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# Japanese Corporate Reorganization

By TEIICHIRO NAKANO

*Assistant Professor, Osaka University*

## I

The Corporate Reorganization Act of Japan came into force as from August 1, 1952. Till then, there had been serious defects in her legal systems for the reorganization of distressed economic undertakings. No effective machinery had been provided to scale down secured debts without a sale of the security and the resultant sacrifice of values. The Amendment of the Commercial Code of Japan in 1938 has introduced an institution called "Arrangement (Seiri; in Japanese) of Stock Corporation",<sup>1)</sup> which was modelled on the equity receivership in American law as well as the arrangement and reconstruction of company in English law,<sup>2)</sup> being expected that by this the reorganization of stock corporations in financial distress would be effected. But this expectation has not been realized at all. Though the provisions concerning the arrangement of stock corporation are still now in force, there has been in fact not a single case in which the reorganization has effected since the day of the coming into force of the Amendment in 1938.<sup>3)</sup> They turned out to have defects common with the reorganization by way of equity receivership in old days in the United States—defects that they were subject to the weakness of inability to control dissenters and if only one of creditors dissents arrangement or reorganization can not be effected.

As to the Bankruptcy Act of the United States, the defects in the equity receivership and the wants of adequate facilities for the reorganization of corporation lead to the enactment of Section 77 B by the Act of

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1) Commercial Code of Japan, §§ 381~403.

2) The Companies Act, 1948, §§ 206~210.

3) See, Materials on Enactment of Corporate Reorganization Law and Amendment of Bankruptcy and Composition Law. Tokyo University. I; p. 19.

June 7, 1934. This Section 77B was used extensively since many corporations were then in financial distress resulting from the great depression. Later it was amended at various times to correct weaknesses in the statute revealed by its administration, and finally, the Amendatory Act of 1939 (Chandler Act) incorporated the provisions of §§77A and 77B with extensive revisions and alterations as Chapter X of the Bankruptcy Act. It is strange that, in Japan, in spite of the above-stated movement in the United States, the institution of arrangement of stock corporation should have been entirely out of use since 1939, remaining even unaltered, till at last in 1952 the Corporate Reorganization Act was enacted after the pattern of the Chandler Act of the United States.

Corporate Reorganization Act of Japan was, indeed, a product of the independent legislation of Japan, but it was, at the same time, one of the striking results that the Occupation Policy after last War had left on the legal systems of Japan. After the enforcement of the New Constitution of Japan (1947) and the arrangements of a series of laws and ordinances appended to it, earnest efforts were begun to arrange the regulations concerning economic undertakings as a link in the chain of the Occupation Policy. They were directed to the revision of the provisions relating to companies, especially stock corporations in the Commercial Code on the one hand, and to the introduction of American institutions concerning the corporate reorganization into Japan on the other hand. And we can guess that both of them had the intention to facilitate the introduction of foreign capital to Japan and to promote international trade, by americanizing Japanese institutions concerning economic undertakings in a normal situation as well as in financial distress.

On February 4, 1949 the Deliberative Council for the Revision of the Bankruptcy Act was created under the Attorney General by a decision of the cabinet meeting under the instructions to that effect from GHQ and entrusted with the task of deliberating on a revision of the Bankruptcy Act, the Composition Act and other laws and ordinances relating to them. This was the first step to the enactment of the Corporate Reorganization Act. The fact that the problem of its enactment was considered as that

of a revision, not of the provisions relating to the arrangement of stock corporation in the Commercial Code, but of the Bankruptcy Law, cannot be said to have nothing to do with the circumstance that in the United States the provisions concerning the corporate reorganization were put into the Bankruptcy Act to avoid the question of the constitutionality. On July 26, 1949, the matters to be deliberated in the revision of the Bankruptcy Act were presented by ESS.<sup>4)</sup> Upon this, on August 13 of the same year, the Attorney General demanded the Legislative Council, then established as an organ attached to the Ministry of Justice, to decide an outline draft concerning the improvement of the legal institutions relating to the bankruptcy, composition and arrangement of stock corporation. To meet this demand, the Council established within itself the Committee for the Bankruptcy Law consisting of scholars, judges, lawyers, business men and other experts, and further, within this Committee, the Subcommittee was created with Mr. Tsunahiro Kikui, then Professor at Tokyō University, as a chairman. After the deliberations in the meetings that were held more than sixty times in all from September 5, 1949 till February 7, 1951, the Subcommittee decided an outline draft<sup>5)</sup> of the Corporate Reorganization Act containing eighty-six sections together with an outline draft of the revision in part of the Bankruptcy Act due to the introduction of the discharge principle.<sup>6)</sup> They were approved by both the Committee for the Bankruptcy Act and the Legislative Council, and then presented to the Attorney General. Based on this outline draft, the government prepared a draft of the Corporate Reorganization Act, which was presented to the 10th National Diet on May 7, 1951.

There were a lot of difficulties in the course of its legislation. They were chiefly due to the fact that the studies of the American bankruptcy law, especially of its corporate reorganization, had hardly been made in Japan and that the literatures on them were then got with very difficulty. This is why, as stated above, in pararell with the task of the Legislative

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4) See, Materials mentioned above note 3. I p. 13.

5) See, Materials. V p. 36 et seq.

6) Bankruptcy Act of Japan, §§ 366 (1)~366 (20), which were added by amendment in 1952.

Council, the Committee for the Bankruptcy Law and the Subcommittee of it, the competent officials of the Ministry of Justice and a small number of scholars, judges, lawyers etc. who were, so to speak, the driving powers of the legislation, held the meetings with the competent officials of GHQ more than sixty times and thoroughly deliberated on the matters. This shows how great the collaboration from GHQ was.

The 10th and the 11th Diet did not come to pass the draft of the Corporate Reorganization Act, but resolved to refer it to a continuous discussion. Prior to the 11th Diet, the Standing Committee for Judicial Affairs of the Lower House had familiar talks with the representatives of the courts, the Chambers of Commerce and Industry etc. in Osaka and other ten main cities throughout the country to listen to their views on the matters. After the 11th Diet, the standing Committee for Judicial Affairs of the Upper House also established the subcommittee for the draft of the Corporate Reorganization Act, and further had familiar talks with the judges, lawyers and business men in Osaka and Nagoya to take advices from them, and thus made efforts to prepare an amended draft.

At the 12th Diet, on November 10, 1951, the adove-mentioned draft was passed in the Lower House only with the amendment of the date of the enforcement, but, in the Upper House, the discussions of the amended draft decided by the Subcommittee did not come to an end, and thus the resolution was made for it to be referred to a continuous discussion. At the 13th Diet held on December 10, 1951, the draft was still on the tapis in the Subcommittee of the Upper House. In parallel with this, on the other hand, negotiations were continued with GHQ for the approval of the amended draft of the Corporate Reoganzization Act. After the approval was gained, the amended draft was passed in the Upper House on May 19, 1952, and further also in the Lower House the draft sent from the Upper House was approved on May 29. Thus, the Corporate Reorganization Act was finally established, and promulgated as Act No. 172 in 1952 on June 7.<sup>7)</sup>

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7) As for the course of enactment of Corporate Reorganization Act, see, M. Inoki, Outlines of Corporate Reorganization Act, 1952, p. 3 et seq.

Now, the enactment of this Act, originally motivated by the Occupation Policy, required the constant collaborations from GHQ to the last moment. The result was that it was in its contents very much similar to the regulation of the corporate reorganization in Chapter X of the Bankruptcy Act of the United States. It is not too much to say that the fundamental construction of the procedure of the corporate reorganization is much the same in them. Yet, there are still a number of differences between them in the forms of the provisions, and in the substances also there are some, though not many. These differences, formal or substantial, may be chiefly ascribed to either of the following three reasons:

The first reason is that the fundamental legal systems of the United States and Japan are of different characteristics. The Japanese procedural laws such as the Code of Civil Procedure, the Bankruptcy Act and the Composition Act as well as the substantive laws have long adopted the European-continental legal systems and been dominated by the German or French fundamental legal concepts and constructions. It is also the case with the Commercial Code, though it has been americanized to much extent since the end of the Second World War. In order to bring the provisions of the Corporate Reorganization Act into harmony with those, above all, of the Bankruptcy Act and of the Composition Act, the common legal concepts or constructions had to be employed there, with the consequent results that the matters that are substantially the same are often expressed differently from in the American Bankruptcy Act.

The second reason is that Japan and America have different social and economic conditions. While these two countries are in close connection in the same capitalistic world, it is also evident that there are wide differences between them in the extents and situations of the developments of the capitalistic economic structures. The differences were taken into account to much extent in the course of the legislation. The amendments that the Upper House effected to the original draft of the Corporate Reorganization Act in the course of its deliberation covered seventeen heads, that is, more than a hundred and fifty articles, some of them being such as to have a great influence upon the function of the corporate reorganization, as we

shall see below. At that time the Peace Treaty was already within sight and the control of GHQ over the Japanese legislation was relaxing step by step, while the independent legislative power of the Japanese Diet was gaining ground. In this sense, the above-stated amendment might be said to have reflected Japan's own conditions to a great extent by adopting the outspoken opinions emanating from academic, judicial and business sources.

The third reason is that the Corporate Reorganization Act does not form a part of the Bankruptcy Act or the Commercial Code, but is promulgated as a separate law. In addition to this, Japan being not under a federal system, such as the legislative power of each State need not be taken into account and therefore the Corporate Reorganization Act can itself alter or restrict the provisions of the Commercial Code or of the Tax Laws, so far as it is necessary to do so in relation to the procedure of the corporate reorganization. The Corporate Reorganization Act of Japan contains as many as two hundred and ninety-five articles in all, while Chapter X of the American Bankruptcy Act contains one hundred and twenty-two articles in all. This increase in the number of the articles may be ascribed partly to the fact that the Corporate Reorganization Act, as an independent separate law, has provided itself with its own articles, in order as possible to avoid to apply the provisions of other Codes, especially of the Bankruptcy Act, correspondingly to its own cases, partly to the fact that the extent which its regulations could cover was much greater than that in the Chandler Act.

## II

The outlines of the proceedings of Japanese corporate reorganization are as follows:<sup>8)</sup>

(1) Jurisdiction.<sup>9)</sup>—A reorganization case is subject to the exclusive juris-

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8) Literatures; H. Kaneko and A. Mikazuki, *Commentary on Corporate Reorganization Act*, 1953; M. Inoki, *Outlines of Corporate Reorganization Act*, 1952; J. Onogi and T. Nakano, *Lectures on Execution and Bankruptcy Law* (Part IV Chap. 5), 1957; J. Onogi, *Outlines of Bankruptcy Law* (Chap. 7), 1957.

9) Corporate Reorganization Act of Japan (=CRA), §§ 6, 7. It is remarkable exception to general rule in Japanese civil procedure that the court may transfer the case of its exclusive jurisdiction. It seems to have modelled after the provisions of Bankruptcy Act of the

diction of the District Court in whose territorial jurisdiction the corporation has its principal office or, if this is located in a foreign country, its principal place of business in Japan.<sup>9)</sup> Should it be found necessary to do so in order to avoid considerable damage or delay, the court may, of its own motion, transfer the case to another District Court having jurisdiction over another place of business or the seat of the property of the corporation.

(2) Eligibility for reorganization.—Any stock corporation being in distress but promising reconstruction is eligible for reorganization.<sup>10)</sup> While in the United States any business enterprise within the definition of “corporation” contained in §1 of the Bankruptcy Act, i. e., all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, is eligible for reorganization, the Japanese Corporate Reorganization Law has limited the eligibility to stock corporation. Therefore, partnerships (Gomei-Kaisha), Limited partnerships (Goshi-Kaisha), or unincorporated associations are not eligible for reorganization, having no similar relief like that.<sup>11)</sup> A stock corporation in liquidation or after a adjudication of bankruptcy is eligible for reorganization, too.

(3) Petition for institution of reorganization proceedings.—A corporation, any creditor having claims against a corporation equivalent to not less than one-tenth of the amount of the capital or any shareholder holding shares representing not less than one-tenth of the total number of the issued shares may file a petition for the institution of a reorganization proceedings to the court.<sup>12)</sup> Shareholders, also have the rights to file petition. The petition for the institution of reorganization proceedings may be filed in cases either where a stock corporation is unable to pay its debts as they mature without the continuance of its business being remarkably interfered with, or where there are grounds for suspecting that the corporation has any fact which

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United States, § 118.

10) CRA § 1.

11) In Japan, most of larger enterprises are stock corporations. It is reasonable that the Japanese Corporate Reorganization Act has introduced this new institution only as to stock corporations to avoid the increase of complexity of provisions, expecting in future the expansion of application to other types of enterprises.

12) CRA § 30. Cf. Bankruptcy Act of the United States, § 126.



is the cause of bankruptcy.<sup>13)</sup> The corporation may file in either cases, but creditor or shareholder only in latter cases.

When a petition for institution of reorganization proceedings has been filed, the court examines as to whether the reorganization proceedings are to be instituted or not, and if it deems the petition reasonable, it makes a ruling of the institution of reorganization proceedings together with the appointment of a trustee and further fixes the period of the filing of claims, the date of the first meeting of the persons interested and the date of investigation of claims.<sup>14)</sup> But, when a corporation does not promise any reconstruction, or when the petition has not been made in good faith, it must be dismissed. Even prior to the institution of the proceedings the court may order the discontinuance of any bankruptcy proceedings, compulsory execution or other such proceedings already effected against the corporation or its property, or effect measures necessary for preserving the affairs or property of the corporation.<sup>15)</sup> The system of a "receiver" in the American Bankruptcy Act has not been introduced into Japan.<sup>16)</sup> When a petition for institution of reorganization proceedings is filed, the court may appoint one or several inspecting commissioners and charge them with the task of investigating the existence of causes of institution of reorganization or whether reorganization is to be instituted or not.<sup>17)</sup> The duties of the inspecting commissioners are, however, restricted to the investigation and the presentation of the statements of his opinions, and he lost his position after institution of proceedings.

(4) Institution of reorganization proceedings—"The proceedings of reorganization come into force as from the time when the ruling of its institution is made."<sup>18)</sup> As from the time, the power of administering the affairs of the corporation and of managing and disposing its property belongs

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13) "cause of bankruptcy" means, as to stock corporations, insolvency and excess of indebtedness over amount of assets. Bankruptcy Act of Japan, §§ 126, 127.

14) CRA § 46.

15) CRA §§ 37~39, 72.

16) See, III 1, *infra*.

17) CRA §§ 40~44.

18) CRA § 2.

exclusively to the trustee.<sup>19)</sup> As from the time of the institution of the proceedings up to that of their termination neither reduction of capital, issuance of new shares or of debentures, amalgamation, dissolution, change or continuance of the organization of the corporation, nor distribution of profits or interest may be effected except according to the reorganization proceedings. As to any alteration of the articles of the corporation, the permission of the court is required.<sup>20)</sup> To the institution of reorganization proceedings follows the arrangement of the pending relations involved in the property of the corporation. E. g.: (i) In respect of a bilateral contract (sale, lease, etc.), when neither the corporation nor the other party has completed its performance yet at the time of the institution of the proceedings, the trustee may rescind the contract, or may demand the performance of the obligations of the other party after having fulfilled those of the corporation.<sup>21)</sup> (ii) An account current comes to an end when in respect of one of the parties the reorganization proceedings is instituted<sup>22)</sup> (iii) In cases where a property belongs to the corporation and to others in common, when the proceedings is instituted, the trustee may demand a partition of the property, notwithstanding any agreement made between them to the contrary.<sup>23)</sup>

When a ruling for institution of reorganization has been made, no petition for adjudication in bankruptcy, for composition, for reorganization, for arrangement or for special liquidation, nor any compulsory execution, provisional attachment or disposition or official auction on the property of the corporation by means of the reorganization claim or of right for security in the reorganization shall be made. Any bankruptcy proceedings, or any compulsory execution, provisional attachment or disposition on the property already effected by means of the reorganization claim or of right for security in the reorganization, or any official auction shall be discontinued. Any composition proceedings, arrangement proceedings or special liquidation

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19) CRA § 53.

20) CRA § 52.

21) CRA § 103.

22) CRA § 107.

23) CRA § 61.

proceedings shall cease to have effect. As from the day when the ruling of the institution of reorganization proceedings is made up to the time of the approval of the reorganization plan or of the termination of the reorganization proceedings, or for a year from the day when the ruling has been made, no disposition for the recovery of taxes in arrears pursuant to the Tax Collection Act, nor disposition for the recovery of taxes in arrears following the model of the Tax Collection Act shall be made. Any such dispositions already effected shall be discontinued. In addition, the pending action relating to property of the corporation are interrupted by the institution of the reorganization proceedings.<sup>24)</sup>

After the institution of the reorganization proceedings, the first meeting of the persons interested is held, to which the trustee shall make a report on the results of his investigation he has made of the matters necessary to reorganization, and in which the court shall hear the opinions of the trustee, the corporation and the persons interested on the appointment of the trustee, and on the administration of the business of the corporation and management of its property.<sup>25)</sup> On the other hand, the filing of the rights of the persons interested to the court and the proceedings of the investigation and confirmation of them shall take place. In parallel with this, the preparation of a draft of the reorganization plan shall be made. (5) Trustee.<sup>26)</sup>—The reorganization court shall appoint a trustee simultaneously with the ruling of the institution of reorganization proceedings. “Debtor in possession” in the American Act is not to be found in the Japanese Act.<sup>27)</sup>

The trustee must be appointed from among those who are fitted for the duties. But he need not be disinterested person, so even the director of the corporation under reorganization proceedings may be a trustee. Of

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24) CRA §§ 67, 68.

25) CRA §§ 187, 188. Normally, the meeting of the persons interested is held three times, and resolution is made only once. CRA §§ 187, 192, 205. The activities of representative commissioners (CRA § 160) outside of proceedings is expected. They correspond with protective committee in the American corporate reorganization. Cf. Bankruptcy Act of the United States, §§ 209~213.

26) CRA §§ 94~101.

27) See, III 2, *infra*.

a trustee is required the talent for management of enterprise as well as the legal knowledge, because he must be engaged in the task not only of managing the property of the corporation, but also of continuing its business and of making and carrying out the reorganization plan. Therefore, in Japan, where the system of corporate reorganization has but just been introduced, it is perhaps very difficult to get the suitable talent as a trustee. That is why the Japanese Corporate Reorganization Act has not required as a qualification for a trustee that he is a disinterested person. Any trust bank, bank or any other corporation may be appointed as a trustee. The trustee may, if it is deemed necessary, appoint a consulting lawyer with the permission of the court.<sup>28)</sup> In case that it is necessary for the trustee to raise a working capital for the purpose of continuing the business of the corporation, the claims of the third party emerging from such an act of the trustee against the corporation may be satisfied, as claims for the common benefit, without following the reorganization proceedings and besides in preference to other creditors.<sup>29)</sup>

In case that, prior to the ruling for the institution of reorganization proceedings, an act prejudicial to the creditor has been made, the trustee may exercise the right of denial by means of an action, a demand or a plea of denial and recover the property of the corporation unduly disposed of.<sup>30)</sup> When the trustee manages the property not belonging to the corporation, the person entitled to it may demand its return from the trustee.<sup>31)</sup>

(6) Creditors, secured creditors and shareholders.—Not only the creditors in general but also secured creditors and shareholders of the corporation take part in the proceedings of reorganization as persons interested.

The claim for property which has arisen against the corporation on the base of the causes prior to the institution of the reorganization proceedings is called a reorganization claim.<sup>32)</sup> The reorganization creditor may take part in the proceedings with his claim. In respect of the reorganiza-

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28) CRA § 186.

29) CRA 208 (5), 209, 54 (3).

80) CRA §§ 78~93.

31) CRA §§ 62~66.

32) CRA § 102.

tion claim the performance of the obligation shall not be made, nor shall the claim be satisfied or liquidated in any other way except according to the reorganization proceedings. Further, reorganization creditor shall not obtain the satisfaction of his claim separately from the others by means of any compulsory execution.<sup>33)</sup>

The reorganization claim or the claim for property which has arisen against the other persons than the corporation on the base of the causes prior to the institution of the proceedings, is, in so far as it is secured by a specific preferential right, a pledge, a mortgage, or a right of retention provided in the Commercial Code, called a right for security in the reorganization. Any person having a right for security in the reorganization (secured reorganization creditor) may take part in the proceedings of reorganization with his right.<sup>34)</sup> He shall not, as in the bankruptcy proceedings, obtain the satisfaction of his claim separately from the other creditors by means of sale or auction of the object of security. There are several provisions for the protect of the rights of the reorganization secured creditor.<sup>35)</sup>

The tax claim (and the rights capable of being collected after the example of the Tax Collection Act) receives the most preferential treatment in the bankruptcy proceedings, while in the reorganization proceedings it is nothing more than a kind of reorganization claims which can be reduced or released. Corporate Reorganization Act, has, however, considering its difference from the other general reorganization claims, inserted some specific provisions.<sup>36)</sup> For instance; the court should give the tax collection authorities the notice that petition for the institution of the reorganization proceedings has been filed, and the tax collection authorities may give the court his opinion on the reorganization proceedings. In order to provide in the reorganization plan the forbearance of the collection or the execution

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33) CRA §§ 112, 113.

34) CRA §§ 123, 124. Any secured reorganization creditor may take part in the reorganization in respect of the part of the amount of his obligation which exceeds the value of the subject-matter of the right for security.

35) See, II (8) (9), *infra*.

36) CRA §§ 35, 122, 159, 228 II.

of a coercive collection of tax claim for the period of not more than two years, it is necessary to sound the opinions of the person entitled to the tax collection. Moreover, in order to provide in the reorganization plan the reduction of or exemption from the tax claim, the forbearance of the collection or the execution of a coercive collection for the period of more than two years, the succession of an obligation, or any other thing affecting the claim, it is necessary to obtain the consent of the above-stated person.

The shareholder may take part in the reorganization proceedings with his shares. But, in cases where there exists any fact forming a cause of bankruptcy as to the corporation, shareholders have no votes.<sup>37)</sup>

(7) Filing, investigation and confirmation of rights:<sup>38)</sup>—The reorganization creditor, secured reorganization creditor, or shareholder who intends to take part in the reorganization proceedings has to file his right to the court within the period of filing fixed by the court. Those who fail to do so cannot take part in the proceedings, and in addition, their rights being not stated in the reorganization plan, the corporation is discharged from them, simultaneously with the approval of the reorganization plan. The single exception to this is that, when by the provisions of the reorganization plan rights have been approved of the shareholders in general, the rights are also approved of the shareholders who have failed to file their rights.<sup>39)</sup>

The court, then, investigates on each of the reorganization claims and of the rights for security in the reorganization, and the rights under the investigation become confirmed, in case that neither the trustee, nor the reorganization creditors, secured reorganization creditors nor shareholders that have filed their rights raise objection to them. In case that any objection has been raised, the rights must be confirmed by way of action. Any

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37) CRA § 129.

38) Japanese Corporate Reorganization Act (§§ 125~158) provides the proceedings of filing, investigation and confirmation of rights in extreme minuteness, modelling after the provisions of Bankruptcy Act of Japan. American Bankruptcy Act has only one brief article (§ 196) with respect to proof and allowance of claims.

39) CRA §§ 243, 244.

right, being approved in the reorganization plan as to the reorganization creditors or the secured reorganization creditors, is approved of only those of them whose rights have become confirmed.<sup>40)</sup> In respect of the rights of the shareholders and tax claims, the process of the investigation and confirmation is not necessary.

(8) Formulation, acceptance and approval of reorganization plan.—While the trustee manages the property of the corporation and continues its business and the filing, investigation and confirmation of the rights are effected on the one hand, the organization plan is formulated and referred to the resolution on the other.<sup>41)</sup>

The trustee must prepare a draft of the reorganization plan and file it to the court within the time fixed by the court after the expiration of the period of the filing of the reorganization claims, rights for security in reorganization and shares. The preparation of a draft of reorganization plan is one of the duties of trustee. The corporation and the reorganization creditors, secured reorganization creditors and shareholders that have filed their rights may also formulate a draft of reorganization plan and file it to the court.

When a draft of reorganization plan has been formulated, the court shall hold the second meeting of the persons interested and, hearing their opinions, deliberate on the draft of plan. After having effected alterations or amendments if necessary, the court shall refer the plan to the resolution of the third meeting. When the court is of opinion that the draft of plan violates the provisions of law, that it is not fair and equitable, or that it is not feasible, it need not refer the plan to the deliberation or resolution of the meeting.

The resolution of an reorganization plan shall be separately made in the groupes in which the reorganization creditors, secured reorganization creditors and shareholders are classified according to the provisions of law. Article 159 of the Corporate Reorganization Act provides the standard of classification, and yet the court itself may give another classification, taking

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40) CRA § 243.

41) CRA §§ 189~207.

consideration of the character of the rights of the persons interested, and relations of interests among them, excepting that the reorganization creditors, secured reorganization creditors and shareholders must be classified always in different groups from another. In order to accept a draft of reorganization in the meeting of persons interested, it is required; in the group of reorganization creditors, the consent of votes representing not less than two-thirds of the total amount of the votes of reorganization creditors who are able to exercise their votes; in the group of secured reorganization creditors, the consent of votes representing not less than three-fourths of the total amount of the votes of the secured reorganization creditors who are able to exercise their votes, in respect of the draft of reorganization plan to determine the prolongation of the due time of the right for security in reorganization, while in respect of the draft of reorganization plan to determine the reduction of or exemption from the rights for security in reorganization, the liquidation or any other measure affecting the rights otherwise than by prolongation of the due time, the consent of all the secured reorganization creditors who are able to exercise their votes; in the group of shareholders, the consent of votes constituting a majority of the total number of the votes of the shareholders who are able to exercise their votes. The right to vote is determined in principle in accordance with the amount of the reorganization claims and rights for security in the reorganization in respect of the reorganization creditors and secured reorganization creditors, or with the number of the shares held by the shareholders in respect of the shareholders, except when the corporation has been adjudicated in bankruptcy, in this case the shareholders have no rights to vote.

When in the meeting the draft has been accepted, the court shall make a ruling as to whether it should approve of it or not.<sup>42)</sup> The court shall examine again as to whether the draft fulfils the requirements of law or not, and it may make a ruling of the approval of it only when it thinks them fulfilled. Even in cases where there is a group which can not get in the resolution the consent of those who have the vote of not less

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42) CRA §§ 232~235.



than legal number or amount, the court may make a ruling of the approval with alteration of draft and provision for the protect of the rights of the persons belonging to the group. The reorganization plan becomes effective as from the time of the ruling of the approval of it.

(9) Contents of the reorganization plan.—There is no limit to the contents of the reorganization plan, provided that they lead to the reorganization of the corporation. For instance:—the alteration of the rights of the reorganization creditors, secured reorganization creditors or shareholders; the transfer, contribution or lease of the business or property of the corporation; the mandate to manage the business of the corporation; the alteration of the articles of the corporation; the change of the directors, representing directors or auditors; the reduction of the capital; the issuance of new shares or debentures; the amalgamation; the dissolution; the formation of a new corporation, and all other things necessary for the reorganization of the corporation. Reorganization plan shall not, however, fail to provide clauses affecting the rights of the whole or a part of the reorganization creditors, secured reorganization creditors or shareholders, clauses relating to the performance of the claims for the common benefit, clauses concerning the way of raising money for the performance of the debts and clauses relating to the way how to use the profit money exceeding the amount prescribed in the plan.<sup>43)</sup> The Corporate Reorganization Act enumerates a series of measures for reorganization and prescribes the particulars to be entered in detail about each of them.<sup>44)</sup> In all cases, the following rank of rights must be taken into consideration and a fair and equitable graduation among them in respect of the conditions of the plan must be made.

- ① Rights for security in the reorganization.
- ② General preferential rights and other general preferential reorganization claims.
- ③ Reorganization claims other than the rights prescribed in the preceding ②.
- ④ Deferred reorganization claims.

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43) CRA § 211.

44) CRA §§ 211~230.

- ⑤ Rights of the shareholders holding shares with preferential particulars as to the distribution of surplus assets.
- ⑥ Rights of the other shareholders than those prescribed in the preceding ⑤.

(10) Execution of the reorganization plan.—When the ruling of the approval of reorganization plan has been made, the trustee must carry it into execution without delay. The court may give orders necessary for the execution of the plan to the trustee, corporation, new-born corporation, reorganization creditor, secured reorganization creditor or shareholder.<sup>45)</sup> The Corporate Reorganization Act prescribes many exceptions to the provisions of the Commercial Code or other laws, or of the articles of corporation so far as it is necessary for the purpose of the smooth and speedy execution of the plan. For example, a resolution of a general meeting of shareholders as to certain matter, though it is necessary according to the provisions of the Commercial Code, is not necessary in the case that the matter is entered in reorganization plan and the plan has been approved. The reorganization creditors, secured reorganization creditors or shareholders who have become shareholders or debentureholders of an existing or a new-born corporation according to the plan shall lose their rights, unless they demand the delivery of share certificates or debenture certificates within three years after they became shareholders or debentureholders.

(11) Termination of the reorganization proceedings.—In case that the reorganization plan has been carried out or the court has had a prospect of successful execution, the court makes a ruling for the termination of the proceedings.<sup>47)</sup>

If no draft of reorganization plan is proposed within the time fixed by the court, if no draft is accepted or approved, if it has become clear that the corporation is able to satisfy in full all creditors that have filed their rights, or if it has become clear that there is no prospect of carrying out of the plan, the court shall abolish the proceedings.<sup>48)</sup> If the draft of

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45) CRA §§ 247, 248.

46) CRA §§ 249~270.

47) CRA § 272.

48) CRA §§ 273, 274, 277.

a plan has been accepted but cannot be approved on account of its failure to fulfil the requirements prescribed by law, the court shall make a ruling of the disapproval of the plan.<sup>49)</sup> A failure of the reorganization does not always lead to adjudication of bankruptcy. However, if in respect of a corporation not adjudicated in bankruptcy the dismissal of a petition for the institution of the reorganization proceedings, the abolition of the proceedings or the ruling of the disapproval of the reorganization plan has been final, the court may make an adjudication of bankruptcy of its own motion, if there exists any fact, which is a cause of bankruptcy, as to the corporation.<sup>50)</sup>

### III

The corporate reorganization in Japan can be compared to a plant of American growth which was transplanted into the different soil and climate of Japan. Has it firmly been rooted here? Is it putting forth its blossoms, and bearing fruit? Or, on the contrary, is it standing dead? We have no data required to give an answer to this question. But judging from a following table alone, it is evident that the corporate reorganization of Japan is not always going all right. In the course of 1952—on August 1

#### Statistics of Cases

(Cited from the "Annual Report of Judicial Statistics; 1956" published by General Secretariat, Supreme Court of Japan.)

Petitions filed anew in	1952	1953	1954	1955	1956
Corporate Reorganization	55	123	129	74	56
Bankruptcy	1531	2010	2599	1949	1732
Composition	54	70	76	79	64
Execution	8906	13509	21947	26319	26998
Official Auction	8764	11646	17966	21252	21041

of the year the Corporate Reorganization Act came into force—the number of the cases of reorganization amounted to 55 for five months through the country, while in the course of 1956 the number decreased to 56 for a

49) CRA §§ 232, 233, 238.

50) CRA § 23~26.

year. And yet bankruptcy and composition cases of 1956 increased in number over those of 1952, and the number of the execution cases of 1956 increased to more than three times, and that of the official auction cases more than twice as many as those of 1952. Perhaps the Japanese corporate reorganization will show in future a steady growth, remedying various defects to be found out through experiences of real cases. The following criticism is now being given on the Corporate Reorganization Act.

1. The reorganization court has too wide scope of powers to exercise promptly and adequately without any proper auxiliary organs for itself. As in the reorganization proceedings the rights of persons interested may be altered by the majority, it is not adequate to leave the proceedings to the supervision of any administrative office or to the autonomy of the parties concerned. In this sense, it is quite right that they have been constructed as judicial proceedings under the supervision of the court. But, the very great powers of the court lead to the delay of the proceedings. In addition to this, as in the organization proceedings the management of undertaking is in principle continued with the aim of rehabilitating it in view, it is necessary for a judge participating in them to combine his legal knowledge with a broader knowledge of economics, business management and accounting. No such combination is, however, to be found in a judge in general. In America the judge may, at any stage of reorganization proceedings, refer the proceeding to a referee in bankruptcy to hear and determine any and all matters not reserved to the judge by the provisions of Bankruptcy Act. Therefore the receipt of many kinds of documents presented to the court, the prolongation of many kinds of legal periods, the approval of a definite number of acts, the hearing on the objections to right and other considerably extensive particulars may be referred to him. In the practice in America the referee is playing a great part in a smooth and prompt progress of proceedings. In Japan, there being no organ which corresponds to a referee in America, an earnest consideration must be given to a creation of such organ or machinery as corresponds to a referee in America and, standing between a trustee and a

judge, assists judge and takes charge of a portion of the work of judge.

2. In Japanese corporate reorganization, the appointment of a trustee is indispensable, while in American Bankruptcy Act, if the indebtedness of a debtor is less than \$ 250,000, the judge may appoint trustee or continue the debtor in possession.<sup>51)</sup> Also in the original draft of the Japanese Corporate Reorganization Act, it was prescribed that, if the indebtedness of a debtor was less than 20,000,000 Yen, the court might continue the debtor in possession and that in this case the court might, if it deemed necessary, appoint an examiner and transfer him the whole or a part of the task of trustee. But, the Upper House amended this original draft and excluded the possibility of debtor in possession on the one hand, and in order to facilitate the appointment of trustee, it deleted the provisions of the original draft that a trustee must be a disinterested person and thus opened the way for appointing general corporation as well as bank or trust company to the post of trustee. The exclusion of debtor in possession served surely a simplification of proceedings. The necessity of a trustee, however, in a case of a smaller scale brings about inadequate increase of the expense of proceedings, while the control of a trustee having no relations to undertaking over the whole business causes a delay of proceedings. In a case of smaller scale, it is necessary to establish a simple reorganization proceedings without trustee. Moreover, the trustee having a liability to execute the proceedings fairly and equitably to creditors, shareholders and other persons of different interests, it is desirable that he is a disinterested person. As a matter of fact, in Japan, where the reorganization proceedings has just been introduced, it may lead to difficulty of the selection of an adequate trustee to restrict the qualifications of a trustee severely. But, this difficulty ought to have been avoided not by selecting trustee from among the persons interested, but by recognizing the way of debtor in possession.

3. In Japanese corporate reorganization, it is not easy for the trustee to raise money necessary to continue the business of corporation. After

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51) Bankruptcy Act of the United States, § 156.

the institution of reorganization proceedings, the power to manage the business of corporation belongs exclusively to trustee. The institution of reorganization proceedings showing clearly the distressing state of the corporation, it would be difficult for trustee to get a new loan of money necessary to continue the business, unless the financing creditor is given sure prospect of collection. That is why the American Bankruptcy Act prescribes that the judge may, upon the approval of a petition, authorize a trustee or debtor in possession to issue certificates of indebtedness for cash, property or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable.<sup>52)</sup> In the Japanese Corporate Reorganization Act, a claim arising from a loan of money which the trustee has made according to his power in respect of the business and property of corporation, is a kind of claims for the common benefit. The trustee liquidates it as such, as occasion calls, without filing, investigation or confirmation of it and prior to the reorganization claims and the rights to security in reorganization.<sup>53)</sup> The claims for the common benefit have priority over existing obligations, secured or unsecured, but when it has been clear that the property of corporation is insufficient to satisfy all of them in full, they can be satisfied only in proportion to the account not yet liquidated. Therefore, they can not always be fully collected.

4. The Japanese Corporate Reorganization Act prescribes that, to accept a draft of reorganization plan in the meeting of persons interested, in the group of secured reorganization creditors, the consent of the persons having the rights to vote not less than three-fourths of the total amount of the votes of the secured reorganization creditors who are able to exercise their vote, is sufficient in respect of the draft of reorganization plan to determine the prologation of the due time of the rights for security in reorganization, while in respect of the draft of reorganization plan to determine the reduction of or exemption from the rights for security in

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52) Bankruptcy Act of the United States. §116 (2).

53) CRA §§208 (5), 209.

reorganization, the liquidation, or any other measure affecting the rights otherwise than by the prolongation of the due time of them, the consent of all the secured reorganization creditors who are able to exercise their vote, is required. It is the greatest and fatal defect of the Japanese Corporate Reorganization Act that in respect of almost all kinds of drafts of reorganization plans the consent of all the secured reorganization creditors is required.

The position of secured creditors must of course be respected to the full. But, the possibility of reorganization will be restricted to a great extent, if the consent of all the secured creditors is required for the acceptance of the reorganization plan. Separating the secured creditors from general creditors (reorganization creditors), the Japanese Corporate Reorganization Act sets up a group of secured reorganization creditors, in demanding the fair and equitable graduation of conditions of reorganization plan, gives the highest priority to the rights for security in reorganization, strictly prohibiting that the creditors lower in rank obtain satisfaction prior to the secured reorganization creditors. If a draft of reorganization plan has been accepted against their interests, the reorganization court may refuse approval.<sup>54)</sup> In these points their position being fully respected, it is clear that the Japanese Corporate Reorganization Act goes too far in demanding the consent of all the secured creditors in respect of the acceptance of the draft. When the consent of all the secured creditors is required even in cases where only the form of rights is altered, without change of the material interests of secured creditors, for example, where secured debts are converted into secured debentures, there leaves almost no room to adjust the relations of rights in corporation together with secured debts and to allow the corporation start afresh as a new-born with reasonable scale and reasonable capital construction. It may not be too much to say that this will hardly meet the purpose that the law wants to achieve by making the secured creditors take part in the proceedings as persons interested. In the United States, though it is emphatically asserted that the position of secured creditors must be respected, a simple two-thirds majority is sufficient to accept

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54) CRA §§ 228, 233.

the draft of reorganization plan in all the creditors including secured creditors.<sup>55)</sup> It is exactly the main aim to scale down secured debts by the majority in spite of dissentients. Unless the alteration of the rights of secured creditors by the majority is possible, there is no hope for efficient and adequate reorganization. The original draft of Japanese Corporate Reorganization Act had demanded in respect to the acceptance of the draft of reorganization plan the consent of a two-thirds majority in the groupe of reorganization creditors and of a three-fourths majority in the groupe of secured reorganization creditors. The Upper House, however, made modifications of this points, as stated above.<sup>56)</sup> It was this very amendment that led to the extreme diminution of the function of Japanese corporate reorganization.

5. Further, in the reorganization proceedings the problem of valuation of property is important, too. According to the results of valuation, a specified group of persons interested (e.g. shareholders) may be excluded from the proceedings, and even if not so, a material difference may arise in respect to the distribution by the reorganization plan. Unless any special rules are established as to at what time and in what way the going concern value of assets of corporation should be found out, there is no hope for the smooth and adequate execution of reorganization proceedings.

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55) Bankruptcy Act of the United States, § 179.

56) See, I *supra*.