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Overview Of The Japanese Legal Framework To Resolve A Systemically Important Financial Institution In Insolvency Proceedings In Japan

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OVERVIEW OF THE JAPANESE LEGAL FRAMEWORK TO RESOLVE A SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTION IN INSOLVENCY PROCEEDINGS IN JAPAN

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Introduction

This article is intended to provide an overview of the Japanese legal framework within which the resolution of a systemically important financial institution would occur in Japan.

While Japan has a well-established scheme of insolvency laws, there have been few insolvencies of Japanese regulated financial institutions in the past decade. In addition, Japanese courts have considerable latitude in administering insolvency proceedings and rendering decisions. The combination of these factors makes it difficult to predict with certainty the mechanisms for implementing a proposed resolution.

International Context

Japan is a member of the Group of Twenty ("***G20***") and the Financial Stability Board ("***FSB***"). As such, Japan's leaders have committed to pursue financial stability, implement international financial standards and undergo periodic peer reviews.[1]

On November 4, 2011, three Japanese financial institutions were named in the initial group of twenty-nine globally systemically important financial institutions ("***G-SIFIs***") identified by the FSB and the Basel Committee on Banking Supervision ("***BCBS***"). The G-SIFIs will need to meet resolution planning requirements by the end of 2012. The Japanese G-SIFIs are (i) Mitsubishi UFJ FG, (ii) Mizuho FG and (iii) Sumitomo Mitsui FG. In addition, sixteen of the initial G-SIFIs have Japanese subsidiaries[2] and seven have branches in Japan.[3] This means that, while the resolution of non-Japanese G-SIFIs will be initiated elsewhere, cooperation with Japanese regulators and courts will be necessary. Japanese policies and procedures regarding multi-jurisdictional insolvency proceedings are discussed below.

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[1] Financial Stability Board Charter (September 25, 2009), Article 5.

[2] Bank of America, Bank of New York Mellon, Barclays, BNP Paribas, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan Chase, Morgan Stanley, Royal Bank of Scotland, Société Générale, State Street, UBS and Wells Fargo (Source: Public Reports of Individual Institutions).

[3] Bank of China, Commerzbank, Group Crédit Agricole, ING Bank, Lloyd's Banking Group, Santander and Unicredit Group (Source: Public Reports of Individual Institutions).

Japan Financial Services Agency (FSA)

Organized under the Japanese Minister for Financial Services, the Financial Services Agency ("***FSA***") is the Japanese national authority responsible for the supervision of Japanese financial institutions (banks, securities companies and insurance companies). All financial supervisory functions in Japan are consolidated into the FSA.

Specifically, the FSA Supervisory Bureau is divided into (i) the Banks Divisions (I and II)[4] regulating banks operating under the Banking Act,[5] (ii) the Insurance Business Division regulating insurance companies operating under the Insurance Business Act[6] and (iii) the Securities Business Division regulating registered broker-dealers operating under the Financial Instruments and Exchange Act ("***FIEA***") (formerly known as the Securities and Exchange Act).[7] The FSA also plays a prominent role supervising the Japan Investor Protection Fund ("***JIPF***") established under FIEA.[8] While the Prime Minister and the Minister of Finance are the named supervisory authorities of the JIPF, the Prime Minister substantively delegates his authority to the FSA.

Finally, the FSA is responsible for supervision and policy-making relating to risk management in the financial system and the resolution of a failed financial institution. While some separateness is maintained among the Divisions, the consolidation of functions at the FSA streamlines the type of inter-agency coordination that will be critical to the effectiveness of a resolution plan.

Overview of Legal System in Japan

Japan has a civil law system based upon statutory codes.[9] Voluminous "Acts" are enacted to supplement the six main codes. The Ministry of Justice provides an online collection of English language translations of many Japanese laws.[10]

Courts in Japan are organized on the District Court, High (Appellate) Court and Supreme Court levels. Japan does not have separate courts for insolvency proceedings. While judicial precedent is not legally binding, Japanese courts do take certain precedents (especially *ratio decidendi* in the Supreme Court decisions) into consideration as guidance when rendering a decision. As a legal formality, the Supreme Court may not reverse any precedent decisions unless it has reasonable grounds such that (i) circumstances have been significantly changed with the lapse of time, (ii) it is necessary to adjust the precedents given the rules of thumb or (iii) there is an error in the precedents.

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[4] The Banks Division I supervises major banks, branches of foreign banks and trust banks. The Banks Division II supervises regional banks.

[5] Banking Act (Act No. 59 of June 1, 1981).

[6] Insurance Business Act (Act No. 105 of June 7, 1995).

[7] Financial Instruments and Exchange Act (Act No. 109 of 2006).

[8] FIEA, Chapter IV-2 (Investor Protection Fund), Articles 79-20 to 79-80.

[9] The codes of Japan are generally referred to as the "Compendium of the Six Codes" and consist of the Constitution, the Civil Code, the Commercial Code, the Code of Civil Procedure, the Criminal Code and the Code of Criminal Procedure.

[10] The translations available can be found at http://www.japaneselawtranslation.go.jp/law/search_nm/?re=02

Scholarly opinion has a significant influence on the development and interpretation of law in Japan. Leading scholars routinely participate in the enactment and reform of Japanese law. A court might consider interpretative guidance from scholars as decisive authority.

As described above with respect to the FSA, the Japanese legal system is also heavily influenced by administrative guidance promulgated by the various ministries.[11] Cabinet orders and ministerial ordinances interpret the laws and provide details for implementing the laws. Insolvency law is less administrative, so there are very few cabinet orders or ministerial ordinances that address the operation of the insolvency laws. However, because regulation of financial institutions is intensively administrative, resolution of a G-SIFI would be significantly influenced by aspects of administrative law (including cabinet orders and ministerial ordinances).

Insolvency Regime in Japan for Regulated Companies

In some jurisdictions, debtors can be subject to different insolvency regimes depending upon how the debtor is organized or regulated. For example, in the United States these insolvency regimes include those found in the Bankruptcy Code,[12] the Federal Deposit Insurance Act (the "***FDIA***"),[13] the Securities Investor Protection Act of 1970 ("***SIPA***")[14] and under domiciliary state law for an insurance company. The United States has also enacted the Dodd-Frank Act,[15] which provides for an Orderly Liquidation Authority to address the resolution of a financial company, the failure of which would have serious adverse effects on financial stability in the United States.

In contrast, while Japan has banking laws,[16] broker-dealer laws[17] and laws addressing the operation of insurance companies,[18] these industry-specific Japanese laws do not include specific insolvency regimes for such regulated financial institutions. Instead, insolvent financial institutions in Japan are subject to insolvency proceedings applicable to ordinary commercial companies.

Upon a deposit-taking financial institution's failure, the FSA appoints the Deposit Insurance Corporation of Japan ("***DICJ***") as financial administrator. The FSA may, alternatively or additionally, appoint attorneys-at-law, certified public accountants and/or other financial specialists as financial administrators. The Deposit Insurance Act[19] governs the failure of a deposit-taking financial institution. Article 74 (*appointment of financial administrator*) is

[11] The Japanese ministries are: Agriculture, Forestry and Fisheries (MAFF); Cabinet Office; Economy, Trade & Industry (METI); Education, Culture, Sports, Science & Technology (MEXT); Environment; Finance (MOF); Foreign Affairs (MOFA); Health, Labor & Welfare (MHLW); Justice (MOJ); Land, Infrastructure, Transport & Tourism (MLIT); Internal Affairs and Communications (MIC); and Defense.

[12] United States Code, 11 U.S.C. § 101 *et seq*.

[13] 12 U.S.C. § 1811 *et seq*.

[14] 15 U.S.C. § 78aaa *et seq*.

[15] 12 U.S.C. § 5301 *et seq*. The Dodd-Frank Act became effective on July 21, 2010.

[16] Banking Act (Act No. 59 of June 1, 1981).

[17] Financial Instruments and Exchange Act (Act No. 109 of 2006).

[18] Insurance Business Act (Act No. 105 of June 7, 1995).

[19] Deposit Insurance Act (Act No. 34 of 1971).

applied to less significant financial institutions, whereas Article 102 (*nationalization and others*) is applied to systemically important financial institutions.

Ordinary insolvency laws are not precluded from cases involving financial institutions. Since the Japanese government changed the policy of protecting a depositor's claim in full, it became at least theoretically possible that such a regular insolvency case filing could be initiated by an impaired depositor. In order to adapt ordinary insolvency laws to the failure of a financial institution, the Act on Special Treatment of Corporate Reorganization Proceedings and Other Insolvency Proceedings of Financial Institutions ("***Act on Special Treatment***")[20] provides certain special rules to modify the Civil Rehabilitation Act (discussed below) and to modify other insolvency laws that are designed to be applicable to regular commercial companies, for insolvent financial institutions. The Act on Special Treatment is discussed in more detail below.

Brief Overview of Japanese Insolvency Laws and Practice

There are four separate insolvency laws in Japan (i) Civil Rehabilitation and Corporate Reorganization contemplate rehabilitation of the debtor and (ii) Bankruptcy[21] and Special Liquidation[22] contemplate liquidation and dissolution of the debtor.

It is generally perceived that the Civil Rehabilitation Act[23] (rather than the Corporate Reorganization Act[24]) should be applied to the failure of a deposit-taking institution. This is largely because, in Civil Rehabilitation, the appointment of a trustee by the court is not mandatory (as it is in Corporate Reorganization cases).

With the exception of Lehman Brothers Japan which filed for Civil Rehabilitation proceedings, securities companies in Japan tend ultimately to liquidate in a proceeding under the Bankruptcy Act (Yamaichi Securities and Sanyo Securities are examples).

Since the amendment of the Act on Special Treatment in 2000, insurance companies tend to use Corporate Reorganization proceedings.[25] In the case of life insurance companies, rights of policyholders are given priority over ordinary unsecured claims, and are therefore excluded from the scope of the Civil Rehabilitation Act (which, as will be discussed below, only covers unsecured claims). As a result, a Civil Rehabilitation Plan cannot affect (by haircut or otherwise) the life insurance policyholders' rights.

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[20] Act on Special Treatment of Corporate Reorganization Proceedings and Other Insolvency Proceedings of Financial Institutions (Act No. 95 of 1996).

[21] Bankruptcy Act (Act No. 75 of June 2, 2004). When discussing Japanese insolvency, the word "bankruptcy" is not used as a generic word for "insolvency" because in Japan, "bankruptcy" is a liquidation proceeding under a specific law.

[22] Special Liquidation (Articles 510 to 574 and Articles 879 to 902 of the Companies Act). Special Liquidation is a sub-part of the Companies Act and is a simplified procedure for consensual liquidations such as a parent winding up a subsidiary.

[23] Civil Rehabilitation Act (Act No. 225 of December 22, 1999).

[24] Corporate Reorganization Act (Act No. 154 of 2002).

[25] This author served as trustee in the Corporate Reorganization proceeding of Chiyoda Life in 2000–2001, which was the first Corporate Reorganization proceeding involving an insurance company.

Since Civil Rehabilitation proceedings are most commonly used for deposit-taking financial institutions, the brief overview in this article will focus on Civil Rehabilitation.

Cases under the Civil Rehabilitation Act are intended to be debtor-in-possession cases, although a trustee may be appointed if the debtor is determined unfit to manage.[26] In a Civil Rehabilitation proceeding of a deposit-taking financial institution, it is anticipated that the FSA will appoint the DICJ as the financial administrator.[27] Thus, the DICJ will take the lead in the case. In most Civil Rehabilitation cases, the court will also appoint a supervisor to monitor the debtor's affairs. The supervisor is not likely to be as proactive as a creditors' committee in a bankruptcy proceeding under U.S. law. Japanese insolvency laws permit the court to recognize a "creditors' committee."[28] However, it is not a creditors' committee as would be seen in the context of a United States bankruptcy and the practice of appointing creditors' committees has gained little traction in Japan.[29] Since, the court controls a Civil Rehabilitation case, the FSA will not be actively involved in the administration of the Civil Rehabilitation case itself. Rather, the FSA will influence the case through the DICJ.

A stay comes into effect upon the "commencement" of a Civil Rehabilitation case.[30] The stay prohibits, among other things, the debtor from paying unsecured pre-commencement obligations. The stay does not prevent creditors from exercising rights of set-off. The treatment of netting financial contracts and *ipso facto* clauses is discussed below.

Although there can be exceptions to the general rule, a case under Civil Rehabilitation generally only modifies the rights of unsecured creditors. Therefore, the stay does not apply to the "right of separate satisfaction" of a secured creditor and a secured creditor is free to enforce its rights against its security without regard to the Civil Rehabilitation proceeding.

Unlike some other jurisdictions, court hearings are not common in Japanese insolvency proceedings. In practice, cases are often advanced via private communications among court-appointed professionals rather than through formal motions and court hearings. These professionals are routinely permitted *ex parte* communications with the court to shape the direction of a case. Although court approval (or, more often, the court-appointed supervisor's approval) may be required before taking actions outside of the ordinary course of the debtor's business, Japanese law does not condition that approval on first providing interested parties with notice and an opportunity to object.

Japanese court dockets are not available to the general public but only to parties with an interest

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[26] Article 64, Paragraph 1 of the Civil Rehabilitation Act.

[27] As discussed below, the DICJ was appointed financial administrator in the Civil Rehabilitation case of Incubator Bank of Japan (*Nippon Shinkō Bank*) ("***NSB***").

[28] Articles 117 to 121 of the Corporate Reorganization Act, and Articles 117 to 118-3 of the Civil Rehabilitation Act.

[29] In 2009 and 2010, however, Bingham obtained recognition of and represented the first-ever officially recognized creditors' committee in a Japanese Corporate Reorganization proceeding (Spansion).

[30] For example, Article 85, Paragraph 1 and Article 39, Paragraph 1 of the Civil Rehabilitation Act. As a technical matter, there is a period between filing an application for commencement and the date on which the court enters an order commencing the case. Technically, there is no automatic stay during this period; however, courts routinely enter injunction orders that serve the same basic purpose as the automatic stay.

in the case (or their lawyers who have filed a power of attorney with the court). The docket is not available through any online system and the docket must be reviewed at the court clerk's office. Photocopying of filings is permitted by interested parties (or their lawyers); however, a few business days may lapse between filing and accessibility of the filing on the docket.

Japan does not have separate courts for insolvency proceedings. Any insolvency proceeding of a G-SIFI would be brought in the Tokyo District Court. Although insolvency proceedings will theoretically be held on an entity-by-entity basis, with respect to group companies, it is customary for the same judge to preside over all the insolvency proceedings for the group entities.[31] Japanese court rules do not technically provide for "consolidated cases"; however, this effectively occurs in practice.

Issues Unique to Financial Institutions

While an insolvency of a financial institution occurs within the framework of insolvency procedures applicable to all companies, financial institution insolvencies pose unique issues with respect to (i) the treatment of deposits made by bank depositors, (ii) returning the customer property of general customers of securities companies, (iii) the rights of insurance policyholders, (iv) close-out and netting of specified financial contracts, (v) transfers to a bridge bank and (vi) licensing.

Act on Special Treatment

As discussed above, the Act on Special Treatment sets forth special rules applicable to the insolvency proceedings of financial institutions. The primary goal of the Act on Special Treatment is to protect the general public (depositors, general customers of securities companies and policyholders) through collective action to be taken by the competent public bodies instead of by the individual depositors, general customers or policyholders.

Under the Act on Special Treatment, the DICJ and the Japan Investor Protection Fund ("***JIPF***") must submit in insolvency proceedings a list of depositors or general customers (as applicable) for and on behalf of such depositors and general customers.

Similarly, with respect to an insolvent insurance company, the Insurance Policyholders Protection Corporations of Japan[32] must submit a list of policyholders for and on behalf of such policyholders in a Corporate Reorganization or Bankruptcy proceeding.

In addition, the Act on Special Treatment grants the FSA (as the supervisory authority) the authority to apply for the commencement of Japanese insolvency proceedings (i) as for banks, the FSA may apply for the commencement of Corporate Reorganization, Civil Rehabilitation or Bankruptcy proceedings,[33] (ii) as for securities companies, the FSA may apply for the

[31] The Supreme Court has issued detailed Civil Rehabilitation Law Practice Rules to govern Civil Rehabilitation proceedings.

[32] There are two such corporations in Japan, one is for life insurance companies and the other is for non-life insurance companies.

[33] Articles 377, 446 and 490 of the Act on Special Treatment.

commencement of Bankruptcy (liquidation) proceedings[34] and (iii) as for insurance companies, the FSA may apply for the commencement of Corporate Reorganization or Bankruptcy proceedings.[35]

Deposit Insurance Corporation of Japan (DICJ)

The DICJ is organized under the Deposit Insurance Act[36] and is supervised by the Ministry of Finance and the FSA. While the FSA is responsible for supervision of banks, the DICJ is responsible for deposit protection and resolution of failed banks.

In practice, within twenty-four hours after a bank's failure, the bank provides magnetic tapes to the DICJ containing depositor information.[37] In order to compile a list, the DICJ then aggregates deposits of single depositors based upon name and date of birth of depositors. The maximum coverage for deposits is JPY 10 million[38] of principal plus accrued interest (per depositor per institution).[39] In a Civil Rehabilitation proceeding, depositors are excluded from the proceeding to the extent their deposit claims are covered by this insurance (up to JPY 10 million). In other words, the DICJ subrogates the portion of each depositor's deposit claims that have been covered by the deposit insurance, and only the amount in excess of JPY 10 million will be treated as that depositor's claim in the proceeding.

The resolution methods available to the DICJ depend upon whether the failed bank is nationally systemically insignificant (where the ordinary resolution method applies) or nationally systemically significant (where the crisis management exception applies). The Prime Minister, in consultation with the Financial Crisis Management Council,[40] makes the determination as to whether the systemic risk exception is applied. For systemically significant banks, in addition to the ordinary resolution method of purchase and assumption through a bridge bank, nationalization and capital injection are resolution alternatives.

While more than a dozen banks have failed in Japan in the past fifteen years, in the past ten years only two banks in Japan have failed.[41] In all of those bank failures (with one exception), depositors and creditors were paid in full.

Incubator Bank of Japan (*Nippon Shinkō Bank*) ("***NSB***") is the first failure of a deposit-taking financial institution in Japan where only a *pro rata* distribution was made to the creditors, including depositors with non-insured deposits (i.e., term deposits exceeding JPY 10 million). NSB was placed under the control of the DICJ and filed for Civil Rehabilitation on September

[34] Article 490 of the Act on Special Treatment.

[35] Articles 377 and 490 of the Act on Special Treatment.

[36] Deposit Insurance Act (Act No. 34 of 1971).

[37] Deposit Insurance System in Japan prepared by the DICJ (September 2009). Available at http://www.dic.go.jp/english/e_shiryo/e_chosa/e_eibei-hikaku/e_2009.9.7.pdf

[38] On May 28, 2012, approximately USD 125,000, EUR 100,000 and GBP 80,000.

[39] Article 54, Paragraph 2 of the Deposit Insurance Act, and Article 6-3 of the Cabinet Order for Enforcement of the Deposit Insurance Act.

[40] The Financial Crisis Management Council consists of the Chief Cabinet Secretary, the Minister of Finance, the Commissioner of the FSA and the Governor of the Bank of Japan.

[41] The DICJ publishes a list at http://www.dic.go.jp/english/e_katsudo/e_hatanshori/index.html

10, 2010. It was quickly determined that NSB was not systemically significant. The failure of NSB was controversial because it "operated under a singular business model of increasingly purchasing loan claims from money lending businesses and rapidly expanding business with major borrowers with which it had a close relationship and, as a result of its failure to perform adequate credit checks and credit management in line with such a business model, the Bank was faced with the need to set aside a large amount of additional reserves".[42] Consistent with current practice for the resolution of failing banks, Friday through Monday procedures (*kin-getsu shori*) were carried out. The business transfer to the Second Bridge Bank of Japan occurred on April 25, 2011. The Civil Rehabilitation Plan became effective on December 14, 2011 (within fourteen months of the filing).

Japan Investor Protection Fund (JIPF)

Organized under the FIEA and related enforcement ordinances, the JIPF will, upon the failure of a securities company, pay up to JPY 10 million per customer (excluding institutional investors)[43] in regard to their legally protected customer assets.[44]

As stated above, under the Act on Special Treatment, the JIPF is empowered to initiate the legal procedures necessary to protect customer claims in a financial institution insolvency proceeding. Upon the commencement of an insolvency proceeding, the court may notify the JIPF instead of the individual general customers.

Without delay after a securities company's failure, the securities company provides a list of customers to the JIPF. The JIPF must then produce a customer list setting forth all customer claims. As a part of this process, the JIPF will make a public announcement as to where the customer list will be available for inspection by customers. The customer list must be made available for inspection by customers for a period of two weeks or more prior to the deadline for submitting claims in the proceeding. If the JIPF becomes aware of customer claims that are not recorded on the original list, it must without delay add those claims to the customer list.

It is the responsibility of the JIPF to submit the customer list to the court prior to the bar date. The submission of the customer list by the JIPF has the same legal effect as if individual customers submitted their own claims. Individual customers may participate in the proceedings (even after the JIPF has submitted the customer list to the court), but the customer must notify the court of the intention to participate individually.

On behalf of customers, the JIPF can act as the claimant in all legal actions. Furthermore, in accordance with the FIEA, the JIPF has the authority to take any action necessary to preserve and protect the customer claims (whether inside or outside of court proceedings).

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[42] Press Conference by Minister Shozaburo Jimi (Financial Services), September 10, 2010.

[43] For example, in the case of Minami Securities (March 2000), the JIPF paid out compensation of JPY 5,891 million to 1,363 customers of Minami Securities and recovered JPY 2,427 million of the company's assets, for a net payout of JPY 3,464 million.

[44] Article 79-57, Paragraph 3 of the FIEA, and Article 18-12 of the Cabinet Order for Enforcement of the FIEA.

Specified Financial Contracts

When the Basel Committee on Banking Supervision reaffirmed its support for close-out netting, it also advocated introducing a short delay to termination rights in order to permit the transfer of an insolvent firm's financial contracts.[45] In the United States under the Dodd-Frank Act, for example, the non-debtor counterparty's right to terminate, liquidate, accelerate, set off or net is suspended for one business day after the appointment of the receiver.[46] In Japan, these rights are immediate.

The Act Concerning Close-Out and Netting of Specified Financial Contracts ("***Act on Close-Out Netting***") provides special rules for the settlement of certain specified financial contracts.[47] Upon the insolvency of a financial institution, certain financial contracts will automatically be terminated with close-out netting in accordance with the close-out netting clause in the relevant ISDA Master Agreement and pursuant to the Act on Close-Out Netting.

If the financial contracts are not subject to the Act on Close-Out Netting (for example, because the underlying agreement does not contain close-out netting clauses), the trustee (or the debtor if a trustee has not been appointed in the Civil Rehabilitation proceedings) may choose whether to terminate or continue the relevant financial contracts pursuant to Article 53 of the Bankruptcy Act (or similar provisions of the Civil Rehabilitation Act or the Corporate Reorganization Act).

Due to a limited number of cases and precedents, enforceability of *ipso facto* clauses (that allow termination of a contract as a consequence of an insolvency) and "walkway clauses" (by which a non-debtor counterparty is relieved of future performance of a financial contract on account of a default caused by the commencement of an insolvency) is not necessarily clear. There are a few cases in Japan where *ipso facto* clauses were not enforced and such position has always been advocated by counsel to debtors to promote a debtor's interests.

While Japanese regulators have not indicated publicly that any amendments to the Act on Close-Out Netting are being considered, it would not be surprising to see a proposal at some point for a one business day suspension rule.

Anti-assignment Terms in Material Contacts

Under Japanese contract law, executory contracts may not be assigned without the consent of the counterparty. While it may be necessary to ensure that anti-assignment terms do not become an obstacle to a bridge bank's succession to the material contracts of an insolvent financial institution, under current Japanese law there is no exception applicable to insolvency proceedings that would permit assignment without consent of the counterparty.

Regulatory Approvals

Regulatory approval is required if a bank is to become an acquirer in a business transfer. In

[45] March 2010.
[46] 12 U.S.C. § 5390(c)(9)(A).
[47] Act Concerning Close-Out and Netting of Specified Financial Contracts (Act No. 108 of June 15, 1998).

addition, regulatory confirmation is required regarding the health of assets to be acquired by the bridge bank. In this way, the FSA remains involved up to the conclusion of the insolvency proceedings.

Licensing Requirements

Under current Japanese law, even if an insolvent financial institution commences Civil Rehabilitation proceedings it would not automatically lose its license. Consequently, there are no definite obstacles to the continuation of business by an insolvent financial institution.

Cross-Border Proceedings

Guided by principles advanced by UNCITRAL,[48] Japan enacted the Act on Recognition of and Assistance in Foreign Insolvency Proceedings ("***Act on Recognition and Assistance***")[49] and the Act to Amend a Portion of Civil Rehabilitation Act ("***Act to Amend***").[50] Together, the Act on Recognition and Assistance and the Act to Amend introduced procedures to recognize foreign insolvency proceedings and to abolish the rigid territoriality principles that previously existed under Japanese law. The effect of a Japanese insolvency proceeding now extends to the debtor's assets located outside of Japan. In addition, any recovery of a creditor obtained by the exercise of its rights from the debtor's assets located outside of Japan is credited against payments under the proceeding in Japan.

Under the Act on Recognition and Assistance, a foreign representative (including a debtor, in the case of DIP) may file a petition with the Japanese court for recognition of the relevant foreign insolvency proceeding and then request an order for assistance. The court will appoint a "recognition trustee" to administer the debtor's business and property in Japan. The Act on Recognition and Assistance also adopted the principle that a debtor shall be subject to only one insolvency proceeding in Japan, and established rules to resolve treatment of multiple proceedings (when domestic proceedings, foreign proceedings and recognition proceedings exist simultaneously).

The Act to Amend clarified that the Japanese court has jurisdiction over an insolvency case as long as the debtor has either an address, residence, business or other offices, or assets within Japan. Finally, the Act to Amend abolished the mutuality principle so that equal (national) treatment is provided to foreign parties regardless of whether such foreign party's home country provides national treatment to a foreign party.

The combination of the Act on Recognition and Assistance and the Act to Amend provides a non-discriminatory, transparent and expedited framework for providing necessary judicial assistance to foreign proceedings and resolution measures, in a manner harmonized with Japanese proceedings.

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[48] UNCITRAL Model Law on Cross-Border Insolvency, May 1997.

[49] Act on Recognition of and Assistance in Foreign Insolvency Proceedings (Act No. 129 of November 29, 2000).

[50] Act to Amend a Portion of Civil Rehabilitation Act (Act No. 128 of November 29, 2000).