
CHAPTER 13: JAPAN

Questionnaire on Creditors' Rights Against Business Debtors

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[The Editors wish to note that, due to the substantially different nature of Japanese bankruptcy law, it would have been very difficult to prepare the Japanese materials in the precise question and answer format utilized elsewhere in this book. Accordingly, the Japanese materials have been arranged in the more traditional essay format.]

I. Introduction

The American economy has been competing with two rival economies founded on civil law systems. One is that of the European Continent, and the other is that of the Japanese Islands.

Japan's civil law system is based upon French and German law from the late nineteenth century. Reception of these legal systems was a sweeping one. Prior merchant law and family law were totally abandoned. This radical reception of a new legal system and subsequent evolution and embellishment of this system under rather isolated cultural circumstances will undoubtedly provide a promising subject for research by persons of socioeconomic orientation. However, no further digression will be allowed here.

The sources of Japanese law are both statutes and decisions. Equal importance should be given to both. The statutes that are the subject of our discussion shall be divided into substantive law and procedural law. Distinctions between these two, as in every jurisdiction, are blurred. For our purposes, "procedural laws" shall simply mean the rules by which each step in the judicial process is carried out, as opposed to the "outcome determinative" nature of substantive statutes and decisional rules.

The English text from which all citations are taken can be found in the EHS (Eibun-Horei-Sha, Inc.) Law Bulletin, published in seven volumes under the authority of the Ministry of Justice and the Codes of [sic] Translation Committee. The volume of concern to this discussion is Volume II, containing the laws discussed. Citations will merely refer to the law sections.

A. Fundamental Procedural Laws

(1) The Code of Civil Procedure (Law No. 29 of 1890, as amended). Scope: Adjudicatory processing of judgment and prejudgment orders. See Appendix 1 for the contents of the code.

(2) The Rules of Civil Procedure (Rule No. 2 of 1956 of the Supreme Court of Japan). Scope: Adjudicatory proceedings of judgment to supplement the Code of Civil Procedure. See Appendix 2 for the contents of the rules.

(3) The Execution Law (Law No. 4 of 1979). Scope: Execution on judgment and foreclosure or collection on security interests. See Appendix 3 for the contents of the law.

(4) The Bankruptcy Law (Law No. 71 of 1922, as amended). Scope: Straight bankruptcy and conversion into arrangement after adjudication of bankruptcy. See Appendix 4 for the contents of the law.

(5) The Composition Law (Law No. 72 of 1922, as amended). Scope: Composition prior to adjudication of bankruptcy. Secured claims are handled outside of composition proceedings. See Appendix 5 for the contents of the law.

(6) The Commercial Code, Part II, Article 4, Chapter 7 and Chapter 9, Sub-Chapter 2 (Law No. 48 of 1899, as amended). Scope: Reorganization of corporations and special liquidation proceedings. Pursuant to this reorganization statute, the enforcement of secured claims may be stayed by court order. Stockholders' interests are not affected in these proceedings and management may not be challenged. See Appendix 6 for the contents of the code.

(7) The Code of Non-Litigation Procedure (Law No. 14 of 1898, as amended). Scope: Reorganization and special liquidation proceedings under the Commercial Code. See Appendix 7 for the content of the code.

(8) The Corporate Reorganization Law (Law No. 172 of 1952, as amended). Scope: Reorganization of corporations. In this form of equity reorganization, a trustee is mandatory. Management must be replaced. Any execution or enforcement of secured claims is automatically stayed. See Appendix 8 for the contents of the law.

(9) The Tax Execution Law (Law No. 147 of 1959, as amended). Scope: Tax priority and its effects on third-party interests. See Appendix 9 for the contents of the law.

(10) The Law Relating to Coordination between Ordinary Execution and Tax Execution (Law No. 94 of 1957, as amended). Scope: Procedural priority and subordination between tax lien and security interests. See Appendix 10 for the contents of the law.

NOTE: Easy access to statutes is guaranteed by Japanese law. Commercial and governmental compilation of currently effective statutes are provided in a series comprising more than 100 volumes.

B. Fundamental Substantive Laws

(1) The Civil Code (Law No. 89 of 1896, as amended).

(2) The Commercial Code (Law No. 48 of 1899, as amended).

(3) The Private Company Law (Law Relating to Yugen-Kaisha, Law No. 74 of 1938, as amended).

(4) The Law Relating to Provisional Registration of Collateral (Law No. 78 of 1978, as amended). Scope: Rights and duties of the parties to a contract of provisional registration of future ownership in realty.

II. Commercial Transactions

Basic concepts of the substantive law relating to creditors' rights are detailed in Sections (A) through (M), which are presented as follows:

- (A) Joint and several obligations (*Rentai*).
- (B) Suretyship obligations (*Hosho*).
- (C) Joint suretyship (*Rentai-hosho*).
- (D) Rights of retention (*Ryuchi-ken*).
- (E) Preferential rights (*Sakidori-tokken*).
- (F) Pledge (*Shichi-ken*).
- (G) Mortgage (*Teito-ken*).
- (H) Mortgage revolving in a fixed sum (*ne-Teito-ken*) and joint revolving mortgage (*Kyodo-ne-teito*).
- (I) Provisional registration of collateral (*Karitoki-tampo*).
- (J) Collateral by transfer of title (*Joto-tampo*).
- (K) Collateral by sale or redemption and promise of resale (*Uriwatashi-tampo*).
- (L) Reservation of ownership (*Shoyuken-ryuho*).
- (M) Miscellaneous.

Introduction to Sections (A) through (M).

Under Japanese law, there are two kinds of legal security or credit. They are (1) personal security and (2) security in property.

Personal security is a form of assurance enabling the obligee, in a case of default by the obligor, to obtain performance of the obligation from a third party, who by agreement between such third party and the obligee has assumed responsibility for the relevant obligation. This subject is regulated by §§ 432–465 of the Civil Code and § 511 of the Commercial Code. Personal security may be undertaken as a joint and several obligation, as a suretyship obligation, or as a joint suretyship obligation.

Security interests in property fall within the categories of security interests provided by law and security interests created by judicial precedent. These categories are treated hereafter according to the following organization:

- (1) Security interests provided by law
 - (a) those created by operation of law (Sections A, C, D, and E),
 - (b) those created by agreement in accordance with the Civil Code (Sections B, C and F through H),
 - (c) those created by agreement in accordance with special legislation (Section I);
- (2) Security interests created by judicial precedents (Sections J through L).

(A) Joint and Several Obligations (*Rentai*)

According to the Civil Code, where there are several obligees or obligors with respect to a single obligation, they shall, in the absence of an agreement stating otherwise, have rights or assume obligations in equal proportions. (Civil Code § 427). However, if the subject of a claim is indivisible by nature or by declaration of intention of the parties, and where there are several obligees, each obligee may demand performance on behalf of all the obligees or the obligor may effect performance to any obligee on behalf of all the obligees. (§ 428).

If the subject matter of the claim is a divisible claim, unlike § 427, and the various obligors have by agreement assumed a joint and several obligation, § 432 of the Civil Code provides: "Where several persons assume a joint and several obligation, the obligee may demand performance, in whole or in part, by one of the obligors or against all of them simultaneously or in succession." Section 511 of the Commercial Code provides: "if 2 or more persons have assumed an obligation through a transaction which is a commercial transaction in respect of one or all of them, the obligation shall be borne jointly and severally by all such persons."

Thus, as a means of securing credit, irrespective of the fact that the debt may be divisible, each joint and several obligor is independently liable for the obligation until it has been discharged in full. The furnishing of such a joint and several commitment as a device to secure performance by a debtor means that "a demand for performance made upon one of the obligors jointly and severally liable shall be effective as against the others." (Civil Code § 434.) Note here that indulgences or concessions to one of the "joint or several obligors" could *not* under the Civil Code be grounds for nullifying or reducing the validity of the obligation assumed by the other obligors to the transaction in question. (Civil Code § 433.)

Acts taken against one of the joint and several obligors may affect all of them. The Civil Code provides that the following acts, if taken

against any one of joint and several obligors, shall have the same effect as if they were taken against all of them.

- (1) A demand for performance made upon one shall be effective as against all. (Civil Code § 434.)
- (2) If a novation has been effected as between one of such obligors and the obligee, the claim shall be extinguished in favor of all obligors. (§ 435.)
- (3) In the event that one of them has a counterclaim against the obligee, and such obligor pleads a setoff, then the claim shall be extinguished in favor of all obligors. However, if the obligor who has the counterclaim does *not* plead setoff, the others may only plead it to the extent of his share of the obligation. (§ 436, paras. (1) and (2).)
- (4) A release given to one shall be effective in favor of the others only to the extent of his share of the obligation. (§ 437.)
- (5) In the event that one of the obligors has merged with the obligee, said obligor shall be deemed to have performed his *part* of the obligation, and the others are released to the extent of the share in the obligation of the obligor which is merged. (§ 438.)
- (6) If prescription has run in favor of one, the other obligors also shall be relieved of their obligations to the extent of the share of the obligor entitled to claim the benefit of the prescriptive bar. (§ 439.)

Except for the above enumerated items, "matters which have occurred as to one of the obligors jointly and severally liable shall *not* be effective as to the other obligors." (Civil Code § 440 (emphasis added).) Thus, if any of the obligors, jointly and severally liable, should have been adjudged bankrupt, the obligee must proceed to prove in *each* relevant bankruptcy the full amount of his unsatisfied claim. (Civil Code § 441; Bankruptcy Law § 24; Corporate Reorganization Law § 107.)

With respect to the allocations of burden among joint and several obligors and the associated question of reimbursement among them, one should note that the Civil Code allows an obligor who has performed an obligation at his expense or who has procured a discharge for the common benefit to claim reimbursement from the other joint and several obligors in proportion to their respective shares. However, if he has not notified the other joint and several obligors of his action, and one of the other obligors had a defense against the obligee, such other obligor may set it up against the performing obligor in respect of his share of the obligation as to which the defense was not utilized. However, where the defense is set up as a setoff, the obligor at fault, in place of such obligor who set up the setoff defense, may demand performance by the obligee of the

obligation that might have been extinguished by the set-off. (Civil Code § 443.)

(B) Suretyship Obligations (*Hosho*)

1. *Scope*

In the case of a suretyship obligation, the surety, of course, as a third party, joins in the same promise to repay the obligation to the obligee as the principal debtor. However, although his liability to the creditor/obligee is original, primary and direct, under the Civil Code his obligation is *subordinate* to the principal obligation and is distinct from that of the principal debtor. Thus Sections 446 and 448 of the Civil Code state respectively: "A surety is liable to perform the obligation in case the principal obligor defaults," and "If the burden of a surety is more onerous than that of the principal obligor either as to its subject or its terms, it shall be reduced to the extent of the principal obligation."

A suretyship, like a joint and several obligation on an indebtedness, is created by contract between the creditor and the surety. Although as mentioned above, the "subordinate" nature of the suretyship (see Civil Code § 446) is the distinct feature of suretyship in Japan, as where

a surety, who has guaranteed an obligation which is voidable by reason of the obligor's incapacity, was aware, at the time of entering into the suretyship, of the cause for its voidability, he is presumed to have assumed an *independent obligation* of the same tenor in the event of non-performance by the principal obligor or avoidance of the obligation. (Civil Code § 449 (emphasis added).)

2. *Capacity of Persons to Act as Surety*

Section 450 of the Civil Code provides:

1. Where an obligor is bound to furnish a surety, such surety shall be a person who fulfills the following conditions:
 - (1) That he is a person of full capacity; and
 - (2) That he has sufficient means to effect performance.
2. If the surety ceases to fulfill the conditions specified in item (2) of the preceding paragraph, the obligee may demand that some other person fulfilling such conditions by substituted.
3. The provisions of the preceding two paragraphs shall not apply in cases where the obligee has designated the surety.

If, however, an obligor is unable to furnish a surety fulfilling the conditions of § 450, he may furnish other security in lieu thereof. (Civil Code § 451.)

3. Suretyship and Creditors' Rights

The scope of a surety obligation includes interest on the principal, penalty and compensation for damages as agreed, and all other charges incidental to the obligation. (Civil Code § 447.) In view of the "subordinate" nature of the suretyship obligation, even if the obligee claims performance of an obligation from the surety, two defenses in addition to the defenses available to the obligor are available to the surety as follows:

(a) Beneficial excuse for notice:

If an obligee has demanded performance of the obligation from the surety, the latter may demand that he first send a notice to perform to the principal obligor; however, this shall not apply in cases where the principal obligor has been adjudged bankrupt or his whereabouts are unknown. (Civil Code § 452.)

(b) Beneficial excuse for execution:

Even after an obligee has given notice to the principal obligor in accordance with the provisions of the preceding Article, the obligee shall first levy execution on the property of the principal obligor, if the surety has shown that the principal obligor has *sufficient means* to effect performance and that the *execution can be accomplished with ease*. (Civil Code § 453 (emphasis added).)

Proof of "sufficient means" in this context is a question of fact; a surety need not adduce evidence that the principal obligor has sufficient funds to repay the entire debt. "Ease" of executions therein means ease in receiving actual payment; that is, generally speaking, enforcement of execution procedures in real estate in some situations cannot be executed with ease.

Under § 454, the surety may assume an obligation *jointly and severally* with the principal obligor (joint suretyship (*Rentai-hosho*)). In this case, note that the surety will not have available the defense of beneficial excuse either for notice or for execution under §§ 452 and 453 of the Civil Code, discussed immediately above.

4. The Surety's Rights

As noted, the obligation of the surety (who has not undertaken a joint and several obligation) is attendant to and distinct from the primary obligation, and the surety is liable to perform the obligation only in case the principal obligor defaults. In addition, although the suretyship obligation includes interest on the principal, penalty, compensation for dam-

ages, and all other charges incidental to the obligation, by agreement a surety's obligations to the obligee may be different from that of the obligor in regard to penalties or compensation for damages, since the surety may, by agreement, stipulate the scope of his suretyship. A surety also may avail himself of the claims available to the principal obligor, as for example, prescription of the principal obligation, setoff, Civil Code § 457, and, in the case of a direct demand for performance made upon him, the pleas of beneficial excuse for notice and for execution, as discussed above.

In addition, a surety has a right of indemnification, the extent of which depends on whether his suretyship has been assumed at the request of the principal obligor. Thus, § 459 of the Civil Code states:

If, where a surety has become so at the request of the principal obligor, he has, without fault on his part, had a judgment ordering performance entered against him or has effected performance on behalf of the principal obligor, or has at his own expense performed any other act causing the obligation to be extinguished, such surety shall have a right to be indemnified by the principal obligor.

Section 460 of the Civil Code goes on to provide:

Where a surety has become such at the request of the principal obligor, he may exercise in advance his right of indemnification against the principal obligor in the following cases:

- (1) If the principal obligor has been adjudged bankrupt, and the obligee does not prove and recover in the bankruptcy;
- (2) If the obligation is due; however, no time granted by the obligee to the principal obligor after the conclusion of the contract of suretyship can be set up against the surety or
- (3) If ten years has elapsed after the conclusion of the contract of suretyship, in cases where the time for the performance of the obligation is uncertain and its maximum duration is unascertainable.

As for the right of indemnification of one who has assumed the surety status other than at the request of the principal obligor, and who at his own expense has procured discharge of the principal obligor, the latter is liable to indemnify the surety to the extent that he has been or is enriched by the discharge depending on the circumstances of the assumption of the suretyship. (Civil Code § 462.)

(C) Joint Suretyship (*Rentai-hosho*)

The Civil Code does contemplate, in addition to the individual suretyship, a joint suretyship, whereby a surety may "assume an obligation

jointly and severally with the principal obligor." (Civil Code § 454.) As previously stated, the joint and several surety loses the right to utilize available defenses of beneficial excuse for notice and of beneficial excuse for execution. In other words, the creditor may proceed directly against the estate of the joint and several surety without proceeding first against the estate of the principal obligor.

Note here that the joint suretyship is very similar to the more general joint and several obligation discussed above in Section (A). Thus, § 458 of the Civil Code provides that most of the operative provisions regarding the occurrence of certain circumstances to one of the more general joint and several obligors are applicable as well to the joint and several suretyship situation.

(D) Rights of Retention (*Ryuchi-ken*)

The right of retention is another right arising by operation of law. Basically, if one in possession of a thing belonging to another has any claim that has arisen in respect to the object in possession, the possessory party may retain it until the claim has been satisfied. This right shall not apply, however, if the claim is not yet due or if the possession has originated in a tort. (Civil Code § 295.) The lien is indivisible, and one having a right of retention may exercise the right over the whole of the object retained until the relevant claim has been fully satisfied. (Civil Code § 296.)

Note in this connection that in the case of a claim arising from a "commercial transaction" between two or more companies where the claim has become due and payable and performance is not forthcoming from the obligor, the obligee may, until he has obtained performance thereof, retain certain movables or valuable instruments belonging to the obligor, which may have come into his possession through commercial transactions with the obligor. However, this provision shall not be applicable if there exists a prior declaration of intention to the contrary. (Commercial Code § 521.) Section 503 of the Commercial Code provides that all transactions affected by a company for the purpose of its business are deemed commercial transactions, and all transactions of a company shall be presumed to be affected for its business purpose.

(E) Preferential Rights (*Sakidori-tokken*)

1. General Survey

Under the Civil Code, "a person having a preferential right has, in accordance with the provisions of this code or other laws, a right to obtain

satisfaction of his claim out of the property of the obligor in preference to other obligees." (Civil Code § 303.) There are three classes of preferential rights: (a) general preferential rights, (b) preferential rights over movables, and (c) preferential rights over immovables. Each of these now will be examined.

1.1 General Preferential Rights

Briefly, there are four *general* preferential rights exercisable over the *entire* estate of an obligor in preference to the claims of other obligees: (a) expenses for the common benefit; (b) wages of employees; (c) funeral expenses; and (d) supplies of daily necessities. (Civil Code § 306.)

1.2 Preferential Rights over Movables

One who has a claim based on any of the eight causes enumerated below has a preferential right over specified movables of an obligor. The relevant causes are: (a) lease of immovables; (b) lodging at an inn; (c) carriage of passengers or goods; (d) negligence of public officers in the execution of their duties; (e) preservation of movables; (f) sale of movables; (g) supply of seeds, seedlings, or fertilizer; and (h) agricultural or industrial labor. (Civil Code § 311.) Section 322 of the Civil Code provides that the preferential right for the sale of a movable exists over the movable in respect of the price and interest thereof. Section 324 goes on to further enumerate what these rights are in respect to each specific movable.

1.3 Preferential Right over Immovables

One whose claim has arisen from any of the three causes mentioned below has a preferential right over specific immovables of an obligor: (a) preservation of an immovable; (b) work on an immovable; and (c) sale of an immovable. (Civil Code § 325.)

2. Rank of Preferential Rights

We shall next consider the rank or priorities among multiple preferential rights in terms of the three classes specified in paragraphs 1.1 to 1.3 above.

2.1 Rank of General Preferential Rights

Where multiple general preferential rights coexist over the same object, their rank of priority shall be in the order mentioned in § 306. (Civil Code § 329.) In the event that general and special preferential rights coexist on the same object, the special preferential right takes precedence.

However, a preferential right for expenses of the common benefit shall have priority as against all obligees benefited thereby. *Id.*

2.2 Rank of Preferential Rights over Movables

Where several special preferential rights coexist over a single movable, their priority shall be in the following order: First, preferential rights for the lease of movables, for lodging at an inn, and for carriage; next, those for preservation of movables—however, if there are two or more of this category, the more recent preserving claimant without notice shall take precedence over earlier ones; and finally, preferential rights for the sale of movables, seeds, seedlings, or fertilizer, and agricultural or industrial labor. (Civil Code § 330. *See also* Civil Code § 330, ¶12.)

2.3 Rank of Preferential Rights over Immovables

Where multiple special preferential rights coexist over a single immovable, their priority is in the following descending order of priority: Persons with claim over, first, the preservation of the immovable, followed second, by work thereof, and third, by sale thereof. (Civil Code § 325.) If there have been successive sales of the same single immovable, the priority of the several vendors' preferential rights shall be in the order of time of sale, with the earliest having priority. (Civil Code § 331.)

2.4 Preferential Rights of the Same Rank

If two or more persons have preferential rights of the same rank over the same object, they shall receive satisfaction in proportion to the monetary value of their respective claims. (Civil Code § 332.)

3. Effect of Preferential Rights

Some eight consequences of transactions regarding objects subject to preferential rights normally are identified in discussions of creditors' rights under Japanese law. First, after an obligor has delivered—gratuitously or by purchase and sale—a movable subject to a preferential right to a purchaser, such preferential right cannot be exercised. (Civil Code § 333.)

Second, where a preferential right and a pledge (see discussion on "Pledge" below) both exist over a movable, the pledgee's right shall be deemed that of a preferential right of the first rank, as mentioned in Article 330. (Civil Code § 334.)

The third point to be noted is that one having a general preferential right may not receive satisfaction out of immovables, unless he has first sought and failed to receive full satisfaction from property other than immovables. (Civil Code § 335.)

The fourth salient feature of preferential rights is that, as to immovables, satisfaction first must be sought out of those immovables that are not subject to a special security interest. *Id.*

Fifth, if one having a general preferential right neglects to participate in a distribution in accordance with the principles identified in the preceding two paragraphs, then as to the value he would have received through such participation, he may not exercise his preference as against third parties who hold and have registered their registerable security interests. *Id.* For example, see the discussion of mortgage interests below.

The sixth point to be noted is that the provisions of the preceding three paragraphs do not apply to cases where distribution is to be made of the consideration received for an immovable prior to consideration received for other property, or where distribution is to be made of the consideration received for an immovable that was the subject of a special security prior to consideration received for other immovables. *Id.*

Seventh, a general preferential right over an immovable, even if not registered, can be set up against an obligee who has no special security thereover. However, this right shall not apply as to third persons who have registered their rights in regard to the mortgage. (Civil Code § 336.) For example, see discussion of mortgage interests below.

Finally, a preferential right that has been properly registered may be exercised in preference to a mortgage irrespective of the chronological order of the rights. (Civil Code § 339.)

In addition to the eight considerations mentioned above, those provisions relating to mortgages shall apply *mutatus mutandis* (with the necessary changes) so as to give effect to the preferential rights in these circumstances. (Civil Code § 341.)

F. Pledge (*Shichi-ken*)

The second category of security provided by Japanese law is known as real rights created by agreement under the Civil Code. These rights are to be distinguished from the category of real rights over property of another created by operation of law, discussed above in Appendixes A through E. They are also distinct from the third form of security in property, real rights created by agreement under special legislation, discussed in Section I below.

The real rights created by agreement under the Civil Code fall into the following categories:

1. pledge (*Shichi-ken*);

2. mortgage (*Teito-ken*);
3. mortgage revolving in a fixed sum (*ne-Teito-ken*);
4. joint mortgage (*Kyodo-teito*);
5. maximal mortgage (*Kyokudo-gaku*).

This section will discuss the security interest known as a pledge. The other forms of security interest created by agreement are considered in the sections of the outline which follow.

1. Creation of a Pledge

Generally speaking, a pledge may be established pursuant to §§ 342–367 of the Civil Code over claims in order to secure an obligation. The pledge, as a real security right, requires the pledgee “to hold possession of the thing which he has received from the obligor or a third person as security for his claim, and to obtain satisfaction of his claim out of it in preference to other obligees.” (Civil Code § 342.) According to § 344 of the Civil Code, a pledge becomes effective upon the delivery to the obligee of the object pledged. If a claim is the object of a pledge, and there exists documentation evidencing such claim, the creation of the pledge takes effect upon the delivery of the pertinent documentation. (Civil Code § 363.)

2. The Object of a Pledge

Things nonassignable may not be the object of a pledge. (Civil Code § 343.) Movables may be pledged only if the pledgee continuously holds possession of the object pledged. (Civil Code § 352.) However, if the pledgee of a movable is deprived of his possession of the thing pledged, he can recover it only by an action of recovery of possession. (Civil Code § 353.) Immovables may be pledged and the pledgee may use and take the profits of immovables under pledge in conformity with the ordinary manner of use of such immovables. (Civil Code § 356.)

The duration of a pledge on an immovable cannot exceed ten years. If a pledge on an immovable is created for any longer period, it shall be reduced to ten years. The pledge on an immovable may, however, be renewed, but the renewal period may not exceed ten years. (Civil Code § 360.)

All rights in connection with assets may be pledged. This includes claims to secure loans or monetary rights. Thus, a pledge may be created over any type of asset, except for those otherwise stipulated by law or as agreed between the parties. However, because the pledgee must take and retain possession of the object pledged, the utility of this device obviously

is limited since it deprives the debtor of the use of the object pledged. The pledge device is thus very rarely used. It is only in the case of a pledge of rights that the mechanism is commonly used.

3. *Scope of Pledge*

In the case of "pledges on rights," § 364 of the Civil Code provides that where a monetary right is made the object of a pledge, such pledge cannot be set up against the obligor or other third persons (such as other creditors of the obligor) unless the obligor has been notified of the creation of the pledge or he has given his consent thereto in accordance with § 467. This section provides that such notice to or the consent of the obligor shall be ineffective against third parties unless it takes the form of an instrument under a certified date (*kakutei hizuke*). The procedure for obtaining such certification is to have a notary affix a date stamp to the pledge agreement.

(G) Mortgage (*Teito-ken*)

1. *Creation*

In the language of the Civil Code, the principal element of the mortgage is that an "obligee of a mortgage is entitled to obtain satisfaction of his claim in preference to other obligees out of the immovable which has been furnished by the obligor or a third person as security *without transferring its possession*." (Civil Code § 369 (emphasis added).)

Unlike the pledge, possession in the mortgage situation does *not* operate to serve as notification of the creation of the security interest; legally cognizable public notice is essential in order to create a valid mortgage. This is achieved by means of registration in the Legal Affairs Bureau having jurisdiction over the geographic area where the property is located. Where several mortgages have been created on a single immovable to secure multiple claims, their priority will be in the order of registration. (Civil Code § 373.)

2. *The Object of the Mortgage*

A mortgage may be created only on property which is registerable, including, inter alia: land, buildings (note that in Japan ownership of land and buildings is separable); superficies, or surface building rights (*chi-joken*); emphyteusis, or lease upon condition of improvement (*eikosa-kuken*); ships (but *not* offshore oil rigs, which are unregisterable as vessels); aircraft; motor vehicles; mining rights; factories; mines; railway foundations, etc.; and various types of equipment (agricultural, construc-

tion, etc.). Under § 370 of the Civil Code, a mortgage shall extend to all things, except buildings, that appertain to or form part of the land encumbered, i.e., all such appurtenances that will be covered by the registration of land.

Section 371 provides that since a mortgagor is allowed use of the mortgaged property, the rents and profits arising from the use of the mortgaged property will *not* be subject to the mortgage. However, the rents and profits are subject to the mortgagee's lien upon levy of attachment on the mortgaged immovable. Rents of purchasers from the mortgagor are subject to the mortgage only if the levy of execution on the immovable was effected within one year following notice of the mortgagee's intention to enforce the mortgage. *Id.*

3. Requirements for Creation of a Mortgage

Assuming that a building is to be the subject of a mortgage, in general, there are a number of requirements for an effective mortgage: there must be a mortgage agreement; the building must be a completed structure (judicial precedent has held that a building is complete for mortgage purposes once the walls and roof have been completed); and the building must be registered by the mortgagor under the Immovables Registration Law (Law No. 24 of 1899, as amended; hereinafter "Immovables Registration Law"). Finally, the existence of the claim to be secured by the mortgage is, of course, indispensable.

The mortgage must be registered under the Immovables Registration Law in order to be effective against third parties. Pursuant to provisions of the Civil Code, priority among mortgage obligees is based on the principle of priority of mortgage registration.

4. Scope of Claims Secured by the Mortgage

Where the mortgagee is entitled to receive interest or periodic payments, enforcement of the mortgage may be accomplished only as regards the payments due for the last two years; however, if a special registration has been made in respect of the periodic payments for the earlier period after they had fallen due, the mortgage may also be exercised in respect of the same, as from the time of such registration. If the mortgagee has a right to demand damages arising from the mortgagor's default, the same two year limitation applies. However, damages together with interest and other periodic payments may not exceed the amount due in respect of the last two years. Civil Code § 374.

5. Joint Mortgage (*Kyodo-teito*)

The joint mortgage is another form of real security rights created by agreement according to the Civil Code. The joint mortgage applies where

the creditor has mortgages over two or more immovables to secure one claim. In such case, the proceeds of the security shall be applied simultaneously to the satisfaction of the claim and the liabilities in respect of the claim shall be divided in proportion to the value of each immovable. If, however, the proceeds of only one of the immovables are to be applied, the mortgagee may obtain full satisfaction for his claim out of that particular property or immovable. In this case, the mortgagee who is next in priority may exercise the right of the prior mortgagee by subrogation to the extent of the amount which the latter would have received out of the other immovables in accordance with the proportionate recovery. Civil Code §392.

(H) Mortgage Revolving in a Fixed Sum (*ne-Teito-ken*) and Joint Revolving Mortgage (*Kyodo-ne-teito*)

1. Mortgage Revolving in a Fixed Sum (ne-Teito-ken)

The mortgage revolving in a fixed sum, or floating charge as it sometimes is called, is a form of mortgage of real property securing an indefinite number of obligations which may arise between an obligor and the obligee over the life of such mortgage. The uniqueness of this device is that it secures not just one specific claim but extends to all obligations of the stipulated character which may arise, mature, be paid or renewed as between obligor and obligee. In this respect, the floating charge differs from the mortgage (*teito-ken*) which simply secures a specific obligation and is extinguished upon discharge of that particular obligation. The revolving mortgage in a fixed sum, however, secures an indefinite number of obligations which an obligee may obtain from an obligor up to the maximum amount specified under a continuing specific transaction or a specific type of transaction.

The term of this type of mortgage may be agreed upon by the parties at the time of the making of the mortgage and can be amended thereafter; however, the maximum period for any single term allowed by law is five years. Civil Code §398-6. Alternatively, the time term may be specified as indefinite, in which case the mortgagor may, at any time after three years following creation of the mortgage, request that the obligations secured by the mortgage be fixed and that the mortgage thereafter be limited to such specific obligations. Where the time term is definite, at its expiration the mortgage will secure only the outstanding obligations

as of the date of expiration, and it is extinguished once those have been discharged.

2. *Joint Revolving Mortgage (Kyodo-ne-teito)*

As to the mortgage revolving in a fixed sum, the provisions related to joint mortgage (See Section (G)(e)) shall be applicable only if such joint mortgage is created and so registered. Civil Code § 398-16.

(I) Provisional Registration of Collateral (*Karitoki-tampo*)

We come now to the third category of security interest in property provided by law. The first and second categories concerned those rights created by operation of law and those created by agreement according to the Civil Code, respectively. This third category concerns real rights created by agreement based on special legislation. Special legislation provides for various kinds of mortgages whereby the effect of a Civil Code mortgage is expanded. For example, special legislation is necessary in the case of the creation of the Factory Mortgage (*kojo-teito*) under the Factory Hypothecation Law (Law No. 54 of 1975, as amended) whereby a mortgage in a factory building extends to industrial machinery, implements and fixtures appurtenant. Under the Civil Code, the mortgage normally would not extend to such items. We will not go at length into all the special legislative devices, nor the various types of mortgages thereby created. However, we shall mention one of the more common mortgages created by such special legislation, the provisional registration of collateral (*Karitoki-tampo*).

In the case of a completed building (provided the same was owned by the mortgagor and publicly registered) provisional registration of collateral could be accomplished on the basis of the Law Concerning Agreements on the Provisional Registration of Collateral (Law No. 78 of 1978). Under this type of collateral security, a debtor agrees that the creditor can provisionally register the ownership of the building in the creditor's name (note: to be effective and have priority, the provisional registration must be made). If the debtor defaults and certain conditions are met, the creditor is then entitled to make a registration *qua* owner with respect to the building. Accordingly, the creditor becomes owner in the event of default and is not obliged to go through the public auction procedures generally applicable to the exercise of mortgage rights. Otherwise the creditor is treated as a mortgagee.

(J) Collateral by Transfer of Title (*Joto-tampo*)

In addition to security interests in property provided by operation of law, by agreement under the Civil Code, and by agreement under special legislation, there is a second group of real security rights which have been developed judicially in Japan and whose basis lies in customary law and practice. These are mainly the creation of real security rights by (1) transfer of ownership or title, (2) redemption and promise of resale, (3) reservation of ownership, and (4) agreement for payment by substitution. The security interest created by transfer of ownership or title is pertinent here as is the creation of real security rights by redemption and by reservation.

The *joto-tampo* security device in Japanese law is a judicially created mechanism for collateralization of property including that property which is not subject to public registration (unlike land and buildings, etc.). This is an alternative to the pledge, the traditional security device as found in the Civil Code for use in case of unregistrable property. As has been stated above, in order for a pledge to be effective, the creditor (or pledgee) must be in actual possession of the collateral. This would be impracticable in many instances, for example, as with industrial machinery installed in a factory. Because possession by the creditor is impracticable in many cases where collateral security is desired by an obligee, Japanese courts have come to recognize the *joto-tampo* as a valid alternative to the pledge. Under this device, a debtor assigns his ownership rights in the collateral to the creditor; the creditor in turn allows the debtor to retain possession of the collateral as his agent in order to allow the debtor to use the collateral in the conduct of his business. The creditor may repossess the collateral in the event the debtor defaults on his obligations, subject to a duty to account for the surplus. In case of registrable properties, this device is used together with the mortgage and is more convenient in light of the fact that it permits bypassing the usual procedures for enforcement of mortgage, i.e., judicially supervised auctions. Further, in the utilization of this device for real estate it is functionally similar to the provisional registration of collateral explained above in Section (I)(i).

In order for a valid *joto tampo* to be created there must be a formal agreement between the obligee and either the obligor or a person who has or will have the ownership of the property to be collateralized. The first party to secure a *joto tampo* has priority over general creditors with respect to the property under *joto tampo*. If the debtor transfers ownership and actual possession to a third party acting in good faith and without negligence or knowledge of the establishment of *joto tampo*, then the

holder of the *joto tampo* interest loses his security interest. This is an inherent risk in the *joto tampo*; because of it, monitoring the debtor's activities or representations as to the collateral is advisable.

(K) Collateral by Sale or Redemption and Promise of Resale (*Uriwatashi-tampo*)

Very briefly, this form of security interest involves the sale of the collateral to the creditor to be secured coupled with a promise of resale to the debtor. The promise of resale would then come within the scope of Section 556 of the Civil Code which provides that a unilateral promise to sell shall become effective as a sale from the time when the person to whom such promise is made declares his intention to complete it. There is no obligation here for repayment by the debtor, but such promise entitles the debtor to redeem the collateral sold to the creditor.

(L) Reservation of Ownership (*Shoyuken-ryuho*)

This type of security is used, for example, where the full price of the goods is still owing to the seller. In this case, until the purchaser performs his obligation in full, i.e., pays the price of the goods, the seller retains title to the goods in question.

(M) Miscellaneous

There are, in addition, other methods to obtain a security interest that have emerged by practice and custom in Japan. In the case of accounts receivable, the pledge and *joto-tampo* devices may, of course, be utilized. See Sections F and J above. In addition, however, there are other alternatives provided by miscellaneous methods. For example, if a bank is the obligee and the accounts receivable of an obligor are the collateral, and if neither the pledge nor *joto-tampo* devices are utilized, the bank may utilize three methods, which have evolved by custom and practice, i.e., receipt from debtors of the accounts receivable in a capacity as agent of the obligor, designation of the bank as transferee of the accounts receivable, and reservation to the bank of the right of setoff.

III. Answers to Recurring Commercial Law Questions

A. Trade Regulations and Payments

- 1. What special impediments exist to routine open account sales, including import-export restrictions and prohibitive tariffs?*

Routine open sales are free from any regulation under the Foreign Exchange Law except for a very limited number of items subject to quotas.

- 2. What is the acceptability of bank drafts in connection with routine sales?*

Under the Geneva Convention known as the Check Law, a bank may draw a check on a corresponding bank. However, this is rarely seen in domestic trade. A similar type of document, which is more often used in Japan, is the cashier's check.

- 3. Are letters of credit frequently employed in connection with routine sales and procedures for ensuring payment?*

Letters of credit are widely accepted, even though there is no statute that governs their use.

- 4. Do limitations exist with respect to the organization and authority of the foreign party to enter into the transaction?*

Section 36 of the Civil Code and §§ 479 to 485 of the Commercial Code acknowledge and give the same protection to foreign profit corporate entities as to their Japanese counterparts.

- 5. What rules regulate the authority of the persons actually signing the documents to execute those documents?*

Sections 99 through 118 of the Civil Code provide principles that are similar to agency law in the United States, e.g., explicit actual authority,

implied actual authority, and apparent authority. Similar provisions are seen in §§ 261–62 (corporate directors) and §§ 37–45 (managers and other employees) of the Commercial Code.

B. Business Organizations

1. What individual liability exists with respect to various forms of business organizations?

Corporate entities are organized primarily to limit private liability. The Japanese director, however, may be held liable to third parties, including shareholders and creditors, for breaches of fiduciary duties to the corporation or for direct unlawful conduct. (§ 266-3, Commercial Code.) Japanese corporate law does not provide for “officers.”

C. Enforceability and Formalities

1. What special rules control the enforceability of the agreement and any related documents in accordance with their terms? Some transactions are illegal or unenforceable in certain foreign countries.

There is no statute of frauds in the Japanese legal system. Oral agreements are binding and enforceable. The doctrine of *pacta sunt servanda* controls, whereby agreements and stipulations of the parties to a contract must be observed. It is up to the trial judge to determine whether there has been an agreement between the parties. No consideration is needed. The concept of good faith found in UCC § 1-203 is embodied in § 1 of the Civil Code. The concept of unconscionability found in UCC § 2-302 is found in § 90 of the Civil Code.

2. What specific requirements concern land sales contracts, including registration?

Absent proper registration, any sale of land will not be effective as against a third party who acquires a conflicting interest. Between the original parties, the sale is nonetheless effective without any such registration. Registration is effective, in principle, upon the submission of the executed sales contract to an office of the Ministry of Justice.

3. *Are there special problems involving leases of personal property, including substantive differences between leases with options to buy at fair market price, leases with options to buy at a nominal price, and secured transactions? What documentation, if any, is necessary to perfect a lease?*

There are no corresponding statutory provisions to §§ 1-201 (37) and 9-408 of the UCC. Leases of personal property are treated as non-security interest rights. However, the trend in bankruptcy law is to regard them as a security interest. No such precedent has yet been established, however. Analogy from certain earlier precedent may indicate such consequences.

4. *Are there requirements for signatures before a notary and for consular consents in connection with transactions involving the foreign person?*

No notarization is required. Notarization, except for a few exceptions, is used to relieve the burden of proof a party may have in establishing his legal rights. The few exceptions include notice of protest, pledges, and certain types of wills.

5. *What about specific requirements for evidence of authority to execute documents? For example, affidavits before a notary or before counsel of the country may be required. In addition, seals are required in certain countries.*

The formalities are unnecessary.

6. *Do requirements exist for loan transactions, including statutory forms of promissory notes?*

No formalities are required for the formation of a loan transaction. A mere consent of the parties and a giving of money or monies worth will satisfy the requirements. However, for any consensual security interest to be effective against a third party who has acquired a conflicting interest in property, it must be registered in the case of realty or must be otherwise delivered to the creditor. Promissory notes are governed by the Geneva Convention on the Law of Draft. Section 75 of the Commercial Code provides a detailed form of a promissory note. A form of draft is provided likewise in § 1.

D. Security Interests

1. *What are the perfection requirements for secured loans and what is the effect of a security interest?*

The concept of perfection under the UCC is covered by the notion of registration in Japan. As discussed in Question C.6. above, depending upon whether realty or personalty is at issue, registration or possession is required against a conflicting security interest of a third party in the same collateral. Registration further satisfies one of the requirements for foreclosure proceedings.

2. *Are there any restrictions upon types of assets that may be pledged as collateral for loans or types of assets that may be owned by foreigners?*

Real property, personalty, accounts, and intangibles may be pledged as collateral. Although an ordinance intended to restrict foreign ownership is in existence, its exemption has been given general recognition in a designated subordination.

3. *Are there any limitations upon collateral for loans, including the duration of the security interest, the manner of its enforcement, and the types of possible collateral?*

There are no limitations upon collateral for a loan. The duration of the security interest is subject to duration of the claim secured by the interest. Enforcement is governed solely by the Execution Law. Fundamental formality requires application for attachment followed by a judicial sale. Self-help repossession is admissible when so agreed upon. Also, neither collection rights on pledged accounts nor detention rights of a secured party are impaired by the Execution Laws, §§ 367, 347, and 297 of the Civil Code.

4. *Are there any specific requirements involving obtaining security interests in intangible assets, accounts receivable, inventory or stock-in-trade, machinery and equipment, motor vehicles and trailers, aircraft, boats and shops, insurance proceeds, and patents or trademarks?*

Registration is required to be effective as against conflicting third parties except as to accounts receivable, inventory or stock-in-trade,

nonconstruction machinery and equipment. Where registration is not required, notification to the account debtor or possession is required.

5. *What are the requirements for obtaining a mortgage interest in real estate?*

The existence of a claim to be secured and a consent to provide such a security interest is required. For requirements of registration, see Questions C.6. and D.1. above.

6. *What are the requirements and restrictions in connection with the corporate guaranty of the obligation of a subsidiary or related corporation?*

There are no such restrictions. The doctrine of *ultra vires* will not render any such guaranty void. In bankruptcy law, however, such guaranty may be voidable when given in connection with an antecedent debt of a subsidiary or related corporation.

7. *What are the specific problems involving personal guaranties of domestic and foreign obligations?*

As a matter of substantive law, there is no problem. The Foreign Exchange Law provides some restrictions in special circumstances. In general, however, no restrictions apply.

8. *What are the specific requirements for the language of documentation? For example, are perfection documents required to be in the local language?*

All documents that accompany an application form may be written in a foreign language provided that a certified translation is attached. Certification by a local attorney will suffice. The application form itself must be in the local language.

E. Litigation and Prejudgment Remedies

1. *What are the requirements necessary to commence litigation to recover on a claim?*

Simple filing of a complaint with the local court is sufficient to commence litigation. (See Code of Civil Procedure § 223.) The form and

required content are provided for in § 224 of the Code. No verification or notarization is necessary, but the signature of the plaintiff or its attorney is required. (See subsection 2, §§ 224, 244 of the Civil Code.)

The filing of a complaint is effective to toll the statute of limitations without service on the defendant in the absence of a dismissal. (See Civil Code §§ 147, 149.) A power of attorney must accompany the complaint. Powers given for this purpose are limited to prosecution of the litigation. (See subsection 1 of § 81, Code of Civil Procedure.) Authorization is also required for such powers as to counterclaims, settlement, or appeals. Such authority is usually stated in the power of attorney. (§ 81(2), Code of Civil Procedure.)

2. What are the requirements of an entity to register in the jurisdiction to file a suit, and do these include qualification to do business in the jurisdiction?

No registration is required to bring suit by any foreign entity. Registration requirements of § 479 of the Commercial Code, generally applicable to a foreign profit corporation, do not apply to litigation. Jurisdiction is the next step.

3. What is the court structure of the country, including the types of courts available for relief?

There are three tiers of Japanese courts: The Supreme Court of Japan, the High Courts, and the District Courts, all having general jurisdiction. In addition there are Family Courts (domestic and juvenile cases) and Small Claims Courts (not more than Yen 900,000). There are no administrative courts. The Constitution of Japan provides for judicial review of questions concerning any law, order, regulation, or official act. (§ 81.)

4. What, if any, are the special problems caused by the debtor being located outside Japan and only some assets being located within Japan?

Jurisdiction will be recognized so long as some assets are within the country, whether related or unrelated to the claim. (Code of Civil Procedure § 8.) Criticism of this rule remains a minority view. Service of process is governed by the Service of Process Treaty, Judicial Comity Treaty, and other bilateral or multilateral treaties.

5. What formal documents are required to commence litigation? For example, are the originals of documents required to commence litigation?

No formal documents are required to commence litigation. Photocopies will suffice for purposes of commencing an action. Original documents, however, are required for hearings and trials.

6. What are the requirements, if any, for formal demand before commencing litigation?

Prelitigation formal demand is unnecessary.

7. What are the taxes or filing fees required to commence litigation?

A filing fee as set out in an official schedule is necessary. There are no taxes required to commence litigation. The plaintiff does, however, purchase revenue stamps to be affixed to the complaint. The filing fee is approximately .5% of the amount in controversy.

8. What are the various pleadings permissible in the jurisdiction?

The rules of procedure are rather flexible as to the various pleadings permitted. Counterclaims, cross-claims, impleader, and pendent claims are all permissible. Interpleader, however, is not allowed.

F. Prejudgment and Judicial Executions

The mere rendition of a judgment or docket filing by a clerk has no legal effect. A judgment creditor must file an application for an execution order based on the judgment. (§ 2, the Execution Law.)

1. What is the ability of a lender or claimant to take action prior to formal court procedures through the equivalent of repossession?

If by operation of law or in accordance with the terms of the agreement, the ownership of certain property is recognizable, the creditor may repossess the property unless the debtor objects to the repossession. Otherwise, no self-help shall be allowed. Prejudgment attachments, garnishments, injunctions, and seizure orders are permissible. Note that these

are judicial orders and thus are subject to specific inquiry of the legitimacy of the claims. Good cause must be shown with sufficient evidence supporting. Although these are ex parte proceedings, no due process problem has been litigated, and would probably be unsuccessful if raised.

2. Does the remedy differ if the debts are liquidated or unliquidated, and are there any distinctions between liquidated and unliquidated debts?

No distinction is made between liquidated and unliquidated debts. Any claim that has some economic value is protected. A nonmoney claim will be given the closest remedy available to restoration of the object for which it has been generated. The procedure is very flexible in this respect, except as to a mandamus, which would force a positive action inherently reserved to the debtor.

3. What assets of a debtor are subject to recovery by the creditors? For example, would recoverable assets include bank assets, savings accounts, special accounts, trust funds, real estate assets, leasehold estates, machinery and equipment, motor vehicles, inventory, accounts receivable, mineral interests, and intangibles?

All types of property listed above are subject to recovery by creditors. Exempt property is limited to personal property and earnings as enumerated in the Execution Law §§ 131, 152. Real property is subject to execution whether or not it is considered "homestead."

4. Can a receiver be appointed for assets of the debtor?

There is no provision for a receivership. A similar device may be applicable to real property as a means of judgment execution or as a prejudgment remedy. However, the power of the administrator is limited to possession, rent collection, and distribution to the creditor. Since rent is often not enough to satisfy the claim, this device is unpopular. (See §§ 93, 175 of the Execution Law.)

5. Are bonds required for the enforcement of prejudgment remedies?

Bonds are required for the enforcement of prejudgment remedies unless some extraordinary good cause is shown for not posting one or the claim is for wage earnings. (See §§ 741, 756 of the Code of Civil Procedure.)

6. *Is the debtor restricted in connection with the use of assets that are the subject of prejudgment proceedings?*

No. Simple use of the asset is not prohibited unless the proceeding against the debtor is that of appointment of the administrator.

7. *Do prejudgment proceedings have any effect upon priority of claims to assets?*

Prejudgment proceedings cannot affect a security interest that has already been registered. Interests not registered are subordinate to execution creditors. A prejudgment proceeding or judgment execution does not give a lien with priority vis-à-vis creditors. Other creditors may join the proceeding already instituted within a limited period. (§§ 51, 105, 154 of the Execution Law.)

Moreover, certain claims that have been duly joined are given priority over the execution creditor. They are known as the Preferential Rights. (See Section II.(G) §§ 51, 185, 87, 181 of the Execution Law.)

8. *What are the rights and time periods available to the debtor to appeal from attachments, seizures, injunctions, or garnishments?*

The debtor may appeal at any time, except a one-week limitation is provided in cases of execution on judgment. (See § 10 of the Execution Law.) There are no limitations until the debtor is barred by the res judicata effect of the judgment in the litigation.

9. *What are the penalties for improper attachment, seizure, injunctions, or garnishments?*

Normally there are no such penalties. The only damages obtainable by the debtor are in the situation in which the creditor had no claim at all for which a deposit has been placed. There is a possibility of criminal responsibility for any deception practiced upon the judge who issues the order of attachment. (Subsection 2 of § 248 of the Criminal Code.)

10. *What is the ability to recover attorneys' fees in connection with litigation?*

Attorneys' fees are not recoverable except those related to the litigation of tort claims.

11. *What are the applicable statutes of limitations for open accounts, written debts and notes, bank drafts, guaranties, secured debts, judgment debts, interim judgments, fraud causes of action against individuals, and fraud causes of action against corporations?*

General noncommercial claims – ten (10) years; commercial open accounts – two (2) years; drafts and notes – three (3) years; checks – six (6) months; general commercial claims – five (5) years; judgment debts – ten (10) years. (Civil Code §§ 166–174-2, 724; Commercial Code § 522; Law of Checks § 51; Law of Drafts §§ 70, 77.)

12. *How should a foreign litigant choose local counsel?*

The best way to choose local counsel is through local correspondence. The U.S. Embassy has a list of attorneys available.

13. *Is an assignment for the benefit of creditors an available remedy?*

Assignment for the benefit of creditors is available. This device has been useful to work out various debt claims. A recent Law Journal reports some satisfactory experience in using trust laws. The advantages as well as disadvantages of this procedure must be carefully examined.

14. *What is the enforceability of a United States judgment in Japan? Sometimes, for example, enforceability is based upon a consent to the jurisdiction of the United States courts coupled with a consent to service of process by mail or otherwise.*

A U.S. judgment is enforceable if it is conclusive and satisfies requirements of § 200 of the Code of Civil Procedure. (See the Execution Law § 24.) The Civil Procedure Code requires the satisfactory existence of the following: (a) jurisdiction; (b) service of process; (c) public policy; (d) reciprocity. Jurisdiction is a major problem. The modern tendency is to determine jurisdiction in accordance with rules of equity, considering related articles of the Code of Civil Procedure §§ 1, 2, 26. The courts will require service of process upon the defendant debtor through the authorized channels between the two governments. A nonformal service by a citizen or by a non-sheriff would cause issues to arise.

15. *What is the stability of the judicial system and the ability of the American investor or lender to obtain impartial relief in Japan?*

These considerations are fully guaranteed. Do not worry.

16. What is the expense of enforcing the rights of the American investor or lender in Japan?

It is relatively inexpensive. Attorneys' fees are reasonable. Billing is normally in proportion to the size of the controversy. The Bar Association has set up a standard fee schedule.

G. Bankruptcy

1. Does Japan have a bankruptcy or insolvency law?

Yes. Japan does have a bankruptcy system. Please see Introduction, Sections A.4. through 8. above.

2. What is the end result of the relief available to a financially distressed entity in Japan? For example, is liquidation the only available form of relief or is reorganization possible?

Reorganization is available, and perhaps advisable when considering all available remedies.

3. If reorganization is available, what types of reorganization relief are available? For example, is a moratorium on payments the only type of relief available or is composition available?

The reorganization relief includes not only a moratorium on payments but also a composition, which impairs any claims outstanding.

4. What is the basis for filing bankruptcy in Japan?

(1) For straight bankruptcy, the basis is insolvency. For a corporate debtor, liabilities exceeding assets is a sufficient cause. Insolvency is presumed from an act that indicates an intention to stop payment. (Bankruptcy Law §§ 126–27.)

(2) For arrangement or composition, the basis is the same as in straight bankruptcy. (The Composition Law § 12.)

(3) For reorganization under the Commercial Code, the basis for relief is the probability of impending insolvency or of liabilities exceeding assets. (Commercial Code § 381.)

(4) For corporate reorganization under the Corporate Reorganization Law, the basis is a grave difficulty in payment of debts as they mature without causing harassment to the continuation of business. (Corporate Reorganization Law § 30.)

5. What is the availability of the equivalent of an involuntary bankruptcy in Japan and what is the procedure for filing such equivalent?

Involuntary proceedings are available in all of the above-mentioned proceedings except the arrangement.

6. What is the extent of court involvement in a bankruptcy or rehabilitation proceeding?

Court involvement in these proceedings is extensive except as to allowance or disallowance of filed proof of claims. In general, corporate reorganization courts are more concerned with the proceeding than the courts of straight bankruptcy. In addition to the approval for disposition of assets, settlement, loans, and other supervisory functions, the reorganization court is eager to cooperate with the trustee in drafting a plan of reorganization.

7. Does a single court govern the bankruptcy proceeding?

No single court governs all bankruptcy proceedings. For example, in Tokyo, division 20 of the District Court of Tokyo handles straight bankruptcy and arrangements, whereas division 8 handles corporate reorganizations under both the Commercial Code and the Corporate Reorganization law.

8. Is the court involved with any sales of assets, operation of the business, or distribution of funds to creditors?

Sales of assets, other than minor assets, are subject to court approval. The courts are indirectly involved in the operation of the business, e.g., obtaining credit is subject to the court's approval, financial statements must be filed each month, etc.

9. Does the court play a role in evaluating the prospects of any proposed surviving entity?

The courts are expected to evaluate the prospects of a surviving entity. Absent a favorable evaluation, the court must dismiss a case. A

court-selected interim trustee (preservation administrator) must give a report on this particular aspect. (Corporate Reorganization Laws §§ 38(5), 43, 98-2, 277.)

10. Are there any other judicial or administrative functions of the court?

A reorganization court sits for: (a) a summary proceeding in the claim against directors on the breach of fiduciary duties (Corporate Reorganization Law § 72); (b) an affirmation proceeding of claims that have been objected to (§ 148); and (c) a claim by a trustee to avoid a preference (§ 82). Thus far there have been no constitutional issues raised regarding these proceedings.

11. What is the extent of creditor participation, if any, in connection with the insolvency proceeding?

A creditors' committee is not recognized by law. Creditors' meetings are, however, mandatory. In practice, therefore, a creditors' committee is organized. In straight bankruptcy and corporate reorganization, the creditors' representatives may be appointed (Bankruptcy Law § 170; Reorganization Law § 160); but in practice, such representatives are rarely seen. If appointed, they are called inspection commissioners in bankruptcy proceedings and agent commissioners in reorganization proceedings. They are different from an investigation commissioner in Reorganization Law § 101, who is like an examiner. Creditors' participation is, de facto, mostly limited to balloting on the plan.

12. Do creditors have a voice in choosing the type of relief sought?

Creditors may file an application for the debtor's relief in straight bankruptcy, reorganization under the Commercial Code, and reorganization under the Reorganization Law. Any concurrent application by the debtor that leads to liquidation shall be stayed so long as the creditors' option is for a reorganization. (Composition Law § 17; Commercial Code § 383; Corporate Reorganization Law §§ 37, 67.)

13. Do creditors have a voice in how the ongoing business of the debtor is managed?

Creditors may have a voice in the meeting of related parties (creditors' meetings). (Reorganization Law §§ 107, 188.) Creditors may submit a

reorganization plan (Reorganization Law § 189), which has never been done (4 Z. Kitagawa, *Doing Business in Japan* § 8.05N.2 at 8-30 (Bender 1984)); move to remove the trustee (Reorganization Law § 98-5); and request any order of the court. A creditor also has the right to inspect the court record. (Reorganization Law § 49.)

14. Does the ultimate reorganization plan require creditor approval, and, if so, is unanimous creditor consent required?

Yes, creditor approval is required, although there are provisions to overcome a group of creditors' dissent. (Reorganization Law § 234.) For unsecured claims, approval must be by more than two-thirds of the creditors with voting rights. For secured claims, approval by more than three-fourths is required when mere extension is sought, and approval by four-fifths is required when any cut is proposed. Equity interest holders have no voting rights when the corporation's liabilities exceed its assets.

15. Is management of the debtor supplemented or displaced by a trustee, receiver, supervisor, administrator, or other appointed official? If so, who appoints the official (e.g., the court, creditors, or otherwise); what is the role of the appointed official; what is the scope of his authority, his principal duties, and obligations; and to what extent is the cooperation of the debtor required?

In a reorganization under the Reorganization Law, management is replaced by a court appointed trustee. (Reorganization Law § 174.) A reorganization proceeding under the Commercial Code is managed by the existing management unless a trustee is selected. (Commercial Code § 386.) The trustee has absolute authority over the corporation. He is responsible for management and administration of all assets. The board of directors becomes disfunctional. He also decides whether to allow or disallow a proof of claim. He evaluates the corporate assets, and drafts the plan of reorganization. In appointment of the trustee, it is customary for the court to hear the opinions of the related parties.

16. Does the government participate either directly through bail outs or indirectly through policy?

The government is notified of proceedings (Reorganization Law § 48), and may state opinions in respect to a particular plan (§ 194).

17. Who are the major players in an insolvency proceeding?

The trustee is the major player.

18. Is the debtor protected from hostile creditor action during the bankruptcy proceeding, and, if so, is such protection automatic or are there steps that must be taken to insure protection?

The debtor is protected from all hostile actions from creditors in the corporate reorganization under § 17 of the Reorganization Law. This protection is discretionary during the period between the filing of a petition and the commencement order (Reorganization Law § 39), and then becomes automatic. On the other hand, the stay in the reorganization under the Commercial Code is limited in its scope in that the automatic stay does not affect enforcement of secured claims upon assets. (Commercial Code § 384.)

19. What types of entities are eligible for relief? Are there any jurisdictional limitations upon eligibility? For example, are residents of foreign countries eligible for relief or is relief limited to entities with property available for distribution?

Corporate reorganization is available only to corporations (limited company) (*kabushiki-kaisha*). It is not available for private companies (*yugen-kaisha*) organized under the Private Company Law. Other proceedings are open to any entity. In any proceedings, corporations organized under the laws of foreign countries are treated equally. (Reorganization Law § 3; Bankruptcy Law § 2.)

20. Are there criminal sanctions or potential civil liabilities for failure to seek relief?

The duty to apply for bankruptcy relief can be found in various corporate liquidation provisions, e.g., Commercial Code §§ 124, 147, 430, 431 and Civil Code § 81. However, these provisions are generally not abided by. Violation of these provisions creates liability for civil penalties. (Commercial Code § 497.)

21. Is a debtor required to seek relief or otherwise account for its financial condition?

A debtor is not required to seek relief unless under the above provisions set forth in answer 20.

22. *Is some type of governmental action required before relief can be sought?*

No governmental action is required.

23. *What are the standards for gaining relief? For example, must the debtor prove its inability to pay debts, its insolvency, or its good faith?*

The standards for relief are shown above in Question G.4. The basis must be proved except where such basis is presumed by law, as under § 126 of the Bankruptcy Law, by transition from a composition proceeding or a reorganization proceeding or where exempted by law, as under § 134 of the Bankruptcy Law where "all the directors agree." Good faith is required. Application for an involuntary proceeding mainly intended to take advantage of the pressures imposed on the debtor is not considered an application in good faith.

24. *Can the court dismiss the insolvency proceeding for lack of good faith or similar reason, or abstain from exercising its jurisdiction?*

The court can dismiss a proceeding for lack of good faith. The ability to work out things outside of the court proceeding can be a reason for dismissal as well.

25. *What is the order of priorities for distribution of property in connection with the bankruptcy proceeding?*

In straight bankruptcy, the priority of distribution is as follows: (a) administrative expenses, including fees payable to the trustee; (b) taxes; (c) general preferential rights, such as wages, see Section D; (d) unsecured claims pro rata. Secured claims may be enforced against the property of the estate regardless of the bankruptcy proceeding. (Bankruptcy Law §§ 92, 95.) The trustee maintains his authority to inspect and to dispose of such property concomitantly. (Bankruptcy Law §§ 195, 203.) In reorganizations under the Reorganization Law, priorities for distribution are as follows:

- (a) common interest claims (administrative expenses), to be paid out at any time. These expenses include accounts payable, fees, compensation for services, and other obligations that arose after commencement of the action (Reorganization Law § 208). Such obligations that

arose between the petition and commencement order are treated as administrative expenses upon prior approval by the court (Reorganization Law §§ 54, 43);

- (b) secured claims (Reorganization Law § 228-I-(1));
- (c) general preferential rights (§ 228-I-(2));
- (d) unsecured claims (§ 228-I-(3));
- (e) subordinate unsecured claims (§ 228-I-(4));
- (f) equity interests (§ 228-I-(5)(b)).

26. Does the American investor or lender have any priority in connection with the bankruptcy proceeding?

No, equality between the parties is the rule.

27. What is the jurisdiction of the bankruptcy court in Japan over assets of the foreign party in the United States or countries other than Japan?

Section 3 of the Bankruptcy Law and § 4 of the Reorganization Law declare the territorial principle of jurisdiction. This means that foreign assets are free from the court's jurisdiction. Strong criticism has emerged against this principle. Practice in this respect is rapidly changing toward the universal principle.

28. Does Japan recognize orders of the United States Bankruptcy Court?

Conversely, § 3 of the Bankruptcy Law and § 4 of the Reorganization Law declare that foreign orders of bankruptcy are void as to debtor's property located within Japan. This policy is under fierce criticism.

29. What is the effect of a bankruptcy proceeding upon liens, attachments, seizures, injunctions, and garnishments?

In straight bankruptcy, security interests can be enforced outside of the proceeding, but any executions on unsecured claims are void. In reorganization under the Reorganization Law, no claim is enforceable as against the debtor outside of the plan, so that the creditor's recovery is strictly in accordance with the plan of reorganization. (Reorganization Law § 112.) Any recovery for interest on principal or damages for default

is limited to a claim that shall arise within a one-year period beginning on the date of commencement. (Reorganization Law § 123.)

30. *What are the mechanics of a bankruptcy proceeding in Japan, including notification of the American creditor or investor, the filing of a proof of claim by the American investor or lender, the time limits for filing such a claim, the procedure for appointing and compensating a trustee or receiver, and any rules relating to the equivalent of fraudulent conveyances, preferential transfers, and other avoiding powers?*

Notification of creditors is a prerequisite under both §§ 143-144 of the Bankruptcy Law and §§ 11-18-3, 47, 48 of the Reorganization Law. Unless a proof of claim is filed, no creditor is entitled to any distribution. The time for filing is limited. Failure to timely file will result in a substantial disadvantage in the reorganization proceedings. (Reorganization Law §§ 127, 138, 140, 141, 242.) Bankruptcy Law is more lenient in this respect. (Bankruptcy Law §§ 234, 236, 270.)

31. *Are there any laws in Japan relating to exempt property?*

Certain property is excluded from the bankruptcy estate. Such property is essentially the same as that exempt from execution. See Question F.3. above.

32. *What type of benefits result from holding a security interest or mortgage or having a right of setoff in connection with the insolvency proceeding?*

A security interest or mortgage or a right to setoff is well protected under §§ 92 and 98 of the Bankruptcy Law. These rights can be exercised or enforced as though no proceeding had been taken. In contrast, in a reorganization proceeding, a security interest or mortgage is locked into the proceeding, and subject to such payment as is stipulated in a plan. (§§ 112, 67.) A right of setoff is unaffected in reorganization, except that it must be exercised within the period for which a proof of claim must be filed.

33. *What type of preparation is advisable to protect the American party in the event of an insolvency proceeding in Japan?*

Quick action based on the Execution Law is most effective. A security agreement is desirable. Numerous alternative devices are available in each circumstance.

Never give up. Selection of a good local specialist is desirable.

34. *What length of time is involved until conclusion of a bankruptcy proceeding?*

The average straight bankruptcy proceeding will last two years. A reorganization will need more than 10 years.

35. *Is there a stigma associated with the process that could significantly affect the rehabilitation efforts of the debtor?*

Factors that most affect the rehabilitation efforts of the debtor include poor industry prospects, old and obsolete facilities, and excessive numbers of employees.

36. *Are prebankruptcy payments of secured claims voidable?*

No, prebankruptcy payments of secured claims are not voidable.

37. *Are there circumstances under which the separate incorporation of related or affiliated entities would be disregarded?*

Yes, the concept of piercing the corporate veil has been widely accepted.

38. *Are there circumstances under which the claims of affiliates or other creditors will be subordinated?*

Subordination as found in *Deep Rock* is accepted in a bankruptcy case. It may in the future be expanded to other areas as well.

39. *Is intercompany debt treated differently from other debt?*

Intercompany debt is mostly treated the same as other debt, but principles of subordination have been recognized by the courts.

40. Will a discharge in the United States be a defense to a suit in Japan against the debtor?

A literal application of § 3 of the Bankruptcy Law and § 4 of the Reorganization Law leads to the conclusion that no discharge from another country will be effective in Japan over assets located in Japan. A strong criticism to this interpretation exists.

41. Will an attachment in the United States of property of the debtor be recognized in the foreign country?

Such an attachment, under the literal application of § 3 of the Bankruptcy Law and § 4 of the Reorganization Law, will be recognized if the United States has a sufficient basis for jurisdiction. But remember a strong criticism exists against this, and note a rapid change in practice toward the universal principle.

42. Does the insolvency proceeding attempt to administer assets outside of Japan?

No. As discussed above in question 28, both bankruptcy and reorganization proceedings are based on a territorial principle of jurisdiction. Strong criticism of this limitation does exist, as trustees are eager to collect all assets whether located inside or outside of Japan.

43. What is the effect of discharge in the foreign bankruptcy?

A discharge means the debts are nonenforceable. The underlying debts themselves are not extinguished. For tax purposes, a discharge is treated the same as a release.

44. How are creditors' committees selected and compensated?

As discussed above in question 11, a creditors' committee is not a formal organization. They are voluntary and organized by the creditors without any compensation, for all practical purposes, considering the amount and nature of various claims.

45. Are executory contracts enforceable?

Executory contracts are enforceable. In general, the trustee has the option to assume or reject such a contract. (Bankruptcy Law § 59; Reorganization Law § 103.)

46. *What are the requirements for notice prior to actions taken in connection with the insolvency proceeding?*

There is no notice requirement prior to insolvency actions.

47. *What is the availability of discovery in connection with the insolvency proceeding?*

In bankruptcy proceedings, the court has the power to question the debtor and its directors. (Bankruptcy Law § 153.) Discovery may be compelled by the detention or custody of the debtor (Bankruptcy Law §§ 154, 147–50) or imposition of a duty to account for the business failure (Bankruptcy Law § 153). In reorganization proceedings, the debtor will be denied relief unless he complies with disclosure requests. (Reorganization Law §§ 32, 33.) The court may question the parties and may exercise any powers of investigation. (Reorganization Law § 9.) Both interim and final trustees have extensive powers to investigate. (Reorganization Law §§ 40, 43, 94, 98-2.) Directors, auditors, managers, and employees are all subject to this investigative power.

48. *What is the availability of discovery in connection with proceedings other than insolvency proceedings?*

This branch of discovery is yet to be fully developed. Available discovery outside the insolvency proceeding is now limited to those generally available to litigants. Such discovery powers include a provisional examination of evidence (Code of Civil Procedure §§ 343–51); the right to an order to produce documents (§§ 313–17); and the right to an order to produce the books of accounts (Commercial Code § 35).

49. *What is the ability of the debtor to use, sell, or lease property of the estate?*

In a straight bankruptcy proceeding, all property of the estate except certain exempt property is under the control of the trustee. The debtor is at the mercy of the trustee's discretion. Normally, the debtor will not be allowed to use the property of the estate. He can never sell or lease the property.

50. *What is the ability of the debtor to obtain additional credit in connection with an insolvency proceeding?*

The debtor may obtain credit through the trustee upon the court's approval. A purchase of supplies on a credit basis is within the ordinary business practices, and, therefore, no permission is required.

51. *What are the types of debts that are not discharged?*

Discharges are available to all debtors, corporate or noncorporate. Certain liabilities as for taxes, torts, general preferential rights, and penalties, among others, are not dischargeable. (Bankruptcy Law, § 366-12.)

52. *What is the postpetition effect of any security interest in connection with an insolvency case?*

The postpetition effect differs in a straight bankruptcy proceeding from a reorganization proceeding. In straight bankruptcy, a security interest can be enforced outside of the proceeding. In a reorganization proceeding, no claim is enforceable against the debtor except in accordance with the plan of reorganization. See question 30 above. Security interest secures the interest on the secured claim until one year after the commencement of the proceeding to the extent of the value of the collateral.

53. *What is the procedure for abandonment of property of the estate?*

Abandonment is allowed only on the court's permission. (Bankruptcy Law, § 197; Reorganization Law, § 54.)

54. *Is there any special treatment of partnership debtors?*

Partnership debtors receive no special treatment. For the purposes of bankruptcy law, a partnership is disregarded unless it is the equivalent of an association.

55. *Can creditors file a plan of reorganization in a Japanese insolvency proceeding?*

Creditors are allowed to file a plan of reorganization. (Reorganization Law, § 190.) As a practical matter, however, in most cases they do not.

The trustee is expected to file a plan of reorganization. The trustee is the sole representative of the debtor, who may bind the debtor by his actions. The board of directors is deprived of its right to manage the debtor corporation.

APPENDIX (1) CODE OF CIVIL PROCEDURE

Book 1. General Provisions

CHAPTER I. Courts

- Section 1. Jurisdiction
- Section 2. Exclusion [sic] [Disqualification] Challenge and Refraining of Court Officials

CHAPTER II. Parties

- Section 1. Capacity for Being a Party and Litigation Capacity
- Section 2. Joint Litigation [Joint Claims and Joint Parties]
- Section 3. Intervention
- Section 4. Advocates and Assistants

CHAPTER III. Costs

- Section 1. Charging of Court Costs
- Section 2. Security for Costs
- Section 3. Aid in Litigation

CHAPTER IV. Proceedings

- Section 1. Oral Argument
- Section 2. Date and Period
- Section 3. Service [of Process]
- Section 4. Decision
- Section 5. Interruption and Suspension of Proceedings

Book 2. Proceedings in First Instance

CHAPTER I. Suit

CHAPTER II. Oral Argument and the Preparation Therefor

CHAPTER III. Evidence

- Section 1. General Provisions
- Section 2. Examination of Witnesses
- Section 3. Expert Testimony
- Section 4. Documentary Evidence
- Section 5. Inspection
- Section 6. Examination of Party
- Section 7. Preservation of Evidence

CHAPTER IV. Special Provisions Concerning the Procedure in Summary Courts [Small Claims Court Proceedings]

Book 3. Appeal

CHAPTER I. Koso Appeal [Appeal from Final Judgment to High Court]

CHAPTER II. Jokoku-Appeal [Appeal from Final Judgment to the Supreme Court]

CHAPTER III. Kokoku-Appeal [Appeal from interim orders]

CHAPTER IV. Retrial

CHAPTER V. Summary Procedure [Special Proceedings for Payment Order]

CHAPTER V-2. Special Provisions Concerning Litigation of Bills and Cheques

CHAPTER V-3. Final[ity] [of] Judgment and Stay of Execution

CHAPTER VI. Provisional Attachment and Provisional Disposition [Pre-judgment Attachment and Injunction]

CHAPTER VII. Procedure for General Pressing Notice [for Service by Publication]

CHAPTER VIII. Arbitration Procedure

SUPPLEMENTARY PROVISIONS

APPENDIX (2)
THE RULES OF CIVIL PROCEDURE 1.

Book 1. General Provisions

CHAPTER I. Jurisdiction

CHAPTER I-2. Security for Cost

CHAPTER II. Proceedings

Book 2. Proceedings of the Court of the First Instance

CHAPTER I. Preparation for Pleadings

CHAPTER II. Oral Pleading

CHAPTER III. Evidence

Book 3. Appeals

CHAPTER I. Appeal from the Final Judgment to the High Court

CHAPTER II. Appeal from the Final Judgment to the Supreme Court

CHAPTER III. Appeal from Interim Orders

CHAPTER IV. Rehearing

CHAPTER V. Special Provisions for Claims on Drafts and Checks

SUPPLEMENTARY PROVISIONS

APPENDIX (3)

THE EXECUTION LAW

I. General Provisions

II. Judgment Execution

1. General Provisions
2. Execution on Money Claims
 - (1) Execution against Real Property
 - (2) Execution against Ships
 - (3) Execution against Movables
 - (4) Execution against Accounts and Other Property
3. Execution on Non-money Claims

III. Execution, Attachment and Injunction

IV. Judicial Sales and Execution on Secured Claims

V. Penalties

APPENDIX (4) THE BANKRUPTCY LAW

Book 1. Substantive Provisions

CHAPTER I. General Provisions

CHAPTER II. Estate

CHAPTER III. Claims in Bankruptcy

CHAPTER IV. Claims Appertaining to Bankrupt Estate [Administrative Expenses and Related Claims]

CHAPTER V. Effects of Bankruptcy upon Juristic Act [Legal Relations]

CHAPTER VI. Right of Avoidance [of Preferential and Fraudulent Transfers]

CHAPTER VII. Right to Redeem [Repossession]

CHAPTER VIII. Right of Separation [Foreclosure on Secured Claims]

CHAPTER IX. Right of setoff

Book 2. Procedure Provisions

CHAPTER I. General Provisions

CHAPTER II. Adjudication of Bankruptcy

CHAPTER III. Administration in Bankruptcy [Trustee]

CHAPTER IV. Inspection Commission [Auditor]

CHAPTER V. Meeting of Creditors

CHAPTER VI. Administration and Realization [Disposition] of Bankrupt Estate

CHAPTER VII. Report and Investigation of Claims in Bankruptcy [Filing of Proof of Claim and Allowance of Disallowance]

CHAPTER VIII. Distribution of Dividends

CHAPTER IX. Compulsory Composition [Composition after Bankruptcy Adjudication]

CHAPTER X. Discontinuance of Bankruptcy [Closing of Proceedings]

CHAPTER XI. Petty Bankruptcy

Book 3. Discharge and Rehabilitation

CHAPTER I. Discharge

CHAPTER II. Rehabilitation

Book 4. Penal Provisions

SUPPLEMENTARY PROVISIONS

APPENDIX (5) THE COMPOSITION LAW

CHAPTER I. General Provisions

CHAPTER II. Commencement of Composition

CHAPTER III. Composition Claims and Report Thereof [Filing of Proof of Claim]

CHAPTER IV. Meeting of Creditors

CHAPTER V. Approval or Disapproval of Composition [by Court]

CHAPTER VI. Discontinuance of Composition [Closing of Proceeding]

CHAPTER VII. Annulment of Concession and of Composition

CHAPTER VIII. Penal Provisions

SUPPLEMENTARY PROVISIONS

APPENDIX (6) THE COMMERCIAL CODE

Book II. Kaisha (Companies)

CHAPTER IV. Kabushiki-Kaisha [Public Limited Corporation]

Section 7. Re-Organization of a Company

Section 8. Dissolution

Section 9. Liquidation

Sub-section 1. General Provisions

Sub-section 2. Special Liquidations

APPENDIX (7)
THE CODE OF NON-LITIGATION PROCEDURE

Book 3. Commercial Non-Litigation

CHAPTER I. Corporations and Judicial Sales

CHAPTER II. Debentures

CHAPTER III. Corporate Reorganizations

CHAPTER IV. Corporate Liquidations

CHAPTER V. Commercial Registrations

APPENDIX (8)

THE CORPORATE REORGANIZATION LAW

CHAPTER I. General Provisions

CHAPTER II. Commencement of Reorganization Proceedings

CHAPTER III. Receiver and Investigation Commissioner [Trustee and Examiner]

CHAPTER IV. Reorganization Creditors, Reorganization Secured Creditors, and Shareholders

CHAPTER V. Meeting of Interested Persons

CHAPTER VI. Proceedings after Commencement of Reorganization Proceedings

CHAPTER VII. Terms [Contents] of Reorganization Plan

CHAPTER VIII. Approval or Disapproval and Execution of Reorganization Plan

CHAPTER IX. Discontinuance of Reorganization Proceedings [Closing of Proceeding]

CHAPTER X. Remuneration [Fees] and Awards

CHAPTER XI. Penal Provisions

SUPPLEMENTARY PROVISIONS

APPENDIX (9)

THE TAX EXECUTION LAW

CHAPTER I. General Provisions

CHAPTER II. Coordination to Tax Claims and Other Claims

CHAPTER III. Secondary Duty

CHAPTER IV. (Deleted)

CHAPTER V. Execution of Tax Claims

CHAPTER VI. Abstention and Stay of Execution

CHAPTER VII. (Deleted)

CHAPTER VIII. Appeals

CHAPTER IX. Miscellaneous

APPENDIX (10)
THE LAW RELATING TO COORDINATION
BETWEEN PRIVATE EXECUTION AND TAX
EXECUTION

CHAPTER I. General Provisions

**CHAPTER II. Private Execution against Properties on which Tax
Execution is Enforced**

**CHAPTER III. Tax Execution against Properties on which Private
Execution is Enforced**

CHAPTER V. Miscellaneous