The Asia-Pacific Restructuring Review 2019

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A Global Restructuring Review Special Report

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The Asia-Pacific Restructuring Review 2019

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Global Restructuring Review is a leading source of news and insight on cross-border restructuring and insolvency law and practice, read by international lawyers, insolvency practitioners and accountants, judges, corporate counsel, investors and academics.

We deliver on-point daily news, surveys, and features which gives our subscribers the most readable explanation of all the cross-border developments that matter allowing them they to stay on top of their game (even more so than they already are).

In the past couple of years, we have published exclusive interviews with bankruptcy judges around the world, unearthed nuggets from court hearings other services missed, released several original surveys, including on what it's like for female professionals working in restructuring, and features including a look at the retail sector and a retrospective on the 10-year anniversary of Lehman Brothers. Our newly-introduced *Worked Out* series, profiling key jurisdictions around the world, has so far published popular and well-read profiles of Singapore, Ukraine and Delaware, with profiles on the Cayman Islands, Hong Kong and China still to come. Our book-length *Art of the Ad Hoc* gathers the wisdom and perspectives of some of the leading practitioners in this area.

Complementing our news coverage, *The Asia – Pacific Restructuring Review* provides exclusive insight, direct from pre-eminent practitioners. *The Review* gathers the expertise of 24 different leading figures from 11 different firms in 10 different jurisdictions. Contributors are vetted for international standing and knowledge of complex issues before being approached.

In this volume our experts in Singapore take a look at the key developments and unresolved issues following the significant amendments to the Companies Act across two chapters, firstly one providing a brief overview of the changes to Singapore's restructuring regime with discussion of the key restructurings that took place since the new regime came into force, in particular, those that took advantage of the enhancements such as "pre-pack" schemes, super priority rescue financing, and court-ordered moratoriums. Our second chapter focusing on Singapore provides an overview of its cross-border insolvency laws.

One note to our readers is that the Singapore section was written before the new omnibus insolvency bill was tabled before Singapore's parliament on 10 September. The bill consolidates Singapore's insolvency regimes into a single statue, mandates qualifications and disciplinary rules for insolvency practitioners and restricts the use of ipso facto clauses in restructurings. The bill is expected to pass into law in time for the next edition.

Global Restructuring Review named India the most improved jurisdiction at our annual awards this year and it has been described in this edition as a jurisdiction 'in the process of laying the foundations of a mature market economy'. Our expert considers the amendments made to the Insolvency and Bankruptcy Code since its enactment and implementation.

In China, our experts consider the notice of the Supreme People's Court on issuing the minutes of the national court work conference on bankruptcy trails, which is considered the most important update to the legal practice of bankruptcy law in recent years. Particular consideration is given to the major aspects of the meeting minutes, selection of bankruptcy administrators, detailed rules on reorganisation, substantive consolidation and cross-border bankruptcy.

This edition also provides an overview of the Insolvency Reform Act in Australia, with case analysis on landmark cases including Bis Industries which was the largest restructuring of 2017 in the Australian market. Additionally, our expert panel consider the criticisms of the Indonesian restructuring legislation and provide jurisdictional updates in Japan, Malaysia, Korea and the Cayman Islands.

The Review is annual and will expand each edition. If you have a suggestion for a topic to cover or would just like to find out how to contribute please contact Mahnaz.Arta@globalrestructuringreview.com.

GRR would like to thank all our contributors for their time and effort.

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Japan

Naoki Kondo and Takayuki Maruyama
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Overview

The insolvency proceedings in Japan consist of civil rehabilitation and corporate reorganisation for restructuring the business, and Bankruptcy and Special Liquidation that is aimed primarily at liquidation. First, both civil rehabilitation, under the Civil Rehabilitation Act (Act No. 225 of 1999), and corporate reorganisation, under the Corporate Reorganisation Act (Act No. 154 of 2002), are the procedures commenced by a court in response to a petition filed by a debtor or applicable interested party for the purpose of restructuring the business of a debtor. These procedures are collectively called 'rehabilitation-type' legal proceedings, under which restructuring of a debtor and distribution to creditors are implemented pursuant to a plan approved by a statutory majority of creditors and confirmed by the court.

Second, both bankruptcy under the Bankruptcy Act (Act No. 75 of 2004) and special liquidation under the Liquidation, Stock Company section of the Companies Act (Act No. 86 of 2005) are also the procedures commenced by a court after the appropriate petition and are collectively called as 'liquidation-type' legal proceedings. While bankruptcy and special liquidation are pursued for liquidation as such, in practice, these proceedings also provide a useful means for restructuring the business.

Further, the disciplines for private arrangements are also available, by which a debtor could carry out debt restructuring without potential disadvantages associated with the legal proceedings.

With respect to cross-border insolvency cases, foreign insolvency proceedings can be effective within Japan by obtaining a recognition order under the Act on Recognition and Assistance for Foreign Insolvency Proceedings (Act No. 129 of 2000), which was established in 2001 referring to the UNCITRAL Model Law on Cross-Border Insolvency. Also, a debtor of foreign insolvency proceeding may file a petition for Japanese statutory insolvency proceedings, and, once such petition is granted, Japanese and foreign proceedings can be proceeded coordinately.

Legislative history

The first comprehensive bankruptcy law ever established in Japan was the bankruptcy part of the former Commercial Code (Act No. 32 of 1890), which was designed by having the French law as its model. The bankruptcy part was soon claimed to be insufficient in providing means of monetising debtor's asset, and accordingly the Bankruptcy Act (Act No. 71 of 1922) was established, reportedly under the influence from German law. The 1922 Bankruptcy Act was in force for more than 70 years until the current Bankruptcy Act took effect. As an alternative to bankruptcy, special liquidation was introduced by the revised Commercial Code in 1938 to provide the legal procedure by which liquidation of a stock company could be conducted in an effective manner.

With respect to rehabilitation-type proceedings, the Composition Act (Act No. 72 of 1922) was enacted together with the 1922 Bankruptcy Act. However, the Composition Act was not always fully functioning due to its shortcomings, ie, for instance, the grounds of commencement of composition were too limited, the requirements to approve the conditions of composition were too strict, and the implementation of the composition was not ensured.

Then the former Corporate Reorganisation Act (Act No. 172 of 1952) was established by referring to the US bankruptcy laws at the time. A reorganisation trustee had the exclusive power to control, administer and dispose of debtor's asset and also to manage the business of the debtor. By taking advantage of a reorganisation plan by which modification of both creditors' rights and organisational matters of the reorganisation company could be accomplished, the former Corporate Reorganization Act functioned as a powerful tool in revitalising the business.

After the bursting of Japan's economic bubble in 1991, many corporations went bankrupt and this became a social issue to be addressed. In order to respond to the changes in the economic circumstances, an overall revision of the legislative insolvency regime was initiated in 1996. First, the Civil Rehabilitation Act was enforced on 1 April 2000, which was designed to overcome the shortcomings of the Composition Act. Second, the Corporate Reorganisation Act was significantly revised in 2002, with the intention of introducing more speedy and effective reorganisation proceedings and providing the reinforced reconstruction method to a reorganisation company. Third, the current Bankruptcy Act was enacted in 2004 and finally, special liquidation was amended by the newly established Companies Act in view of streamlining the proceedings.

Rehabilitation-type legal proceedings

Characteristics

civil rehabilitation and corporate reorganisation share its primary purposes, ie, enabling a distressed debtor to rehabilitate or reorganise under the procedure, though they have distinguished characteristics particularly in the following aspects.

Form of subject company

Corporate reorganisation is only available for stock companies established under the Companies Act, while civil rehabilitation is available also for other types of companies, legal entities and individuals.

Limitation on exercise of secured claims

In civil rehabilitation, security interests are treated as rights of 'separate satisfaction', which means that secured creditors may generally exercise their secured claims regardless of the pending civil rehabilitation proceedings. In contrast, in corporate reorganisation, secured claims exercised prior to the commencement are stayed and further exercise is prohibited. Secured creditors shall also be bound by the reorganisation proceedings and its secured claims may be impaired in accordance with the reorganisation plan.

Chart 1
Standard schedule of corporate reorganisation (Tokyo District Court)

Events in the proceedings	Number of days (Standard type)	Bankruptcy Proceeding (simplified type)
Petition; provisional administration order	0 days	0 days
Investigation on grounds for commencement or status of assets		
Order of commencement Deadline for filing of claims	1 month from petition 2 months from commencement order	1 month from petition 1 month and 2 weeks from commencement order
Completion of asset evaluation; statement of approval or disapproval submission deadline	5 months from commencement order	3 months and 2 weeks from commencement order
Reorganisation claims investigation		
Proposed plan submission deadline	9 months from commencement order	6 months from commencement order
Voting by document		
Resolution; order of confirmation	11 months from commencement order	8 months from commencement order
Execution of reorganisation plan		
Order of termination	1 to 2 months – 10 years from order of confirmation	1 to 2 months – 10 years from order of confirmation

Chart 2
Standard schedule of civil rehabilitation (Tokyo District Court)

Events in the proceedings	Number of days from the filing of a petition for the commence-ment of proceedings
Filing of a petition for the commencement of proceedings; prepayment of expenses	0 day
Date for scheduling meeting	0 to 1 day
Issue of a temporary restraining order; appointment of supervisors	0 to 1 day
Creditors' meeting organised by the debtor	0 to 6 days
Order of commencement	1 week
Deadline for filing of claims	1 month and a 1 week
Asset evaluation, written report submission deadline	2 months
Proposed plan (draft) submission deadline	2 months
Second meeting between the debtor and the court	2 months
Statement of approval or disapproval submission deadline	2 months and 1 week
Ordinary period for investigation	10 to 11 weeks
Proposed rehabilitation plan submission deadline	3 months
Third meeting between the debtor and the court	3 months
Opinion letter by supervisors submission deadline	3 months and 1 week
Order of convocation of creditors meeting	3 months + 1 week
Voting by document	Until 8 days prior to creditors' meeting
Creditors' meeting; order of confirmation of the plan	5 months

Status of management personnel

In corporate reorganisation, the court appoints a trustee who handles the operation of business, as well as the administration and disposal of assets of the reorganising company, and management personnel (ie, directors) of the company loses their managerial rights. Usually, an attorney with extensive experience in insolvency practice is appointed as a trustee.

In this respect, since 2009, the Tokyo District Court has introduced the 'debtor in possession-style' (DIP) corporate reorganisation, in which the incumbent management personnel may be appointed as a trustee under certain conditions, ie, the management personnel shall not be a person who has been involved in any unlawful management and the involvement of such personnel in management of the reorganising company shall not be objected by major creditors. After the introduction of the DIP style, the other cases are often referred to as 'administered-type' corporate reorganisation.

In civil rehabilitation proceedings, a trustee is generally not appointed, and the existing management personnel will continue to manage the company (debtor in possession).

Schedule

Corporate reorganisation is designed for large companies, and it provides a powerful mechanism for reorganisation with the involvement of all interested parties to the distressed company. As a trade-off, the procedures in corporate reorganisation are generally 'heavy' – complicated, strict and require much time and expenses to comply. However, as an effort to reduce these disadvantages, the Tokyo District Court released the standard schedule as shown in Chart 1, and the proceedings are currently carried out in accordance therewith. The Tokyo District Court has also announced that the DIP style can be completed in a shorter time.

As for civil rehabilitation, the process from the petition to the confirmation of rehabilitation plan is generally completed in approximately five months, as shown in Chart 2, which is the standard schedule issued by the Tokyo District Court. In comparison to corporate reorganisation, the procedures in civil rehabilitation are simpler and require shorter time and smaller expenses to comply. As such, also thanks to its feature that directors of a debtor company generally keep their position, civil rehabilitation is generally regarded as being more 'debtor-friendly' procedure, and accordingly debtors are often inclined to use civil rehabilitation rather than corporate reorganisation. Meanwhile, corporate reorganisation is used where it is necessary to bind secured creditors, or where more strict proceedings are required to cause management personnel to resign in case the company has become insolvent due to fraud, misconduct and the like. As a recent trend, the proportion of cases initiated by a petition filed by creditors, in relation to cases brought by a debtor, has been increasing in corporate reorganisation.

Overview of the proceedings

Petition for commencement

A debtor may file a petition with a court for the commencement of either corporate reorganisation or civil rehabilitation if there is:

- a suspicion that the factual basis that constitutes the grounds for the commencement of bankruptcy (insolvent or unable to pay debts) would occur; or
- a suspicion that a significant hindrance to the continuation of debtor's business will occur, if the debtor repays its debts that are due.

A creditor may also file a petition for the commencement of both procedure if there is a suspicion referred to in the first point above; provided that, with respect to corporate reorganisation, creditors, either individually or collectively, are required to hold claims that account for one-tenth or more of the amount of the stated capital of the stock company to file the petition. Shareholders, either individually or collectively, who hold a tenth or more of the voting rights of all shareholders may also file a petition in corporate reorganisation.

Orders issued prior to commencement

Civil Rehabilitation

Temporary restraining order

In order to prevent the debtor's assets from being dispersed and to protect the assets from any preferential repayments in prior to the commencement, the court may order a provisional seizure or provisional disposition or issue any other necessary temporary restraining order concerning the debtor's business and property, such as an order to prohibit the debtor from making repayments to creditors.

Supervision order

The court, when it finds it necessary, may issue an order of supervision by a supervisor. The responsibilities of a supervisor cover various matters, such as giving consent to certain actions by the rehabilitation debtor, conducting investigation on the business and property of the rehabilitation debtor, preparing an opinion letter on proposed rehabilitation plan, and supervising the implementation of the rehabilitation plan. In practice, a supervisor is generally appointed from among experienced attorneys in civil rehabilitation.

Corporate reorganisation

Appointment of provisional administrators and provisional order

Usually a petition for a provisional administration order is filed at the same time as a petition for the commencement of the reorganisation proceedings is filed and the court appoints a provisional administrator, generally from among experienced attorneys, to maintain the status of the company's assets 'as is'. Upon the appointment, the provisional administrator is vested with the exclusive rights to administer and dispose of the company's estate until the commencement of the proceedings.

Supervisor for DIP-style reorganisation

In case of a DIP-style reorganisation case, the existing management maintains the rights to administer and dispose of the property and manage the business before the commencement of the proceedings. However, in order to prevent the property from being dispersed, a provisional order, such as an order to prohibit the company from making repayments to creditors, is issued, generally immediately after the petition is filed. In addition, the court generally appoints an experienced attorney who serves as both a supervisor and an investigator.

Commencement order

When a petition for the commencement of the rehabilitation or reorganisation proceedings is duly filed and the grounds for the commencement are satisfied, the court issues an order of the commencement of rehabilitation or reorganisation proceedings.

With respect to the reorganisation proceedings, the court, upon making an order of the commencement, appoints a reorganisation trustee. The provisional administrator is usually appointed as a reorganisation trustee and continuously manages the company's business. In case of DIP-style proceedings, the existing management is appointed as a trustee and the attorney who served as the pre-commencement supervisor and investigator is appointed as an investigator for post-commencement proceedings in general. In recent DIP-style cases, a court is inclined to appoint both an attorney and the existing management as trustees. If this is a case, the trustees are generally referred to as a 'legal trustee' and a 'business trustee', respectively.

No trustee is appointed in civil rehabilitation other than in exceptional cases but the debtor is continuously supervised by the supervisor.

Right of avoidance

In corporate reorganisation, the reorganisation trustee has the right of avoidance to nullify any debtor's conduct occurred before the commencement of the proceedings that is detrimental to creditors. Specifically, debtor's conduct that either unduly reduces the estate (fraudulent conduct) or impairs the equality of creditor (preference) are subject to the execution of such right.

Also in civil rehabilitation, fraudulent conduct and preference of the debtor before the commencement can be nullified by the right of avoidance. While the right of avoidance is exercised by a trustee who has the ability to administer and dispose of the estate in both corporate reorganisation or bankruptcy, in civil rehabilitation it is not exercised by a debtor who has such ability, but by an supervisor whose primary duty is to supervise a debtor during the proceedings.

Filing, investigation and determination of claims

An unsecured creditor needs to file a proof of claims with the court under the rehabilitation or reorganisation proceedings. A secured creditor also needs the filing in corporate reorganisation. In civil rehabilitation, a secured creditor is not required to file a proof of secured claims as he or she may exercise his or her security interest regardless of the pending proceedings.

A rehabilitation debtor or reorganisation trustee prepares a statement of approval or disapproval providing whether the claims and the amount of voting rights which have been filed are approved or not, and submits the statement to the court.

A creditor who has filed a proof of his or her claim may make an objection to the court, within the ordinary period for investigation, with regard to the content of a claim stated in a statement of approval or disapproval.

For the claims that were approved by a rehabilitation debtor or reorganisation trustee and to which no objection was raised by any creditors, the content and the amount of the voting rights are determined. In contrast, for the claims that were not approved or to which an objection was raised during the investigation period, a procedure is implemented to determine the claims.

Preparation and submission of evaluation report

A rehabilitation debtor or reorganisation trustee shall evaluate the value of any and all of property that belongs to the debtor, and prepare an evaluation report to be submitted to the court. A rehabilitation debtor or reorganisation trustee shall also prepare an inventory of assets and balance sheets based on the evaluation and submit the same to the court.

Submission of proposed plan to the court

A rehabilitation debtor or reorganisation trustee shall prepare a proposed rehabilitation or reorganisation plan specifying matters such as a policy to rehabilitate or reorganise the debtor's business, modification of rights held by the creditors and payment plan, and submit it to the court.

Creditors who filed the claims may also submit a proposed plan to the court.

Chart 3
Comparison of corporate reorganisation (DIP and administered) and civil rehabilitation

	DIP corporate reorganisation	Administered corporate reorganisation	Civil rehabilitation
Purposes	Rehabilitation-type court procedure		
Subject	Stock company		Legal entity or natural person
Petitioner	Debtor, creditor, shareholder		Debtor, creditor, company director, etc
Person in charge of leading the procedure	Trustees appointed by court (management personnel of debtor (and attorney))	Trustee appointed by court (generally, attorney)	Debtor
Requirements for creditors' approval on plan	Reorganisation claims: • consent of persons who hold voting rights in excess of half of total voting rights of reorganisation creditors Secured reorganisation claims: • consent of persons who hold voting rights of two-thirds or more of total voting rights of the secured reorganisation creditors (in general)		Consent of majority of rehabilitation creditors who exercised their voting rights; and consent of persons who hold voting rights at least half of total voting rights of rehabilitation creditors
Handling of secured claims	Incorporated in procedure as secured reorganisation claims; prohibited to exercise		Treated as rights of separate satisfaction; freely exercisable regardless of pending procedure
Right of avoidance	Available		
Supervision by court-appointed person	Before commencement: • supervisor concurrently serving as investigator. (in general) After commencement: • investigator (in general, but not applicable if attorney were appointed as trustee)	None (in general)	Supervisor (in general)
Required period of time (according to Standard Schedule)	Approximately seven months	Approximately one year	Approximately five months

Chart 4
Comparison of bankruptcy and special liquidation

	Bankruptcy	Special liquidation
Purposes	Liquidation-type court procedure	
Subject	Any individual or legal entity	Stock company
Petitioner	Debtor, creditor, company director, etc	Creditor, liquidator, auditor or shareholder
Grounds for commencement	'Unable to pay debts' (the condition in which debtor, due to its inability to pay, is generally and continuously unable to pay its debts as they become due) or 'insolvent' (the condition in which debtor is unable to pay its debts in full with its assets)	Suspicion of being insolvent, etc
Right of avoidance	Available	Not available
Monetary distribution to creditors	Pari passu basis	Pari passu basis in principle; exceptions are cases where creditors agree or minor claims are treated differently in fair manner
Requirements for creditors' approval on repayment plan	Not required (distributed pursuant to order and proportion prescribed by law)	Either agreement with each creditor or approval on scheme of arrangement in creditors meeting (ie, consent of both the majority of creditors having voting rights that were present in meeting; and creditors who have voting rights at least two-thirds of total voting rights of creditors) is required
Supervision by court-appointed person	None	Investigator may be appointed
Required period of time	A few months to few years, depending on time necessary to monetise debtor's assets after commencement of procedure	

Resolution of proposed plan

Rehabilitation plan

The proposed rehabilitation plan is approved by obtaining the consent of both:

- the majority of the creditors who exercise voting rights; and
- the creditors that account for not less than half of the total amount of the voting rights.

Reorganisation plan

The proposed reorganisation plan is approved, as a general rule, by obtaining approvals by statutory majority from two classes of creditors, ie:

- more than half of the total amount of voting rights held by reorganisation creditors; and
- not less than two-thirds of the total amount of voting rights held by secured reorganisation creditors.

Confirmation of plan

The court shall make an order of confirmation of the rehabilitation or reorganisation plan approved by creditors unless any of grounds for disconfirmation stipulated in laws, such as infeasibility to implement the plan, the plan's contents being unfair or inequitable and the like, exists.

Once the order of the confirmation becomes final and conclusive, the rehabilitation plan becomes effective, and the rights of the rehabilitation creditors are modified in accordance with the rehabilitation plan. On the other hand, the reorganisation plan becomes effective upon issuance of an order of confirmation, before it becomes final and conclusive.

Implementation of plan and close of proceedings

A rehabilitation debtor or reorganisation trustee implements the confirmed plan, such as making payments in accordance with the plan.

As a general rule, where a supervisor is appointed under the rehabilitation proceedings, such proceedings are closed after three years have elapsed since an order of confirmation of the rehabilitation plan became final and conclusive. With respect to the reorganisation proceedings, the court shall make an order to close such proceedings, where the payment of the debts in accordance with the reorganisation plan has been completed or where the payment of more than two-thirds of the debt has been made and the court does not find that the reorganisation plan is unlikely to be implemented.

Liquidation-type legal proceedings

Among the two types of court-based liquidation procedures (bankruptcy and special liquidation), bankruptcy has its emphasis on pursuing the liquidation in an equal and fair manner pursuant to the strict statutory procedures. By contrast, special liquidation was enacted for the purpose of mitigating adverse effects that would derive from the strict nature of bankruptcy; namely, the significant amount of time and expenses involved in the proceedings. As such, first, special liquidation is pursued by a liquidator appointed by a resolution of a shareholders' meeting of the company, as opposed to a trustee appointed by a court in bankruptcy. Second, while bankruptcy proceeds pursuant to the statutory procedures, special liquidation is designed to enable a liquidator to implement the proceedings flexibly and swiftly on the basis of the autonomy of interested parties (ie, a liquidating company and its creditors).

For instance, a trustee appointed by a court in bankruptcy makes monetary distribution to creditors on a pari passu basis strictly in accordance with the preferential order of claims designated by the law. Whereas in Special Liquidation, the treatment of creditors in a repayment plan may deviate from a *pro rata* basis if either the creditors agree with such treatment or such treatment is applied only to minor claims in a fair manner, thereby providing a liquidator with flexibility in designing the plan.

A comparison of features of bankruptcy and special liquidation is provided in Chart 4. As indicated in the chart, while the distribution is conducted by following the law in bankruptcy, either executing an agreement with each and every creditor or obtaining the approval of a creditors' meeting on a repayment plan is necessary to implement the repayment in special liquidation. Accordingly, if creditors are unlikely to cooperate with the procedure, a debtor may wish to consider bankruptcy instead of special liquidation. Moreover, in the event that a fraudulent transfer is found, bankruptcy would be suitable, as a trustee in bankruptcy is equipped with the right of avoidance whereas such mechanism is not provided in special liquidation.

Special liquidation is used for liquidation where, for instance, a parent company, management or a major creditor is able to provide the funds or necessary assistance for liquidating the company smoothly. Further, since special liquidation enables interested parties to implement the proceedings by its initiative, it is frequently used as a method of restructuring by combining it with a business transfer or a company split.

Private arrangements

Having the court-based insolvency procedures described above as a backbone, many insolvency cases in Japan are also worked out through 'private arrangements', a process in which a debtor and creditors negotiate and implement a debt restructuring plan on a consensus basis without the involvement of a court. As similar to the workouts conducted in other jurisdictions, notable advantages of private arrangements in comparison to the court-based procedures are:

- the reduction or even elimination of negative impact on corporate value (by not involving trade creditors);
- the status of being 'behind the curtain';
- the flexibility in designing a restructuring plan; and
- the increased speed in completing the process.

While private arrangements can be conducted without referring to any publicly available mechanism for restructuring ('genuine' private arrangements), many case are worked out on the basis of such mechanisms. These include:

- special conciliation, in which a debtor and creditors reach an agreement before a court or otherwise a court can issue a binding resolution even without consensus of the parties under certain circumstances;
- the Guidelines for Out-of Court Workouts, which is designed to provide a procedure conducted in a transparent manner for a debtor company and financial creditors to agree on a restructuring plan on a consensus basis;
- restructuring assistance provided by the Small and Medium-sized Enterprise Revitalisation Support Council or the Regional Economy Vitalisation Corporation, both of which are entities established by the law for the purpose of, among others, assisting debt restructuring of a distressed company; and
- turnaround alternative dispute resolution (ADR), which is a procedure established by the law for the purpose of helping a distressed company to reach an agreement with financial creditors by the involvement of an impartial third party, authorised by the Minister of Economy, Trade and Industry.

Special conciliation is included in the mechanism for private arrangement, even if the procedures is done before a court, because it does not have the effect of prohibiting creditors from enforcing their rights, nor does provide a binding effect of a restructuring plan on a majority basis. The Guidelines for Out-of Court Workouts has not been used recently, as the procedure must be commenced by the initiative of both a debtor and the 'main bank' of the debtor, thereby often resulting in a significant burden on such bank in practice. Turnaround ADR functions as a substitute to the guidelines to a certain extent; however, it is generally regarded as the procedure suitable particularly for a large company.

Cross-border insolvency

Effect of foreign insolvency proceedings in Japan

In case of a debtor whose insolvency proceedings have commenced outside Japan and who has its business office or assets in Japan, such debtor may obtain a decision of the Tokyo District Court, which has exclusive jurisdiction over recognition cases, to recognise the foreign insolvency proceedings so as to give effect to them within Japan. Alternatively, the debtor may separately file a petition for commencement of insolvency proceedings in Japan concurrently with the foreign insolvency proceedings.

Recognition and assistance proceedings

In Japan, the Act on Recognition of and Assistance for Foreign Insolvency Proceedings was established referring to the UNCITRAL Model Law on Cross-Border Insolvency and enforced in April 2001.

The recognition and assistance proceedings under the aforementioned act are the proceedings to recognise foreign insolvency proceedings so as to give effect to them within Japan. However, the order to recognise foreign proceedings in Japan does not have any specific effect in itself and only works as a precondition for assistance order, ie, it allows the court to order such as stay of compulsory execution, or prohibition of repayment.

Concurrent insolvency proceedings

A debtor whose insolvency proceedings have commenced outside Japan may file a petition for bankruptcy or civil rehabilitation if it has either its business office or assets in Japan, or for corporate reorganisation if it has its business office in Japan. A trustee of foreign insolvency proceedings is allowed to file a petition for these proceedings in Japan. For the case that insolvency proceedings is concurrently commenced in Japan, the relevant Japanese laws prescribe the provisions concerning mutual cooperation and provision of information between a trustee in Japan (a debtor) and a foreign trustee.

In this relation, for the case that insolvency proceedings are being processed both in and outside Japan, the Hotch-Pot rule is applicable under Japanese law. Pursuant to this, if a creditor has received any repayment under foreign insolvency proceedings after the order of commencement of Japanese insolvency proceedings, such creditor may not receive any repayment during under the Japanese insolvency proceedings until any other creditor with the same priority has received repayment at the same proportion.

Recognition of Japanese insolvency proceedings in foreign countries – Re Elpida Memory Inc

Laws to recognise foreign insolvency proceedings have been enacted in many jurisdictions based on the UNCITRAL Model Law on Cross-Border Insolvency. Japanese insolvency cases utilising the recognition proceedings in other jurisdictions have been increasing in case where the debtor has its assets located outside Japan and needs to protect them from foreign creditors' actions for recovery. However, while the recognition of Japanese insolvency proceedings in other jurisdictions prohibits creditors from exercising their rights against assets located in that jurisdiction, modification of the creditors' right made under the rehabilitation or reorganisation plan does not become effective or binding in that jurisdiction by the recognition of the proceedings.

In this regard, reorganisation trustees of Elpida Memory Inc, a major dynamic random-access memory manufacturer in Japan, obtained, in addition to an order to recognise the reorganisation proceedings, an order to recognise the reorganisation plan confirmed in Japan from the Delaware Bankruptcy Court under the proceedings stipulated in Chapter 15 of the US Federal Bankruptcy Code, thereby enabling the trustees to implement the plan in the United States accordingly.

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Since the founding of our firm in 1981, Oh-Ebashi has achieved numerous accomplishments as the largest law firm in western Japan. We boast of numerous achievements in domestic and cross-border investments, corporate restructuring, mergers and acquisitions, and dispute resolution cases. As of August 2018, we have 137 attorneys, four registered foreign lawyers, one foreign lawyer and two advisers.

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