical consistency requires that their answer

to Question 5 in its converse form serve as the answer to the present question of whether a foreign or domestic creditor's remedies within Japan shall be impeded. As we have seen, synthesis of the maximum common elements of the foregoing academic opinions leads to the conclusion that a foreign trustee appointed in the court of the principal jurisdiction will have the right to manage foreign assets in Japan (Country B). Similarly, a creditor's action, foreign or domestic, shall not be impeded, except that those Country A creditors and Japanese (Country B) creditors having a nexus with Country A may be subject to adjustment or prohibition under proceedings afforded to the foreign Country A representative.[54] Academic commentators are divided in their review of Case II. One opinion holds the result in Case II to be correct, in that the bankruptcy court was sitting in Hong Kong and not in India, which was merely a non-principal jurisdiction for the debtor.[55] Another opinion also holds Case II as justifiable due to the heavy burden placed upon the creditor to show evidence that the requirements of Section 200 of the Civil Procedure Code were satisfied, although it recognizes the right of the foreign representative to sue, as a general theory.[56] However, the author of this second opinion conditioned his decision on the presumption that the debtor's business in Japan was distinct from the business in Hong Kong, and that a proof of claim had not been filed in the Hong Kong court. This country's reporter would think that the debtor as seen from the decision conducted business both in Hong Kong and in Japan to a similar extent, although there had been slightly more overdrafted amounts in Hong Kong than in Japan. The reporter also thinks that the location of the debtor's center of business as well as the identity of the chosen trustee for the debtor in Hong Kong must have been clear to the creditor, and that Case II seems to have neglected to clarify these points, and that this lack of precision resulted in the court having reverted to a formalistic construction of the territorial principle. The Revised Outline suggests that a foreign bankruptcy adjudged in the principal jurisdiction be recognized in Japan (Country B), including both the trustee's right to manage assets automatically and the right to enforce the comprehensive power of execution upon an order recognizing foreign bankruptcy. Therefore, where a foreign (Country A) law prohibits a creditor's individual remedies, any such remedial actions taken by both domestic and foreign creditors would be prevented as against the assets of Enterprise X or against Enterprise X after the recognition order has been entered. In a case similar to Case II under the Revision Outlines, the outcome would depend upon whether the foreign insolvency jurisdiction had been based upon the location of the debtor's center of business.

(3) Heretofore, we have seen that Japanese practice (or the law of practice) has essentially abandoned the territorialism with respect to insolvency proceedings commenced in Japan. The question remains as to whether the law in practice will result in the same cooperative attitude upon the receipt of a request for cooperation in relation to a foreign insolvency proceeding. The reporter is hopeful that Japanese courts will not selfishly pursue their own interests in view of the long passage to the present practical interpretations. However, it is still feared that such cooperation might be denied under the pretext of the lack of law or the protection of domestic creditors, thus incurring strong criticisms from friendly nations. Fortunately, there has not been any instance in which a Japanese court has received a request to recognize the comprehensive power of execution in order to prohibit an individual creditor's actions from a foreign proceeding. Thus, so far the law in practice appears seamless. On a future occasion, should a Japanese court receive requests from a foreign court or foreign trustee to provide assistance by refusing to sustain a creditor's individual action, whether domestic or foreign, for example, a request for an execution judgment to Japanese court of general jurisdiction based upon a foreign insolvency adjudication, a request for an execution judgment to Japanese insolvency court, a request to stay execution on judgment or

enforcement on a secured claim, litigation, or preservative provisional remedies, or a request for avoidance of preferences, we would like to see the court make its decisions in recognition of the following considerations.

First, any posture refusing effectively to provide cooperation would be regarded as disregarding the norms of international good faith, considering the present evolution of Japanese practice.

Second, from a closer analysis of both Case I and Case I-A (the wording taken by Case I is that the foreign trustee is recognized its rights to exercise the bankrupt's rights afforded under the territorialism in Japan on its behalf; however, that wording is excessively technical and it is in essence the same as having recognized directly his full power to manage the property and to sue in Japan), and of the synthesis of academic opinion given herein, it becomes clear that the impact of the Japanese judicial recognition of the foreign trustee's power to manage assets is far greater than it may appear at first glance, since a literal reading of the statute, which states that foreign insolvency proceedings shall have no effect upon property or assets in Japan, would lead to the conclusion that the administration of the Japanese assets would be entrusted only to the Japanese parties. The present status of the law demonstrates how far case law and academic opinion have progressed. Furthermore, it should be noted that precedent and academic opinion clearly distinguish between the concepts of a trustee's authority to manage assets and its comprehensive power of execution. These arguments are premised upon creating separate and independent concepts; therefore, criticism that such separation is not proper alone would not engender much support. It will, however, be admitted that under the law of insolvency in Japan, it is expected that the comprehensive power of execution become enforced immediately upon the rendering of the judgment, which marks the commencement of insolvency proceedings. In addition, the trustee (the choice of whom is legally required concurrent with the adjudication of bankruptcy), is expected to take possession of all of the debtor's properties,[57] to close the debtor's books of account,[58] and to require a sheriff to levy executions based upon the adjudication of bankruptcy. The court, on the other hand, gives orders to debtor's account debtors and holders of debtor's assets prohibiting them from paying or making delivery to the bankrupt.[59]

These orders are both served upon creditors and published. Regardless of whether this enforcement of comprehensive power of execution is regarded as a comprehensive levy or a general assignment to the trustee, it is clear that the prohibition of a creditor's individual remedies takes effect immediately upon the statutory commencement of the insolvency proceeding. Therefore, to be precise, the appointment of the trustee and his rights to manage the property arise once the comprehensive power of execution is exercised, while at the same moment effecting the prohibition of individual remedies. If the foregoing reasoning is accepted, only a small step of logic and consistency remains towards recognition of a foreign trustee's comprehensive power to manage assets, and the acknowledgement that the prohibition of individual creditor action is a part of the same comprehensive power of execution, once such trustee's power to manage assets has been recognized. Simply put, the question of whether to afford recognition only to the extent of the right to manage property, or whether to accept prohibition of individual remedies, seems to be akin to the question of whether to denounce less a person fleeing 50 steps than a person who fled 100 steps. While the difficulty of providing protection to local creditors is a question of serious nature, such protection would be futile where there are insufficient assets within the jurisdiction to fully satisfy all local creditors on their claims (there has been no reported incident in which local creditors have obtained locally complete satisfaction of their claims). Rather, it would seem more vital to the protection of the interests of local creditors that their priority within the local order of law be preserved in the foreign proceedings, and that appropriate accommodations be provided

such that local creditors do not incur unnecessary expenses or incur unnecessary inconveniences in filing their proofs of claim, and that they be notified and given the opportunity to speak or object in a hearing for an execution judgment or other bankruptcy administration matters, thus satisfying the requisites of due process.

Third, the argument utilizing in personam jurisdiction theory from a foreign system to justify the denial of individual remedy taken by a creditor who has sufficient contact with a foreign country (Country A) fails to refer to such foreign system's in rem jurisdiction, which extends the coverage of the foreign proceedings to the property within Country B. In other words, those who argue only by borrowing concepts of in personam jurisdiction will face difficulty in justifying their denial of a foreign court's (Country A) request to protect the property of the forum.

Fourth, the dynamic concept of due process, as applied to the exercise of jurisdiction by courts in the countries which gave birth to that principle, deals with particular issues involving the level of contacts and whether certain means of effecting jurisdiction should be permissible or not. Due process does not simply exempt purely local creditors merely by the fact of their status as such. The reporter notes that there has not been any serious argument that Section 304 of the U.S. Bankruptcy Code is in violation of the federal due process clause.

Fifth, if we view foreign insolvency proceedings within the perspective of foreign judgments as being recognizable, and if we may say that the Civil Execution Law only deals with a foreign monetary judgment, then the means of recognizing other kinds of foreign judgments which section 200 of the Civil Procedure Code does embrace falls within the discretion of the Japanese court. Subject to the local Japanese creditors' exercise of rights being protected by way of summons, hearings, objection rights, petitions for adequate protection and so forth, it is quite possible that a Japanese court taking jurisdiction under the Japanese law of insolvency (the court of the center of the debtor's business in Japan) could recognize the foreign judgment opening the foreign bankruptcy proceedings upon the motion of the foreign court or the foreign representative. Based upon this recognition judgment, the Japanese court could exercise and act upon its power to prohibit individual creditors' remedies upon such conditions as are deemed appropriate under the circumstances. The Japanese execution system anticipates that another court would intervene to stop execution proceedings. From a different perspective, such rendition of assistance by the insolvency court of Japan could be seen as cooperation between courts in terms of the fair distribution a court's responsibility. Such cooperation by the Japanese court to other courts would be deemed required under the Law Relating to the Reciprocal Judicial Aid Given At The Request of Foreign Courts (the "Judicial Aid law"), the Law of the Judiciary in its section on assistance, or the insolvency law (for example, Bankruptcy Law Section 109). Therefore, as international cooperation grows, the reporter would think it possible that the courts of Japan will render assistance to the foreign proceedings by way of entering execution judgments in the court where the debtor's business is located in Japan, or where the debtor's asset is located, because Japan may been seen to have declared as a matter of procedural policy that it shall follow international cooperation, as shown in Section 200 of the Civil Procedure Law, which can logically be treated as a part of Bankruptcy Law through its section 108 and also as a part of the Law of Reorganization through its section 8. The practice of law, centering upon case law, will be able to create law or be able to creatively find law in this field through the resolution of specific legal issues. Here, the reservation should be made clear that the foregoing is only the personal view of the reporter, and it is feared that realization thereof would occur only perhaps in his dreams.

(4) Only a few cases have been reported that can be distilled down to the description within Question 7, such as *U.S. Lines, Inc* (1987)[60] and *Bank of Commerce and Credit*

International, S.A. (BCCI, 1991).[61] In *U.S. Lines*, the debtor-in-possession under Chapter 11 of the U.S. Bankruptcy Code successfully petitioned for Japanese bankruptcy adjudication with respect to its Japanese branch, and it is to be noted that the rights of the debtor to sue in Japan, where there is no court-appointed trustee, have been recognized. The *BCCI* matter, although in actuality a bankruptcy, is being processed under Special Liquidation proceedings following the close of the debtor's business. As a colossal case involving concurrent bankruptcies, it will be quite interesting to observe the kinds of cooperation that will be achieved among the different courts administering liquidation proceedings in the various countries.[62]

8. How will an application for similar proceedings against Enterprise X in Country B be handled?

As stated in the answer to Question 3, a debtor in Japan who has a main business office in a foreign country is subject to Japanese insolvency (Country B) jurisdiction, so long as it maintains a place of business in Japan. Based upon this fact, there is adequate statutory basis for the court to commence insolvency proceedings also in Japan (Country B) against Enterprise X along with the insolvency proceedings overseas (Country A). As a matter of interpretation, whether petitions for insolvency proceeding filed by creditors can be dismissed, or whether the proceedings can be stayed in Japan depends upon the application of precedents, academic opinions, and law in practice as described under Questions 5 and 7. We may receive affirmative responses from academic opinions inclined strongly towards the universalism, whereas we may receive negative responses from opinions relying upon the maximum of the common elements among academic opinions. Also, it is not clear how insolvency distributions should be adjusted which come from two proceedings where concurrent insolvencies are administered. It is possible that those who have received distributions in a foreign country (Country A) are not entitled to distributions in Japan (Country B) until other creditors shall have received the same rate of distribution in Japan (Country B). However, the time is not ripe for arguments regarding this issue. The aforementioned Revised Outline, on the other hand, is clear in its stance in the sense that it answers affirmatively.

Incidentally, it is abundantly clear that a petition for insolvency proceedings against Enterprise X filed by a representative of the foreign insolvency proceedings in Japan is to be accepted by Japanese court (cf. *U.S. Lines*).

9. When there has been a request for recognition of Country A's insolvency proceedings or for judicial assistance based on such proceedings, can a response in aid of Country A's proceedings be given? If so, what would the content and extent of such a response be?

Recognition of a representative of foreign (Country A) insolvency proceeding will be definitely given as to the power of administration and disposal over Japanese (Country B) assets. This point of law was considered under Question 7. Regarding requests for service of process in relation to insolvency proceedings from overseas (Country A), it is possible for Japan (Country B) to offer cooperation under the Judicial Aid Law. (However, this Law is said to be applicable exclusively to "litigation," and thus there is apprehension that the said law cannot be applied to insolvency proceedings. Nevertheless, the term "litigation" may be too narrowly defined when contrasted with the corresponding expression of "case on civil or criminal matters" in the original English text.) Japan is a signatory to the Convention of Civil Procedure (1954, the "Civil Procedure Convention") and the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965). On the othor hand, cooperation in examining evidence for foreign insolvency proceedings can be provided

either under the Judicial Aid Law, where the word "litigation" may be broadly interpreted, or under the Civil Procedure Convention in which there is no qualification other than "civil or commercial matters." Japan is not a signatory to the Hague Convention on the Taking of Evidence Abroad (1970). Refer to the explanation under Question 7 regarding further recognition and cooperation (for example, prohibitions on individual execution and the petition for concurrent insolvency).

D. International Private Law

10. The reporter's country is taken as Country A. In addition, under Country A law, the effect of Enterprise X's insolvency proceedings is taken to extend to Country B.

(a) What is the governing law for the substantive and procedural treatment of Country B general priority claims (including claims arising from taxes or employment relations)? What are the grounds?

(b) What is the governing law for the substantive and procedural treatment of Country B secured claims? What are the grounds?

(c) What is the governing law for the substantive and procedural treatment of issues such as fraudulent conveyances, set-offs and bilateral executory contracts in Country B? What are the grounds?

(1) Suppose that the effect of Japan's (Country A's) insolvency proceedings extend to Country B. In such case, choice of law rules from the perspective of international private law are not clear due to the lack of precedents resulting from the past dominance of the principle of territorialism, nor frankly are the arguments particularly ripe. Certainly what is described below is more a product of theory, but we can generalize on the following points.

As a starting point, the purely procedural rules for the purpose of achieving the final objective of the insolvency procedure of Enterprise X, that is, its reorganization or liquidation, are, of course, those of Japan. Generally speaking, the principle of *lex fori* as to proceedings is also applicable in Japan.[63] Consequently, it can be understood, as to general priority creditors, secured creditors, recipients of fraudulent conveyances, those entitled to set-offs, and parties to bilateral executory contracts in a foreign country, that Japanese procedural regulations are to apply.

(2) Under Japanese insolvency procedures, general priority given to, for instance, a labor claim, is determined theoretically, first as a premise, by applying the law of the contract as to its creation (or the nonexistence thereof) of the claim, its priority nature, and preferential range, which law shall be chosen according to principles of international private law,[64] subject to the review thereafter according to the local labor laws of the place where the labor is to be furnished from the vantage point of societal strategy.[65] Thereafter, priority claims are reevaluated under Japanese insolvency proceedings, for the purpose of a determination of their status and ranking in that country's insolvency law system, having regard for other preferences as well as their standing in relation to general claims.[66] Previously, this reporter has introduced the Revised Outline published as a proposed summary of amended text relating to the international insolvency law. This Revised Outline is being made public simultaneously with the Draft Model Provisions of Bilateral Treaty.[67] According to the Draft Bilateral Treaty ("Model Treaty"), full recognition of the effect of insolvency procedures begun in the jurisdiction in which the debtor's business is centered shall be afforded by the other contracting state. Thus it will be quite informative to refer to the Model Treaty in dealing with the disposition of Country B's general priority claims in Japan under Question 10. If we borrow the thought of the Model Treaty provisions in providing an answer, the existence of general

priority claims, their scope, and their standing shall be determined according to the substantive law of the claim (labor claims being determined according to the laws of the place where labor is furnished), and their treatment and ranking for purposes of bankruptcy law would be determined according to insolvency procedural law.

General principles among foreign countries regarding rights of taxation, i.e. the rejection of a foreign government's exercise of its taxation rights, have been introduced to Japan and have been accepted.[68] Consequently, although it is possible that their priority rights will not be recognized, since we have included a premise that the Japanese insolvency procedure shall be effective in a foreign country (Country B), then tax priority claims would probably be recognized as to standing and scope, in alignment with the Japanese insolvency procedural system (although when the limits of scope and standing in Country B are inferior to that in Japan, then the tax creditor is subject to such inferior limits).[69]

(3) Regarding contractual secured claims, the traditional view is that determination as to the creation (the existence or nonexistence thereof) of the secured claims is to be made by applying the governing law for the secured claims which is chosen first according to general principles of international private law.[70] Thereafter, the creation, existence and effect of property rights are to be determined according to the laws of the place where the property is located (for movable property such as vessels or airplanes, the law is that of the property's place of registration, rather than the location of the property).[71] On the other hand, as opposed to those espousing the theory that secured claims arising by statute are to be considered in the same way as those arising by contract (by cumulative application of the laws governing the secured claims and the laws governing collateral where the property is located), the theory that the only law to be considered is that governing the secured claim is also strong.[72] Importantly, status and standing of such claims under Japanese (Country A) insolvency procedure will be decided under Japanese procedural laws.[73]

(4) Fraudulent conveyances, set-offs and bilateral executory contracts pose difficult problems.

Japanese theory first approaches the law governing claims for their creation, or the laws governing contracts for the formation and the validity of a contract.[74] Thereafter, the requisites and effects of fraudulent transfers (avoidance powers), the requisites for admissible set-offs (however, the effect of set-offs is determined either from the aggregate application of laws governing mutual claims or the laws governing passive claims), and the definition, rejection and assumption under bilateral executory contracts, are to be finally determined in accordance with the law of the country where the insolvency proceedings are opened.[75] The rationale: resolutions of these issues will function to maintain equality and impartiality among creditors. As a minority view, it is possible that the governing law would be that of the location where the transaction in question took place, or where the set-off is to be performed.)[76] Therefore, as a general answer to the basic question, the governing law would probably be that of Japan (Country A).

11. The reporter's country is taken to be Country B. In addition, it is assumed that Country B recognizes Enterprise X's insolvency proceedings or gives judicial assistance based upon such proceedings. In the Country B proceedings:

(a) What is the governing law for the substantive and procedural treatment of Country B general priority claims (including claims arising from taxes or employment)? What are the grounds?

(b) What is the governing law for the substantive and procedural treatment of

Country B secured claims? What are the grounds?

(c) What is the governing law for the substantive and procedural treatment of issues such as fraudulent conveyances, set-offs and bilateral executory contracts in Country B? What are the grounds?

The present state of Japanese theory is basically that explained in the answer to Question 10. Regarding general priority claims and secured claims, one would think that the theory could be applied by reversing the condition of Question 10. There may be, however, a strong inclination to protect the rights of Japanese (Country B) domestic creditors with respect to fraudulent conveyances (the avoidance thereof), set-offs, and bilateral executory contracts, and it is possible that the court will emphasize the application of Japanese insolvency procedural law to the extent it feels is appropriate (in particular in cases where Japanese creditors are all local creditors and have no connection to Country A). However in these cases, there is no doubt that the foreign trustee's competency as plaintiff is fully acknowledged, and therefore the use of the avoidance regulations under an insolvency procedure commenced in a foreign country (Country A) seems to be supportable. Given particularly that there is no Japanese adjudication which would trigger Japanese bankruptcy law provisions, there is something that prevents one from asserting the use of avoidance regulations under Japanese bankruptcy law. As has been discussed already concerning the recognition of foreign insolvency proceedings, even where Japanese insolvency law is to be applied, the reporter would think a better understanding of law would require an execution judgment for a foreign adjudication before Japanese courts would apply the avoidance law provisions of Japan (Contry B).

E. Combined Enterprises

12. Are there methods to treat the wholly-owned subsidiary in Country C as an integral part of the proceedings in Country A (such methods including procedural consolidation, or substantive consolidation through, for example consideration of assets distributed in Country C)? (The reporter's country is taken to be Country A).

(1) As a substitute for answering the question directly, the reporter would like to generally explain the disposition in Japan of an insolvent combined enterprise.[77] First, one notices that there are considerable differences between Corporate Reorganization and Bankruptcy. That is, under Corporate Reorganization, if a parent corporation becomes insolvent, then usually the subsidiary also is considered to be insolvent and the parent corporation and the subsidiary petitions are submitted as part of the same insolvency procedure. The bankruptcy court receives the parent and subsidiary petitions assigning separate numbers based upon the status of each as a legal entity, but appointing the same person as representative (trustee) for both. The procedural progression in which, for example, creditors meet in their meetings, will also be consolidated. Documentation which must be done by the trustee, including reports and plans for the parent and subsidiary, are also presented as one document. Then, the possible inequality between creditors arising from such matters as the merits and demerits of the financial condition of the parent and subsidiary, or opaque transactions between the two, and the complications from multiple or secondary obligations (furthermore, such issues as the protection of a contractual party which relied upon the subsidiary or parent alone), is when necessary, settled according to a joint plan dealing with the merger of the parent and subsidiary, the result being that the only claim that remains is the one more beneficial to a creditor. Furthermore, there is also the method of providing for the same rate of distribution without a merger as to both the parent and the subsidiary.

On the other hand, in Bankruptcy there is usually no automatic linkage of the

bankruptcy petitions of the parent and subsidiary. Even should both submit bankruptcy petitions, the procedural representative (trustee) will be different for each, and proceedings will progress separately under the separate administration. (However, in practice sometimes the sessions of the creditors meetings occur in the same place at the same time.

Obligations between the parent and subsidiary, and guarantee obligations on behalf of another party, and so forth, follow general principles and thus are to be separately settled (given the premise of separately established legal entities, but subject to a piercing of the corporate veil). This type of clear distinction between Corporate Reorganization and Bankruptcy arises from the economic need that the operation and preservation of a subsidiary's assets must be maintained for the benefit of the continuing operation and reconstruction of the parent corporation. Thus, one must separate the inquiry under Question 12 into two cases: that in which Enterprise X intends to reorganize (for the success of the reorganization, the Country C subsidiary is considered indispensable), and that in which Enterprise X is liquidated.

(2) Assuming that Enterprise X's 100% owned subsidiary being registered in Country C or having a principal office set forth in the articles of incorporation in country C is vital to the successful reorganization of Enterprise X, ordinarily management of the 100% subsidiary will be centralized and will be in Japan. Usually it will have at least an operational office in Japan (if there is more than one such office, one of them is the chief office). If this is the case, Section 6 of the Corporate Reorganization Law establishes the Japanese District court's jurisdiction over the Country C subsidiary. In this case, no obstacle is presented by the fact that the subsidiary is a company organized according to the corporation law of Country C and is not a Japanese corporation.[78] Thus, in theory, Corporate Reorganization procedures of Enterprise X as well as its subsidiary in Japan can be jointly processed in Japan.

From this perspective, a Japanese parent and its foreign subsidiaries may benefit from consolidated, unified procedures. In the alternative, the trustee may draft proposals maintaining the independence of the corporate personality of Enterprise X and its subsidiary in Country C. Difficulty in dealing with multiple filing creditors can be resolved by altering the payout ratio, or other means. Moreover, it is not inconceivable that the jointly proposed plan contain a provision for a bold international merger between the parent and the Country C subsidiary.[79] If we can only see such a merger as basically an actual investment in kind, or merely as having made international outward or inward investment, then the difficulty of having two corporations' laws governing both companies shall cease to be problematic. Also, according to corporate reorganization law, there will be widespread exceptions as to mergers pursuant to the Commercial Code. Furthermore, under a foreign legal system, the merger of a domestic corporation and foreign company is widely approved.[80] However, whether Country C approves the corporate reorganization procedure of the Country C subsidiary in Japan, and whether the legal entity resulting from the international merger will be approved shall remain as a separate problem. Further, the above discussion describes what is possible in the theoretical sense, but the reporter should like to note that Japan has not necessarily seen great prospective or test cases using these arrangements. If the methods described in sub part (1) are considerably unusual techniques, then in Country C, after firstly having taken separate reorganization procedures following the laws of Country C, one can imagine choosing the Japanese reorganization representative as the procedural representative of the subsidiary. Whether this choice is made or not, the second step must be to create a common plan which maintains equality among creditors while adequately protecting creditors who have relied upon the parties, all in an equitable and impartial manner.

At that time, creditors of the subsidiary may attempt to employ various devices such as piercing the corporate veil, confidential/fiduciary relationships, and tort theories[81] in filing their proofs of claim or in litigating against Enterprise X; conversely, the creditors of Enterprise X in Japan may use various theories too to attempt to assert their claims against the assets of the Country C subsidiary. When these types of issues arise, the decision of how to conduct the disposition will probably be finally made by providing in each of the plan(s) for a balancing device whereby their claims are treated as much as possible in the same way as they would be in a consolidated or jointly processed proceeding.

(3) The reporter now would like to explore the disposition of the Country C subsidiary when Enterprise X undertakes Bankruptcy instead of Corporate Reorganization. The basic focus at that time is gaining direct access to the Country C subsidiary, in other words to its assets and liabilities. Of course, it should not be forgotten that reasonable preservation on behalf of the employees of the subsidiary resident in Country C is also necessary. Theoretically as seen from Corporate Reorganization described in sub part (2), also in the instance of an insolvency at the Japanese court where the bankruptcy procedure of Enterprise X was commenced, there are grounds for the court assuming bankruptcy jurisdiction over the Country C subsidiary (in other words, that Country C 100% subsidiary's operations are controlled from Japan and even if not, that the Japanese chief office is equally ascertainable).

Usually, there would be no harm in the same person undertaking the responsibilities of the trustee for both parent and subsidiary, and indeed there could be many benefits that could be derived, but conflicts of interest arising from the debt and credit obligations between the parent and subsidiary and instances where the parent's mismanagement extends to the subsidiary would have to be carefully considered, which would probably result in the appointment of a different Bankruptcy trustee. Amongst the innovations for maintaining impartiality and equality between creditors (also, the preservation of the creditor interest having unilaterally relied upon one of the parties considered to this point relating to corporate reorganizations), a merger would, unfortunately, probably be rejected as lacking a necessity, and partiality or inequality shall be settled according to general principles. Namely, various balancing means should be employed to achieve equality and fairness whether it be a procedure which, for example, disallows the filed claims of the creditors, or whether it be a so-called hotchpot style adjustment, whether it be a disallowance of the debts and obligations between the parent and subsidiary, and whether it be a negation of a claim (i.e. the treatment as stock) or subordination.[82] Furthermore, the above discussion is based upon the premise that the bankruptcy in Japan as against the Country C subsidiary will be acknowledged in Country C (or, at least that objections will not be voiced or a duplicate procedure will not be commenced).

On the other hand, the trustee for Enterprise X may employ the strategy of entrusting the bankruptcy procedure for the subsidiary C to the courts of Country C, and only exercising its stockholder's rights (there is also liquidation, and causing a legal representative to petition for bankruptcy). At that time, one should yield to Country C's procedures, thereafter seeking adjustments of many of the legal relationships including those discussed above with the Country C subsidiary's procedural representative (the Japanese trustee and its designee or some unrelated party).

Cases are reported in which the trustee of the Japanese Enterprise X concluded the disposition of its subsidiary in Country C by making sales abroad, including in Country C, of the stock of the Country C subsidiary; in which the trustee effected the liquidation following the laws of Country C to be followed by a bankruptcy petition taken due to a deteriorated situation concerning the liquidation; and in which the trustee, while

designating the responsible management of the Country C subsidiary made an out-of-court workout with local creditors in Country C.

13. Taking the reporter's country as Country C:

How will Country C (including its courts) treat a cooperation request from Country A requesting consolidation or some other form of integrated treatment of the wholly-owned subsidiary in Country C, with concurrent proceedings in Country A?

How will Country C (including its courts) handle attempts by the subsidiary's creditors from both countries to exercise individual rights against the subsidiary, or a request by such creditors for original insolvency proceedings in Country C?

(1) Japan's basic policy is as previously described. The reporter shall firstly address an instance in which Japanese courts have received requests for cooperation from Country A, when bankruptcy proceedings were commenced in Country A involving a Japanese (Country C) subsidiary. If the center of the Japanese subsidiary's operations, notwithstanding its registered office in Japan (Country C), is in Country A and the foreign insolvency proceedings are based upon principal jurisdiction over the subsidiary, as previously described in the answers to Question 7 through 9, then the effect of such proceedings will be more likely than not be recognized in Japan as well, and the courts will be greatly inclined to provide the requested cooperation. When there are bankruptcy petitions from Japanese creditors against the Japanese subsidiary, whether the court may halt their petitions, given that the court has recognized the effect of the bankruptcy procedure of the Japanese subsidiary commenced in Country A, and dismiss such claims in its discretion is a difficult problem. Essentially, this is the same kind of problem as that posed with respect to the effect of the foreign (Country A) insolvency procedures concerning Enterprise X: whether the creditor's petition against Enterprise X in Japan is subject to discretionary dismissal. In that particular case, as previously described, if one can conclude that individual creditor actions may be prevented in the domestic setting, then with the same force one can conclude that the petition for bankruptcy may be prevented or dismissed. If such is the case, then it is also conceivable that the court should be able to stop the bankruptcy procedures against the Japanese (Country C) subsidiary petitioned by creditors in Japan (Country C) under the rationale that bankruptcy procedures of the Japanese subsidiary in Country A have already been commenced, and dismiss them under its discretion. However, it is safe to predict that parallel bankruptcy procedures would be initiated in Japan because of a strong notion among Japanese jurists that the company is incorporated under the corporate laws of Japan, and the home office of the company is registered in Japan, thus subjecting the subsidiary to the full jurisdiction under the courts of Japan.

(2) If there have not been commenced in Country A any insolvency proceedings with respect to the subsidiary in Country C, then proceedings initiated by Enterprise X as the stockholder of the Japanese (Country C) subsidiary based upon the premise of the exercise of stockholder's rights in Enterprise X will be processed as a domestic Japanese proceeding.

If the procedure is essentially extra-judicial (for example, winding up or even special winding up), the appointment of the foreign proceedings' (Country A) representative of Enterprise X as the local representative in Japan (Country C) of its subsidiary would be respected, but one would be safer predicting a negative attitude in judicial procedure. However, to the reporter, that type of cooperation in judicial proceedings would not be inappropriate. For the repayment plan under Japanese domestic procedure,

even where such plan is presented by the foreign representative and contains adjustment provisions for the purpose of maintaining equality among domestic and foreign creditors, will be relegated to the majority rule and the majority may fairly authorize it. Aside from the case in which Japanese (Country C) bankruptcy procedure has been opened in Japan, the exercise of individual rights by creditors of either Country A or Japan (Country C) against the subsidiary in Country C or its assets in Country C will probably be permitted, since it is taken as a premise that bankruptcy proceedings are not proceeding in Country A against the Japanese subsidiary.

F. Bilateral and Multilateral Treaties

14. Has the reporter's country concluded or participated in treaties having an important relationship to insolvency proceedings? What are the names of such treaties, and the other countries party to them? Include treaties now in preparation, negotiation or in the process of revision.

Japan is not a signatory to any such treaty, except the previously described Model Treaty which has been published.

G. Legislation

15. Has there been domestic legislation relating to matters contained in any of the above questions? Include legislation now being prepared.

There is no such domestic legislation in preparation, and the published Revised Outline has already been mentioned. However, demands from scholars, as well as the business community for legislation have been quite strong. The reporter has no less considerable expectations as to future case law and business practice .

Notes

A. Note on Abbreviations

Hasanho	Bankruptcy Law	Bankr. Law
Shoho	Commercial Code	Comm. C.
Kaisha Koseiho	Corporate Reorganization Law	Corp. Reorg. Law
Wagiho	Composition Law	Comp. Law
Saibanshoho	Judicial Law	Jud. Law

Notes

1) Comm. C., Part 3, Law No. 32, 1890 (Meiji 23); Draftsman, Herman Roesler; M. Kato, HASANHO YORON [Digest of the Law of Bankruptcy], (1934) 22.

2) Bankr. Law, Law No. 71, 1922 (Taisho 11).
Comp. Law, Law No. 72, 1922 (Taisho 11).

3) Liquidation is regulated both under Law No. 32, Comm. C. 1890 (Meiji 23), and under Law No. 48, Comm. C. 1899, (Meiji 32). Neither arrangement nor Special Liquidation were modelled after foreign legal systems, and both were created based upon the revision of the Commercial Code in 1938 (Showa 13).

4) Corporate Reorganization is governed by the Corp. Reorg. Law, Law No. 172, 1952 (Showa 27).
For its legislative history, see Ministry of Legal Affairs, the History of the Enactment of the

Corporate Reorganization Law, and the amendments to the Bankruptcy Law and Composition Law (1) or (10). For scholars, See A. Mikazuki, KAISHA KOSEIHO KENKYU [THE CORPORATE REORGANIZATION LAW RESEARCH] (1970) 167, 169, 174.

5) Jud. Law., Chapter 4: "The judgment of an upper court is binding upon a lower court concerning the very same case." Relating to statutes and case law as sources of Japanese law, See generally T. Kawashima, MINPO SOSOKU [GENERAL PROVISIONS OF CIVIL LAW] (1965) at 26 et seq. (1965). Japanese statutes probably belong to the first category described in R. Pound, Common Law and Legislation, 21 HARV. L. REV. 383, 385 (1908). See also, Schuster, GERMAN CIVIL LAW, 17, cited by Pound at 388.

6) In the form of a pronouncement from a Judge of the Tokyo District Court, See, M. Aoyama, Kokusai Tosan Jidai Ni Sonaeta Hosei No Seibi [Legislative Preparation for the Age of International Insolvency], in 65 MINJIHO JOHO [CIVIL LAW INFORMATION], 1 (1992). Representing the administrative agency, Kokusai Ogata Tosan, Kankeiho Seibi e [Towards Preparation of Related Laws in Large Scale International Insolvency], Nihon Keizai Shinbun, Morning issue, June, 1, 1992, information from the Finance Ministry.

7) Corp. Reorg. Law, Section 30.

8) Bankr. Law, Sections 132, 133, and 134.

9) Corp. Reorg. Law, Section 37.
Generally speaking, an affirmative effort is being made towards issuing orders, to prohibit generally the exercise of individual rights, however, the majority who have influence lean towards a negative view of this trend. See JOU [1] A. Mikazuki, M. Takeshita, K. Kirishima, Y. Maeda, J. Tamura, and Y. Aoyama., JOKAI KAISHA KOSEIHO 331 (H. Kaneko, 1973), cited hereinafter simply as "Kaneko, JOKAI KAISHA KOSEIHO."

10) An order prohibiting payment by debtors may be issued, the forceful result being that debtor's incentive to refuse to make payments is created, however, this order is not addressed to the debtor. Corp. Reorg. Law, Section 39.

11) Bankr. Law, Section 105, Corp. Reorg. Law, Section 6.

12) *Ibid*.

13) Bankr. Law, Section 107.

14) Jud. Law, Section 25.

15) Judgment of Oct. 16, 1981 (Showa 56), Supreme Court of Japan, No. 2, Small Court, 35 SAIHAN MINSHU No. 7, 1224 employing inference theory in relation to international civil jurisdiction.
See, M. Takeshita, Wagakuni ni okeru Kokusai Tosanho no Genjo [The Present State of International Bankruptcy Law in Japan] in Takeshita, KOKUSAI TOSANHO, to 3, 13 (1991), for an application of the inference principles of international insolvency jurisdiction from those of international civil procedure, cited simply hereafter as "Takeshita, Kokusai Tosanho no Genjo."

16) K. Takeuchi, Kokusai Hasan e no Shiron [Proposal for International Insolvency, 76 HOGAKU SHIRIN 45, 98 (1978), cited hereinafter simply as "Takeuchi, Shiron."

17) Corp. Reorg. Law, Section 3.

18) Bankr. Law, Section 2.

19) Y. Taniguchi, TOSAN SHORIHO [THE LAW OF DISPOSITIONS IN INSOLVENCY], (First ed.) 413, 414 (1976).

20) Y. Aoyama, Tosan Tetsuzuki ni okeru Gaikokujin no Chii [The Status of Foreign Nationals Under Insolvency Proceedings], 7 SHIN JITSUMU MINJI SOSHO KOZA [LECTURES ON THE NEW PRACTICE OF CIVIL LITIGATION] 267, 279 (1982).

21) H. Kobayashi, KOKUSAI TORIHIKI FUNSO [INTERNATIONAL TRANSACTIONAL DISPUTES] 216 (1987), cited hereinafter simply as "KOBAYASHI, KOKUSAI TORIHIKI."

22) Bankr. Law, Article 3 (Principle of Territoriality): A bankruptcy adjudged in Japan shall be effective only with respect to the bankrupt's properties which exist in Japan.
2. A bankruptcy adjudged in a foreign country shall not be effective with respect to properties existing in Japan.

3. Obligations, of which demand may be made by way of judicial proceedings under the Code of Civil Procedure, shall be deemed to exist in Japan.

23) Korean Bankruptcy Code (Kankoku Hasanho), Section 3 (1962). Republic of China Bankruptcy Code (Chuka Minkoku Hasanho), Section 4 (1934).

24) K. Ume, Hasanho Gaisetsu [Summarization of Insolvency Law] HOGAKU KYOKAI ZASSHI (Gogai) [LEGAL STUDIES ASSOCIATION MAGAZINE (Special Ed.)], February, 1903 (Meiji 36). See also, M. Kato, 6 HASANHO KENKYU [STUDIES IN INSOLVENCY LAW], Vol. 6, 455 (Transcripts of a 1922 lecture).

25) Y. Aoyama, Tosan Tetsuzuki ni okeru Zokuchishugi no Saikento [Critical Reexamination of Universalism within the Insolvency Procedural Law], 25 MINJI SOSHO ZASSHI 131 (1979), cited hereinafter simply as "Aoyama, Zokuchishugi Saikento."

26) See e.g., Motobayashi, Hasan Kaisha ya sono Kogaisha no Zaigai Zaisan to Hasan Zaidan [The Foreign Assets and the Bankruptcy Estates of An Insolvent Corporation and Its Subsidiaries], in TOSAN KAISHA vs. SAIKENSHA [DEBTORS VS. CREDITORS] 62 (1978).

27) Decision of January 30, 1981 (Showa 56), Tokyo Kosei, 994 HANREI JIHO 53 (1981).

27-A) Decision of September 26, 1991 (Heisei 3), Tokyo Chisai, 897 KINYU SHOJI HANREI 30 (1992).

28) Takeuchi, Shiron at 100; Aoyama, Zokuchishugi Saikento, at 125,155; and Y. Kaise, Kokusai Tosanho Josetsu [An Introduction to International Insolvency Law], 487 (1989), cited hereafter simply as "Kaise, Josetsu."

29) KOBAYASHI, KOKUSAI TORIHIKI, 223.

30) K. ISHIGURO, KOKUSAI SHIHO TO KOKUSAI MINJI SOSHOHO TO NO KOSAKU, [(THE) ANTAGONISM BETWEEN PRIVATE INTERNATIONAL LAW AND THE LAW OF INTERNATIONAL CIVIL LITIGATION] 249, n. 557 (1988), cited hereinafter simply as "ISHIGURO, KOSAKU".

31) Takeshita, Kokusai TosanHo no Genjo 47; also, M. Ito, Hasanho [BANKRUPTCY LAW] (New edition) 116 (1991).

32) Y. Taniguchi, Tosan Tetsuzuki to Zaigai Zaisan no Sashiosae [Attachment of Assets Abroad and Insolvency Procedure], YOSHIKAWA TSUITO (IN DEDICATION TO PROFESSOR YOSHIKAWA): TETSUZUKIHO NO RIRON TO JISSEN [PROCEDURAL PRACTICE AND THEORY], 578, 587 (1981), hereinafter cited simply as "Taniguchi, Zaisan Sashiosae". See also, M. Takeshita, Kokusai Tosanho no Genjo, 15 et seq..

33) See KOKUSAI TOSANHO [INTERNATIONAL INSOLVENCY LAW] (M. Takeshita, ed.) 417 et seq., (1991), including commentary by M. Ito, 381 et seq.. Cited hereinafter simply as "Takeshita, KOKUSAI TOSANHO." The Revised Outline is set out below:

Preliminary Draft of the International Bankruptcy Related Provisions in the Japanese Insolvency Proceedings

Section 1 Purpose of this Preliminary Draft:

The purpose of this Preliminary Draft is to fairly satisfy the rights of local and foreign creditors by establishing and/or revising statutory provisions related to international insolvency cases with respect to insolvency proceedings in Japan such as bankruptcy, corporate reorganization, composition, arrangement, and special liquidation.

Section 2 International jurisdiction of insolvency cases:

(1) Ordinary jurisdiction:

i) Japanese courts have jurisdiction over insolvency proceedings for debtors who have their principal office or center of business in Japan.

ii) It is presumed that Japanese persons and legal persons established under Japanese laws have

their principal office or center of business in Japan.

(2) Complementary jurisdiction:

Even if a debtor has his principal office or center of business in a foreign country, if such debtor has property in Japan, the Japanese courts will have jurisdiction. However, if a petition for the commencement of insolvency proceedings is made on the ground that nominal property exists in Japan, the court has the discretion to dismiss the petition.

Section 3 Extraterritorial effect of Japanese insolvency proceedings:

(1) Extraterritorial effect of insolvency proceedings based upon ordinary jurisdiction:

If Japanese courts commence bankruptcy proceedings based upon ordinary jurisdiction as specified in Section 2(1), the effect thereof shall extend to property which the debtor owns in foreign countries.

(2) Extraterritorial effect of insolvency proceedings based on complementary jurisdiction:

Alternative I. If Japanese courts commence proceedings based on complementary jurisdiction as specified in Section 2(2), the effect thereof shall not extend to property of the debtor in foreign countries.

Alternative II. If Japanese courts commence proceedings based on complementary jurisdiction specified in Section 2(2), provided that foreign courts have not commenced proceedings based upon ordinary jurisdiction, the effect of the proceedings in Japan shall extend to property of the debtor in foreign countries.

(3) Trustee's responsibility for administration and disposal of property in foreign countries:

A trustee shall be responsible with due diligence and care for the administration of property in foreign countries to which the effect of proceedings in Japan extend, provided however, that, in accordance with Article 197, Section 12 of the Bankruptcy Law and Article 54, Section 7 of the Corporate Reorganization Law, the trustee may waive the right of administration and disposal of such property in foreign countries if the administration and disposal of such property is difficult.

(4) Request of cooperation of foreign courts:

i) If there is the necessity for the administration of property to which the extraterritorial effect extends, the trustee may request a foreign court's cooperation in taking any appropriate measures therefor.

ii) In case of the request of cooperation specified in i) above, the trustee shall obtain the approval of courts in accordance with Article 197 of the Bankruptcy Law, Article 54 of the Corporate Reorganization Law, and others.

(5) Authorization of Preservation Administrator:

A preservation Administrator appointed by a court based on preservative measures prior to commencement of insolvency proceedings shall have the same rights as the trustee with respect to property in foreign countries.

Section 4 The intraterritorial effect of foreign insolvency proceedings:

(1) Intraterritorial effect:

If a foreign court commences insolvency proceedings based on ordinary jurisdiction and a Japanese court recognizes such proceedings based on a petition by the trustee in accordance with Section 4(3), the

effect of the foreign proceedings shall extend to the property of the debtor in Japan. However, before such recognition is made, the foreign trustee can exercise rights as to the property in Japan in place of the debtor.

(2) Variation of foreign proceedings:

Even if a debtor, instead of the trustee, has a right to administer and dispose of his property under foreign insolvency proceedings, Japanese courts may recognize the intraterritorial effect thereof based on a petition of the debtor.

(3) Application for recognition of intraterritorial effect:

i) A foreign trustee may petition Japanese courts to recognize foreign proceedings.

ii) If a petition in accordance with Section 4(3) i) is made, the court may examine persons interested.

(4) Court of recognition:

A petition for acknowledgment of foreign insolvency proceedings shall be made to the court which has jurisdiction over the recognition proceedings.

(5) Order for preservation:

The court which accepts the petition for recognition may issue an order for preservation based on the petition until such court makes a judgment regarding the recognition.

(6) Requirements for the recognition:

The courts shall rule to recognize foreign insolvency proceedings only if it is determined that the foreign insolvency proceedings have been commenced under ordinary jurisdiction and that none of the following occur:

(a) there is a possibility that the rights of all persons interested as to debtors may not be treated fairly;

(b) there is a possibility that the interests of local creditors may be unduly harmed;

(c) there is a substantial discrepancy between the applicable foreign laws and the Japanese proceedings with respect to the priorities of the rights of the persons interested; or

(d) the foreign insolvency proceedings violate Japanese public policy.

(7) Petition of protest:

A person interested may make an immediate complaint against the decision on the petition for recognition.

(8) Effect of recognition:

i) In case a court makes a decision approving recognition, the court shall make an official request for registration of the bankruptcy with respect to the corporation registration and real estate registration and issue an official notice of such decision , and notices to all creditors known to

the court.

ii) In case a court makes a recognition decision, the foreign proceedings shall become effective in Japan retrospectively as of the date of the decision to commence the proceedings in the foreign country.

iii) The effect of foreign proceedings recognized by Japanese court shall be decided in accordance with the laws of the place where the insolvency proceedings are commenced. The effect shall be specified in the recognition decision, provided however, that if, as a result of the effectiveness of the recognition, any creditors of priority, such as creditors of tax claims or labor claims, are prohibited from exercising their claims and the disadvantages to the creditors caused by the prohibition is substantial, the court may withdraw the prohibition of the exercise of such claims.

(9) Supervision of foreign trustee:

i) In case a recognition decision is made, supervision of a foreign trustee is determined by foreign insolvency proceedings, provided however that the court of recognition may order that a foreign trustee report the execution of his duties to the court or to a representative of the local creditors.

ii) In case the execution of the duties of the foreign trustee substantially harms the interests of the local creditors the court of recognition may revoke all or part of the recognition decision.

(10) Cooperation in foreign proceedings:

In case of necessity, the court of recognition may take measures, including appointment of an assistance trustee to the foreign trustee.

Section 5 Concurrent insolvencies:

(1) Equalization of distribution:

When insolvency proceedings are pending simultaneously in Japan and a foreign country with respect to a certain debtor and a certain creditor files claims in both proceedings, a court shall deem any distribution which the creditor received or is expected to receive in the foreign proceedings as a distribution which the creditor receives in the Japanese proceedings.

(2) Suspension of concurrent insolvency proceedings:

If an insolvency proceeding is commenced with respect to a certain debtor in a Japanese court under complementary jurisdiction, thereafter an insolvency proceeding is commenced with respect to the debtor in a foreign court under ordinary jurisdiction, and the foreign proceeding is recognized under Section 4(3) above, the Japanese court which commenced the Japanese insolvency proceeding shall suspend the Japanese insolvency proceedings.

(3) Concurrent insolvencies based upon petition of foreign trustee:

A foreign trustee may petition a Japanese court to commence insolvency proceedings for a debtor against whom insolvency proceedings have already been commenced in a foreign country.

Section 6 Position of foreigners in insolvency proceedings:

Foreigners or foreign corporations shall have the same position as Japanese and Japanese corporations with respect to insolvency proceedings.

Section 7 Discharge:

(1) Recognition of the foreign discharge:

If discharge is granted to a debtor under a foreign insolvency proceeding, and if a foreign trustee or the debtor petitions the recognition of the foreign insolvency proceeding in the Japanese Courts under Section 4(3) and obtains a recognition decision, the discharge shall become effective in Japan.

(2) Recognition of Japanese discharge:

If a debtor obtains a decision of discharge under Japanese insolvency proceedings, the decision shall be effective in foreign countries.

The International Bankruptcy Research Group which developed the Draft comprised: M. Takeshita, M. Ito, K. Takeuchi, M. Nishizawa, T. Uehara, J. Yokoyama, H. Nomura, and Y. Hasebe. (The above translation is a reproduction of the same in Takeshita, KOKUSAI TOSANHO 428.)

34) Tokyo District Court, (Hu) No. 115, (1975 [Showa 50]), Bankruptcy.
In this case, the Hong Kong liquidation (of a Hong Kong subsidiary) was initiated by the parents' Japanese bankruptcy trustee. The Hong Kong liquidator sued its parent against Koyama Kaiun (Koyama Shipping Enterprise) pursuant to its duties as liquidator. Thereafter, the Japanese trustee submitted a bankruptcy petition against Koyama Kaiun's Hong Kong branch office. The case was settled in a closing consultation between both trustees and liquidator as described in Kobayashi, KOKUSAI TORIHIKI, 215. Many thanks to T. Nomiya, Esq. for his guidance concerning this case.

35) Tokyo District Court, (Mi) No. 19, (1975 [Showa 50]), Corporate Reorganization.

36) Tokyo District Court, (Mi) No. 15, (1975 [Showa 50]), Corporate Reorganization. See also, report related to this case in Takeuchi, Shiron 104, n. 12.

37) Tokyo District Court, (Hu) No. 220 (1977 [Showa 52], Bankruptcy. A report related to this international bankruptcy case is in Takeuchi, Kokusai Hasan e no Shiron 104, n. 11.

38) Kobe District Court, (Mi) No.1 (1978 [Showa 53]), Corporate Reorganization: this case triggered a major incident involving a petition to foreclose based on a vessel mortgage by Japanese creditor, and an arrest of vessels owned by debtors in Canada. The initial arrest was canceled; however, it was later revived. In the end, it turned out to be a full foreclosure and sale action, during which Japanese scholars and attorneys testified as to the state of Japanese law. The Montreal Canada Federal District Court permitted claims in this case (as well as a foreclosure), on the premise of Japanese principles of territorialism. There is a detailed report on this case in Y. Masuda, Kaiun Kosei Kaisha Shoyu Senpaku no Gaikoku ni okeru Sashiosae [The Foreign Attachment of the Vessel Owned by An Ocean Carrier], 73 KAIJIHO KENKYUKAISHI [ADMIRALTY LAW MAGAZINE] 1 (1986). See also M. Takeshita, Kokusai Tosanho no Genjo 1. Cf. regarding the Canadian judgment, Orient Leasing Company Ltd. v. The Ship of Kosei Maru, 94 D.L.R.(3d) 658 (1979).

39) Tokyo District Court, (Mi) No.1 (1984 [Showa 59]), Corporate Reorganization. For a report related to this case, See S. Miyake Osawa Shokai, Kaisha Kosei ni miru Kokusai Tosan to sono Taio, Pts. (1),(2),(3) [Viewing International Insolvency Through the Corporate Reorganization of Osawa Trading Company and Its Response], 2 DEBT ADMINISTRATION, 4 (1987), 3 DEBT ADMINISTRATION 10 (1987), and 4 DEBT ADMINISTRATION 8 (1988), which mainly deal with trustees' foreign strategy, insolvency proceedings by foreign subsidiaries (U.S. and France), and the handling of the parent companies' debts; hereinafter cited simply as S. Miyake, "Osawa Shokai (Part 1),(Part 2), or (Part 3)."

40) Tokyo District Court, Showa 59 (1984), (Mi) No. 7, Corporate Reorganization. It involved cases of liquidations of foreign subsidiaries such as German enterprises, and foreign creditors.

41) Tokyo District Court, (Hu) No. 511 (1985 [Showa 60]), Bankruptcy, involving the disposal of shares of stock issued by foreign subsidiaries. A report regarding this case is in Miyake, Osawa Shokai (Part 1), 7 and Osawa Shokai (Part 2) 15.

42) Tokyo District Court, (Mi) No. 6 (1985 [Showa 60]) Corporate Reorganization: a notable case in that the trustee filed a proceeding under U.S. Federal Bankruptcy Code Section 304, and was granted a stay against Sanko Kisen's (a foreign creditor) action against Sanko's assets. In re Sanko Steam Ship Co., Ltd., No.86 B10291 (S.D.N.Y. decided July 30, 1986). See K. Takeuchi, Kokusai Tosan Shori no Genjo to Kadai [The Present Status and Task of International Insolvency Administration], 39 JIYU TO SEIGI 45, 50, in cooperation with K. Tezuka, Esq. (1988).
The U.S. Federal District Court's order is given in K. Takeuchi, Jitsurei kara Mita Kokusai Tosan no HoTeki Sho Mondai (1) [Problems of International Bankruptcy Viewed from Actual Cases (Part 1)], 7 DEBT ADMINISTRATION 4, 10 n. 8.

43) Tokyo District Court, (Mi) No. 1, (1991 Heisei 3]), Corporate Reorganization: this case is noteworthy in that the Japanese trustee applied for domestic U.S. bankruptcy administration under Section 303 of Chapter 11 of the U.S. Federal Bankruptcy Code, *In re Maruko, Inc.*, (No. SD91-12303-LM11), which aimed at a full-scale reorganization, instead of Section 304 (ancillary proceedings), since the estate involved considerable U.S. real estate. Cf. the Chapter 11 petitions of the two subsidiaries under Federal Bankruptcy Regulations R1015: *In re Maruko, Guam Inc.*, (No., SD91-12546-LM), and *In re Maruko New York, Inc.*, (No. SD91-13398). Many thanks to H. Sakai, Esq..

44) Nagoya District Court, (Hu) No. 87 (1991 [Heisei 3]), Bankruptcy. This case involved substantial real estate and works of art located in several foreign countries. It is remarkable that the court appointed two trustees, dividing their responsibilities between domestic and foreign administration. In addition, the foreign trustee's exequatur petition was acknowledged in France (Jugement rendu le 11 Juillet 1991, Tribunal de Grande Instance de Paris). My thanks to K. Narita, Esq. for his assistance on this case.

45) Nagoya District Court, (Hu) No. 91 (1991, [Heisei 3]), Bankruptcy. This case is remarkable for three reasons in particular: a) as with *Urban*, the court appointed an additional trustee for a purpose of administration and disposal of foreign assets, b) its petition for the execution of judgment was acknowledged (Jugement rendu le 26 Septembre 1991, Tribunal de Grande Instance d'Argentan), c) workouts of French affiliated companies (which own a great number of golf courses) was supervised by the Japanese courts in the course of a liquidation of the subsidiary Japanese corporation. Many thanks to T. Kosugi, Esq. and T. Ikeda, Esq. concerning this case.

46) Tokyo District Court, (Hu) No. 1594, (1991 [Heisei 3]), Bankruptcy. This case is related to the Ibaraki Country Club scandal. It is worth mentioning that the petition for reorganization procedures was filed under Chapter 11 (not Chapter 7) and based upon Section 303 instead of Section 304 requesting recognition of the Japanese insolvency proceedings. Presumably the trustee recognized some procedural advantage such as the ability to utilize U.S discovery procedure to search for concealed outflow of capital and avoid preferences under provisions more advantageous than those available under Japanese Law. For the U.S., it is an *Axona* version of foreign insolvency proceedings. Cf. In re Axona International Credit & Commerce Ltd., 88 B.R. 597 (Bkrtcy. S.D.N.Y. 1988), in which a petition for Chapter 7 based on U. S. Federal Bankruptcy Code, Section 303 was made by a Hong Kong company, achieving an avoidance. Upon recovering its assets, the trustee petitioned for suspension of Chapter 7 and for turnover of the domestic U.S. assets to a Hong Kong trustee, which petition was granted under the conditions that: administrative expenses and U.S. priority creditors would be paid first; and trustee would make distribution in Hong Kong within 72 hours after the assets had been transferred to Hong Kong. My thanks to K. Ohashi, Esq. concerning Tokyo District Court (Hu) No. 1594.

47) In addition to the aforementioned cases, the writer refers the reader to a report of study of international bankruptcies (prior to March, 1987) based upon the records of Japanese courts:

M. Ito and M. Wagatsuma, Kokusai Tosan Jitsumu ni arawareta Mondai-Kokusai Tosan Jittai Chosa Hokoku [Publication of the Results of a Study of Problems in Actual International Bankruptcies], in Takeshita, KOKUSAI TOSANHO 57, et seq..

48) T. Mitsui, Kokusai Hasan [International Bankruptcy], SHOGAI HANREI HYAKUSEN, 188 (1967); Takeuchi, Shiron, 92, Aoyama, Zokuchishugi Saikento, 154; Kaise, Josetsu, 477 et seq.; Takeshita, Kokusai Tosanho Genjo, 40, et seq..

49) M. Kato, Hasan Senkoku no Kokusaiteki Koryoku [International Cooperation in Bankruptcy Judgments], HASANHO KENKYU [THE STUDY OF BANKRUPTCY LAW], Vol. 1 (Fifth edition), 310 (1924).

50) Along the same lines, See K. Takeuchi, Hasan to Torimodoshi-ken [Bankruptcy and the Right of Recovery], HASANHO JITSUMU TO RIRON NO MONDAITEN [INSOLVENCY PRACTICE AND THEORETICAL ISSUES] (New edition), 218 (1990).

51) Taniguchi, Zaigai Sashiosae, 589 and ISHIGURO, KOSAKU 250, follow up on this concept.

52) T. Kawakami, Kaisha [The Company], 3 KOKUSAI SHIHO KOZA [INTERNATIONAL PRIVATE LAW] 739 (1964); J. Tsubota, Kigyo Tosan o Meguru Kokusai Mondai [International Problems Involving Business Bankruptcies], 3 KOKUSAI TORIHIKI JITSUMU KOZA [LECTURES ON INTERNATIONAL TRANSACTIONAL PRACTICE] 757, (1979). See also, K. ISHIGURO, KOKUSAI SHIHO (new edition) 255 (1990), cited simply hereinafter as "ISHIGURO, KOKUSAI SHIHO" and "ISHIGURO, KOSAKU" 171, 198, which view from the perspective of judicial or administrative action which creates private legal relationships (*Gestaltung*). It is argued that we take an international civil actions approach (cf. factors mentioned with Section 200 of the Law of Civil Procedure) rather than a private law approach which applies as to the formalities, and the law of the place where legal actions are taken as to the validity of the *lex causae*.

53) Judgment of September 30, 1983 (Showa 58), Osaka District Court, 516 HANREI TIMES 139.

54) Needless to say, one can conclude that the stronger the tendency towards universalism, the more likely to prohibit the execution of individual creditors' (both domestic and foreign) rights in Japan (Country B), as we can see in Takeuchi, Shiron 100, and Aoyama, Zokuchishugi Saikento, 158, describing prohibition of such rights following the execution judgment; or, in Kaise, Josetsu 518, describing prohibition without such execution judgment.

55) Takeshita, Kokusai Tosanho no Genjo, 47.

56) ISHIGURO, KOKUSAI SHIHO, 277.

57) For a bankruptcy example, See, Bankr. Law, Section 142, Clause 1 and Section 185.

58) Bankr. Law, Sections 186 and 187.

59) Bankr. Law, Section 143, Clause 1, No.4, Clause 2.

60) Tokyo District Court, (Hu) No. 216 (1987 [Showa 62]), Bankruptcy. A U.S. corporation filed a petition under Chapter 11 for reorganization in November of 1986 in the U.S.. A petition for bankruptcy in Japan in May of 1987 concerning its branch in Japan, by the debtor-in-possession. My thanks to H. Yamakawa, Esq. on this issue.
As a reference, U.S. Lines filed for protective orders around the world. Upon filing the U.S. petition, U.S. Lines sought to extend the effect of the U.S. automatic stay against those who executed mareva injunction in Britain after the petition for Chapter 11. However, the petition was denied in England, due to the fact that the reorganization targeted only North America (however, this decision has clearly indicated that the mareva injunction creditors should have been treated equally in the U.K. regarding liquidation), Felixstow Dock and Railway Co. v. United States Lines Inc. (1989) __ Q.B. 360. See also, SMART, CROSS-BORDER INSOLVENCY 147 (1991), regarding the effects of domestic provisional attachments and foreign insolvency proceedings in relation to the above case.

61) Tokyo District Court, (Hi) No. 2012, (1991 [Heisei 3]), Special Liquidation: a petition for a special liquidation was filed by the Minister of Finance as an interested party (The Commercial Code, Section 485, Clause 1) on the basis that the debtor's business location had been discontinued (under Section 485, Clause 3) and a judgment of commencement was

granted. As neither the debtor nor the creditor filed a petition it is a notable liquidation case, although there is apprehension about independent autonomy in the framework of disciplines of the private law. Of course, the Minister of Finance would assert that authority from Section 51, Clause 1 of the Banking Law [*Ginkoho*], and that the same provision under the Commercial Code was thereby invoked by operation of Clauses 2 and 3 of the same Section of the Banking Law. Legally, both liquidation and special liquidation are available. But Okamoto, 13 Annotated Corporate Law, 544 et seq. (1990), only for special liquidation. The rationale, being a reference in Section 485, Clause 2 to Sections 431 through 456. If BCCI was insolvent, then either BCCI was left with either special proceeding of liquidation bankruptcy by mixture of Sections 485, 430, an 24 of Comm. Cod. and Section of the Comm. Code. It is unclear whether there was any preference in this case. My thanks to I. Kugisawa, Esq. for his assistance in considering this case.

62) For a report on the degree of progressive cooperation between the liquidators of BCCI, See, BCCI Jiken no Sono Ato [BCCI and Its Aftermath], 499 N.B.L. 4 (1992). This type of cooperation and consultation between insolvency representatives, will hereafter be an important theme in international bankruptcy whether we call it "Universalist + Ancillary Procedure" or "Concurrent Insolvency." According to the new Anglo-American case of an English company, *Maxwell Communication Corporation plc* (The English High Court, No. 0014001 of 1991), simultaneous administration is occurring in England, under Section 8 of the Administrative Proceeding (Insolvency Law), 1986 and in the U.S. under Chapter 11, *In re Maxwell Communication Corporation plc* (No. 91 B15741 (S.D.N.Y. 1991)).

The representatives in the two proceedings, an Examiner appointed under 11 U.S.C. Section 1104(b) in the U.S., and in England an Administrator pursuant to Section 13 of the Insolvency Act of 1986, reached an accord termed the "Order and Protocol," designed to effectively delineate a common scheme. This operational plan has been approved both by The High Court of Justice, Chancery Division Companies Court and the U.S. Bankruptcy Court for the Southern District of New York. Proceedings have only recently commenced under this management plan so there are not many results to investigate, however, if we combine the concrete decision relating to management, the Protocol confirms that: (1) court permission and consent of the U.S. Examiner is required for any transfer, lease or collateralization of assets within the set group administered by the British Administrator; (2) any other disposal shall require consultation with the U.S. Examiner; (3) modification in management issues requires the consent of the U.S. Examiner; (4) any auditing plans made by the British Administrator will require the consent of the U.S. Examiner; (5) the bankruptcy plans of the two proceedings shall be consistent in substance. A simple introduction to this case may be found in D. Flaschen, Maxwell Communications, Inter. Bar Assoc. Comm. J. 4 Int. Rep.-1 (1992).

63) Takeshita, Kokusai Tosanho no Genjo 26; Ito, Hasanho [Bankruptcy], 115; K. Yamato, Hasan 3 KOKUSAI SHIHO KOZA [LECTURES ON INTERNATIONAL PRIVATE LAW] 882, 893 (1964), hereinafter cited simply as "Yamato, Hasan."

64) Horei [Choice of Law], Section 7; Yamato, Hasan, 897.

65) R. Yamada, Kokusai Shiho, 282 et seq. (1989); Judgment of April 26, 1965 [Showa 40], Tokyo Chisai 16 ROMINSHU 308.; S. Kuwada, Tojisha Jiji no Gensoku [principle of selfautonomy], SHOGAI HANREI HYAKUSEN, 76 (1967); M. Jikkata, Kakushu no Keiyaku [Various Contracts], 2 KOKUSAI SHIHO KOZA 460 (1955).

66) Yamato, Hasan, 897.

67) Takeshita, KOKUSAI TOSANHO, 422 including Nishizawa's commentary at 397. Cf., following the text of the Model Bilateral Treaty:

International Bilateral Treaty

Japan and _____ make the following treaty with respect to their respective insolvency laws:

1 The Scope of the Treaty

(1) This Treaty shall apply to the following proceedings in a contracting State.

1 "Bankruptcy", "Composition", "Arrangement", "Special Liquidation", and "Corporate Reorganization" under Japanese Law.

2 ____, ____, under the laws of _____.

(2) Under this Treaty, the proceedings in the preceding subsection shall be called "insolvency proceedings".

2 Jurisdiction

(1) The court having jurisdiction over the insolvency proceedings is that of the State where the debtor has its principal office or its center of business.

(2) If the court given jurisdiction in accordance with the preceding subsection is prevented from commencing insolvency proceedings by domestic law, and if the debtor has a place of business or property in the other State's territory, this territory's court shall have jurisdiction. In this case, the insolvency proceedings shall have effect only within the territory of the State where proceedings are commenced.

3 Universality

(1) The effect of insolvency proceedings which are commenced in one contracting State according to this Treaty shall extend to the other, except in the case of the second sentence of 2(2). The same is true of the effect of preservative measures, where the laws providing for the insolvency proceedings allow this before the commencement of the insolvency proceedings.

(2) Insolvency proceedings commenced in one contracting State shall take effect in the other contracting State at the time the proceeding is to take effect according to the laws of the commencing State.

4 Unity

(1) When a court in one of the contracting States commences insolvency proceedings, as long as proceedings continue, a court in the other State cannot commence insolvency proceedings with respect to the same debtor. Where the latter has already taken some preservative measures, these measures shall be deemed to have been taken by the former.

(2) When a court in one of the contracting States dismisses a petition to commence insolvency proceedings on the ground that a court in the other State has jurisdiction, and the decision is final and binding, the court in the latter State cannot dismiss the petition to commence insolvency proceedings on the ground that a court in the former State has jurisdiction.

(3) When insolvency proceedings are commenced in a court in one of the contracting States, the court has jurisdiction over the litigation to allow creditors' claim and the litigation concerning propriety of the trustee's administration, except in the following situations:

1. Where the litigation concerns an employment contract, under which the work is or should be performed in the other State.

2. Where the litigation concerns taxes or a similar claim based on public law.

5 Applicable Law

The laws of the State where insolvency proceedings are commenced shall be applicable.

6 Proclamation and Notice

When a court in one of the contracting States commences insolvency proceedings, the court can make official requests in the following matters to the previously appointed authorities of the other State, provided that the debtor has either a place of business or property in the other State, or that any obligees lives there.

1. Proclamation of those matters requiring notification according to the law of the State where the insolvency proceedings take place.

2. Notice of the above matters to known obligees.

3. Entry in public records, such as registers, where commencement of insolvency proceedings must be so entered in accordance with the law of the State where the proceedings take place.

7 Trustee's Power

(1) Powers vested in a trustee by the law of the contracting State commencing insolvency proceedings shall extend to the territory of the other State.

(2) The court commencing insolvency proceedings can request the court of the other State to appoint a co-trustee.

8 Executory Contract

When, at the commencement of insolvency proceedings, a contract has not been completely performed on both sides, the law of the contracting State commencing the insolvency proceedings shall determine the validity of the contract, except the following cases:

1. The effect of insolvency proceedings on an ongoing employment contract shall be determined according to the law of the State where the work is or should be performed.

2. The effect of an insolvency proceeding on a contract to lease real estate shall be determined according to the law of the State where the real estate lies.

9 Continuing Litigation or Execution

When any litigation or execution by an individual creditor is pending at the commencement of insolvency proceedings in one of the contracting States, the law of the contracting States commencing the insolvency proceedings shall determine the effect of the insolvency proceedings on the litigation or execution.

10 Claims and Priority Claims

The law of the contracting State commencing insolvency proceedings shall be applicable in determining the allowance of claims and priority claims.

11 Preferential Claims and Securities (Draft I)

(1) The validity, extent, and priority of preferential claims for the entire insolvency estate (except as provided at (6)) shall be determined according to the law applicable to the claims, and the status of such preferential claims under insolvency proceedings shall be determined according to the law of the State commencing such proceedings.

(2) The validity, extent, and priority of preferential claims for specific movables that are situated in

one of the contracting States at the commencement of insolvency proceedings shall be determined according to the law of that State, and the status of such preferential claims under insolvency proceedings shall be determined according to the law of the State commencing such proceedings.

(3) The validity, extent, and priority of preferential claims for specific real estate that is situated in one of the contracting States at the commencement of insolvency proceedings shall be determined according to the law of that State, and the status of such preferential claims under insolvency proceedings shall be determined according to the law of the State commencing such proceedings.

(4) The validity, extent, and priority of preferential claims for specific ships and airplanes that are registered in one of the contracting States at the commencement of insolvency proceedings shall be determined according to the law of that State and the law applicable to the preferential claims, and the status of such preferential claims under insolvency proceedings shall be determined according to the law of the State commencing such proceedings.

(5) The validity, extent, and priority of preferential claims for specific claims that are situated in one of the contracting States at the commencement of insolvency proceedings shall be determined according to the law of that State, and the status of such preferential claims under insolvency proceedings shall be determined according to the law of the State commencing such proceedings.

(6) The validity, extent, and priority of preferential claims for the entire insolvency estate based on employment relations for the work that is or should be performed in one of the contracting States shall be determined according to the law of that State, and the status of such preferential claims under insolvency proceedings shall be determined according to the law of the State commencing such proceedings.

(7) The validity, extent, and priority of preferential claims for the entire insolvency estate concerning taxes or social security in one of the contracting States shall be determined according to the law of that State, and the status of such preferential claims under insolvency proceedings shall be determined according to the law of the State commencing such proceedings.

11 Preferential Claims and Securities (Draft II)

(1) The same as Draft I.

(2) The validity, extent, and priority of preferential claims for specific movables that are situated in one of the contracting States at the commencement of insolvency proceedings, and the status of such preferential claims under insolvency proceedings, shall be determined according to the law of that State.

(3) The validity, extent, and priority of preferential claims for specific real estate that is situated in one of the contracting States at the commencement of insolvency proceedings, and the status of such preferential claims under insolvency proceedings, shall be determined according to the law of that State.

(4) The validity, extent, and priority of preferential claims for specific ships and airplanes that are registered in one of the contracting States at the commencement of the insolvency proceedings and the status of such preferential claims under insolvency proceedings, shall be determined according to the law of that State.

(5) The validity, extent, and priority of preferential claims for specific claims that are situated in one of the contracting States at the commencement of insolvency proceedings, shall be determined according to the law of that State.

(6) The validity, extent, and priority of preferential claims for the entire insolvency estate based on the employment relations for the work that is or should be performed in one of the contracting States, and the status of such preferential claims under insolvency proceedings, shall be determined according to the law of that State. As to property in the other contracting State, this privilege is subordinate to preferential claims for the entire insolvency estate based on employment relations for the work that is or should be performed in the other State.

(7) The validity, extent, and priority of preferential claims for the entire insolvency estate concerning taxes or social security in one of the contracting States, and the status of such preferential claims under insolvency proceedings, shall be determined according to the law of that State. As to property in the other contracting State, this privilege is subordinate to preferential claims for the entire insolvency estate concerning taxes or social security in the other country.

12 Filing, Hearing and Allowance of Claims

(1) The proceedings relating to the filing, hearing, and allowance of claims by interested persons shall be governed according to the law of the State where insolvency proceedings are commenced.

(2) The court may grant an extension of time for the filing of claims for the sake of interested persons living in the other contracting State.

13 Disqualification and so on

Whether or not and to what extent the commenced proceedings take effect for purpose of disqualification etc. in the other State as against the insolvent debtor is determined according to the law of the other State.

14 Respect for other Treaties

No provision in this Treaty shall violate the provisions of other insolvency proceedings treaties that one of the contracting States has concluded or will conclude.

15 Disputes in Administration of this Treaty

Disputes between the contracting States regarding the interpretation or application of this Treaty shall be resolved in a diplomatic manner.

The International Bankruptcy Research Group which developed the Draft was comprised of: M. Takeshita, M. Ito, K. Takeuchi, M. Nishizawa, T. Uehara, J. Yokoyama, H. Nomura, and Y. Hasebe. (The above translation is a reproduction of the same in Takeshita, KOKUSAI TOSANHO .)

68) K. ISHIGURO, GENDAI KOKUSAI SHIHO JOU (Part 1), 473 (1986).
69) This concept is similar to that underlying the Model Treaty.
70) Yamato, Hasan, 902; Takeshita, Kokusai Tosan no Genjo 26.
71) H. Tanigawa, Tampo Bukken [Collateral Rights], KOKUSAI SHIHO [INTERNATIONAL PRIVATE LAW] 60 (1973), cited hereafter "Tanigawa, Tampo Bukken" ; S. Hayashida, Gaikoku Tampoken no Jikko [Execution of Security Rights Abroad], KOKUSAI MINJI SOSHOHO NO RIRON [THEORIES OF INTERNATIONAL CIVIL LITIGATION] 437 et seq. (1987). A new and better view will only apply the law of property in disregard of the law of the contact.
72) Tanigawa, Tampo Bukken, 63.
73) Takeshita, Kokusai Tosan no Genjo, 26; K. Takeuchi, Kokusai Tosan Shori [International Insolvency Disposition], GENDAI TOSANHO NYUMON [INTRODUCTION TO MODERN INSOLVENCY LAW] 298 (1987).
74) Yamato, Hasan, 901.
75) T. TERAO, KOKUSAI SHIHO [INTERNATIONAL PRIVATE LAW] (1898); Yamato,

Hasan, 896, 901, 903; Takeshita, Kokusai Tosanho no Genjo, 26.

76) Kaise, Josetsu 516.

77) Dispositions of combined enterprises under Japanese insolvency procedure are taken from the vantage point of procedural law and developed into the concept of procedural consolidation. M. Ito, SAIMUSHA KOSEI TETSUZUKI NO KENKYU [DEBTOR REHABILITATION PROCEDURE], 277, 321 (1984).

78) Corp. Reorg. Law Section 1; Kaneko, JOKAI KAISHA KOSEIHO, 133.

79) For introduction of the International Law Association, at their 1960 Hamburg Convention, T. Kawakami, Kaisha [Corporations], 3 KOKUSAI SHIHO KOZA [INTERNATIONAL PRIVATE LAW] 727 (1964). Section 4, paragraph 4 of the Treaty Relating to the Acknowledgment of the Corporate Character of Foreign Companies, Affiliations and Corporate Associations, adopted at the Seventh Hague International Private Law Convention:
Mergers between a company, association (*Die Verein*), or estate (*Die Stiftung*) chartered as a legal entity in a contracting state with another company, association or estate chartered as a legal entity, the legal entity in another contracting state shall be recognized by all contracting states, provided that such merger is permitted within each of the relevant states.
In Japan, prior to the Seventh Hague Convention, a response to the questionnaire published relating to affiliated countries was returned by the Tokyo University Property Law Research Association, but according thereto: "The establishment of provisions concerning mergers between corporations incorporated in one of the contracting countries and another such corporation established in another contracting country is desirable. However, for such a purpose, it is necessary that the merger be recognized according to the incorporation law governing each company." Furthermore, T. Suzuki and T. Yazawa prepared the "Opinion on the Treaty Concerning Corporation," according to which, since "Japanese law lacks such legislation," the envisaged international mergers would not be recognized. See 340 HOMU-SHIRYO [Materials Concerning Legal Affairs], No. 340: Shusengo ni Okeru Kokusai Shiho ni Kansuru Hague Joyakuan (3), [Post-War Treaty Provisions of the Hague Convention Relating to International Private Law] 152, 653, 674 (1956)

80) Business Corporation Law 907 (New York).

81) S. Ochiai, Takokuseki Kigyo ni okeru Kogaisha no Saikensha Hogo [Protection of Creditors of the Subsidiaries of Multinational Enterprises], TAKOKUSEKI KIGYO TO KOKUSAI TORIHIKI [MULTINATIONAL ENTERPRISES AND INTERNATIONAL TRANSACTIONS], 381 et. esq. (1987).

82) Y. Tashiro, OYAKO KAISHA NO HORITSU [THE LAWS OF PARENT AND SUBSIDIARY COMPANIES], 52 et seq. (1968).