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An Overview of Insolvency Proceedings in Asia

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AN OVERVIEW OF INSOLVENCY PROCEEDINGS IN ASIA

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I. INTRODUCTION

Asia is characterized by the diversity of its laws, customs, culture, and history.[1] Certainly this holds true for its bankruptcy laws.

This paper gives an overview of current bankruptcy (insolvency) proceedings in Asia. It will explain the existing laws, which are generally old and too outmoded to resolve modern cross-border debtor/creditor disputes. It will explore cultural attitudes which have both inhibited use of the existing laws and prevented meaningful changes to them. It will discuss how the changing structure of the market makes bankruptcy proceedings more common today than in the past, and appears to be leading many countries to revamp their bankruptcy laws.

This paper will focus on the bankruptcy laws of eight Asian countries: Hong Kong, China, Taiwan, Indonesia, Malaysia, Singapore, Thailand, and Japan.

II. BACKGROUND

When a company is in financial trouble, especially severe financial trouble, its remedies depend upon the law of the jurisdiction in which it

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1. Simon Walker, *Asian Insolvency Regimes Feel Strain,* THE NAT'L L.J., May 4, 1998, at C3.

(or its assets) are located. All Asian countries (indeed, most countries in the world) allow a liquidating bankruptcy proceeding, in which the debtor company's assets are sold and the proceeds are distributed on an equitable basis among its creditors. The debtor is then out of business. The laws vary, however, in many ways, such as who is eligible to file, how the debtor and its creditors are treated, and how the laws are perceived culturally.

Some countries also allow reorganization proceedings, a relatively modern concept pursuant to which the debtor remains in business, and is "rescued" by restructuring its debts or asset base, or taking other steps necessary to allow it to remain operating and yet still reach a satisfactory arrangement with its creditors. Reorganization is the best option if the company retains value as a going concern. Until very recently, however, reorganization proceedings have not been authorized in Asian countries. In the past decade they have started to be authorized, and indeed are coming into common use some countries. As reorganizations become more common, they are more accepted.

This paper will discuss the laws and culture of each of the eight countries in turn.

A. HONG KONG

Among the Asian countries, Hong Kong has one of the most recent bankruptcy laws, which were substantially amended in 1984.[2] Ironically, Hong Kong's model for the 1984 amendments was old United Kingdom law from 1948, which was no longer the law in the U.K. by the time Hong Kong emulated it.[3] Historically, the United Kingdom's laws have been notoriously pro-creditor.[4] Thus Hong Kong's laws remain archaic and harsh. As one practitioner put it, "[T]he purpose of the law is to kill the company so that the creditor gets the best deal."[5] The proceeding for the insolvency of an individual is called bankruptcy, and the proceeding for the insolvency of a company is called "winding up."[6] Both are

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2. China and Thailand have the newest bankruptcy laws. China's were enacted in 1996, and Thailand's in 1998. They are discussed *infra*.

3. Roman Tomasic, et al., *Insolvency Law Administration and Culture in Six Asian Legal Systems*, 6 AUSTL. J. OF CORP. LAW 248, 255 (1996).

4. Walker, *supra* note 1.

5. Tomasic, *supra* note 3, at 256.

6. Charles Booth, *Living in Uncertain Times: The Need to Strengthen Hong Kong Transnational Law*, 34 COL. J. OF TRANSNAT'L LAW 389, 391 n.1 (1996).

liquidation proceedings. Hong Kong does not have any formal "rescue" system (reorganization or restructuring). [7]

Proposals for introducing a rescue system are pending. In 1995 the Law Reform Commission of Hong Kong established a Subcommittee on Insolvency to study and discuss new provisions to rescue its insolvent companies.[8] The Commission proposed amending the bankruptcy laws to allow a type of corporate rescue (reorganization) called judicial management.[9] Judicial management is a type of reorganization proceeding in which a court appoints a manager for the company, whose duty is to make agreements with creditors so that the company can avoid liquidation.

The law has not passed because of opposition from two quarters: (1) employee groups, who are opposed to the judicial management system because they fear that employees will not be able to claim arrears from the government's wage insolvency fund if the company is not liquidated, and (2) operators of the wage insolvency fund, who fear that the fund would be overtaxed if it had to pay claims of employees of judicially managed companies.[10] Those in favor of judicial management argue that the judicial management system would allow businesses to stay open and employees to keep their jobs in the long run,[11] which is far better than merely being able to make a claim against a fund.

During the several years that the argument has been waging, many companies have had to be liquidated because no rescue system was available to them.[12] The committee must somehow reassure the employees, or amend the laws to deal with their objections, so that the judicial management proceeding can be authorized.

With regard to foreign bankruptcies, Hong Kong subscribes to the universality approach, which means that it recognizes the extraterritorial scope of bankruptcy proceedings. It uses common law principles to determine whether to recognize a foreign bankruptcy proceeding.[13]

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7. Tomasic, *supra* note 3, at 255.
8. Booth, *supra* note 6, at 391; Tomasic, *supra* note 3, at 255.
9. Jo Tura, *"Power-play" in Hong Kong over Corporate Rescue Law,* LAW MONEY, Jan. 13, 1999. (available at www.lawmoney.com/public/news/hotnews/news990113.1.html). Author Tura uses the term "provisional supervision" instead of "judicial management." For purposes of this article, the terms are interchangeable.
10. *Id.*
11. *Id.*
12. *Id.*
13. Modern Terminals (Berth 5) Ltd. v. States Steamship Co., H.K.L.R. 512, 514-21 (1979).

Once the foreign bankruptcy is recognized, the foreign insolvency representative is allowed title to the debtor's moveable assets located in Hong Kong.[14] As far as nonmoveable assets (such as real property) are concerned, the foreign representative must file a local action, typically a receivership action, to obtain rights over that property.[15]

Hong Kong also allows a foreign company with assets in Hong Kong to have its Hong Kong assets liquidated in Hong Kong as part of a Hong Kong bankruptcy proceeding, even if the company has not filed bankruptcy in its own country or elsewhere. To determine when this is allowable, the Hong Kong courts use a two-part test: (1) whether a "sufficient close connection" exists between Hong Kong and the debtor to justify allowing a Hong Kong bankruptcy proceeding, and (2) whether a reasonable possibility exists that the creditors will be benefited by the liquidation of the assets that are in Hong Kong.[16] Applying this test in 1994, the court allowed a bankruptcy proceeding to be brought in Hong Kong against a Chinese company called China Tianjin International Economic & Technical Co-operative Corporation (CTIETCC).[17]

China has become the biggest investor in Hong Kong, and as a result there has been an increase in Chinese businesses that owe money to Hong Kong creditors yet are unable or unwilling to pay.[18] Yet China does not recognize Hong Kong bankruptcies.[19] Thus creditors may increasingly use the type of "backdoor" bankruptcy used in CTIETCC to obtain redress in Hong Kong against Chinese companies.

The insolvency situation in Hong Kong is dependent on whether China will continue to honor the Joint Declaration and Basic Law.[20] If it does, the bankruptcy system in Hong Kong will continue in place. If not, new laws will be promulgated and foreign investors may liquidate their Hong Kong assets and move abroad. Further, foreign countries would be less likely to recognize Hong Kong's bankruptcies. In the United States, for example, Hong Kong bankruptcies are recognized now because Hong

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14. Galbraith v. Grimshaw, App. Cas. 508 (Hong Kong 1910).

15. Booth, *supra* note 6, at 401.

16. *In re* China Tianjin International Economic & Technical Co-operative Corp., 2 H.K.L.R. 327, 328 (1994).

17. *Id.*

18. Booth, *supra* note 6, at 439, citing Adrian Kennedy, *Mainland is Biggest Investor,* EASTERN EXPRESS, Feb. 11-12, 1995, at 27.

19. Booth, *supra* note 6, at 434.

20. These provide that Hong Kong will become a Special Administrative Region of the People's Republic of China but will continue to have a high degree of autonomy, maintain an independent judiciary, retain its own laws, and keep its capitalist way of life for 50 years (from 1997).

Kong is a "sister common law jurisdiction."[21] This would not be the case if China stops honoring the Declaration.

As far as cultural approaches to insolvency in Hong Kong, filing bankruptcy does not appear to have as much stigma as in many of the other Asian countries.[22] Perhaps this is due to its having a market economy of long standing, which may lead to a more pragmatic attitude about risk and business failure. Although the Hong Kong community is relatively small, it is internationally-oriented and transient, so the stigma is not as great as in small, tightly knit communities where everyone knows each other. In the 1980's many bankruptcies were filed in Hong Kong, some very high-profile, such as the Peregrine brokerage house and the Yaohan department store,[23] thus making the idea more common, and therefore more acceptable. Nonetheless, among the Chinese population who live in Hong Kong, the idea still has a fair amount of stigma, and it is rare for a purely Chinese-owned business to file bankruptcy.[24] Usually the Chinese try to work out their financial problems in other ways.

B. PEOPLE'S REPUBLIC OF CHINA (CHINA)

Early imperial China had no bankruptcy laws, because all land and property belonged to the emperor. Legally, no concept of "private property" existed.[25] Nonetheless, local customs developed for dealing with debtor/creditor problems: the debtor would divide all of his possessions among his creditors.[26] This would not necessarily prevent criminal sanctions from being assessed against the debtor, including whipping. More significantly, the debt, if unpaid, would be passed from generation to generation, thus forever condemning the debtor's descendants to a life of indentured poverty.[27]

China's first bankruptcy laws were enacted in 1906 by Imperial Edict of the Qing Dynasty and drafted with the help of a Japanese, Matsuoka Yoshi-masha.[28] The laws were heavily dependent on Japanese and

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21. *In re* Axona Int'l Credit & Commerce Ltd., 88 B.R. 597, 610 (S.D.N.Y. 1993), aff'd 115 B.R. 442 (S.D.N.Y. 1990), appeal dismissed, 924 F.2d 31 (2d Cir. 1991).

22. Walker, *supra* note 1; Tomasic, *supra* note 3, at 269.

23. Walker, *supra* note 1.

24. Tomasic, *supra* note 3, at 269-70.

25. Stephen Baister, *Efficiency versus Ideology — The Insolvency Law of the People's Republic of China,* 8 TROLLEY'S INSOLVENCY LAW & PRACTICE 166 (1993).

26. *Id.*

27. *Id.;* Tomasic, *supra* note 3, at 277.

28. Baister, *supra* note 25, at 166; Ronald Winston Harmer, *Insolvency Law and Reform in the People's Republic of China,* 64 FORDHAM L.R. 2563, 2567 (1996).

European law, but were in effect for only two years before being repealed. In large part, local custom was still used to resolve debtor/creditor disputes, a practice which was recognized and approved by the Chinese Supreme Court.[29] In 1934 Chiang Kai-shek's Kuomingtang government enacted a comprehensive bankruptcy law, which included a form of judicial management to facilitate compromise, and gave the local Chambers of Commerce significant involvement.[30] The law lasted only 15 years. In 1949, when China became communist, all previous "republican" laws were abolished, and virtually all private enterprises became state-owned.[31] Between 1949 and 1988, no bankruptcy laws existed for reasons similar to those of imperial times: the enterprises were all owned by the state, and the state cannot be declared bankrupt. (Some special economic zones, such as the Shenzhen, have their own regional and local bankruptcy laws and customs, including their own bankruptcy courts.[32] Special economic zones are areas established by the government to facilitate foreign trade. These zones have their own sets of laws that may differ from laws applicable to the rest of China. The laws of the special economic zones are beyond the scope of this paper.)

During the 1970's and 1980's, twenty percent of China's state-owned enterprises were operating at a loss, and 15% of government spending was on subsidizing the state-owned enterprises.[33] China's financial problems largely had to do with the "triangularization" of debt. "Triangularization" means that each state-owned enterprise owes money to another state-owned enterprise, which in turn owes another state owned enterprise . . . and ultimately, the state bears the debt.[34] Further, no one can enforce the debt, because all of the state-owned enterprise's property belongs to the state.[35]

China became increasingly interested in developing a modern economy, and in taking steps to break the deadlock of triangularization. To further this goal, one proposal was to enact modern bankruptcy laws. Debate over the issue was intense, because bankruptcy is inherently a capitalist

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29. Tomasic, *supra* note 3, at 257.
30. Harmer, *supra* note 28, at 2568.
31. Baister, *supra* note 25, at 166.
32. Harmer, *supra* note 28, at 2571; Tomasic, *supra* note 3, at 251-52.
33. Baister, *supra* note 25, at 168.
34. Harmer, *supra* note 28, at 2582; Tomasic, *supra* note 3, at 254-55; Booth, *supra* note 6, at 439 n.263.
35. Tomasic, *supra* note 3, at 254-55.

idea, tied up with the concept of credit and market risk. Many did not feel that a socialist state could tolerate such an idea.[36]

Others, however, believed that if China were to move forward into a market economy, then bankruptcy was a necessary corollary. They believed that China should embrace a "socialist market economy," which would force state-owned enterprises into the marketplace, and make them more productive, more autonomous, and less reliant on government support.[37] Bankruptcy was seen as a facilitator. This point of view won out, and in 1986 China passed a law which provided for state-owned enterprises to liquidate, reorganize, merge, and be subject to take-over.[38]

Between 1986 and 1996, over 2,000 bankruptcies were reported, a figure which is probably low,[39] but only 20 of them were for state-owned businesses.[40] It is far more common for the state-owned enterprises to be acquired by another entity than to be liquidated.[41] Part of the reason for this is that much concern exists for the employees and what will become of them if a company is liquidated.[42] The Chinese have been raised with the concept that the state will take care of them from "cradle to grave" with an "iron rice bowl."[43]

The old concept of stigma still remains, but seems to be dependent on the circumstances. Personal bankruptcy is much more shameful than business bankruptcy. Business bankruptcy is increasingly seen as a normal consequence of the risks associated with a market economy.[44] But different parts of the country also have different cultural approaches. In the Chinese courts, especially along the coast and in the special economic zones, bankruptcy is common. In other parts, including Beijing, it is not accepted as readily and local rules are in place which make it somewhat more burdensome administratively to file bankruptcy.[45]

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36. Baister, *supra* note 25, at 167; Harmer, *supra* note 28, at 2574-75; Walker, *supra* note 1 at 254-55.
37. Walker, *supra* note 1, at 253-54.
38. *Id.* at 253.
39. Tomasic, *supra* note 3, at 253 n.18 and corresponding text.
40. *Id.* at 279.
41. *Id.* at 254.
42. Harmer, *supra* note 28, at 2581-82.
43. Tomasic, *supra* note 3, at 275.
44. *Id.* at 265.
45. *Id.* at 278.

China adopts the territorial approach to bankruptcy.[46] It will not recognize other countries' bankruptcies nor provide any cross-border assistance to foreign bankruptcy representatives.[47] In a 1990 case, a Chinese court refused to recognize a Hong Kong bankruptcy, and would not allow the Hong Kong representative to participate in a lawsuit in China over a breach of contract.[48] The Chinese court protected its own citizen corporation from the foreign insolvency proceeding. This will have to change as cross-border insolvency issues will continue to arise. The Chinese and Hong Kong governments are continuing to study these matters.[49]

C. REPUBLIC OF CHINA (TAIWAN)

Taiwan's bankruptcy law is heavily influenced by ancient Chinese models and values.[50] Its current laws were enacted in 1929 and 1935, with some modifications in 1966 to allow for reorganization.[51] Local custom, however, is allowed to prevail over the law, and does.[52] A strong Confucian ethic prevails, which means that debtor and creditors are to settle their disputes amicably through personal relationships; if that fails, they will ask a third party to mediate.[53] Commonly, the local Chamber of Commerce takes part in these mediations.[54] Taiwan has a small business community in which everyone knows everyone else, and one's "hsin-yung" (business reputation) a loss of face; many commit suicide rather than file bankruptcy.[55]

Because the laws are so archaic, the procedures are unclear and bankruptcy may drag on because there are no strict restraints or procedural schedules.[56] As of 1996, no successful reorganizations had been reported.[57]

Other reasons to avoid bankruptcy are that the officers of the corporation may be prevented by law from becoming involved in other industries

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46. Booth, *supra* note 6, at 434.
47. *Id.*
48. Liwan District Constr. Co. v. Euro-America China Prop. Ltd., A People's Court in Guangdong Province (Feb. 9, 1990), reprinted in 6 CHINA L. & PRAC. 27 (1990).
49. Booth, *supra* note 6, at 434.
50. Tomasic, *supra* note 3, at 256.
51. *Id.* at 256-57.
52. *Id.* at 257-58.
53. *Id.* at 258.
54. *Id.*
55. *Id.* at 267.
56. *Id.* at 268.
57. *Id.*

after a corporation in which they were an officer files bankruptcy.[58] The Confucian ethic and the stigma combine to make out-of-court consensual arrangements much more common than bankruptcies. As a result, the laws remain archaic, but there is no internal pressure to amend the existing bankruptcy laws because they simply are not often used in Taiwan.[59]

D. INDONESIA

Indonesia's bankruptcy laws were enacted in 1906 by the ruling government, the Netherlands, and are based on the bankruptcy laws of the Netherlands.[60] The laws were adopted by Indonesia when it gained independence in 1945.[61] The laws as adopted, however, applied only to Europeans and "Foreign Orientals" (i.e., Chinese) residing in Indonesia, not to native Indonesians.[62] The 1906 law remains as the only bankruptcy law in Indonesia today.[63] The local Chinese, because of loss of face and other cultural reasons discussed *infra*, avoid using the bankruptcy laws. Because of that, and because they do not apply to native Indonesians, the laws are rarely used.[64] In fact, in the ten years between 1984 and1994 only 13 bankruptcies were filed: nine individual bankruptcies, and four company bankruptcies.[65]

In Indonesia, creditors rarely use bankruptcy as a remedy, and bankruptcy bears a heavy stigma.[66] Harmony is an important cultural value there, so Indonesians avoid confrontation about problems. Negotiation is the accepted method of handling debtor/creditor problems, and even then references to financial problems are discreet; direct reference is rude.[67]

This is changing, however, as conditions in Indonesia change, especially as many business failures have occurred and the economy is collapsing.[68] So far the government has been dealing with failed businesses on a case-by-case basis, enacting laws to make mergers between banks easier, and

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58. *Id.*
59. *Id.* at 269.
60. Tomasic, *supra* note 3, at 261.
61. Walker, *supra* note 1.
62. Tomasic, *supra* note 3, at 261, 263.
63. *Id.*
64. *Id.* at 262.
65. *Id.*
66. *Id.* at 262-63; Walker, *supra* note 1.
67. Tomasic, *supra* note 3, at 262-63.
68. *Id.*

giving indirect assistance to failing businesses, such as management assistance and allowing debt restructuring.[69] Indonesian businesses are increasingly relying on foreign capital, and are entering into loan transactions with foreign companies.[70] As one commentator said, "It is ironic that the Southeast Asian country with perhaps the most complex legal system, and the one most opposed to insolvency, is the very country that needs clear insolvency proceedings most urgently."[71] It is to be hoped that Indonesia will consider some reform soon.

E. MALAYSIA

Malaysia's bankruptcy laws were enacted in 1965, and revised in 1973.[72] They were based on old United Kingdom laws, which, as noted, are famous for being extremely pro-creditor and concerned with liquidating the debtor in a way to achieve the best pay-out to the creditors. Under these laws, receivership and liquidation are a matter of course.

During the recession in the 1980's, and after the 1987 market crash, some proposals were made to introduce a reorganization system to Malaysia, but the banks opposed the idea and the law did not pass.[73] The Chamber of Commerce, which handles many negotiations between debtors and creditors, tried in 1992 to introduce a form of reorganization and judicial management into the negotiation process.[74] Although formal reorganization laws have not passed yet, it seems that Malaysia is closer to introducing a reorganization proceeding than many other Asian countries: It has at least started seriously considering such a move.

The stigma perception applies in Malaysia, especially among the Chinese population,[75] but the Malays have a more pragmatic, "easy come, easy go" attitude toward bankruptcy than the Indonesians, for example.[76] Further, to preserve public confidence in the economy, bankruptcy filings are not publicized in Malaysia[77] and it is possible to file rather quietly, thus lessening the stigma.

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69. *Id.*
70. Tomasic, *supra* note 3, at 263.
71. Walker, *supra* note 1.
72. Tomasic, *supra* note 3, at 263.
73. *Id.* at 264.
74. *Id.* at 264-65.
75. *Id.* at 286.
76. *Id.*
77. *Id.*

F. SINGAPORE

Singapore's laws are diverse, like those of Indonesia, because of its Malay and Chinese populations. The Malay law and customs have aspects of Islamic law. The Chinese still follow many Chinese customs. In light of these differences, Singapore enacted a new bankruptcy law in 1965, called the Companies Act. It was based on laws of Australia, which in turn were based on the laws of the United Kingdom.[78] Part of the goal of the 1965 law was to minimize the differences between the Singapore and Malaysian bankruptcy laws, and to facilitate trade and commerce between the two.[79]

In 1985, a serious crisis in the local financial market took place when Pan-American Industries collapsed. The collapse of a public company, followed by its going into receivership, in turn caused the closure of the Singapore and Malaysian stock exchanges and left a lot of companies bankrupt.[80] Criticism of the bankruptcy laws centered around the laws' harsh pro-creditor procedures. Many felt that some of the bankruptcies could have been avoided, and that the companies should have had the option to reorganize.[81]

In 1987, therefore, the bankruptcy laws were amended to allow for judicial management,[82] a procedure by which companies in financial difficulty could be reorganized with the assistance of a court-appointed manager. The goal of the law is to rescue companies which can be rescued.[83] The law takes a pragmatic approach and focuses on solving problems, not just liquidating.[84]

Judicial management has not been a miracle fix, though. First, as in other parts of Asia with large Chinese populations, the stigma against bankruptcy still exists. But the attitude seems to be easing, especially toward business (as distinguished from individual) bankruptcy proceedings.[85] Other laws reflect this change in attitude. At one time, a person who was a director of a company that filed bankruptcy was deemed unfit to serve as a director again. Now, to prevent one from

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78. Tomasic, *supra* note 3, at 258-59; Walker, *supra* note 1.
79. Tomasic, *supra* note 3, at 258.
80. *Id.* at 259.
81. *Id.* at 259-60; Walker, *supra* note 1.
82. *Id.* at 260; Walker, *supra* note 1.
83. Tomasic, *supra* note 3, at 260.
84. *Id.* at 260-61.
85. *Id.* at 271-72, 283.

acting as a director for another company, one would have to show that the bankruptcy was that director's fault.[86] That standard may be difficult to meet.

G. THAILAND

Thailand has the newest bankruptcy law in Asia, with a new reorganization law which was effective on April 10, 1998.[87] The law amends the Bankruptcy Act of 1940, which in turn derived from a version of the United Kingdom's bankruptcy law of 1914.[88] The 1914 law provided only for liquidating bankruptcies, with a very harsh pro-creditor bent, and led to a state of paralysis during the current financial crisis.[89]

The new law was ten years in the making. In 1988, the Ministry of Justice established a bankruptcy law reform committee to humanize the bankruptcy laws, and to handle the situation when a viable company has financial difficulties.[90] The committee studied the laws of the United Kingdom, the United States, and Singapore.[91] The new law is a hybrid of the latter two. It is basically a judicial management of the financial restructuring of the debtor company. It contains very specific procedures, allows the creditors to vote on an acceptable plan, and establishes short time frames to keep the reorganization on track.[92] The Act is modeled more on U.S. law than on U.K. law, which is not surprising considering that Thailand and the United States have historically had very close relations, as exemplified by the Thai-U.S. Amity Treaty, which for many years has granted preferential status to U.S. investors in Thailand.[93]

Fifteen cases have already been filed under the new law, including a case involving Alphatec Electronics Public Company Ltd. (ATEC), a major electronics firm with debts estimated at $570 million (20 billion baht).[94]

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86. *Id.* at 272.
87. Wisit Wisitsora-At, *New Thai Statute Blends Chapter 11 with Singapore Practices,* AM. BANKR. INST. J., March 1999, at 1.
88. *Id.*
89. Walker, *supra* note 1.
90. Wisitsora-At, *supra* note 88, at 1, 19.
91. *Id.* at 19.
92. *Id.*
93. Walker, *supra* note 1.
94. Wisitsora-At, *supra* note 88, at 19.

Already the Thai government has initiated some amendments to the new bill. In early 1999, the Thai Parliament passed a law establishing a special bankruptcy court,[95] which opened on June 25, 1999. Further, the government also plans to include measures to reduce the stigma associated with filing bankruptcy, which is strong in Thailand,[96] and to prepare for cross-border bankruptcy cases.[97]

Thailand is well in the forefront of Asian insolvency law.

H. JAPAN

In Japan, several different statutes provide for bankruptcy filings, and they were each borrowed from different foreign jurisdictions: some were adopted from Germany in 1921, some from the United Kingdom in 1938, and some from the United States in 1952.[98] (Each of those three foreign jurisdictions have remodeled their bankruptcy laws since then, but Japan has not followed suit.)

Each time Japan enacted a new set of bankruptcy laws, it kept the old system intact as well. It made no attempt to integrate or reconcile the systems.[99] Thus, there are two types of liquidation proceedings and three types of reorganization proceedings in Japan.[100] Before filing, the debtor must study each alternative and determine which will work best for it. The types vary in many respects, including whether a "stay" is in place to prevent attachments of the debtor's property, and whether the creditors must consent to the reorganization plan.

In some instances Japan will allow a debtor to remain in possession of, and continue to operate, its own business, as in the case of an American chapter 11 debtor.[101] Japan also allows for judicial management by a court appointed supervisor or administrator.[102] Most commonly, though, when the debtor is a corporation, its management is replaced by a court-appointed trustee.[103] The debtor may lawfully be deprived of some

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95 The Bankruptcy Act B.E. 2483 (1940 A.D.) (amended B.E. 2541 (1998 A.D.)).

96. Walker, *supra* note 1.

97. Wisitsora-At, *supra* note 88, at 36.

98. Patrick Shea & Kaori Miyake, *Insolvency-Related Reorganization Procedures in Japan: The Four Cornerstones,* 14 PAC. BASIN L.J. 243, 244-45 (1996).

99. *Id.* at 245.

100. *Id.;* Shoichi Tagashira, *Intraterritorial Effect of Foreign Insolvency Proceedings: An Analysis of "Ancillary" Proceedings in the United States and Japan,* 29 TEX. L.J. 1, 5 (1994).

101. Shea, *supra* note 98, at 257.

102. Shea, *supra* note 98, at 250-51, 257-58.

103. *Id.* at 251, 257-58; Tagashira, *supra* note 99, at 5, 25.

rights, and discriminated against; for example, an individual debtor may lose his professional license.[104] The Japanese also have antipathy to the idea of a discharge of debts, although it is allowed under the United States' common law approach Japan adopted in 1952.

Reorganization or liquidation may also be accomplished though private negotiation, without the necessity of a bankruptcy filing.[105] These efforts may not be effective, however, if any of the major creditors are unwilling or uncooperative. In such instances, a formal bankruptcy proceeding is necessary.

Japan's approach to foreign bankruptcy proceedings is extremely territorialistic.[106] Japan will not recognize a foreign bankruptcy proceeding or discharge.[107] Japan will, however, allow a foreigner who is engaged in business in Japan to file a bankruptcy proceeding in Japan.[108] And it will allow the Japanese bankruptcy representative to take possession of the Japanese debtor's foreign assets located in a foreign country.[109]

This "have your cake and eat it, too" attitude cannot continue to prevail in an increasing atmosphere of world trade and cross-border credit transactions. Japan's position at first was that a treaty would be necessary to ensure international insolvency cooperation.[110] More recently, in the absence of any treaty, Japan has been considering a Draft Law which would repeal the territoriality doctrine and give extraterritorial effect to Japanese insolvency proceedings, and establish recognition procedures for foreign bankruptcies.[111]

The efforts Japan is making are increasingly necessary in the modern world. Japan's move is a step in the proper direction, but it cannot do it alone. To achieve complete universality of bankruptcy laws, all of the world's countries would have to cooperate, and to coordinate all of their procedural and substantive laws. Certainly this is not a realistic prospect.

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104. Tagashira, *supra* note 99, at 25.
105. Shea, *supra* note 98, at 243 n.2, 243-44.
106. Tagashira, *supra* note 99, at 7.
107. *Id.* at 8-9.
108. *Id.* at 6-7.
109. *Id.* at 8.
110. *Id.* at 7.
111. *Id.* at 10-11.

III. CONCLUSION

The economic turmoil in Asia has focused attention on the antiquated nature of many bankruptcy laws in the region. Each country has different laws, influenced by other countries, and its own peoples' attitudes and culture. In the past, Confucian tradition and personal beliefs have prevented use of the bankruptcy laws, or the updating of them. The changing nature of the Asian economy, the emerging capitalism and entrepeneurship in Asian nations, and the economic crisis, are causing long-held beliefs about bankruptcy to change. Further, expanding transnational trade mandates changing bankruptcy laws to deal with the corresponding transnational bankruptcy issues. These changes are starting to occur in Asia. They are ambitious but not impossible changes, and should achieve the goals of assisting businesses and the economy.