

ABHANDLUNG / ARTICLE

Too Hot to Handle : Extinguishing Secured Creditors' Interests in Insolvency under Japan's Civil Rehabilitation Law

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I. INTRODUCTION : THE LIMITS OF INSOLVENCY LAW ?

The Security Interest Extinguishing Scheme (*tanpoken no shômetsu seikyû seido*, hereafter Scheme) under Japan's *Civil Rehabilitation Law* (CivRL)¹ provides a comparative perspective on the famous conclusion that there are logical limits to the goals of insolvency law.² It also sheds light on the impact of Japan's prolonged economic malaise on

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1 *Minji saisei-hô* Law No. 225/1999, as amended; Engl. transl. prior to amendment: Australian Journal of Asian Law 2(2) (2000) 113 (S. STEELE trans.). The Law came into effect on 1 April 2000. See also S. STEELE, Evaluating the New Japanese Civil Rehabilitation Law, in: Australian Journal of Asian Law 2(1) (2000) 54; K. ANDERSON, Small Business Reorganizations: An Examination of Japan's Civil Rehabilitation Act Considering U.S. Policy Implications and Foreign Creditors' Practical Interests, in: American Bankruptcy Law Journal 75 (2001) 355; M. KODAMA, Introduction to Japanese Civil Rehabilitation Law, in: American Bankruptcy Institute Journal 20(8) (2001) 8.

2 A play on Jackson's seminal work, T.H. JACKSON, The Logic and Limits of Bankruptcy Law (1986). See also D.G. BAIRD, The Uneasy Case for Corporate Reorganisations, in: Journal of Legal Studies 15 (1986) 145 and D.G. BAIRD/ T.H. JACKSON, Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy, in: The University of Chicago Law Review 51 (1984) 97-130, 101-102.

insolvency law reform and the ordering of debtor and creditor interests. Further, the background leading up to the enactment of the law in 1999 reveals a reform process highly focused on solving policy predicaments that might traditionally be considered outside the realm of insolvency law.

Japan's severe deflation since the collapse of the Bubble economy means that many companies in Japan have assets that are secured for more than their present value.³ Prices are still falling by 1 percent per year.⁴ Further, during the 1980s, under-secured lending, particularly against immovable assets, was rife.⁵ This is noted by both non-Japanese and Japanese commentators.⁶ The slump in property prices at the beginning of the 1990s exposed many creditors to further difficulties in collecting under-secured loans. The Scheme was introduced in part to combat these problems. However, it was also justified on the basis of promoting equality amongst secured and unsecured creditors.⁷ Proponents of the Scheme also argued that it would reduce the amount of debt owed by debtors to the reasonable current value of their secured property, and thus make it possible for debtors to rehabilitate.⁸

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- 3 According to the Japanese Economic Planning Agency, 'the collapse of the 'Bubble' economy brought down the value of stocks and real properties between 1990 and 1996, a capital loss amounting to about 840 trillion yen, or 170% of GDP in 1996, was suffered by corporations and households'. See RESEARCH BUREAU, ECONOMIC PLANNING AGENCY, *The Japanese Economy in 1998: A review of events and challenges for the future – Recovering from the after-effects of the bubble's collapse*, at: <<http://www.epa.go.jp/99/f/kaiko-e/kaiko-e.html>>, Chapter 2 Part 1, December 1998. Japan's deflation problems have also been reported in the Australian press recently, citing the American economist ALLAN MELTZER as identifying the Great Depression and the current deflation in Japan as the only two times in history where deflation has been a problem. See P. HARTCHER, *Fireside Chat: Greenspan tests his deflation theory*, in: *The Australian Financial Review*, Sydney, Thursday, 26 June 2003, 1.
 - 4 P. HARTCHER, *Greenspan's greatest fear*, in: *The Australian Financial Review*, Sydney, Saturday, 28 June 2003, 21.
 - 5 ECONOMIC PLANNING AGENCY, *supra* note 3, at Chapter 2 Part 1. The Research Bureau argues that this was a result of large companies finding alternatives to bank finance and the banks increasing lending to SMEs. Because there was not enough information about these small and medium enterprises (SMEs), the banks were forced to use real estate as secured property for the loans. This is only one explanation for the over-reliance on immovable assets in Japan. Other reasons include the lack of a registration system for movable assets.
 - 6 *E.g.*, R.F. GRONDINE, *Financing Direct Investments and Operations in Japan*, in: MCALINN (ed.), *The Business Guide to Japan (1996)* 139 and S. TAKAGI, *Kaisha kōsei-hō no rippōteki kadai* [Legislative problems of the Corporate Reorganisation Law], in: *Jurisuto* 1111 (1997) 98, 102.
 - 7 T. MIYAMA *et al.*, *Ichimon-ittō minji saisei-hō* [Q&A on the Civil Rehabilitation Law] (2000) 190. This book was authored by the Ministry of Justice team that arranged the day-to-day drafting of the insolvency law reform process.
 - 8 M. KIUCHI, *Shin saikengata tetsuzuki to tanpoken hyōka (shōmetsu) seido* [New reconstruction-type proceeding and evaluation of security interests (extinguishing) system], in: *Ginkō hōmu* 21 562 (1999) 20, 20.

However, at first glance, the Scheme also suggests a deterioration of the primacy traditionally accorded to a secured creditor's right of separation (*betsujōken*) in Japan. The Scheme allows debtors to make an offer via the courts to pay out secured creditors in the context of a Civil Rehabilitation procedure and thus 'extinguish' (*shōmetsu*) the secured creditor's interest. Although a secured creditor has a right to challenge the court's decision to approve the cancellation of its security, it only has a right to do so in relation to the amount of the offer and whether the secured asset is indispensable to the rehabilitation of the debtor's business. The Scheme also gives rise to theoretical questions about the role of insolvency law. Should it be used to combat deflation and poor lending practices? Should protection of creditors be eschewed in favour of rehabilitation and policy goals such as forcing creditors to clean their books of underperforming loans whilst also freeing up real property assets? The Scheme confirms that insolvency law may be aimed at achieving goals other than the traditional objectives of liquidation or rehabilitation.

II. UPSETTING HISTORICAL TREATMENT OF SECURITY INTERESTS

A. *Traditional Focus on Secured Creditors' Rights in Insolvency Law Procedures*

Classical liberal theory envisages the free exercise and exchange of property rights. *Carruthers* and *Halliday* argue that interests or rights in property are the foundation of a market society, because market activity consists largely of exploiting and exchanging property rights.⁹ However, they see insolvency as a time when the discretion of owners of property rights may legitimately be restricted.¹⁰ Insolvency, particularly in the rehabilitative context, is arguably an event that requires a reconsideration of all interests related to a company, despite judicial and legislative reluctance to restrain secured creditors from enforcing security freely given by a debtor.¹¹ On the other hand, if credi-

9 B. CARRUTHERS / T. HALLIDAY, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (1998) 16, 23. They go on to argue that, 'protection of property rights is one of the irreducible functions of the state, acknowledged even by those who wish to minimise government as much as possible'.

10 *Ibid* 17. See also J. GARRIDO, *The Distributional Question in Insolvency: Comparative Aspects*, in: *International Insolvency Review* 4(1) (1995) 25. GARRIDO provides an interesting historical background of insolvency law from its origins in the mercantile states of Italy in the middle ages to support the view that insolvency law is the appropriate place to make decisions about the order of priority of payment to creditors. *Cf. Delaney* who argues it goes against democratic decision-making principles. K. DELANEY, *Veiled Politics: Bankruptcy as a Structured Organizational Field*, in: *American Behavioural Scientist* 39(8) (1996) 1025. *Cf. also* BAIRD / JACKSON who argue that: 'Social reform should be brought about through broad changes in the substantive law rather than through ad hoc modifications of rights in bankruptcy', *supra* note 2, at 103.

11 This suggests an interpretation of rehabilitation that excludes liquidation outcomes. On the reluctance to intervene with respect to secured creditors' interests in Australia see, *e.g.*, R. TOMASIC / K. WHITFORD, *Australian Insolvency and Bankruptcy Law* (2nd ed, 1997) 23-5.

tors cannot be certain that they will be able to enforce their security, that uncertainty will be taken into account in determining whether to lend money and what interest rate to charge. The controversy surrounding the debate on extinguishing secured creditors' interests has been exacerbated by the prolonged financial crisis in Japan and high expectations that insolvency law reform will help resuscitate the economy.

Linked closely to the disagreement about the treatment of secured creditors are divergent beliefs about the role of the state in regulating corporations in financial distress.¹² One view is that the sole purview of insolvency law is to promote narrowly defined economic efficiency.¹³ On this view, the state, in the form of the courts and insolvency legislation, has a role to play to the extent that a reorganisation procedure may achieve the goals of debt collection and redistribution of assets.

Whilst debt collection and maximising returns to creditors are traditionally important in insolvency, the focus on economic efficiency is based on a narrow perception of the role of insolvency law.¹⁴ It does not take into account the interests of other parties apart from the so-called owners of the firm.¹⁵ Furthermore, it does not take into account the variety of policy goals that the state may seek to achieve through insolvency law. These include maintaining full employment, creating certain distributions of wealth in society, providing a forum for various interests and the moral regulation of corporate directors. The objections to the economic efficiency thesis also tie in with the interpretation of corporations as entities that are not beholden solely to the providers of capital.¹⁶ According to this interpretation, the focus of insolvency laws should be the coordination of debt collection and rationalisation of the process of decision-making about the future of a firm.¹⁷

This interpretation of insolvency law justifies a greater involvement on the part of the state in reorganising debtors and umpiring debt workouts. Proponents of this

12 For a summary of different philosophies of insolvency law see A. FLESSNER, *Philosophies of Business Bankruptcy Law: An International Overview*, in: J.S. ZIEGEL (ed.), *Current Developments in International and Comparative Corporate Insolvency Law* (1994) 19. See also V. FINCH, *The Measures of Insolvency Law*, in: *Oxford Journal of Legal Studies* 17(2) (1997) 227.

13 On this view, see the seminal work of T.H. JACKSON, *The Logic and Limits of Bankruptcy Law* (1986) and BAIRD (1986), *supra* note 2.

14 Critics also argue that until the moment of bankruptcy, there is no identifiable, common pool of assets in the hands of the debtor that the creditors can lay claim to. See arguments in FLESSNER, *ibid* 25-6.

15 On the need to take into account a wider group of stakeholders in the insolvency law process see D. KOROBKIN, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, in: *Columbia Law Review* 91 (1991) 717, especially, 766-8, on the difference between bankruptcy and non-bankruptcy debt collection law.

16 FLESSNER, *supra* note 12, at 24.

17 *Ibid*. FLESSNER calls this the forum philosophy of insolvency law. KOROBKIN, *supra* note 15, at 772, also uses this term.

approach tend to eschew viewing reorganisation through liquidation-tinted glasses.¹⁸ However, this view of insolvency law is criticised because it talks about including many stakeholders in the insolvency law process without offering any means to determine the ranking of their interests.¹⁹ Moreover, despite claims to the contrary, it still tends to overlook the fundamental limitations of reducing insolvency law to a dichotomy of liquidation versus reorganisation.²⁰

By reducing the debate over the role of insolvency law into a binary framework, there is a tendency to focus on whether a procedure protects debtors or assists creditors and to ignore the wider forces at play when insolvency laws are drafted. *Korobkin* points out that identifying reorganisation with rehabilitation has been one of the major problems. Rehabilitation, and thus reorganisation, is perceived as a failure if the process ends in ‘the sale of assets in a piecemeal fashion and the discontinuance of the corporation as a going concern’.²¹ In this way he argues for a broader definition of ‘rehabilitation’ as providing a chance for interested parties to come to a new understanding of what a company ‘shall exist to do’.²²

Given the debate leading up to the introduction of the Scheme, it would seem that most reformers in Japan took the view that insolvency law does have a broad role to play, but they too seem to have identified reorganisation too closely with ‘rescue’. The debate about secured creditor’s rights and the Scheme reflects this. A similar dilemma is facing all countries trying to use insolvency law as a type of ‘industrial policy’ to achieve wider social reform, for example, China, Indonesia and other countries making a transition to a market economy. However, it is also an issue for industrialised countries where insolvency law is being used by companies to avoid, for example, mass injury and environmental suits²³ or by governments to entrench corporate morality amongst directors.²⁴

18 See, e.g. KOROBKIN, *ibid* 772.

19 FLESSNER, *supra* note 12, at 27.

20 In reality, there has been a convergence of the traditional debt collection and reconstruction goals of insolvency law in practice such that liquidation and reorganisation are no longer entirely separable aims. This conflation of aims suggests that it is difficult to carve up insolvency laws according to whether they are based on liquidation and reorganisation aims. If we accept that rehabilitation may end in a liquidation-type sale, this framework becomes, to an extent, obsolete. This is the case in the Japanese *Civil Rehabilitation Law*, where it is possible that the insolvency workout process may end in liquidation even though the procedure is generally described as a reconstruction or reorganisation type proceeding.

21 KOROBKIN, *supra* note 15, at 773.

22 KOROBKIN, *ibid* 774.

23 For example, the use of Chapter 11 of the American *Bankruptcy Code* by American companies. DELANEY, *supra* note 10, 1027. See also P. SPENDER, Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability, in: *Sydney Law Review* 25(2) (2003) 223.

24 For example, the introduction of a director’s duty to prevent a company from trading while it is insolvent in Australia (1992-93).

B. *Treatment of Secured Creditors under the Civil Rehabilitation Law*

Secured creditors in Japan enjoy a strong position in substantive law and have traditionally been treated with deference in insolvency proceedings. The lack of any restrictions on the enforcement of security interests in the composition procedure under the *Composition Law* (*Wagi-hô* Law No. 72/1922), the predecessor to the *Civil Rehabilitation Law*, was thought to be one of the major failings of the procedure as a rehabilitative mechanism.²⁵ Secured creditors could enforce their security, making rehabilitation impossible. Given the historical interest in the issue of whether to introduce a moratorium or stay into the *Composition Law*, it is understandable that the initial reform proposals focused on the introduction of a moratorium on execution of secured interests.²⁶ Although there was general support for such a mechanism in the new procedure, there was also great reluctance to restrict the interests of secured creditors. In particular, there was reluctance to go as far as introducing an automatic stay of the type that exists under Chapter 11 of the *Bankruptcy Code* of the United States.²⁷

The initial proposal for the treatment of secured creditors in the *Civil Rehabilitation Law* in the *Questionnaire on the reform of the insolvency law system* was conservative, consisting of an amalgam of ideas to be found in existing Japanese insolvency procedures.²⁸ The *Questionnaire* suggested three major provisions dealing with the treatment of secured creditors.²⁹ First, it asked for comments on maintaining the principle of the right of secured creditors not to be affected by the rehabilitation found in the *Composition Law*.³⁰ According to the members of the Insolvency Law Reform

25 See M. KAWANO, *Wagi tetsuzuki no rippôteki kadai* [Legislative problems of the Composition procedure], in: *Jurisuto* 1111 (1997) 74, 78; S. ITÔ, *Tanpoken shômetsu seikyû seido no tanpoken rironjô no mondai* [Theoretical problems regarding secured rights involved in the system to demand the extinguishing of secured rights], in: *Jurisuto* 1166 (1999) 96, 96; Y. AOYAMA / H. NAKAJIMA, *Wagi jittai chôsa no igi to gaiyô* [Scope and outline of the composition fact-finding survey], in: Y. AOYAMA (ed.), *Wagi-hô no jisshôteki kenkyû* [Empirical research on the Composition Law] (1998) 11.

26 For a critique of the issues regarding security interests at the beginning of the reform process see T. UEHARA, *Tôsan-hô ni okeru tanpoken no jikkô no kisei* [Regulation of the exercise of a secured claim in insolvency law], in: *Jurisuto* 1111 (1997) 131. Uehara argues in favour of a moratorium.

27 See, e.g. TAKAGI, *supra* note 6.

28 HÔMUSHÔ MINJIKYOKU SANJIKAN SHITSU (Office of the Counsellor of the Civil Affairs Bureau of the Ministry of Justice), *Tôsan hôsei ni kansuru kaisei kentô jikô* [Questionnaire on Reforms relating to Insolvency Laws], December 1997, reproduced in: *Bessatsu NBL* (NBL Special Issue) 46 (1997) 1. The Questionnaire was produced by the Insolvency Law Reform Committee, set up within the Legislative Deliberative Council (*Hôsei shingikai*).

29 See The Questionnaire, *ibid* at Dai 1 bu Dai 2 shô Dai 1 no 3(2) ka d (Part 1, Chapter 2, 1-3(2) ka [katakana] d).

30 This is known as a ‘right of separation’. In Japanese usage, once a proceeding is commenced, secured creditors are no longer called secured creditors; they become ‘persons with a right of separation’. This follows the German *Bankruptcy Law* (*Konkursordnung*) of 1877 method.

Committee from the Ministry of Justice, of the approximately ninety opinions that it received in response to the *Questionnaire*, the majority were in favour of this proposal. They noted that the support for maintaining the right of separation principle was based ‘on the perspective of balancing the severity of the procedure with the reliability of security’.³¹ This proposal was adopted in the *Civil Rehabilitation Law* with respect to the treatment of secured creditors (CivRL Arts. 53 and 88).³²

However, despite the support for the overall principle of protecting secured creditors’ interests, the further two suggested reforms created exceptions to the principle. The first restriction on the enforcement of security interests was in the form of a discretionary post-commencement stay. The discretionary moratorium concept derives from the suspension order procedure available in the Corporate Arrangement procedure in the *Commercial Code* (Art. 384) and the Special Liquidation procedure in the *Commercial Code* (Art. 433).³³ A discretionary post-commencement moratorium was included in the *Civil Rehabilitation Law* (Art. 31). However, there have only been a small number of stays against official auctions granted by the courts under the *Civil Rehabilitation Law* to date.³⁴

31 T. MIYAMA / Y. KOGA / R. NAMURA / T. TSUTSUI / S. SAKAMOTO, ‘*Tōsan hōsei ni kansuru kaisei kentō jikō ni taisuru kakukai iken no gaiyō (I)*’ [Outline of various sectors’ opinions on the Questionnaire on Reforms regarding the insolvency law regime Part II], in: NBL 648 (1998) 30, 33 [5 part series]. The authors are part of the Ministry of Justice team responsible for the reforms.

32 Secured creditor in this provision refers to a person with a special preferential right, pledge, hypothec or right of retention under the *Commercial Code*. The right of separation is supported by the ‘remainder principle’ (CivRL Art. 88). Secured creditors have a right to participate in a Civil Rehabilitation proceeding to the extent that the full amount of the secured money owed to them cannot be satisfied from the proceeds of a sale of the secured property.

33 According to the Ministry of Justice team, there were also a reasonable number of opposing opinions. There were also opinions that suggested that conditions for the granting of a suspension be made clear in the legislation and that the period of time for the suspension be specified. MIYAMA ET AL, *supra* note 31, at 33. On the conditions for the granting of a suspension and the introduction of a suspension into the Civil Rehabilitation procedure generally, see A. FUKUNAGA, *Tōsan hō ipponka no zehi to mondaiten* [The advantages, disadvantages and problems of consolidating the insolvency law regime] Jurisuto 1111 (1997) 29. On specifying a limited time for the suspension period, see also S. TAGASHIRA, *Shin saikengata tetsuzuki ni okeru tanpoken no seigen zakkan* [Mixed feelings about limiting secured interests in the new reconstruction-type procedure], in: Ginkō Hōmu 21 563 (1999) 23.

34 See K. ANDERSON / S. STEELE, *Insolvency Law, Japan Business Law Guide*, CCH [loose-leaf], forthcoming 2003, at para. 19-336. See also T. SONOO, *Minji saisei-hō shikō go ni nenkan no unyō jōkyō ni tsuite (I) Tōkyō Chisai no genjō* [The operation of the Civil Rehabilitation Law for the 2 years since it was enacted: (1) The present situation in the Tokyo District Court], in: Hōritsu no Hiroba 10 (2002) 10, 20. He notes that the usual period for a stay on secured creditor’s rights is 3 months in the Tokyo District Court. There were also few reported cases of a moratorium being ordered under the corporate arrangement procedure. On moratoriums in Japanese insolvency proceedings before the

The other proposed restriction on security interests was in the form of a demand procedure which would force secured creditors to participate in a proceeding at the request of the debtor or the administrator. The demand for secured creditor participation was based on the Special Liquidation procedure in the *Commercial Code* (Art. 449). The Ministry of Justice team found that the idea of enabling debtors or administrators to demand that secured creditors participate in the proceeding received the support of a majority of responses.³⁵ However, this proposal did not make it into the *Civil Rehabilitation Law*. It was replaced in the final months of the reform process as a result of a movement arguing that the restrictions on secured creditors as they stood in the *Questionnaire* would be incapable of rehabilitating debtors with property worth less than its secured value. The traditional debate in Japan over the introduction of a moratorium, was overtaken by a renewed emphasis on the sudden increase in insolvencies and the problem of under-secured lending, exacerbated by deflation.

III. OVERVIEW OF THE SCHEME IN THE CIVIL REHABILITATION LAW

A. *Outline of the Scheme*

Under the Scheme in the *Civil Rehabilitation Law* a debtor has a right to demand that a secured creditor's interest be extinguished if the secured property is indispensable to the rehabilitation of the debtor. The Scheme can be summarised as follows:

1. the security interest must exist at the commencement of the Civil Rehabilitation proceeding (CivRL Art. 148-1);
2. the secured property must be indispensable to the continuation of the rehabilitation debtor's business (CivRL Art. 148-1);
3. the debtor may petition the court, including a description of the secured property, a valuation, a description of the security interest and the amount of the secured money (CivRL Art. 148-1 and 148-2); and
4. the debtor must pay into court an amount commensurate with the value of the secured property (CivRL Arts. 148-1 and 152-1).

If a court decides to grant a ruling to cancel the secured creditors' interests referred to in the debtor's petition, it must notify those secured creditors and provide them with a copy of the debtor's petition and attachments (CivRL Art. 148-3). If a secured creditor objects to the court's ruling, it may apply for a *kôkoku* appeal immediately (CivRL

reforms and the need for reform see A. FUKUNAGA, *Saikengata tôsan tetsuzuki kaishi to tanpoken jikkô chûshi* [Commencement of a reconstruction-type insolvency procedure and suspension of the enforcement of security interests], in: Kinyû Shôji Hanrei 1060 (1999) 24.

35 MIYAMA ET AL, *supra* note 31, at 33.

Art. 148-4).³⁶ If the secured creditor disagrees with a debtor's estimate of the value of the secured property, it may file a petition for a court valuation within one month of the delivery of the debtor's petition (CivRL Art. 149-1). In that case:

1. the court, unless it rejects the secured creditor's petition, must appoint a valuer (CivRL Art. 150-1);
2. the court must decide on a value on the basis of the valuer's appraisal (CivRL Art. 150-2);
3. the standard for the valuation will be the liquidation value of the asset;³⁷
4. where a number of secured creditors' interests are to be cancelled and a number of objections are received, the court may deal with them together (CivRL Art. 150-3); and
5. the court's ruling on value will bind all affected secured creditors, even those that did not object to the debtor's valuation (Art. 150-4).

B. *Origins of the Scheme*

The Scheme seems to have been most strongly supported by members of the Osaka Bar Association.³⁸ Although it was not included in the original proposed draft of the law (released on 16 April 1999), after lobbying by academics and lawyers who often represent debtors, such as Osaka lawyer *Kiuchi*, it became part of the agenda for the

36 An immediate *kôkoku* appeal (*sokuji kôkoku*) is usually provided for when an issue should be settled quickly so that a proceeding may progress. It differs from ordinary *kôkoku* in that there is a time limit within which an immediate *kôkoku* appeal must be made – usually one week from the day that notice of a ruling is received from the court, although sometimes a period of two weeks is specified.

37 This is not stipulated in the *Civil Rehabilitation Law*, but is set out in the Supreme Court Rules, rule 79-1. The issue of whether to use liquidation or going concern values was disputed. See K. YAMAMOTO, *Shin saikengata tetsuzuki ni okeru tanpoken no shogû to kokusai tôsan* [Treatment of security interests and international insolvencies in the new reconstruction procedure], Paper presented at the Japanese Civil Procedure Symposium (operated annually by *Shôji Hômu Kenkyû-kai* [Commercial Law Association]), Tokyo, 3 April 1999) 14, 19-20 (Copy on file with author). This was later reproduced as K. YAMAMOTO, *Shin saikengata tetsuzuki ni okeru tanpoken no shogû to kokusai tôsan* [Treatment of security interests in the new reconstruction procedure and cross-border insolvencies], in: NBL 665 (1999) 29. References in this article refer to the symposium paper. For a practitioner's viewpoint, see M. ICHIKAWA, *Tanpoken no shômetsu* [Extinguishing security interests], in: M. TAKANAKA / S. KONDO / K. MATSUSHIMA / M. ICHIKAWA / H. NAKAMURA (eds.), *Jitsumu minji saisei-hô* [Legal Practice and the Civil Rehabilitation Law] (2000) 269.

38 OSAKA BENGOSHI-KAI [Osaka Bar Association], *Tôsan hôsei ni kansuru kaisei kentô jikô ni tai suru ikensho* [Opinion with regard to the Questionnaire on Reforms to the insolvency law system], 31 March 1998 (Copy on file with author). For a commentary on the Osaka Bar Association's response see T. IKEDA, *Tôsan tanpo-hô no shinjidai* [A new era for the insolvency security law], in: Hanrei Taimuzu 991 (1999) 20.

new *Civil Rehabilitation Law* at the beginning of 1999.³⁹ A similar procedure was also suggested by the Ministry of International Trade and Industry (MITI)⁴⁰ and the Japan Federation of Bar Associations (*Nichibenren*)⁴¹ in their responses to the initial *Questionnaire*⁴² in December 1997. However, all of the proposals lacked detailed analysis of the possible effects of the Scheme on secured creditors' interests.⁴³

Kiuchi argued that the economic climate in Japan, where the main assets of most debtors likely to use the Civil Rehabilitation procedure are secured for more than they are worth, made it impossible for debtors to repay all of their secured creditors and rehabilitate.⁴⁴ He also argued that the pre-reform insolvency laws were skewed too far in favour of secured creditors against unsecured creditors. Unsecured creditors rarely received any payment from the sale of secured property once secured creditors were paid. This meant that unsecured creditors were unlikely to support rehabilitation.⁴⁵ In his view, rehabilitation equated with saving the debtor's business. A simple moratorium

39 KIUCHI, *supra* note 8; M. KIUCHI, *Shin saikengata tetsuzuki ni okeru tanpoken no toriatsukai – tanpoken ni taisuru 'hyōka' seido no dōnyū* [Treatment of secured claims in the new reconstruction procedure: introduction of an 'evaluation' system for secured claims], in: Hanrei Taimuzu 991 (1999) 12. It also gained the support of academics such as FUKUNAGA. See FUKUNAGA, *supra* note 34, at 28. On the process of reform with respect to extinguishing generally see, e.g. A. SHINOMIYA, *Shin saikengata tetsuzuki to tanpoken no toriatsukai* [The new reconstruction-type procedure and treatment of security interests], in: Ginkō Hōmu 21 563 (1999) 5, especially at 6.

40 TŌSAN HŌSEI KENKYŪ-KAI TSŪSANSHŌ [Insolvency law system research group, Ministry of International Trade and Industry (MITI)], *Shin saikengata tetsuzuki' ni kan suru teigen* [A proposal with regard to the 'New reconstruction-type procedure'], 17 March 1999, 80-2 (Copy on file with author). According to Matsuda, people such as Fukunaga and himself who advised MITI presented the idea to MITI telling them it was the Osaka Bar Association's idea. Comments made by MATSUDA, in: H. TAKAHASHI (Moderator), *Tōsan-hō kaisei hōkō: tōgi* [Trends in insolvency law reform: discussion] [Series] 'Jō' 'Part 1' NBL 666 (1999) 6, 'Part 2' NBL 667 (1999) 34, 'Part 3' NBL 668 (1999) 30 (Participants = H. KOBAYASHI, S. TAKAGI, T. MIYAMA, T. MATSUO, H. YAMAMOTO, S. TAGASHIRA, Y. MATSUDA, H. NAKAJIMA, S. YOSHINO, H. TAKADA, C. SŌDA, M. HATA, A. SHINOMIYA, J. MATSUSHITA, M. TAHARA, KAZUHIKO YAMAMOTO, S. MIYAKE, T. UEHARA, KATSUMI YAMAMOTO, T. NAKANISHI and M. TAKESHITA), 'Part 2' 43.

41 NIHON BENGOSHI RENGŌ KAI [Japan Federation of Bar Associations], *Tōsan hōsei ni kansuru kaisei kentō jikō' ni tai suru ikensho* [Opinion with regard to the Questionnaire on Reforms to the insolvency law regime], May 1998, <http://www.nichibenren.or.jp/sengen/iken/9805_3.htm> (Copy on file with author).

42 See *supra* note 28 on the *Questionnaire*.

43 Probably the first person to really consider the details of the proposal from a theoretical perspective was KAZUHIKO YAMAMOTO, arguing in support of introducing the Scheme. This only occurred in April 1999, less than six months prior to the finalisation of the draft Civil Rehabilitation Bill by the Legislative Deliberative Council (*Hōsei Shingi-kai*). See K. YAMAMOTO, *supra* note 37. KIUCHI did make some attempt at an analysis of the problems involved in introducing the system prior to YAMAMOTO, but his arguments were not backed up by an extensive theoretical analysis. KIUCHI, *supra* note 8, at 12-3.

44 KIUCHI, *ibid* 20.

45 *Ibid* 13.

on the enforcement of security interests would not prevent secured creditors from enforcing claims against property necessary for rehabilitation after a moratorium expired with the conclusion of a proceeding.⁴⁶ Hence the need to extinguish the secured creditors' interests.

Kiuchi gave the following simple example in support of the introduction of the Scheme:

Company A is insolvent. It possesses exclusively land, buildings and equipment (for reasons of capital and technology, let us presume that it is not possible to move them). The value of the land and building is \$1million. There are two secured creditors: first secured creditor with security worth \$1million; and second secured creditor with security worth \$1million. There are ordinary creditors who do not have security who are owed a total of \$4million. Company A currently has a profit capacity of \$200,000 per year. Thus under a rehabilitation plan, which can run for a maximum of 10 years, it is possible to pay \$2million.⁴⁷

Under substantive Japanese law, the debtor must pay both the first and the second-ranking secured creditors in full before the security interests will be extinguished, leaving nothing for the unsecured creditors under the plan (*Civil Code* Art. 396).⁴⁸

Under the Scheme, the land and building of Company A would be returned to the debtor unencumbered if the debtor paid a reasonable price into court for distribution to secured creditors.⁴⁹ This amount would be limited to the present value of the land and building, that is, \$1million. Under the payment plan the first secured creditor would be paid \$1million immediately. The remaining \$1million from Company A's profits that could be used to pay ordinary creditors would be shared amongst the second secured creditor, who would essentially become an ordinary creditor, and the original ordinary creditors over the term of the plan. The amount owed to ordinary creditors would thus be \$5million to be distributed over 10 years (\$4million owed to the original ordinary creditors plus \$1million owed to the second secured creditor). On *Kiuchi's* calculation, this meant at a distribution rate of 20%. However, if there are more than first and second-ranking secured creditors (and for security interests created during the Bubble period in Japan this was often the case) creditors other than the first-ranking secured creditor are unlikely to share in such a large distribution percentage. In any event, the

46 Anecdotal evidence in relation to Australia's Voluntary Administration procedure suggests that this is not true. Secured creditors find it difficult to exculpate themselves from the Voluntary Administration once a deed of company arrangement has been executed even though they may enforce their security either (1) during the 10-days following the commencement of the proceeding before the moratorium comes into effect or (2) after the proceeding comes to an end if they did not vote in favour of the deed of company arrangement.

47 KIUCHI, *supra* note 8, at 12-13. I have exchanged 1 million dollars for every 100 million yen in *Kiuchi's* example.

48 This is because of the indivisibility principle in the *Civil Code*, as discussed below.

49 The following discussion also follows *Kiuchi's* example. KIUCHI, *supra* note 39, at 13.

lower ranking secured creditors are also prejudiced because they must wait for payment under the plan.

C. *Precedents for the Scheme*

The Scheme under the *Civil Rehabilitation Law* has been described as revolutionary.⁵⁰ However, like most provisions in the *Civil Rehabilitation Law*, the Scheme draws on existing precedents. The two mechanisms that provided precedents for the Scheme are the purging scheme under the *Civil Code* (*Minpō* Law No. 89/1899) and the scheme for extinguishing rights of retention under the old *Corporate Reorganisation Law* (Corp RL).⁵¹ These other schemes have been rarely used and both are controversial.

The fundamental similarity between the previous schemes and the Scheme under the *Civil Rehabilitation Law* arises from the fact that all three override the importance placed on protecting secured creditors in the Japanese *Civil Code*, particularly reflected in the principle of indivisibility (*fukabunsei*) (*Civil Code* Arts. 296, 305, 350, 372).⁵² Indivisibility means that a security interest cannot be extinguished unless the debtor pays the creditor the whole of the amount of the security owed to the creditor. This is based on the French concept, *indivisibilité*.⁵³ Previously, it was accepted in Japan that this was part of the nature of security interests and an indisputable principle.⁵⁴

50 See S. FUJIWARA, *Minji saisei tetsuzuki no kaisetsu* [Interpretation of the Civil Rehabilitation procedure] (1999) 26. See also K. KAMATA, *Tōsan-hō ni okeru butsuteki tanpoken no shogū – Minpō no tachiba kara* [Treatment of real security interests in insolvency law – From a Civil Code perspective], Paper presented at the Annual Minshō Gakkai [Civil Procedure Conference], Tokyo, 16 May 1999) 4. Kamata argued that the Scheme represented a “changing of the guard” away from individual enforcement in favour of collective proceedings.

51 *Corporate Reorganisation Law* (*Kaisha kōsei-hō* Law No. 172/1952); Engl. transl. prior to amendment in 2002: *Kaisha kōsei-hō at EHS Law Bulletin Series LZ*, No 2350. The 1952 *Corporate Reorganisation Law* was substantially amended and replaced by the new *Corporate Reorganisation Law* (*Kaisha kōsei hō* Law No. 154/2002) which came into effect on 1 April 2003. The new law includes a scheme (Arts. 104-112) which is similar to the Scheme set out in the *Civil Rehabilitation Law*.

52 Indivisibility applies to all real security interests. This principle is provided for separately in the *Civil Code*, for each security interest that it covers, starting with the right of retention (Art. 296). Latter provisions on security interests refer to article. 296 and apply *mutatis mutandis* (see *Civil Code* Arts. 296, 305, 350, 372).

53 On the concept of *indivisibilité* in the French *Code civil* (Civil Code) 1804 from an insolvency law perspective see H. NAKAJIMA / T. TAKAHASHI, *Tanpoken shōmetsu seikyū seido to tanpoken no fukabunsei – furansu minpō / tōsan-hō kara no shisa* [Demand to extinguish security interests system and the indivisibility of security interests – Suggestions from the French Civil Code and insolvency law], in: *Ginkō Hōmu* 21 564 (1999) 60.

54 Real security interests in Japan are said to have certain ‘effects’ and ‘natures’. The real security interests under the *Civil Code* are: rights of retention; liens or preferential rights; pledges; and hypothecs. They entitle the holder of that interest to: preferential payment; retention; and the fruits of the secured property.

Consequently, the principle of indivisibility was thought to be the biggest theoretical obstacle to the introduction of the Scheme in the *Civil Rehabilitation Law*.⁵⁵

1. *Purging Scheme under the Civil Code*

Under the *Civil Code*, a debtor must repay the whole of the secured money before a security interest created in real property can be cancelled.⁵⁶ Where the whole of the secured money is not repaid, the creditor has the right to enforce the security and recoup the secured money from a sale under the provisions of the *Code of Civil Procedure* (*Minji soshô-hô* Law No. 109/1996). The purging scheme in the *Civil Code* allows a third party purchaser to make an offer to the secured creditor and if the creditor accepts, its security interest will be extinguished (*Civil Code* Art. 378). However, if the secured creditor objects, he/she can petition for an official auction for a higher price (*sôka kyôbai*). If there is no offer at the auction which is one tenth higher than the price offered by the third party purchaser, the secured creditor must pay the third party purchaser the initial offer price plus the extra one tenth (*Civil Code* Arts. 384-2 and 385, *Code of Civil Procedure* Arts. 185-7).

According to Kazuhiko Yamamoto, a member of the Insolvency Law Reform Committee and proponent of the introduction of the Scheme, the purging scheme in the *Civil Code* (Arts. 378-87) provided a precedent for allowing policy considerations to override the protection of secured creditors and the principle of indivisibility. He argued that the principle of indivisibility was conceived of by the French as being merely a *garantie supplémentaire* (supplementary guarantee)⁵⁷ and concluded that the purging scheme in the *Civil*

55 K. YAMAMOTO, *supra* note 37, at 16. Other principles and concepts which support the protection of secured creditors in Japanese law that Yamamoto and other writers explore in relation to the Scheme include: secured creditors' rights to choose the time of enforcement; secured creditors' rights to object to an official auction where there is no surplus (*Civil Execution Law* (*Minji shikkô-hô* Law No. 4/1979) Art. 63); and the concept of improving a secured creditor's ranking as higher ranked secured creditors are satisfied. For an interesting argument in support of the Scheme based on the effect of the reforms to the *Bankruptcy Law* (*Hasan hô* Law No. 71/1922) and the diminishing of the indivisibility of security interests and the right to object to an official auction without a surplus see J. MATSUSHITA, *Tanpoken shômetsu seido no tôsan-hô jô no chiizuke ni tsuite no shiron* [Essay on the position of the system of extinguishing security interests in insolvency law], in: *Ginkô Hômu* 21 564 (1999) 58.

56 This is known as a 'hypothec' in Japan, which is an interest similar to a mortgage over an immovable asset. A hypothec gives the creditor (the obligee) a right to auction the secured property where the debtor defaults and to receive distribution from the sale of security in preference to other creditors. Title is not transferred to the creditor: the debtor retains possession of the security and can use the property. For an English language source on Japanese security generally see *Doing Business in Japan*, Chapters 4, 4A and 5 on Security [Matthew Bender Loose-leaf].

57 K. YAMAMOTO, *supra* note 37, at 16. Yamamoto argues that according to the memorandums of *Boissonade de Fontarabie, Gustave Emile*, the author of proposed draft legislation which greatly influenced the Japanese drafters of the Japanese *Civil Code*, the Frenchman intended

Code was designed to support the circulation of immovable assets in the market, and as such, purging was a justifiable exception to the protection afforded secured creditors.⁵⁸

Like the Scheme in the *Civil Rehabilitation Law*, the purging scheme in the *Civil Code* is designed to apply to cases where the proceeds from a sale will not be sufficient to cover the secured money owed to a creditor.⁵⁹ By analogy, *Yamamoto* argued that rehabilitation and equality amongst creditors are policy reasons which justify overriding the protection afforded to secured creditors in the *Civil Code*.⁶⁰ At the very least, supporters of the introduction of the Scheme argued that rehabilitation is a sufficient reason to limit the protection of secured creditors in the Civil Rehabilitation procedure to the present value of the secured property. They claimed that this is all that secured creditors could hope to obtain in the event of an insolvency of the debtor anyway.⁶¹

However, the purging scheme is arguably not an appropriate analogy for the Scheme.⁶² First, in the case of the Scheme, it is the debtor and not a third party purchaser who has the right to demand that a secured creditor's interest be extinguished. This means that in some cases, a debtor may petition for Civil Rehabilitation for the sole purpose of extinguishing a secured creditor's interest. This raises interesting issues in terms of the debtor's perceived responsibility for its own insolvency. Second, the higher price auction mechanism in the purging scheme gives the creditor the option of

the provision to be a direct application of the French concept and thus the Japanese reading of indivisibility as indisputable perhaps goes too far.

- 58 K. YAMAMOTO, *ibid* 16. On this point, see especially, S. NISHITSU, *Tekijo* [Purging], in: *Kyūdai Hōgaku* 74 (1997) 35, 42. She argues that a public interest debate focusing on the circulation of immovable assets was developed in the context of the purging scheme because it was thought that the protection of third party purchasers, that is, private interests, was not a sufficient justification for extinguishing of security interests under the purging scheme.
- 59 Naturally, secured creditors would not voluntarily agree to having their security interests extinguished without recouping the whole of the secured money owed to them. See NISHITSU, *ibid* 36.
- 60 K. YAMAMOTO also argues that the goal of rehabilitation should override secured creditors' rights to choose when to enforce their security. K. YAMAMOTO, *supra* note 37, at 17-18, 20. YAMAMOTO conceives of the right to choose when to enforce security as upholding the concept of indivisibility. KIUCHI also questions whether these rights should be allowed to override the goal of rehabilitation. KIUCHI, *supra* note 39, at 12.
- 61 See, e.g., Y. IKEDA, *Tsukai de no aru tanpoken shōmetsu seikyū ken* [A usable right to the security interest extinguishing scheme], in: *Ginkō Hōmu* 21 563 (1999) 17, 17. A similar argument is made with respect to the purging system: if the creditor is able to receive a reasonable price, there should be no need to go through the cumbersome official auction procedure in order to realise an asset where a third party purchaser is prepared to pay that reasonable price. See NISHITSU, *supra* note 58, at 42-3. *Itō* questions this conclusion in terms of secured creditors' rights. S. ITŌ, *supra* note 25, at 98.
- 62 See, e.g., S. ITŌ, *ibid* 98. See also H. KOBAYASHI, *Tanpoken shōmetsu seikyū seido no hyōka to mondaiten* [The secured interests extinguishing demand system: evaluation and problems], in: *Ginkō Hōmu* 21 563 (1999) 14, 14; N. IIKUMA, *Jittai hō kara mita tanpoken shōmetsu seikyū seido* [The secured interests extinguishing demand system from a substantive law perspective], in: *Ginkō Hōmu* 21 563 (1999) 16.

obtaining the secured property for itself and it resembles a market mechanism not unlike the auction method a secured creditor might use in order to enforce its security without reference to the scheme. In comparison, the appeal and court valuation system which is set out under the *Civil Rehabilitation Law*, is like a compulsory acquisition because the price is decided by the debtor or the court-appointed valuer and the secured creditor has no option but to accept the court's decision.⁶³

2. *Extinguishing Rights of Retention under the Corporate Reorganisation Law*

Similarly, simple comparisons of the Scheme and the scheme for extinguishing rights of retention (*ryûchi-ken*) in the 1952 *Corporate Reorganisation Law* are also questionable. Under the 1952 *Corporate Reorganisation Law*, where a creditor with a *Commercial Code* right of retention kept an object that was worth more than the amount of its secured claim, the reorganisation trustee had a right to demand that the security interest be extinguished by paying into court either the amount of the secured claim or the value of the object, whichever was lower. In this case, the secured creditor has an interest in the money that has been paid into court equivalent to that of a pledgee.

This system looks similar to the Scheme under the *Civil Rehabilitation Law*, but there are a number of differences. First, the Scheme has the potential for much wider application than the procedure under the 1952 *Corporate Reorganisation Law*. The 1952 *Corporate Reorganisation Law* only applied to stock corporations and before a judge would commence a Corporate Reorganisation proceeding he/she had to be convinced that there was a good chance of a successful reorganisation.⁶⁴ In contrast, the new *Civil Rehabilitation Law* applies to all persons and the requirements to commence a proceeding have been relaxed, thus leading to many more cases than those heard under the Corporate Reorganisation proceeding.⁶⁵

Second, the type of security interest that could be extinguished under the Corporate Reorganisation procedure was limited to rights of retention arising under the *Commercial Code* (*Shôhō Law* No. 48/1899), whereas the Scheme will cover at least all of the main types of statutory security in Japan. Third, the extinguishing of rights of retention where the creditor was holding an asset that was necessary for the reorganisation of the debtor was arguably justifiable in light of the clear rehabilitation aims of the *Corporate Reorganisation Law*; that is, to maintain businesses with certain social and economic importance to the community (CorpRL Art. 1). The aims of the new *Civil Rehabilitation Law* are not so unequivocal (CivRL Art. 1). Lastly, a trustee

63 The creditor has a right to complain to the court that the property in question is not indispensable to the debtor's rehabilitation.

64 See comments made by S. TAKAGI in: TAKAHASHI (Moderator), *supra* note 40, at 'Part 2' 38.

65 See ANDERSON/STEELE, *supra* note 34, at paras. 19-300, 19-310, in relation to the application and commencement of the *Civil Rehabilitation Law*. See STEELE, *supra* note 1, at 65-66 in relation to the relaxing of commencement requirements.

was always appointed in a corporate reorganisation proceeding and it is the trustee who demanded that a security interest be extinguished, whereas the procedure in the new *Civil Rehabilitation Law* is at least designed to be a debtor-in-possession procedure, so there is the potential for the debtor itself to make the demand.⁶⁶

D. Technical Issues

1. What Security Interests are Covered ?

One of the main problems with the Scheme is that it is not clear what security interests it will encompass. Despite arguments that it supports equality amongst creditors, the Scheme arguably only applies to the list of security interests referred to in the law: special preferential rights, pledges, mortgages or hypothecs (*teitōken*) and *Commercial Code* rights of retention (CivRL Art. 148-1, as listed in Art. 53-1). This means it may not apply to *Civil Code* rights of retention or non-statutory security interests such as title-security transfers,⁶⁷ nor to taxation claims and lease interests. However, there is scope to argue that the reformers intended something different. The provisions in the *Civil Rehabilitation Law* follow the provisions drafted for discussion in the Insolvency Law Reform Committee to be found in the Proposed Draft Bill of 23 July 1999. In that Proposed Draft Bill, the Scheme was only to apply to those security interests listed under Article 77-1 of that Bill (see Proposed Draft Bill (23 July 1999) Art. 111-1). However, the Draft Bill of 26 August 1999 referred to all security interests (Art. 140-1, referring to the list in Art. 50-1). It is not clear whether this was merely a simple grammatical amendment or whether the Scheme was intended to include non-statutory security interests.⁶⁸ In the final version of the Bill that became the law, a list of security interests to which the Scheme applies was supplied. However, commentators predict that this issue will be litigated, at least initially, until the courts define the parameters of security interests that fall within the Scheme.⁶⁹

66 In practice, a supervisor is being appointed in the majority of Civil Rehabilitation proceedings. ANDERSON / STEELE, *supra* note 34, at para. 19-322.

67 A title-security transfer can apply to immovable and movable assets. It gives the creditor ownership rights with respect to the secured property, but the debtor retains the asset and may use it. Where the debtor defaults, the creditor may sell or acquire the secured property. This type of security includes what *Hasebe* describes as 'title-oriented security interest in inventory'. Such an interest may be created in accounts receivable and includes any after-acquired goods. Y. HASEBE, The Position of Creditors in the Distribution of Insolvent Estates: Consensual Secured Creditors in Japan, in: J.S. ZIEGEL (ed.), *Current Developments in International and Comparative Corporate Insolvency Law* (1994) 403, 407.

68 S. ITÔ, *supra* note 25, at 96.

69 *Kazuhiko Yamamoto* argued that the only real problem with respect to what the Scheme covers is idle property – property not being used in the debtor's business – because it would be difficult to argue that such assets are indispensable to the rehabilitation of the debtor.

2. *Time-consuming Scheme?*

Before the *Civil Rehabilitation Law* came into effect, there was also concern that it would lengthen the rehabilitation process which in turn would increase the likelihood of the debtor's assets diminishing in value. Delays may arise with respect to the Scheme because secured creditors have a right to object to the decision to extinguish their security interests and the amount that the debtor proposes to pay into court.⁷⁰ However, *Fujiwara*, a bankruptcy specialist, argued that the Scheme would speed up the rehabilitation process in practice by providing for a quick business transfer because debtors can be made more attractive for sale.⁷¹

Certainly, this type of pre-packaged plan speeds up the time that it takes to transfer business assets once a proceeding is commenced, even if there are delays caused by disgruntled secured creditors who exercise their rights to appeal under the Scheme.⁷²

3. *Non-insolvency Use of the Scheme*

Japanese commentators were also concerned that the Scheme may be used by debtors in a non-insolvency context.⁷³ Given that to date there have been few instances of the

Comments made by K. YAMAMOTO in: TAKAHASHI (Moderator), *supra* note 40, 'Part 2' 42. Note, however, in relation to a secured creditor making an objection on the basis that an asset is not indispensable to the rehabilitation of the debtor, *Ichikawa* makes the interesting point that if the secured property is indispensable to the rehabilitation of the debtor, surely it would not be selling the asset. The suggested response to this is that the provision should be read widely enough to include the proceeds of the sale being indispensable to the rehabilitation. See ICHIKAWA, *supra* note 37, at 263. *Ichikawa's* book is a reference guide for practitioners using the *Civil Rehabilitation Law*. He argued against other commentator's interpretations that a lessor with a finance lease has a right of separation and would fall within the scope of the Scheme. See also ICHIKAWA, *supra* note 37, at 261. It would seem that a ruling from the Osaka District Court (No 1) (Case No. 90100 (*mo*) 2001) has confirmed this view, rejecting a petition to extinguish a lessor's retention of title right in respect of leased assets. However, the Court found that the property in question could not form the subject of a petition under the Scheme because it could not be said to have been the property of the debtor in the first place.

70 See, e.g. KOBAYASHI, *supra* note 70, at 15.

71 FUJIWARA, *supra* note 50, at 63-4.

72 Based on Tokyo District Court statistics up to July 2002, 623 juristic persons filed for ordinary Civil Rehabilitation and of these cases court permission for a business transfer before a rehabilitation plan was confirmed in 29 cases and a business transfer was included in the plan in 7 cases. See SONOO, *supra* note 34, at 10, 11. *Sonoo* also notes that the courts are becoming faster at turning Civil Rehabilitation cases around. For example, in 2001 courts made rulings on Civil Rehabilitation petitions within 15 days in a median of cases, in contrast to the former framework under the Composition procedure where a decision took between two to six months. See C. TSUTSUMI/ K. KOSUGA, *Minji saisei jiken-hô shikô go 2 nenkan no gaikyô wo furikaette* [Looking back on the general situation of the Civil Rehabilitation cases two years after enactment of the law], in: NBL 741 (2002) 8, 11.

73 On the protections against this see, e.g. the brief mention in T. MIKAMI, *Tanpoken no*

Scheme being used in court, it may be that the Scheme is being used by debtors as a stick to encourage creditors to negotiate for the rehabilitation of a debtor or to refinance the debtor.⁷⁴ Takagi suggested that petitions for commencement should be denied if they are aimed at using the procedure just to refinance a company, but acknowledged that this will be difficult for courts to regulate.⁷⁵

Similar issues have caused concern in Japan in the context of the other schemes.⁷⁶ The purging scheme, for example, is criticised because it has been used in practice to coerce creditors into accepting payments by third party purchasers that are below the market value of the property: it not only extinguishes the secured creditor's interest, but forces them to guarantee a higher price at auction (*Civil Procedure Code* Art. 186-1).⁷⁷ For these reasons, there are strong calls for the purging scheme to be reformed or repealed,⁷⁸ and judicial decisions attempt to limit the use of purging by interpreting the conditions for exercising a right to purge strictly.

shômetsu seikyû to tekijo [Demands to extinguish secured interests and purging], in: Ginkô Hômu 21 563 (1999) 27.

- 74 See, e.g. S. ITÔ, *supra* note 25, citing Y. MATSUDA, *Shin saikengata tetsuzuki ni tsuite no kikaku hôteki teigen* [A comparative law proposal with respect to the new reconstruction procedure], in: Ginkô Hômu 21 563 (1999) 10, 13. The Scheme could be used where a debtor wishes to refinance: the new financier could provide the money to extinguish the existing security interests and take over the obligations of the debtor. The Scheme is also open to use by a debtor who could transfer assets to a third party or even a new company set up by the management of the debtor.
- 75 S. TAKAGI, *Saimu chôsei tetsuzuki (kashô) ni okeru tanpoken shômetsu seikyû no ranyô bôshi saku* [Policy to avoid misuse of the secured interests extinguishing demand in the debt adjustment procedure (tentative title)], in: Ginkô Hômu 21 563 (1999) 35. See also TAGASHIRA, *supra* note 33, at 23.
- 76 See, e.g. G. KÔNO, *Jittai-hô to no seigôsei ga kigakari* [Substantive law and concern about conforming to it], in: Ginkô Hômu 21 563 (1999) 22. He argued that compared to the purging scheme, there is less chance of the Scheme being used for non-insolvency purposes because the courts are involved. Whilst this might be true of the procedure itself, it does not stop debtors from, for example, threatening to use the *Civil Rehabilitation Law* in order to gain the upper hand in negotiations with secured creditors.
- 77 The aim of the purging system is usually said to be to protect third party purchasers and promote the circulation of hypothecated immovable assets and thus achieve harmonisation between the right to value and usufructuary rights. See T. UCHIDA, *Minpô III: Saiken sôron/tanpo bukken* [Civil Law III: General provisions of 'obligations' and 'real security rights'] (1996) 402; NISHITSU, *supra* note 58, at 37, 40.
- 78 For an excellent review of the issues involved in this debate and an analysis of the French origins of the purging scheme, see NISHITSU, *supra* note 58.

IV. FAILURE OF THE SCHEME?

A. *Use of the Scheme since 2000*

Despite the debate amongst academics and other stakeholders during the reform process and the popularity of the Civil Rehabilitation procedure,⁷⁹ very few debtors have used the Scheme in court since it became law as part of the Civil Rehabilitation procedure on 1 April 2000.⁸⁰ This suggests that, although the Scheme theoretically provides a debtor with a means to cancel a secured creditor's interest, at best it is providing them with leverage to negotiate with creditors outside of court. The Scheme has not created a turbulent environment for lenders. However, it has arguably made business transfers under the umbrella of a Civil Rehabilitation procedure more attractive and shifts the power balance in a Civil Rehabilitation procedure slightly away from secured creditors in favour of the debtor or its new financier/sponsor.

Business transfers are the most popular form of merger and acquisition (M&A) structure in Japan and their introduction into the Civil Rehabilitation procedure may have significant implications for economic and business literature on the difficulties of acquiring Japanese companies.⁸¹ Put simply, a business transfer is characterised by the transfer of a whole or part of the assets of a company which function as a structured organic part, although this may include transfers of real property assets.⁸² For the business transfer provisions to work effectively, there must be a buyer for the business assets of the debtor. Given the current economic climate in Japan, it is difficult to conceive of many investors wanting to purchase a business burdened with assets secured for more than they are worth or a debtor gaining a rehabilitation advantage by selling an asset for less than its secured value.⁸³

79 See ANDERSON / STEELE, *supra* above note 34, para. 19-312.

80 See ANDERSON / STEELE, *supra* note 34, at para. 19-342, citing TSUTSUMI / KOSUGA, *supra* note 81, at 11, 12, 13. SONOO, *supra* note 34, at 12, suggests that the Scheme will increase in popularity as more practitioners become used to the Civil Rehabilitation procedure.

81 On the use of mergers and acquisitions see FUJIWARA, *supra* note 50, at 66. See ANDERSON / STEELE, *supra* note 34, at para. 19-372 for an overview of business transfers under the *Civil Rehabilitation Law*. See also ANDERSON / STEELE, *supra* note 34, at para. 19-643 on the development of private equity funds in Japan, including foreign companies such as *Ripplewood*.

82 S. TAKAHASHI, *Eigyô jôto to tôsan shori* [Business transfers and insolvency workouts], in: S. TAKAGI / U. YAMAZAKI / M. ITÔ (eds.), *Tôsan-hô jitsumu jiten* [A practitioners' guide to insolvency law] (1999) 1173.

83 On the importance of finding a sponsor see H. MORII, *Furikô ga ôi wagi jôken* [Often unperformed: composition requirements], in: *Ginkô Hômu* 21 562 (1999) 72, 73. At the time the *Civil Rehabilitation Law* was being drafted, it was very difficult to find a sponsor or a number of buyers for a financially distressed company in a short period of time. See, e.g. *Tôsan no kenkyû: seido hirô kishimu 'seiji'* [Insolvency research: groaning system fatigue 'politics'], in: *Nikkei Shimbun*, Tokyo, 18 April 1998, as reproduced in: SANGI'IN HÔMU'INKAI CHÔSA SHITSU [Research Office of House of Councillors' Committee on Judicial Affairs], *Minji saisei hōan (Sankô shiryō)* [Civil Rehabilitation Bill (Reference

Security interests and other obligations are an obstacle to the operation of an insolvency procedure that relies on mechanisms like business transfers.⁸⁴ To make the business transfer system work in Japan so that business assets are able to be sold and acquired for the best possible price, a purchaser can use the Scheme to cancel out secured creditors' interests that may deflate the price of the business assets to be transferred.

Conversely, the only way that the Scheme works in practice is if a debtor can find a financing partner.⁸⁵ Financially distressed companies are unlikely to have the money necessary to pay-out secured creditors and thus use the Scheme by themselves.⁸⁶ Thus, debtors need a financier or a purchaser to obtain funds to use the Scheme. It may be that where a debtor has difficulties with its current financier, it could use the Scheme to change financiers. Certainly, used in conjunction with the business transfer provisions, the Scheme has the potential to bring about a change in the balance of rights between debtors and creditors in Japan.⁸⁷

Even before the *Civil Rehabilitation Law* came into effect, at least one commentator warned that it would not achieve the goals described by *Kiuchi* and its other proponents. According to *Susumu Itô*, financial institutions such as banks, who were comparatively more able to obtain security for a debt (and still are), had no need to be concerned about the Scheme.⁸⁸ Indeed, there was no major outcry from the banks about this reform.⁸⁹

materials)], Kakuho (Cabinet Law) No 64, December 1999, 76 (Copy on file with author).

84 *Baird* argues that a system that relies on liquidation needs to be able to create saleable assets free from all claims in order to be effective. He was discussing Chapter 7 in the *Bankruptcy Code* 1978 (US). See BAIRD (1986), *supra* note 2, 145-6.

85 See, e.g. M. YOSHIDA, *Tanpoken wa betsujōken no mama de yoi ka* [Should secured interests be retained as rights of separation?], in: *Ginkō Hōmu* 21 563 (1999) 33; K. YAMAMOTO, *supra* note 25. H. YAMAMOTO also argued that the types of companies who will be able to use the Scheme will be those aiming at a business transfer or who can negotiate a refinancing deal. See H. TAKAHASHI (Moderator), *supra* note 40, 36.

86 K. YAMAMOTO, *ibid* 22. Yamamoto argued that one way of overcoming this problem is by allowing debtors to pay off the secured creditor in instalments. However, he concluded that this would undermine the position of secured creditors 'too much' and a court could not make a secured creditor accept this kind of payment. This would effectively force the secured creditor to participate in a Civil Rehabilitation proceeding if it desired payment, because in the meantime it could not enforce its security. However, despite making full payment necessary under the law, he suggested that in practice, if the secured creditor consented, the debtor should be allowed to pay the amount necessary to extinguish the security interest in instalments. This might allow the debtor to use the scheme without the assistance of a sponsor or business transfer sale. There is no formal recognition of this idea in the *Civil Rehabilitation Law*.

87 For a pre-reform commentary on the probable importance of the Scheme for dealing with debt see MATSUDA, *supra* note 74, 13. For a post-reform detailed look at the Scheme, see *Minji saisei-hō chikujō kenkyū* [Research on the Civil Rehabilitation Law provision-by-provision], in: *Jurisuto Sōkan* 12 (2002).

88 *Ibid* 101.

89 However, there was concern about the standard for a court-valuation (*i.e.* liquidation or

This is because despite the massive deflation of asset values in Japan, the amount owed by the debtor to top ranking creditors is likely to come within the present valuation of the secured property and the reasonable price that the debtor must pay into court for distribution amongst secured creditors.⁹⁰ This seems to fit with one of the underlying currents of the reforms, which is the continuing emphasis on the role of banks in rehabilitation proceedings. One interpretation of what is occurring is that banks are no longer willing to intervene in informal workouts, but that their involvement is being inadvertently codified under the new laws by the incorporation of provisions that encourage their involvement in court-supervised workouts.⁹¹

Previously, the writing on corporate governance in Japan suggested that ‘main bank monitoring’ and *keiretsu* corporate groups mitigate the need for reliance on rehabilitation laws.⁹² According to these theories, main banks and affiliated members of a financially distressed company intervened where possible before a company was forced to use legislative rehabilitation procedures.⁹³ The banks in Japan were able to do this because of the high debt and equity interests that they have in companies in their fold. Furthermore, intervention by Japanese banks was not penalised by the courts in insolvency in the same way that it has been in America, where courts have looked harshly on bank intervention with respect to a debtor company before a loan agreement has actually been breached or any formal insolvency proceedings are commenced.⁹⁴ The underlying assumption behind the American courts’ attitude is that if creditors intervene before formal proceedings are commenced, they may attempt to reorganise the debtor in favour of their own private interests.⁹⁵

Under the *Civil Rehabilitation Law*, banks will be able to take part in business transfer negotiations without fear of avoidance provisions later making the deal void, so

going-concern). See K. YAMAMOTO, *supra* note 37, 19-20.

90 S. ITÔ, *supra* note 25, 101. Cf. *Kiuchi*’s example discussed above.

91 Similarly, the introduction of the Voluntary Administration procedure in Australia in 1992-93 initially appeared to weaken the position of secured creditors by introducing a moratorium on the enforcement of security for the first time in Australian insolvency law. However, despite some practitioners’ expectations the changes have not made a significant impact on the position of secured creditors. Secured creditors still play an important role and usually must actively support, or remain passive, for a company to survive beyond voluntary administration. See generally R. FRUCHTMAN, *Corporate Law Reform Act 1993: Australia’s Voluntary Administration Scheme*, in: *International Insolvency Review* 3(1) (1994) 33, 34, 53 and 55; P. CRUTCHFIELD, *Corporate Voluntary Administration Law* (1997) especially, Chapter 2; TOMASIC / WHITFORD, *supra* note 11, especially at Chapter 6 and 187.

92 See ANDERSON / STEELE, *supra* note 34, at para. 19-601 in relation to informal insolvencies in Japan and para. 19-620 in relation to the Guidelines for Out-of-Court Workouts and the so-called Main Bank System.

93 For a summary of the literature see K. KOJIMA, *Japanese Corporate Governance: An International Perspective* (1997) 108.

94 KOJIMA, *supra* note 104, at 110. Contrast with the discussion of the concern over avoidance of transactions.

95 *Ibid* 119, n 15.

long as the deal is completed within a Civil Rehabilitation proceeding context and with the court's permission. This will also place them in a good bargaining position with respect to the Scheme as they will be able to negotiate for a price that covers their secured money. Further, the introduction of the Scheme and business transfer provisions may encourage the banks' participation in Civil Rehabilitation proceedings because it will be in their interests to take a supervisory role. For example, although creditors do not have the power to veto a business transfer proposal put to a court prior to the formation of a Civil Rehabilitation plan, the court must listen to the opinions of creditors, the Creditors' Committee (if any) and employee representatives (CivRL Arts. 42-1, 42-2 and 42-3). In practice, where creditors object to the business transfer proposals, the court will be reluctant to give its permission to the transfer.⁹⁶ This means that a secured creditor may challenge a proposal under which it receives a pay out and its security is cancelled by objecting to the business transfer proposal. In this way, the creditor may be able to overcome the debtor's intended reliance on the Scheme without objecting to the debtor's valuation or appealing against it on the basis that the secured property is indispensable to the rehabilitation of the debtor.

B. Lack of Opposition to the Scheme

The Effect of the Bubble Bursting: Focus on Overcoming Debt Problems

Despite the Scheme's potential to upset the traditional treatment of security interests in Japan, it seems that there were not many people involved in the Insolvency Law Reform Committee or the wider reform process who disapproved of the Scheme.⁹⁷ However, there were some dissenting or cautionary voices. As *Susumu Itô*, for example, pointed out secured creditors obtain security, in part, to protect themselves in time of insolvency.⁹⁸ He was concerned that if Japanese insolvency law failed to protect their interests, they would become less likely to provide credit or would only do so at high interest rates in order to protect the increased risks involved in lending. This may have led to a credit crunch.⁹⁹ At the time of the creation of the *Civil Rehabilitation Law*, *Itô* was almost the only public critic to offer a comprehensive overview of the opposing

⁹⁶ ANDERSON / STEELE, *supra* note 34, at para. 19-374.

⁹⁷ See, e.g., the series of short articles in *Ginkô hômu* 21 run over a number of editions of the journal: *Ginkô Hômu* 21 562-4 (1999).

⁹⁸ See S. ITÔ, *supra* note 25, at 97, 99; S. ITÔ, *Tanpoken shômetsu seikyû seido to seijô jôtai tanpoken he no eikyô* [The security interests extinguishing demand system and the effect on normal security interests], in: *Ginkô Hômu* 21 563 (1999) 18.

⁹⁹ S. ITÔ, *ibid* 18. See also R. NAKAMURA, *Tanpoken shômetsu seikyû seido ni tsuite iken* [Opinion on the demand to extinguish security interests system] *Ginkô Hômu* 21 564 (1999) 57. NAKAMURA also expressed concern about a credit crunch because financial institutions might internalise the risk of their security being extinguished under the *Civil Rehabilitation Law*.

perspective.¹⁰⁰ He questioned whether rehabilitation is a good enough reason to override the traditional protection of secured creditors in Japanese law and suggested that the reformers were too concerned about the consequences of the end of the Bubble period.¹⁰¹

The lack of opposition to the Scheme could also reflect the fact that the *Civil Rehabilitation Law* does not prejudice all secured creditors to the same extent. The system favours the first-ranking secured creditor, but is particularly dismissive of the interests of subordinate secured creditors like the second-ranking secured creditor in *Kiuchi's* example. *Kiuchi* argued that this was necessary in order to realise the insolvency law principle of equality among creditors, but this is surely taking the definition of equality too far. Equality in insolvency law is arguably limited to equality amongst creditors of the same ranking; thus, it is sufficient that all unsecured creditors be treated equally.¹⁰² Further, if the majority of first-ranking secured creditors are large banks who are likely to be in the best position to constitute an organised opposition, and their interests are not being adversely affected, it is difficult to see the disparate interests that might make up subordinated creditors forming a coherent argument against the Scheme.

V. CONCLUSION

Although difficult to verify as yet, one of the outcomes of the Scheme for secured creditors may be that security over immovables will become too hot to handle and the shift in Japan towards types of security that are not covered by the Scheme will accelerate. That is, there will be a continuing move away from taking security over immovable assets. A similar phenomenon occurred in Australia as a result of the introduction of the Voluntary Administration scheme. Because secured creditors with a charge over the whole or substantially the whole of a debtor's assets are exempt from the moratorium

100 Other people to express reservations about the Scheme include, T. KATÔ, *Tôsan-hô ni okeru tanpoken jikkô no kisei – Sono arikata wo megutte* [Regulations on the enforcement of security interests in insolvency law – the way it ought to be], Paper presented at the annual Minshô Gakkai [Civil Procedure Conference], Tokyo, 16 May 1999. From a *Civil Code* perspective see KAMATA, *supra* note 50. From a retired banker's perspective see K. KATAOKA, *Kigyô tôsan tetsuzuki to tanpoken no toriatsukai ni tsuite no komento* [Comment on the treatment of security interests in the enterprise insolvency procedure], in: Hanrei taimuzu 991 (1999) 29.

101 S. ITÔ, *supra* note 25. He argued that if there are to be reforms to the Japanese law dealing with security interests, the reforms should be made to substantive law and not through the backdoor of procedural law such as insolvency law. This type of argument is reminiscent of arguments made by BAIRD / JACKSON, *supra* note 2.

102 ITÔ also argued that the principle of equality should not override the rights of secured creditors. S. ITÔ, *supra* note 25, at 97. He argued that the emphasis on unsecured creditors' rights and the lack of concern for lower ranking secured creditors almost suggests that the Scheme was designed to punish creditors for investing 'foolishly' during the Bubble period when their investment was under-secured.

under the Voluntary Administration for the first 10 working days, many creditors now take a charge over the whole or substantially the whole of a debtor's assets, whereas in the past they may have only taken security over specific real property assets.¹⁰³ The Scheme under the *Civil Rehabilitation Law* is also likely to discourage subordinate creditors from investing in debtors where there is not enough security to cover their investment, because Japanese companies will not be able to use immovable assets to obtain additional capital from subordinate creditors. This in turn may lead to changes in the way in which they raise capital.¹⁰⁴ These possible outcomes support *Baird and Jackson's* view that 'bankruptcy law does not exist in a vacuum'.¹⁰⁵

Further, insolvency law reform is still a moving target in Japan. Recently, the Japanese government set up the Industrial Revitalisation Corporation to focus on the reconstruction of corporate and financial sectors, and professional organisations and courses revolving around workouts have emerged, for example, the Japanese Association of Workout Professionals.¹⁰⁶ As for the Scheme, it would appear that the Insolvency Law Reform Committee did not consider extinguishing secured creditor's rights as too hot to handle. The new *Corporate Reorganisation Law* which came into effect on 1 April 2003 includes provisions based on the Scheme in the *Civil Rehabilitation Law*.¹⁰⁷

ZUSAMMENFASSUNG

Das japanische Zivilrechtliche Sanierungsgesetz (Minji saisei-hô, Gesetz Nr. 225/1999) wird seit seinem Inkrafttreten am 1. April 2000 von Schuldnern gerne in Anspruch genommen. Obwohl die Durchführung einer zivilrechtlichen Sanierung nach dem neuen Gesetz nicht als revolutionär neuartig bezeichnet werden kann und durchaus auf bisherige gesetzliche Bestimmungen zurückgreift, werden mit dem Gesetz auch grundsätzlich neuartige Regelungen z.B. zur Löschung bzw. Auslösung von Kreditsicherheiten

103 FRUCHTMAN, *supra* note 112, at 53.

104 S. ITÔ, *supra* note 25, at 97-99, 101. See also A. YAMANOME, *Tanpoken shômetsu seikyû seido no hyôka: sono ippankai to tokushukai* [Evaluation of the secured interests extinguishing demand system: an ordinary understanding and a special understanding], in: *Ginkô Hômu* 21 563 (1999) 30, 31.

105 BAIRD / JACKSON, *supra* note 2, at 95.

106 See Corporate rehabilitation drive set to take off, in: *The Asahi Shinbun*, 2 May, 2003, <www.asahi.com/english/business>, accessed on 19 May 2003.

107 Interestingly, the commentary on the reforms introduced by the new *Corporate Reorganisation Law* does not seem to have become caught up in arguments against including an extinguishing scheme based on the Scheme; rather, it focused on the amendments to the Scheme required due to the perceived differences between the Civil Rehabilitation procedure and the Corporate Reorganisation procedure. See, e.g. HÔMUSHÔ MINJIKYOKU SANJIKAN SHITSU (Office of the Counsellor of the Civil Affairs Bureau of the Ministry of Justice), *Kaisha kôsei-hô kaisei yôkô shian hosoku setsumei* [Supplementary explanation of the draft Bill to reform the Corporate Reorganisation Law], in: *NBL Bessatsu* [Special edition] 70 (2002) 100.

eingeführt (tanpô-ken no shômetzu seikyû seido). Der Einbruch des Immobilienmarktes in den vergangenen zehn Jahren hat dazu geführt, daß nun an vielen Vermögensgegenständen japanischer Unternehmen Sicherungsrechte für Forderungen bestehen, deren Betrag deutlich über den Wert dieser Vermögensgegenstände hinausgeht. Viele Forderungen sind also nicht hinreichend gesichert. Das Zivilrechtliche Sanierungsgesetz ermöglicht Gemeinschuldern, die ein Sanierungsverfahren nach diesem Gesetz betreiben, auch in einem solchen Fall in einer besonderen Verfahrensweise alle zugunsten von Gläubigern bestellten Sicherheiten gegen Bezahlung einer bestimmten Geldsumme auszulösen. Dazu ist die Bestätigung durch ein Gericht erforderlich. Der Gläubiger bzw. Sicherheitsnehmer besitzt zwar die Möglichkeit, dagegen Widerspruch einzulegen und eine Überprüfung der gerichtlichen Entscheidung herbeizuführen, allerdings nur im Hinblick auf die Angemessenheit der Höhe der Auslösesumme, nicht dagegen in grundsätzlicher Hinsicht zur Verhinderung dessen.

Auf den ersten Blick scheinen die neuen Bestimmungen die traditionelle Vorrangstellung, die dem Gläubiger, der zugleich Kreditsicherheitsnehmer ist, hinsichtlich seines Absonderungsrecht in der Insolvenz des Gemeinschuldners zukommt, zu beeinträchtigen. Kurz gesagt bedeutet diese Vorrangstellung, daß der gesicherte Gläubiger das Recht hat, die Verwertung des Sicherungsgutes außerhalb des förmlichen Insolvenzverfahrens zur Befriedigung seiner Forderungen zu betreiben. Darüber hinaus bedeutet das Verfahren zur Auslösung von Kreditsicherheiten nach dem neuen Gesetz auch insofern eine Bedrohung für einen Gläubiger, daß bereits die Möglichkeit zur Durchführung eines solchen Verfahrens dazu führen kann, daß er sich in Verhandlungen dazu genötigt sieht, einem Schuldner, der sich in einer finanziellen Zwangslage befindet, Zugeständnisse zu machen. Befürworter des Verfahrens argumentieren hingegen, daß es hierdurch Schuldner in finanzieller Bedrängnis erleichtert wird, sich zu sanieren, bzw. daß auf diese Weise ein größeres Interesse bei potentiellen Investoren geweckt wird, den Betrieb zu kaufen und die Sanierung durchzuführen. Dennoch haben bisher erst weniger Unternehmen von dieser Möglichkeit Gebrauch gemacht als allgemein erwartet.

Der Autor vertritt die Ansicht, daß die mangelnde Akzeptanz des Verfahrens zur Auslösung von Kreditsicherheiten nicht bedeutet, daß die Insolvenzrechtsreform insgesamt auf Ablehnung stößt. Es scheint jedoch so zu sein, daß dieses spezielle Verfahren nur geringe Bedeutung im Zusammenhang mit Gläubigern hat, für die erst-rangige Sicherheiten bestellt worden sind. Dies betreffe insbesondere Hausbanken als Gläubiger, die eng mit Unternehmen verbunden sind. Hier scheint das Verfahren für finanziell angeschlagene Unternehmen keine besonderen Vorteile zu bieten. Nach Meinung einiger in der japanischen Literatur werde die Popularität des Verfahrens schnell wachsen, sobald die Praktiker damit besser vertraut würden. Andererseits sei zu warten, daß Kreditgeber bzw. Sicherheitsnehmer hiergegen entschieden auf die eine oder andere Weise vorgehen würden, wenn sie eine Gefahr sähen, daß hierdurch ihre Interessen beschädigt würden. Zum jetzigen Zeitpunkt habe die Einführung dieser

neuen Methode zur Löschung bzw. Auslösung von Kreditsicherheiten durch wirtschaftlich angeschlagene Unternehmen zu keiner bedeutenden Veränderung der Lage für Kreditgeber geführt. Es sei demgegenüber so, daß die Einführung dieses Verfahrens zu einer gewissen Erhöhung der Attraktivität des Kaufs von angeschlagenen Unternehmen geführt habe, die ein Sanierungsverfahren nach dem Zivilrechtlichen Sanierungsgesetz betrieben. In diesem Zusammenhang verschiebe sich das traditionelle Kräfteverhältnis im Insolvenzverfahren geringfügig zugunsten des Unternehmens sowie neuen Investoren im Verhältnis zu den gesicherten Gläubigern des Unternehmens.

(Die Redaktion)