5
Treatment of International Insolvency Issues in Japan

Koji Takeuchi
Sakura Kyodo Law Offices, Tokyo, Japan

5.1 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] Originally provisions concerning liquidation and reorganisation were included within the corporate law sections[3] of the Commercial Code. The synthesis of various laws of reorganisation culminated, after the Second World War, in the reception of the American law governing corporate reorganisation (*Kaisha Kosei*).[4] Consequently, there is an enormous variety of proceedings, means and

*The following abbreviations are used in the footnotes to this chapter:
Hasanho — Bankruptcy Law — Bankr. Law;
Shoho — Commercial Code — Comm. C.;
Kaisha Koseiho — Corporate Reorganisation Law — Corp. Reorg. Law;
Wagiho — Composition Law — Comp. Law;
Saibanshoho — Judicial Law — Jud. Law.

[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 reorganisation 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 Reorganisation Law, and the amendments to the Bankr. Law and Comp. Law (1) or (10). For scholars, see A. Mikazuki, *Kaisha Koseiho Kenkyu* [*Studies in the Corporate Reorganisation Law*] (1970) pp. 167, 169, 174.

Current Issues in Cross-Border Insolvency and Reorganisations (E. B. Leonard, C. W. Besant, eds.; 1–85333–958–X; © International Bar Association; pub. Graham & Trotman/International Bar Association, 1994; printed in Great Britain), pp. 69-102.

potential parties involved in Japanese insolvency proceedings, and the modern Japanese law of insolvency is unique 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 under 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, containing principles representing the nation's general will, and which are to be applied using deductive reasoning, it being understood that they carry greater weight than judicial precedent (although the precedent has a great significance within the body of law).[5]

The jurisdictional foundation of Japanese international insolvency is its strict territorialist principles, which are set out in the aforementioned statutes. As will be seen later in this chapter, various inherent contradictions between these statutes and economic realities in international insolvency may well be the price of legal stability under the doctrine of statutory pre-eminence. As to the relationship between the law of insolvency and the Japanese economy, even if one were confidently to acknowledge Japan's economic success in the world's economy, many of the former weaknesses of the Japanese economy stand uncorrected, and business failures continue to occur for structural or managerial reasons. While free market principles function, conservation of capital and work place entitlements has also been effected simultaneously through the exercise of social and industrial policies. The Japanese insolvency system may have been constructed in a piecemeal fashion, but it currently provides support for many of the societal, economic and industrial expectations of the Japanese. 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, occasioned by the ample opportunities for participation. International bankruptcy is an area to which this general interest has been directed; it has also occasioned some official comment.[6]

5.2 General domestic proceedings

5.2.1 Insolvency remedies available

Should a Japanese *Kabushiki Kaisha* (limited company) plan to reorganise 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 (the trustee or, prior to the decision or

[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) pp. 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*, p. 17, cited by Pound at p. 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, 1 June 1992, information from the Finance Ministry.

judgment, the administrator for the preservation of the estate, subject to selection by the court), it could take advantage of the corporate reorganisation procedures established by the Corporate Reorganisation Law ("Corporate Reorganisation") as the most appropriate procedure for business reorganisation. If management seeks to preserve the rights of stockholders and management's rights to administer corporate property, and if there is adequate capital and profitability to justify the holding of those rights, it may utilise the procedures for corporate arrangements established by the Commercial Code ("Commercial Code arrangement"), or composition under the Law of Composition ("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 the *kabushiki kaisha* 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 exist ("special winding-up"). A foreign company, ceasing to do business, has the option of utilising special winding-up procedures. 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 debtor rehabilitation (although there is little of case law on this).

The following discussion will only deal with corporate reorganisation and bankruptcy proceedings for a *kabushiki kaisha*. Under corporate reorganisation, 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 *kabushiki kaisha* have petition rights.[7] Under bankruptcy, creditors (regardless of the number and the amount owed), the *kabushiki kaisha* and its managing director all have petition rights.[8]

5.2.2 Effects of an insolvency petition upon actions by individual creditor

Under corporate reorganisation 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, the prohibition of individual remedies is the result of the order which commences the proceeding (the "order"). The period from the submission of a 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, the prohibition against individual creditor remedies can be raised by the court's own motion, or by a petition by a party in interest with respect to a specific individual action.[9] Collection in fact and non-legal actions are not generally addressed by such orders.[10] Even were a creditor to

[7]Corp. Reorg. Law, s 30.

[8]Bankr. Law, ss 132, 133 and 134.

[9]Corp. Reorg. Law, s 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, s 39.

undertake individual remedies, to the extent not expressly forbidden by law or by specific order, the court does not have the power to restrain or sanction such creditors for contempt.

5.3 Extraterritorial effects of Japanese insolvency proceedings

5.3.1 Fundamental rules relating to insolvency jurisdiction in Japan

The following discussion refers only to corporate reorganisation and bankruptcy.

There are specific rules referring to jurisdiction within the Japanese statutes. In bankruptcy, the court may take jurisdiction over the bankrupt when the debtor's principal place of business or its 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 Japan,[12] when the debtor's major business location in Japan or the debtors' assets are located in its jurisdiction[13] (subject-matter jurisdiction always lies in the District Court[14]). Generally, these statutory provisions are those relating to determination of venue rather than that of international bankruptcy jurisdiction, modelled on similar statutory provisions in the Civil Procedure Law. Consequently, in view of this general concept concerning jurisdiction over civil litigation and its admitted reference to international civil litigation, it could be assumed that Japanese international bankruptcy jurisdiction lies whenever bankruptcy jurisdiction is acknowledged under those venue provisions by one of the domestic courts.[15] Thus, parallel international bankruptcies involving Japanese concerns were anticipated by Japanese legislators. However, a growing minority of legal commentators now argue that the courts of the jurisdiction where the centre of the debtor's business is located should have exclusive bankruptcy jurisdiction on the basis that factors such as efficiency of proceedings and equity should determine jurisdiction, not simply the text of statutory provisions.[16]

5.3.2 Treatment of foreign creditors in Japanese insolvency proceedings

The standing of foreign creditors under corporate reorganisation is premised on complete equality, while in bankruptcy, equality of treatment is accorded on the principle of mutuality.[17] The weight of authority is that the provisions in the bankruptcy law calling for mutuality[18] are to be construed as a formulaic mutuality (ie that a Japanese creditor should be treated the same as local creditors in the foreign jurisdiction),[19] or

[11]Bankr. Law, s 105; Corp. Reorg. Law, s 6.
[12]*Ibid.*
[13]Bankr. Law, s 107.
[14]Jud. Law, s 25.
[15]Judgment of 16 October 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*, 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 *Hoganku Shirin* 45,98 (1978), cited hereinafter simply as "Takeuchi, *Shiron*".
[17]Corp. Reorg. Law, s 3.
[18]Bankr. Law, s 2.
[19]Y. Taniguchi, *Tosan Shoriho* [*The Law of Dispositions in Insolvency*], (1st ed.) pp. 413, 414 (1976).

that such provisions should be disregarded in practice.[20] Indeed, in actual practice, foreign creditors are sometimes accorded better treatment than their Japanese counterparts, as in the cases of *Sapporo Toyopet* and *Osaka Shoken Shinyo* (1981).[21]

5.3.3 Effects of Japanese insolvency proceedings upon the property of the insolvency estate in a foreign country

(a) Statutory considerations

Japan's statutory insolvency law is based upon the so-called territorial principle in its purest form (ie 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] As a result, traditional case law and theory reflect and realise this principle of territorialism. One clear outcome is that the Japanese trustee receives no authority to litigate in a foreign country, having neither the power to dispose of assets located in the foreign country, nor to impede the exercise of individual rights by Japanese or foreign creditors in the foreign country against assets located there.[25] At best, as against the debtor (or its representative), the trustee has the power to order that assets located in a foreign country be removed to Japan, to require that a responsible employee delegate to the trustee the power of disposition over such assets, and to assert authority over assets transferred from the foreign country to Japan after insolvency proceedings have been initiated.[26] The remarkable economic achievements made by Japan, the flow of its capital into foreign countries, the growing amount of foreign capital entering into the Japanese market and the increasing number of corporate insolvencies have all emphasised this inequity when compared to similarly-situated creditors — ie the void in the law of insolvency that results from this approach to jurisdiction — and the wisdom of territorialism has been called into question. A view in favour of

[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*] pp. 267, 279 (1982).

[21]H. Kobayashi, *Kokusai Torihiki Funso* [*International Transactional Disputes*], p. 216 (1987), cited hereinafter simply as "Kobayashi, *Kokusai Torihiki*".

[22]Bankr. Law, Art 3 (Principle of Territoriality):

1. 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*), s 3 (1962). Republic of China Bankruptcy Code (*Chuka Minkoku Hasanho*), s 4 (1934).

[24]K. Ume, "*Hasanho Gaisetsu*" ["*Summary of Insolvency Law*"] in *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 Re-examination of Universalism within the Insolvency Procedural Law"], 25 *Minji Sosho Zasshi* 131 (1979), cited hereinafter simply as "Aoyama, *Zokuchishugi Saikento*".

[26]See eg, 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 v Saikensha* [*Debtors v Creditors*] 62 (1978).

limited construction, and even of revision and amendment of the territorialist statutes, has become conspicuous in case law, academic opinion and practice in the courts. This revisionist movement has made significant progress, and seems to have reached a point where it is accepted as a fixed theory of interpretation of such jurisdictional provisions.

(b) Case law

In one case ("Case I"), 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 of which vested in the trustee under the law of the foreign jurisdiction.[27] This has recently been followed in a case in which a foreign representative as a shareholder successfully petitioned the court for revocation of certain shareholders' resolutions at a meeting called in contravention of the Commercial Code ("Case II-A").[28] It is not unreasonable to draw inferences from the foregoing as to the likely interpretation in Japan of the effects of Japanese insolvency proceedings upon foreign assets of the debtor.

(c) Academic opinions

Academic opinions advocating dynamic construction of the territorial principle have flourished since 1975, and the scope of suggested amendment and the grounds therefor naturally vary from implicit acceptance of territorialism to approaches which would lead to wholesale revision of the principle. They may be summarised as follows:

(a) One view, which inclines strongly towards the doctrine of the universality of bankruptcy proceedings, argues that a Japanese insolvency judgment, including its comprehensive power of execution (including the rights to manage assets and to prohibit individual remedies) in foreign countries, should be given effect by means of an executory judgment, or even effected without any formality, where such judgment is ordered by a Japanese court exercising jurisdiction over the centre of the debtor's business.[29]

(b) A second view, which allows for concurrent bankruptcies, presumes that Japanese insolvency judgment would affect foreign assets located in foreign jurisdictions which recognise such effects.[30]

(c) A third approach contends that the right to manage foreign assets should be recognised, but only to the extent that this does not impede the individual remedies taken by foreign creditors not participating in Japanese proceedings.[31]

(d) A fourth opinion advocates that the rights to manage assets be recognised without the right to prohibit remedies, subject to the limitation that individual remedies

[27]Decision of 30 January 1981 (*Showa* 56), Tokyo Kosei, 994 *Hanrei Jiho* 53 (1981).

[28]Decision of 26 September 1991 (*Heisei* 3), Tokyo Chisai, 897 *Kinyu Shoji Hanrei* 30 (1992).

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

[30]Kobayashi, *Kokusai Torihiki*, p. 223.

[31]K. Ishiguro, *Kokusai Shiho to Kokusai Minji Soshoho to no Kosaku*, [*The Antagonism between Private International Law and the Law of International Civil Litigation*], p. 249, n. 557 (1988), cited hereinafter simply as "Ishiguro, *Kosaku*".

taken in conflict with such rights over assets should 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).[32]

(e) A fifth opinion would recognise the trustee's rights to recover assets from abroad, including the right to require co-operation from the debtor, and would deem any advantage resulting from any individual remedy taken by a Japanese creditor to be an unjust enrichment.[33]

If an attempt is made to analyse the common factors of each of the above opinions, the current view would appear to be that the trustee's direct or indirect (through the debtor) powers of administration and disposal over assets held overseas be recognised, that the comprehensive power of execution 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 shall be readjusted through the application of preference, unjust enrichment and hotchpot rules.

However, this conclusion is only a synthesis of common factors in academic positions. Whether the administration of an insolvency estate faced with imminent threat of piecemeal execution will actually be accomplished in accordance with these views — ie whether fairness, equity and successful reorganisation are to be attained — remains to be seen.

Nevertheless, 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 based on the notion of universalism.[34] The revision outline comprises the following points:

(a) Domestic insolvency proceedings should 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 centre of the debtor's business.
(b) The trustee should have the responsibility of administration and/or disposal of the foreign assets.
(c) Co-operation may be requested from foreign courts.
(d) A creditor, having taken individual remedies in contravention of the above, should be subject to disgorgement of the benefit as an unjust enrichment.

[32]Takeshita, *Kokusai Tosanho no Genjo*, p. 47; see also M. Ito, *Hasanho* [*Bankruptcy Law*] (New ed.), p. 116 (1991).

[33]Y. Taniguchi, "*Tosan Tetsuzuki to Zaigai Zaisan no Sashiosae*" ["Attachment of Assets Abroad and Insolvency Procedure"] in Yoshikawa Tsuito (in dedication to Professor Yoshikawa): *Tetsuzukiho no Riron to Jissen* [*Procedural Practice and Theory*], pp. 578, 587 (1981), hereinafter cited simply as "Taniguchi, *Zaisan Sashiosae*". See also M. Takeshita, *Kokusai Tosanho no Genjo*, pp. 15 *et seq.*

[34]See M. Takeshita(ed.), *Kokusai Tosanho* [*International Insolvency Law*], *pp. 417 et seq* (1991), including commentary by M. Ito, pp. 381 *et seq*. Cited hereinafter simply as "Takeshita, *Kokusai Tosanho*". The Revision Outline is set in Amex 1.

The revision outline makes clear that certain effects of insolvency proceedings filed in Japan involving *kabushiki kaisha* would automatically extend to foreign countries. Consequently, neither an individual execution taken by creditors in Japan or in a foreign country against foreign assets owned by the *kabushiki kaisha*, nor against the rights of the *kabushiki kaisha*, would be permitted.

(d) Legal practice

Practitioners, comprised of judges and trustees (usually attorneys), are more actively pursuing and effecting the goals of universalist doctrine. Efforts to weaken the territoriality principle made by those practitioners have become increasingly obvious since 1975. Reflection on the progress of such "law as practice" enables several different evolutionary stages to be discerned. Stage I involved the trustee's self-constrained administration and disposal of foreign assets, all the while having to endure and defend against attacks against the foreign assets initiated by advantageously-placed creditors (both domestic and foreign). This process usually ended by the trustees settling for a negotiated solution. Stage II involved the debtor's request for assistance from foreign courts and then its attempt to defend and if necessary obtain protection for foreign assets. These requests extended to enjoining all creditor actions. Stage III — the current situation — is characterised by highly sophisticated efforts to recover and preserve foreign assets, utilising to the fullest extent available, foreign bankruptcy systems to effect the goals of the Japanese trustee.

Examples of large-scale international insolvency cases belonging to Stage I are: *Koyama Kaiun* (1975),[35] *Terukuni Kaiun* (1975),[36] *Eiko Business Machine* (1975),[37] *Petri Camera* (1977),[38] and *Issei Kisen* (1978).[39] Belonging to Stage II are *Osawa*

[35]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, 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*, p. 215. Many thanks to T. Nomiya for his guidance concerning this case.

[36]Tokyo District Court, (*Mi*) No. 19, (1975 [*Showa* 50]), Corporate Reorganisation.

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

[38]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*, p. 104, n. 11.

[39]Kobe District Court, (*Mi*) No.] (1978 [*Showa* 53]), Corporate Reorganisation: 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 cancelled but 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 Canadian Federal Court, Trial Division, 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* p. 1. Cf. regarding the Canadian judgment, *Orient Leasing Company Ltd v The "Kosei Maru"* (1979) 94 DLR(3d) 658 (Fed. TD).

Shokai (1984),[40] *Riccar* (1984),[41] *Sobu Tsusho* (1985),[42] and *Sanko Kisen* (1986).[43] Belonging to Stage III are *Maruko* (1991),[44] *Urban* (1991),[45] *SAC* (1991),[46] and *Ken International* (1992).[47] During Stage I, the bankruptcy or reorganisation estate in Japan

[40]Tokyo District Court, (*Mi*) No.1 (1984 [*Showa* 59]), Corporate Reorganisation. 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 Reorganisation 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 (US 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)*".

[41]Tokyo District Court, (*Mi*) NO. 7 (1984) [*Showa* 59], Corporate Reorganisation. It involved cases of liquidations of foreign subsidiaries, such as German enterprises, and foreign creditors.

[42]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)*, p. 7 and *Osawa Shokai (Part 2)* p. 15.

[43]Tokyo District Court, (*Mi*) No. 6 (1985 [*Showa* 60]) Corporate Reorganisation: a notable case in that the trustee filed a proceeding under US Federal Bankruptcy Code, s 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 (SDNY decided 30 July 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 co-operation with K. Tezuka (1988). The US 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.

[44]Tokyo District Court, (*Mi*) No. 1, (1991 [*Heisei* 3]), Corporate Reorganisation: this case is noteworthy in that the Japanese trustee applied for domestic US bankruptcy administration under s 303 of Chapter 11 of the US Federal Bankruptcy Code, *In re Maruko Inc* (No. SD91-12303-LM11), which aimed at a full-scale reorganisation, instead of s 304 ancillary proceedings, since the estate involved considerable US 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.

[45]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 for his assistance on this case.

[46]Nagoya District Court, (*Hu*) No. 91(1991, [*Heisei* 3]), Bankruptcy. This case is remarkable for three reasons: (1) as with *Urban*, the court appointed an additional trustee for a purpose of administration and disposal of foreign assets; (2) its petition for the execution of judgment was acknowledged (Jugement rendu le 26 Septembre 1991, Tribunal de Grande Instance d'Argentan); and (3) workouts of French grandchild companies (which own a great number of golf courses) were supervised by the Japanese courts in the course of a liquidation of the subsidiary Japanese corporation. Many thanks to T. Kosugi and T. Ikeda concerning this case.

[47]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 reorganisation procedures was filed under Chapter 11 (not Chapter 7) and based upon s 303 instead of s 304 requesting recognition of the Japanese insolvency proceedings. Presumably the trustee recognised some procedural advantage such as the ability to utilise US discovery procedure to search for concealed outflow of capital and avoid preferences under provisions more advantageous than those available under Japanese law. For the US, it is an *Axona* version of foreign insolvency proceedings. Cf. *In re Axona International Credit & Commerce Ltd*, 88 BR 597 (Bkrtcy. SDNY 1988), in which a petition for Chapter 7 based on US Federal Bankruptcy Code s 303 was made by a Hong Kong company, achieving an avoidance. Upon recovering its assets, the trustee petitioned for suspension of Chapter 7 proceedings and for turnover of the domestic US assets to a Hong Kong trustee, which petition was granted under the conditions that administrative expenses and US priority creditors would be paid first and the trustee conduct the distribution in Hong Kong within 72 hours after the assets had been transferred to Hong Kong. My thanks to K. Ohashi concerning Tokyo District Court (*Hu*) No. 1594.

suffered attacks, such as attachments filed in various regions against vessels used by shipping companies. However, the attaching creditors were usually domestic creditors or their foreign affiliates. This stage can be said to represent a period in which economic realities continuously projected legal questions to be solved. Stage II was notable for 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 authorising ancillary proceedings under the US Federal Bankruptcy Code.

During Stage III, some radical changes have taken place, which include 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 legal techniques of corporate reorganisation utilising, for example, parallel petitions under full Chapter 11 (US) reorganisation together with its joint administration of US subsidiaries; and
(d) a sophisticated application of law of foreign countries in aid of Japanese liquidation bankruptcy which utilised parallel petitions under full Chapter 11 reorganisation, aiming at an advantageous application of the US preference and discovery provisions.[48]

It can be seen from Stage III cases, therefore, that the basis of Japanese insolvency jurisdiction, although predicated on territoriality in theory, has essentially shifted to universalism in practice.

5.3.4 The theoretical basis of the foreign impact of Japanese insolvency proceedings

The foreign impact of Japanese insolvency proceedings is based on the propositions that a foreign judgment is entitled to full recognition, and that insolvency proceedings can be viewed as one judgment (or at least as analogous to a judgment) or as a series of judgments to carry out the inherent purposes of such proceedings.[49] A minority view is that an insolvency proceeding is merely an execution, but this view tends to result in territorialist conceptions.[50] The Anglo–American concept of assignment is not widely accepted in Japan.[51] An explanation deriving from personal

[48]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*, pp. 57 *et seq.*

[49]T. Mitsui, "*Kokusai Hasan*" ["International Bankruptcy"], in *Shogai Hanrei Hyakusen*, 188 (1967); Takeuchi, *Shiron*, p. 92; Aoyama, *Zokuchishugi Saikento*, p. 154; Kaise, *Josetsu*, pp. 477 *et seq*; Takeshita, *Kokusai Tosanho Genjo*, pp. 40 *et seq.*

[50]M. Kato, "*Hasan Senkoku no Kokusaiteki Koryoku*" ["International Co-operation in Bankruptcy Judgments"], in *Hasanho Kenkyu* [*The Study of Bankruptcy Law*], Vol. 1 (5th ed.), p. 310 (1924).

[51]Along the same lines, see K. Takeuchi, "*Hasan to Torimodoshi-ken*" ["Bankruptcy and the Right of Recovery"], in *Hasanho Jitsumu To Riron No Mondaiten* [*Insolvency Practice and Theoretical Issues*] (new ed.), p. 218 (1990).

jurisdiction and *in rem* jurisdiction is similarly only accepted by a minority.[52] Japanese private international law theory selects the law of the jurisdiction of incorporation of a company to govern such matters as incorporation, organisation, management and dissolution. Based upon this theory, there are also reasons to support the conclusion that effects arising from Japanese corporate law should be recognised in other forms.[53]

5.4 The domestic effect of foreign proceedings

5.4.1 Effects of foreign proceedings upon individual creditor actions in Japan

(a) Case law

Case I (*see* **5.3.3(b)**) is of importance in that it represented a major shift in the approach of the Japanese courts to 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 assets was to be recognised. The court answered in the affirmative. With respect to another issue, whether an execution judgment on a foreign insolvency adjudication should be obtained, Case I's holding presupposed that such judgment was not required (it is still not clear whether such an execution judgment is statutorily recognised within Japanese procedural law, or whether it is an invention derived from academic opinions or case law). This analysis also applies to Case I–A, another case that touched upon the power of a foreign insolvency representative in Japan. An apparent conflict with these two cases is Case II, which actually occurred between Case I and Case I–A, and which took the somewhat traditional approach to the law of international bankruptcy. In that case, an individual of Indian nationality was declared bankrupt in Hong Kong.[54] 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 may have sought to avoid the trustee's interference; from the judgment itself it is not clear whether the debtor's centre of business was located in India or Hong Kong).

(b) Academic opinions

Logical consistency requires that the academic approach to the effect of foreign insolvencies on proceedings and remedies in Japan should be the converse of their

[52]Taniguchi, *Zaigai Sashiosae*, p. 589 and Ishiguro, *Kosaku*, p. 250, follow up on this concept.

[53]T. Kawakami, "*Kaisha*" ["The Company"], 3 "*Kokusai Shiho Kosa* [*Private International Law*] 739 (1964); J. Tsubota, "*Kigyo Tosan o Meguru Kokusai Mondai*" ["International Problems Involving Business Bankruptcies"], in 3 *Kokusai Torihiki Jitsumu Kosa* [*Lectures on International Transactional Practice*] 757, (1979). See also K. Ishiguro, *Kokusai Shiho* (new ed.), p. 255 (1990), cited simply hereinafter as "Ishiguro, *Kokusai Shiho*" and Ishiguro, *Kosaku*, pp. 171, 198, which view an insolvency proceeding from the perspective of judicial or administrative action as creating private legal relationships (*Gestaltung*). It is argued that we take an international civil actions approach (cf. factors mentioned with s 200 of the Law of Civil Procedure) rather than a private law approach which applies as the *lex causae* to the formalities and validity.

[54]Judgment of 30 September 1983 (*Showa* 58), Osaka District Court, 516 *Hanrei Times* 139.

answer to the question of what effect is to be given to Japanese insolvency proceedings upon creditor actions in foreign countries. As already noted, synthesis of the 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. Similarly, a creditor's action, foreign or domestic, shall not be impeded, except that those creditors who have strong contacts with the foreign proceedings may be subject to adjustments or prohibition under the proceedings afforded to the foreign insolvency representative.[55]

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.[56] Another opinion also considers Case II to be 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.[57] However, the author of this second opinion reserved his decision with respect to whether the debtor's business in Japan was distinct from the business in Hong Kong, and whether a proof of claim had been filed in the Hong Kong court. The author of the second opinion recognises, as a matter of general theory, the right of the foreign representative to sue. However, it would appear from a view of the Case II decision that the debtor conducted business both in Hong Kong and in Japan to a similar extent, although its bank accounts were slightly more overdrawn in Hong Kong than in Japan. It would also seem that the location of the debtor's centre 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. This lack of precision resulted in the court reverting to a formalistic construction of the territorial principle.

If we look at the revision outline, we see that it suggests that a foreign bankruptcy granted in the principal jurisdiction of the debtor be recognised in Japan, including both the trustee's right to manage assets automatically and the right to enforce the comprehensive power of execution upon an order recognising foreign bankruptcy. Therefore, where a foreign law prohibits a creditor's individual remedies, any such remedial actions taken by both domestic and foreign creditors in Japan would be prohibited as against the assets of the foreign debtor or against the foreign debtor after the recognition order had been entered. In a case similar to Case II under the revision outline, the outcome would depend upon whether the foreign insolvency jurisdiction had been based upon the location of the debtor's centre of business.

(c) Legal practice

Heretofore, 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 co-operative attitude upon the receipt of a request for co-operation in relation to a

[55]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*, p. 100, and Aoyama, *ZokuchiShugi Saikento*, p. 158, describing prohibition of such rights following the execution judgment; or in Kaise, *Josetsu*, p. 518, describing prohibition without such execution judgment.

[56]Takeshita, *Kokusai Tosanho no Genjo*, p. 47.

[57]Ishiguro, *Kokusai Shiho*, p. 277.

foreign insolvency proceeding. It seems likely that the Japanese courts will not selfishly pursue their own interests in view of the long passage to the present practical interpretations. However, it is still possible that such co-operation might be denied under the pretext of the lack of law or the protection of domestic creditors, thus provoking criticism from friendly nations. Fortunately, there has not been any instance in which a Japanese court has received a request deriving from a foreign proceeding to recognise the comprehensive power of execution in order to prohibit an individual creditor's actions in Japan; thus, so far, the law in practice appears seamless.

In the future, should a Japanese court receive a request from a foreign court or trustee to provide assistance by refusing to sustain a creditor's individual action, whether domestic or foreign (eg 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 would be preferable for the court to make its disposition in light of the five following considerations.

First, any posture effectively refusing to co-operate 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 adopted in Case I is that the foreign trustee is recognised in respect of its rights to exercise the bankrupt's rights in Japan on its behalf, although that wording is excessively technical and in essence is the same as having directly recognised the trustee's full power to manage the property and to sue in Japan), and 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. Given that 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, it is clear 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. These arguments are premised upon creating separate and independent concepts. Thus 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 is 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 to be made concurrent with the adjudication of bankruptcy) is expected to take possession of all of the debtor's properties,[58] to close the debtor's books of account[59] and to require a sheriff to levy execution based upon the adjudication of bankruptcy. The court, on the other hand, gives orders to the debtor's account debtors and holders of debtor's assets prohibiting them from paying or making delivery to the bankrupt.[60] These orders are both served upon creditors and published. Regardless of whether this enforcement of the compre-

[58]For a bankruptcy example, see Bankr. Law, s 142, Clause 1 and s 185.

[59]Bankr. Law, s 186 and 187.

[60]Bankr. Law, s 143, Clause 1, No.4, Clause 2.

hensive 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 recognised. To borrow a phrase, 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 absurdity of the person retreating 50 steps ridiculing the person who retreats 100 steps. While the difficulty of providing protection to local creditors is a serious matter, such protection would be futile where there are insufficient assets within the jurisdiction to satisfy fully 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, and that appropriate accommodations be provided such that local creditors do not incur unnecessary expense or inconvenience 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.

A third consideration is that the argument utilising *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 fails to refer to such foreign system's *in rem* jurisdiction, which extends the coverage of the foreign proceedings to the property within foreign countries. 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 request to protect the property of the forum.

Fourthly, 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 upon those having such contacts should be permissible. Due process does not simply exclude purely local creditors merely by the fact of their status as such. It should be noted that there has never been any serious argument that section 304 of the US Bankruptcy Code is in violation of the federal due process clause.

Finally, if it is sensible to view a foreign insolvency proceeding as a species of foreign judgment, then, in terms of the statutes, the civil execution law provides a special proceeding only for a foreign monetary judgment. The means of recognising other kinds of foreign judgments embraced by section 200 of the Civil Procedure Code rests with 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 Japanese insolvency law (being the court of the centre of the debtor's business in Japan) could recognise 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 creditor's 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, the rendition of assistance by the Japanese insolvency court could be seen as co-operation between courts in terms of the fair distribution of a court's responsibility. Such co-operation by the Japanese court with other courts would be deemed to be required under the Law relating to the Reciprocal Judicial Aid given at the request of Foreign Courts (the "Judicial Aid Law") and the Law of the Judiciary in its section on mutual assistance or the insolvency law (eg Bankruptcy Law, section 109). Therefore, as international co-operation grows, it is probable that Japanese courts would assist foreign proceedings by entering execution judgments in the court where the debtor's business is located in Japan, or where the debtor's assets are located. Japan will show that, as a matter of procedural policy, it intends to follow international co-operation, as shown in section 200 of the Civil Procedure Law (section 200 can possibly, by the exercise of logic, be treated as a part of Bankruptcy Law through its section 108 and likewise as a part of the Law of Corporate Reorganisation through its section 8). The practice of law, centering upon case law, has the capacity to create law and creatively to "find" law in this field through the resolution of specific legal issues. However, the foregoing is mere speculation; the gulf separating these proposals from current reality may well never be bridged.

(d) Major relevant insolvency cases

Two cases, *US Lines Inc* (1987)[61] and *Bank of Commerce and Credit International SA ("BCCI")* (1991),[62] have contributed a great deal to current discussion. In *US Lines*,

[61]Tokyo District Court, (*Hu*) No. 216 (1987 [*Showa* 62]), Bankruptcy. A US corporation filed a petition under Chapter 11 for reorganisation in November of 1986 in the US A petition for bankruptcy in Japan in May 1987 concerning its branch in Japan, by the debtor-in-possession. My thanks to H. Yamakawa on this issue.

As a reference, US Lines filed for protective orders around the world. Upon filing the US petition, US Lines sought to extend the effect of the US automatic stay against those who executed a *Mareva* injunction in the UK after the petition for Chapter 11. However, the petition was denied in the UK, due to the fact that the reorganisation targeted only North America (however, this decision has clearly indicated that the *Mareva* injunction creditors should have been treated equally in the UK regarding liquidation), *Felixstowe Dock and Railway Co v US Lines Inc* [1989] 2 All ER 77, QB. See also, Smart, *Cross-Border Insolvency*, p. 147 (1991), regarding the effects of domestic provisional attachments and foreign insolvency proceedings in relation to the above case.

[62]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 (Commercial Code, s 485, Clause 1) on the basis that the debtor's business location had been discontinued (under s 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, and there is apprehension why independent autonomy in the framework of disciplines of the private law failed to function. Of course, the Minister of Finance would assert that authority under s 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*, pp. 544 *et seq* (1990), argues only for special liquidation, the rationale being a reference in s 485, Clause 2 to ss 431 through 456. If BCCI was insolvent, then either BCCI was left with either special proceeding of liquidation bankruptcy by mixture of ss 485, 430, and 24 of the Comm. Code. and Section of the Comm. Code. It is unclear whether there was any preference in this case. My thanks to Mr. Kugisama for his assistance in considering this case.

the debtor-in-possession under Chapter 11 of the US 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, were recognised. 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 co-operation which will be achieved among the different courts administering liquidation proceedings in the various countries.[63]

5.4.2 Effect of foreign insolvency proceedings upon concurrent bankruptcy petition in Japan

A debtor in Japan who has a main business office in a foreign country is subject to Japanese insolvency jurisdiction, so long as it maintains a place of business in Japan. Based upon this, there is adequate statutory groundwork for the court to commence insolvency proceedings in Japan against a foreign debtor along with the insolvency proceedings overseas. As a matter of interpretation, whether petitions for insolvency proceedings filed in Japan by creditors can be dismissed or whether the proceedings can be stayed in Japan, depends, ultimately, upon the application of precedents, academic opinions and law in practice. While academic opinions leaning strongly towards universalism may support these results, there are likely to be more negative responses from the common elements in the academic world generally. However, the aforementioned revision outline is clear that it supports the approach based on universality. It is not apparent how insolvency distributions which come from two proceedings should be adjusted where concurrent insolvencies are administered, but it is possible that those who have received distributions in a foreign country are not entitled to distributions in Japan until other creditors have received the same rate of distribution in Japan.

[63]For a report on the degree of progressive co-operation between the liquidators of BCCI, see, "*BCCI Jiken no Sono Ato*" ["BCCI and its Aftermath"], 499 *NBL* 4 (1992). This type of co-operation 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 a English company, *Maxwell Communication Corporation plc* (English High Court, No. 0014001 of 1991), simultaneous administration is occurring in England, under s 8 of the Administrative Proceeding (Insolvency) Act 1986 and in the US under Chapter 11, *In re Maxwell Communication Corporation plc* (No. 91 B15741 (SDNY 1991)).
The representatives in the two proceedings, an Examiner appointed under 11 USC s 1104(b) in the US, and in England an Administrator pursuant to s 13 of the Insolvency Act of 1986, reached an accord termed the "Order and Protocol", designed effectively to delineate a common scheme. This operational plan has been approved both by the High Court of Justice, Chancery Division, Companies Court and the US Bankruptcy Court for the Southern District of New York. Proceedings have only recently commenced under this management plan so there are few results to investigate, however, if we examine the concrete decision relating to management, the Protocol confirms that: (i) court permission and consent of the US Examiner is required for any transfer, lease or collateralisation of assets within the set group administered by the British Administrator; (ii) any other disposal shall require consultation with the US Examiner; (iii) modification in management issues requires the consent of the US Examiner; (iv) any auditing plans made by the British Administrator will require the consent of the US Examiner; and (v) the bankruptcy plans of the two proceedings shall be consistent in substance.

Incidentally, it is abundantly clear that a petition for insolvency proceedings against a foreign debtor filed by a representative of the foreign insolvency proceedings in Japan will now be recognised (cf *US Lines*).

5.4.3 Extent of assistance to foreign insolvency proceedings

Recognition of a representative of a foreign insolvency proceeding will be definitely given as to the power of administration and disposal over Japanese assets. As to requests for service of process in relation to insolvency proceedings from overseas, it is conceivable that Japan may be able to offer co-operation 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 might not be applicable to insolvency proceedings. At the same time, however, the term "litigation" may be too narrowly defined when contrasted with the corresponding expression of "case law on civil or criminal matters" in the original English text of the Law, and the relevant 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, co-operation 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 where 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). (*See* **5.4.1** for discussion on recognition and co-operation; eg prohibitions on individual execution and the petition for concurrent insolvency).

5.5 Private international law

5.5.1 Priorities, fraudulent conveyance set-offs and executory contracts: governing law in Japanese proceedings

(a) Introduction

What would be the effect if Japan's insolvency proceedings extended to foreign countries? To begin, choice of law rules from the perspective of private international law are not clear, due to the lack of precedents resulting from the past dominance of the principle of territorialism. And frankly, at present, arguments on the subject are not particularly sufficient in number or extent. Certainly what is described below is more a product of theory, although some generalisations can be made.

As a starting point, the purely procedural rules for the purpose of achieving the final objective of the insolvency procedure of a Japanese *kabushiki kaisha* — ie its reorganisation or liquidation — are, of course, those of Japan. Generally speaking, the principle of *lex fori* as to proceedings is also applicable in Japan.[64] Consequently, Japanese procedural rules now extend to issues such as general priority creditors, secured creditors, recipients of fraudulent conveyances, those entitled to set-offs, and parties to bilateral executory contracts in a foreign country.

[64]Takeshita, Kokusai, *Tosanho no Genjo*, p. 26; Ito, *Hasanho* [*Bankruptcy*], p. 115; K. Yamato, "*Hasan*" 3 *Kokusai Shiho Koza* [*Lectures on Private International Law*], pp. 882, 893 (1964), hereinafter cited simply as "Yamato, *Hasan*".

(b) General priority (preferred) claims

Under Japanese insolvency procedures, general priority given to a labour claim, for example, is determined theoretically, first, as a premise, by applying the law of the contract as to its creation (or the non-existence thereof) and its priority and preferential range, which law shall be chosen according to principles of private international law.[65] However, this is then subject to review according to the local labour laws of the place where the labour is to be furnished, which review proceeds from the vantage point of societal strategy.[66] Thereafter, priority claims are re-evaluated under Japanese insolvency proceedings for the purpose of a determination as to its status in that country's insolvency law system, taking into consideration other preferences as well as their standing in relation to general claims.[67]

The revision outline, published as a proposed summary of amended text relating to international insolvency law, is reproduced in Amex 1. This outline is being made public simultaneously with the Draft Model Provisions of Bilateral Treaties.[68] 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 centred 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 foreign countries' general priority claims in Japan. According to the provisions of the Model Treaty, the existence of general priority claims, their scope and their standing shall be determined in relation to the substantive law of the claim (labour claims being determined according to the laws of the place where labour is furnished), and the standing for purposes of bankruptcy law shall be determined according to insolvency procedural law.

A foreign country's general principles regarding rights of taxation — ie the rejection of a foreign government's exercise of its taxation rights — have been introduced by scholars.[69] Consequently, although it is possible that their priority rights will not be recognised since we have inserted a premise that the Japanese insolvency procedure shall be effective in a foreign country, tax priority claims will probably be recognised as to standing and scope, in alignment with the Japanese insolvency procedural system (although when the limits of scope and standing in the foreign country are more restrictive than in Japan, then the tax creditor is subject to such restrictions.[70]

(c) Secured claims

The traditional view is that determination as to the creation (the existence or non-existence 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 pri-

[65]*Horei* [Choice of Law], s 7; Yamato, *Hasan*, p. 897.

[66]R. Yamada, *Kokusai Shiho*, pp. 282 *et seq* (1989); Judgment of 26 April 1965 [*Showa* 40], Tokyo Chisai 16 *Rominshu* 308.; S. Kuwada, "*Tojisha Jiji no Gensoku*" ["Principle of Self-autonomy"], in *Shogai Hanrei Hyakusen*, 76 (1967); M. Jikkata, *Kakushu no Keiyaku* ["Various Contracts"], in 2 *Kokusai Shiho Koza* 460 (1955).

[67]Yamato, *Hasan*, p. 897.

[68]Takeshita, *Kokusai Tosanho*, p. 422 including Nishizawa's commentary at p. 397. Cf., the text of the Model Bilateral Treaty reproduced in Amex 2.

[69]K. Ishiguro, *Gendai Kokusai Shiho Jou (Part 1)*, p. 473(1986).

[70]This concept is similar to that underlying the Model Treaty.

vate international law.[71] 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 ships and airplanes, the law is that of the property's place of registration, rather than the location of the property).[72] 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 aggregation of the laws governing the secured claims and the laws governing collateral where the property is located), the view that the only law to be considered is that governing the secured claim is also strong.[73] Incidentally, the status and standing of such claims under Japanese insolvency procedure would probably be decided (solely) under Japanese procedural laws.[74]

(d) Fraudulent conveyances, set-offs and executory contracts

Fraudulent conveyances, set-offs and bilateral executory contracts present problems of considerable difficulty. Japanese theory first considers the law governing claims to evaluate the creation of a claim, and the law governing contracts for the formation and the validity of a contract.[75] Thereafter, the requisites and effects of fraudulent transfers (avoidance powers), the requisites for authorisation of set-offs (although the effect of set-off 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.[76] (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.)[77]

5.5.2 Priorities, secured claims, preferences, set-offs and executory contracts: governing law in recognised foreign proceedings in Japan

The present state of Japanese theory is basically that explained in **5.5.1**. As to general priority claims and secured claims, one would think that the theory could be applied by reversing that analysis. There may be, however, a strong inclination to protect the rights of Japanese domestic creditors with respect to the avoidance of fraudulent conveyances, set-offs and bilateral executory contracts, and it is possible that the court will emphasise the application of Japanese insolvency procedural law to the extent it feels is appropriate (in particular in cases where Japanese creditors are all local and

[71]Yamato, *Hasan*, p. 903; Takeshita, *Kokusai Tosan no Genjo*, p. 26.

[72]H. Tanigawa, "*Tampo Bukken*" ["Collateral Rights"], in *Kokusai Shiho* [*International Private Law*] 60 (1973), cited hereafter "Tanigawa, *Tampo Bukken*"; S. Hayashida, "*Gaikoku Tampoken no Jikko*" ["Execution of Security Rights Abroad"], in *Kokusai Minji Soshoho no Riron* [*Theories of International Civil Litigation*], pp. 437 *et seq* (1987).

[73]Tanigawa, *Tampo Bukken*, p. 63.

[74]Takeshita, *Kokusai Tosan no Genjo*, p. 26; K Takeuchi, "*Kokusai Tosan Shori*" ["International Insolvency Disposition"], in *Gendai Tosanho Nyumon* [*Introduction To Modern Insolvency Law*], p. 298 (1987).

[75]Yamato, *Hasan*, p. 901.

[76]T. Terao, *Kokusai Shiho* [*International Private Law*] (1898); Yamato, *Hasan*, pp. 896, 901, 903; Takeshita, *Kokusai Tosanho no Genjo*, p. 26.

[77]Kaise, *Josetsu*, p. 516.

have no connection to the foreign country). However, in these cases there is no doubt that the foreign trustee's competence as plaintiff is fully acknowledged and that, therefore, while using the avoidance regulations under an insolvency procedure commenced in a foreign country seems to be supportable (particularly given that there is no Japanese adjudication that would trigger Japanese bankruptcy law provisions), there should be pause for thought before asserting the use of avoidance regulations under Japanese bankruptcy law. As discussed already, concerning the recognition of foreign insolvency proceedings, it is submitted that a better understanding of the law would require an execution judgment for a foreign adjudication by a Japanese court and an application of the avoidance law provisions of the applicable foreign jurisdiction.

5.6 Combined enterprises

5.6.1 Treatment of a foreign wholly-owned subsidiary of a Japanese parent company in Japanese insolvency proceedings in Japan

(a) Background

Some background is useful in understanding the Japanese disposition of an insolvent combined enterprise.[78] First, one notices that there are considerable differences between corporate reorganisation and bankruptcy. Under corporate reorganisation, if a parent corporation becomes insolvent, then usually the subsidiary is also 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 case numbers to each 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 will also be consolidated. Documentation that must be effected by the trustee, including reports and plans for the parent and subsidiary, are also presented in one document. Then there is the issue of possible inequality between creditors arising from such matters as the merits and demerits of the condition of the various assets of the parent and subsidiary, or opaque transactions between the two, and the complications from multiple or secondary obligations (and such additional issues as the protection of the exception of the contractual party who relied upon one rather than the other). When necessary, these issues are settled according to the plan dealing with the merger of the parent and subsidiary, the result being that only one claim remains, which is 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 of each of the estates. However, in practice it is common for the creditors meeting to convene in the same place at the same time, or to have other limited joint administration.

[78]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*, pp. 277,321(1984).

Obligations between the parent and subsidiary, and guarantee obligations on behalf of another party, and other obligations, following general principles, 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 reorganisation 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 this inquiry into two cases: (i) that in which a Japanese parent debtor intends to reorganise (for the success of the reorganisation, the foreign subsidiary is considered here to be indispensable); and (ii) that in which the debtor is to be liquidated.

(b) Reorganisation of Japanese parent company

Assuming that the foreign subsidiary (either registered in the foreign country or having a principal office, as set forth in the articles of incorporation, in the foreign country) is vital to the successful reorganisation of the parent debtor, management of a wholly-owned subsidiary will ordinarily be based in Japan. For the purpose of jurisdiction, it will usually suffice that there is at least an operational office in Japan (and, if there is more than one such office, that one of them is principal). If this is the case, then section 6 of the Corporate Reorganisation Law establishes the Japanese District Court's jurisdiction over the foreign subsidiary. In this case, no obstacle is presented by the fact that the subsidiary is a company organised according to the corporation law of a foreign and not a Japanese corporation.[79] Thus, in theory, corporate reorganisation procedures of the parent as well as its subsidiary can proceed jointly in Japan.

From this perspective, a Japanese parent and its foreign subsidiaries may benefit from consolidated, unified procedures for reorganisation. In the alternative, the trustee may draft proposals maintaining the independence of the corporate personality of the parent and its subsidiary in the foreign country (claiming, for example, that problems of multiple filing creditors can be resolved by altering the payout ratio).

Moreover, it is not inconceivable that the jointly proposed plan may contain a provision for a bold international merger between the parent and the subsidiary.[80] If such

[79]Corp. Reorg. Law, s 1; Kaneko, *Jokai Kaisha Koseiho*, p. 133.

[80]For introduction of the International Law Association, at their 1960 Hamburg Convention, T. Kawakami, "*Kaisha*" ["Corporations"], in 3 *Kokusai Shiho Koza* (*International Private Law* 727 (1964). s 4, paragraph 4 of the Treaty Relating to the Acknowledgment of the Corporate Character of Foreign Company, 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 recognised 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, as follows: "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 recognised 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 recognised. See 340 *Homushiryo* [*Materials Concerning Legal Affairs*], No. 340: *Shusengo ni Okero Kokusai Shiho ni Kansuru Hague Joyakuan (3)*, [Post-War Treaty Provisions of the Hague Convention Relating to International Private Law], pp. 152, 653, 674 (1956).

a merger can be seen as an actual investment in kind, then the difficulty of having two corporations' laws governing both companies would cease to be a problem. In any event, under the Corporate Reorganisation Law, there are widespread exceptions to mergers pursuant to the Commercial Code. Furthermore, the merger of a domestic corporation and foreign company must be approved under the corporate and other laws of the foreign legal system.[81] However, whether the foreign country recognises the corporate reorganisation procedure in Japan, and whether the legal entity resulting from the international merger will be recognised, are separate problems. Further, the above discussion describes what is possible in theory, but as yet there have been no test cases using these arrangements.

If the methods described in **5.6.1(a)** are seen to be unusual techniques in the foreign country, then after having followed separate reorganisation procedures following the laws of the country, the foreign court could still select the Japanese reorganisation 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 legal distribution between the parent and subsidiary companion, 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[82] in filing their proofs of claim, or in litigating against the Japanese parent debtor. Conversely, the creditors of the debtor in Japan may also use various theories to attempt to assert their claims against the assets of the foreign subsidiary. When these types of issues arise, the decision of how to conduct the disposition will probably be made by providing in each of the plan(s) with 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.

(c) Bankruptcy of the Japanese parent company

When the parent debtor undertakes bankruptcy instead of corporate reorganisation, a major concern is to gain direct access to the foreign subsidiary, in other words, to its assets and liabilities. Of course, it should not be forgotten that reasonable steps to preserve assets for the employees of the subsidiary resident in the foreign country are also necessary. Thereafter, as seen from corporate reorganisation described theoretically in **5.6.1(b)** (as also in the instance of an insolvency at the Japanese court where the bankruptcy procedure of the parent debtor was commenced), there are grounds for the court assuming bankruptcy jurisdiction over the foreign subsidiary if the activities of the foreign wholly-owned subsidiary operations are controlled from Japan, or if not, if the Japanese principal office is ascertainable.

Theoretically, it is conceivable that there would be no harm in the same person undertaking the responsibilities of the trustee for both parent and subsidiary, and indeed many benefits could be derived. However, conflicts of interest arising from the debt and credit obligations between the parent and subsidiary, and instances where the parent's misman-

[81]Business Corporation Law, s 907 (New York).

[82]S. Ochiai, "*Takokuseki Kigyo ni okeru Kogaisha no Saikensha Hogo*" ["Protection of Creditors of the Subsidiaries of Multi-National Enterprises"], in *Takokuseki Kigyo to Kokusai Torihiki* [*Multinational Enterprises and International Transactions*], pp. 381 *et seq* (1987).

agement extends to the subsidiary, would have to be carefully considered, and would probably result in the appointment of a different bankruptcy trustee. Amongst the innovations for maintaining impartiality and equality between creditors, a merger would, unfortunately, probably be rejected as lacking substance, and partiality or inequality would be settled according to general principles. In particular, various balancing means should be employed to achieve equality and fairness, whether it be a so-called hotchpot style adjustment, a disallowance of the debts and obligations between the parent and subsidiary, or a negation of a claim (ie the treatment as stock) or subordination.[83] Furthermore, all this is based upon the premise that the bankruptcy in Japan as against the foreign subsidiary will be acknowledged in the foreign country (or, at least that objections will not be voiced or a duplicate procedure will not be commenced).

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

Cases are reported in which the trustee of the Japanese parent concluded the disposition of its subsidiary in a foreign country by making sales abroad, including in the foreign country itself, of the stock of the subsidiary. There are others in which the trustee effected the liquidation of its foreign subsidiary following the laws of the foreign country, to be followed by a bankruptcy petition filed due to a deteriorated situation concerning the liquidation. And there are other known situations in which the trustee, while designating the responsible management of the foreign country, effected an out of court workout with local creditors in the foreign country.

5.6.2 Effect of foreign parent insolvency proceedings upon its Japanese subsidiary

(a) Effect where there are foreign proceedings against the Japanese subsidiary

Japan's basic policy is as previously described. The case to be described here first is one in which Japanese courts have received requests for co-operation from a foreign country, when bankruptcy proceedings were commenced there involving a Japanese subsidiary. If the centre of the Japanese subsidiary's operations, notwithstanding that its registered office is in Japan, is in the foreign country and the foreign insolvency proceedings are based upon principal jurisdiction over the subsidiary, the effect of such proceedings will more likely than not be recognised in Japan, and the courts will be greatly inclined to provide the requested co-operation.

When there are bankruptcy petitions from Japanese creditors against the Japanese subsidiary, whether the court may halt their petitions (given that the court has recognised the effect of the bankruptcy procedure of the Japanese subsidiary commenced in the foreign country) and dismiss such claims in its discretion is a difficult problem. Essentially, this is particularly the same kind of problem as that posed with respect to the effect of the foreign insolvency procedures concerning a foreign debtor: whether

[83]Y. Tashiro, *Oyako Kaisha no Horitsu* [*The Law of Parent and Subsidiary Companies*], pp. 52 *et seq* (1968).

the creditor's petition against the foreign debtor in Japan is subject to discretionary dismissal. In that particular case if one can conclude that individual creditor actions may be prevented in the domestic setting, then with the same argument it could also be concluded that the petition for bankruptcy against the foreign debtor in Japan may be 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 subsidiary petitioned by creditors in Japan under the rationale that bankruptcy procedures of the Japanese subsidiary in the parent's country 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 subsidiary is incorporated under the corporate laws of Japan, and the home office of the company is registered in Japan.

(b) Effect where there are no foreign insolvency proceedings against the Japanese subsidiary

If no insolvency proceedings have commenced in a foreign country with respect to the subsidiary in Japan, then proceedings initiated by its parent debtor as the stockholder of the Japanese subsidiary based upon its ownership will be processed as a domestic Japanese proceeding. If the procedure undertaken in Japan is essentially extra-judicial (eg winding-up or even special winding-up), the appointment of the representative of the parent debtor in the foreign proceedings as the local representative of the subsidiary in Japan would be respected, but one might be safer predicting a negative attitude in Japanese judicial proceedings. However, it is submitted that this type of co-operation would not be inappropriate. Under Japanese domestic procedure, the repayment plan, even where such plan is presented by the foreign representative and contains a provision for maintaining equality among domestic and foreign creditors, will be subjected to majority rule, and the majority may fairly authorise it.

Aside from the case in which Japanese bankruptcy procedure for the subsidiary has been opened in Japan, the exercise of individual rights by creditors of either the foreign country or Japan against the subsidiary in Japan or its assets there will probably be permitted, since it is taken as a premise that bankruptcy proceedings are not pending in the foreign country against the Japanese subsidiary.

5.7 Bilateral and multilateral treaties

5.7.1 Bankruptcy treaties to which Japan is a signatory

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

5.8 Legislation

5.8.1 New bankruptcy legislation or any preparation in process

There is no such relevant domestic legislation in preparation, although the published revised outline has already been mentioned. However, demands for legislation from scholars, as well as from the business community, have been quite strong. It is anticipated that the development of the law through future cases and business practice will increase these demands.

Annex 1
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 fairly to 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 reorganisation, 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 centre 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 centre 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 Reorganisation 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 co-operation of foreign courts

(i) If there is the necessity for the administration of property to which the extra-territorial effect extends, the trustee may request a foreign court's co-operation 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 Reorganisation Law, and others.

(5) Authorisation of preservation administrator

A preservation administrator appointed by a court based on preservative measure: 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) Intra-territorial effect

If a foreign court commences insolvency proceedings based on ordinary jurisdiction and a Japanese court recognises 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 recognise the intra-territorial effect thereof based on a petition of the debtor.

(3) Application for recognition of intra-territorial effect

(i) A foreign trustee may petition Japanese courts to recognise 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 recognise 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 recognised 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 labour 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) Co-operation 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) Equalisation 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 recognised 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 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 428.)

Annex 2
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 Reorganisation" 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 centre 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 tn 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 creditor's 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.)