



Asia-Pacific
Economic Cooperation

**2003 Study on Debt Collection
Litigation/Arbitration in APEC Economies**

**Strengthening Economic Legal Infrastructure Coordinating Group
APEC Committee on Trade and Investment**

2003

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Reproduced electronically in June 2007

Produced for
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APEC#207-CT-01.8

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- Executive Summary -

Objectives

Since the Asian economic crisis in 1997, debt collection systems in this region have been significantly improved by the efforts of APEC economies. The legal system relating to debt collection shall provide a basis for economic development, since a reliable credit mechanism is essential to increase accrued transactions between companies. In other words, the legislation of debt collection, and the credit economy mechanism brought about by the legislation, provides the fundamentals for foreign companies to expand their business transactions with local companies including small and medium scale companies. Such processes accelerate intra-regional economic transactions.

This study aims to identify, from the viewpoints of business people in the Asia-Pacific region, the issues in connection with the practical function of debt collection procedures as part of the challenges for strengthening the economic legal infrastructure in APEC member economies. Predictability and transparency of the debt collection system is an essential element for the business sector, especially for manufacturers, which are the main target of this study. This report, therefore, intends to help economies share information about the current situation, to motivate member economies to take actions for further improvement of the legislation and its enforcement, and to lay the groundwork for further cooperation. The study analyzes and proposes possible directions and actions for solving the problems that business faces, and tries to encourage APEC economies to strengthen sound and predictable debt collection systems.

Methodology

This study was mainly conducted by the following three methods: (1) questionnaire survey to Japanese affiliated companies, (2) field surveys, and (3) analyses and discussions by experts.

First, questionnaires were distributed to Japanese affiliated companies throughout the APEC economies, with the full cooperation of ABAC Japan. The major aim of the survey was to understand the situation faced by the private business sector in this area.

In general, Japanese affiliated companies have been active in direct investments in manufacturing for a long time. Although recent studies on debt collection in APEC economies have been mainly conducted in the financial context, this questionnaire survey focuses on Japanese companies with long experience of direct investment in manufacturing and, therefore, could provide a new perspective on this area.

Second, in order to follow up the results of the questionnaire survey above, field surveys were also conducted in several APEC economies, such as China, Indonesia, Thailand and Vietnam. The survey teams visited governmental organizations, judicial courts, ADR-related institutions, legal experts, the business sector and so on, to get firsthand information.

Third, a study group was organized for analysis and discussion. The study group, as well as the field survey teams, was composed of legal experts in the areas of civil procedural law, international economic law, Asian comparative law and business legal practice. One of the purposes of establishing the study group with experts is to ensure the preciseness and quality of the study. The study team received additional input from ABAC Japan and its member companies.

Recent studies in this field tended to focus on the reform of the collective debt collection system including insolvency law and bankruptcy law, to dissolve the effect of economic crisis. This study, however, extended its scope to cover the broader fundamentals of the market transactions, including individual debt collection.

Findings

In this study, debt collection systems will be analyzed and discussed, noting the following three aspects: 1) disclosure of corporate information and the general judicial system, as an environment to enable debt collections; 2) “individual debt collection system” or a debt collection method involving a single creditor who seeks satisfaction of his or her individual claim from the assets of a debtor, including enforcement of security rights and compulsory execution; 3) “collective debt collection system”, including bankruptcy and reconstruction procedures, a method of debt collection in which all the creditors are paid collectively.

General background of debt collection

Disclosure of corporate information and accounting systems - fundamental to confidence in business transactions

In each economy, the importance of the disclosure of corporate information and proper accounting systems is highly recognized, and the systems are under going a process of development. Several economies, for example, have recently introduced a system requiring companies listed on the stock exchange to disclose of corporate information to the public. In addition, some economies have improved the accounting/auditing system. Today, therefore it is easier to obtain reliable corporate information of listed companies. Our survey, however, shows that important business counterparts of foreign affiliated companies are not only listed companies but also non-listed companies, including small and medium-sized companies and state owned enterprises, and that these foreign affiliated companies are willing to develop the relationship with such non-listed companies. A challenge still remains in non-listed companies for improving information disclosure as well as establishing proper accounting systems. Since some economies have already conducted several policy studies including those on small and medium-sized companies, it is worth considering the sharing of updated information within the framework of APEC to discuss and study the “best practices.”

Judicial system - significance of securing binding and compelling power for business relationships between interested parties

It is found that all the economies targeted by this study are quite active in their judicial reforms. Their enthusiasms, including reformation of court systems, formulation of legislative processes and training systems for legal professionals, were quite impressive. However, some foreign affiliated companies tend to hesitate to rely on local judicial systems. Some companies indicate that the principle of state decision has not been fully established in some economies, and therefore it is difficult for them to predict the court decisions beforehand. Other companies indicate that judicial decisions tend to be arbitrary against the interests of foreign firms. This implies that it will take some time before the reforms under way actually improve the quality of court practices.

Individual Debt Collection - Dispute resolution in court and enforcement of the solution thereon

The study found that the companies have been facing difficulties in obtaining judgments fair both to local and foreign companies and conducting enforcement of the solution. It is expected that both legislation and enforcement process will be improved,

accompanied by the judicial reforms, to facilitate the effective enforcement of judgments. As for the technical aspects of dispute resolution proceedings in court such as means to expedite the litigation process, it may be helpful to exchange information and to study best practice among APEC economies.

Security interests and enforcement thereof

Since the economic crisis, each economy has been making efforts to introduce/revise relevant laws, with a view to firmer legal systems. In particular, foreign companies see significant improvement in the areas of laws of security interests on movable properties and deregulation of establishment of security interest. However, the study found that foreign investors are still hesitant to extend credit with security interests, and tend to rely on cash payment on delivery, because of the difficulties of acquisition and execution of security interests. In the future, the legal framework for secured transactions will be vital, given that transactions are expected to become more complicated and sophisticated with the surge in service liberalization. Furthermore, the acquisition of security interests will provide higher priority in bankruptcy procedures. Their significance should draw attention also in the context of collective debt collection systems. Thus, in order to improve the availability of the security system, information exchange within the APEC economies may be useful.

Alternative dispute resolution (ADR)

The surveys noted the clear stance of promoting ADR systems in each APEC economy. Particularly, there exists a trend toward international harmonization of arbitration law, as well as clarification of the execution procedures in both international and domestic arbitration systems. In addition, each economy recognizes the importance of mediation within and outside the litigation process. According to the surveys, however, in some economies, such ADR systems are not fully utilized by foreign companies. As the reason for this reluctance, certain unpredictability of dispute settlement without clear rules and precedents is implied. Predictability is an essential requirement for long-term business activities like foreign direct investment. Information exchange within the APEC economies in this area may be useful.

Collective debt collection system – liquidation and reorganization procedures

In APEC economies, governments have tried to enhance their collective debt collection systems including establishment of corporate reorganization procedures as part of the process of structural reforms after the economic crisis. Within the series of such structural reforms, the aspect of these measures as the “remedy” for emergencies resulting from crisis has been stressed in political contexts. Different treatments are

sometimes observed between domestic companies and foreign companies. APEC economies have almost overcome the difficulties of the Asian economic crisis, but the outcome of the study calls for reviewing how economic legal infrastructure can be strengthened over a long period from the viewpoint of business. During such processes, rational choices by interested parties supported by their free will, as well as avoidance of moral hazard, should be adequately taken into account. Information exchange among APEC member economies on their own reform efforts might be beneficial to promote continuous endeavors to enhance economic legal infrastructure.

Recommendations

Based on the major findings and analyses above, this report, explores several recommendations, from both short-term and long-term perspectives, for solving current difficulties of the business. The prospective goal of these recommendations is to enable and to strengthen sound legal systems, based on the idea that sound legal systems with adequate public management (predictable implementation/enforcement of those systems) are essential for fostering confidence among businesses so as to fuel their investment and business transactions. Some examples of the recommendations are as follows: (1) to aggregate best practices of APEC economies for a better debt collection system, (2) to develop human resources, in particular personnel involved in litigation practice, ADR procedures, and/or enforcement, (3) to promote accessibility to information related to debt collection litigation, and (4) to explore the possibilities of an APEC-wide ADR framework, if desirable and feasible.

In each economy, the government has been making various efforts to improve the system for debt collection processes by itself. In addition, cooperative projects by international organizations and the other economies have been supporting such efforts by individual economies. The APEC member economies need to promote discussions on which measures, or combinations thereof, should be undertaken by which economies, taking into account the diversity of each economy's society, economy, and culture. Finally, it is impossible to overemphasize that the basic condition for undertaking effective measures in accelerating economic legislation is the efforts made by each individual economy in response to its own needs.

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Chapter 1 Introduction

1. Background

Recognizing, since the Asian economic crisis of 1997, that structural reform is essential for achieving sustainable economic growth in this region, activities for “Strengthening the functioning of market” have been initiated under APEC. Among several issues, strengthening economic legal infrastructure, such as company law, corporate law policy, etc., is fundamental to vital business activities. Therefore, the Strengthening Economic Legal Infrastructure Coordinating Group (SELI) was established in 2001, and has been undertaking these activities, aiming at transparent and stable frameworks and rules of the market.

The APEC economies have been making rapid progress in recent years in establishing economic legal infrastructure by their own efforts and through cooperative projects with various international organizations after the crisis. Compared with the situation before the crisis, remarkable progress has been made in the areas of economic legal infrastructure, including introduction and revision of bankruptcy laws, competition laws and corporation laws.

Nevertheless, businesses active in the APEC region still point out the difficulties relating to the economic legal issues in the APEC economies. This simply expresses that the predictability of appropriately adjusted rules and transparent and impartial implementation and enforcement of the rules are the vital fundamentals for business activities in the region.

The purpose of this report, “Study on Debt Collection Litigation/Arbitration in APEC Economies,” is therefore to collect and aggregate the views of the businesses in the region by questionnaire survey and interviews, to study the current system and challenges based on such views, to illustrate the difficulties to be overcome, and to offer recommendations.

Within the broad field of economic laws in general, this time we have set the scope of study on debt collection related law and procedure, which closely relates to the non-performing debt in the region. The following situations are the reasons for the selection of the study theme: many companies have been facing difficulties in dealing with non-performing debt caused by the economic crisis; the issue of non-performing debt is one of the serious difficulties in APEC economies including Japan; and huge

efforts have been made including introduction and revision of insolvency laws and other relevant laws.

Establishing related legal infrastructure and appropriate enforcement thereof are essential in order to solve the issue of the non-performing debt in the APEC region, which would accelerate further dynamism of business activities. From such a perspective, we hope this report contribute to considering what kind of difficulties companies are facing relating to debt collection and how the current situation should be modified to solve such difficulties in this region.

2. Scope of Study

The focus of the study is laws and regulations of insolvency, bankruptcy, company restructuring, implementation and enforcement under the courts and compulsory execution of such laws. The scope of study is also extended to cover the circumstances to facilitate implementation, such as legislation systems, publication of corporate information and reliability of financial systems. The current situation of the legal system and enforcement is analyzed and described, and future challenges are illustrated, for the sake of the reliability and stability of an economic legal infrastructure that facilitates more dynamic business activities by the companies in the APEC region.

“Debt collection system”, which is the main theme to be elaborated in this report, will be taken up from the following three aspects:

The first aspect for of analysis consists of 1) the premise of the credit economy system, and 2) a judicial system that supports business activities.

Credit transactions are premised on accessibility to of corporate information including auditing/accounting system and publication of management/financial information, and financial settlement systems These elements are the targets of the analysis regarding 1) above. The credit transaction, in turn, is the basic requirement for occurrence of credit/debt. Therefore, these issues, being not directly within the scope of the legislation on debt collection itself, provide a significant framework for analysis of debt collection matters from the viewpoint of business activities.

In 2) above, the targets of the analysis will include civil procedure and court systems. A reliable judicial system that enables impartial and transparent judgment provides

fundamentals for business activities.

The second aspect is “individual debt collection system”, including security systems and compulsory execution. This aspect is closely related to the smooth implementation and further expansion of business activities, as individual companies face issues relating to security interest and enforcement thereof, during their ordinary operations.

The third aspect is “collective debt collection system”, including bankruptcy and reconstruction laws. Usually, cases of collective debt collection have constraints of adjusting among several stakeholders, so that the special frameworks have been provided in several economies.

The reason for discussing individual and collective debt collection systems separately is as follows:

1) The Individual debt collection system including security system and compulsory execution is regarded as the basis for business activities, since implementation and execution are the current focus, given the current situation of APEC economies with rapid progress in recent years in establishing economic legal infrastructure, including bankruptcy laws and other relevant laws;

2) Recently the Collective debt collection system in several economies has been attracting raises attention, sometimes in political contexts. The introduction of a collective debt collection system on the basis of rather premature individual debt collection systems tends to cause unnecessary burden on the economies;

3) Thus, the individual system and collective system face challenges in different phases, with separate laws respectively. Therefore it is regarded as effective to divide the issue into two parts when analyzing debt collection.

This report also takes into account, in as far as possible , individual efforts within each economy and the supportive activities by international organizations and other economies.

3. Methodology

This study was mainly conducted by the following three methods: (1) questionnaire survey to Japanese affiliated companies, (2) field surveys, and (3) analyses and discussions by experts.

First, questionnaires were distributed to Japanese affiliated companies throughout the APEC economies, with the full cooperation of ABAC Japan. The major aim of the survey was to understand the situation faced by the private business sector in this area. In general, Japanese affiliated companies have been active in direct investments in manufacturing for long time. Although recent studies on debt collection in APEC economies have been mainly conducted in the financial context, this questionnaire survey focuses on Japanese companies with long experience of direct investment in manufacturing and, therefore, could provide a new perspective on this area.

Second, in order to follow up the results of the questionnaire survey above, field surveys were also conducted in several APEC economies, such as China, Indonesia, Thailand and Vietnam. The survey teams visited governmental organizations, judicial courts, ADR-related institutions, legal experts, the business sector and so on, to get firsthand information.

Third, a study group was organized for analysis and discussion. The study group, as well as the field survey teams, were composed of legal experts in the areas of civil procedural law, international economic law, Asian comparative law and business legal practice. One of the purposes of establishing the study group with experts is to ensure the preciseness and quality of the study. The study team received additional input from ABAC Japan and its member companies.

Recent studies in this field tended to focus on the reform of the collective debt collection system including insolvency law and bankruptcy law, in order to dissolve the effect of economic crisis. This study, however, extended its scope to cover the broader fundamentals of market transactions, including individual debt collection.

4. The Structure of this report

The structure of this report is as follows:

Chapter 1 (this Chapter) briefly gives the background of the study.

“Chapter 2: How APEC Economies are coping with debt collection” objectively describes the current situation of APEC economies’ systems, implementation and execution related to debt collection. A short overview of the APEC economies as a whole is given, followed by detailed discussions on China, Indonesia, Thailand and Vietnam, based upon the field surveys in these economies;

“Chapter 3: Remaining Tasks and Direction of Resolutions” attempts to clarify the challenges relating to debt collection, and the direction for resolving these in the future, based on the objective descriptions of the current situation in the previous Chapter. The outcome of the questionnaire survey, as well as the interviews obtained from the field surveys, is taken into account.

“Chapter 4: Discussion on future Challenges”, as the final Chapter of this report, offers recommendations on the measures considered in APEC in order to meet the challenges mentioned in Chapter 3. In this Chapter, diversity of development, which is one of the characteristics of APEC, will be fully taken into account.

Chapter 2 How APEC Economies are coping with debt collection

– Outline of the system, its application and execution –

1. Overview

The Asian economic crisis reminded APEC economies of the necessity of fair and transparent legal systems within each economy as well as the region. APEC economies especially seriously affected by the crisis have been quickly moving forward with developing legislation that relates to debt collection procedures, in particular, civil laws, security interest laws, and insolvency laws.

However, as these APEC economies have different historical, cultural and economic backgrounds, progress in each economy in developing the legislation varies widely. For example, regarding legal systems, noticeable differences seem to occur depending on the source of law, i.e., whether the legal system as a whole as well as laws relating to debt collection originates in, Civil Laws or Common Law. The basis for the law of the economies in Chile and Korea are categorized in the former, and Australia, Hong Kong, and the United States in the latter. In a few economies, the influence of both sources of law is observed during the course of the introduction of the new laws, which may sometimes create challenges in the transparency of the legal system.

Against the background of such difference, it should be adequately noted that, in each economy, the government has been making various efforts to improve the system for debt collection processes. In this respect, the current situations generally shared by APEC economies are found to be as follows:

As for the disclosure of corporate information and accounting systems as fundamentals for confidence in business transactions, the importance of the disclosure of corporate information and proper accounting systems are highly recognized, and the systems are in an ongoing process of development. At the same time, the judicial reforms, including reformation of court systems, formulation of legislative processes and training systems for legal professionals, are also ongoing.

In the individual debt collection system, despite the efforts by the economies, the study finds that the companies have been facing difficulties in obtaining impartial judgments relating both to local and foreign affiliated companies and enforcement of solutions. With regard to security interests and enforcement thereof, each economy has been making efforts to introduce/revise relevant laws since the economic crisis. In

particular, foreign affiliated companies see significant improvement in the areas of laws of security interests on movable properties and deregulation of establishment of security interest.

As for alternative dispute resolution (ADR), the surveys note the clear stance of promoting ADR systems in each APEC economy. Particularly, there exists a trend toward international harmonization of arbitration law, as well as clarification of the execution procedures in both international and domestic arbitration systems. In addition, each economy recognizes the importance of mediation within and outside the litigation process.

In the collective debt collection system, such as liquidation and reorganization procedures, governments have tried to enhance their systems including establishment of corporate reorganization procedures as part of the process of structural reforms after the economic crisis. The effectiveness and the utilization of such systems still have some room for further enhancement.

2. China

2.1 Foreword

2.1.1 Overall Judicial System in General

(1) Legislating a system aimed to establish a socialist market economy

In 1992, at the 14th National People's Congress of the Communist Party of the People's Republic of China, the establishment of a socialist market economy was advocated as the goal of China's economic reform, radically shifting China from a centrally planned economy to a market economy. The following year in 1993, with the amendment of its constitution, the establishment of a socialist market economy was formally acknowledged as China's national policy. In the same year at the Third Session of the 14th Chinese Communist Party's Congress, it was confirmed that normative standards backed by a comprehensive legal system and legal guarantee were deemed essential for the establishment of a socialist market economic system. Toward this end, it was decided that China should focus on establishing a legal system, coordinate formation of a legal system with ongoing reform/door-opening, and undertake economic management through legal means. As China's economic orientation was clarified, so was the direction of its legal system reform.

Legal reform to accommodate transformation to a market economy, however, does not end at simple revision of the existing legal system under the centrally planned economy, but accompanies far greater changes. The areas involved are diverse and those directly related to business activities alone include corporate laws, bankruptcy laws, competition laws, investment laws and trade laws. China's membership to WTO in 2002 has further accelerated such trends.

(2) Reforming the legal system

On October 20, 1999, China's Supreme People's Court promulgated "The Five-Year Court Reform Outline" as a program to reform China's legal system. It was a reform proposal as follows. In this connection, a unified bar examination has also been implemented since March 2002.

(a) Change in methods to appoint judges

After 2003, a system that selects all higher court judges from among lower courts' competent judges, socially esteemed lawyers and other high-level legal experts shall be put into practice along with assignment change and transfer of posts to keep each court well metabolized and thereby raise the morale of judges. A quorum for newly

appointed judges shall also be introduced in an effort to improve their work conditions.

(b) Collegiate court for legal hearing and strengthening of the power and responsibility of individual judges

According to the reform outline of the Supreme People's Court, collective leadership in legal system shall continue to be practiced in a few important and difficult cases, which are taken up by a court commission for deliberation and judgment, but, eventually, all cases shall be entrusted to a collegiate court or a single judge.

(c) Check and balance within courts

Functional differentiation between planning and hearing, trial and supervision, decision and execution shall be systematically enhanced to set up a management mechanism promoting efficiency and adequacy at every phase of judicial procedures. Supervisor system shall also be set up in every higher court.

(d) Centralization of the execution of court decisions

At this stage, a higher court unilaterally manages the execution of all decisions made by lower courts within its jurisdiction, and coordinates with other higher courts for the execution outside of its jurisdiction. When the conditions mature, a nationally unified system to manage every court's executing organ shall be established.

(e) Transparency of and democracy in trials

Compilation of judicial precedents and their disclosure shall be promoted, and the systematizing statistical data and their disclosure shall be improved. These efforts shall enable rule compilation for a system in which public opinion and the society play a supervisory role over case hearings.

(f) Active use of information technology

When the use of multimedia and computers are widely spread, computerization of the legal system shall be sought nationwide. Specifically, computer networks connecting courts shall be constructed, and management of cases, collection and transfer of statistical data shall be carried out through these networks. The technical level in the operation of legal institutions shall thus be raised.

2.1.2 System and environment relating to debt collection

(1) Information on corporate business management and assets

It is essential for a company to accurately grasp business management conditions and

assets of client companies, whether domestic or international, in view of conducting appropriate business dealings and debt collection. In China, this information is available through researches conducted by the State Administration for Industry & Commerce and State Administration for Real Estate. The State Administration for Industry & Commerce has broad authority over many areas of corporate management, including corporate registration, issuing business licenses, regulating trademark infringement and oversees violation of Prevention of Unfair Competition Law. Since companies have the obligation to report to the authorities, all information concerning business conditions and assets of Chinese companies, including foreign capital companies, is concentrated in the authority. In China, anyone may access and copy information on corporate registration (under the Corporate Registration Management Rule) and Chinese lawyers may be able to obtain information on companies' business conditions (although there is no law to authorize such action). Information available at the State Administration, including documents related to corporate establishment (business license issued by the State Administration for Industry & Commerce, letter of intent for joint /collaborate enterprise, letter of proposal on items, feasibility study report, joint/collaborate enterprise contract, articles of an association, statutes of a corporate group, technical/trademark license contract and charter for foreign capital companies), documents relating to increase/decrease of registered capital and transfer of holdings, and annual documents relating to business conditions (balance sheet, profit-and-loss statements),

Information on Chinese companies' conditions for setting up a security interest may be available through investigation (Working Rule under Land Management Law) conducted by the State Administration for Real Estate (Land Management, Building Management, Land & Building Management). In practice, however, the availability of the information seems to differ by regions.

2.2 Individual debt collection procedure

2.2.1 Civil proceeding

The law for civil trial now in force in China is the Civil Proceeding Law of the People's Republic of China (referred to as Civil Proceeding Law hereafter), which took effect in 1991, revising the Civil Proceeding Law enforced on probation in 1982. The current law was enacted before China's transformation to a socialist market economy in 1992.

2.2.2 Security interest system

China's existing laws and regulations relating to security interest are the Security Interest Law of the People's Republic of China (the Security Interest Law hereafter) and "the Legal Interpretation on a Few Problems relating to the Application of the Security Interest Law of the People's Republic of China (the Legal Interpretation on Security Interest Law hereafter)".

(1) The Security Interest Law

The Security Interest Law, enforced in 1995, is composed of 7 chapters and 96 articles covering general rules, guarantee, mortgage, pledge, common-law lien (retention), deposit (earnest money in continental law) and others. In China, there are "guarantee" as security with personal promise, "mortgage" and "pledge" as movable property corresponding to stipulated security right in Japan, "lien" likewise corresponding to legal security right, and "deposit." The difference with Japan is that deposit is formally acknowledged as a category of security interest.

Guarantee: In principle, natural person, legal entity and other organizations that can be sued may make a contract for guarantee. A contract for guarantee must be made in writing.

Mortgage: A contract for mortgage must be made in writing. Objects of mortgage are to be enumerated, but land proprietary right has been excluded. However, mortgage may be placed on land use rights. Under the provision of the Urban Land and House Property Management Law (1994), ownership for building and land may not be separated when setting up a real estate mortgage (land and building, however, are separately registered). Since land is a public property in China (state-owned or collectively owned by farmers' collectives), companies may not own land. Instead they set up land use rights to carry out their business activities. With collectively owned companies, transfer, lease and setting up of security interest are strictly regulated.

Pledge: Besides a contract to create it, a pledge comes into effect with transfer of concerned object or delivery of a deed. Contract for forfeit is banned.

Lien: Although a lien is a legal collateral object, its removal through concerned parties' agreement is acknowledged. When a company is liquidated, a lien does not lose its effectiveness against the liquidation team and is regarded as a right of exclusion.

There are three ways to enforce security right: appropriation of evaluated amount of debt, conversion with reference to a market price and auction. The enforcement of security right usually accompanies a lawsuit.

(2) Legal interpretation concerning the Security Interest Law

In general, legal interpretation by the Supreme People's Court is given as a guideline for lower courts. It plays an important role to ensure stability in judicial decisions and predictability in legal system operation and execution. As the number of cases to set up security interests increased after the enactment of the Security Interest Law, "the Legal Interpretation on a Few Problems Relating to the Application of the Security Interest of the People's Republic of China" was put into effect on December 13, 2000. Composed with 134 articles (the chapters follow the exact pattern of the Security Interest Law), the interpretation extensively supplements the Security Interest Law and provides solutions for issues that would likely challenge judicial work.

(3) Rules concerning security interest set up for foreign entities

The Security Interest Law and its interpretation described above stipulate domestic cases within China. In case of security interest set up for foreign entities that Chinese domestic organizations (Chinese corporations and foreign capital companies) offer to foreign organizations, Domestic Organizations' Foreign Security Management Rules and their Specified Regulations are applied in addition to the Security Interest Law and its interpretation. In general, security interest set up for foreign entities require prior permission of the State Administration of Foreign Exchange Control, but some forms of security interests set up for foreign entities only require registration.

2.2.3 Property preservation system

In China, the system for preservation of property is stipulated in Civil Proceeding Law. There are three kinds of preservation system in China: preservation prior to the start of lawsuit, preservation during the lawsuit and prior execution (allowing partial provision demanded in the property claim before a decision is given). Of those three, the first and the second correspond to property preservation. In property preservation, there are preservation of money credit and preservation of a claim on specified property. The measures for preservation include a seal, attachment, freeze, and others. Preservation takes effect as soon as the decision is made and maintains its effect until the execution is completed. Since execution procedure is taken ex officio by the court after the decision is given, the applicant need not apply for execution.

2.2.4 ADR (mediation/ arbitration) system

In China, the law relating to arbitration is the Arbitration Law of the People's Republic of China put into effect in 1995 (the Arbitration Law hereafter). The

Contract Law, Special Procedural Law on Maritime Trials, Chinese-Foreign Equity Joint Venture Law, and Chinese-Foreign Contract Joint Venture Law encourage the use of arbitration as a means to resolve conflicts.

(1) CIETAC

One of the alternatives of resolving commercial disputes with the use of arbitration is provided by the China International Economic and Trade Arbitration Commission (CIETAC). This institution, which has assumed its present name in 1988, was set up in 1956 in accordance with the “Decision by the Central People’s Government of the People’s Republic of China regarding the establishment of the Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade” of 1954. CIETAC carries out arbitration proceedings in accordance with the Arbitration Law, while it has its own Arbitration Rules (parts of which that contradict or conflict with the above Arbitration Law were amended following its promulgation). CIETAC has operated as the institution in charge of international disputes and such disputes relating to regions including Hong Kong Special Administrative Region, Macao Special Administrative Region, and Taiwan Region, but since 2000, assumed jurisdiction over disputes occurring amongst domestic enterprises. CIETAC is a national organization, with sub-commissions in cities including Shanghai. Approximately 800 cases are brought to the CIETAC every year, and about 80 of those are reconciled when a settlement is reached in the arbitration tribunal. CIETAC’s arbitration tribunal will render an arbitral award within nine months as from the date on which it is constituted (this award is final and binding), and parties concerned are required to perform the arbitral award voluntarily within the period specified in the arbitration clause. In case the award is not performed, the other party may either apply to the People’s Court for enforcement, or in accordance with the New York Convention (1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards) apply to a foreign court for enforcement. While CIETAC is financially independent, its personnel affairs are under the supervision by the China Council for the Promotion of International Trade (the number of staff: approx. 40). There are approximately 500 registered arbitrators, and a third of those are foreign personages (There are 3 Japanese arbitrators).

In May 2003, the CIETAC newly established and introduced a set of rules on the financial disputes arbitration, called “Financial Disputes Arbitration Rules”, for the purpose of impartial and prompt resolution of disputes arising from financial transactions among parties. In the rules, the term “financial transactions” refers to rather broad transactions arising between financial institutions inter se, or arising between financial institutions and other natural or legal persons in the currency, capital, foreign exchange, gold and insurance markets that relate to financing in both domestic

and foreign currencies, and the assignment and sale of any and all types of financial instruments and documents denominated in both domestic and foreign currencies, including but not limited to: loans, deposit certificates, guarantees, letters of credit, negotiable instruments, fund transactions and fund trusts, bonds, collection and remittance of foreign currencies, factoring, and reimbursement agreements between banks.

(2) Beijing Arbitration Commission and other commissions

Beijing Arbitration Commission (BAC) was established in 1995, upon approval by the Beijing People's Government in accordance with the Arbitration Law. Its Rules of Arbitration are formulated in accordance with the related provisions of the Arbitration Law and the Civil Proceedings Law. By March 2001, BAC had already accepted 1,421 cases, most of them being disputes relating to sales, real estates (construction-related disputes), and investments. BAC has nearly 250 arbitrators, consisting of lawyers, university professors, experts in those fields such as economics, and civil servants, etc. After the amendment regarding the jurisdiction was introduced in 2000, there no longer is any significant difference in arbitration procedures between CIETAC and BAC, except that at BAC, the cost is slightly lower and arbitration period is shorter.

Beside BAC, there are 160 local arbitration commissions throughout China. Each commission has its own distinct regulations (There are regulations without provisions regarding foreign-related arbitrations). For example, Shanghai Arbitration Commission was established also in 1995, registers arbitrators even from foreign countries such as the United States, the United Kingdom, Canada, Hong Kong, Chinese Taipei, and Japan, and currently accepts around 500 cases annually based on active business developments in the area.

(3) CCPIT Conciliation Center is in operation as a mediation institution in charge of business-related disputes.

This organization was established in 1987, jointly by China Council for the Promotion of International Trade (CCPIT) and China Chamber of International Commerce (CCOIC). This center deals with a wide range of disputes including commercial and maritime affairs. The time required for mediation process to complete is about 30 to 90 days, and approximately 80% of the claims brought to the center reach settlements. Though settlement reached at this center are not self-enforcing, arbitrators may persuade the parties concerned to conclude a contract, and draw up an arbitration clause that stipulates the details of the arbitration agreement.

(4) Mediation at court

With regard to dispute resolution, there is also a system of mediation at the People's Court in accordance with the Civil Proceedings Law in China. This refers to informal dispute resolution activities conducted during the civil procedure at People's Court, where both parties, with a chief judge, carry out consultations on a voluntary basis, gaining mutual understanding and making concessions, thereby reaching an settlement. The concept behind this activity is similar to that of consent judgment. The settlement reached thus will be signed by the judge and the court clerk, and served on both parties. Once signed by both parties, it shall become legally effective and enforceable.

2.3 Collective Debt Collection Procedure

2.3.1 System Concerning Bankruptcy

(1) Current Legal System

Current system regarding enterprise insolvencies in China is comprised of the following three laws as well as related administrative regulations, judicial interpretations and local laws etc.: 1) Law of the People's Republic of China on Enterprise Bankruptcy (interim implementation), that has been in effect since 1988 and is only applicable to state-owned enterprises; 2) 19th Chapter of the Civil Proceedings Law enacted in 1991 that stipulates procedures for handling bankruptcies of legal entities not wholly owned by the people; and 3) 8th Chapter of the Company Law enacted in 1994, with special provisions regarding procedures for handling bankruptcies of limited liability companies and limited stock companies.

Civil Proceedings Law and its related judicial interpretations are applied to the bankruptcies of foreign capital firms. Provisions in both Civil Proceedings Law and Company Law concerning enterprise bankruptcies are rather basic, and in practice, Law on Enterprise Bankruptcies (interim implementation) aimed at state-owned enterprises is applied correspondingly.

In September 2002, Supreme People's Court issued judicial interpretations of a number of problems with regard to hearing of cases of enterprise bankruptcies in China. In these interpretations, trial procedures for cases of state-owned enterprise bankruptcies and non-state-owned enterprise bankruptcies were integrated for the first time, and stipulated in detail the basic procedures for bankruptcy cases handled by the People's Court, showing the People's Court a unified and comprehensive codes regarding procedures for bankruptcy cases. The above judicial interpretations consist of 14 clauses and 106 articles.

(2) Current System as it is operated

In the current system concerning bankruptcies, causes for bankruptcies are as follows: state of insolvency following serious losses, and the losses concerned are due to poor business management (in case of state-owned enterprises).

In the current system, creditors and debtors have the right to file for bankruptcy, but in case of state-owned enterprises, debtors can only petition for bankruptcy by first obtaining permission from the superior department in charge of that enterprise. When creditors file to declare a state-owned enterprise bankrupt, petitioners have to submit a written statement and materials that prove those facts regarding the amount of claims, whether or not they are secured by physical collateral, and the evidence of insolvency and payment suspension. When the debtor, a state-owned enterprise, files for bankruptcy, it should submit such materials including circumstances of the enterprise's losses, a detailed list of debts and a detailed list of claims and its business license, as well as written permission for filing a bankruptcy issued by either the enterprise's superior department in charge or an authorized government department. If the reorganization procedure is to be adopted, only the enterprise's superior departments in charge can make the application.

When the petition for bankruptcy is accepted, other civil enforcement proceedings against the property of the debtor will be suspended, and payment by the debtor to only some of the creditors will be null and void, with the exception of payments required for the normal production and operations of the debtor.

Provisions in the Law on Enterprise Bankruptcies (interim implementation) stipulate that prohibition of individual debt collection by the creditors of bankrupt companies shall not interfere with the exercising of security interest, but as the reorganization policy is given a great emphasis, the Second Paragraph of Article 39 in the Opinions of the Supreme People's Court No. 35 issued in 1991, set out restrictive regulation which states that security interest may only be exercised during the period beginning with the acceptance of the bankruptcy case to the announcement of bankruptcy, following the approval of the People's Court.

With regard to the treatment of secured creditors in the bankruptcy procedure, the Law on Enterprise Bankruptcies (interim implementation) stipulates that Property that already constitutes security collateral will not belong to the liquidation team, while the portion of the value of the security collateral exceeding the amount of the debt that it secures belongs to the liquidation team. Furthermore, it is stated that with respect to claims secured with property that are established before bankruptcy is declared, the creditors enjoy the right to receive repayment with priority with respect to such security, and the remaining part that is not repaid constitutes a bankruptcy claim and will be repaid in accordance with the bankruptcy proceedings. Therefore with these

provisions, secured creditors who are given priority over bankruptcy creditors may demand, from the bankrupt debtor, payments on security interest without having to rely on bankruptcy proceedings.

The liquidation team is to give priority to the payment of the expenses such as its management cost, and if there still is any surplus asset left, repayment shall be made in the following order: 1) wages of staff and labor insurance expenses that are owed by the bankrupt enterprise; 2) unpaid taxes of the bankrupt enterprise; and 3) bankruptcy claims. The State Council Notice No. 59 regarding proposal for carrying out State Enterprise Bankruptcy Law in some cities issued in 1994 set out the standard that based on the political consideration with regard to the interest of the society as a whole, the proceeds from the transfer of land use right should first be used to resettle the employees. Also following on from this notice, Article 5 of Joint Ordinance No. 492 issued in 1996 by the State Economic and Trade Commission and People's Bank of China established a clear rule that collateral secured on land use right will come after the settlement of the employees.

(3) Current Initiatives on Amendment and Introduction of a New Laws

Since Chinese government has established in 1992 its transition toward market economy, incidence of bankruptcies of various kinds of enterprises increased rapidly in China. However, in order to meet the need for further growth of socialist market economy, the need for a new bankruptcy legislation arose for the following reasons: 1) the current Law on Enterprise Bankruptcies (interim implementation) has limited scope for application, as it is only applicable to state-owned enterprises; 2) provisions of Civil Proceedings Law that provide rules for bankruptcies of non-state-owned legal entities are inadequate; and 3) existing system for salvaging those enterprises (especially large- or medium-sized enterprises) that may have possibilities for rehabilitation is inadequate. Given these situations, the National People's Congress commenced the work of formulating a new bankruptcy law in 1994. When the bill was being drawn up, drafts submitted by Sichuan Province and Liaoning Province were used as a basis of discussion. The bill was finalized in 1996 and submitted to the National People's Congress, but is not yet adopted to the present day.

When the bill was submitted in 1996, the following explanation was given with regard to the background on the amendment of the bankruptcy law, and in particular, the scope of application of the current law: "First, the existing Bankruptcy Law has too narrow a scope of application, it being limited to state-owned enterprises. With the continuous deepening of reform and open-door policies and with the development of socialist market economy, the number of state-owned holding companies and joint

capital companies, non-state-owned enterprises and companies without corporate status will increase greatly in our country, and issues relating to insolvency of such companies should be dealt with legally. Though the Civil Proceedings Law has stipulations with regard to insolvency issues of corporate entities, they are neither complete nor specific, and furthermore not applicable to enterprises without corporate status.” (From the explanation of drafts given by Mr. Dong, vice chairman of Finance and Economics Committee of the National People’s Congress)

The basic idea behind the draft bill of the new bankruptcy law is that the new law should “meet the need for development of socialist market economy, based on the conditions of China, and should bring advantage to the growth of social productive force, and at the same time, it should connect systems and methods that are internationally acceptable” (explanation by Mr. Dong as above).

The draft bill of the new bankruptcy law in 1996 allows for 1) expansion of the scope of application; 2) making a distinction between liquidation type procedure and reorganization type procedure; 3) clarification of conditions with regard to petitioning for a bankruptcy; and 4) amendment of the current law with respect to such aspects as strengthening the power of People’s Court.

With regard to “expansion of the scope of application”, Article 3 of the draft bill in 1996 states that the law is mainly applicable to 1) corporate entities; 2) trade unions and its partners; 3) individually owned company and its owner; and 4) other economic organizations established legally.

As for the point regarding “making a distinction between liquidation type procedure and reorganization type procedure,” the following expressions are used in the above explanation: “(we should) deal with the acts of composition, reorganization and liquidation by drawing up law. Those corporations that meet conditions of bankruptcies that must be declared bankrupt should be liquidated in accordance with the law, and those for which settlement is possible should seek composition legally, and those that satisfy conditions for rehabilitation should be rehabilitated legally, thereby promoting improvement on structure of enterprises and resource allocation, increasing the level of corporate quality and economic performance overall.”

Furthermore, with regard to “clarification of conditions for petitioning for bankruptcy,” Article 4 of the draft bill in 1996 states that “if the debtor cannot pay debt in time, the debt should be repaid in accordance with the procedures stipulated in this law. If the debtor suspends the payment of debt that fell due, it is assumed that the debtor is unable to make repayment. In case the corporate entities suffer managerial or financial hardships, and look to be unable to make redemption of the debt that now fell due, the reorganization procedure stipulated in this law may be applied.”

3. Indonesia

3.1 Introduction

The legal system of Indonesia has been developed in a stepwise manner after the country became independent in 1945. In general, the influence of the Dutch legal system introduced in colonial times is said to be very strong, but a unique legal system is being developed through numerous reforms following the days. Under the Basic Law on the Judiciary of 1970, the Indonesian judiciary is structured into a general court system comprised by a Supreme Court and lower courts, and religious courts, military courts and administrative courts¹. The commercial courts, which have jurisdiction over bankruptcies and others (it will be described in the following sections), were established in 1998. Yet, the independence of the judicial power in Indonesia is not adequately guaranteed under law², and the Department of Justice used to hold the actual power to appoint justices in lower courts and to impose budgetary control. Thus “Law No 35 of 1999 to make Amendment to Law No 14 of 1970 Concerning Basic Regulations on Judicial Power” (“Amended Basic Law on Judicial Power”) was formulated with the objective of establishing independent judicial power, and securing its independence from administrative power in particular. Under this law, the control over the judicial administration and the financial affairs of all courts (except for religious courts) is to be gradually transferred to the Supreme Court by 2004. Yet, there are indications that the process of transfer of control is not advancing smoothly³.

As for the attorney system in Indonesia, the Attorney Law was formulated in 2003, and work on clarification of qualification criteria for attorneys, development of attorney ethics code and establishment of an unified attorney organization, is being advanced towards completion by April 2005. Yet, attorneys divided into seven associations (those that are recognized by the government) oppose these judicial reforms, and their status of implementation still faces certain difficulties.

Some of the basic issues of the court system in Indonesia are; (i) the limited *stare decisis*; (ii) a prematurely organized system for disclosure of court decisions and other precedents; (iii) corruption; and (iv) interference with the administration of justice from various sectors. In order to deal with these issues, since March 2000, efforts are being put forth to ensure fair jurisdictional proceedings through a moderate supervisory system, including a National Ombudsman system to monitor court actions.

The influence of activities implemented by international organizations cannot be overlooked when exploring the recent legal system of Indonesia and the civil legal system in particular. Regarding activities by the IMF, which had a great impact on

amending the Bankruptcy Law, the current funding program should be completed at the end of 2003. Yet it has been decided that the IMF will continue to implement post-program monitoring, and major disruptions are not expected to occur after the end of this year. Strong international support is being provided in the legal field as well, and according to interviews with local relevant officials, organizations such as the World Bank, the Australian Agency for International Development (AUSAID), the United States Agency for International Development (USAID) and the Japan International Cooperation Agency (JICA) have achieved significant results in the field of debt collection legislation alone, and the European Union (EU) is expected to provide assistance in the future.

3.2 Individual debt collection system (System for execution and enforcement of security interest, etc.)

3.2.1 Execution based on civil litigation, etc.

In cases when debt collection is to be executed based on general (non-secured) claims, an action must be filed with a district court and a court decision must be obtained. The system of civil litigation in Indonesia has remained basically unchanged ever since the Dutch colonial rule (even the laws are written in Dutch), and this area in general has fallen behind in the process of system modernization. Also, the decisions of district courts can be appealed in appellate courts and the Supreme Court, and in some cases civil review is conducted in court divisions of the Supreme Court. As a result, confirmation of court decisions takes time (Indonesia's laws do not allow provisional execution of inconclusive decisions), and thus debtors use appeals as a tool for negotiations.

Sufficient information on following execution proceedings could not be collected in this study, but, generally speaking, it is pointed out that it is difficult to apply execution as a tool for collecting debt in commercial transactions due to the following reasons: detection of property eligible for execution of debt collection is very difficult; the procedures are slow and costly; the results are unpredictable⁴.

3.2.2 Security system and security enforcement procedures

(1) Security system

The security system in Indonesia is composed immovable rights based on the Immovable Mortgage Law formulated in 1996 and traditional movable rights of pledges founded on the 1847 Civil Law. An important recent legislation is the Law concerning Fiduciary Transfer formulated in 1999 as one of the conditions set by the IMF. By establishing a registration system of security interest, this law aims to promote secured transactions for movable properties and bonds, which have practically and customary been eligible for movable rights by transfer, since in the past, means for public notification such as immovable mortgage did not exist. As described later, this new system of security interest transfer could trigger activation of the security system as it ascertains simple methods of its enforcement. Yet, some problems have been pointed out, such as for instance the lack of clear regulations on the priority relations with pledges and other existing security rights, and some say that the practice of fiduciary transfer based on traditional precedents has not been improved significantly. The interviews conducted in Jakarta demonstrated that at least Japanese affiliated companies still had some reservations about the effectiveness of the security laws including fiduciary transfer, and did not expect much of this system.

(2) Security laws and enforcement procedures of security interests

(a) Enforcement procedures of security rights based on court decision

In principle, a petition for enforcement should be filed with a court in order to enforce security interests such as foreclosure on secured immovable, except for cases when voluntary sale is made with the consent of the debtor, and self help is not allowed. After the court decision in favor of the secured creditor is confirmed, the State Auction Office implements the enforcement procedures of security interests under the supervision of the district court. However it usually takes between three and five, sometimes more than five years before the court decision is confirmed, as it is appealed with a high court and/or the Supreme Court. For this reason, the secured creditor tends to settle the dispute through negotiations (voluntary sale) rather than enforcement of security interests⁵. Under the above-mentioned Law concerning Fiduciary Transfer, private enforcement of secured interests is possible and it can realize easy and prompt conversion into cash and satisfaction (if the satisfaction received exceeds the secured credit, the creditor is imposed with a liquidation obligation). Furthermore, in the procedures of public enforcement that are recognized on a selective basis to the holder of fiduciary transfer, the registration certificate of security interest has the equivalent

effect to a court decision (Article 15, Paragraph 2 of the Law Concerning Fiduciary Transfer) and thus it is stipulated that security interest shall be enforced without court decision⁶.

(b) Enforcement of security interests based on a notarial deed

Enforcement of security interest based on a notarial deed is theoretically possible. In such cases, a secured right can be enforced immediately upon obtaining a district court decision that confirms the existence of debt (secured right) (appealing is prohibited). Nevertheless, courts tend to reject the validity of notarial deeds with attached supplementary contracts and conditions as not “pure.” As a result, this method for enforcement of security interest has not been used in cases filed with court for the past 10-15 years⁷.

3.2.3 Alternative dispute resolution (ADR) and ADR-based execution

(1) Present state of ADR

In response to the numerous problems originating in the debt collection methods under the national court system described above, an Indonesian National Board of Arbitration (BANI) was established in 1977 as an alternative mean, but a full-fledged legal infrastructure focused on arbitration was developed later under the 1999 “Law on Arbitration and Dispute Settlement Alternative (Law. No.30/1999)” (hereinafter referred to as “ADR Law”) and it became possible to execute awards after obtaining execution orders at court⁸. Since then, in transactions with domestic companies as interested parties, the number of contracts includes the provision for the BANI arbitration (according to interviews in local attorney offices). Yet, there have been some cases where foreign affiliated companies, acting on their reservations towards the credibility and the insufficient achievements of BANI, include arbitration clauses originating in neighboring Singapore, whose common law-based judiciary boasts high levels of credibility and fairness, in the contract of transaction, and this study could not confirm any cases where BANI-induced arbitration has actually been applied. Yet, against the backdrop of the poor credibility of the incident-resolution capacities of courts (judges) there is strong interest and high expectations toward ADR. Interviews with Supreme Court officials made it clear that there is a plan to establish a mediation organization attached to the Supreme Court.

(2) Execution based on arbitration award

This issue, too, was settled in the ADR Law. In a case of domestic award, following a petition by an interested party, the chief justice of a district court issues execution orders based on his review of the arbitration agreement, the arbitrability of the conflict, and public policies (within 30 days of the filing of the petition) and based on this decision arbitral award can be executed (Articles 61 and 62 of the ADR Law). As far as international arbitration is concerned, arbitral awards based on an order by the head justice of the District Court of Central Jakarta can be executed if the conditions under the international conventions are satisfied (Indonesia is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) (Article 66 of the ADR Law).

3.3 Collective debt collection system (bankruptcy system, business reorganization system, etc.)

3.3.1 Outline of the collective debt collection system

(1) Overview of the collective debt collection procedures

Judicial insolvency procedures are based on the Bankruptcy Law formulated in 1905 and amended in 1998. In concrete terms and as described later, insolvency procedures can be separated into bankruptcy (liquidation) procedures in the narrow sense of the word, procedures for suspension of repayment, and procedures of composition.

Regarding the present state of bankruptcy, as of June 1999, of 70 cases of insolvency procedures, there have been 9 cases of bankruptcy adjudication; 18 cases of motion dismissals; and 19 cases of withdrawal of petitions by the creditor (including settlement with the debtor); and 9 cases in which petitions for suspension of payments have been filed⁹. Also, according to statistical information obtained at the commercial court, the new cases of liquidation procedures (until May for both years) have dropped significantly from 39 cases in 2002 to 17 cases in 2003. The number of administrative protests filed with the Supreme Court from 1998 to June 2003 according to the statistics of the Commercial Court Division of the Supreme Court is presented in Figure 3.2.1.

Figure 1-1 State of administrative protests in bankruptcy related cases filed with the Supreme Court

	Appeals	Judicial reviews
1998	7	
1999	47	26
2000	36	20
2001	52	33
2002	30	20
2003 January - June	22	6

** Commercial Court Division of the Supreme Court*

Collective debt collection procedures other than the insolvency procedures implemented in court are private reorganization procedures implemented by the Jakarta Initiative Task Force (JITF), which is described later.

(2) Commercial courts

Bankruptcy procedures and other judicial insolvency procedures are under the exclusive jurisdiction of the commercial courts. In terms of court hierarchy, the commercial courts are a structure within the district courts. The first commercial court was established in 1998 only in the District Court of Central Jakarta, but nowadays there are five commercial courts established all over the country. Today, the commercial courts have jurisdiction not only over bankruptcy cases alone, but also over intellectual property rights-related cases, and in the future their jurisdiction is expected to expand to cover antitrust laws-related cases¹⁰. Judges in the commercial courts are specialized in trials over commercial affairs, and in principle are not transferred to other courts. Also, based on a Presidential Decree, outside experts have been appointed as “ad hoc judges” in commercial courts since 1999, but among the 11 judges appointed so far, only one reported of “active service.” The model administrative procedures for trial (MOCA) for various types of proceedings are currently being compiled with the support of the World Bank, and the model rules on bankruptcy procedures were completed recently.

Decisions of commercial courts can be appealed directly in the Supreme Court (two-tier review system). Also, it is possible to file a petition for judicial review under certain conditions (discovery of a new evidence for example) (Article 286 Paragraph 2.a of the Bankruptcy Law), and in practice most cases advance to appeals and judicial reviews. The Commercial Court Division at the Supreme Court (comprised of 16 of

the 42 Supreme Court Judges) is in charge of appeal and judicial review cases including the above-mentioned bankruptcy related cases.

(3) Movement for amendments to the Bankruptcy Law

Work on further amendments to the Bankruptcy Law is currently being advanced towards submitting a draft version to the Parliament before the end of the year¹¹. These are the two major points of the proposed amendment.

(i) In the bankruptcy procedures, the minimum debt amount for which the creditor can file a petition should be set at more than half of the aggregate debt amount, and the evaluation of the financial situation of the debtor who the petition has been filed against should be conducted by a public accounting firm. By restricting the criteria for small-lot creditors to file a petition in tandem with relegating the evaluation of the financial situation of the debtor to outside experts and thus ensuring the objectivity of this evaluation, this amendment aims at banning bankruptcy petitions that reverse the results of out-of-court negotiations.

(ii) The draft version of the amended law contains the plan of establishing procedures for business reorganization that are not restricted to suspension of payment and bankruptcy and composition as stipulated under the current laws. The detailed content of this plan could not be clarified when this report was being created, but undoubtedly this amendment aims to promote in a more active manner the revitalization of debtors in tandem with the above-mentioned restriction on criteria for creditors to file a bankruptcy petition.

3.3.2 Court-based insolvency procedures

(1) Bankruptcy (liquidation) procedures

(a) Petition and bankruptcy adjudication

Entities eligible for bankruptcy procedures are legal entities including individuals (consumers). Entities that can file petitions are debtors, creditors and prosecutors, but the only entity that can file a petition against a bank is the Central Bank (Article 1 of the Bankruptcy Law). The commercial court where the petition is filed must make a decision whether to grant the petition for bankruptcy adjudication or to dismiss it within 30 days from the date of registration of the petition (Article 6, Paragraph 4 of the Bankruptcy Law). Having two or more creditors and failing to repay at least one debt which has matured are the conditions for bankruptcy adjudication (Article 1, Paragraph

1 of the Bankruptcy Law)¹². Yet, there are some aspects to the latter condition in which it is difficult to practically foresee the inability of the debtor to repay their debt. For instance, examples are reported where the automatic acceleration of maturity as stipulated in an agreement are not acknowledged, or the presence of a guarantor does not allow to reject the possibility that the debtor might be able to pay their debt¹³. Another practical difficulty that was pointed out is that in cases when a petition for bankruptcy adjudication is filed by a creditor, it is difficult to obtain the adjudication unless the creditor reaches an agreement with the other creditor(s).

When a debtor is adjudicated bankrupt, a bankruptcy administrator is appointed and authorized to dispose and manage the property of the bankrupt debtor (Article 67 of the Bankruptcy Law). Under the old Bankruptcy Law bankruptcy administrators were officials of a government organization called Balai Harta Peninggalan (BHP) (“Orphan’s Chamber” or “Probate Court”) subordinate to the Department of Justice, but under the amended law it became possible to appoint ordinary administrators (including corporate bodies) if a petition is filed, and a BHP administrator is appointed only to cases which no ordinary administrators are appointed to.

(b) Treatment of creditors and secured creditors in bankruptcy procedures

When a bankruptcy adjudication is issued, the execution rights of an ordinary creditor are restricted. Creditors execute their rights by filing claims to bankruptcy administrators during the period set by the supervising judge. On the other hand, execution rights of secured creditors (mortgage creditors, holders of security interest by transfer under the Law Concerning Fiduciary Transfer) are deferred for a period of not more than 90 days from the date the bankruptcy is adjudicated (Article 56A, Paragraph 1 of the Bankruptcy Law). The rights can be executed if the proposal for bankruptcy and composition is not submitted to, or rejected at the meeting of verification of claims, in which case the rights must be executed within two months from the commencement of insolvency (Article 57, Paragraph 1 of the Bankruptcy Law). If they are not executed, the right to converse property serving as security interest into cash is transferred to the bankruptcy administrator, without prejudice to the said right of the holder of priority right to obtain the proceeds from the sale of such security interest (Article 57, Paragraph 2).

The sale and distribution of the bankrupt property is conducted in line with Article 170 of the Bankruptcy Law. The company does not automatically cease to exist even after the bankruptcy procedures are completed. The Corporate Law stipulates that a dissolution decision based on a claim filed by the creditor is necessary in order to dissolve a company (Article 117 of the Corporate Law). According to the provisions

of international law on bankruptcy as stipulated in Article 202 and onwards of the Bankruptcy Law, the creditors who, after the bankruptcy adjudication, have attained satisfaction outside Indonesia are required to compensate the bankruptcy foundation for what they attained. This clause seems to ascertain the international validity of the domestic bankruptcy procedures, but on the other hand, there is no clause that ascertains the validity of international bankruptcy procedures in Indonesia.

(2) Procedures for suspension of repayment

Procedures for suspension of repayment were introduced with the 1998 amendment of the Bankruptcy Law. Under these procedures, debtors, the only side that can file petitions, who expect that they will be unable to repay their debts, may request a suspension of the repayment until they present a proposal for bankruptcy and composition (Article 212 of the Bankruptcy Law). These procedures are envisioned for application in tandem with the bankruptcy and composition procedures, but technically they are different procedures.

A supervising judge and a trustee are appointed after a decision for suspension of repayment (temporary suspension) is made. Trustees are different from the liquidators who have the exclusive right to dispose and manage the bankrupt property, instead they serve as co-administrator with debtor. If a proposal for composition has already been prepared, a creditors' meeting held no later than the 45th day after the decision on the suspension of repayment was made decides whether to accept or reject the proposal. If such a proposal has not been yet formulated, the creditors' meeting decides to grant or refuse a suspension of repayment (permanent suspension) with the intention of formulating and deciding on a proposal for composition. Nevertheless, the period of the permanent suspension of repayment may not exceed 270 days.

During the suspension of repayment, ordinary creditors as well as secured creditors cannot exercise their rights¹⁴.

(3) Composition (after and before bankruptcy is adjudicated)

(a) Composition after bankruptcy is adjudicated

A bankrupt debtor who decides to file a petition for bankruptcy and adjudication after bankruptcy is adjudicated, may file it to the court within eight days before the meeting for verification of the claims (Articles 134 and 135 of the Bankruptcy Law). The proposal is accepted in the creditors' meeting if approved by more than one-half of the creditors attending the meeting and those who hold no less than two-thirds of the total credits of creditors attending the meeting (Article 141 of the Bankruptcy Law). The proposal for bankruptcy and adjudication ratified by the court is binding for all

ordinary creditors without exception (Article 152 of the Bankruptcy Law). Supervision of the implementation process is not stipulated.

(b) Composition before bankruptcy is adjudicated

The establishment of the procedures for suspension of repayment in 1998 cleared the way to composition before bankruptcy is adjudicated. If a proposal for composition has been submitted to the court, the court determines the last day on which the claims subject to the suspension of repayment must be submitted to the trustee and the day and time a creditors' meeting shall be held (Article 252 of the Bankruptcy Law). The proposal is accepted in the creditors' meeting if approved by more than one-half of the creditors attending the meeting and those who no less than two-thirds of creditors attending the meeting (Article 265 of the Bankruptcy Law). The proposal for composition ratified by the court is binding for all creditors without exception. Supervision of the implementation process is not stipulated and in this point, the composition before bankruptcy is adjudicated does not differ from the composition after bankruptcy is adjudicated. If the proposal is rejected by the creditors' meeting, the court must adjudicate the debtor bankrupt (Article 274 of the Bankruptcy Law).

3.3.3 Out-of-court collective debt collection system procedure (collective alternative dispute resolution (ADR))

(1) Jakarta Initiative Task Force (JITF)

The Jakarta Initiative Task Force (hereafter JITF) which was established in 1998 based on the Letter of Intent (LoI) with the IMF is an agency which promotes the establishment of private adjustment plans (agreements) for debt adjustments of the debtors who have fallen into operating crisis due to the Asian economic crisis. The JITF and the Indonesia Bank Restructuring Agency (IBRA) that will be described in the following sections, share a commonality in their duty to report on their activities to the "Financial Sector Policy Committee (FSPC)," composed of Minister of Finance and others. However, while IBRA, as a creditor interferes with the debt restructuring of the debtors, on the contrary, JIFT, as a mediation agency promotes the debt adjustment and business rehabilitation through agreements with the relevant parties.

(2) Mediation procedures implemented by the JITF

The mediation procedures implemented by the JITF are comprised of the following three stages: (i) compiling a Memorandum of Understanding (MoU), an agreement

without any legal binding force; (ii) compiling, in the presence of a notary, a Legal Agreement, a final agreement with legally binding force and (iii) execution based on the agreement (free from constraining jurisdiction in case of default). This procedure, however, is not a typical mediation procedure but has been schemed as an effective procedure through incentives such as preferential tax treatments and avoiding delisting, as well as sanctions to individuals that have been deemed uncooperative.

As of August 4, 2003, 127 cases were handled, and of them 21 are pending cases and in 96 cases Memorandum of Understanding (MoU) was signed. Furthermore, the aggregate debt for all cases exceeds US\$29 billion, when measured in dollar value terms¹⁵.

(3) Plan after the dissolution of JITF

JITF is a time-bound agency, and therefore the debt adjustment procedures overlooked by JITF will be concluded by the end of 2003. There is a plan to establish the National Mediation Center as an agency that will carry out similar functions. This is an idea to provide mediation services by utilizing private funds, and according to the field interview, a “Pilot Project” will be launched soon and preparation for its full operation will be advanced.

3.4 Other debt collection systems

3.4.1 Debt sales market

The debt sales market has been created after 1998 following the Asian economic crisis and has shown growth in the past two years. However, this has not been led by active sales of debt by general business companies. The main debt sellers are IBRA and foreign financial institutions that wish to expedite the write-off of debts and the sale value of the IBRA serves as the benchmark for the market price in the debt sales market.

On the other hand, the buyers, in addition to the European and American investment banks, include Chinese that have been channeling off resources to overseas, family firms of debtors and others. The new creditors who have purchased debt in those markets have not been welcomed by the existing creditors since at the negotiations for debt cuts in the out-of-court ADR, they accept significant cut in debts.

3.4.2 Mechanism for financial debt disposal

The IBRA, as part of its operation to recuperate the financial function of banks, has the jurisdiction to acquire non-performing debts from banks and without the intervention of the court, realize the debt. In cases where, having acquired debts from banks, IBRA becomes a major creditor, as a creditor it can negotiate with the debtor on its own and by following the rules established as internal regulations by the organization (for example, the repayment period of up to two years, maximum installment repayment period of 10 years, reduction of earned interest to the level of current interest rate) formulate a rehabilitation plan for the debtor (when the debtor is uncooperative, IBRA may exert its independent jurisdiction and seize the debt and put it up for sale to execute a compulsory collection procedure). On the contrary, when the IBRA is only one among the many creditors, the mediation procedures by the JITF and the bankruptcy procedures by the court are implemented. However, even under these procedures, IBRA is making active contributions through utilizing its specialized knowledge and experience (employs capable staff with international experiences and knowledge) concerning disposal of non-performing debts and rehabilitation procedures of debtors.

Nevertheless, IBRA, too, is a time-bound agency operating until February 2004 and measures have already been taken in preparation for its dissolution, such as the reduction of employees. As an idea to carry on the functions of IBRA, there are plans to strengthen the functions of the existing Committee on National Debt Collection so to take over the functions of IBRA and the government organizations are conducting preparatory work for its realization.

¹ The 2001 amendment to the Constitution stipulates that a Constitutional Court shall be established (Article 24 C), but such a court has not been established yet.

² See “*Democratization Process and Law in Asia*” (2003) by Naoyuki Sakumoto and Shinya Imaizumi, page 90. Quoted by author.

³ See “*Indonesia’s Legal System – Direction of Development, Volume 2*” by Terutoshi Yamashita in *Horitsu no Hiroba*, page 59 of November 2002. Also, according to information by the International Monetary Fund (IMF), the Supreme Court of Indonesia is working towards establishing a Judicial Commission by the end of 2003. This commission will become the headquarters for promotion of the judicial reforms. See <http://www.imf.org/External/NP/LOI/2003/idn/01/index.htm>.

⁴ Darrell R Johnson, Asian Development Bank, Regional Technical Assistance Project No.5795-REG, *Insolvency Law Reforms, Report on Indonesia* (http://www.insolvencyasia.com/insolvency_law_regimes/indonesia/index.html), Sec. E2-3.

⁵ *Id.* Sec. C3

⁶ For details, see Koji Suzuki “*Bankruptcy Laws and Movable Collateral Laws in the Asian Countries*” (2000) page 176.

⁷ Johnson, *supra* note 4, Sec.C3 (e)

⁸ See “*ADR in the Asia-Pacific Countries*” Ed. *Asia-Pacific Legislation Systems and ADR Workshop*,” (separate volume NBL No75), page 47 and onward (2002).

⁹ See “*Current Status of Development and Actual Operation of Insolvency Laws in Nine Asian Countries*”, page 13 (2000), Japan Center for International Finance (JCIF).

¹⁰ For the current status and background of jurisdiction expansion, see paper by Yamashita (Note 3), page 59.

¹¹ Apart from the numerous locally conducted interviews, the following web page was used for reference <http://news.goo.ne.jp/news/nna/kokusai/20030731/20030731idr002A.html>.

¹² All references to clauses of the Bankruptcy Law hereinafter are citations from an unofficial English translation of the law.

¹³ For other examples of cases when petitions for bankruptcy adjudications are dismissed see FN 6 at 19 and FN 9 at 13.

¹⁴ See FN 6 at 83. See the same section on unclear points in the legal regulations pertinent to the treatment of secured interest.

¹⁵ For detail, see the following URL.
http://www.jitf.or.id/publication/doc_report/report_aug_0403.pdf According to the information from the field interview, there were four dismissed cases other than the above-mentioned 127 cases.

4. Thailand

4.1 Introduction

In accordance with the promulgation of a new constitution in Thailand in 1997, the judicial system was made independent of the legislative administration (Ministry of Justice). Under the current system, civil proceedings are based on the ordinary three-tier review system. In addition to the ordinary three-tier review system, as a special court with peculiar procedural methods, the Intellectual Property and International Trade Court was established at the end of 1997. One of the purposes of their establishment is to accelerate dispute resolutions arising from external economic matters, and the systems have gained good reputations both nationally and internationally as they facilitate flexible and quick procedures through a two-tier review system. At the same time, in 1998, the Bankruptcy Court was established to speed up procedure pertaining to bankruptcy cases. In the Intellectual Property and International Trade Court, private lawyers, professors in law and legal experts of private corporations contribute to the court proceedings as associate judges. On the contrary, in the Bankruptcy Court, only a fully-qualified judge presides. In both cases the Supreme Court holds the final jurisdiction.

Additional special courts already in existence include the systems of the Labor Court and the Tax Court, both of which adopt two-tiered review systems with the Supreme Court holding the final jurisdiction. In addition, under the new constitution of 1997, a Constitutional Court and an Administrative Court were newly established. In particular, as Constitutional Court justices, legal and political scholars and other legal experts, in addition to professional judges, are appointed. As an alternative dispute resolution (ADR) system, in addition to court-authorized amicable settlement the Mediation Center affiliated to the court is being actively utilized. With regard to trade disputes, the Arbitration Office under the Office of the Judiciary has taken jurisdictions, and there are also several systems of arbitrations by administrative bodies in individual fields such as insurance and securities.

As to individual debt collection procedures in Thailand, there is compulsory execution based on the judgments of regular courts as well as security interest enforcement procedures, and compulsory execution based on arbitration courts and judgment on judgments, among other procedures. On the other hand, collective debt collection and business reorganization schemes are divided into four broad categories: (i) liquidation and rehabilitation procedures in the Bankruptcy Court; (ii) arbitration and mediation procedures at the ADR Office under the Office of the Judiciary; (iii) debt

restructuring methods in the Corporate Debt Restructuring Advisory Committee (CDRAC) under the Central Bank; and (iv) disposal of non-performing debts by the Thai Asset Management Corporation (TAMC). The following is an overview of the various kinds of individual and collective debt collection systems.

4.2 Individual Debt Collection System (compulsory execution, security interest legal system, etc.)

4.2.1 Compulsory execution based on civil proceedings

(1) Overview of compulsory execution based on civil proceedings

The basic law dealing with civil proceedings and execution of procedures is the Civil Procedure Code enacted in 1935. Pursuant to the Code, after judgments have been handed down by courts, they are executed within ten years. In order to execute the judicial judgments, the parties involved submit an ex parte application to the court requesting execution. The court which receives the application orders executions, such as stipulations and sales by auction of the debtor's assets, based on the presentation of the judgment. Moreover, upon the execution of the judgment, creditors may request the court for an examination of the debtor or a third party, who is in a position to know information appropriate to the location of the debtor's assets.

Given that Thailand is not a party to the Treaty concerning Acceptance and Execution of Foreign Judgments, compulsory execution targeting domestic assets may not be taken based on foreign judgments and a judgment is necessary for creditors to gain the approval of the Thai courts.

(2) Recent trends towards amendment of the Civil Procedure Code

In the wake of the 1997 Asian economic crisis, as part of a series of activities strengthening economic legal infrastructures, in 1999 a series of amendments to the Civil Procedure Code was conducted, concerning civil execution (including enforcement of security interests). These legislative amendments aim to accelerate execution procedures in general, for example, by creating measures to improve the issuance of execution orders (those ordering execution within a fixed period) and their delivery procedures, and to restrict abusive or inappropriate applications. In addition, the acceleration of execution for cases involving small amounts of money (less than 40,000 baht) (orders issued for execution within a 15-day period) has been realized.

4.2.2 Security interest system and its enforcement procedures

(1) Security interest system

Under the former security interest legal system in Thailand, the concept of security interest (mortgage and pledge) stipulated in the “Civil and Commercial Code” take a major role (Part 3, Contract, Civil Code). It belonged to the continental law group. In addition, the Machine Registration Act of 1971 (Ministry of Industry) exists as one of the security interest systems for continuous-possession of movables. The Act, by expanding the concept of “immovables” under the “Civil and Commercial Code,” widens the scope for a mortgage rights system concerning types of machinery used in production activities. In addition, several medium or low ranking commercial banks were used to finance by making agreements on a kind of mortgage by transfer targeting liquid assets such as accounts receivable and the right of lease on immovables. According to a strict interpretation of the Bankruptcy Law of 1940 (Article 6), preference rights have been denied for such untypical collateral insolvency procedures.¹ In general, under the former system, continuous-possession of collateral are possible only for assets defined as immovables, while movable and liquid assets were, with the exception of machine tools which were included in the definition of immovables, classed as lien for non-security debt to the extent that the debtor possessed them exclusively and continuously.

However, in the security interest system reforms in the wake of the Asian economic crisis, under the conditionalities by international organizations such as the World Bank and International Monetary Fund (IMF), easing of regulations on land held by foreign capital and amendments to laws for civil proceedings were taken as short-term measures to improve security implementation procedures. In addition, as mid- to long-term challenges, given the issue described above of dependence on immovable security interest, international organizations have required as conditionalities the diversification of substantive security interest laws which is based upon the introduction of a movable security interest system for non-owned movable assets.² Given this development, the draft Business Security Act was compiled mainly by the Ministry of Justice at the beginning of 2000. The Act aimed to establish a movable security interest registration system in order to expand the scope of continuous use security interests that had previously been limited to immovables into trade assets. Although as of 2003 this draft has still not been enacted, under the new security interest system, convenience for creditors is strongly recognized; that is, its comprehensive nature covering varieties of targets, comprehensive revolving collateral that does not specify debt amounts, and high flexibility of its enforcements.

(2) Security interest legislation and its implementation procedures

Through the auction of targets the secured creditor holds preferential rights on debt. However, as stated later, once the court has decided that reorganization procedures are to be implemented, the procedures for implementation of the target for the secured creditor are not conducted, and the debt collection process would be conducted following a debt recovery plan or asset management plan agreed in a Creditor's Meeting and approved by the court. With regard to mortgage deeds, procedures for their foreclosure and auction need to be processed through the courts and the enforcement of rights without court intervention is not permitted. The legal amendments (to the Civil Procedure Code) that were undertaken in 1999 with the aim of accelerating civil proceedings, including enforcement procedures in mortgage deed cases, have been mentioned in 4.2.1 (2) above.

On the other hand, the enforcement of pledges could be undertaken privately. In addition, when parties agree, relating to fiduciary transfers, to execute security interests privately, it is possible to execute security interest without court orders. Under the draft of the Business Security Act, it is emphasized that there are plans to promote private enforcement which is of greater convenience for secured creditors.

According to hearings undertaken with private-sector companies in Bangkok, it was pointed out that one of the problems relating to the immovable security interest system in Thailand is the lack of a system for auctions and foreclosures of collateral.

4.2.3 ADR and its Execution

(1) Current status of ADR

The ADR Office, the forerunner to the Alternative Dispute Resolution Office, was established in 1987 by the then Ministry of Justice. The aim of the Office was to promote amicable settlement and arbitration as an alternative means of dispute resolution, fulfilling the same functions as legal procedures undertaken by the courts. In 1999, the status of the ADR Office was changed to an affiliate of the judicial courts from a division of the Ministry of Justice, and in 2002, the Arbitration Act of B.E. 2545 (2002) was adopted. The Act bases its many regulations on the UNICTRAL model law. In 2002, there were 988 applications for arbitration and of these 500 cases went to arbitration, 107 did not result in arbitration, 66 applications were withdrawn and the rest were subject to other circumstances. The amount for arbitration in 2002 alone is valued at in excess of 500 million baht. In addition, in Thailand, with the aim of reducing the length of civil proceedings as a whole (in 2002 a total of 1.5 million applications were lodged with the courts with a total of only 3,000 judges), the role of

the court-affiliated “mediation center” is being promoted. In addition, the Government of Thailand is training 200 mediators other than judges based on a program for mediators from 2001 to 2003.

In addition, as independent trade arbitration systems implemented by government and the private sector, a variety of systems exist as indicated below: (i) arbitration by the Board of Trade of Thailand for trade disputes; (ii) arbitration by the Mutual Insurance Association and the Department of Insurance of the Ministry of Commerce concerning vehicle insurance; (iii) arbitration by the stock exchange; and (iv) ad hoc arbitration by the International Chamber of Commerce (ICC). Also an arbitration system by the Department of Intellectual Property of the Ministry of Commerce is currently under consideration³.

(2) Compulsory execution based on arbitration awards

The procedures of compulsory executions based on awards are different between arbitrations within the court and those outside of courts. Firstly, in the case of arbitrations under litigation procedures, after awards have been handed down, the arbitrator is obliged to submit those awards to courts. Courts examine the awards and if there are no problems with their fairness, a decision is made by the court based on the rulings. In the case that one of the concerned parties does not follow the ruling by the court, in accordance with the Civil Procedure Code, the other party can make an application to the court for the execution following writ of execution.

On the other hand, in cases where arbitrations are out of the court’s procedures, the concerned arbitrators are not obliged to submit the ruling to courts. For this reason, if one of the parties involved in the arbitration concerned does not comply with the awards, the party demanding execution based upon the awards can appeal to a court within three years of the awards being made. The court receiving the application will examine the ruling and hand down a judgment within an appropriate period. With regard to the execution of awards issued in foreign countries, approval and execution of foreign country awards can be based on the New York Convention (to which Thailand is a signatory)(cf. Article 41 of the Arbitration Law). In Thailand where judgments of foreign country courts are neither accepted nor executed (see preceding 4.2.1 (1)), foreign country awards that are accepted and executed domestically have great significance.

4.3 Collective Debt Collection System

4.3.1 Overview of the Collective Debt Collection Procedures

(1) Overall picture of collective debt collection procedures

The Bankruptcy Act of 1940 established liquidation procedures led by creditors both for natural and juridical persons, and as a part of this process composition procedures exist.⁴ Given the conditionalities imposed by international organizations after the Asian economic crisis, the Act was amended in April 1998, and as Chapter 3/1 of the Bankruptcy Law of 1940, business reorganization (rehabilitation) procedures targeting corporate bodies were newly introduced⁵. In particular, since the former system only provided bankruptcy procedures and, as a part of its process, composition procedures for bankruptcy procedures only through applications by creditors, the significance is emphasized of the newly established provisions which make reorganization procedures possible through applications by creditors, debtors or auditing agencies. It is important to note that the main portion of the amendment draft took the Government of Thailand nearly ten years to compile. Although the momentum from the conditionalities laid out by international organizations such as the IMF has had a very strong effect for enacting the law, it could be said that the content of the law itself is already therefore reflected in the current Thai situation. In addition, the Bankruptcy Act re-amended in 1999 introduced grouping and clam-down systems for deciding the approval of reorganization plans for the business reorganization procedures and clarified approval conditions by courts. Also with regard to liquidation procedures, the amendment intended to promote relief funds through protecting the positions of relief fund providers and revise the right of avoidance system. After the amendment the number of debtors using the system increased.

Other means of collective debt collection other than legal insolvency measures are the Debt Restructuring Measures at CDRAC under the auspices of the Central Bank which will be explained below, and the disposal of non-performing debt by Thai Asset Management Corporation (TAMC).

(2) Bankruptcy court

The Bankruptcy Court was established in Bangkok based upon the Bankruptcy Court and Procedure Act of 1999, with the aim of accelerating bankruptcy procedures and business reorganization procedures as stipulated by the revisions to the Bankruptcy Act since 1998. Between 1999 and June 2003, out of a total of 6,303 bankruptcy

applications, examination of 5,230 cases had been completed. The bankruptcy court employs 23 judges who are supported by 50 secretarial staff. Whereas bankruptcy cases are examined under a three-tier review system, newly established business reorganization procedures are examined under a two-tier review system through which it is now permitted to submit appeals directly to the Supreme Court. Appeals against the decisions in business reorganization cases by the bankruptcy court currently run at a rate of 20 to 30 percent. Appeals against the decisions of business reorganization cases to the Supreme Court require the permission of the chief judge in the bankruptcy court.

4.3.2 Insolvency Procedures through Courts

(1) Bankruptcy procedures

As a result of the recent amendment to the Bankruptcy Act, a procedural flow has emerged as a “one law, two procedures” system, in which within the one law, liquidation procedures and business reorganization procedures have been merged. Let us take a look at liquidation procedures. Under the recent amendment no significant changes have been made to liquidation procedures and the existing bankruptcy procedures continue to be used. In bankruptcy procedures only applications from creditors are accepted, which is a unique characteristic of the Thai system. For a creditor to submit an application, it is stipulated that the debtor corporation to which the application pertains must hold debts to the level of 2 million baht, owed either to an individual or to multiple parties. Once the court examines the application and deems that it is appropriate, it issues a final receiving order. Once the final receiving order is issued, an official receiver is appointed to manage the assets of the debtor. On the other hand, after the final receiving order is issued, the debtor can apply for compulsory composition within seven days. The compulsory composition is set at three-quarters of the total debt owed to the creditors present. After the final receiving order is issued, because discussions are required concerning whether compulsory composition should be made, or whether to take the path towards an official declaration of bankruptcy, or how to manage debtor assets, an initial Creditor’s Meeting is held. A decision at the creditor meeting could be adopted by approvals of creditors owed more than half the debt. After the final receiving order is issued, in the event that liquidation procedures are approved at an initial Creditor’s Meeting, a formal declaration of bankruptcy is issued.

(2) Business reorganization procedures

Under the newly established business reorganization procedures, requirements to initiate procedures are a state of “sin-lanpan-tua” (insolvency) and the possibility for reorganization (Article 90/3). The right of application lies with the creditor, debtor or auditing agency (Article 90/4). Once the application is lodged, a wide range of automatic suspensions occurs simultaneously, and liquidation procedures are blocked at this time (Article 90/12). However if liquidation procedures have already been implemented and a final receiving order has been issued, then these take precedence (Article 90/5). After reorganization procedures have been initiated, the opportunity to transfer these to liquidation procedures is built into the process only in the case of a so-called anchor function, whereby compulsory measures to promote procedures are taken after talks have broken down. For example, only in cases where procedures become gridlock can a decision be made to transfer to liquidation procedures. These include deadlock in the appointment or reappointment of a reorganization plan planner (Article 90/48, Article 90/54); insufficient fulfillments of requirements for a reorganization plan (Article 90/58); or deadlock in the reappointment of a planning manager (Article 90/68). However as a result of such a device, the transfer to liquidation procedures cannot be made on a discretionary basis by reason of the disappearance of an objective possibility for reorganization during the reorganization procedures. For this reason it is only possible for the transfer to be made once the implementation period for the reorganization plan has expired (Article 90/70).

(3) System of the right of avoidance

Under the old act, in the first instance of the avoidance of crisis, all acts of asset transfer up to three months prior to the application were subject to procedures and with regard to discrimination the debtor would be questioned on subjective requirements (former Article 115). However protection was given to bona fide purchasers (former Article 116). In a case of avoidance with intent, in addition to the right to revoke fraudulent acts being used under the Civil and Commercial Code (Articles 237-240) (former Article 113), with regard to all acts related to the transfer of assets up to three years prior to the application, the burden of proof of bona fide used to be transferred (former Article 114). However, the bona fide purchasers were given protections (former Article 116).

Under the business reorganization procedures of the amended law of 1998, the regulations on crisis avoidance are adhered to (former Article 90/41). At the same time, with regard to intentional avoidance, although presumed effects of all disposal acts were admitted for the three-year period prior to the application, the period is narrowed

to one year for specified acts. Also the right to revoke fraudulent acts was applied under the strict provisions of the Civil and Commercial Code (Article 90/40). The protection of bona fide sub-acquires was taken over (first part of Article 90/41). Under the re-amendment of 1999, the changes of the provisions concerning the intentional avoidance in the above-mentioned business reorganization procedures were also reflected to those of liquidation procedures (Article 114 of the amendment).

4.3.3 Collective Debt Collection Outside Courts

(1) Corporate Debt Restructuring Advisory Committee (CDRAC)

(a) Overview of CDRAC

Given the guidance of the international organizations imposed since August 1998, a “Bangkok Approach” – a private restructuring promotion framework – has been initiated led by the Corporate Debt Restructuring Advisory Committee (CDRAC) which falls under the auspices of the Bank of Thailand.⁶ The characteristic of this committee is that through the use of force in the form of administrative pressure and “contracts,” it encourages participations by creditors and creditor in privately-led restructuring and discourages their disengagement. Specifically non-performing debt disposals are promoted through creditor agreements (approval of reorganization plan accounting for majority of creditors or more than 75% of total debt), or debtor-creditor agreements (the aim of which is to promote procedures for a debt restructuring plan by all creditors with the participation of debtors. Penalties are imposed on creditors who do not indicate whether they support or oppose the plan).

(b) Debtor-creditor agreement (DCA)

Debtor-creditor Agreements (DCA) exist in written format, compiled by the central bank with the cooperation of the main industry organizations for finance and business sectors as a means of encouraging participation in CDRAC.⁷ In these agreements, debtor participations are promoted through securing debtor management rights, suspending legal insolvency procedures and postponing the long-term interest arrears payments (Article 6.b and others). For the creditors, major banks are named as the lead managers (Article 3) and obliged to control all creditors and to conclude negotiations within five to seven months. As a further framework to deter disengagement, the DCA stipulates that any actions that deviate from acceptable standards on the part of the creditors will result in a breach of agreement and a fine up

to ten percent of the balance of debt (Article 11). As an exception, a measure is in place for large-scale creditors with investments in excess of 1 billion baht to disengage from the process (Article 4).

(c) Inter-Creditor Agreement (ICA) and Simplified Debtor-Creditor Agreement (SA)

In addition to the DCA, the CDRAC also provides other frameworks for non-performing debt disposal: an Inter-Creditor Agreement (ICA) which is signed by financial groups composed of creditors⁸, and a Simplified Debtor-Creditor Agreement (SA). In the case where a restructuring plan is submitted, according to the DCA,, if the agreement of the majority of creditors or creditors holding more than 75 percent of the total debt is achieved, ICA provides a procedure to approve the plan. In the case of disengagement from the agreement, the creditor would incur a breach of agreement penalty of 50 percent of the total debt (Article 7). ICA was limited until the end of 2000 after which time withdrawal from agreements within financial institutions was permitted. However, the only financial institution to withdraw to date is a Japanese affiliate that had merged with another, and the ICA framework is still functioning effectively.

The Simplified Debtor-Creditor Agreement (SA) aims to utilize the schemes of the CDRAC for small and medium debtors who are not currently on the creditor/debtor list. In the case that financial institutions indicate the debtor, or that the debtor announces their intention to participate in the scheme, mediation is initiated based on the scheme. This scheme was ended two years ago.

Under the CDRAC scheme, the Central Bank acts as the promoter or the mediator in the agreement. According to the person in charge of CDRAC at the Bank of Thailand, the superiority of the CDRAC scheme with regard to disposals of non-performing debt over legal process lies in the point that the scheme makes it possible to reduce litigation costs and shorten periods required for agreement.

(2) Thai Asset Management Corporation (TAMC)

(a) Overview of TAMC

The aim of the Thai Asset Management Corporation (TAMC) is, by buying up the non-performing debt of domestic banks, to continue to dispose of the non-performing debt that has accrued since the Asian economic crisis, and create an environment in which banks can start making loans once again. The TAMC is a 100 percent government-owned corporation under the Financial Institutions Development Fund

(FIDF), with the objective of managing assets received from the assignment of non-performing debt. The Board of Directors of TAMC is comprised of 11 persons, who are responsible for the formulation of policy and, under the board, an Executive Committee comprising five persons engage in examination of proposals. The Board of Directors and Executive Committee members are appointed from debtor (e.g. Federal Association of Thai Business) and creditor (e.g. Bank Association) representatives. Many of the other persons have a finance-related background either in the private sector or the Bank of Thailand.

(b) Activities of TAMC

TAMC has received 780 billion baht in non-performing debt from financial institutions, and of this 580 billion baht has already been disposed. In the disposal of non-performing debt TAMC undertakes financial restructuring and business reorganization of the company in question, although financial restructuring cases predominate. Business reorganization cases through M&A are limited in number. There have only been four cases to date where management has been changed in business reorganization. It is rather the case that the Central Bankruptcy Court deals actively with business reorganization.

In debt management, based on financial information such as cash flow, TAMC makes judgment following its criteria on the possibility of business reorganization. The enforcement of security interest has been implemented when TAMC finds a lack of cooperation from targeted companies in restructuring plans or when the implementation of a plan is deemed difficult. TAMC has the right to progress with procedures for debt restructuring without recourse to the courts. The detection of foreign debt is currently not carried out. Practically, restructuring plans are planned and implemented with consents of debtors and creditors.

4.4 Other topics – Access to Management and Financial Information of Debtors

4.4.1 Access to Corporate Management Information

As a precondition of debt collections, it is important for creditors to ensure a framework for the access to management and financial information of debtors at all times. Creditors are able to use general public information at the company registry as an information source. Although the Public Limited Company Act B.E. 2535 (A.D.

1992) provides that anyone can access company information at the company registry (Article 10), the information comprises just a balance sheet with audit certification, a profit-and-loss statement and a final profit statement in case of public limited companies (Article 127) and only a balance sheet with audit certification for limited liability companies (Article 1197 of the Civil and Commercial Code). Also these kinds of information seem not to be utilized in practice for making finance agreements in business practice.

According to one sampling research conducted by the World Bank, only 40% of total finance agreements in Thailand were contracted based on proper disclosure of financial information with audit certifications⁹.

Also in Thailand, all the registered companies (including partnerships) were required to be audited by certified public accountants. However, the Accounting Act 2000 exempted registered normal partnerships not exceeding a certain scale¹⁰ from the requirements of certified public accountant audits. (It should be noted, on the other hand, that they are still required to undertake tax audits by certified public accountants or tax analysts.)

4.4.2 Other Disclosure of Management Information and System of Management Supervision

A system for disclosing management information of debtor companies other than stated above is the release of financial information of companies listed on the stock exchange. Inspections of companies by company registry officers and tax supervising system exist, as systems for supervising managements of private companies. In particular, as stated above, the latter requires small partnerships exempted from account audit to be supervised for tax matters by certified public accounts or tax accountants.

¹ See *Corporate Insolvency and Collateral Law in Asia-Pacific Countries* by Assistant Professor of Tammasat University of Thailand Sahaton Ratanapijit delivered at the February 1999 “International Civil and Commercial Code Symposium,” hosted by the Research Institute of the Ministry of Justice and the International Civil and Commercial Code Center, at 241-249.

² See Letter of Intent of Government of Thailand dated May 24, 1998.

³ See the report of Judge Vichai Ariyanuntaka of the Thai Central Intellectual Property and International Trade Court, held at the Ministry of Justice Research Institute/International Civil and

Commercial Code Center (2002), “*ADR in Asia-Pacific*,” at 273.

⁴ “Praracha-Banyat-Lomlalay, Putasakra 2483” (Bankruptcy Act of 2483 (1940))

⁵ “Krabuan-picharana-kiawkap-kaanfunfu-kichakaan-khon-lukni” (“Procedures regarding business reorganization of debtors”)

⁶ Given the creation in June 1998 of the “Public-Private Joint Committee” comprising such organizations as the Thai Central Bank, Trade Committee, and Federation of Thai Industries, and based on the Thai Central Bank memo 215 of June 25 1998, CDRAC was launched.

⁷ This paper refers to the English translation of the report issued by the Central Bank in March 1999: “Final Draft: Debtor-Creditor Agreement on Debt Restructuring Process.”

⁸ After the announcement in June 1998, various amendments were made, but this paper refers to the English translation by the Thai Foreign Bank Association of 19 March 1999: “Inter-Creditor Agreement on Restructuring Plan Votes and Executive Decision Panel Procedures.”

⁹ Hallward-Driemeier, M., Dwor-Frecaut, D. & Colaco, F.(1999), “Asian Corporate Recovery: A Firm Level Analysis,” June, 1999, at 12

¹⁰ A registered fund should be less than 5 million Thai Bahts and totals of both assets and profits less than 30 million Thai Bahts.

5. Vietnam

5.1 Introduction

5.1.1 Judicial system in general

Ever since the launch of the Doi Moi (renovation policy) at the 6th Congress of the Communist Party in 1986, Vietnam has been promoting fundamental revisions of socialist principles as manifested in the rapid introduction of the market economy system and foreign capitals and acknowledgement of private ownership. As part of this process, the government has been making a series of reforms in the judicial system and, concurrently, is accelerating the development of debt collection legal system.

For instance, the National Assembly amended part of the 1992 Constitution in its session at the end of 2001 whereby the authority of the People's Procuracy was partly revised. In addition, laws governing the organization of judicial organs were revised, and the Law on Organization of People's Court and Law on Organization of People's Prosecution, which stipulate the structure and authority of the People's Courts and Offices of People's Procuracy, were amended. Moreover, laws concerning the selected citizens serving as People's assessors and judges of the People's Courts and laws concerning the officers of the People's Procuracy, which stipulate the authority and qualification of judges, jurors, and prosecutors, have also been amended. Furthermore, laws concerning lawyers, which stipulate the authority of lawyers and matters regarding the law office, lawyers' fees, and qualifications required to become a lawyer, were newly enacted.

Currently such offices as the Supreme People's Court and the Ministry of Justice are respectively developing systems of educating and training legal professionals, such as judges, prosecutors, and lawyers, but there are also moves toward reforming the systems and integrating the training facilities to establish a national judicial institute.

Major moves toward reforms are also being noted in the civil laws in general. Currently, work on thoroughgoing introduction of the Civil Proceedings Law, which is at the core of proceedings to deal with civil disputes, is under way; and a law concerning the execution of judgments, which govern the proceedings for executing judgments on benefits and other issues, are being drafted, incorporating stipulations on the proceedings to exercise security interest. Moreover, amendments are being drafted for the Bankruptcy Law concerning the liquidation or rehabilitation of financially troubled companies. There are also new moves toward reforming the security interest

law system.

Judicial independence is differently recognized based on the principle of the distribution of power of the Vietnamese socialist government. In other words, according to the 1992 Constitution, the People's Court and the People's Procuracy are of equal power in the judicial office and are both supervised by the National Assembly, their governing body. The Chief Justice of the Supreme People's Court and the Head of the Supreme People's Procuracy are appointed by the National Assembly, and other judges and prosecutors are appointed by the President.

The Constitution prescribes that the power to interpret the laws belongs to not the courts as the judicial branch but to the Standing Committee of the National Assembly, which is positioned in the legislative branch. This is evaluated as a manifestation of democratic centralism, a socialist doctrine that places the judicial branch in a position lower than the legislative body. However, some remarks suggest that the jurisdiction (whether or not it is final remains unclear) to interpret the laws belongs to the judicial branch (Supreme People's Court).

5.1.2 Court system

According to the 1992 Constitution, the court is made up of the Supreme People's Court, local People's Courts, Military Tribunals, and other special tribunals. The National Assembly may enact special laws to set up special tribunals and grassroots organizations to deal with minor offenses and disputes.

In 1992, along with the Constitution, the Law on Organization of People's Court was enacted to stipulate the structure of the courts. The Supreme People's Court is located in Hanoi, and the appellate departments of the Supreme Courts are also located in Da Nang and Ho Chi Minh City. The lower courts consist of 61 province level and 620 district level. The provincial and district courts had been under the jurisdiction of the Ministry of Justice, but an amendment to the Law on Organization of People's Court in April 2002 placed them under the supervision of the Supreme People's Court as of October 2002.

The courts' jurisdiction over the subject matter is divided into five categories of civil, criminal, economic, labor, and administrative, and there are decrees that stipulate the proceedings of each category. The economic subject discussed here involves disputes regarding economic contracts between companies or contracts between a company and a business-registered individual which regulate production, buying and selling of merchandize, provision of services, and other basic business matters; however, such

disputes are not clearly differentiated from those of the commercial contracts governed by the commercial law and also those of the civil contracts governed by the civil law, and the ambiguity has raised difficult issues.

The multilevel appeal system in Vietnam's judiciary is two-tiered. When the first trial is ruled by a district court, the appeal is handled by a provincial court, and when the first trial is ruled by a provincial court, the appeal is handled by the Supreme People's Court. Vietnam's characteristic is that the decree pertaining to each subject matter stipulates the court that has jurisdiction of the trials.

In general, the Vietnamese people have faith in their court system and judges, and the country has a sound multilevel appeal system. Nonetheless, as a social custom, the people are inclined to solve civil disputes by alternative dispute resolution (ADR) or direct negotiations between the involved parties rather than bringing them to trial. Furthermore, there are very few instances where Japanese affiliated companies have brought cases to the courts.

5.1.3 Other agencies of dispute resolution

There are several arbitration centers in Vietnam, and major amendments to relevant laws have recently been enacted as described in the following sections.

Vietnamese villages traditionally had their own arbitration committee whose role was extremely important in that it handled household disputes, minor offenses, and particular civil disputes. However, these committees have been dismissed, and new voluntary arbitration committees (also known as "reconciliation teams") have been set up. Those who are dissatisfied with the decisions, which do not possess judicial authority, have the option of taking their cases to trial; but approximately 30% of all civil disputes are solved by these committees.

5.1.4 Types of legislation

There are numerous types of statutes in Vietnam.

The legislation is governed by the Law on the Promulgation of Legal Documents of 1997, and the main legislative body consists of the National Assembly, Standing Committee, the President, the government, the Prime Minister, the Cabinet ministers, the Supreme People's Court, and the Supreme People's Procuracy; and at the municipal level, there are the People's Councils and People's Committees. At the central level,

the President and lower bodies enact laws to execute the ones enacted by the National Assembly and the Standing Committee. They in fact play an important role in the actual implementation of the laws.

The National Assembly enacts and amends the *hien phap*: Constitution and *phap luat*: Law the Standing Committee enacts and amends *phap lenh*: Ordinance; the government enacts and amends *ngghi dinh*: Decree; the Prime Minister formulates *quyet dinh*: Decision; and the Cabinet ministers issue *thong tu*: Circular. The national organs may at times jointly issue notices, which are called the Joint Circular. Regarding the effectiveness of the laws, the Constitution is positioned at the top and notices at the bottom.

Laws in Vietnam have increased in number since the Doi Moi, and it is said that there are over 300,000 including those enacted municipally. Among the numerous laws, there are more than a few that were enacted under emergencies and compromise the consistency of the legal system, but on the contrary, it seems that there are also areas that require governance by more laws.

The procedure for drafting bills in Vietnam is not always transparent, but it is also partly democratic in the sense that public opinion is often solicited. The people in fact do respond, and many comments are made by various people around the country. In the event of an amendment to the financial legislation, the Ministry of Finance sometimes conducts unofficial telephone hearings to the foreign affiliated companies as well.

5.1.5 Disclosure policies on business management

Regarding the disclosure of management details significant to the dealings between companies, the 1999 Enterprise law: Law No. 13:/1999/QH10 stipulates that under Article 8 of the said Law, companies must provide their financial information so that it may be accessible to interested parties (under Article 20 of the Law). However, as for the specific description of the financial statements, there is no detailed stipulations except for the rules on stock holding information in Article 14 of the Law.

In order to introduce the International Accounting Standards, the National Assembly enacted the Accounting Law: Law No. 03/2003/QH11 in its session conducted in April and May 2003, which requires state own and private companies to be audited every year (Article 35 of the Law). State Agencies, along with joint-stock companies and limited liability companies are required to go through the same procedure under Article 1 of the Law.

The management information of state own companies is made available by the Ministry of Planning and Investment. Many Japanese affiliated companies, however, are not adequately aware of such way to access to the information, and, moreover, state own companies have been accused of lacking initiative to disclose information.

A stock exchange was recently established in Vietnam, and companies have started raising funds through the stock market; but the number of listed companies is still very limited.

An amendment to the Enterprise Law concerning the privatization of state own companies will be presented to the National Assembly in October 2003, and the Finance Law is also being prepared for enactment in fiscal 2004 in order to promote the independence of commercial banks based on market demand.

5.1.6 Immature credit economy

A credit economy is generally the foundation on which the mechanism of debt and debt collection functions, but businesses conducted on credit are still undeveloped in modern Vietnam. In other words, credit transaction has not taken root in Vietnamese society, and cash settlement is the prevalent means of business. This also includes foreign affiliated companies, and, therefore, the issue of “debt collection” is relatively insignificant from their perspective. At any rate, an increase in credit transaction is a basis for economic growth, and with the imminent accession to the WTO, the country is accelerating its review of the laws aimed at the popularization of credit transaction. Moreover, Vietnam received only limited damage from the Asian economic crisis of 1997 and is not subject to the IMF conditionality.

Loan-for-consumption contracts, however, exist in primitive credit relationship, such as that of between family and relatives, and hence family relationships may turn into a debt-credit relationship depending on the situation.

Bills of exchange and cheques are still not widely used in Vietnam, but their usage is gradually spreading and relevant laws were implemented in the latter half of the 1990s. In addition, the national bank has started promoting the use of personal accounts, and there is a trend toward the establishment of an electronic settling center; but judging from the number of bank accounts that have been opened, it seems to be still not a widespread practice.

5.1.7 Assistance by many countries in accelerating Vietnam's legislation

Unlike Cambodia, Vietnam has received assistance from various countries to strengthen its legal system.

First of all, Japan currently has provided support to improve the Civil Code, Civil Procedure Law, and Bankruptcy Law as well as legislation concerning the handling and registration of security interest, registration of immovables, execution (execution of judgment), and national reparation. Japan is also involved in the reforms of the judicial system mentioned earlier by supporting the establishment of an integrated learning and training facility for the three elements of Vietnam's judicial community, similar to the Legal Training and Research Institute in Japan.

In the end of June 2003, a mission from JICA visited Vietnam and started a new scheme, "Phase 3," of cooperation for legal and judicial system in July with the agreement of the Vietnamese government. The Japanese support to Vietnam for the improvement of its judicial system has been implemented since 1996, in response to the request expressed by the Vietnamese Government in 1994. In Phase 1 which lasted from 1996 until October 1999, specialists were dispatched and trainees accepted and to sum up, a seminar on Japan-Vietnam civil commercial law was organized. In Phase 2 from November 1999 to May 2003, advices were given to the Ministry of Justice, Supreme People's Court and its prosecutors to help with legislation, improve the judicial system, and train human resources. In Phase 3, which has just been introduced, activities which were determined each year in Phases 1 and 2 were revised to set goals for a three-year term. The activities are largely divided into two categories. The first is assisting the development of statutes in areas such as the civil laws (including Intellectual Property Law), Civil Procedure Law, Corporate Bankruptcy Law, Fiduciary Transaction and Registration Law, Immovable Registration Law, Judgment Execution Law, and National Compensation Law. The second is the training of legal professionals, specifically their pre-appointment training in anticipation of the above mentioned establishment of a national judicial institute, supporting the development of a process for writing judgment documents (improving the contents of documents containing legal precedents and assisting their disclosure), and teaching Japanese laws in Japanese language at the law school of the national university in Hanoi.

Other countries are also assisting Vietnam in the development of its legal system, such as the United States of America which, under the trade agreement between the two countries, provides support ("Star Project") for the Civil Proceedings Law, Intellectual Property Law, Arbitration Law, and Civil Security Law. France supports the Fiduciary Transaction and Registration Law, and Denmark supports the personnel training of the

Procuracy agencies. Furthermore, Sweden and Canada are conducting personnel training for the civil executive agencies, and the E.U. is conducting the post-appointment education of judges. Assistance is also provided by organizations such as the International Bank for Reconstruction and Development (World Bank), ADB, and UNDP.

5.1.8 Disparity between the law and reality

In Vietnam, there is a clear disparity between the law and reality. In other words, the laws have outstanding principles from a Western point of view, but they are not necessarily applicable to the realities of Vietnamese society. There are more than a few aspects of the legal system that do not respond to the socio-economic conditions of modern Vietnam. In addition, some laws are enacted without a prescribed method of execution, results in premature function. There are also practical difficulties of existing laws. However, the country is making efforts to correct such issues as it is doing for other areas of its legal system.

Foreign affiliated companies in Vietnam advocate the prevention of disputes and emphasize the importance of contracts, and thus, among other measures, employing lawyers to draw up detailed contracts is becoming increasingly popular in the society. The practice is expected to spread to the medium-size companies in the future.

5.2 Individual Debt Collection System

5.2.1 Japanese affiliated companies and issues with debt collection

Generally speaking, major Japanese affiliated companies such as trading companies and banks are not yet involved in businesses that raise major issues in debt collection. They have been practically refraining from such businesses based on their policies on risk control as credit transactions are not an established business practice in Vietnam.

However, there was a Japanese affiliated company in Ho Chi Minh City that recently filed a civil lawsuit pertaining to debt collection, which is evidence that Japanese affiliated companies, depending on the market, do in fact face difficulties of uncollected debt. There was also a company that brought a civil dispute to trial in an international arbitration court.

5.2.2 Economic legal system (laws that govern production) and civil law system

The economic legal system (laws that govern production) and the civil law system (laws that govern private relationships) comprise different legislation, but the boundary line between the two systems is ambiguous as mentioned before. Moreover, there are separate legal proceedings for economic contracts and for civil contracts, but efforts are currently being made to integrate the two legal systems.

5.2.3 Security system

The 1999 Decree of the Government on Loan Security of Credit Institutions; No. 178/1999/ND-CP was amended by the Government Decree No. 85 of 2002. It improved the immovable property assessment, and a registry was established in the Ministry of Justice to enforce the movable registration system. The registration of immovables has become a popular practice especially in urban areas, but there still are difficulties that require technical solutions, which the Land Law to be enacted this year is expected to provide.

Regarding movable property, currently only the outline of the movable property registration system has been decided, and its full-scale implementation is dependent on the enactment of the law, which will not occur before 2004. However, a registration system of security right has already been established where people register their movable property at the registry in the Ministry of Justice, and the system has been used by increasingly more people of late. Nonetheless, some Japanese affiliated companies claim that the effectiveness of movable property in their factories is weak. Furthermore, in the business practice of Vietnam, personal assets are not pledged as security interest.

Regarding immovable property, the basic policy is that ownership of land is vested in the country, but the pledging of land usage right is accepted by the system. However, although there is no restriction on pledging of land usage right by foreign affiliated companies, they rarely acquire immovable property because of the questionable enforcement of security interest. The registration of immovables is currently handled separately in each district by the respective People's Committee.

Regarding the execution of security interest, only the voluntary, private executions are stipulated by the current civil code, but procedures for executing security interest held by insurance companies are specified in the Joint Circular No. 03/2001/TTLT/NHNNBTP-BCA-BTC-TCDC of April 23, 2001 Guiding the handling

of Loan Security Property to Recover Debts for Credit Institutions. This point will be incorporated in the execution-related law (Judgment Execution Law) currently being drafted, which reserves one entire chapter to comprehensively stipulate various proceedings for enforcement of security right.

5.2.4 Execution system

The current civil proceedings, a prerequisite of execution, concern a procedure of forming a title of debt, and are made a sharp distinction, as under substantial laws, between economic contracts (contracts that govern production) and civil contract (that govern private relationships) derived from socialism, and their legal procedures also are different respectively. For example, there is no rule about the duration of a trial for civil proceedings, while in the economic proceedings, the duration is set for six-months.

However, the new Civil Procedure Law, which is currently under legislation, is designed to integrate these proceedings.

Although there are various issues about the proceedings of sentence in the Civil Procedure Law as mentioned earlier, guidelines for applying laws are being made clear through judicial precedents and directions from the Supreme People's Court. There are also new moves toward making court sentences public as well as studying precedents and writing notes of interpretation.

From the point of view of Japanese affiliated companies, there seem to be basically no idea of resolving civil disputes at courts or in any other forms of judicial proceedings. Detailed contracts are drawn up in accordance with the strict notion of contract, thereby preventing disputes from occurring. On the other hand, however, many foreign affiliated companies appear to have given up the idea of filing a legal action because, they believe, there is little chance for them to win a court battle.

The law concerning the execution of judgments is currently undergoing reform, and the drafting team at the Ministry of Justice is said to be drawing up the fourth draft. Different completely from Japan, this reform is designed to apply the law to the execution of criminal judgments as well as civil judgments. Japan is extending assistance to the civil execution parts, including exercise of security interest.

In Vietnam, execution comes under the jurisdiction of the Ministry of Justice, and is carried out as an administrative sanction. There are about 2,000 executors in the country.

Once a year, the Ministry of Justice's department of civil judgments is to submit to

the National Assembly a report on the executions carried out throughout the country. About 8,000 executions reportedly took place in 2003.

Issues with regard to the current system of execution and exercise of security interest are as follows:

Firstly, execution is considered an administrative function, and therefore comes under the jurisdiction of the Ministry of Justice. Since execution is not carried out under the supervision of the People's Court, it does not necessarily assure both rapid and effective execution by a fair and neutral judicial institution. As it stands, disputes occurring in the process of execution are not being resolved by judicial means. The other difficulty is that there are no procedures or means for creditors to track down the property of debtors, though it is a prerequisite for petitioning for execution.

Previously, there were also issues regarding execution applied to the unregistered immovables and issues concerning property valuation, but these issues have been reportedly resolved recently.

The revised bill designates the People's Courts as an institution to examine complaints against the executors' actions.

Secondly, there is a difficulty of executors, the sole enforcement authority, who are not executing their assignments efficiently. Delays in execution and corruption are also often pointed out. There is a rule by which the judgment should be executed within two weeks after it was handed down; the rule is meant to encourage a prompt execution. In reality, however, execution often requires a longer period of time. Also, it is stipulated that in case an execution turned out to be unsuccessful, it must be carried out again three months later, even if no claim came from the creditors.

A legal reform is currently under way to improve the executors system. The revised law assures ways to file a complaint with the court against executors, as mentioned above.

Thirdly, security interest is exercised not by the law, but by the "procedure like a voluntary auction". This procedure is not necessarily clear and undergoing a legal reform. The revised bill includes, as part of civil execution, exercising of security interest as well as compulsory execution of judgments on benefits and other issues.

Fourthly, as to the arbitration judgment, or award, previously, only those who had an award given at a foreign arbitration court were entitled to a judgment on judgment, and a title of debt.

It has become possible recently, however, to obtain a title of debt after securing a judgment on execution domestically, just like a foreign arbitral award with a judgment

on execution.

5.2.5 Arbitration

The Ordinance No. 08/2003/PL-UBTVQH11 on the Commercial Arbitration, adopted by the National Assembly's Standing Committee on 25 February 2003 was enforced on July 1, 2003, opened up ways for making it possible to obtain a title of debt (Article 57 of the said Ordinance) as in award by granting a judgment on execution at a local court. The Supreme People's Court also upholds this basic principle of promoting domestic arbitration, and is said to have informed each court level of this principle.

Institutions which undertake commercial arbitration under this Ordinance of 2003 can be classified into two types.

Firstly, they are the five economic arbitration centers set up nationwide. These centers were set up under the Decree No. 116/CP dated 5 September 1994 and Circular No. 02-PLDSKT dated 3 January 1995 of the Ministry of Justice. The five centers set up nationwide are all non-profit organizations and are managed through government subsidies and fees charged for usage. Of these the Economic Arbitration Center in Ho Chi Minh City was established in 1998 and since then handled approximately 50 cases. It is reported that the Center has handled a wide-range of economic cases and the users were not only Vietnamese companies, but included international companies from South Korea, Chinese Taipei and Hong Kong. There are 90 arbitrators registered at the Economic Arbitration Centers throughout the nation and 20 are registered at the center in Ho Chi Minh. It is said that these arbitrators simultaneously hold other occupations such as university professors, attorneys and civil servants. Secondly, are the Vietnam International Arbitration Centers (VIAC) managed by the Vietnam Chamber of Commerce and Industry. As for international arbitration, Vietnam has ratified the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards. But VIAC was established based on the Decision No. 104-TTg dated 28 April 1993 of the Prime Minister. Several laws in Vietnam stipulate that ADR should be utilized as much as possible, but the number of cases received remains at only around 20 cases a year (However, some of these cases are withdrawn through reconciliations.) These cases have, by and large, been brought to settlement in four to six months. In VIAC, many arbitration cases are disputes on trade-related issues, but the cases are wide-ranging and include those on investments, displacements, government finances, and tax systems. The lines of business covered are also diverse and includes

construction, insurance and machineries. Among the arbitrators are 75 experts on economic laws and economic fields. It is mentioned that the top users are Koreans, followed by Americans, British, French, Hong Kong, Singaporean, Malaysian and Chinese. Moreover, there are disputing cases between foreign affiliated companies. Arbitration costs are determined in accordance with the claim amount. For example, in case where the claim amounts to US\$10,000, the arbitration cost will be US\$500 and if the claim amount exceeds US\$100,000 and less than US\$200,000, the cost will be 1.5 percent of US\$2,750 plus the excess US\$100,000, in order to secure transparency.

Enforcement of the above arbitration law has (1) integrated decisions that had been made separately under the rules and ordinances in the past, and unified the process under the law, (2) expanded the scope of cases valid for arbitration, (3) made it possible to secure cooperation from courts, and (4) given an award with execution on judgment the same effect as a judgment on benefits and other issues.

5.3 Collective debt collection system

5.3.1 Practice and issues under the current Bankruptcy Law and moves toward its amendment

The current Bankruptcy Law of 1994 does not have provisions to make clear in detail the business reorganization procedures and declaration of bankruptcy. Also, as to the procedures after the declaration of bankruptcy, lots of points remain unspecified. The law has not been fully utilized so far. Another aspect is that Vietnamese companies are not ready for a bankruptcy because many of them are state-owned companies that belong to provinces.

In Vietnam, banks and insurance companies are monitored by special supervision and inspection so that they will not go bankrupt. Incidentally, the Corporate Law contains provisions concerning the corporate creditors' questioning of those in managerial position about their responsibilities when the corporation in question had exhausted its financial resources. Under the current bankruptcy law, about 50 corporations have reportedly gone bankrupt (a third of them were state-owned companies).

However, in shifting toward the market economy system with an eye on Vietnam's accession to WTO, improvement of laws concerning corporate bankruptcy is a pressing issue. Work is progressing in full swing on the amendment of the current corporate bankruptcy law enacted in 1994. The bill is to be submitted to the National Assembly in November this year and voted into law within 2004.

Chapter 3 Direction of Remaining Tasks and Resolutions

- Based on results of questionnaire of Japanese-affiliated companies -

1. Overview (APEC economies and regions overall)

1.1 Introduction

In writing this report, with cooperation from the APEC Business Advisory Council (ABAC) Japan, a questionnaire survey was conducted to Japanese affiliated companies doing business in APEC economies from mid-April of this year. In the survey, we asked for provision of information regarding the following.

Questionnaire on the Current Status of Debt Collection Litigation/Arbitration in APEC Economies Summary of Contents

- = Profile of the company – sector, scale (number of employees, capital, sales)
- = In-company section of debt collection (number of staff) / external experts (local lawyers)
- = Experiences of difficulties in debt collection, if any, difficulties of;
 - in-company management,
 - laws/regulations with regard to holding pledge and/or other risk-hedging tools (A),
 - debt collection litigation/arbitration procedure, and/or enforcement of debt collection based upon the result of litigation/arbitration (B) , and
 - others
- = Details of above difficulties:
 - in case of (A) or (B) above, it was caused by;
 - 1) absence or inappropriateness of laws/regulation themselves,
 - 2) procedural matters (objectivity, transparency, cost, time frame, capacity of related-organizations/officials in charge, etc.),
 - 3) enforcement of the result of litigation/arbitration (objectivity, transparency, time frame, capacity of related organizations/officials in charge, etc), and/or
 - 4) others
- = Specific cases of debt collection litigation/arbitration in detail, including:
 - place of the case, nationality of counterpart company
 - time frame and cost from the beginning of the case until its solution
 - key issues such as 1) to 4) above
 - key contributor for the solution

In this section, we will give an overview of the questionnaire results as an introduction involving the direction and tasks left in Chapter 2.

1.2 Where questionnaires were sent and the companies that responded

1.2.1 Where questionnaires were sent

- Australia, Chile, the People's Republic of China, Hong Kong, China, Indonesia, the Republic of Korea, Malaysia, Mexico, Peru, the Republic of the Philippines, Singapore, Thailand, USA (four locations) , Vietnam (two locations)
- Survey period: April-August 2003

1.2.2 Companies that responded

- Number of companies that responded: 283
- Industry types: Responses from a wide range. Particularly numerous were 14 Electronics and electronic machines, 15 Electronic parts, 17 Automobile parts, and 21 Trading and wholesale.
- By economy: The most responses came from Thailand and Malaysia. Next were Australia and Singapore. Only six responses came from China, due to the impact of SARS as well.

Figure 3-1 List of companies responding to questionnaire survey
(by industry and by economy)

By industry	Australia	China	Indonesia	Japan	Malaysia	Mexico	Philippines	Singapore	South Korea	Thailand	US	Vietnam	(No reply)	Total
01 Foods	1	1	1		1			1		3				8
02 Textile / Fabrics					1				1	2				4
05 Paper / Pulp					2			1						3
06 Chemistry				1	1		1	3	1	4				11
07 Pharmaceutical products									1					1
08 Rubber goods	1									2				3
09 Ceramics					2			1		1		2		6
10 Steel	2		1		2		1			1		1		8
11 Nonferrous metals			1		5		2				1			9
12 Metal products					3		2		1	2				8
13 General machinery	2				1			3	1	1		1		9
14 Electric and electronic machines	1		1		9		2		1	6				20
15 Electronic parts		1			10		4	4		2	1			22
16 Automobiles			1		1					1	1	1	1	6
17 Automobile parts					2		4		1	10				17
18 Other transport vehicles	1									1				2
19 Precision machinery	1				2									3
20 Other manufacturing industries	1				4		3	2		1		1		12
21 Trading / Wholesale	8	3	1	1	4		1	9	4	10				41
22 Agriculture / Forestry / Fisheries / Mining	2		1											3
23 Construction / Civil engineering / Immovable property			1		2		2	3		2		3	2	15
27 Communications	1				1				1					3
28 Transportation / Storage	1		1				1	4		2	1	2		12
29 Retail / Department stores / Supermarkets					1					2				3
30 Finance / Securities / Insurance	4	1	2		2		1			1				11
31 Information processing / Software, etc	1				1									2
32 Consulting / Legal services / Accounting	1		1											2
33 Other nonmanufacturing industries	2				2			3	2					9
(No reply)	7				7	1	2	1	3	7			2	30
Total	37	6	12	2	66	1	26	35	17	61	4	11	5	283

1.3 In-company investigation/legal affairs system for handling debt in arrears and non-performing debt

Figure. 3-2 Existence of full-time staff in charge of debt collection

	Full-time staff		Staff also otherwise engaged		No staff in charge		No reply		Total
	Respondents	%	Respondents	%	Respondents	%	Respondents	%	
Australia	6	16%	7	19%	17	46%	7	19%	37
China	1	17%	3	50%	2	33%	0	0%	6
Indonesia	1	8%	4	33%	7	58%	0	0%	12
Japan	0	0%	1	50%	1	50%	0	0%	2
Malaysia	4	6%	16	24%	39	59%	7	11%	66
Mexico	0	0%	0	0%	0	0%	1	100%	1
Philippines	0	0%	3	12%	19	73%	4	15%	26
Singapore	6	17%	8	23%	20	57%	1	3%	35
South Korea	0	0%	6	35%	8	47%	3	18%	17
Thailand	3	5%	6	10%	46	75%	6	10%	61
US	2	50%	1	25%	1	25%	0	0%	4
Vietnam	0	0%	0	0%	9	82%	2	18%	11
(No reply)	2	40%	1	20%	0	0%	2	40%	5
Total	25	9%	56	20%	169	60%	33	12%	283

- Among the responding companies, almost 60% replied that there is no “full-time staff” or “staff also otherwise engaged” for debt collection. On the other hand, the fact relatively many companies from Australia and Singapore had full-time staff in charge of debt collection attracts attention.

Reference: Existence of “full-time staff” by industry type

	Full-time staff		Staff also otherwise engaged		No staff in charge		(No reply)		Total
	Respondents	%	Respondents	%	Respondents	%	Respondents	%	
01 Foods	0	0%	3	38%	5	63%	0	0%	8
02 Textile / Fabrics	0	0%	1	25%	3	75%	0	0%	4
05 Paper / Pulp	0	0%	1	33%	2	67%	0	0%	3
06 Chemistry	0	0%	3	27%	8	73%	0	0%	11
07 Pharmaceutical products	0	0%	0	0%	1	100%	0	0%	1
08 Rubber goods	1	33%	0	0%	2	67%	0	0%	3
09 Ceramics	0	0%	1	17%	3	50%	2	33%	6
10 Steel	0	0%	2	25%	6	75%	0	0%	8
11 Nonferrous	0	0%	2	22%	7	78%	0	0%	9
12 Metal products	0	0%	2	25%	6	75%	0	0%	8
13 General machinery	2	22%	0	0%	7	78%	0	0%	9
14 Electric and electronic machines	2	10%	4	20%	14	70%	0	0%	20
15 Electronic parts	1	5%	8	36%	13	59%	0	0%	22
16 Automobiles	0	0%	1	17%	5	83%	0	0%	6
17 Automobile parts	0	0%	1	6%	16	94%	0	0%	17
18 Other transport vehicles	0	0%	0	0%	2	100%	0	0%	2
19 Precision machinery	1	33%	1	33%	1	33%	0	0%	3
20 Other manufacturing industries	0	0%	0	0%	12	100%	0	0%	12
21 Trading / Wholesale	7	17%	15	37%	19	46%	0	0%	41
22 Agriculture / Forestry / Fisheries / Mining	0	0%	0	0%	3	100%	0	0%	3
23 Construction / Civil engineering / Immovable property	3	20%	1	7%	10	67%	1	7%	15
27 Communications	0	0%	1	33%	2	67%	0	0%	3
28 Transportation / Storage	2	17%	3	25%	6	50%	1	8%	12
29 Retail / Department stores / Supermarkets	1	33%	1	33%	1	33%	0	0%	3
30 Finance / Securities / Insurance	3	27%	5	45%	3	27%	0	0%	11
31 Information processing / Software, etc	0	0%	0	0%	2	100%	0	0%	2
32 Consulting / Legal services / Accounting	0	0%	0	0%	2	100%	0	0%	2
33 Other nonmanufacturing industries	2	22%	0	0%	7	78%	0	0%	9
(No reply)	0	0%	0	0%	1	3%	29	97%	30
Total	25	9%	56	20%	169	60%	33	12%	283

- A look by industry type reveals that many of the “Trading and wholesale” companies have “full-time staff” or “staff also otherwise engaged” for debt collection, and some “Financial, securities and insurance” companies also have “full-time staff” or “staff also otherwise engaged.”

1.4 Status of appointment of lawyers for handling debt in arrears and non-performing debt

Figure 3-3 Status of appointment of lawyers for debt collection

	1 Corporate lawyer		2 Ad hoc adviser		3 No contact with lawyer		4 Others		5 No reply		Total
	Respondents	%	Respondents	%	Respondents	%	Respondents	%	Respondents	%	
Australia	20	54%	5	14%	2	5%	2	5%	8	22%	37
China	3	50%	3	50%	0	0%	0	0%	0	0%	6
Indonesia	1	8%	8	67%	2	17%	0	0%	1	8%	12
Japan	0	0%	2	100%	0	0%	0	0%	0	0%	2
Malaysia	10	15%	26	39%	12	18%	7	11%	11	17%	66
Mexico	0	0%	0	0%	0	0%	0	0%	1	100%	1
Philippines	11	42%	4	15%	2	8%	3	12%	6	23%	26
Singapore	7	20%	16	46%	8	23%	2	6%	2	6%	35
South Korea	3	18%	7	41%	2	12%	0	0%	5	29%	17
Thailand	9	15%	27	44%	12	20%	6	10%	7	11%	61
US	0	0%	2	50%	0	0%	1	25%	1	25%	4
Vietnam	0	0%	1	9%	7	64%	1	9%	2	18%	11
(No reply)	3	60%	0	0%	0	0%	0	0%	2	40%	5
Total	67	24%	101	36%	47	17%	22	8%	46	16%	283

- Among respondents, 58% companies said they had consulted with a lawyer regarding debt collection, while only 17% responded that they had no contact with a lawyer.

Reference: Appointment of lawyers by industry

	1 Corporate lawyer		2 Ad hoc adviser		3 No contact with lawyer		4 Others		5 No reply		Total
	Respondents	%	Respondents	%	Respondents	%	Respondents	%	Respondents	%	
01 Foods	2	50%	2	25%	2	25%	0	0%	2	25%	8
02 Textile / Fabrics	2	22%	1	25%	1	25%	0	0%	0	0%	4
05 Paper / Pulp	0	0%	2	67%	0	0%	0	0%	1	33%	3
06 Chemistry	1	11%	5	45%	4	36%	0	0%	1	9%	11
07 Pharmaceutical products	0	25%	1	100%	0	0%	0	0%	0	0%	1
08 Rubber goods	1	9%	1	33%	1	33%	0	0%	0	0%	3
09 Ceramics	2	17%	2	33%	1	17%	0	0%	1	17%	6
10 Steel	4	18%	2	25%	1	13%	1	13%	0	0%	8
11 Nonferrous	2	0%	4	44%	2	22%	1	11%	0	0%	9
12 Metal products	2	33%	3	38%	1	13%	1	13%	1	13%	8
13 General machinery	1	25%	5	56%	1	11%	1	11%	1	11%	9
14 Electric and electronic machines	5	41%	8	40%	3	15%	3	15%	1	5%	20
15 Electronic parts	2	67%	9	41%	6	27%	2	9%	3	14%	22
16 Automobiles	1	20%	4	67%	1	17%	0	0%	0	0%	6
17 Automobile parts	3	33%	6	35%	3	18%	4	24%	1	6%	17
18 Other transport vehicles	0	17%	1	50%	1	50%	0	0%	0	0%	2
19 Precision machinery	1	33%	1	33%	0	0%	1	33%	0	0%	3
20 Other manufacturing industries	3	36%	2	17%	6	50%	1	8%	0	0%	12
21 Trading / Wholesale	17	50%	19	44%	1	2%	2	5%	2	5%	41
22 Agriculture / Forestry / Fisheries / Mining	2	0%	1	33%	0	0%	0	0%	0	0%	3
23 Construction / Civil engineering / Immovable property	3	22%	8	53%	3	20%	0	0%	1	7%	15
27 Communications	1	3%	2	67%	0	0%	0	0%	0	0%	3
28 Transportation / Storage	2	25%	3	25%	4	33%	1	8%	2	17%	12
29 Retail / Department stores / Supermarkets	1	33%	0	0%	0	0%	2	67%	0	0%	3
30 Finance / Securities / Insurance	5	46%	4	36%	1	9%	1	9%	0	0%	11
31 Information processing / Software, etc	1	9%	1	50%	0	0%	0	0%	0	0%	2
32 Consulting / Legal services / Accounting	0	50%	0	0%	2	100%	0	0%	0	0%	2
33 Other nonmanufacturing industries	2	33%	4	44%	2	22%	1	11%	0	0%	9
(No reply)	1	0%	0	0%	0	0%	0	0%	29	97%	30
Total	67	23%	101	35%	47	17%	22	8%	46	16%	283

- A look by industry reveals conspicuous past appointment of lawyers in the industries of “Trading and wholesale” and “Financial, securities and insurance,” in similar fashion to the responses regarding full-time staff for debt collection.

1.5 Difficulties in collection of debt in arrears and non-performing debt

Figure 3-4 Difficulties in collection of debt in arrears and non-performing debt

	1 No problems in particular		2(1) Problems at local affiliates		2(2) Problems with the legal system for debt collection		2(3) Problems with arbitration/court decisions/execution		2(4) Multiple problems		3 Others		No reply		Total
	Respondents	%	Respondents	%	Respondents	%	Respondents	%	Respondents	%	Respondents	%	Respondents	%	
Australia	24	65%	1	3%	2	5%	0	0%	1	3%	1	3%	8	22%	37
China	4	67%	0	0%	0	0%	0	0%	0	0%	1	17%	1	20%	6
Indonesia	5	42%	1	8%	1	8%	4	33%	0	0%	0	0%	1	8%	12
Japan	1	50%	0	0%	0	0%	0	0%	0	0%	1	50%	0	0%	2
Malaysia	43	65%	3	5%	2	3%	1	2%	3	5%	1	2%	13	20%	66
Mexico	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	1	100%	1
Philippines	16	62%	1	4%	0	0%	0	0%	0	0%	3	12%	6	23%	26
Singapore	21	60%	4	11%	2	6%	0	0%	0	0%	2	6%	6	17%	35
South Korea	13	76%	0	0%	1	6%	0	0%	0	0%	0	0%	3	18%	17
Thailand	45	74%	1	2%	0	0%	2	3%	2	3%	2	3%	9	15%	61
US	3	75%	0	0%	0	0%	0	0%	0	0%	1	25%	0	0%	4
Vietnam	9	82%	0	0%	0	0%	0	0%	0	0%	0	0%	2	18%	11
(No reply)	4	80%	0	0%	1	17%	0	0%	0	0%	0	0%	0	0%	5
Total	188	66%	11	4%	9	3%	7	2%	6	2%	12	4%	50	18%	283

- 66% of responding companies replied that they felt no problem in particular regarding debt collection. About 15% of the whole responded that they felt there were difficulties.

Reference: Difficulties in collection of debt in arrears and non-performing debt, by industry

	1 No problems in particular		2(1)Problems at local affiliates		2(2)Problems with the legal system for debt collection		2(3)Problems with arbitration/court decisions/execution		2(4) Multiple problems		3 Others		No reply		Total
	Respondents	%	Respondents	%	Respondents	%	Respondents	%	Respondents	%	Respondents	%	Respondents	%	
01 Foods	6	75%	0	0%	0	0%	0	0%	0	0%	0	0%	2	25%	8
02 Textile / Fabrics	4	100%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	4
05 Paper / Pulp	3	100%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	3
06 Chemistry	9	82%	0	0%	1	9%	0	0%	0	0%	1	9%	0	0%	11
07 Pharmaceutical products	1	100%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	1
08 Rubber goods	3	100%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	3
09 Ceramics	2	33%	3	50%	0	0%	0	0%	0	0%	0	0%	1	17%	6
10 Steel	5	63%	0	0%	0	0%	1	13%	0	0%	1	13%	1	13%	8
11 Nonferrous metals	8	89%	1	11%	0	0%	0	0%	0	0%	0	0%	0	0%	9
12 Metal products	5	63%	0	0%	1	13%	0	0%	0	0%	2	25%	0	0%	8
13 General machinery	5	56%	1	11%	0	0%	0	0%	0	0%	0	0%	3	33%	9
14 Electric and electronic machines	17	85%	1	5%	0	0%	0	0%	0	0%	0	0%	2	10%	20
15 Electronic parts	19	86%	1	5%	0	0%	0	0%	0	0%	0	0%	2	9%	22
16 Automobiles	5	83%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	6
17 Automobile parts	16	94%	0	0%	0	0%	0	0%	0	0%	1	6%	0	0%	17
18 Other transport vehicles	2	100%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	2
19 Precision machinery	1	33%	1	33%	0	0%	0	0%	1	33%	0	0%	0	0%	3
20 Other manufacturing industries	12	100%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	12
21 Trading / Wholesale	24	59%	2	5%	2	5%	3	7%	2	5%	4	10%	5	12%	41
22 Agriculture / Forestry / Fisheries / Mining	3	100%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	3
23 Construction / Civil engineering / Immovable property	9	60%	0	0%	1	7%	0	0%	0	0%	1	7%	4	27%	15
27 Communications	2	67%	0	0%	0	0%	0	0%	1	33%	0	0%	0	0%	3
28 Transportation / Storage	8	67%	0	0%	1	8%	0	0%	0	0%	2	17%	1	8%	12
29 Retail / Department stores / Supermarkets	1	33%	0	0%	1	33%	0	0%	0	0%	0	0%	1	33%	3
30 Finance / Securities / Insurance	6	55%	0	0%	0	0%	3	27%	2	18%	0	0%	0	0%	11
31 Information processing / Software, etc	0	0%	1	50%	1	50%	0	0%	0	0%	0	0%	0	0%	2
32 Consulting / Legal services / Accounting	2	100%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	2
33 Other nonmanufacturing industries	7	78%	0	0%	0	0%	0	0%	0	0%	0	0%	2	22%	9
(No reply)	3	10%	0	0%	0	0%	0	0%	0	0%	0	0%	27	90%	30
Total	188	66%	11	4%	8	3%	7	2%	6	2%	12	4%	51	17%	283

- A look by industry shows that similar to “full-time staff” and “appointment of lawyers,” “Trading and wholesale” and “Financial, securities and insurance” companies had past experience with difficulties in debt collection.

Analysis

1.5.1 In-company investigation/legal affairs systems for handling debt in arrears and non-performing debt

Regarding in-company investigation and legal systems involving debt collection, responses of “no” regarding “full-time staff” and “appointment of lawyers” for debt collection accounted for nearly 60% of all internal respondent companies. On the other hand, relatively many companies from Australia, Singapore, etc., had full-time staff in charge of debt collection.

1.5.2 Appointment of lawyers for handling debt in arrears and non-performing debt

The following difficulties regarding the appointment of lawyers for debt collection were pointed out in survey responses.

- Charges of the professional fee are not transparent
- Their prices are expensive compared to the job requested
- They merely help with procedures and contacts; limited advice and strategy planning ability
- They suddenly litigate with no reporting or consulting
- Their handling of the case varies depending on the status of the debtor
- Results vary depending on their connections with the court
- etc.

1.5.3 Difficulties in legal systems and execution systems for debt collection

By analyzing actual detailed examples written among the questionnaire responses, one can break down difficulties into two groups: difficulties with the security interest legal system itself, due to the goal of risk avoidance, and difficulties with arbitration, trial and enforcement systems. The economies can be separated into five groups by questionnaire answers: i) economies that are said to have no difficulties with security interest system or arbitration, trial and execution systems; ii) economies that have relatively marked difficulties with the former; iii) economies that have more marked difficulties with the latter than the former; iv) economies that are cited as having difficulties with both; and v) economies that lack a developed legal system itself. In these ways, there are disparities in the state of the legal system among the APEC member economies. The fact that in each economy, private sector companies are facing difficulties involving debt collection in the course of their business activities

(excluding the economies that are said to have no difficulties with security system or arbitration, trial and execution systems in “i)” above), was clarified through this survey.

The following individual items were pointed out as issues with the security interest system.

- Calculation of secured asset value is difficult
- Foreign ownership of immovable property is restricted
- Security setting status cannot be accessed freely

Difficulties cited involving arbitration, trial and execution systems included difficulties with systems themselves and difficulties with procedures and execution mechanisms.

Difficulties with systems themselves

- There is a tendency for courts to deliver unfavorably biased decisions against foreign creditors in some cases.
- The possibility that courts reach rational conclusions is low.
- The credibility of the local arbitration systems themselves is low, so companies use the arbitration system of a third country.

Difficulties with procedures and execution mechanisms.

- The speed of the court proceedings differs greatly depending on the location of the court, and in some cases debtors use this as a means to sabotage the proceedings.
- Execution of awards in a third country is difficult.
- Regarding the execution of security interest, in many cases the enforcement of security interest is not approved as the debtor demonstrates an intention to repay the debt over a long period of time.

(Note: The above points are samples from the results of the questionnaire survey, and the facts have not been confirmed directly.)

Regarding some APEC economies, although no specific difficulties were pointed out, due to the few past judicial precedents and unsettled legal systems, even in consultations with attorneys and consultants the only answers we received were pertinent to decisions taken in line with the existing legislation, and some respondents pointed out that results could be produced only after actually conducting direct

negotiations with the relevant institutions. As a general trend, many respondents commented that in order to protect their account receivables they utilize tools such as advance payment, Letter of Credit (L/C) by a major bank, or bank deposit, and in general avoid doing business with partners that do not offer proper guarantees.

1.5.4 General indications

As a concluding remark, the following points could be extracted from the questionnaire survey.

Disclosure of corporate information and accounting systems - fundamental to confidence in business transactions

In each economy, the importance of the disclosure of corporate information and proper accounting systems is highly recognized, and the systems are under going a process of development. Several economies, for example, have recently introduced a system requiring companies listed on the stock exchange to disclose of corporate information to the public. In addition, some economies have improved the accounting/auditing system. Today, therefore it is easier to obtain reliable corporate information of listed companies. Our survey, however, shows that important business counterparts of foreign affiliated companies are not only listed companies but also non-listed companies, including small and medium-sized companies and state owned enterprises, and that these foreign affiliated companies are willing to develop the relationship with such non-listed companies. A challenge still remains in non-listed companies for improving information disclosure as well as establishing proper accounting systems. Since some economies have already conducted several policy studies including those on small and medium-sized companies, it is worth considering the sharing of updated information within the framework of APEC to discuss and study the “best practices.”

Judicial system - significance of securing binding and compelling power for business relationships between interested parties

It is found that all the economies targeted by this study are quite active in their judicial reforms. Their enthusiasms, including reformation of court systems, formulation of legislative processes and training systems for legal professionals, were quite impressive. However, some foreign affiliated companies tend to hesitate to rely on local judicial systems. Some companies indicate that the principle of state decision has not been fully established in some economies, and therefore it is difficult for them to predict the court decisions beforehand. Other companies indicate that judicial

decisions tend to be arbitrary against the interests of foreign firms. This implies that it will take some time before the reforms under way actually improve the quality of court practices.

Individual Debt Collection - Dispute resolution in court and enforcement of the solution thereon -

The study found that the companies have been facing difficulties in obtaining judgments fair both to local and foreign companies and conducting enforcement of the solution. It is expected that both legislation and enforcement process will be improved, accompanied by the judicial reforms, to facilitate the effective enforcement of judgments. As for the technical aspects of dispute resolution proceedings in court such as means to expedite the litigation process, it may be helpful to exchange information and to study best practice among APEC economies.

Security interests and enforcement thereof

Since the economic crisis, each economy has been making efforts to introduce/revise relevant laws, with a view to firmer legal systems. In particular, foreign companies see significant improvement in the areas of laws of security interests on movable properties and deregulation of establishment of security interest. However, the study found that foreign investors are still hesitant to extend credit with security interests, and tend to rely on cash payment on delivery, because of the difficulties of acquisition and execution of security interests. In the future, the legal framework for secured transactions will be vital, given that transactions are expected to become more complicated and sophisticated with the surge in service liberalization. Furthermore, the acquisition of security interests will provide higher priority in bankruptcy procedures. Their significance should draw attention also in the context of collective debt collection systems. Thus, in order to improve the availability of the security system, information exchange within the APEC economies may be useful.

Alternative dispute resolution (ADR)

The surveys noted the clear stance of promoting ADR systems in each APEC economy. Particularly, there exists a trend toward international harmonization of arbitration law, as well as clarification of the execution procedures in both international and domestic arbitration systems. In addition, each economy recognizes the importance of mediation within and outside the litigation process. According to the surveys, however, in some economies, such ADR systems are not fully utilized by foreign companies. As the reason for this reluctance, certain unpredictability of dispute settlement without clear rules and precedents is implied. Predictability is an

essential requirement for long-term business activities like foreign direct investment. Information exchange within the APEC economies in this area may be useful.

Collective debt collection system – liquidation and reorganization procedures

In APEC economies, governments have tried to enhance their collective debt collection systems including establishment of corporate reorganization procedures as part of the process of structural reforms after the economic crisis. Within the series of such structural reforms, the aspect of these measures as the “remedy” for emergencies resulting from crisis has been stressed in political contexts. Different treatments are sometimes observed between domestic companies and foreign companies. APEC economies have almost overcome the difficulties of the Asian economic crisis, but the outcome of the study calls for reviewing how economic legal infrastructure can be strengthened over a long period from the viewpoint of business. During such processes, rational choices by interested parties supported by their free will, as well as avoidance of moral hazard, should be adequately taken into account. Information exchange among APEC member economies on their own reform efforts might be beneficial to promote continuous endeavors to enhance economic legal infrastructure.

2. China

2.1 Foreword

2.1.1 Overall situation of debt collection

(1) General outline of institutional reforms in China

Over the past several years, China, as a socialist market economy integrating into the global economic system through gaining membership of WTO, has come to grips with a number of reforms in the area of debt collection, not only revising existing systems but also introducing varied new systems. Various efforts for reforms to ensure prompt enforcement of existing systems and transparency in their operation have been made throughout the state, and the coastal areas leads them based on their active business developments in the global economy. In general, the direction of these trends could be favorably received.

On the other hand, issues still remaining under these circumstances are: 1) lack of integrity in the economic legal infrastructure including enforcement and implementation of laws, caused by its rapid preparation for a market economy system, 2) uneven accessibility to relevant information for business transactions such as real estate registration, 3) incomplete infrastructure for credit-based transaction system, 4) necessity of further judicial reforms (for instance, disclosure of precedent, impartiality of judgments including arbitration) which improve stability and predictability, 5) lack of awareness concerning contractual obligations, and 6) being unprepared for such major legislation as bankruptcy law for every type of business. These issues might affect the effectiveness of the reforms described above and the potentiality of further growth under the global economic regime, if they should remain unresolved over the long term.

(2) State of foreign affiliated companies' debt collection

In general, Japanese and other foreign affiliated companies have accumulated credit management skills from their business experiences in China. Each company has now established its own credit management systems tailored to the risks inherent in its business. Commonly noted in these systems is preventive credit management as well as a stance of avoiding making a judiciary case and settling the matter of debt collection within regular business activities before it develops into a dispute. Specifically, companies try to obtain and analyze credit information as much as possible in advance, pay frequent visits to debtor companies/offices, and adopt low-risk methods of payment (cash-on-delivery, short-term payment periods, and adding a risk rate to the selling

price).

In the following section, the remaining issues in China and the direction for their settlement will be examined in the order set out in Chapter 1.

2.1.2 System and environment relating to debt collection procedures

(1) Information on corporate business management and assets

For a company to adequately conduct credit management, it is indispensable to grasp the state of client companies' business management and assets. This is possible when reliable information is steadily provided to the market. This is of particular importance for foreign affiliated companies, which must keep relying on preventive credit management.

In China, information on corporate registration and business management is concentrated in the local Administrations for Industry & Commerce (and the State Administration for Industry & Commerce with nation-wide authority). Anyone may obtain information on corporate registration from the office while any lawyer, judge or others concerned with legal matters may peruse and copy information on corporate business management. Information on corporate registration includes that on basic corporate credit standings. However, the rules for disclosure of such information, particularly information on corporate business management, and whether one can copy or not (by writing or by machine) are said to vary among localities.

In Shanghai, disclosure of information on immovables registered by companies and individuals is being promoted for the sake of business safety from the established notion that information on assets is not a matter of privacy, so anyone can obtain information on registered immovables. However, rules for disclosing information on assets differ by regions, and in regions other than Shanghai, access to the information is limited to certain quarters of judiciary personnel and to an occasion in which the immovables are in an issue of lawsuit cases.

In such a vast economy as China, it can be easily conceived that enforcement of a nationally unified system is accompanied by many difficult problems. Companies, however, do not necessarily establish their manufacturing bases in coastal areas alone. In fact, an increasing number of companies are creating their strongholds in inland provinces. Therefore, from the point of view of smooth credit management and doing business without trouble, it is necessary to enforce unified systems across the economy and to enhance predictability of the systems for companies. In particular, considering that the State-owned Assets Supervision and Administration Commission, created in March this year with a reorganization of the State Council, announced a new liquidation policy for state-owned companies (urging the liquidation of state-owned companies that

meet bankruptcy conditions), it is becoming ever more important to keep the market supplied with highly reliable information on corporate management and asset conditions.

In Shanghai and other metropolitan areas, a number of corporate credit information centers have been set up. They provide corporate information on a business basis. In addition to having the Administration for Industry & Commerce and tax authorities as their main sources of information, they conduct hearings on relevant parties. At this stage, it cannot be denied that the information they provide may contain inaccurate data.

(2) Circumstances for credit-based transactions

In the mid- to long-terms, more dynamic business developments under the global economic regime will require development of infrastructure for transactions based on credit granting among parties, and emphasis on practices of those kinds of transactions, since the current credit management system inevitable limits the types and sizes of business.

2.2 Individual debt collection procedure

2.2.1 Security interest system

Foreign affiliated companies generally do not set up a security interest and enforce it as a direct means to collect debt, and with preventive credit management carrying much weight, they may regard those businesses that need security interest as risky ones. Therefore, at this moment, the fact that the Security Interest law has been enacted as a separate law may not be fully appreciated in the businesses which foreign companies are involved. (In addition, immovables are not set up as collateral even by domestic Chinese corporations.) This tendency is due to the following reasons: (1) security interest for foreign affiliated companies is subject to the regulations controlling foreign capital like prior permission, (2) the situation regarding security interest may be ambiguous (when information on registered immovables is not available, situation of security interest may not be identified), (3) there are restrictions when actually enforcing a security interest (one needs to start a lawsuit at the people's court and markets for selling collateral are generally not mature yet).

Under such circumstances, a foreign affiliated company may set up security interest not for the purpose of actual debt collection through its execution, but for the purpose of strengthening its negotiating position against the debtors by suggesting its enforcement.

Based on these situations, in order for the Security Interest law to function appropriately in a market economy as the law originally intended, the following

measures are necessary: 1) to loosen regulation on foreign-related security interests, 2) to implement section 45 of the Security Interest law which explicitly allows anyone to read and copy the registration documents of security interest appropriately across the nation, and 3) to prepare practical and suitable mechanisms for enforcement.

2.2.2 Asset preservation system

The asset preservation system in China is one of the measures to be taken when foreign affiliated companies start proceedings for litigation or arbitration. It is recognized as an indispensable procedure in view of debt collection. In particular, preservation of debtors' bank accounts is deemed effective. Some foreign affiliated companies, however, contend that the amount of security money demanded by the people's court seems to be excessive. Since an amount equal to that of the debt is demanded as security, adoption of the international level (20 to 30 percent of the amount of debt) may need to be considered.

2.2.3 Civil proceedings

With regard to civil proceedings for debt collection in China, although there have been significant improvements in recent years, there are still remaining issues.

In terms of civil proceedings for debt collection, foreign affiliated companies have pointed out the following issues: complaints are not always accepted by the courts; litigation process is often delayed; court judgments are sometimes questionable; and at times judgments are not executed smoothly. However, they admit that since the judicial reform after 1999, and application of global rules after joining the World Trade Organization, these issues, for the most part, have been moving towards resolution. The common understanding today is that the improvements are being realized in coastal metropolitan areas.

It is also pointed out that an improvement can be noted in the quality of lawyers and judges following the introduction of a unified judiciary examination system in 2002. An increasing number of foreign affiliated companies now believe that when they bring their cases to higher courts, their legitimate appeal could be recognized.

The current Civil Proceedings Law was enacted before the economy's shift to the market economy, and necessity of its adaptation to the market economy has long been pointed out. In practice, however, through the judicial interpretations by the Supreme People's Court and other measures, a shift from the principle of concentrating powers in the court to the adversary system is occurring. At the same time, oral argument is gaining more importance in the process of legal proceedings.

While there have been these substantial improvements described above, there are still remaining issues as follows:

1: These improvements above are noted in major coastal cities and have yet to prevail across the economy. In addition, although judiciary examination has taken a remarkable initial step forward, it may take some time before that step leads to a major reform of the legal profession in general across the economy.

2: The resolution of confusion resulting from the improvement of legislation in a short period of time (such as lack of integrity, or gaps between the real situation in market/society and the legislation) may be characterized as an important task ahead.

3: The following issues tackled as main pillars of the 1999 judicial reform may also be still characterized as important tasks ahead: 1) further independence of the courts in order not to allow broad intervention by administration, 2) systematic editing and publication of judicial precedents and related information (official notices issued by the government) and access to the information concerned in order to improve transparency and predictability, and 3) unified management of judgment execution, and establishment of a unified execution authority to some extent in as a countermeasure to regional protectionism.

2.2.4 ADR (arbitration) system

In the past, foreign affiliated companies and others used to point out the following issues with regard to arbitration: the process of selecting arbitrators sometimes lacks transparency (chief arbitrators and self-selected arbitrators); arbitration process is sometimes delayed; arbitration process sometimes lacks fairness; in some cases, enforceability of arbitration is rather low. However, foreign affiliated companies admit that, as with the proceedings mentioned earlier, there have been improvements in many of the arbitration issues during the last few years in major coastal cities. The skills of arbitrators are also admitted to have shown a notable improvement.

One reason for the notable improvement in China's arbitration system may be found in the fact that there can be no process of arbitration unless the system is selected by the concerned parties as an alternative means of resolving disputes and, also, that there are so many competitive arbitration agencies inside and outside the economy. The Chinese arbitration organizations appear to be aware of their position as service providers and have a sense of competition in the good sense of the word. Such a sense, for example, can be noted in new arbitration rules regarding financial disputes set up by CIETAC in May this year. Thus, arbitration organizations have a strong wish to be chosen as service providers. So, if the issues mentioned above continue to exist, the arbitration organizations will lose their competitiveness. In such competitive

conditions, it is expected that the situation will steadily move in the direction of fairness and transparency.

However, such changes are again not prevalent nationally, and foreign affiliated companies are not fully aware of the existence of the regional arbitration commissions including the ones in metropolitan areas (Shanghai Arbitration Commission and Beijing Arbitration Commission, for instance) and their potential capacity and readiness to deal with external and economic cases. In addition, in terms of impartiality of arbitrators, foreign businesses are still not fully confident, compared to the situation in other international counterparts, though the arbitration courts have made efforts to improve impartiality.

The selection of a means to resolve debt collection issues between litigation at the People's Court and arbitration at the arbitration commission will not be readily generalized. It is, however, often pointed out that, in major coastal provinces, the issues with litigation and arbitration are being removed and the skills of those engaged in the services are improving. In the future when the remaining issues above are resolved, it will be more realistic to make a choice between litigation and arbitration as a means for settlement, by examining their merits and demerits, best suited to the particular nature of the dispute. (Refer also to the table below).

Figure 3-5 The merits and demerits of arbitration noted by several arbitration commissions in China

[Merits]
<ul style="list-style-type: none">- Arbitrators may be chosen by the parties concerned- Disputes can be resolved behind closed doors (trade secrets as well as corporate image can be kept intact)- Substantial power of enforcement is secured by collaborating with the People's Court- Execution abroad using the New York Convention is also possible- Possible to develop one's own case sufficiently- Possible to resolve the problem in a relatively short time- A high degree of satisfaction for the both parties- Less expensive than litigation (in the case of appeals)- (In the case of local arbitration commissions) it is possible to resolve disputes by taking into account local conditions
[Demerits]
<ul style="list-style-type: none">- Conclusion could differ depending on the arbitrators selected- No direct enforcement- Settlement at the first arbitration trial- More expensive than litigation (where the case is closed at the first trial)- Awareness (recognition) on the part of companies is still low- Organizations other than CIETAC have only limited experiences (for the external cases in particular)

2.2.5 Other issues

Considering the present state of individual debt collection, where the preventive debt management system is regarded as more important and issues differ depending on the types of industries and forms of transactions, a study should be made on the establishment of a system focused on cultivating awareness of fulfilling the contractual obligations which are a fundamental part of transactions, in addition to a more direct method of resolving issues as described above. For example, the Japanese systems of sanctioning the dishonoring of bills (if one issues a bad draft twice in six months, banking transactions will be suspended), action against delay in payment of subcontract proceeds to subcontractors (facilitating the transactions of subcontracting enterprises),

or rules against abuse of dominant bargaining position (elimination of such abuse) might fall under this category.

2.3 Collective debt collection procedure

2.3.1 Bankruptcy system

Foreign corporate creditors need to regard bankruptcy as one direct means of debt collection. Moreover, even if debt collection from a bankrupt corporation is difficult due to its lack of remaining valuable assets for repayment, it is important to regard bankruptcy as a means of obtaining the right of writing off the debt without any tax having been levied in the home country. (There is also another method of making use of increased bargaining power, by implying the imminent start of legal procedures, as in the case of the security interest described above.)

However, the current bankruptcy system in China is not sufficient as a procedure for the debt collection means described above, in terms of the following points: 1) there are several laws and interpretations such as the Judicial Interpretations by the Supreme People's Court related to bankruptcy, and no integrated system exists, 2) the existing Corporate Bankruptcy Law (for interim implementation) of 1988 only targets state-owned companies, 3) there are not enough and clear rules for reorganization of corporations that retain potentiality for revitalization, and 4) rules for bankruptcy of non-state-owned corporations and foreign related corporations are not sound, and therefore the Corporate Bankruptcy Law has to be applied correspondingly even to those corporations.

In addition to these points, taking account of the recent policy of promoting liquidation of state-owned companies adopted by the State-owned Assets Supervision and Administration Commission, it is necessary to legislate and adopt -rather than the current Corporate Bankruptcy Law (interim implementation)- a new clarified liquidation procedure, stipulated by provisions in a new unified bankruptcy law, where procedures of composition, liquidation and reorganization are independently set out.

In terms of the new legislation on corporate bankruptcy in China, several bills have been prepared since 1994. The draft bills, however, are still under discussion in the National People's Congress as well as among experts. The major reasons for this is that discussion and practical legislative solution on major issues such as 1) status of most large-scale state-owned enterprises that have historically played significant roles in Chinese society as well as the economy, 2) provisions on receivership and receivers (such as their structures and roles), and other matters have taken for certain time. In addition, understanding and penetration of the notion of bankruptcy under the market

economy system among Chinese society also takes certain time. Currently, the bill is listed in the second priority group at the National People's Congress.

After all, an early introduction of a new integrated legislative system on bankruptcy under the market economy regime, 1) which stipulates impartial and transparent procedure, 2) which puts emphasis on protection of creditors as well as that of debtors, 3) by which procedures for all types of corporations are stipulated (such as state-owned, private, foreign-related), and 4) by which the most suitable procedure for each entity could be adopted based on its specific situation (such as liquidation, reorganization, and composition), is strongly expected.

3. Indonesia

3.1 Development of the Overall Civil Judicature System

As seen in Chapter 1, the need for development of the judicature infrastructure is fully realized in Indonesia and legal changes are gradually progressing for the realization of such development with such examples as the Amended Basic Law on the Judicial Power of 1999 and the Attorney Law of 2003. However, definite achievements for the establishment of the appropriate civil judicature system should not be blatantly expected through these changes. Firstly, regarding the judicial independence stipulated by the above-mentioned Basic Law on the Judicial Power of 1999, due to the opposition from the Ministry of Justice and Human Rights, the transfer of jurisdiction concerning the human resources and financial affairs of the courts to the Supreme Court has been disrupted. In the background are, apart from the competition for leadership among the bureaucratic organizations, a sense of caution among the people for the transfer of jurisdiction since the Ministry of Justice and Human Rights is more committed to fair judiciary and elimination of corruption than the Supreme Court. Furthermore, regarding administration of justice itself, in general the social trust in the qualities and specialized knowledge of individual judges is not high and the remuneration of judges are not enough to ensure independency, serious considerations, therefore, must be made for providing adequate remuneration and social status to judges). In addition, there are issues regarding the independence of the judges such as the Supreme Court possessing the jurisdiction to give orders in individual cases of lower courts.

On the contrary, as for the attorney system, the integration of attorney organizations and other measures planned were not welcomed by the relevant parties and there is no prospect that the scheduled revision policies will be realized¹.

In this manner, in a situation where courts, attorneys and other systems that have a vital role in the Civil Judicature has not stabilized, it is inevitable that the credibility of the various procedures for debt collection would be questioned. In order to have companies including foreign companies, indulge in business and transactions comfortably in Indonesia, it is essential to realize a predictable and fair legal debt collection system. Therefore, there is a need to confront the basic issues and patiently and persistently make efforts to improve them.

Nonetheless, these issues reflect the society and history of Indonesia; therefore, not only can results not be expected from rash attempts for correction, there are fears that

they may in fact cause confusion. As one strategy, the specialized knowledge of the staff members of the court including the judges will be strengthened through guaranteeing systematic disclosure of verdicts, comprising a forum for studying legal precedents with out-of-court experts as well as fostering a sense of tension in the court and other organizations in their operation of Civil Judicature. With the financial support of the IMF and the Asian Development Bank (ADB), a team comprised of Indonesian attorneys and judges (called “Team 7” since it is comprised of seven members) are assessing the past court decisions made in the commercial courts. Looking from the above-mentioned perspective, these steady activities are valuable and should be actively promoted in the future.

3.2 Individual debt collection system (compulsory execution, security legal system, etc.)

3.2.1 Execution procedure based on civil court decisions, etc.

It has been noted that revisions of the laws concerning civil litigation and execution are scheduled; however, the specific schedule for their enactment has not been set. The inadequacies of the responses for systematic development of these laws are undeniable in comparison to development of the recent insolvency procedures and fields such as Alternative Dispute Resolution (ADR).

In the current situation, (at least for many of the Japanese companies) debt collection is not performed through execution upon obtaining civil court decision due to the fact that execution based on civil litigation is not fully functioning, and instead, execution has become a formality taken for the sole purpose of write-offs due to bad debt. Furthermore, even in cases where individual execution will be sufficient, there are times in which petitions for bankruptcy procedures are filed even when it results in higher social costs.

In Indonesia, it is inevitable that interest is focused on insolvency procedures and ADR and other procedures due to pressure from foreign countries and international agencies following the Asian economic crisis. Nevertheless, civil litigation and execution are the basis of the civil judicature of a country. Adequate considerations are necessary for the systematic and operational development of these procedures. Nevertheless, if obtaining of a court decision which forms the basis of execution requires exceptional time and expenses under the current conditions, for small cases and cases in which the other party does not seem to contend, it is one idea to adopt a method that would allow easier acquisition of documents (title of debt) which will be the basis

of execution. Examples of these would be notarial deeds and documents of, reconciliation before filing a lawsuit, summary procedures and others.

3.2.2 Security legal system and security interest implementation procedures

Regarding the security legal system, legislative development has been observed after the Asian economic crisis under the Law concerning Fiduciary Transfer of 1999. However, immediate conclusion cannot be made on whether these systematic reforms will establish secured transactions in their true form in the transactions world of Indonesia. At least for the Japanese affiliated companies in Indonesia, their expectation for security interest including setting security rights based on the Law concerning Fiduciary Transfer is not that high. Local parties point out as reasons for their low expectations the fact that, first, even when filing a lawsuit for the enforcement of security rights, significant amounts of time and costs are lost for the obtaining of a court decision since the procedure does not advance when the other party is absent and other problems and, second, there is a possibility that the enforcement of security will be denied with a vague argument that the debtor is working hard to meet the payments. Furthermore, although it is not a contravention of the law systematically, the existence of many cases in which the family firms and others of the debtor (its owner) purchase the secured property at the auction becomes one of the premises for doubting the fairness of the implementation procedure of security interest.

In terms of the development of the security legal system, in the near future, there is a need to make an overall revision of the security system which has been developing separately, in terms of time and provision of law, from the Civil Law, the Immovable Mortgage Law (1996) and the Law concerning Fiduciary Transfer. However, as a premise of such systematic development, it is desirable to view it from the perspective which seeks for the factors which obstruct the utilization of security interest and what kind of security system is easy-to-use by the creditors (this will allow an easier fund procurement for the debtors).

3.2.3 ADR and its execution procedure

Regarding the ADR in general, in spite of the enactment of the ADR Law in 1999, it is not sufficiently effective and as already mentioned in 3.2.3 of Chapter 2, there is a tendency of trying to actively take advantage of arbitration institutions in Singapore in

commercial transactions. (This indicates the existence of an escape phenomenon to foreign forum for dispute resolution.) Furthermore, so far, in comparison to the developments being advanced mainly with focus on the arbitration procedures, sufficient development cannot be seen with the mediation procedures (mediation procedures of relative civil disputes excluding mediation of collective debt adjustment by the JITF). However, as introduced earlier, there already are developments that must be followed, such as the plan for a mediation agency attached to the Supreme Court. The question of how the functions will be allocated between this mediation agency and the National Mediation Center (NMC) which is planned to take over the role of the JITF is another interest provoking question.

Therefore, the development of ADR has an immense significance for the development of the overall debt collection system of Indonesia and may become a theme worthy of international assistance.

3.3 Collective debt collection system (bankruptcy system, business rehabilitation system, etc.)

3.3.1 Commercial courts

The establishment of a system which gives commercial courts special jurisdiction over commercial cases such as insolvency and intellectual property right cases can be assessed as a positive reform for case disposal utilizing the expertise of commercial courts. However, regarding insolvency issues, there are concerns over the decreasing trend of the cases filed in commercial courts (See Chapter 1, 3.3.1. (1)). Naturally, the reasons for the decrease in number of cases must be analyzed from various perspectives; however, if there are obstacles which are stopping debtors and creditors from resorting to their foothold and utilizing the insolvency procedure offered by the court, these obstacles must be eliminated.

As one such obstacle, people who used the bankruptcy procedures suggested the fact that the expertise of the judges at the commercial courts concerning insolvency issues has not fully been established. On one hand, this is an issue where improvements must be made from a perspective of long term human resources development. However, at the same time, there are concerns that expanding the range of cases the commercial courts will handle to other economic dispute issues before the expertise of the judges is established may lower the basic rating of the commercial courts. On the other hand, it is also a problem when too much emphasis is placed on the expertise of the judges thus

forcing them into the closed career system of the commercial courts (and of the Supreme Court after promotion). The already implemented experiments with giving judges special jurisdiction have not always brought positive results. The reasons for failure should be identified in parallel with designing a system with new ideas, which are not entrapped in the current system of the courts, such as employing economic and financial specialists from private and public companies and government economic agencies as commercial court judges.

3.3.2 Bankruptcy procedures

The bankruptcy procedures are based on the new legal system and their systematic structure is complete in general. However, as for its operation, there are still points that cause dissatisfaction among the people utilizing the procedures. For example, there is inconsistency by the commercial courts on cases of bankruptcy adjudication (such as cases where bankruptcy is adjudicated although the debtor is capable of payment, or cases where petition are dismissed without recognizing the effectiveness of the maturity acceleration clause, etc.). This has brought confusion among the people utilizing the procedures. In the field study, explanation was given that in most cases when bankruptcies are adjudicated by the commercial court, appeals are made to the Supreme Court. However, this is another factor that brings doubts of whether commercial courts are appropriately operating the bankruptcy procedures and it is necessary to clarify the reasons for such doubts and devise measures based on the findings.

According to the press, the draft amendment of the Bankruptcy Law which is scheduled to be submitted to the Parliament soon includes revisions of the bankruptcy procedures such as, (1) setting the minimum amount of debt by creditors who have petition rights at more than one-half of total amount of debt and (2) outsourcing the assessment of the financial situation of the debtor to accounting firms. The second revision which entrusts the accounting decision to out-of-court specialists in itself is a desirable reform. However, as for the first revision, doubts remain as to whether the right of the creditors would be protected when limiting the right to file petition for bankruptcy procedures to major creditors while the procedures for the realization of the rights other than the bankruptcy procedures are still insufficient.

(1) Suspension of payment, bankruptcy and composition procedures

The procedures of the suspension of repayment introduced in 1998 is significant, as

they give debtors time to negotiate by suspending the enforcement of security interest and make possible composition before bankruptcy is adjudicated. Nevertheless, issues for improvement which require further revisions of the law remain, such as the lack of definite rules concerning the treatment and right of veto of secured creditors in the procedure for suspension of payment. Legal measures to deal with issues that remained unsolved in the 1998 revision are anticipated to be incorporated in the draft amendment of the Bankruptcy Law which is currently under consideration.

The draft amendment of the Bankruptcy Law which will be submitted to the Parliament in the near future is also reported to include rules concerning full-fledged business rehabilitation type procedure. The details on what kind of bill for business reorganization procedures will be submitted to the Parliament are currently unclear. However, emphasis should be made in light of the experiences of Japan that the systematic principle and procedure structure are significantly different between the composition procedures, which are merely reconciliation through majority vote around the debtors and the creditors and the full-fledged business rehabilitation type procedures. Even in Japan, for some time after the enactment of the Corporate Reorganization Law, there was confusion on the distinction between the operations of the Composition procedures and the corporate reorganization procedures. Regardless of the type of proposal for business rehabilitation procedures, sufficient amount of time should be given for its preparation and familiarization and numerous in-court and out-of-court debates should be conducted before it is enforced.

(2) Out-of-court collective debt collection system procedure (collective ADR)

The private reorganization promotion procedures implemented by the JITF should be highly assessed for their accomplishments in restructuring the debt and business of the companies in financial slump during the Asian economic crisis. Even in this survey in Jakarta, there have been many encouraging voices that highly assess the procedures implemented by the JITF for their incentives such as the above-mentioned tax preferential treatment and for their success in selecting and appointing highly skilled mediators. On the other hand, however, there were critical voices which pointed out issues pertinent to the inadequacy of the measures to realize the execution of the agreement, insufficient supervision of the execution process after reaching an agreement and lack of measures to enforce the execution when the agreement is not executed (however, these issues and voices could rather be perceived as a recommendation from the position of expecting further accomplishments by the JITF).

From now on, careful considerations must be made on how to carry on the functions

of the JITF. The possible general directions to be taken are to maintain (or strengthen) the role of public mediation procedures or to maintain the strengths of the procedures by the JITF while returning to regular mediation. In theory, the aggressive interference of governmental administrative organizations such as the JITF with the debt reorganization of companies is justified only during Asian economic crisis and other emergency situations while during normal times the mediation agencies should interfere with debt adjustment procedures only modestly (cases that need further attention should be solved through legal insolvency procedures by the commercial courts). However, in order to realize such a concept, it is essential to improve the qualifications of judges and national courts and establish them as institutions of internationally recognized credibility, fairness and transparency, as well as to develop the infrastructure for the attorney judicature.

If the development of the judiciary infrastructure in those terms is still underway, the procedures of the JITF, which realized the promotion of debt reorganization through flexible adjustments of various relevant parties and government agencies, may be considered as a desirable system that is appropriately adapted to the current situation of Indonesia. From this kind of perspective, the plan to establish by private funds a National Mediation Center (NMC) to take over the functions of the JITF is assessed positively and should be promoted. Specific points for consideration that should be pointed out are, (1) considering that securing the quality and number of mediators (mediation agencies) for the promotion of mediation would be the top priority issue, NMC should further strengthen the mechanism to secure competent human resources (transfer of excellent human resources from IBRA and JITF and new development of human resources) and (2) during the mediation procedure, under certain conditions, the NMC should be given the jurisdiction to suspend individual execution of right of the creditors and supervise the performance of mediation clauses (rehabilitation plan) by the debtors.

As for the establishment of NMC in collaboration with the court (Supreme Court), on one hand, an establishment of a dispute resolution system with close communication between the two bodies can be anticipated. However, there remain concerns that the cases will be allocated between the two bodies while ignoring the will and the situation of the people utilizing the procedures. Ideally, the legal procedures and the ADR should be competitive while maintaining a close relationship and the construction of a system which can maintain this kind of balance is desirable.

¹ Hutagalung, Partosedono & Yazid, Indonesian Attorney System and Its Reform, at 10 [unpublished article].

4. Thailand

4.1 Introduction

As discussed in Chapter 2, the judiciary branch is separated from the executive in Thailand both formally and substantively based on the new Constitution of 1997 and the Judicial Administration Act of 2000. The attorney system was also developed through the 1985 Lawyers Act. Due to the effects of the 1997 Asian economic crisis and the subsequent conditionality requirements from the IMF, Thailand's civil law system, including the Bankruptcy Act, are also developing. According to the surveys on corporations operating in Thailand, many of them held the view that Thailand's overall civil judicature worked appropriately. Thus, it is possible to point out that confidence in Thailand's legal system on the whole is actually high compared with its neighboring countries.

However, it is no wonder, or perhaps even unavoidable, that the coordination of authority among organizations and the cultivation of specialty judges are not keeping up with recent rapid systemic reforms. Insufficiencies regarding the people's access to trial (disclosure of judgements) also remains as future challenge. It will be difficult to tackle these issues with an approach limited to individual issues. Policies such as various forms of human resources cultivation and development of law reports (including the development of law reports of the Supreme Court already in progress) can be thought of as a basic approach. There has also been a backlash to rapid reform in the areas of disposal of non-performing debts and business rehabilitation. From the standpoint of foreign creditors, examples can be seen wherein it is thought that a trend that can only be seen as nationalistic is exerting an influence even on individual rulings. Notwithstanding, it is certain that these examples are at present limited, and the confidence in Thailand's legal system on the whole is thought to be high. However, since payment of the IMF standby loan was completed in July of this year, attention should be paid to its effect on future amendments of economic law systems.

4.2 Individual debt collection system (compulsory execution, security interest legal system, etc.)

4.2.1 Civil proceedings, compulsory execution

The present procedures of compulsory execution and security interest enforcement seem not to be convenient for corporations doing business domestically. In Thailand, a court ruling is now required for both compulsory execution and security interest enforcement procedures, and this costs both time and money. Furthermore, the problems, such as debtors evading executions, and abusing the systems for appeals and objection petitions on executions due to the severity of procedures for serving writs, have long been pointed out. Among these problems, although a few improvements were found regarding issues concerning execution procedure delays themselves, through the 1999 law amendment on execution procedures (improvement of procedures for delivering execution orders, prevention of delay through restrictions on petition), the fact that execution cannot be implemented without a court decision will need more consideration. One possible issue for consideration as a measure would be to provide alternatives to obtaining title of debt for judgment on small-claims litigation.

4.2.2 Security interest legal system and its enforcement procedures

As pointed out in Chapter 1, in Thailand, dependency of collateral acquisition on immovable security interest is significant. At the same time, because purchasing is limited for foreign companies facing regulations on land ownership, it is difficult to utilize security interest for land for foreign companies. Regarding the enforcement of security interest as well, in addition to the lack of a developed system of auction or foreclosure for enforcement of security interest, issues that have been cited in interviews with private sector corporations include the facts that the requirements for provisional enforcement are strict, and collateral is dissipated due to fraudulent acts, committed even after a writ of enforcement is obtained, as a result of an inability to conserve collateral. Therefore, at the very least, many foreign companies view security interest as not being very effective and the present situation is one where normally other methods are employed to secure performance (guarantee by the parent company and other personal sureties, letter of guarantee, etc.).

Meanwhile, in Thailand, amid these circumstances, deliberation in the Congress is currently underway on the business security bill, which is expected to become law

within days. The bill would make unfettered private security interest enforcement possible at its implementation stage by way of making it possible to set a “business security interests” that covers a corporation’s trade assets in total or in part, by using a newly established security interest registration system. As explained earlier, traditionally Thai banks have almost never taken intangible assets as collateral. Therefore, the business security bill, which introduces the idea of intangible assets as collateral, has strong support from small and medium enterprises that do not have tangible assets. In regard to security interest enforcement procedures, the bill is also expected to facilitate a highly convenient mechanism for secured creditors, for example, by making it possible for a secured creditor to freely choose between private and public enforcement. This point is thought to reflect the criticism of the actual situation, in which the traditional type of security interest enforcement system requires overly detailed proceedings wherein enforcement procedures are possible after a judgment is obtained from a court, during which time all manner of obstruction tactics by the debtor’s side regarding the serving of complaint as well as appeals and objections cost secured creditors huge amounts of time and money.

One problem with the bill is that security interest provision is conditional on exclusive possession with a limit of one time per asset. Thus, even if there is more than one creditor, only the primary creditor can initiate security interest enforcement. As a result, there is concern among some parties that major financial institutions usually having great negotiating power will set multi-layered business security interests with traditional immovable mortgages and further cement their exclusive grip on debtors’ corporate assets. In addition to the legal system itself, the development of an electronic public registration system and capacity building of the executive branch of government regarding disclosure and coordination of rights-related information are thought to be important to the development of the security interest system in Thailand.

4.2.3 Alternative Dispute Resolution (ADR) and its execution procedures

It is sometimes said that in general Thai people tend to frown on litigation, in part due to religious reasons, in particular in relation to the Buddhist concept of karma. While there are various theories on the extent of the Thai dislike for litigation, it is a fact that alternative dispute resolution (ADR) is functioning effectively and is used in business practice in the country.

As pointed out in Chapter 1, the ADR Office that was transferred from the executive branch to the jurisdiction of the Court of Justice through the Judicial Administration Act

of 2000 is the center for resolution of individual disputes, including debt collection disputes, and is carrying on energetic work. Moreover, in addition to public ADR that had until now been developed mainly under the initiatives of the Ministry of Justice, the use of ADR in the private sector is also increasing. As a result, there is a noteworthy trend: while countries and areas like Singapore, Hong Kong, China have traditionally been the major centers of ADR, the number of ADR cases is currently increasing in Bangkok. At the ADR Office affiliated to the Court of Justice, where interviews were held, they are considering holding seminars targeting Myanmar, Singapore, Vietnam and elsewhere. Thus, since further advances in ADR are expected, including in international aspects, close attention should be paid in the future.

On the other hand, the issue of enforceability of established mediation has been cited as a problem point in the Thai mediation system. (Also this point has been significantly addressed in regard to approvals and executions of arbitration awards by the 2002 Arbitration Act.) Mediations by the Court of Justice's ADR Office, if conducted before litigation is filed, can only have the same effect as an amicable settlement (i.e., are not enforceable). The question of how to construct a system that ensures fulfillment of individual mediations will be an ongoing challenge. Another task will be the diffusion of regional mediation and arbitration centers attached to courts, which now seem to be in the initial phase of operation.

4.3 Collective debt collection system (bankruptcy system, business reorganization system, etc.)

4.3.1 Court-run insolvency procedures

As described earlier, many of the private corporations interviewed rated the insolvency legal system itself, including the bankruptcy court system, reasonable on the whole. However, the fact that confidence in the operational facets of the insolvency laws is dissipating, particularly among foreign companies who feel that the handling of recent large reorganization cases (Siam Strip Mill case (SSM), Thai Petrochemical Industries case (TPI), etc.) was unfair, should be mentioned.

The points perceived as problematic in specific cases such as the large reorganization cases mentioned above include: (1) the power of the Chief Judge of the Bankruptcy Court is great and wide in scope, and there is concern that in some instances, that power may exert influence over the handling of individual cases; (2) in Thai insolvency procedures, an Official Receiver, who is an executive official, not only guides

procedures, but is also involved in issues regarding the content of the rights of the interested parties (for example, the right of determining the value of voting rights of creditors, which was a focus of the SSM case), and under the wording of Bankruptcy Law, his or her decision could be read as the absolute one. These points were cited by parties and proxies involved in specific cases, and could possibly be viewed as limited problems encountered in exceptional cases. However, it is also certain that they have facets as structural problems that throw doubt on the predictability of bankruptcy procedures. Our impression upon conducting our field survey is that local experts seem to be already aware of these issues and therefore we can expect new developments of the discussions to come.

Some problematic points that are thought to stem from rapid legal reform probably also remain in Bankruptcy Act provisions. For example, the following points regarding appeal can be cited: (1) bankruptcy (liquidation) procedures have a three-tier review system (scheduled to be amended soon), while rehabilitation procedures have a two-tier review system; (2) while the law stipulates that approval of the Chief Judge of the Bankruptcy Court is required for appeal, there are also provisions that allow the Supreme Court to grant special approval for appeal, and the relationship between the two authorities is not clear. (The general interpretation by the Supreme Court is that its own approval takes precedence, but our impression was that the criteria for this approval are unclear.)

4.3.2 Collective debt collection outside courts (Collective ADR)

(1) Corporate Debt Restructuring Advisory Committee (CDRAC)

The Corporate Debt Restructuring Advisory Committee (CDRAC) has built up a record of handling a significant number of cases, and is considered on the whole to be playing its role effectively. On the other hand, the CDRAC is a mechanism of the Bank of Thailand that has the goal of resolving problems of non-performing debts through negotiations among the parties involved, and thus has no legal force. Therefore, unlike the Thai Asset Management Corporation (TAMC), it has inherent limits, such as its lack of enforceability. In large cases where the interests of the parties are connected in complicated ways, legal procedures tend to be preferred over the CDRAC. In fact, a mere one case among those handled by CDRAC in 2002 could have been deemed “large.” From now on, the role of CDRAC could be changed by shifting its function to quasi-judicial debt adjustment procedures that also bring small and medium enterprises into view. However it is important not only to unilaterally

provide debtors with a chance to rebuild their business, but also to establish proper reorganization procedures, such as exchange of former managers and pursuit of management responsibilities. The study team would like to watch carefully how the CDRAC experience and achievements relating to debt collections would be utilized in the debt collection procedures on the whole including insolvency procedures by courts in Thailand.

(2) The Thai Asset Management Corporation (TAMC)

The Thai Asset Management Corporation (TAMC) was established according to a temporary law in effect for 10 years. At present, its formulation of restructuring plans is nearly complete, and it is now about to enter the stage of administering the implementation of the formulated plans. TAMC's overall reputation is that it functioned effectively in the disposal of non-performing debts of government-owned financial institutions, but because criteria were strict for private sector financial institutions regarding the purchase of non-performing debts, its use is extremely limited as a scheme for disposal of non-performing debts by private financial institutions. The problems of moral hazard by relieving public companies through public fund investment are also pointed out. The probable focus from now on will be on how the experience of TAMC is utilized within the collective debt collection system in the future, once its role of disposal of non-performing debts of financial institutions subsides.

4.4 Others – Access to Company Management Information –

It is essential for debt collection and also, as an important factor, for credit management, to secure access to accurate company management information and, in this sense, such access is a foundation of proper market functions. As discussed in chapter 1, although the Public Limited Company Act and the Civil and Commercial Code provide the disclosure of company information in Thailand, a future problem to be tackled is the fact that the disclosed items are limited. Also, because of the IMF conditionalities after the Asian economic crisis, companies listed on the stock exchange are obliged to establish an outside-director supervisory committee and the authority of the committee covers not only the investigation of accounting illegalities but also that of management validity. As a result, companies listed on the stock exchange have triple supervising systems: newly introduced general management supervision by outside director supervising committees, supervision of accounting illegality by auditors as before and outside supervision by certified public accountants. However it should be

noted that the effectiveness of these systems would not be secured without assistance of substantial reforms, such as strengthening of the monitoring pressure of outside directors, obliging inside auditors to be qualified and improving the quality of certified public accountants.

4.5 In closing

Local experts pointed out that at the root of the problems seen in Thailand's individual debt collection system (in particular the security interest system) and the collective debt collection system(in particular the recent large reorganization cases such as TPI and SSM) is the fact that Thailand's cultural and religious backgrounds are exerting a powerful influence (for example, the national dislike for litigation based on the Buddhist concept of karma). For example, regarding the security interest system, in addition to the national aversion to litigation, in many cases debtors who have acquired collateral have been business partners over several generations. This causes low enforcement rate of security interest. Along with this, the lack of a developed enforcement system including auction and low liquidity of securities also has an effect. Meanwhile, regarding problems in administration of the Bankruptcy Act in recent business rehabilitation cases, as exemplified in the TPI case, opposition to the new Bankruptcy Act system and the impact of nationalistic tendencies are seen to be strong. However, there were also local experts who pointed out, from a slightly different perspective, that the Thai sense of ethics, which has viewed as virtuous the creditor who shows a lenient heart to a debtor, was influential in the government intervention in the TPI case and its subsequent developments.

It is not our objective in this report to delve deeply into the philosophical question of the relationship between Asian culture and values and global standards. However, there is no question that ensuring the transparency and reliability of the legal and execution systems established by the Diet is an unavoidable choice to make in order for Thailand to continue as an important member of the global economy. This view was shared almost unanimously by those in the legal profession in Thailand who were interviewed. Actually, this shows that, through the future development of laws on debt collection, the issues of Asian values on the one hand and fairness and transparency of legal and procedural systems on the other are certainly not mutually exclusive, and this is likely to be the path that Thailand and many other Asian economies should follow.

Thus, in the absence of an overnight prescription for the resolution of the problem points concerning debt collection procedures now confronting Thailand (or cited by other countries as confronting Thailand), we should take the time to allow resolutions to be brought about through exchange of opinions and discussion, regarding the issues of fairness and transparency of laws and their implementations, with the human resources leading the judicial community in Thailand, such as those in the legal profession.

5. Vietnam

5.1 Introduction

5.1.1 Issues of the overall judicial system and points for improvement

Vietnam adopted the Doi Moi policy in 1986 and since then has been making a fundamental revision and achievement of the socialist idea, introducing a market-oriented economic system as well as foreign capital, and approving of the system of private ownership. As part of the policy, a series of judicial reforms have been going on in recent years, and in step with this, development of statutes relevant to debt collection, as stated above, is under way in high gear.

The powerful surging waves of reforms are having impacts on the field of civil laws in general. For example, work on the fundamental amendment of the Civil Procedure Law that lies at the core of procedures to deal with civil disputes is progressing, while provisions on the exercise of security interest are to be added to the revised law concerning the execution of judgments, which stipulates procedures for executing judgments on benefits and other issues. The Bankruptcy Law concerning the liquidation by bankruptcy or reorganization of corporations facing an economic collapse is also being amended. There are also moves toward revising the Security Interest Law. These reforms may take a considerable period of time before their results come to be known, and basically it is necessary to keep watching the reform efforts and make their evaluation from a long-range point of view.

Independence of the judicature is not guaranteed in Vietnam which is under the socialist political system. However, independence of the judicature and the judges should be a question of national importance, when consideration is given to the significance of court system as a fair and impartial dispute-settlement organ essential for the protection of human rights and the maintenance of the vitalized market economy. Independence of the judicature and judges, when established, will lead to providing business corporations with a certain set of significant normative guidelines, thereby forming a predictable society, and in the end will enhance the dependability of courts as the last resort for settling civil disputes.

In order to realize the judiciary independence, it is necessary, on one hand, to maintain the quality of the judges, who are to be the instruments in its realization, above a certain level, and, on the other, to grant the Supreme People's Court the power to determine the constitutionality of laws, as well as the power to make their final

interpretation.

5.1.2 Current state of court system and its issues

Removal of provincial People's Courts and district People's Courts from the jurisdiction of the Ministry of Justice to that of the Supreme People's Court, following recent legal reforms, is a milestone in the process of achieving the division of the three powers and judiciary independence.

However, in addition to the above-mentioned issues the court system is facing, elimination of difference in procedure between civil and economic cases and creation of a unified process are desired from the users' point of view. It can be evaluated that the current legal reforms are basically progressing in that direction.

People in Vietnam generally trust the court system and judges, but as their social custom, they tend to prefer the settlement of civil disputes by way of face-to face negotiations and ADR between the parties concerned to resorting to courts. Incidentally, the Japanese affiliated companies have not resorted much to courts with a few exceptions. Whether or not the parties concerned file a lawsuit depends on their preference, but it is important that a more reliable court system, which foreign affiliated companies can also trust, should be created.

5.1.3 Consolidation and integration of laws

There are numerous forms of legislation in Vietnam as referred to earlier.

The 1997 Law on Promulgation of Legal Documents govern laws and other forms of rules. The entities entitled to enacting laws and rules include the National Assembly, National Assembly's Standing Committee, President, the government, Prime Minister, various ministers, Supreme People's Court and the Supreme People's Procuracy. At the local level, there also exist laws and rules enacted by the People's Council and the People's Committee. They themselves may be of historical significance with their relevance to the authority of each entity, but the numerous, and rather tangled, laws and rules should be integrated or consolidated in the future.

Reform is already taking place in this direction in certain areas, and creation of accessible and comprehensible legislation that fit the requirement of the contemporary society is desired.

The process of formulating legislation in Vietnam, generally, is not necessarily clear in some aspects. It has, however, certain democratic elements that are worthy of attention, such as asking the general public to put forth comments repeatedly. This certainly is an essential stage in making laws that meet needs of society, but a new process for prompt enactment of laws based on thorough discussion should be also devised and established.

It is also essential for the country to overcome the following difficulties.

Firstly, laws and other rules are enacted in accordance with the yearly legislation program worked out by the National Assembly, but since each bill is discussed article by article, a considerably long period of time has to be consumed on deliberation before its enactment in practice. Bills are often amended during the discussion, sometimes even resulting in inconsistencies and contradictions in text. Furthermore, since only around 10 laws and ordinances are enacted every year, the real needs of society are not met. Such a situation should be redressed.

Secondly, in Vietnam there is a persistent stance of regarding legislation just as something that sets the framework of a system. Therefore, enactment of laws alone cannot drive the system forward. There could be a case where a system does not function according to a new law or rule before specific directions are issued in the form of notification or other lower-level rules. Simultaneous enactment of detailed regulations, therefore, is desirable.

Thirdly, sectionalism among the ministries is going strong, and since there is no coordination agency similar to the Cabinet Legislation Bureau of Japan to oversee the effect of legislation, inconsistencies and contradictions between or among the laws of different levels handled by different government offices often remain unsolved. The above-mentioned Law concerning the Promulgation of Legal Documents has provisions specifying the relationship among the laws. However, even if contradictions or inconsistencies are found between laws of different ranks, higher-ranked laws do not necessarily take precedence over the lower-ranked ones because, in the country, the sense of regarding the legislation as a comprehensive system is not so strong. These difficulties should be overcome at the time of enacting laws, and to this end, it is advisable to create an agency, similar to Japan's Cabinet Legislation Bureau, to oversee and coordinate legal functions from a broader perspective.

Fourthly, the enacted laws are made public in an official gazette (following the gazette in Vietnamese, an English version is published), but not all the laws are publicized. It is often pointed out that lower-ranked laws which are of far more importance to actually operate the system are not made public. A step should be taken

to publicize such laws, too. It is preferable for the important issues to be stipulated in legal system.

Fifthly, it is said that there also were cases in the past where the tax system had undergone sudden changes.

5.1.4 Difficulties of disclosing corporate information

As to the disclosure of corporate management information which is of particular significance for business transactions, the Enterprise Law of 1999 requires companies to register their financial information, so that the interested parties can peruse the information. However, the law has a narrow stipulation on the details of the financial statements to be registered for disclosure. Generally, disclosure of information on corporate management including that on state-owned corporations would be an indispensable prerequisite for strengthening the investment environment. Moreover, specific measures should be considered to enable greater access to such information by foreign affiliated companies with plans to undertake projects in Vietnam as well as companies and entrepreneurs with intentions to introduce new projects.

It is also advisable to strengthen the country's conditions to secure the implementation of the Accounting Law of 2003 that will ensure the introduction of the International Accounting Standards (IAS) of 2003.

5.1.5 Immature credit economy

Generally, mechanism of obtaining a credit and its collection requires as its basis a systematic infrastructure of the credit economy, but, in present-day Vietnam, credit transactions have yet to develop, as stated earlier. In fact, a variety of statutes are rapidly being enforced for the expansion of credit transactions. Immaturity of credit economy, basically, could be taken as a facet of Vietnam's business practice. But, reforms from a long-range perspective and permeation of credit transactions will be necessary for a remarkable progress of the economy. Under the status quo, due to the limitations on credit transactions, a number of foreign affiliated companies have pointed out the difficulty of expanding transactions. With this in mind, expansion of credit transaction is highly recommendable.

As for the legal infrastructure on bills and notes, functions for simple and prompt settlement should be established, and various other measures should also be taken for

bolstering credit transactions.

5.1.6 Challenges for other countries in assisting the strengthening of Vietnam's legal infrastructure

As stated earlier, Japan has been extending various forms of assistance to Vietnam. On one hand, the country is showing a positive stance toward steadily improving legal infrastructure with assistance from other countries. But on the other hand, the country is taking the cautious stance vis-a-vis support from other countries. It will not rely totally on the support from certain countries, for the enactment of particular laws but rather selects, on its own, what it thinks is the best from among the options or adopt them after making necessary revisions. That is, the drafting committee on various statutes, we understand, is not to commission wholly particular support countries to draw up certain bills, but working independently, and secretly, on the drafting. This shows Vietnam's basic posture aimed at independent digestion of what is extended and proposed by other countries and opportunity of decision-making on its own and getting on well with other countries from a long-range point of view.

It is not easy for supporting nations, as examined above, to find a reasonable attitude toward the basic stance of Vietnam. But it is desirable to be ready for supporting optionally created laws and rules that can be regarded as best suited to the concerned country from a long-range point of view, taking the global standards into consideration. At the same time, it may be also desired for supporting nations, among themselves, to keep exchanging information and supplying Vietnam with legal information from varied angles based on their own historical lessons.

5.1.7 Disparity between the law and reality

As stated earlier, we can see, in Vietnamese society, a conspicuous gap between laws and realities. However, efforts to rectify these can be seen in various aspects.

In general, the phenomenon of a gap between the law and the reality are seen in a number of countries that should be corrected gradually through education from a long-range point of view and steady execution of laws. But, if this was found hard to achieve, the statutes should be revised in a way more acceptable to society and easier to abide by.

5.2 Individual debt collection system

5.2.1 Issues of security system and prospect

As for the security system, a rapid legal reform has been going on in recent years, but more effective use of the security system with an expected future expansion of credit transactions is desired. About the exercise of security interest, varied proceedings of exercising security interest are comprehensively specified in one chapter of the draft for the law concerning the exercise of judgments. Preparations for the bill are well under way. But it is desired to establish a procedure by which security interest can be exercised promptly and effectively and debts can be collected smoothly.

5.2.2 Issues and prospect of civil proceedings system

There are varied issues pertaining to judgment procedures of civil proceedings. At present, it is said that a guideline for applying laws is being made clear through guidance and precedents of the Supreme People's Court. Also, there are signs of new moves toward making judgments public as well as activation of comments and interpretations of precedents. As a means of supporting these moves, it may be a useful, for instance, as a method of interpreting or applying laws in a trial, to carry out a joint Japan-Vietnam study for improving the quality of civil trials and gaining the people's confidence.

Furthermore, it is also necessary to overcome some of the difficulties frequently pointed out about Vietnam's civil trial system.

Firstly, this country employs for a civil lawsuit case the "reconciliation-first principle" or the practice of completing reconciliation proceedings, in principle, before oral proceedings. But, there often are cases where court proceedings are delayed because plenty of time has to be consumed repeatedly on reconciliation proceedings. The reconciliation-first principle should be abolished, because there appear to be many cases where an action is instituted seeking a court verdict from the beginning, and a reconciliation is possible at any point during the court proceedings.

Secondly, it is said that there are instances where some cases of civil and economic cases are passed from one court to another due to a difference of views on jurisdiction. It is also said that there are instances where, particularly in the trials of economic cases, some judges do not necessarily have sufficient knowledge about the cases. Legal steps

will be required to deal with these sorts of difficulties.

Thirdly, it is also said that, in civil and economic cases, settlement of the cases is often delayed if the parties concerned accept the reconciliation or the verdict, because proceedings have to be resumed if prosecutors or supervisors lodge a complaint. It is necessary to rectify the present condition so as to secure the independence of judiciary power and to make a court judgment final.

Fourthly, Vietnam employs the two-tier appellate system for civil proceedings, but the rate of appealing against the first instance is very high. It is often pointed out that the high rate of appealing is the cause of prolonged proceedings. This may be the matter of finding a compromise between securing the quality of trial and the right to lay before the court, but it is necessary to regulate, in some form or other, the appealing to a higher court.

Fifthly, there is a issue of judgments to be kept unpublished. All of the judgments handed down by the Supreme People's Court should be published, and, furthermore, sentences of lower courts should also be made public depending on their importance. The Supreme People's Court says it is ready to make public its judgments any time, provided that certain conditions are satisfied (meaning that if budgetary measures are taken). Meanwhile, in the country today, many interested parties are making comments, interpretations and studies of judicial precedents. The measures should be taken to deal with such issues.

Sixthly, it is often pointed out that companies from other countries are reluctant to institute a lawsuit in Vietnam as they often lose court battles against local firms because, the courts in general handle the matter in the interest of local corporations. (Foreign affiliated companies generally think there is no possibility to win a lawsuit they file.) The court treatment of any case under the law should be fair and impartial.

5.2.3 Issues and prospect of execution system

The reform centered on the law concerning the execution of judgments is currently under way, and the drafting team of the Department of Justice is working on the fourth draft. This law is of particular interest in that it is designed to execute not only the judgments in civil cases, but also those in criminal cases.

The present execution has difficulties as specified below, all of which need to be overcome in future.

Firstly, the execution is positioned as part of administrative work under the

jurisdiction of the Department of Justice. Since the execution is not carried out under the supervision of a court, a prompt and efficient execution by the fair and impartial judiciary authorities cannot necessarily be assured. Also, a dispute that could break out in the process of execution may not be legally resolved. Furthermore, there is also the issue, as a premise of applying for an execution, that the creditors have no legal means of finding out the debtors' property.

The revised law will have no provisions to transfer the jurisdiction of execution to the court, but it is expected that a court will serve as an organization to deal with complaints about executors' acts and others. In the future, execution should be recognized as part of the judiciary right.

Secondly, there are also issues of executors who, as they serve as the sole executive agent as well as administrator, who are not executing their assignments efficiently. Also, the issues of a delay in execution work as well as corruption, among others, are pointed out. These difficulties should be overcome by giving a fair position to execution as a court office.

5.2.4 Issues of arbitration system and prospect

An outstanding reform is progressing in the sphere of arbitration law.

By the Commercial Arbitration Law which was enforced on July 1, 2003, a way has been opened up for transferring titles of debt, through granting a judgment of execution at the court, in connection with internal award. The Supreme People's Court, on its part, basically has the policy of promoting the internal arbitration, and the Economic Arbitration Centers also, as stated earlier, have been steadily achieving notable results.

As to the international arbitration, as stated earlier, promulgation of the above arbitration law has brought about improvement in various aspects. A list of arbitrator candidates in varied walks of life is being prepared. So, great expectations are being placed on future development of the matter.

On the other hand, a voice of concern is being heard from among Japanese investment firms about possible removal of the work on the settlement of business disputes within Vietnam from the jurisdiction of the foreign arbitration centers.

5.3 Collective debt collection system

5.3.1 Revision of the Bankruptcy Law and its issues

The draft of the revised bankruptcy bill to be voted into law in 2004 has distinctive features as follows. First of all, even a state-owned corporation has a possibility to go under. Also, the rehabilitation proceedings can be placed before the bankruptcy liquidation proceedings, depending on the court's judgment. Furthermore, in the rehabilitation proceedings, the system of automatic suspension will be introduced, while regulations are to be imposed on the use of rights by secured creditors. Also, basically, the law aims to formulate a rehabilitation program in the interest of debtors. As individual issues, for instance, it is pointed out that the parts concerning right or wrong of the disappearance of security interest, the resolution at interested persons' meeting, the matter of approving rehabilitation plans have not been studied sufficiently. So, the future development of the work remains to be noted.

The draft stipulates details of judges' involvement in the process of bankruptcy proceedings. However, voices of apprehension are being raised about the judges' involvement in the proceedings from the point of view of their capacity. The training of receivers should also be studied.

5.4 Others

In order to promote Japanese companies' investment in Vietnam, the ratification of the Japan-Vietnam investment agreement appears to be just around the corner. The joint Japan-Vietnam initiative plan now under consideration between the two countries is at the stage of final arrangement, and is said to include some points relevant to the legal system. It is hoped that in future, discussions on specific issues should be undertaken at every opportunity.

Vietnam currently faces a number of tasks regarding international economic frameworks such as preparations for accession to the WTO, measures such as cutting customs rate based on the ASEAN Free Trade Agreement, and implementation of the bilateral trade agreement between the United States which has already taken effect. Taking these favorable opportunities, Vietnam is expected to further proceed with improving its legal system.

It is also pointed out that the inspection commission set up within the Office of Prime

Minister, for instance, carries out inspections to expose tax evasion and smuggling. And local consumer centers are said to make a compulsory mediation of disputes between foreign affiliated companies and local people by resort to a de-facto threat to leak the matter to mass media. Grounds for resorting to this kind of emergency measure probably should be specified in laws, ordinances or other forms of rules.

As to the advance into Vietnam by Japanese affiliated companies, the government has often had them change the location of establishing factories and other facilities. Because of such governmental moves, some Japanese affiliated companies had to give up doing business in Vietnam. To deal with this kind of issue, it is hoped that a forum be set up to provide opportunities to have sufficient dialogues and find the most desirable choice for the both sides.

Chapter 4 Discussion on Future Challenges

– The importance of promoting individual efforts suited to each economy –

This report, the purpose of which is to contribute to increased information sharing by those in governments and industries and improved transparency of information within the APEC region, has examined the legal system (including bankruptcy systems, business regeneration systems, and security systems) and actualities of operation and execution, as well as the environment necessary to facilitate its functioning (including the overall legal system and judiciary system, disclosure of information on the audit-accounting system and management to prevent the fixation of credits, and the credit market in connection with the liquidity of credits).

In the report, we have discussed the central examination theme, “the debt collection system” by categorizing it into the “individual debt collection system” involving independent creditors and “the collective debt collection system” involving multiple creditors. The reasons are: 1) in the APEC economies, while improvements of relevant legal systems are progressing, further improvement of the “individual” debt collection system such as security interest laws and compulsory execution is basically required because the actual enforcement of relevant laws (securing of execution, for instance) is presently a focal issue, and 2) although multiple economies are giving more attention to the collective debt collection system, it is feared that introduction of the “collective” system while development of the individual debt collection system remains immature would be an additional burden on those parties concerned in each economy, and, therefore, it is advisable to discuss the two separately.

In putting together this report, we have referred, as much as possible, to individual efforts within each economy and the support activities of international organizations and other economies.

In this chapter, we will discuss the following viewpoints and examine future measures to help improve the reliability and stability of economic laws necessary for companies within the bounds of APEC to perform more actively.

Figure 4-1 Viewpoints in clarifying points at issue in this chapter

Levels of issues: Where do difficulties lie in “the implementation of the law,” “correct application of the law,” and “security of execution”?

Areas of challenges: Where do difficulties lie in “the judiciary system and relevant systems in general,” “individual debt collection system,” and “collective debt collection system” which are the areas subject to examination in this report?

Measures for difficulties: Which of the following measure are taken to deal with difficulties? – “Human resources training and education,” “improvement of accessibility to information and provision of information” and “enhancement of organization structure.”

Duration of measures: Whether the measures and their effects will be “short term” or “mid term.”

1. Legal system relevant to debt collection, its operation and execution, and difficulties

In recent years, each economy has been working aggressively on the improvement of laws relevant to the above issues. They are acting on legal reforms either individually or by utilizing support from other economies and international organizations, but in either case, the legal reforms are being made so as to adapt to their legal base and social and economic conditions.

Revision of existing laws and introduction of new laws have proceeded actively since the latter part of the 1990s particularly in the sectors mentioned in Figure 4-2 below: Laws related to issues taken up in this report (example). Three out of the four economies where area surveys were conducted are currently working on the revision of their existing bankruptcy laws. Moreover, during the recent several years, each economy has been developing statutes relevant to "individual debt collection" such as business security interest law or fiduciary transfer law, or is in the process of deliberating relevant existing laws.

Figure 4-2 Legal system related to issues in this report (example)

<p>Legal systems and other environment concerning judiciary and other related systems in general</p>
<p>Current legal system concerning overall judiciary system</p>
<p>Current legal system concerning civil judiciary cases: civil code/ civil law, commercial law</p>
<p>Legal systems and other environment concerning company registration and disclosure of financial information: company/ corporation law, (public) accounts law</p>
<p>Legal systems and other environment concerning credit transaction: bills of exchange law, checks law</p>
<p>Legal systems and other environment concerning the individual debt collection system</p>
<p>Security interest law, civil procedure law, judgment execution law, law of administering justice, court organization law, ADR Law, attorneys-at-law law</p>
<p>Legal systems and other environment concerning collective debt collection system</p>
<p>Bankruptcy law, business regeneration law and corporate reorganization law, ADR Law</p>

While introduction and revision of laws are progressing, many economies are facing various difficulties in actual use of new laws.

For example, the following cases are often pointed out as difficulties that need to be resolved for effective use of legal system: bankruptcy procedures based on the Bankruptcy Law take too much time and the number of bankruptcy cases actually disposed of is very limited; the law on bills and the checks law have been developed but they are rarely used for actual cases; the security interest law has been enacted, but the registration system of security interest has not been installed, or the system of accepting registration has much room for improvement. The following points are cited as possible causes of the above cases: Minor laws such as execution orders which are necessary for the superior laws to be enforced have not been developed yet; an organizational structure to operate the laws needs to be developed; interested persons including those in the business community have not been sufficiently informed of relevant laws.

There is also the issue of conducting the execution according to a judicial decision based on a new law. For example, even when a declaration of bankruptcy is issued, or security interest is sanctioned by the court, the procedure for compulsory execution may not be taken. Smooth debt collection is possible only when these issues of execution

are solved, and therefore, improvement of the situation centered on execution is highly important.

In order to cope with a series of difficulties as stated above, it is important to establish systems and management structures that complement each economy's society, economy, and culture. For this purpose, policy-making officials of each economy should continue and step up their voluntary efforts to establish such systems.

There are sometimes cases where the legal system has been developed, laws are being enforced, and the framework for securing the execution has been developed, but, still the legal framework is not fully utilized because the business community has not been sufficiently informed of the new legal system. It is necessary for the government of each economy to put more emphasis on the supply of information, while foreign affiliated companies and other members of the business community, for their part, should make more efforts to obtain information, by utilizing existing networks and other means. This report is designed to help share information in this area.

2. Measures to facilitate debt collection

In each economy, administrative and judiciary offices have been voluntarily taking various concrete measures to develop and improve systems that will facilitate debt collection processes. Such steps include human resources training, disclosure of information, better accessibility to information, and reinforced organizational structures. In many cases, the measures were taken in collaboration with other economies and international organizations.

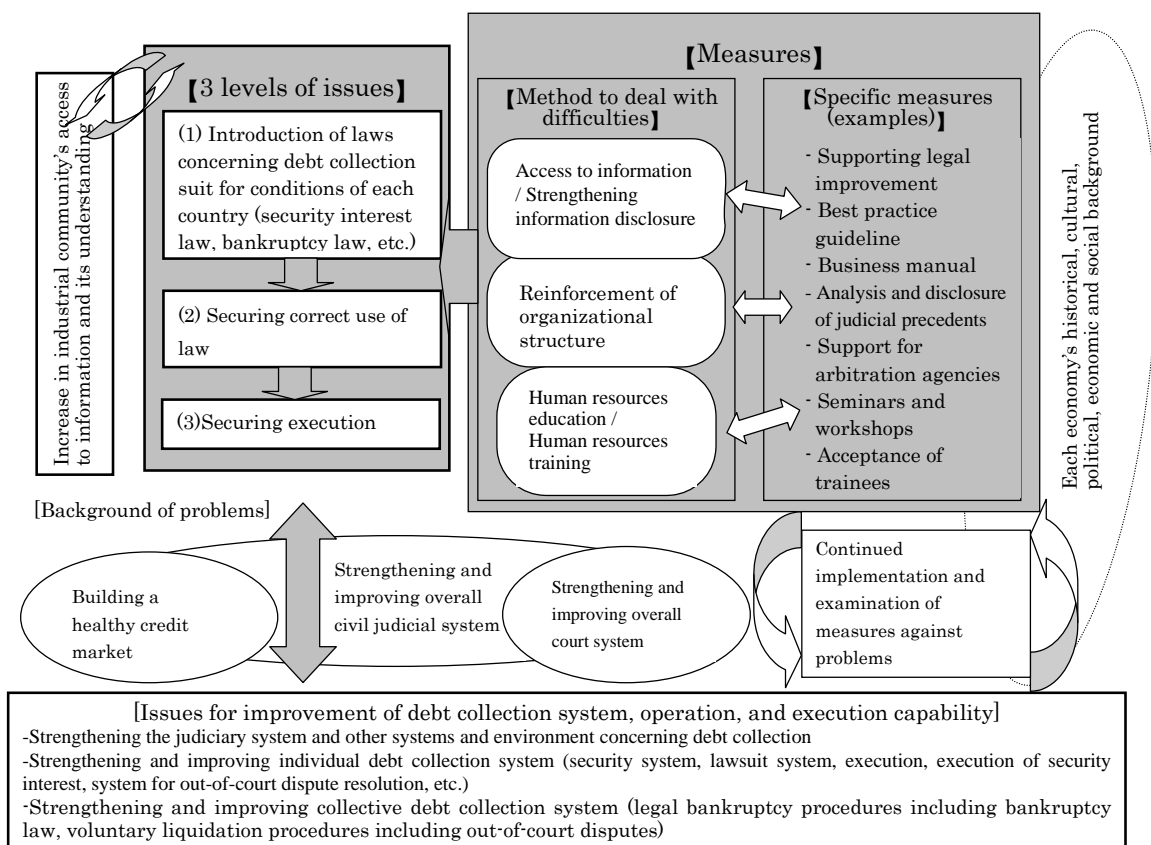
For example, when Asian economies were hit hard by an economic crisis, each economy overcame difficulties by taking steps based on IMF conditionality as well as cooperation from the World Bank and the Asian Development Bank. Thus, international organizations have played certain roles in the area of debt collection. Advanced economies have also been playing significant roles in the area of development of legal systems and effective use of laws, specifically the improvement of organizational structures, human resources training and increased availability of information.

The above measures differ in terms of the period of time required for making preparations and length of time before actual results are obtained. For instance, seminars and workshops on information sharing and human resources training are a short-term activity that can be undertaken immediately, but require a certain period of

time before specific effects appear. In the case of setting up a limited-time mediation agency, a certain period of time is required for its preparation, but once it is inaugurated, the outcome is available in a shorter time (in the sense of settling a matter). Further, in human resources training at the university level, it will take a long period before the future legal professionals become active in their economies.

As stated above, the measures required for activity or results in the areas at issue involve a wide range of elements such as human resources, information, and organization, among others. Therefore, it is necessary to keep trying to work out measures not inconsistent with legal systems and social environments in general in the economies concerned, and to this end, too, it is extremely important for each economy to take leadership, and promote individual undertakings with a view to their future.

Figure 4-3 Difficulties and measures for improving debt collection system, operation, and execution capability (illustrated concept)



Reference

[Issues at the basis of this report]

(1) Improvement of environment and systems concerning the judiciary system and debt collection.

(2) Improvement and strengthening of the individual debt collection system (collateral system, lawsuit system, compulsory execution, enforcement of security interest, ADR)

(3) Improvement and strengthening of the collective debt collection system (legal bankruptcy procedures including bankruptcy law; voluntary liquidation procedures including out-of-court dispute resolutions)

[Levels of Issues]

(1) Introduction of laws (2) correct use of laws (3) securing execution

(In addition, point of view of the business community)

[Measures against difficulties]

Strengthening of accessibility to information and information disclosure

Reinforcement of organization systems

Human resources training

3. Direction of measures for the future

3.1 Basic stance in planning measures

This session will discuss the direction of future measures based on the questionnaire surveys conducted in each economy and the field investigations conducted in four economies to draw up this report.

As mentioned earlier, a basic condition for implementing effective measures in accelerating economic legislation is the voluntary efforts by each economy that respond to the needs of its economy. In the event that assistance schemes are implemented by international agencies and other economies, it is of utmost importance that the receiver economies claim “ownership” of the measures by accurately positioning and utilizing them in their respective policies and development plans.

There are measures from which short-term results can be expected, and there are those whose benefits will only become apparent in the mid-to-long term. It is crucial for both types of measures to be examined with equal attention and to foster those that contribute to the establishment of systems and management structures that complement the relevant economy’s society, economy, and culture.

Although the debt collection system is the main theme of this report, a wider perspective is required to develop relevant measures, including an examination of a wide variety of topics from the civil law system in general and the development of measures to improve areas that prevent situations necessitating debt collection, such as disclosure of corporate information.

3.2 Recommendation of measures

Based on the conditions described above, this chapter will provide specific proposals for each area of the challenges, level of issues, and measure category as below.

(1) Measures to improve the legal system in general 1: Education and human resources training

Each economy is making its own efforts in the pre- and post-appointment education and development of legal professionals, and enhancements to the training systems are also actively being planned. Japan and other developed economies within and outside APEC have been providing assistance in such efforts.

Education and human resources training are means to improve the legal system in general and not just the areas pertaining to debt collection. They also comprise issues in which commitment and resourcefulness must be sustained despite the long period of time that is required to achieve tangible results.

Education and human resources training can be divided by training venue into 1) acceptance of trainees by donor economies, 2) seminars, lectures, and training sessions conducted in target economies, and 3) regional seminars, lectures, and training sessions in third-party economies.

Regarding 1), the acceptance of trainees by donor economies, Japan and other donor economies are expected to review their existing measures in human resources training, to exchange information, and to make enhancements as necessary. For example, Japan accepts future legal professionals into the faculties of law at universities and graduate schools, which is one important method of utilizing existing schemes. Moreover, Japan, as well as several other donor economies, accepts the training of practicing legal professionals, such as judges. The programs provide opportunities to incorporate education on debt collection law and practice in conjunction with other themes.

Regarding 2), the measures conducted within target economies, it is necessary to review and enhance the assistance in endowment lectures and scholarship funds granted

to universities and graduate schools for their faculties of law for long-term results. It will also benefit the local judges, lawyers, and prosecutors if programs on improving debt collection are offered simultaneously. For example, the programs could be based on themes linked directly to debt collection, such as business regeneration or enforcement of security interest. Moreover, delegation of lecturers by Japan on a regular basis to teach those programs could be considered.

In addition, it is desirable to implement measures regarding 3), since programs conducted in third-party economies are outstanding opportunities for economies to exchange information and opinions on the difficulties in debt collection.

(2) Measures to improve the legal system in general 2: Enhancement of organizational structure (and human resources training)

In many economies, it is apparent that alternative dispute resolution (ADR) is an effective means of solving disputes. It is therefore worthwhile to investigate the relevancy, effectiveness, and feasibility of setting up a legal advisory or an ADR forum within APEC. However, it must be done with deliberation on existing ADR procedures and the roles of the new facilities.

Other economies are already assisting the existing ADR procedures and future establishment of private arbitration centers. Along with the exchanges of information between the economies on ADR conditions, an examination should be made of the demand for assistance from Japan and other economies in human resources training and improving accessibility to information.

(3) Measures to improve the legal system in general 3: Promotion of information access and information disclosure

Some of the economies have inadequate disclosure of their legal systems and legal precedents, and in some cases, it is difficult for interested businesses to get access to information even though it may have been disclosed. The implementation of an IT-based system to disclose information on the legal system and legal precedents should therefore be considered. In order to design a system that is beneficial to a wide array of users, the categories of laws and precedents made accessible, method of access, network infrastructure, and other pertinent issues must be carefully studied.

(4) Cross-sectional measures for multiple categories and levels of debt collection 1:
Promotion of information access and information disclosure

In addition to the system described in (3) above, it may also be relevant to implement an IT information disclosure system that limits the information it contains to the laws and precedents regarding debt collection. The system will facilitate the disclosure, analysis, and assessment of the legal precedents of bankruptcy courts, which may in turn raise the effectiveness of their trials.

(5) Cross-sectional measures for multiple categories and levels of debt collection 2:
Best practices

This report has focused on the conditions and challenges of the economies, however, economies are also taking many highly commendable measures. Consequently, based on APEC's spirit of voluntary liberalization and opening of regional trade, issuing a collection of "best practices" indicating the economies' successes and exemplary efforts in debt collection may prove useful. It is also possible to share such information by compiling a report for each economy, whose contents can be consolidated into a general report after a certain period of time, which the economies may use as a reference for their decisions on proactive reforms.

(6) Cross-sectional measures for multiple categories and levels of debt collection 3:
Education and human resources training (plus information access)

Seminars and workshops that target government and legal personnel should be conducted on the difficulties in debt collection raised in each economy from the foreign affiliated companies' point of view. They will provide valuable opportunities to people such as the official receivers in charge of corporate reforms and judges presiding over commercial trials under the bankruptcy law to discuss and to share experiences and information on debt collection with members of the legal, administrative, and corporate communities.

(7) Enhancement of individual laws and business proceedings

In developing the debt collection system, it is imperative to improve and publicize individual debt collection proceedings and other aspects of the security laws. Consequently, it is recommended to keep providing assistance in accelerating legislation to economies that still require it, to advocate the compilation of business manuals that have already been initiated in some economies, and to publicize their results through seminars and workshops.

(8) Supplying information to companies

The users of the debt collection system are companies. It is thus expected that corporate personnel are informed of the current situation through seminars and workshops and that information is facilitated by various methods including publications of analyses, business manuals, and reports on the legal system. The availability of information that helps companies understand the system will become the foundation on which they deliberate future measures to be taken.

3.3 Additional points to be examined (when assistance schemes are implemented)

The measures described in 3.2 must be “sustainable” whether they are taken individually by the economies or with assistance by donors. More specifically, when donors provide assistance, the ownership of the receiving economies is of paramount importance. The receiving economies must not simply accept “ready-made” assistance but must have the initiative to capitalize on it by setting goals for their future systems and policies. Moreover, the donors must give maximum consideration to the receiving economies’ social and cultural backgrounds, to which their assistance must be tailored in order to advocate autonomy and the sharing of experiences.

Furthermore, assistance measures should not only benefit a target economy but should also positively affect the surrounding regions, and in other cases, a ripple effect should reach legal systems lying beyond debt collection.

For example, the Thai ADR Center actively conducts seminars and workshops on alternative dispute resolution for its neighboring economies of Vietnam, Laos, and Cambodia, but it nonetheless faces financial difficulties. Thus ADR assistance for the least developed economies in cooperation with Thailand will greatly benefit the donor side, not to mention the receivers. In addition, it is critical to recognize measures with mid-to-long term ripple effects, such as the successes of a bankruptcy court being used as a reference by other special courts.

Another significant point in implementing assistance programs is that periodic evaluations must be made on the degree to which the programs have penetrated and benefited the economies.

3.4 Conclusion

This chapter discussed short-term and mid- to long-term measures in the future that address human resources training, information access, and enhancement of structures in one area or multiple areas of debt collection.

Discussions and arrangements must be made on which measures or which combination of measures will be implemented by which economies, but in the meantime, conditions of debt collection should not disintegrate, additional difficulties should not arise, and productive sharing of opinions and information should be conducted continuously toward the improvement of conditions. Regular follow up should also be made to confirm the sustainability of conditions.

The users of the economic law system are the members of the business community, and continuous efforts by and cooperation between industry and government are indispensable to legal maintenance and progress. This report will serve its purpose if it contributes to the future deliberations by companies within APEC on further facilitating and vitalizing their business activities.

Annex I

Current Status on Debt Collection

1. Current status of China

Chapter 1: The current state of debt-collection-related efforts in the APEC economies -- An outline of the system and its enforcement and implementation -- Summary of the objective facts concerning system and its enforcement and implementation			
Areas for review	Current laws		Donor assistance
(0) "Preface" The legal system Other environments related to debt collection	<p>[Information on corporate business management and asset]</p> <ul style="list-style-type: none"> - Anyone may access and copy information on corporate registration (under the Corporate Registration Management Rule) and Chinese lawyers may be able to obtain information on companies' business conditions (although there is no law to authorize such action). - Information on Chinese companies' conditions for setting up a security interest may be available through investigation conducted by the State Administration for Real Estate. In practice, however, the availability of the information seems to differ by regions. 		
Areas for review (Related laws)	Current laws Discussion on revision of existing laws and introduction of new laws	How system currently operates	Donor assistance
(1) Individual debt collection system (compulsory execution and security systems)	<p>[Civil proceeding]</p> <ul style="list-style-type: none"> - The Civil Proceeding Law of the People's Republic of China, which took effect in 1991, revising the Civil Proceeding Law enforced on probation in 1982. - Reform of judicial system in accordance with 1999 five-year plan for reform of the courts: Changes to laws governing appointment of judges, checks and balances in courts, centralized execution of rulings, transparency and democratization of litigations, use of information technology <p>[Security system]</p> <ul style="list-style-type: none"> - The security interest laws of the People's Republic of China and "the Legal Interpretation on a Few Problems relating to the Application of the security interest laws of the People's Republic of China" <p>[Property preservation system]</p> <ul style="list-style-type: none"> - The system for preservation of property is stipulated in Civil Proceeding Law. <p>[ADR (mediation/ arbitration) system]</p> <ul style="list-style-type: none"> - The Arbitration Law of the People's Republic of China <p>[CIETAC]</p> <ul style="list-style-type: none"> - In May 2003, the CIETAC newly established and introduced a set of rules on the financial disputes arbitration, called "Financial Disputes Arbitration Rules". 	<p>[Civil proceeding]</p> <ul style="list-style-type: none"> - The current law was enacted before China's transformation to a socialist market economy in 1992. <p>[Security system]</p> <ul style="list-style-type: none"> - The Security Interest Law, enforced in 1995, is composed of 7 chapters and 96 articles covering general rules, guarantee, mortgage, pledge, lien, deposit and others. - All five categories of collateral for foreign entities exist on the same level without structural distinction. - The exercise of security right usually accompanies a lawsuit. - In case of collateral for foreign entities that Chinese domestic organizations offer to foreign organizations, Domestic Organizations' Foreign Security Management Rules and their Specified Regulations are applied in addition to the Security Interest Law and its interpretation. <p>[Property preservation system]</p> <ul style="list-style-type: none"> - Preservation takes effect as soon as the decision is made and maintains its effect until the execution is completed. <p>[CIETAC]</p> <ul style="list-style-type: none"> - CIETAC carries out arbitration proceedings in accordance with the Arbitration Law, while it has its own Arbitration Rules. 	
(2) Collective debt collection system (bankruptcy system and company reconstruction system)	<p>[System Concerning Bankruptcy]</p> <ul style="list-style-type: none"> - 1986 Enterprise Bankruptcy Law (trial): State-owned enterprises only. - Section 19 of 1991 Civil Procedure Law (bankruptcy procedures for corporate entities other than enterprises "owned by all the people"), Section 8 of 1994 Company Law (bankruptcy procedures for limited liability companies and limited stock companies): Companies other than state-owned enterprises. - 1996 unified bankruptcy code (new draft bill): Even applies to companies other than state-owned enterprises (incl. overseas companies). 	<p>[System Concerning Bankruptcy]</p> <ul style="list-style-type: none"> - Administrative bodies' have strong authority over handling of bankruptcies - Protection of interests of bankrupt enterprises' employees is given great emphasis (awarded the preferential right, etc.) - Rehabilitation types and liquidation types are not two separate procedures, and also in case of the former, composition and rehabilitation is set out as one and the same procedure 	

2. Current status of Indonesia

Chapter 1: The current state of debt-collection-related efforts in the APEC economies -- An outline of the system and its enforcement and implementation -- Summary of the objective facts concerning system and its enforcement and implementation			
Areas for review	Current status		Donor assistance
<p>(0) "Preface" The legal system Other environments related to debt collection</p>	<p>[Legal system as a whole]</p> <ul style="list-style-type: none"> - Introduced relevant legislation such as bankruptcy and fiduciary laws in second half of 1990s with World Bank assistance to set up legal systems <p>[International bodies]</p> <ul style="list-style-type: none"> - End of IMF conditionality period imminent <p>[Economic climate/secondary market etc.]</p> <ul style="list-style-type: none"> - High interest rates - Influx of short-term, speculative investment - Secondary market has grown rapidly in recent years. IBRA is driving market prices (20-30%) 		<ul style="list-style-type: none"> - Training for judges and judicial officers (Netherlands/IMF: Supreme Court justices; Japan and AusAID: Training for judicial staff; EU: Plans for training)
Areas for review (Related laws)	Current laws Discussion on revision of existing laws and introduction of new laws	How system currently operates	Donor assistance
<p>(1) Individual debt collection system (compulsory execution and security systems)</p>	<p>[Fiduciary law]</p> <ul style="list-style-type: none"> - Current 1999 law on fiduciary 	<p>[Fiduciary/Implementation]</p> <ul style="list-style-type: none"> - If registered with the Fiduciary registration Office of Ministry of Justice and Human Rights in accordance with this law, a certificate is issued that should enable implementation if taken to a district court <p>[Compulsory execution]</p> <ul style="list-style-type: none"> - Execution is under jurisdiction of district courts and police 	
	<p>[Arbitration]</p> <ul style="list-style-type: none"> - Current law is Arbitration and Dispute Settlement Alternative Law (Law No. 30/1999) - Moves underway to boost arbitration function in Supreme Court 	<p>[Arbitration]</p> <ul style="list-style-type: none"> - In terms of arbitration bodies, the Indonesian National Board of Arbitration (BANI) is the only ADR body outside of the courts registered by the Ministry of Justice. Used for around 30 cases annually 	
<p>(2) Collective debt collection system (bankruptcy system and company reconstruction system)</p>	<p>[Bankruptcy law]</p> <ul style="list-style-type: none"> - Current 1998 Bankruptcy Law now undergoing revision. Main focus is on expanding procedural aspects of law, modification of wording and clarification of definitions (e.g. definition of "suspension of payment") - Steering Committee on Commercial Court reviewing law as step toward strengthening function of bankruptcy litigations <p>[Corporate reconstruction laws]</p> <ul style="list-style-type: none"> - No procedural law exists for corporate reconstruction, however there are moves to introduce such a law. - Moratorium of debt payment in 1998 Bankruptcy Law only provides for deferment and is not a procedure for corporate reconstruction (The moratorium for debt payment is recognized to allow negotiations to proceed) 	<p>[Bankruptcy litigations]</p> <ul style="list-style-type: none"> - Almost all bankruptcy cases are presented for appeal in the Commercial Court of the Supreme Court - Number of bankruptcy cases presented to the Commercial Courts of District Courts declining - Bankruptcy litigations in court have no business revival aspect other than providing a moratorium of debt payment 	<ul style="list-style-type: none"> - Input in revision of Bankruptcy Law (IMF, USAID, AusAID) - World Bank is reviewing past litigations at district court level with the aim of enhancing transparency - Training for justices and judicial officers (Netherlands/IMF: Supreme Court justices; Japan and AusAID: Training for judicial staff; EU: Plans for training)
	<ul style="list-style-type: none"> - December 1999 law establishing Financial Sector Policy Committee (FSPC) obliges Indonesia Bank Restructuring Agency (IBRA) and Jakarta Initiative Task Force (JITF) to report to this committee <p>[JITF]</p> <ul style="list-style-type: none"> - JITF is an institution prescribed to expire in certain time period. Moves are underway to set up private sector National Mediation Centers (NMCs) to take over the functions of the JITF, which is due to be dismantled at the end of 2003 <p>[IBRA]</p> <ul style="list-style-type: none"> - The IBRA is established in accordance with Article 278 of the 1998 Banking Law, being prescribed to expire in February 2004, assigned quasi-judicial institution status in a 1999 government decision - A bill is currently under discussion that would expand the National Committee on Collection of State-owned Debt under the jurisdiction of the Ministry of Finance and see it take over the functions of the IBRA 	<ul style="list-style-type: none"> - Since its formation the JITF has processed 96 out of a total of 120 cases involving bankruptcy proceedings or restructuring plans, however it has no function in terms of ensuring execution - The IBRA has achieved a certain degree of success in: 1) Ensuring liquidity by taking on liabilities in the dissolution of banks (asset liquidation), 2) Assisting original owners and creditors and 3) Taking unfaithful debtors to court. However it has no power to enforce execution. 	<p>World Bank played guiding role in setting up the JITF, with subsequent technical assistance from the World Bank and USAID.</p>

3. Current status of Thailand

Chapter 1: The current state of debt-collection-related efforts in the APEC economies -- An outline of the system and its enforcement and implementation -- Summary of the objective facts concerning system and its enforcement and implementation			
Areas for review	Current laws Discussion on revision of existing laws and introduction of new laws		Donor assistance
(0) "Preface" The legal system Other environments related to debt collection	<ul style="list-style-type: none"> - The 1997 Constitution of Thailand separated the judicial department from administrative authority. - Lawyer system established with 1985 Lawyers Act. - Courts system functioning effectively overall - Loan repayments to the IMF will be finished by end of 2003 - Rapid recovery of the Thai economy has promoted bankruptcies and business reconstruction procedures in general - Secondary loan market remains very small 		
Areas for review (related laws)	Current laws Discussion on revision of existing laws and introduction of new laws	How system currently operates	Donor assistance
(1) Individual debt collection system (compulsory execution and security systems)	<ul style="list-style-type: none"> - The Civil and Commercial Code <p>[Business Security Mortgage Act]</p> <ul style="list-style-type: none"> - Draft Business Mortgage bill (2000) <p>(Although the draft was submitted to the national assembly in 2000, as of July 2003 it remains under discussion)</p>	<ul style="list-style-type: none"> - Basically except for real estate security interest, the secured party has no priority for other movable assets if these are in the possession of the debtor - Under the draft business security mortgage act, it will be possible to designate the entire business assets of a company as a business security mortgage 	<ul style="list-style-type: none"> - Southwest Asia Regional Cooperation in Human Development (CIDA)
(2) Collective debt collection system (bankruptcy system and company reconstruction system)	<p>[Bankruptcy laws]</p> <ul style="list-style-type: none"> - Greater opportunities for use of court system following further revision of Bankruptcy Act in 1999 - Amendments of Bankruptcy Act now under discussion <p>(Currently two draft bills exist: one presented by Senator Meechai and one from the Ministry of Justice</p> <ul style="list-style-type: none"> - Revisions to procedural laws for the Supreme Court currently under discussion <p>(Supreme Court itself to determine acceptance/non-acceptance without permission from Chief Judge of Bankruptcy Court)</p>	<ul style="list-style-type: none"> - Court system functioning effectively overall - However, there is room for improvement in terms of authorities of administrators (Official Receiver: Authority to determine voting rights at meetings of creditors) and of Chief Judge of the Bankruptcy Court (right to approve appeals to the Supreme Court) - Amendments to the Bankruptcy Act of 1998 and 1999 are based not so much on IMF guidance as on bankruptcy legislation drawn up by the Ministry of Justice since the 1980s. 	<ul style="list-style-type: none"> - Unconfirmed information that the IMF and World Bank are assisting the Ministry of Justice in its draft bill for amendments to the Bankruptcy Act now under discussion
	<p>[ADR law]</p> <ul style="list-style-type: none"> - Draft revisions currently under discussion on Arbitration Act (Main amendment: elimination of previously permitted substantive investigations by courts of arbitration decisions) <p>[CDRAC]</p> <ul style="list-style-type: none"> - Corporate Debt Restructuring Advisory Committee (CDRAC: Established in 1998 under auspices of Central Bank) <p>[TAMC]</p> <ul style="list-style-type: none"> - Thai Asset Management Corporation (TAMC: Set up in 2001 by Emergency Decree on Thai Asset Management Corporation B.E. 2544) 	<ul style="list-style-type: none"> - Mediation of non-performing loan cases by ADR Office under the Office of Judiciary functioning effectively - Operation of CDRAC based on agreement between creditors is functioning effectively - TAMC functioning effectively as scheme for processing non-performing loans of public financial institutions 	

4. Current status of Vietnam

Chapter 1: The current state of debt-collection-related efforts in the APEC economies -- An outline of the system and its enforcement and implementation -- Summary of the objective facts concerning system and its enforcement and implementation			
Areas for review	Current status		Donor assistance
<p>(0) "Preface" The legal system Other environments related to debt collection</p>	<p>[Law and Economic Backgrounds]</p> <ul style="list-style-type: none"> - Rapid shift to market economy and policy of opening up to the outside since adoption of Doi Moi - Restriction/ privatization of state own corporation, introduction of competition (e.g. Revised State Owned Enterprise Law to forward to Assembly in October 2003) - Transaction based on credit among economic enterprises is yet to ingrain <p>[Judicial System]</p> <ul style="list-style-type: none"> - Unified system of ordinary court; Separation of judiciary and administration in 2002 (by Amendment of Law on Organization of People's Court and Law) - Lawsuit system in primary and secondary (final) courts; high appeal ratio; frequent review - Revision of Civil Procedure Law is expected in 2003 to integrate both the procedures for civil cases and economic cases <p>[Corporate and Financial Information Access]</p> <ul style="list-style-type: none"> - Enterprise registration under Enterprise Law in 1999 (Law No. 13/1999.QH10) - Accounting Law (Law No. 03/2003/AH11) passed Assembly in April-May 2003, covering both state owned enterprises and private business - Opening of Vietnam Stock Exchange in July 2000; security transactions for listed shares in four companies and government bonds at current market prices 		<ul style="list-style-type: none"> - Training and institutional enhancement projects for human resource development by Japan and other donors - Legal advisory cooperation (on drafting of individual items of legislation, and advice on setting up legal structures) by Japan on Commercial Code, Civil Procedure Law. - Legal advisory cooperation by US on Civil Procedure Law - Other donors active in legal issues: Sweden, Denmark, France, US, Canada, European Union, the UNDP, World Bank and Asian Development Bank
Areas for review (Related laws)	Current laws Discussion on revision of existing laws and introduction of new laws	How system currently operates	Donor assistance
<p>(1) Individual debt collection system (compulsory execution and security systems)</p>	<p>[Civil Execution]</p> <ul style="list-style-type: none"> - Procedural law is separated between civil cases governing "civil contracts" (Ordinance on the Procedures for Dealing with Civil Cases, issued by the State Council on 29 November 1989) and economic cases governing "economic contracts" (Decree No.31 L/CTN dated 29 March 1994) - Basic law governing civil execution is Decree No. 69-CP of the Government dated 16 October 1993 on the Procedure for Civil Judgments Enforcement (also three Decrees and eight Circulars). - Revised draft of Civil Execution Law will be submitted to the Assembly by around third-quarter of 2004, to cover both civil cases and economic cases - Conciliation procedures exist through court proceedings and "conciliation groups". Adoption of "preliminary conciliation" principle in civil cases, but not mandatory in economic cases - Full authorization of conciliation can be carried out by procedures in the Decree No. 69-CP as a final decision of the court 		
	<p>[Secured Transaction]</p> <ul style="list-style-type: none"> - Civil Code of 1995 as basic law for secured transaction; draft amendment under discussion. - 1999 Decree of the Government on Loan Security of Credit Institutions (178/1999, NP-CP), Government Decree No.85/2002 - Introduction of Joint Circular No. 03/2001/TTLT/ NHNNBTP-BCA-BTC-TCDC of April 23, 2001, Guiding the handling of Loan Security Property to Recover Debts for Credit Institutions - 1998 amendments to Land Law, Decree No. 17 1999 (land use rights) - Registration system for security interests on movables envisaged in Decree No.165/1999 and Decree No.8/2000, but not yet popular. New legislation to elaborate this system is expected after 2004. - As a result of 2000 revision of the Law on Foreign Investment in Vietnam, it became possible for foreign companies to obtain secured credit from banks such as land lease rights - Registration of secured assets governed by Decree No. 8 dated March 10 2000, which introduced registration system - Draft amendments to civil laws (registration system is a problem due to security transactions) currently under discussion 	<ul style="list-style-type: none"> - Pledges can be executed through private sale i.e. not through courts - Land and movable assets can be registered as security. - Approx. 8,000 cases of execution in 2003 reported to Assembly via Ministry of Justice 	<ul style="list-style-type: none"> - The Asian Development Bank and Canadian experts said to have cooperated in 2000 legislation governing pledged assets - Legal advisory cooperation by Japan on Immovable asset and registration law, Secured transaction and registration law, Decision execution law, and National compensation law.
	<p>[ADR]</p> <ul style="list-style-type: none"> - Commercial arbitration centers established under Decree No. 116/CP dated 5 September 1994 and Circular No. 02-PLDSKT dated 3 January 1995 - Vietnam International Arbitration Center (VIAC) set up under Decision No. 204-TTg dated 28 April 1993 of the Prime Minister, and enhanced by Decision No.114-TTg dated 16 February 1996 of Prime Minister - Ordinance No. 08/2003/PL-UBTVAH11 on the Commercial Arbitration, based upon the UNCTRAL model, entered into force. The decisions can be forwarded to the Execution Office of the Ministry of Justice for their execution 	<ul style="list-style-type: none"> - The Commercial Arbitration Centers resolve an average of 20 cases annually, 60% of these by negotiation - VIAC resolved 15-17 cases out of 20 petitions per year 	
<p>(2) Collective debt collection system (bankruptcy system and company reconstruction system)</p>	<ul style="list-style-type: none"> - Current law is Bankruptcy Law of 1994 - Draft amendments currently under discussion, and submitted to Assembly in November 2003, aiming approval in 2004. - Committee of commercial bank restructuring set under Vice President in 2001 is discussion about bank-owned debts 	<ul style="list-style-type: none"> - Been applied also to liquidate State Owned Enterprises - Approx. 800 economic cases in provincial court per year. Approx. 30 economic cases in Peoples' Supreme Court 	<ul style="list-style-type: none"> - Legal advisory cooperation on bankruptcy law

**Annex II Questionnaire on the Current Status of Debt Collection
Litigation/Arbitration in APEC Economies**

I. Corporate profile and investigation/legal system of your company (head office)

[I-1] Please fill out your corporate profile. For type of business, please pick a number for your main business from the "List of Business Category".

Type of Business	No.	
Capital	million yen	
Sales (FY2001)	domestic	million yen
	Total of domestic /overseas	million yen

< List of Business Category >

Manufacturing industry

1	foods	2	textile/fabrics	3	apparel
4	lumber/wood products	5	paper/pulp	6	chemistry
7	pharmaceutical products	8	rubber goods	9	ceramics
10	steel	11	nonferrous metals	12	metal products
13	general machinery (incl. business equipment)	14	electric and electronic machines	15	electronic parts
16	automobiles	17	automobile parts	18	other transport vehicles
19	precision machinery	20	other manufacturing industries (concretely :)		

Non-manufacturing industry

21	trading/wholesale	22	agriculture/forestry/ fishery/mining	23	construction/civil engineering/immovable property
27	communications	28	transportation/ storage	29	retail/department stores/supermarkets
30	finance/securities/insurance	31	information processing/ software, etc.	32	consulting/legal services/ accounting
33	other non-manufacturing industries (concretely :)				

[I-2] Do you have full-time staff in charge of the collection of debt in arrears and non-performing debt at overseas branches?

Please circle an appropriate number.

(1) Yes. (2) Not "full-time" but "staff also otherwise engaged" exists. => go to [I-2-B]

(3) No. => go to [I-3]



[I -2-A]Which one of the following applies, (1) or (2)? Please circle an appropriate number and fill in name of divisions, number of staffs, etc

(1) Independent division or department (section) exists.

Name of division/department(section): _____

No. of staff: _____

(2) Independent division or department (section) does not exist

Division name of full-time staff: _____

[I -2-B] Please fill in names of departments (sections) and number of the staffs also otherwise engaged:

Name of division/department(section): _____

No. of the staff also otherwise engaged: _____

[I-3] Do you have appointed lawyers (including foreign law agent / person qualified for foreign law, etc.) or other professionals (including debt-collection firms, etc.) to always consult with about legal aspects of the debt collection in arrears and non-performing debt at overseas branches and department in charge of overseas debt collection?

Please circle an appropriate number. (Please mark all that apply.)

- (1) We consult with corporate lawyer, etc.
(Name of law office, if possible. Please list all, if many. _____)
- (2) We consult with ad hoc adviser, etc..
(Name of law office, if possible. Please list all, if many. _____)
- (3) Not always but as occasion demands.
(Name of the person or office, if possible _____)
- (4) No contact with lawyers, etc.
- (5) Other (concretely : _____)

[I-4] Do you have any complaints about lawyers you consulted with in the past?

Please give details below, if any. Also, please specify problems concerning credibility of the lawyers, scope of business committed (up to litigation/arbitration, up to the execution of arbitration/court decisions, etc.), and lawyer's fee, etc.

(column)

II . Issues concerning the collection of debt in arrears and non-performing debt.

[II-1] In performing international transactions and overseas business activities, was there a case where debt collection was not feasible due to the problems of legal system or law execution system of the recipient/correspondent country? Please circle an appropriate number. (Please mark all that apply.)

- (1) We have experienced no particular difficulties in debt collection. => go to [III]
- (2) We have fallen into difficulties in debt collection.
 - (a) It was caused by the management system at local affiliates. => go to [II-2]
 - (b) It was caused by laws/regulations with regard to holding pledge and/or other risk-hedging tools. => go to [II-3]
 - (c) It was caused by debt collection litigation/arbitration procedure, and/or enforcement of debt collection based upon the result of litigation/arbitration. =>go to [II-4]
 - (d) It was caused by multiple factors concerning (a), (b) and (c). => go to [II-2] [II-3] [II-4]
- (3) Other (concretely : _____)

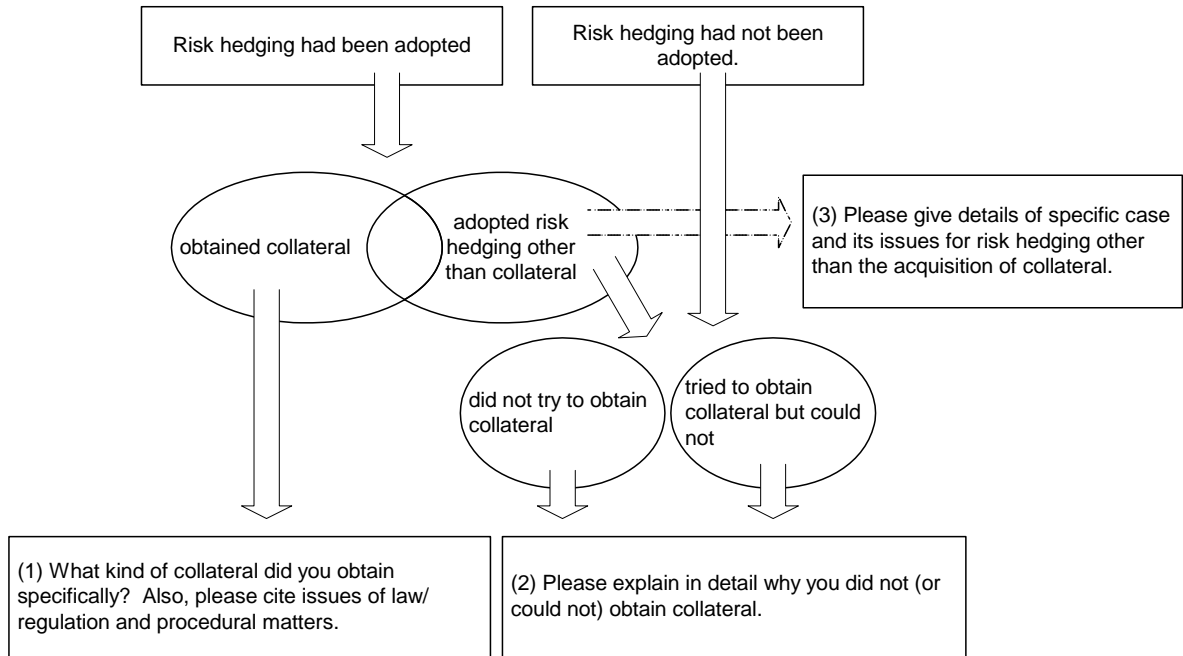
[II-2] In case management system at local affiliates caused difficulties with the collection of non-performing debt, please give details of the issues concerning specific cases.

(column)

[II-3] As a countermeasure for debt collection issues in the future, have you adopted risk hedging by obtaining collateral? Please specify issues you were faced with in detail. Please cite issues concerning local rehabilitation law, if any.

- (1) In case you obtained collateral, what was it specifically? Please specify law/regulation and/or procedural matters for the case.
- (2) In case you did not obtain collateral, was it due to local law/regulation and/or execution system? Or was it due to issues other than law/regulation such as local situation, cost, corporate strategy, etc.? Please explain in detail.
- (3) Have you adopted risk hedging other than the acquisition of collateral such as private credit insurance, personal sureties, reservation of ownership? Please explain in detail.

Chart1 : Risk Hedging in Developing Overseas Business Activities

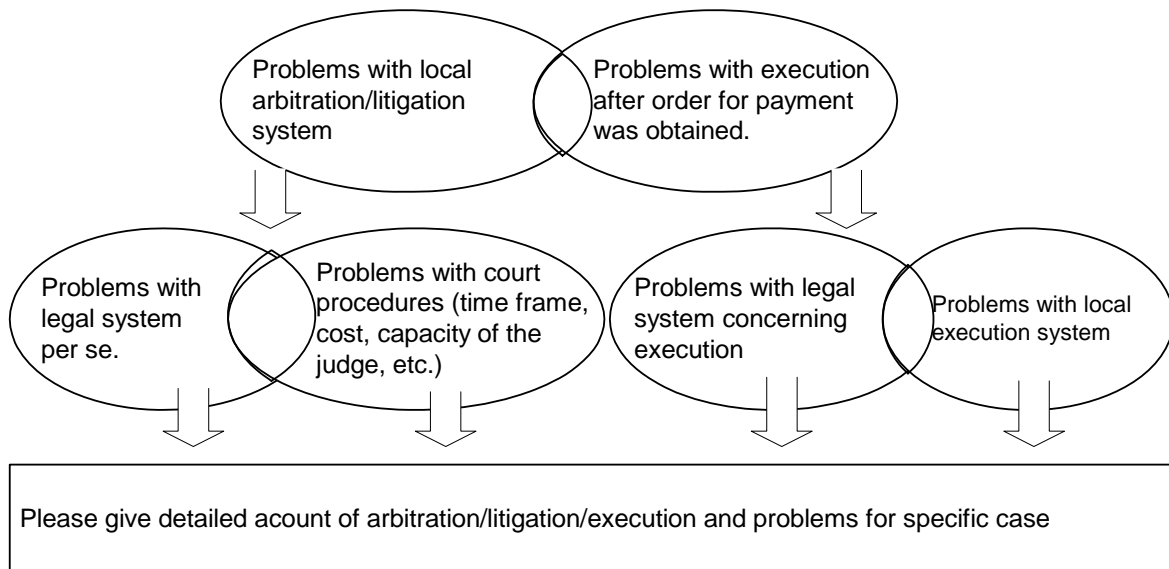


(column)

[II-4] In collecting non-performing debt, have you ever resorted to legal action such as arbitration/litigation? If so, please give detailed account of the issues concerning specific cases (including those still in litigation) on the following page. Please refer to the attached sheet for example.

- (1) In case of problems with arbitration/litigation per se, was it due to the absence or inappropriateness of law/regulation themselves? Or was it due procedural matters (time frame, cost, capacity of related-organizations/officials in charge, etc.) with court and/or arbitration court?
- (2) In case of problems at the stage of enforcement after obtaining order for payment by arbitration/litigation, was it due to the absence or inappropriateness of law/regulation themselves? Or was it due to local enforcement status (fairness, transparency, readiness, etc.) ?

Chart2 : Issues Concerning Collection of Non-performing Debt



(column)

Country/Region: :

Location of arbitration/litigation, etc. :

Nationality of counterpart company :

Time frame :

Time required for settlement :

Cost from the beginning of the case until its solution :

Key contributor for the solution :

III . Other

Please fill in other comments, if any.

This is the end of the survey. Thank you for your cooperation. The results of this survey will be utilized as valuable information for future trade negotiations such as policy dialogue in APEC.

Annex III Visiting List of Field Surveys

1. China (September 8th - 17th, 2003, Beijing and Shanghai)

Legislative, Judicial and Administrative Agencies in Indonesia

Ministry of Commerce

State-owned Assets Supervision and Administration Commission

State Administration for Industry and Commerce

Supreme People's Court of China

China International Economic and Trade Arbitration Commission (CIETAC)

Shanghai Arbitration Commission

House and Land Assets Administration Office

Shanghai State Administration for Industry and Commerce

Academics

China University of Politics and Law

University of International Business & Economics

Private Law Firms

Japanese Companies and Business Associations

The Government of Japan and Related Agencies

JICA China Office

JETRO Beijing

JETRO Shanghai

2. Indonesia (June 30th – July 4th, 2003, Jakarta)

Legislative, Judicial and Administrative Agencies in Indonesia

Ministry of Justice and Human Rights of the Republic of Indonesia

Republic Indonesia Vice Cabinet Secretary

Supreme Court of the Republic of Indonesia

Commercial Court, the Supreme Court

Office of Head of State Court

Badan Perencanaan Pembangunan Nasional

Ministry of Industry and Trade Republic of Indonesia

Ministry of Foreign Affairs of the Republic of Indonesia
The Indonesian Bank Restructuring Agency (IBRA/ BPPN)
Jakarta Initiative Task Force

Private Law Firms and Accounting Offices

Japanese Companies and Business Associations

The Government of Japan and Related Agencies

Embassy of Japan
JICA Indonesia Office
JETRO – Japan External Trade Organization- Jakarta Office

3. Thailand (July 21st – 25th, 2003, Bangkok)

Legislative, Judicial and Administrative Agencies in Indonesia

Alternative Dispute Resolution Office, Office of the Judiciary
Business Reorganization Office, Legal Execution Department, Ministry of Justice
Central Bankruptcy Court
Central Intellectual Property and International Trade Court
Corporate Debt Collection Group, Bank of Thailand
Judicial Training Institute, Office of the Judiciary
Supreme Court (Bankruptcy Dept.)
Thai Asset Management Corporation

Academics

Thammasat University

Private Law Firms

Japanese Companies and Business Associations

The Government of Japan and Related Agencies

JICA Thailand Office
JETRO – Japan External Trade Organization- Bangkok Office
Japanese Chamber of Commerce, Bangkok

4. Vietnam (August 25th – 29th, 2003 Hanoi and Ho Chi Minh)

Legislative, Judicial and Administrative Agencies in Vietnam

National Assembly of the S.R. of Vietnam

Supreme People's Court

Ministry of Justice of Vietnam

Dept. of Law and Investment implementation, MPI

State Bank of Vietnam

Ministry of Trade

HCMC Economic Arbitration Center

Vietnam International Arbitration Center (VIAC)

Academics, Experts and Lawyers

Institute of State and Law

Hanoi University of Law

Private Lawyers

Japanese Companies and Business Associations

The Government of Japan and Related Agencies

Embassy of Japan

JICA Vietnam Office

JETRO – Japan External Trade Organization- Ho Chi Minh Office

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