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ARTICLE

Tools for Corporate Reorganisations in Japan

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1. Introduction

Japanese insolvency laws and practice have changed significantly in the past ten years. The enactment of the Civil Rehabilitation Act in 1999 was the starting point for such changes. Since then, the new Law for Recognition and Assistance for Foreign Insolvency Proceedings was enacted in 2000, and the Corporate Reorganisation Act and the Bankruptcy Act were renewed in 2002 and 2004 respectively. In addition, the Company Law came into effect in 2006, abolishing the major part of the Commercial Code relating to corporations and providing many tools for corporate restructuring.

Along with such law reforms, the practice of dealing with distressed companies has changed. It has become the trend for a debtor corporation to file for insolvency protection at an early stage, and for the courts in Japan to open insolvency cases more easily. In addition, the Industrial Revitalisation Corporation of Japan, incorporated in 2003 induced the practice of corporate restructuring through an out-of-court workout at an early stage.

This article provides an overview of the tools available in Japan to reorganise corporations in financial trouble.

2. Guideline for the out-of-court workout

Out-of-court workout is a useful tool for reorganising a debtor corporation with excessive debts without impairing trade creditors' claims, which would deteriorate the value of the business. However, it would be difficult to achieve fair and transparent out-of-court workout with no guidelines upon which interested parties could rely. In order to provide a tool for a fair and transparent out-of-court workout, the Guideline for Out-of-Court Workouts ('the Guideline') was introduced in September 2001 by a committee established by the National Bankers Association, the Federation of Economic Organisations, and other relevant organisations associated with the Financial Services Agency, the Ministry of Finance, the Ministry of Economy, Trade and Industry, the Bank of Japan and the Deposit Insurance Corporation.

2.1 Requirements for a restructuring plan under the Guideline

The Guideline was designed to clear the huge number of non-performing loans owed to multiple banks and financial institutions and to restore the debtor corporation to viability. Although the Guideline refers to the INSOL 8 principles for international multi-creditors, it also includes requirements for a business restructuring plan as well as procedural rules. The requirements for the plan include the following:

(i) the insolvency and negative earnings of the debtor corporation should be cleared within three years of acceptance of the proposed plan;

(ii) the interests of the debtor's controlling shareholders should, in principle, be divested and the proportional interest of the existing shareholders should be reduced or eliminated altogether through a capital reduction and subsequent capital increase;

(iii) the debtor's current managers should retire upon the acceptance of the proposed plan;

(iv) the plan should, in principle, emphasise equal treatment of all relevant creditors; and

(v) the plan should be economically reasonable, including the expectation of a larger recovery in comparison to the envisioned plans under the statutory insolvency proceedings.

2.2 Procedural rules

According to the Guideline, the workout begins with the debtor corporation applying to a 'main bank' for a multi-bank out-of-court workout. The application is accompanied by a proposed reorganisation plan as well as financial documents to explain reasons for its financial difficulties, and the feasibility of the plan. Debt and business restructurings should be formulated in the proposed plan. The main bank then goes through the application documents to determine whether the statements are accurate and the plan is feasible and reasonable. If these criteria are met and the main bank agrees that the plan is likely to be acceptable to

all banks and financial institutions whose debts are to be impaired under the plan, the main bank will issue a notice of 'standstill' to all the relevant creditors and convene the first creditors' meeting. After the sending of the standstill notice, the relevant creditors should refrain from any debt collection efforts, including enforcement of secured claims and improvement of their exposure, and should maintain the balance of their claims. It should be noted that the standstill notice does not affect trade creditors' debt collection efforts.

The first creditors' meeting must be held within a week of sending the standstill notice. At the first creditors' meeting, the unanimous consent of the relevant creditors must be obtained to continue the standstill period, which should not be more than three months after the first creditors' meeting. After receiving such consent, the professional advisors, consisting of lawyers and accountants, are generally elected by the relevant creditors, and the date for the second creditors' meeting is decided.

The professional advisors elected at the first creditors' meeting will examine the accuracy of financial statements and the reasonableness and feasibility of the proposed plan. After such examination, they will provide the relevant creditors with their exploratory reports.

The second creditors' meeting should be held within three months of the first creditors' meeting. If all the relevant creditors consent to the proposed plan at the second meeting, the reorganisation plan becomes effective, and the creditors' rights are amended according to the proposed plan. If one or more of the creditors disagree with the plan, the proposed plan cannot be effective and the workout procedure should be terminated. In such a case, the debtor company generally needs to file a petition for civil rehabilitation or corporate reorganisation proceedings.

2.3 Practical aspects

The out-of-court workout under the Guideline is useful in that it does not impair the debtor's business as much as restructuring under statutory insolvency proceedings such as civil rehabilitation or corporate reorganisation proceedings. While accurate numbers are unknown, about 30 to 40 corporations were reorganised by out-of-court workouts using the Guideline between 2001 and 2005.

The Guideline, however, is too cumbersome for small or medium-sized corporations, because it was originally designed to facilitate multi-bank workouts of larger corporations with huge debts. In addition, requiring consent of all the relevant creditors is too rigorous in same cases, and arguments have been made for its modification.

3. Mergers and acquisitions

An out-of-court workout often involves merger and acquisition activities. Mergers and acquisitions involving Japanese corporations are, among other things, regulated by the Company Law.

The Company Law provides more flexibility in structuring corporate organisations, which includes relaxation regarding types of consideration for mergers and acquisitions. Under the Commercial Code, types of consideration to be provided in exchange for mergers, corporate demergers, share exchanges were generally limited to shares of the counterparty in the transaction. The Company Law, however, relaxed the types of consideration to include cash and shares in other companies. This relaxation is applicable to absorption-type mergers, absorption-type corporate demergers and share exchanges. Due to such relaxation, triangular mergers and cash-out mergers have become possible in Japan.

Provisions of mergers and acquisitions are applicable not only to distressed corporations, but are useful for such corporations to step out of financial difficulties. Some of the main methods used for mergers and acquisitions in Japan are given below.

3.1 Mergers

Under the Company Law, the procedures generally required for an absorption-type merger between stock corporations are as follows:

(i) execution of a merger agreement;

(ii) prior disclosure of the merger agreement, etc.;

(iii) special resolution of the shareholders' meeting at the surviving corporation and the ceasing corporation approving the merger agreement;

(iv) share repurchase procedure for opposing shareholders;

(v) creditor protection procedure;

(vi) commercial registration; and

(vii) after-merger disclosure.

There are, however, some exceptions to the requirement for approval by the shareholders' meeting mentioned in (iii) above.

That is, in absorption-type merger transactions, if the total book value of merger consideration is 20% or less of the net assets of the surviving corporation, approval of the shareholders' meeting of the surviving corporation is not required. This exception is called 'Simple Merger'. The Simple Merger exception, however, does not apply where (a) the merger will result in a deficit in merger at the surviving company, (b) merger consideration includes transfer-restricted shares of the

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surviving corporation and the surviving corporation is not a public corporation,[1] or (c) shareholders holding a certain number of voting shares give notice of opposition to the surviving corporation.

In addition, if one party to the merger transaction is a 'special controlling company'[2] of the other party, the resolution of approval at the shareholders' meeting of the controlled company may be omitted. This exception is called 'Summary Merger.' The Summary Merger exception, however, does not apply where (a) merger consideration includes transfer-restricted shares of the surviving corporation and the ceasing corporation is a public corporation, or (b) merger consideration includes transfer-restricted shares of the surviving corporation and the surviving corporation is a non-public corporation.

In a merger transaction, all assets and debts of the ceasing corporation will be automatically and comprehensively transferred to a surviving or a newly incorporated corporation. Because exclusion of particular assets or liabilities (including contingent liabilities) is not permissible, a sponsor to a distressed corporation may be reluctant to choose a merger transaction as a method of rescuing it from its financial difficulties.

3.2 Corporate demergers

A corporate demerger is a split of a company. The procedures generally required for corporate demergers between stock corporations are similar to the ones for mergers, which include approval by special resolution of the shareholders' meeting of the demerging corporation and the successor corporation. As with merger procedures, the shareholders' resolution may not be required in an absorption-type demerger where the conditions for the Simple Merger or Summary Merger are met.

In a demerger transaction, all or part of the rights and obligations of a corporation relating to its business are automatically and comprehensively succeeded to by another company. Unlike the transfer of business explained below, identification of particular assets or liabilities to be assumed or consent from creditors are not necessary. In this sense, a demerger transaction is simpler to execute.

3.3 Transfer of business

A distressed corporation may need to sell its assets or business to streamline its organisation. If the assets to be transferred constitute the entire or a material part of the business,[3] the transferor is generally subject to approval by special resolution of a shareholders' meeting and stock repurchase procedures. A transferee, on the other hand, is subject to approval by special resolution of a shareholders' meeting and stock repurchase procedure only when the transfer constitutes the entire part of the business.

As with the Simple Merger exception, the approval resolution of the transferee is not required when the total book value of the consideration provided in exchange for the acquired business is 20% or less than the amount of the total net assets of the transferee. Such exception, however, does not apply when shareholders holding a certain number of voting shares give notice of opposition to the transferee corporation.

In addition, as with the Summary Merger exception, if one party to the transaction is a 'special controlling company' of the other, the approval resolution of the controlled company at the shareholders' meeting may be omitted.

In a transfer of business, the subject of transfer must be identified so that particular assets or liabilities can be excluded from the transaction. In addition, a transfer of each subject contract and obligation is subject to the consent of creditors or obligees.

3.4 Share exchange & stock transfer

A share exchange is a transaction by which a corporation will become a 100% subsidiary of another corporation. A stock transfer is a transaction by which a corporation will become a 100% subsidiary of a new corporation to be incorporated due to the stock transfer.

The procedures generally required for share exchange or stock transfer are similar to the ones for merger transactions.[4] In addition, the shareholders' resolution may not be required where the conditions for a Simple Merger or Summary Merger are met.

The share exchange or stock transfer does not cause the transfer of assets and debts held by the wholly owned subsidiary, except for the bond portion of cor-

Notes

1 A public corporation under the Company Law is a corporation for which the transfer by acquisition of shares in at least one class is not subject to approval by the corporation under the articles.

2 The special controlling company is defined as a company that directly or indirectly holds 90% or more of the voting rights of another corporation.

3 Under the Company Law, if the book value of the assets included in the transferred business is 20% or less of the total assets of the transferor corporation, such business is not deemed to be a material part.

4 The creditor protection procedures, however, are required only in limited situations because share exchange or stock transfer transactions do not generally affect creditors' rights.

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porate bonds with share purchase warrants. Therefore, unlike the absorption-type mergers, the absolute parent in share exchange or stock transfer transactions is free from succession of contingent liabilities of the wholly owned subsidiaries.

3.5 Issuance of shares

A distressed corporation may need to receive a capital injection from a sponsor by issuing new shares. Under the Company Law, if an offer is made by a transfer-restricted corporation[5] without granting existing shareholders a pre-emptive right, the terms of offer are generally subject to special resolution of the shareholders' meeting.[6] If the subscription price is particularly favourable to subscribers, the directors must explain the reason for the offer at the shareholders' meeting.

On the other hand, if the offer is made by a public corporation without granting a pre-emptive right to the existing shareholders, the terms of offer are subject to resolution of the board of directors' meeting. However, if the subscription price is particularly favourable to subscribers, the terms of offer must be approved by special resolution of the shareholders' meeting.

By issuing new shares, a debtor corporation may be able to swap its debts to equity because the contribution can be in kind, including monetary claims against the debtor. While issuance of shares by contribution in kind generally requires investigation by a court-appointed inspector, it is not required if the monetary claim has matured and the offer price is not more than the book value of the claims.

3.6 Practical aspects

While mergers and acquisitions are not only used for distressed corporations, they are certainly a fast way to reorganise a distressed corporation. The number of merger and acquisition deals in Japan has substantially increased, from somewhere around 500 in the 1990s to 2,725 in 2005, and 2,775 in 2006. The Company Law provides more choices for mergers and acquisitions activities.

4. Civil rehabilitation proceedings

All types of businesses and individuals are eligible for rehabilitation under civil rehabilitation proceedings. Although the Civil Rehabilitation Act was originally designed for small and medium-sized enterprises, its debtor-friendly features have also attracted large companies. The following is an overview of the Civil Rehabilitation Act.

4.1 DIP system

Under the Civil Rehabilitation Act, the debtor in possession (DIP) has the power to manage the debtor's business and dispose of its assets after the commencement of the rehabilitation proceedings. The DIP system makes the Civil Rehabilitation Act more attractive to a debtor because it enables the debtor's current officers to remain in charge after the filing. While the court may appoint a trustee, the Tokyo District Court does not generally make such appointment. Rather, a DIP is monitored by a court-appointed supervisor. When appointing a supervisor, a court will issue an order specifying which DIP actions require the supervisor's consent, and any DIP actions taken in violation of this requirement are void.

4.2 Secured claims

The treatment of secured claims under the Civil Rehabilitation Act is very different from that found under the Corporate Reorganisation Act. While the stay on execution applies to all secured creditors under the Corporate Reorganisation Act, it does not apply to secured creditors under the Civil Rehabilitation Act. A secured claim under the Civil Rehabilitation Act is categorised as a 'separation right' to the extent of the value of the collateral.

Secured creditors are free to proceed with debt enforcement rights against a debtor for whom a rehabilitation case has been opened. A rehabilitation plan cannot modify secured claims. To avoid enforcement by a secured creditor, a debtor needs to negotiate a deal with the secured creditor.

If a secured creditor does not attend negotiations in a rehabilitation case and instead starts a foreclosure sale, the court may issue a provisional order to suspend the foreclosure sale for a reasonable period of time. In addition, if the property is vital for a debtor to continue its business, the court may allow a debtor to discharge an under-secured security interest upon payment of only the value of the collateral instead of the entire debt. If there is a disagreement with regard to the property's

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5 A transfer-restricted corporation under the Company Law is a corporation for which shares in any class are subject to transfer restriction under the articles.

6 The shareholders' meeting, however, can delegate the decision to the board of directors' meeting and the board can decide on the terms of offer for which the subscription due date or the end of the subscription period is within one year of the date of the shareholders' resolution.

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value, the secured party can ask the court to determine the value.

4.3 Sale of a business at an early stage

If a distressed company seeks to sell all or part of its business, the sale must typically be completed as soon as possible, because the value of it tends to decline very quickly. Therefore, the court under the rehabilitation proceedings may permit a debtor to sell all or a major part of its business once a case is opened. To authorise such a sale, the court must find that the sale is necessary for the rehabilitation of the debtor's business. In addition, if the debtor is insolvent and a sale is necessary for its rehabilitation, the court may permit the sale without an affirmative shareholders' resolution.

4.4 Plan approval

Under the Civil Rehabilitation Act, a debtor must submit a draft of the rehabilitation plan by a deadline set by the court. This deadline can vary from one month to approximately eight months after the court-issued commencement order.

Because the Civil Rehabilitation Act allows a plan to modify or change only the rights of unsecured creditors, unsecured creditors alone have the right to vote on the plan. In order to approve a plan, 50% or more of the unsecured creditors who are present at the meeting or who vote by ballot must vote in favour of the plan, and those voters must represent at least half the aggregate claim amounts.

4.5 Practical aspects

Before the Civil Rehabilitation Act was adopted, courts scrutinised each filing over a long period of time and opened cases on a selective basis. The Civil Rehabilitation Act, however, triggered wider opening of cases. In addition, the Civil Rehabilitation Act enabled the court to handle rehabilitation cases more speedily. For instance, a rehabilitation plan in the Tokyo District Court is generally confirmed within six months of the filing for the rehabilitation proceedings.

5. Corporate reorganisation

The Corporate Reorganisation Act was originally designed to reorganise larger corporations by providing strong tools for reorganisation. Unlike the Civil Rehabilitation Act, only a stock corporation is eligible for reorganisation under the Corporate Reorganisation Act. The following is an overview of the Corporate Reorganisation Act.

5.1 Appointment of a trustee

Under the Corporate Reorganisation Act, a court must appoint a trustee with the exclusive power to manage the debtor's business and property under the court's supervision. Although the Corporate Reorganisation Act does not have a DIP provision, it permits appointment of the debtor's officer as a trustee unless the officer is potentially subject to an officer liability.

5.2 Secured claim

Upon issuance of a commencement order in a reorganisation case, secured creditors are prohibited from receiving payments and proceeding with debt enforcement rights. If the court determines, however, that the collateral securing a claim is not necessary for the reorganisation, it then may lift the stay with respect to foreclosure on such property. In addition, the Corporate Reorganisation Act permits a debtor to terminate a lien on its property without a creditor's consent if it pays the lien-holder the value of the collateral.

Unlike the treatment under the Civil Rehabilitation Act, secured claims may be modified by a reorganisation plan and receive payment according to the plan.

5.3 Reduction of capital and issuance of new stock

A reorganisation plan may provide for a reduction of capital, reverse stock split, or stock redemption. In addition, the Corporate Reorganisation Act provides that if a company wants to issue new stock, preemptive rights, or bonds, it may include such provisions in the reorganisation plan.

The fair and equitable rule under the Corporate Reorganisation Act requires that all the shares of a debtor have to be replaced when the plan provides amendment of the secured claims of the insolvent debtor. It is, therefore, the standard practice under the corporate reorganisation proceedings to completely eliminate the debtor's former shareholders.

5.4 Mergers, demergers and new company formation

The Civil Rehabilitation Act and the Corporate Reorganisation Act differ in their treatment of mergers, demergers and the formation of new companies. Because the Civil Rehabilitation Act is intended for simple cases with no need for a merger, demerger or new company formation, it contains no provisions on these subjects. If a merger, demerger or formation of a new company is necessary to restructure a business, a firm in a rehabilitation case must follow relevant procedures under the Company Law. The Corporate Reorganisation Act, on the other hand, was intended to address

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more complex cases where mergers, demergers or new company formations are necessary. Thus, a company in reorganisation procedures may simply incorporate provisions on a merger, demerger or formation of a new company in its reorganisation plan and not satisfy the requirements of the Company Law.

5.5 Plan approval

The Corporate Reorganisation Act divides voters into several different classes: secured creditors, priority claim holders, general unsecured creditors, preferred shareholders and ordinary shareholders. Plan approval under the Corporate Reorganisation Act requires the approval of the unsecured creditors, secured creditors and shareholders.[7]

For approval by unsecured creditors, a plan must receive support from those who hold at least 50% of the total value of the unsecured claims.

For approval by secured creditors, a plan must meet the following vote requirements: (i) votes representing at least two-thirds of the total value of the secured claims if the plan alters the maturity dates of their claims, (ii) votes representing at least three-quarters of the total value of the claims if the plan includes a discharge of claims or change other than a mere alteration of the maturity dates, and (iii) votes representing at least nine-tenths of the value of the claims in the event that the plan contemplates liquidation of the debtor's business.

Finally, for approval by shareholders, those voting in favour of the plan must hold at least 50% of the total outstanding shares.

It is worth noting that only the Corporate Reorganisation Act has a 'cram down' provision. That is, when the approval requirements specified above are not met, the court may confirm a reorganisation plan by amending it to protect the rights of a dissenting class.

5.6 Sale of business

With court approval, a company in reorganisation proceedings may sell its business early in the case. While the Corporate Reorganisation Act does not require an affirmative shareholders' resolution pursuant to the Company Law, the court will not permit a sale if the debtor is solvent and the shareholders holding more than one-third of the voting rights file a written objection. Shareholders, however, do not have such veto power if the company is insolvent.

5.7 Practical aspects

The tools for reorganisation under the Corporate Reorganisation Act are much stronger than those under the Civil Rehabilitation Act, in that the Corporate Reorganisation Act restricts and can modify secured creditors' claims, and the plan under the Corporate Reorganisation Act can stipulate fundamental changes to corporate structures of the debtor.

In addition, the timetables that courts have set for reorganisation proceedings are less expedited than those for civil rehabilitation proceedings. For example, the Tokyo District Court's reorganisation proceeding timetable contemplates issuance of a commencement order within approximately one month of the filing for reorganisation protection, submission by the debtor of a reorganisation plan within 11 to 12 months, and confirmation of the plan within 13 to 14 months. Consequently, the reorganisation time frame accommodates complex cases in which the debtor may require more time to diagnose its problems, prepare a reorganisation plan and rectify its operations.

6. Conclusion

The corporate bankruptcy cases in Japan have increased by 18% in 2007 as compared to 2006, according to research by Teikoku Databank Ltd. It is expected that bankruptcies will continue to increase, and the pace will likely accelerate as the Japanese economy is now clearly slowing down, and that will hurt small and medium-sized firms severely. However, as explained in this article, there are many useful tools for corporate reorganisations in Japan, and the practice of early and quick corporate reorganisation is expected to continue.

Notes

7 If a company is insolvent, shareholders do not have a voting right on the plan.

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