Japanese Insolvency Law

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I. INTRODUCTION AND OVERVIEW

While Japan has a long tradition of commercial law, the present Japanese corporate law may be characterized as a synthesis of primarily Western civil and common law traditions. Upon the overthrow of the feudal Tokugawa government, and the forced "opening" of the country to foreign commerce, the Meiji government began the modern period with programs of inviting foreign social, political and legal scholars to Tokyo. As a result, the modern Japanese legislation was drafted based upon a French model and/or German model. Accordingly, the first legislation relating to bankruptcy (*hasan*) was modeled after the French legal system; the second, together with composition with creditors (*wagi*), was promulgated under the primary influence of the German legal system. Original provisions concerning winding-up (*seisan*) were included within the corporate law sections of the Commercial Code, to be followed by the addition of arrangement (*kaisha seiri*) for rehabilitation and special liquidation (*tokubetsu seisan*), both created in 1938, based upon the revision of the Commercial Code. The synthesis of domestic and foreign rules and theories relating to corporate reorganization culminated, after World War Two, in the reception and integration of American legal concepts for reorganization (*kaisha kosei*). Consequently, the current Japanese laws governing insolvency proceedings, and the parties with access thereto, are richly varied. We can see that it is a synthesis of several substantively different legislative enactments, an exception among legal systems.

The flexibility available to the debtor in fashioning the reorganization process has largely been accepted, being regarded as the result of Japan's choice to integrate differing laws into one civil code system. However, the noticeable gaps in the rights and remedies available depending upon the law invoked, create natural disadvantages coexisting with the advantages of access to the various perspectives and theories.

Another quality worth noting is the fact that although the latest major influence was of the American common law system, the statute remains the first line of inquiry among the various sources of Japanese law. Notwithstanding the fact that precedent does carry great significance within the body of law, statutory enactments are said to contain the primary principles representative of the national will, and are applied using deductive reasoning.

II. PRE-BANKRUPTCY CLAIMS AND ENFORCEMENT

A. Security in Property

Japanese sources relating to security in property are both statutory and contained in case law. The following (non-exhaustive) group of statutes deal with substantive aspects of the law: The Civil Code (*Minpo*; a main body of law for security in property), The Commercial Code (*Sho Ho*; a supplementary body in commercial settings),

The Factory Mortgage Law (*Kojo-Teito Ho*), and The Law Relating to Provisional Registrations of Collateral (*Karitoki Tampo Ho*). The principal security in property recognized under these statutes are: rights of retention (*ryuchiken*); preferential rights (*sakidori-tokken*); the pledge (*shichiken*), various mortgages (*teito-ken*), and provisional registration of title (*karitoki-tampoken*). The first two arise by operation of law, while the others may only be created consensually. The principal security interests in property recognized as having evolved under the case law are: collateral by transfer of title (*joto-tampo*, available for collateralizing inventory and accounts); collateral by sale with redemption (*uri-watashi-tampo*); reservation of ownership (*shoyuken-ryuho*), and agency for purposes of collection (*dairi-juryo*). These security interests under the case law are all consensual in creation.

Japan maintains a real property registration system, as do the individual American states, and prioritizes various securities on immovable property in the order in which they are registered. Unrecorded security interests on immovable property are always subordinate to subsequently created, but earlier recorded, security interests. However, unlike American states, Japan does not maintain a filing system for security in personal property. Perfection of such security is accomplished by direct possession by the secured party, or by the debtor's direct possession on behalf of that secured party. Perfection through the debtor's possession for the secured party, between holders of competing security interests, has naturally been the source of controversy before the courts.

Enforcement of secured claims recognized under the statutes are always initiated by a petition to the court for execution on the security, with respect to real and intangible personal property; with respect to personal tangible property, such petition is directed towards the sheriff. The entire proceedings are governed by Civil Execution Law (*Minji Shikko Ho*), Law No. 4 of 1979. An exception to the above description is the enforcement of provisional registration of title security (*karitoki-tampo,*) which enforcement may be undertaken by the method provided for in the Law, including non-judicial foreclosure. Subject to the policing powers of the court, judicial precedent has established that enforcement of security may be provided for by the parties in the agreement which created the security interest.

B. Unsecured Claims

Unsecured creditors may take advantage of the widely available remedy of attachment, and, depending upon the nature of the claim, a restraining order or injunction may also be available. Attachment will usually issue *ex parte*, although the debtor will then have access to subsequent remedial procedures. Requirements and proceedings for attachment or injunction are provided in Civil Pre-Judgment Remedy Law (*Minji Hozen Ho*, Law No. 91 of 1989). Unsecured creditors should beware, however, that prosecution of a civil complaint on unsecured claims may take 2 to 3 years to obtain judgment, if contested. Enforcement of judgment is also governed by the Civil Execution Law (*Minji Shikko Ho*).

Foreign claimants are entitled to sue in Japanese courts, and are afforded the same protection as Japanese litigants. Foreign judgments (which have been primarily monetary), are entitled to recognition in Japanese courts. An execution judgment pursuant to a foreign judgment will usually be rendered with inquiries only as to the propriety of such foreign judgment with respect to jurisdiction, notice and hearing protections, and the public order.

III. JAPANESE LAWS OF INSOLVENCY

A. Principal Laws and Procedures

The principal laws which may be activated under Japanese insolvency procedures are: The Bankruptcy Law (*Hasan Ho*; straight bankruptcy and post-bankruptcy composition); The Composition Law (*Wagi Ho*; pre-bankruptcy composition); The Commercial Code (*Sho Ho*; corporate arrangement and special liquidation), and the law of Corporate Reorganization (*Kaisha Kosei Ho*). Apart from these laws, case law may be found relating to out of court work-outs (*nini-seiri* or *shiteki-seiri*).

Initially, we shall examine basic considerations relating to the domestic reorganization of a Japanese stock company (*kabushiki kaisha*). Generally, the Corporate Reorganization Law (*Kaisha Kosei Ho*) will provide the most appropriate procedure for business reorganization, provided the company accepts the conditions that the rights of stockholders will be completely subordinated to ordinary claims, and that all rights to administer assets and manage the company will be transferred to a third party—, the trustee (or, prior to the decision to commence a reorganization), the administrator for the preservation of the estate, depending upon the selection by the Court. If there is a strong preference in management that shareholders rights remain unimpaired and that the rights to administer its property remain under its control, and, furthermore, if there is adequate capital and profitability to justify the retention of those rights, then corporate arrangement (*seiri*, under the Commercial Code), or composition with creditors (*wagi*, under the Law of Composition) will be preferable. Note that under these (*seiri* and *wagi*) procedures, the secured creditors' right to proceed against the collateral will not be impaired.

However, if the condition of the *kabushiki kaisha* indicates that it should be dismantled, bankruptcy procedures under the Bankruptcy law (*Hasan Ho*) and winding-up under the Commercial Code (*Sho Ho*) are available. Winding-up is converted to special winding-up proceedings ("Special Winding Up"), or bankruptcy where the debtor is shown to be insolvent, or other reasons for conversion exist. These are also available to a foreign company which ceases to do business in Japan. A company is not under an obligation to petition for a bankruptcy adjudication, unless found to be insolvent in Winding-up procedures. Extra-judicial workouts are available for purposes of both liquidation and rehabilitation, and a body of case law exists relative thereto.

B. Courts Which Administer Insolvency Proceedings

Various courts have supervisory or adjudicatory powers over insolvency proceedings. In Tokyo, for example, Division 20 of the Tokyo District Court is charged with straight bankruptcy and composition, while Division 8 handles corporate reorganizations and corporate arrangements. Each court is generally responsible for the supervision of asset sales, approval of financial statements, and indirect operation of the debtor's business. Upon the report given by the interim reorganization trustee, a court is required to dismiss a case as to which the prospects for the survival of the company are not acceptable.

With respect to jurisdiction, we shall explore only corporate reorganization and bankruptcy, in which there are specific rules referring to jurisdiction. In bankruptcy, the court may take jurisdiction over a bankrupt debtor having it's principal place of business (or, it's major business location) within the territorial jurisdiction of that court. If the debtor has its principal place of business or its major business location outside of Japan, then such court will take jurisdiction when the debtor's

major business location is within the court's territorial jurisdiction, or when the debtor maintains assets within in its jurisdiction. In corporate reorganization, the existence of mere assets does not confer jurisdiction to the Japanese court. "Subject matter" jurisdiction in bankruptcy or corporate reorganization cases always lies in District Courts.

These statutory provisions are generally thought of as relating to the determination of venue, rather than pertaining to international bankruptcy jurisdiction, and follow from an analogy to similar statutory provisions within the law of civil procedure. Consequently, having borrowed this general concept concerning jurisdiction over international civil litigation, we would infer and assume that Japanese courts may assert jurisdiction over international insolvency cases when insolvency jurisdiction is acknowledged under otherwise applicable venue provisions. Clearly, parallel international insolvencies were anticipated by legislators. A minority of theorists, who are increasingly collecting support, argue, apart from statutory provisions, that exclusive jurisdiction should be based upon the central location of the debtor's business reasoning, *inter alia*, that considerations of procedural and equitable efficiency should determine jurisdiction.

C. Commencement of an Insolvency Proceeding

A corporate debtor may petition to commence a case under either straight bankruptcy, arrangement or composition provided, that it is insolvent (i.e. general inability to pay debts as they mature, or liabilities exceed assets). A presumption of insolvency arises when a corporation acts in such a way to stop making payments to creditors. Only a *kabushiki kaisha* (as opposed to a private company) may petition to commence a reorganization, the basis being a considerable probability of impending insolvency. A creditor may resort to an involuntary adjudication of insolvency under all procedures, except for arrangement.

Under corporate reorganization, insolvency proceedings do not automatically commence upon the submission of a petition. Rather, insolvency proceedings are initiated only after a hearing and upon a court order. 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 the debtor *kabushiki kaisha* have petition rights. Bankruptcy creditors (regardless of the number and the amount owed), the company, and its managing director all have petition rights. The courts will not discriminate against foreign creditors vis-a-vis Japanese creditors merely because of their status as such. The plight of foreign creditors under corporate reorganization is statutorily alleviated by a complete equality and reservation of the principle of mutuality. The weight of authority is that provisions in the bankruptcy law are to be construed as supportive of a formulaic mutuality (i.e. that a Japanese creditor should be treated the same as local creditors) and that conflicting provisions should be disregarded. In actual practice, however, foreign creditors are sometimes accorded better treatment than their Japanese counterparts.

The period between the submission of a petition until the order may be brief, but it is not unusual for the process to require from three to six months. Prohibition of individual statutory remedies is one effect of the Order, which commences the official proceeding, and illustrates the potential negative consequences of this delay. During this period, prevention of the debtor's paying pre-petition debts or the creditors' collecting on pre-petition debts, is realized only by an interim judicial order. The court may *sua sponte* prevent

individual creditors engaging remedies upon its own motion, or by sustaining a petition by an interested party with respect to a specific individual action. Collection-in-fact and non-legal actions are not generally addressed to the creditors by such orders. As noted above, an interim order prohibiting payment may issue to prevent in fact such creditor actions. However, even were a creditor to attempt to undertake individual remedies to the extent not expressly forbidden by law, the court is not empowered with contempt sanctions with which to impose restraint on such creditors. Under a liquidation bankruptcy, this period from the petition until the order is made much shorter. Enforcement of security in property is not prevented, during this period and even after the order opening bankruptcy. Only enforcement on an unsecured claim is subject to an interim order prohibiting such enforcement, and is void after the formal adjudication of bankruptcy.

D. Parties in Insolvency Proceedings

The trustee is the cardinal player in a reorganization, and is a mandatory functionary in a reorganization, but merely an option or discretionary entity under commercial code arrangement (*kaisha seiri*). The trustee in liquidation bankruptcy has sole responsibility for the liquidation of the bankrupt. Related parties may present opinions to the court regarding its selection, but the trustee has absolute authority over the corporation and completely displaces management (and the board of directors) in the administration of assets and operation of the business of the organization. The trustee also determines which proofs of claim are to be permitted. The court is also extensively involved, as its approval is required for settlements, loans, and disposition of assets.

Reorganization creditors are not entitled to a committee with a voice in the proceedings, but are required, nonetheless, to meet and to vote upon a final plan in reorganization. Only rarely is a sole creditors' representative appointed. Creditors may move to remove a trustee, request an order of the court, inspect the court record, and submit a reorganization plan. Confirmation of a reorganization plan requires two-thirds vote of unsecured creditors with voting rights, and the approval of at least three-fourths of those secured creditors having voting rights as to rescheduling of payment, and further the approval of at least four-fifths, with respect to the reduction of their principal or interest thereon. Holders of equity interests are not entitled to vote when the corporation's liabilities exceed its assets.

Liquidation bankruptcy creditors are entitled to an occasional meeting in which the trustee publishes a report, and to vote on matters such as discontinuance of the debtor's operation and selection of examiners (these are usually not selected, due to the court's standard preference for direct supervision of the trustee).

E. The Insolvency Estate

1. The appointment of the trustee and his rights to manage the property arise, simultaneously effecting the prohibition of individual remedies, once the comprehensive power of execution is exercised. The trustee is expected to take possession of all of the debtor's properties, to close the debtor's books of account, and to require a sheriff, where necessary, to levy executions based upon the adjudication of insolvency. The court's role is to promulgate orders to account debtors and holders of debtor's assets prohibiting them from paying or making delivery to the debtor.

The reorganization estate comprises the debtor's total assets when ever owned; the liquidation estate comprises the debtor's assets owned at the time of bankruptcy,

provided that exempt property from individual execution levy is also exempt from the bankruptcy estate. More importantly, in both reorganization and liquidation, the statutes provide that the estate does not comprise assets out of the territorial jurisdiction of the Japanese courts. This provision, however, is being increasingly subjected to strong criticism by scholars. Efforts to alleviate the irrational results of simplistic application of this provision are beginning to produce important change in the actual administration of both liquidation and reorganization estates. This issue will be explored more fully in later sections.

2. Pre-bankruptcy period payments by the debtor subjected to review and avoidance as preference relate back to 30 days before the date of cessation of payments. During this period, payments or transfers made outside of the ordinary course are avoidable. Payments or transfers made after the cessation of payment are all avoidable. Avoidance may be accomplished, with respect to any fraudulent transfer, without reference to the date of transfer.

IV. MULTINATIONAL INSOLVENCIES

A. Introduction

One salient point of the Japanese law of international insolvency which bears mention is that, notwithstanding the fact that many learned scholars from the late 19th century introduced ever more sophisticated concepts relating to international bankruptcy law to Japan, the legislative response to the nascent Japanese territorial economy was to insert an exclusionary attribute in the insolvency statute which endures to the present. It seemed to take some time for the voluminous international industrial activity made by Japanese capital to foreign countries matched by an influx of new foreign capital to the Japanese market to shake the territorial nature of Japanese bankruptcy law, allowing the optimum spectrum of remedies and procedures available to be fully reflected in the Japanese laws of insolvency.

As the Japanese economy underwent rapid expansion in the latter half of the 1970's, such expansion carried with it frequent occurrences of international insolvency by both domestic and foreign concerns—, a foreseeable result of business activity. Concurrently, cases dealing with international insolvency began to emerge and Japanese scholars began to present proposals relating to such problems, primarily from the perspective of Japanese overseas investment, thereby creating a wealth of excellent research, legislation, treaty proposals accompanied by practical manipulations of law by practitioners.

The most controversial issue of Japanese international insolvency, therefore, remains in the interpretation of the extremely (pure) territorial principles, set out in the aforementioned statutes (namely, Section 3 of the Bankruptcy Law, and Section 4 of the Corporate Reorganization Law), and in defining the extent of such territorial principles. As we shall observe, inherent contradictions between these statutes and economic realities in international insolvency may well be the price for legal stability under the doctrine of statutory preeminence.

B. Recognition of Foreign Representatives and Power of Domestic Trustee over Foreign Assets

1. In so far as the exercise of such power in Japan does not compete with individual actions by creditors in Japan against the same Japanese assets, recognition of a representative in a foreign insolvency proceeding may be assumed with respect to the power of administration and disposal over Japanese assets. This recognition,

notwithstanding the aforementioned statutory territorial principle, has now become firmly established in Japanese case law. In following a case holding that a foreign bankruptcy representative has standing to move the court for avoidance of an attachment by putting up a release bond, in a recent case, a foreign representative (as shareholder) successfully petitioned the court for revocation of certain shareholders' resolutions made at a meeting called in contravention of Commercial Code requirements. (Decision of January 30, 1981 (Showa 50), Tokyo Kosai, 994 *Hanrei Jiho* 53 (1981); Decision of September 26, 1992 (Heisei 3), Tokyo Chisai, 897 *Kinyu Shoji Hanrei* 30 (1992)).

Japan is not a signatory to the Hague Convention on the Taking Evidence Abroad (1970). However, under the Judicial Aid Law, Japanese courts may offer cooperation regarding requests for service of process in relation to insolvency proceedings from overseas. However, this Law is said to be applicable exclusively to "litigation," and thus there is apprehension that this law may be inapplicable to insolvency proceedings. There is ample room for the counter-argument that such an interpretation would rely upon an overly narrow construction of the term "litigation," when contrasted with the corresponding expression of "case on civil or criminal matters" in the original text, and similar provisions in 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). Nonetheless, cooperation in examining evidence for foreign insolvency proceedings can be provided under either the Judicial Aid Law, where the word "litigation" may be broadly interpreted, or under the Civil Procedure Convention as there is no qualification other than that the procedure relate to "civil or commercial matters."

2. As discussed in the foregoing paragraph, the case law is clear on the power of the Japanese trustee over foreign assets. By converse application of the theory recognizing the power of a foreign trustee over Japanese assets, one may well surmise that a Japanese trustee's power to administer and dispose of the estate's property extends to its foreign assets.

Practitioners are more positively pursuing and effecting the goals of universalist doctrine. Their efforts to modify the proclivity towards territorialism 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 foreign assets, which usually ended by settlement. Stage II involved the trustee's requests for assistance from foreign courts and subsequent attempts to defend and obtain protection for foreign assets. These requests stretched to enjoining all creditor actions.

Stage III, in which we presently find ourselves, 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. During Stage III, radical changes have taken place which include 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 legal techniques of corporate reorganization utilizing e.g. parallel petitions under

full Chapter 11 (U.S. reorganization) together with its 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.

C. Return of Assets to Foreign Trustee with Priority over Local Creditors

The prevailing view is that the foreign trustee's direct or indirect power of administration and disposal of assets held in Japan be upheld, but that a comprehensive power of execution be negated to the extent that it prohibits individual execution against assets situated in Japan, regardless of whether the individual execution be undertaken by a local creditor or foreign creditor. 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 locally obtained 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, 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 or recognition judgment on foreign insolvency adjudication, satisfying domestic requisites of due process. A dissenting opinion advocates reviewing foreign insolvency proceedings within the perspective of foreign judgments. As a special proceeding is provided within the provisions of the Civil Execution Law for foreign judgments, the means of recognizing other kinds of foreign judgments or orders should rest within the discretion of the Japanese court. Subject to the exercise by local creditors of rights 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 Japanese laws of insolvency (the court of the center of the debtor's business in Japan) would respond amicably, upon the motion of the foreign court or the foreign representative, to the foreign judgment opening the foreign bankruptcy proceedings. Based upon such an execution or recognition judgment, the Japanese court could exercise and act upon its power to prohibit individual creditor's remedies upon such conditions as are deemed appropriate under the circumstances.

A synthesis of the maximum common elements of academic opinions, therefore, 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. Similarly, a creditor's action, foreign or domestic, would not be impeded, except that those foreign creditors actions in Japan may be subject to modification under proceedings afforded to the foreign representative. If we look at the Revision Outline (see discussion *infra*, under General Information), it suggests that a foreign bankruptcy adjudged in the principal jurisdiction be recognized in Japan, including both the trustee's right to manage assets, and the right to enforce the comprehensive power of execution upon an order recognizing foreign bankruptcy. And therefore, where a foreign law prohibits a creditor's individual remedies, any such remedial actions taken by both domestic and foreign creditors would be applied as against the assets of the company or after the recognition order had been entered.

We have seen that Japanese practice (or the law-of-practice) has essentially abandoned 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. We are hopeful that the Japanese court will not selfishly pursue its own interests in view of the long passage to the present doctrinal interpretations. However, it is still to be feared that such cooperation might be denied under the pretext of an absence of law (judicial activism is highly unusual in this area), or the protection of domestic creditors, thus incurring strong criticism from friendly nations. Fortunately perhaps, Japanese courts have not yet 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 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), it is to be hoped that the court make dispositions in recognition of several considerations.

Foremost is the certitude that any posture effectively refusing to provide cooperation would be regarded as disregarding the norms of international good faith, considering the present evolution of Japanese practice. A synthesis of academic opinion shows that 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 trustee, and demonstrates how far case law and academic opinion have progressed. Furthermore, it should be noted that precedent and academic opinion make a clear distinction between the concepts of the trustee's authority to manage assets and its comprehensive power of execution. Nonetheless, it is admitted that under Japanese laws of insolvency, the comprehensive power of execution is expected to be enforced immediately upon the rendering of the judgment marking the commencement of insolvency proceedings, while the authority to manage assets is regarded as being only part of this conferred comprehensive power of execution.

D. Conflict of Laws Issues

The dearth of precedents resulting from the past dominance of the principle of territorialism serves to negate the presumption that Japan's insolvency proceedings have an extraterritorial effect, and does nothing to clarify choice of law rules from the perspective of international private law. Certainly, the points described below are more products of theory, but we can make certain generalizations.

One would start with the hypothesis that purely procedural rules for the purpose of achieving the final objective of the insolvency procedure of the corporation, that is, its reorganization or liquidation would be those of Japan. Generally speaking, the principle of *lex fori* as to proceedings is also applicable in Japan. Consequently, it can be understood that Japanese procedural regulations will be

considerably extended, 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.

Under Japanese insolvency procedures, general priority given to e.g. labor claims is theoretically determined, first, by applying the law of the contract as to the creation of the claim (or nonexistence thereof), its priority nature, and preferential range, which law would be chosen according to principles of international private law, subject to the review thereafter according to the local labor laws of the place where the labor is to be furnished. Thereafter, priority claims are to be reevaluated under Japanese insolvency procedural law, for the purpose of a determination of the status of the claim in Japanese insolvency law system, having regard for other preferences as well as their standing in relation to general claims.

According to a draft Bilateral Treaty (the "Model Treaty," prepared by a group of prominent Japanese law professors; See discussion *infra*, under General Information), 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 general priority claims in Japan arising under—, or from, abroad. 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 the standing for purposes of bankruptcy law would be determined according to insolvency procedural law.

A foreign country's general principles regarding rights of taxation, i.e. the rejection of a foreign government's exercise of its taxation rights have been introduced. Consequently, since we have inserted a premise that the Japanese insolvency procedure shall be effective in a foreign country, then tax priority claims will 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 a foreign country are inferior to that in Japan, then the tax creditor is subject to such inferior limits.

The traditional view concerning contractual security in property, is that determination as to the creation (the existence or nonexistence thereof) of the security in property is to be made by first applying the governing law for the secured claims which is chosen, according to general principles of international private law. Thereafter, the creation, existence and effect of the property rights are to be determined according to the laws of the place where the property is located (for movable property such as vessels, airplanes, the law is that of the property's place of registration, rather than the location of the property). A more recent view concerning contractual security in property argues that the law of the property is solely applied as to the creation, existence and effect of the property right. On the other hand, as to secured claims arising by statute, the theory that the only law to be considered is that governing the secured claim is also credible, 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 aggregation of the laws governing the secured claims and the laws governing collateral where the property is located). Status and standing of such claims under Japanese insolvency procedure would probably be decided solely under Japanese procedural laws.

Fraudulent conveyances, set-offs and bilateral executory contracts are considerably difficult problems. Japanese theory first approaches the law governing claims

for its creation, or the laws governing contracts for the formation and the validity of a contract. Thereafter, the requisites and effects of fraudulent transfers (avoidance powers), the requisites for authorization of 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, refusal and performance under bilateral executory contracts— resolutions of which all function to maintain equality and impartiality between creditors, are to be finally determined in accordance with the law of the country where the insolvency proceedings are opened.

The present state of Japanese theory concerning general priority claims and secured claims reflects a strong inclination to protect the rights of Japanese 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 creditors are all local creditors). However in these cases, there is no doubt that the foreign trustee's competency as plaintiff is fully acknowledged and that, therefore, while the proclivity towards using avoidance regulations under Japanese insolvency law seems to be understandable, given particularly that there is no Japanese adjudication which would trigger Japanese bankruptcy law provisions, there is something that gives one pause in asserting the use of avoidance regulations under Japanese bankruptcy law. As has been discussed already concerning the recognition of foreign insolvency proceedings, the author would think a better understanding of law would require an execution or recognition judgment for a foreign adjudication and therefore Japanese courts should apply the avoidance law provisions of a foreign jurisdiction.

VI. GENERAL INFORMATION

A. Local counsel

Martindale-Hubell publishes the most complete English language guide to large Japanese law firms, although several associations also maintain rosters by country— the Inter-Pacific Bar Association in particular lists many other firms. Many Japanese attorneys are also listed with the American Embassy, although no endorsements are made thereby. Finally, the American Chamber of Commerce counts several U.S. law firms operating in Japan (who can serve as conduits to Japanese firms) amongst its members. Of course, interested persons should feel free to contact this author for either assistance or references.

B. Translations of Primary Material

Primary materials, in particular statutes, may be purchased through the Eibun Horei Sha company in Tokyo, some legislation may be contained in Prof. Kitagawa's *Doing Business in Japan*. Translations, if available, can also be obtained through the author for often Japanese texts will contain facing translations of important treaties and legislation. Several of the author's articles (including those upon which this article depend) appear in English, and he would be happy to provide the Japanese versions.

C. Proposed Legislation

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. The group also submitted the "Model Treaty" for consideration. The Revision 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;

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 Revision Outline, it is clear that certain effects of insolvency proceedings filed in Japan would have an automatic effect abroad. Consequently, neither an individual execution taken by creditors in Japan or in a foreign country against foreign assets, nor rights against the company would be permitted.