

Foundation of the Industrial Revitalization Corporation in Japan

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On 30 October 2002, the government's "Comprehensive Measures to Accelerate Reforms" and the Financial Supervisory Service(FSA)'s "Financial Revival Program" were released. The Task Force for Industrial Revival and Employment, established by the Comprehensive Measures consisted of economic related ministers, announced the "Basic Policy for Corporate and Industrial Revitalization" on 19 December 2002. Subsequently, the bills of the Law to establish the Industrial Revitalization Corporation and other related laws were drafted and sent to the Diet on 20 February 2003, after adoption in a Cabinet meeting held on 28 January 2003, intended to take effect coming early April. With the Japanese economy in a slump for the thirteen years since 1991, the Industrial Revitalization Corporation (IRC) must be established as soon as possible to spur economic recovery.

Japan has enacted a series of legislation meant to rehabilitate struggling companies, including the "Financial Revitalization Law", "Industrial Revitalization Law", "Civil Rehabilitation Law", "Corporate Reorganization Reform Law", the "Special Law for Reorganization of Financial Institutions" and "Laws for Recognition and Assistance of Foreign Insolvency Proceedings". With the addition of the IRC Law, Japan will boast one of the most extensive legal systems for corporate rehabilitation. Tools such as the "Guidelines for Multi-Creditors Out of Court Workout", corporate recovery funds, DIP financing and debt-to-equity swaps are seeing increasing use. However, the tax system must still be revised to determine the use of outdated operation loss carryforward in non performing loans (NPLs) disposal, refund of taxes paid in prior years, the taxation policy on unrealised profit/loss from revaluation of assets, and a more flexible application of tax-deductible treatment on debt forgiveness.

On 28 February 2003, the government nominated me as a candidate of the chairperson of the IRC Committee. This report was written before my nomination was announced and reflects my personal views only, and is in no way intended as the official view of the IRC or the IRC Committee.

1 Outline of IRC as defined in the Basic Policy

The Comprehensive Measures to Accelerate Reforms proposed that the IRC be established as a key part of aggressively rehabilitating companies and industries, in addition to accelerating NPL disposal, aiming to cut NPLs by half within two years. The Basic Policy (BP) were adopted on this basis, and define the IRC and its operation policies as follows:

- (1) The IRC will act as a neutral intermediary in helping companies with excessive debt reorganize themselves when the company is viable but conflict of interests prevent the company and creditors from agreeing on a rehabilitation plan.
- (2) The IRC will intercede in matters that should be resolved by private entities. Therefore, the IRC should utilize private initiative as much as possible, promote the development and expansion of loan credit markets and securitization, and foster a market for corporate recovery funds.
- (3) The IRC shall not attempt to prolong a hopeless company's life. And will help regroup industries with overcapacity in cooperation with governing ministries and agencies and by using the amended Industrial Revitalization Law if necessary.
- (4) The IRC will be financed by government-guaranteed loans. It will be incorporated as a joint stock company, allowing the government's involvement in setting criteria for financial support and choosing executive directors.
- (5) The IRC will give support to companies classified as "borrowers requiring attention" (including "special attention" and "doubtful" debtors considered capable of rehabilitation). The IRC will purchase the loan obligations from the debtor's non-main banks and draw up a reorganization plan in cooperation with the main bank and the debtor company if the IRC determines that more loans can be collected by reorganizing the company than by liquidising it and the reorganization plan agreed on by the main bank and the debtor company is considered feasible.
- (6) In preparing a reorganization plan, the IRC will ask for assistance from private sector experts in corporate restructuring. It will also use statutory procedures for corporate rehabilitation such as the Civil Rehabilitation Law and Corporate Reorganization Law.
- (7) Debt-to-equity swaps and DIP financing by government-affiliated financial institutions will be used. The IRC will be able to give additional loans, inject capital, form trusts and

give guarantees to reorganizing and reorganized corporations.

- (8) The IRC will concentrate its purchase of NPLs in the first two years and sell the purchased NPLs and equities acquired via debt-to-equity swap within its five-year life span. In doing so, the IRC will strive to minimise the secondary losses taxpayers will ultimately bear.
- (9) The IRC will set fair and transparent standards for the NPLs it purchases. NPLs will be purchased at a market value deemed fair paying due consideration to the reorganization plan. No NPLs should be purchased or sold without approval of the IRC Committee, made up of experts.
- (10) A reorganization plan must be completed within three years and include measures to improve the balance sheet and profitability of a debtor company so that the debtor company will be able to be re-financed by itself and the IRC will be able to sell the loans it purchased. In principle, a plan must set targets that meet the standards stipulated in the Industrial Revitalization Law – standards of productivity enhancement and balance sheet restoration that are described below – for the debtor company to be approved for rehabilitation under the IRC scheme. The Industrial Revitalization Law is to be amended concurrently with the adoption of the IRC Law. The IRC will apply the criteria flexible, ready to make exceptions if the Committee believes there is good reason to do so.
- (11) A reorganization plan must include measures that enable a debtor company to achieve at least one of the following goals related to productivity improvement at the end of the planned period, which is three years or less:
 - (i) An increase in return on equity (ROE) of more than 2% (if a corporate recovery fund or other company buys the debtor company for the purpose of reorganizing it, cash flow—adjusted return on assets (ROA)—must increase by more than 2%.)
 - (ii) An increase in turnover ratio of tangible assets exceeding 5%.
 - (iii) An increase in added value per employee exceeding 6%.
- (12) Similarly, a reorganization plan must include measures aimed at achieving all of the following targets in financial health by the end of the three-year period or less:
 - (i) Interest-bearing debt 10 times less than the annual cash flow.
 - (ii) Ordinary income that exceeds ordinary expenses.

2 Basic Policy for the construction industry

Along with the BP, the Basic Policy for Revitalization of the Construction Industry were also released. These BP were specifically aimed at the construction industry, which, despite its overcapacity, cannot be left to fall apart on its own for various reasons.

Construction investment in the private sector is expected to decline 43% to JPY32trn in fiscal 2002 from a peak of JPY 56trn in fiscal 1990. In addition, public works spending is expected to decrease 29% to JPY25trn in fiscal 2002, compared with JPY35trn at its peak in fiscal 1995. In contrast, the number of construction contractors increased to about 570,000 at end-March 2002, a 9.4% rise from end-March 1992. Orders to the major 50 general contractors peaked at JPY23trn in fiscal 1992, dropping 39% to about JPY14trn in fiscal 2001.

Delays in realigning the construction industry are attributed to the fact that the construction industry does not operate on an economy of scale, since it does not need production facilities and each building is made to order, and inefficient market mechanisms, with insufficient competition for the public work projects that make up half of the market.

The Construction BP sets the conditions under which the construction industry can receive support in order to solve the overcapacity problem and revive the industry. The IRC will purchase loan claims and provide other support only under the following conditions:

- (1) (i) In principle, the scale of a business should be reduced since the market is shrinking and orders are decreasing, or
(ii) Support should aim to reorganize businesses by integrating multiple companies or establishing a subsidiary among multiple companies.
- (2) At the completion of a three-year revival plan, a company's financials must meet the criteria mentioned above, i.e., (i) interest-bearing debt 10 times less than cash flow and (ii) ordinary income that exceeds ordinary expenses. In addition to these, the company's financial ratios must be comparable to the average level:
 - (i) Profitability ratio: operating profit margin, ROA (ordinary profit/total assets)
 - (ii) Leverage ratio: equity ratio (shareholders' equity/total assets), debt/equity ratio
 - (iii) Liquidity ratio: fixed assets/shareholders' equity ratio, fixed assets/(long-term liabilities + shareholders' equity) ratio
- (3) Standards for productivity improvement are the same as in the BP.

3 IRC Law and the Operation Overview

The IRC Law, currently under deliberation in the Diet, provides insight into the workings of the IRC. The main points can be summarized as follows:

- (1) The IRC helps individual businesses with viable resources but excessive debt to reorganize by

purchasing this debt from financial institutions, thereby ensuring that a healthy financial system is maintained through industrial revitalization and bad-loan disposal.

- (2) The IRC is a business corporation (K.K.) established by approval from the authorizing ministers, which in this case are the prime minister, finance minister, and minister of economy, trade and industry. These ministers must approve the IRC's executive appointments, budget plans, and financing (guaranteed by the government). They may use their supervisory position to issue administrative orders requesting reports and inspections of the IRC's operations.
- (3) The Industrial Revitalization Committee (with a membership not to exceed seven and including three or more directors, two of whom must be a representative director and external director) determines whether to extend revitalization support and makes decisions regarding the purchase and disposal of loans. Once a decision has been reached, the committee members consult with the authorizing ministers, and the minister administering the IRC's operations makes recommendations in light of the extent of the industry's overcapacity. The decision to extend support and purchase loans must meet the publicly disclosed criteria for support.
- (4) Companies will apply for reorganization support by submitting a business reorganization plan to the IRC with their financial institutions (in general, the main bank or banks). Based on the Committee's conclusion, the IRC will move quickly to decide whether to support those plans deemed to have a high chance of success. Non-main banks and other financial institutions have three months to decide whether to sell loan claims to the IRC (including loan trusts) or accede to the business reorganization plan, and the IRC will generally request that these banks temporarily stay debt collection during this period.
- (5) The IRC will purchase the loans when these financial institutions request the purchase, or when the total sum of loans held by the financial institutions agreeing to the reorganization plan meets the sum necessary for revitalization (in the event that most financial institutions agreed to the purchase or agreed to the reorganization plan). The purchase price will be the appropriate market value decided by the IRC committee paying due consideration of feasibility of the reorganization plan. The decision to provide support will be retracted if revitalization is not feasible due to the exclusion of financial institutions that do not apply for debt purchase or of financial institutions that hold large amounts of debt but do not agree to the reorganization plan, preventing the plan from reaching the necessary debt sum.
- (6) If financial institutions provide financing to the targeted company from the time the IRC decides

to provide support to the time it decides to purchase debt, the super-priority claim of the DIP lender is noted in the reorganization plan, and the financial institution can request that the IRC acknowledge the necessity and super-priority claim of this DIP financing. The company may start proceedings for civil rehabilitation or corporate reorganization at a later point (before the IRC disposes of the purchased debt). Any unpaid DIP loans should be given priority in the reorganization plans which would be approved in the subsequent rehabilitation or reorganization proceeding. The courts may determine whether the authorization would go against the equitable treatment of creditors, but the courts must keep in mind that (1) the IRC has given their approval to the claim and (2) financial institutions forgave loans according to the terms of the reorganization plan formed in former IRC proceeding, so the super-priority claims of DIP lenders will not hurt other creditors (this has set a precedent for the preferential treatment given to the claims of DIP lenders established before the debt transfer in subsequent statutory reorganization procedures.)

- (7) The IRC can support the revitalization of a company whose debt it has purchased by providing financing, guarantees and capital. It can also review and adjust company operations, provide advice and conduct any other necessary task.
- (8) The last date for debt purchase is 31 March 2005, and the IRC must attempt to transfer or dispose of all purchased debt and/or converted stocks within three years of the purchase decision date. The IRC can raise funds by borrowing through government guarantee, and the government will compensate for losses to be incurred by IRC's negative net worth at its liquidation.

4 Expected practice of the IRC

The section of the IRC law pertaining to the IRC's administrative responsibilities could have been drafted in reference to part of the "Guidelines for Multi-Creditors Out of Court Workout." Referring to these guidelines, the IRC's actual responsibilities can be summarized as follows:

- (1) Companies that are struggling due to excessive debt can draft a reorganization plan with their main bank(s). The company and banks' staff will develop this plan with help or backing from certified public accountants and restructuring advisers. The reorganization plan will encompass both financial and business reorganization, the first achieved by using debt forgiveness and debt-equity swaps to cut interest-bearing debt and increase/decrease capital, and the latter by closing and cutting unprofitable businesses in peripheral divisions, strengthening profitable core divisions, and even splitting up the company, using mergers and affiliations and business

transfers. Preparing the draft plan takes from two to three months, and 10 to 20 staff—including bank and company staff and external specialists—work on the plan. Financial advisers provide help, and the staff look for candidates for sponsors and corporate recovery funds.

- (2) The main bank and the company hold preliminary discussions with the IRC's administrative office. The office uses external sources such as restructuring advisers, and follows the advice of members in the IRC Committee as necessary, in reviewing the accuracy of the financial data and the draft's validity, feasibility and economic rationale. Revisions are made as necessary, and the office calls on the advice of certified public accountants, tax accountants, and lawyers as necessary. The office also performs a due diligence process to set the appropriate market value for the debt purchase price. This process requires about 20 staff and a two-month period.
- (3) Once a reorganization plan with high feasibility is completed, the company and its main bank(s) officially apply to the IRC for aid. After consulting with the relevant ministers, the IRC Committee makes a decision without delay on whether to offer revitalization support. Based on this decision, the IRC makes its own decision on support, and distributes the plan to the non-main banks, requesting a temporary stay on collections. The IRC also asks that the banks decide within a maximum of three months between two choices: whether to apply for debt purchase or to agree to the reorganization plan. The detailed reports prepared by the restructuring advisers and specialists will be used by the relevant ministers in their consultation, and by the committee in making their decision, regarding the prospects for the company's successful revitalization. In other words, a great deal of preparatory work is done out of sight during the period from the prior consultations mentioned in (2) to the application for revitalization support. Most plans that do not seem likely to be successful, despite revisions made at the review stage, probably never make it to the official application stage. The IRC does not publicly release information on plans that make it to the application stage and are not accepted.
- (4) With the exception of a few creditors that can be excluded without impeding revitalization, the IRC purchases the debt when the non-main banks apply for debt purchase or agree to the reorganization plan. The IRC withdraws from the decision process if it does not gain the cooperation of the necessary financial institutions, and in this case the companies are likely to go through statutory reorganization procedures. The IRC sells the purchased debt within three years of purchase, and during this time it monitors the progress of the plan with the main bank. Any breakdown in the revitalization process will likely result in transfer to statutory reorganization procedures.

5 **Impact of IRC on revitalizing businesses**

The IRC's objective is to help reorganize individual companies—a role normally left to the private

sector to conduct on their own initiative. However, my involvement in establishing and administering the “Guidelines for Multi-Creditors Out of Court Workout” has shown me the necessity of the semi-private, semi-governmental IRC’s involvement in reducing the interest-bearing debt of companies with excessive debt and restoring these companies to health quickly, for private-sector efforts are often insufficient for full-fledged revitalization. In October 2001 the government’s economic council issued its “Program to Accelerate Reform,” which aims, among other things, to establish a lot of corporate recovery funds and make DIP financings more popular in Japan at the initiative of the DBJ, after which the Development Bank of Japan (DBJ) received an additional JPY100bn in the FY01 supplementary budget. In 2002 a lot of corporate recovery fund were set up with or without involvement of the DBJ and DIP financing saw increasing use. This is similar to the IRC’s scheme in that the public sector provides support for corporate and industrial reorganization efforts. Reports state that IRC policy does not exclude small and medium-sized enterprises (SMEs) from this program. The IRC was given the immense sum of JPY10trn to efficiently rehabilitate enterprises that cannot be left to the private sector, on the premise that the IRC was created to complement the RCC. The revisions in 2001 to the Financial Revitalization Law enabled the RCC to help companies reorganize by buying up their loans, but this alone has not been sufficient, which explains the need for the IRC. The IRC and RCC should work together to clean up debt-ridden companies and efficiently rehabilitate as many companies as possible. Of course, it will take effective economic policy, and not just the revitalization of individual companies, to resurrect the overall Japanese economy.

(1) Limits to relying on private-sector initiative for revitalization

As stated in the BP, ideally the private sector should be able to revitalize corporations with its own efforts, but factors such as the difficulty involved in balancing the interests of creditors require the presence of an institution that can consolidate debts and serve as a neutral mediator to accelerate the revitalization of companies with potential but which cannot be left to the private sector.

In 1999 and 2002 a number of major companies received large amounts of financial aid. Given the worsening asset deflation, the banks’ own compliance problems and restrictions posed by taxation, it was probably inevitable, but financial weakness prevented the main banks from extending sufficient support to these companies, as many analysts noted. This indicates the limits of the private sector’s ability to rehabilitate companies. According to the IRC Law, the IRC can provide aid to companies that are deemed likely to recover by following a reorganization plan. Since a great deal of the taxpayer’s money will be poured into these companies, the final decision on whether to proffer aid must rest on thorough asset evaluation founded on conservative estimates and a reliable business plan

based on realistic projections—it is not enough to simply determine that the company would not necessarily collapse. If the financial profile and revenue improve more than the conservative assessments initially suggested, the IRC could realize gains on a rise in the price of stock obtained through a debt-equity swap.

Although many companies have gone through the statutory reorganization procedures and continue to do so, these procedures inevitably lead to deterioration in corporate value. As such, ailing companies tend not to file for court protection until it is too late for them to be revitalized.

(2) Difficulties with main banks in out of court workout procedures

The “Guidelines for Multi-Creditors Out of Court Workout” were prepared in September 2001 as a tool to facilitate the private sector’s own efforts to revitalize corporations, but it was only used six times in the 15-month period through the end of 2002. The reorganization plans made in out of court workout proceedings under the guidelines provided that companies limit their requests for loan forgiveness to their main and secondary main banks, and ask their tertiary banks only to maintain their credit balance. This was motivated by the fear that the tertiary banks would not agree to requests that losses be spread evenly among the creditor banks and that any attempt at out of court workout would be over before it had started. In an equitable division, the main banks typically take on an amount equivalent to that forgiven by the tertiary banks. Next the company would request aid from its secondary main banks, such as debt forgiveness equivalent to the amount of aid needed from all its creditor banks (including tertiary banks), but this would most likely result in a situation in which the main banks have to take on a larger share of the burden in order to decrease the secondary main banks’ burden enough so that the debt forgiveness scheme is agreed on by all parties. For main banks, this disproportionate burden compared to other banks limits the merits of out of court workout resolution. The December 2002 reorganization plan for Nippon Yakin Kogyo faced so many difficulties that some suspected it would be the last out of court workout case under the guidelines requiring support from secondary main banks.

Only Tokyo Mitsubishi, Mizuho Corporate Bank (including Fuji Bank and Daiichi Kangyo Bank before the merger), Fukuoka Bank and Yamanashi Chuo Bank involved in out of court workout cases under the Guidelines at the position of main banks. Although it is merely my own speculation, reasons why other banks did not use the workout proceeding under the Guidelines might be that there is no room to ask secondary and tertiary banks for their cooperation to the loss sharing because banks other than main banks withdrew their loan, or because the main banks were determined to maintain their policy of helping their group companies under their umbrella even in adversity.

Whatever the reason, main banks were required to shoulder almost all burden from October 2002, making it extremely difficult to work out reorganization plans under the guidelines. The only way to rehabilitate companies so that they regain profitability and a healthy financial profile—which is certainly beyond the ability of most banks to accomplish alone—is for the IRC to buy up debt from the secondary and tertiary banks and hold three-way discussions with the main bank and company to establish a sound reorganization plan. This points to the strong need for the IRC to be set up as soon as possible. Reorganization plans for Seibu Department Store and Hazama Gumi launched in January 2003 have been worked out under the Guidelines. According to Hazama Gumi's plan, its tertiary banks will be asked for help with half of the financial losses allocated on a pro-rata basis. After the first reorganization plan requiring secondary and tertiary banks to share losses had been worked out, the RCC bought up the non-performing loan assets from those banks as requested.

(3) Incentives encouraging applications for loan purchases

In addition to JPY100bn in capital, JPY10trn of funds will be available for the IRC for use in revitalizing companies. This will enable the IRC to rehabilitate many major corporations, but this certainty is marred by fears that non-main banks might not respond to the IRC's call for offers to purchase debt. However, even in this case the goal will have been achieved if these non-main banks consent to the reorganization plan and provide financial support in the form of debt forgiveness and debt-equity swaps.

The price for the loans will be set at a level commensurate with the business recovery plan, but there is some doubt as to what this will actually mean. Although market value is the usual alternative to book value, it will not be used in this case since the debt will not be traded in the market. The net book value prior to the reorganization plan worked out in agreement with creditors is equivalent to the value of the loan less reserves, but the net book value employed when a reorganization plan is worked out would be equivalent to the loan value less the amount of debt forgiven and the value of stocks gained in a debt-equity swap. Neither of these methods will be used here. A rigid standard would not be appropriate even if referring to the market's valuation methods. The value used will likely be a sum discounted from the face amount depending on the reorganization plan's feasibility, given the amount likely to be recovered in estimated future cash flow. However, the IRC will provide aid when it determines that a recovery plan has a high chance of saving the company, so setting a price for the loan purchase that sharply undercuts the loan's face value could shed doubt on the validity of its valuation of the company. Buying up loans at a high price increases the risk of secondary losses, but setting a low price could limit the number of buyers. This is certainly a point of difficulty. Even if

they are uncomfortable with the price, non-main banks can agree to reorganization plans for companies they deem capable of recovery, and offer support through debt forgiveness and debt-equity swaps. This kind of participation is enough to efficiently resurrect struggling companies without the IRC having to use public money to buy up loans.

(4) Possibility of increase in prepackaged statutory reorganizations

Prepackaged statutory reorganization procedures involve the preparation of a reorganization plan that is negotiated and consented on by interested parties including creditors before the company actually files for bankruptcy with the court which has jurisdiction over the case. Prepackaged procedures have certain advantages such as the availability of DIP financing, approval of rehabilitation plan by creditors' majority vote, avoiding power to cancel preferences and fraudulent transfers and rejection of executory contracts.

Convincing creditors other than the company's main bank(s) to forgive debts, allocating losses to the secondary main banks as well and convincing tertiary banks to maintain a credit line for the reorganizing company is an extremely difficult undertaking. Although the main bank and creditor companies may plead with the non-main banks for their cooperation, it takes about a year to gain the agreement necessary for reorganization (a year-and-a-half if preparation time is included), and it is not unusual for the banks to force the reorganizing company to increase the deposits serving as collateral as a condition for their consent. The procedures laid out in the "Guidelines for Multi-Creditors Out of Court Workout" shorten the period—including preparation—to six months (within two or three months of the notice of stand still), but it has not been unusual for some banks to resist cooperation to the last, requiring tremendous efforts to persuade them.

The involvement of the semi-governmental IRC will make financial reorganization much easier compared to out of court workout, but even in this case it will be no simple matter to gain cooperation from the creditors accounting for the necessary portion of debt. When the total debt held by the banks agreeing to the plan is less than the total necessary debt, the company will have to give up on the IRC's scheme and instead follow procedures for civil rehabilitation or corporate reorganization. Previous cases have shown that out of court workout under the Guidelines involving only financial creditors result in much less damage to corporate value than is typically incurred in the statutory reorganization procedures. This is likely because the news that only financial institutions' debt will be affected relieves trade partners enough for them to continue transactions. The temporary suspension or standstill request made simultaneously with the IRC's decision to provide aid will also affect only financial institutions. When there are worries that the necessary number of financial institutions

will not agree, the necessary steps regarding trade receivables will be taken during the review period, making it possible to avoid involving general creditors in reorganization plans. Once statutory reorganization procedures start, the general creditors will be protected, as their receivables will be dealt with as minor debt. These measures also minimize the extent of the damage to corporate value, even if the company is forced to undergo statutory reorganization procedures. In this procedure, the reorganization process begins unless it is clear that the reorganization plan will not be drafted, adopted, or approved, and definite decisions are not made regarding the feasibility of reorganization in the early stages. However, the IRC has a team of experts, including external restructuring advisers, conduct a intensive review over a two to three month -period, then the IRC Committee decides to help the debtor corporation only if the Committee is satisfied that proposed reorganization plan should be highly feasible referring to the report made by the experts. This means that the civil rehabilitation and corporate reorganization procedures, which accede to the IRC's decision, have a higher chance of success than other cases. Awareness of this further restricts the damage to the company's credit in the eyes of its trade partners, which could ensure that the civil rehabilitation and corporate reorganization procedures run faster and more smoothly. This suggests that conversion to statutory reorganization procedures should not necessarily be avoided. Such a conversion may be made when some banks insist not to agree to the proposed plan, but a good track record of successful reorganization under converted statutory procedures could make it easier to gain banks' cooperation in future IRC cases.

Flexible management by the courts has made it easier to use the civil rehabilitation procedures. In December 2002 the Corporate Reorganization Reform Law was enacted, and became effective after April 2003. The extensive revisions include a partial DIP mechanism allowing the current executive officers to be appointed as trustees, more flexible majority criteria for accepting reorganization plans, and the use of fair value in asset assessment and evaluation of collateral, all of which facilitate the application for corporate reorganization procedures (similar to civil rehabilitation). Japan's bankruptcy laws are now among the most user-friendly in the world. The launch of the IRC will help to transform Japan's statutory reorganization procedures into tools similar to Chapter 11 bankruptcy procedures in the US.