Issues of the Civil Execution System in Myanmar

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1. Introduction

This paper purports to identify the characteristics of the civil execution law and practice in Myanmar from a comparative perspective, as the result of the author's research conducted from April 2014 to March 2017 under the auspice of the grand in aid for scientific researches of the Ministry of Science, Education and Sports of Japan (hereinafter "Kaken"), basic research type-B, No. 26285004, which included two times of visits to the Myanmar courts in March 2016 and January 2017, facilitated by the director general of the Supreme Court of the Union of Myanmar, for the purpose of interviewing with judges and execution officers with expertise.

Civil execution in Myanmar is currently governed by the Supreme Court Order XXI, which is based upon The Code of Civil Procedure, 1908 that was enacted in India during British colonization. This system has remained unchanged since that time. For an investor entangled in a legal dispute, in order to execute a judgment against a debtor's assets located within Myanmar, not only when the dispute was resolved by obtaining a judgment via the Myanmar courts but also when an award is obtained via foreign arbitration based on an arbitration clause included in the joint venture contract, it is impossible to avoid going through The Code of Civil Procedure, 1908 and Order XXI. In 2013 Myanmar signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but this meant only limiting the reasons to refuse to recognize an arbitration award, without any change to the conventional execution process. Therefore, investors to Myanmar have shown concerns on the civil execution system in Myanmar. During the author's interview conducted in January 2017 with a Japanese law firm that has had a presence in Myanmar for several years, the author was told that of the few cases handled by the firm that have involved the filing of a civil suit, all cases were either lost or withdrawn following a decision not to continue the case, meaning there were no examples of a

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case that had proceeded to civil execution. All of the cases were exceedingly simple debt recovery cases, yet the short answer for why each ended in loss or withdrawal was the procedural delay, which makes the Japanese parties eventually decide to withdraw their case. If the use of the courts in Myanmar is to progress, it is worth discussing in advance the eventual reform of the civil execution system.

National statistics regarding the number of civil execution cases in Myanmar are not published. According to the author's Kaken research group's interview of six judges of the Yangon Western District Court on 24 January 2017, within the court's geographical jurisdiction during the 2016 year there have been 415 civil execution cases concerning real or moveable property, zero cases of execution via the detention to the civil prison, and few cases of specific performance (execution of registration by proxy, etc.). Yangon Western District Court is located within the Yangon Region, the nation's former capital that has a population of 7 million. It is one of the largest district courts in the country and, together with the Yangon Eastern District Court, it has jurisdiction over the 13 township courts that cover Yangon's commercial center. The Yangon Region can be compared to Osaka Prefecture, which has a population of 8 million, but the Osaka District Court's Execution Center, which similar to the Yangon Western District Court is located in the commercial center of Osaka, has an annual caseload of 2,000 execution cases against land and 7,000 execution cases against claims, which is not comparable. There may be several reasons that cause this lack of activity in Myanmar's civil execution system.

A characteristic of Myanmar's civil execution procedure is that in almost all execution cases the judgment debtor files a formal objection. For example, a stay occurs under Order 21, Rule 29 due to a separate action being in progress, and the execution procedure is indefinitely stayed while the other action proceeds. The time limit for execution procedures is normally 12 years after execution is applied for (Code of Civil Procedure Article 48, Paragraph 1), which leads judgment debtors to drag their weight and cause delay. However, there may be a further extension (pursuant to Paragraph 2 of the above article) if execution is impeded by fraud or violence committed by the judgment debtor, or if execution was suspended due to partial repayment etc. as defined in Appendix 1, Article 183 of the Limitation Act 1909. In reality, according to the aforementioned author's interview with execution

judges, there are a considerable number of cases that have required more than ten years to complete execution. The disparity with Japan is remarkable, where compulsory execution against real estate and the exercise of security interests requires an average of 8 to 9 months.

Does this delay in civil execution in Myanmar derive from causes within the execution procedure itself? If so, how this delay can be mitigated by a reform in the course of initiative currently implemented by the Supreme Court of the Union of Myanmar.[1] In the following, the author will first describe the basic characteristics of the Myanmar execution procedure from a comparative view (section 2), then focus on the issues related to the attachment to the debtor's properties (section 3), and consider the aspects in the interface with the bankruptcy law for which a revision work is going on by the initiative of the Myanmar judiciary (section 4). Section 5 is the conclusion.

2. Characteristics of the Civil Execution Procedure

(1) Multiple Opportunities to Stay the Execution

Japanese civil execution is commenced by a judgment creditor submitting an application with a Title of Obligation (*saimu meigi*) attached to the executive agency, who determines to commence compulsory execution. Title of Obligation is a judgement, a notary document in case of monetary claim, or an arbitration award. At this time, if a "Certificate of Execution" (*sikkou-bun*) is attached to the Title of Obligation, the effect is that the execution agency can perform execution automatically without having to investigate whether there are any problems that affect the ability to execute, such as the validity of the Title of Obligation and the conditions for execution have been met. A party may commence an action in objection relating to the grant of a Certificate of Execution or an action in objection that contests the executability of a Certificate of Execution, but in principle this does not have the effect of staying execution. Further, if a Title of Obligation is formally valid but the substantive claim has been extinguished, an action to oppose execution may be commenced to cancel the executability of the Title of Obligation, but even in this case execution will not be stayed unless there is a provisional injunction etc. that stays execution. Under Japan's execution procedure, pure formalities such as the

Certificate of Execution, document service and the elapsing of certain time periods form the basis of the decision to commence execution, and afterwards the execution mechanism is solemn and automatic. In comparison, Myanmar's execution procedure has the characteristic of the execution court confirming whether there is a substantial right of claim when commencing the execution procedure.

In the execution system in Myanmar, there is a premise that the judgment court establishes a structure for constant recording of the implementation of a judgment, and the execution court progresses through the execution process while confirming the executability parallel to that record. The final judgment (decree) against a judgment debtor is carried out by the court, or if voluntary performance or reduction/release from the debt occurs outside of the court there is a requirement that it be reported to the court (Order 21, Rule 1) and the court will record it after receiving verification from the judgment creditor (Rule 2 (1)). Any voluntary performance or reduction/release from the debt that omits this verification and recording is not recognized by the court (Rule 2 (2)). When a court other than the judgment court performs execution, the judgment court will deliver to the execution court the decree together with a certificate relating to the execution status of the judgment and an order for the execution of the decree (Rule 6). In comparison to Japan's progression of execution via formal processing of the certainty and executability of the judgment based on the Certificate of Execution, in Myanmar, the system's structure substantively ascertains the execution of a judgment based on the verification and recording of the status of execution controlled by the judgment court itself.

Further, regarding the judgment court's verification of the implementation of a judgment, there is a way for the judgment-debtor to raise an objection in the execution court which, unlike an action to oppose execution in Japan, stays the execution process. The court which receives an application for execution must, in certain circumstances (when 3 years have passed since the judgment, execution is against the legal representative of the debtor, or agricultural property is the subject of the execution), provide the judgment-debtor with notice and the opportunity to oppose the execution (Rule 22 (1)) or, if necessary, to summons the judgment-debtor instead of issuing a notice (Rule 22 (2)). If the judgment-debtor files an objection, the

execution court must consider the objection (Rule 23) and dispose of the objection by deciding for itself whether there is a substantive right of claim. It is expressly provided that the execution court has the discretion to reject the application for execution (Rule 21).

Only after these objections have been finalized can the execution court issue a judgment execution order (process for the execution of the decree) (Rule 24 (1)). Further, when the execution court is different from the judgment court, the execution court stay execution in order to give the judgment-debtor the opportunity to request a stay of execution in the judgment court (Rule 26). In the author's interview with the Yangon Western District Court judges mentioned above, this opportunity is almost always used by the judgment-debtor to file an objection, which stays the process. During the hearing the execution is stayed, the parties are summonsed to the judgment court and the substantive implementation status of the judgment is examined. Also, the execution court can stay execution if the judgment-debtor has a separate lawsuit against the judgment-creditor.[2]

The execution court appoints execution officers (Rules 24, 25), but execution officers are normally young judges in their second or third year of appointment with scant experience; parties bypass the execution officer and lodge many objections not with the execution court but the judgment court.

Further, during the process for attachment, the execution court must accept and consider any claims by third parties, except those made for the purpose of causing undue delay (Rule 58). Regarding third-party objections to compulsory sale by auction, the execution court must summons the parties and hold a hearing before making a determination on the objection (Rules 100-101), and it is also possible for a third party to substantively contest the sale in a separate lawsuit (Rule 103).

In most of Myanmar's execution cases, according to the aforementioned judge interviews, the judgment-debtor or third parties make endless use of objections and separate lawsuits to cause delay. The institutional design of these objections and separate suits is to stay execution in order to protect the rights of the judgment-debtor or third party, which makes them easy to abuse. As will be seen in the next section, execution methods including civil detention and a range of indirect enforcement methods have been designed for the benefit of the judgment-creditor,

which may strengthen the motive for judgment-debtors to try to escape from the execution. Also, particularly when the judgment court also acts as the execution court because the assets subject to execution are within the geographical jurisdiction of the judgment court, the execution court is confronted with confusion at every turn during the execution process, which is created by a mixture of objections to the execution process as well as substantive objections against the claim in the judgment court.

In execution in Japan, objections and appeals against execution in principle do not require a stay of execution, and if the execution court makes a discretionary decision to stay execution, the period of the stay is short; for example an objection to execution is normally dealt with in about one month. It is therefore difficult to utilize objections and appeals for the purpose of delay, of which there are few examples.[3] Further, procedural objections (in connection to the execution court) and substantive objections (in connection to the judgment court) are calmly separated with the intention of prompt resolution. In order to streamline judicial execution in Myanmar, it is necessary to give priority to the progression of the execution process by separating the system for protecting judgment-debtor and third party rights as an external factor. Also, instead of the judgment/execution court dealing with all types of objections as one, it seems that a design where procedural objections to execution and substantive objections are separated (and consequently, the judgment court and execution court and separate organizations) is also required.

(2) Execution Method Options – Civil Detention

One characteristic of Myanmar's civil execution procedure is that the system allows the judgment-creditor (and a successor to the decree, referred to as the "decree-holder") to select the execution method. That is, when the decree-holder applies for execution, they may select from (1) delivery of specific property; (2) attachment and sale of any property, or sale without attachment (enforcement of security); (3) arrest and detention in civil prison; (4) appointment of a receiver; or (5) other relief (Order XXI, Rule 11, Paragraph 2 (j)).

Regarding judgments that order the payment of money, civil detention may be chosen as an alternative to, or used together with, the attachment and sale of property (Rule 30). The period of detention is for 6 months. The process for civil

detention is that first a notice requesting voluntary appearance must be issued, and only if this is breached is a criminal arrest warrant issued (Rule 37). Following arrest an opportunity for a hearing is provided, and the execution court has the discretion to make flexible decisions including release on parole and re-arrest (Rule 40). Also, at the time of pronouncing judgment, upon an oral application by the judgment-creditor, there is a process for immediate arrest and civil detention (Rule 11 (1)). The costs of arrest and imprisonment are borne by the court, but expenses for food, clothing and shelter during detention are borne by the decree-holder (Rule 39).

In this way, civil detention is a system in which the nation's courts are responsible for depriving a judgment-debtor who lacks the capacity to repay a debt their personal freedom for a period of six months, in what can be called a private punishment on behalf of a judgment-creditor. There was a historical background that called for the strengthening of the remedy of specific performance, in which civil detention was a central element, as a method to enforce labor contracts during labor disputes with dock workers in the historical British governance of India.[4] After the colonization of Burma it was a method exploited by Indian usurers. Myanmar law also continues to follow today this anachronism left over from the 19th century colonial system.

According to the author's interviews at the Yangon Western District Court in January 2017, there were no instances of civil detention within the court's jurisdiction in recent years, however as it is still active in regional areas, there have been no calls for the abolition of the civil detention system. At the same time the author conducted interviews with several chiefs of villages on the outskirts of the cities of Dawei and Myeik in the Tanintharyi Region of southern Myanmar, but none had heard of cases of civil detention. However, civil detention is identified as being still used as an active threat made in the collection of usury debts in everyday life. Under Indian law, with the introduction of the individual bankruptcy process law (Civil Procedure Code, Rule 22c) in 1976, in most states civil detention has lost its substance and been repealed.[5] In Myanmar too modernization is a challenge.

(3) Indirect enforcement and self-help via civil detention

There are several other flexible indirect enforcement methods available

to decree-holders. The prime method is six-week civil detention (Code of Civil Procedure, Section 58). First, it is possible to use civil detention as a method of indirect enforcement for the delivery of movable property (Order 21, Rule 31). Regarding obligations to perform acts also, such as the specific performance of a contract, restitution of conjugal rights and injunctions, indirect enforcement is possible via civil detention, attachment of property, or both (Rule 32 (1)). Civil detention of a director can be used as an indirect enforcement method against a corporation (Rule 32 (2)). Where a judgment-debtor does not obey a decree for the specific performance of a contract or an injunction, the execution court may, instead of or in addition to the methods mentioned above, allow the decree-holder to perform the act instead, in other words allowing self-help (Rule 32 (5)). In this respect there are no detailed provisions to guarantee an appropriate process.

These execution methods, which provide a high degree of freedom to the party seeking execution of a judgment, sound good when described as a flexible system, but questions arise from the perspective of guaranteeing modern human rights that value personal freedom and due process, and overcoming the anachronistic design of the system is an issue.

(4) Property Disclosure System

As described above, the execution procedure does not neatly separate the functions of the judgment court and execution court, but instead the record management of implementation of the judgment and dealing with substantive objections by the judgment court, and dealing with objections to disposition of the execution by the execution court, are performed as one harmoniously merged progression. But on the other side, that the execution court frequently summons the parties to court for directly questioning suggests the strength of the degree that the execution court substantially affects the parties for the physical implementation of execution. A process for property disclosure was introduced in Japan in 2003, but its insufficient effect means further measures such as third-party inquiry and strengthening of sanctions is being discussed. Myanmar law already has a wide-ranging system of third-party disclosure. Specifically, especially in the execution of judgments that order the payment of money, the decree-holder may apply to the

court for the oral questioning of the judgment-debtor, an officer of a corporation, or any other third party for the purpose of disclosing information about the conditions of the judgment-debtor's debt burden and property, and the court may summons these third parties and order them to submit documentation (Order 21, Rule 41). Evasion or concealment of property is punishable with civil detention (Code of Civil Procedure Section 51).

(5) Execution in Installments

Another point which attracts attention as a convenient measure for facilitating the execution of judgments that order the payment of money is execution in installments. Although there is not a clear legislative basis under the Code of Civil Procedure or Order 21, it is said that execution in installments is used very frequently in actual executions.[6] In final judgments, orders that specify performance in installments are not rare; particularly when destitute judgment-debtors lack the financial means to fulfill the order, judgments are written that order the payment in installments as a realistic method of encouraging performance of the order, even in small increments, while making it a pressuring method to order the immediate arrest and civil detention at the time of judgment (Order 21, Rule 1 (1)). Further, the judgment court may certify and record payments made out of court, or where the parties adjust the method of performance (Order 21, Rule 2). In the procedure for summonsing and interrogating a judgment debtor after applying for execution (Rule 22), there are many cases where the execution court discretionally orders execution in installments. Decree-holders sometimes raise an objection to such orders, which is one point of battle in the execution process.

It is possible that this unwritten law of flexible practice in the execution process that exists in Myanmar, which has adopted India's body of laws, is a successor to the traditional dispute resolution culture that existed prior to British colonization. This attitude of aiming for "mediatory execution", where the judgment courts writes its judgment after examining the judgment-debtor's personal circumstances including financial means and the execution court considers those personal circumstances in the execution process, is very interesting as a method of final resolution of a legal battle. In traditional Burmese society, administrative rulers

such as village chiefs and district chiefs acted as judges, and as seen in the *Manugye Dhammathat* (Chapter Eighth) which is one of the most popular version of written codes applied in the Combaung Dynasty before the British colonization,[7] compulsory norms in the law of obligations that intervened in contracts were found, such as restrictive limits on interest to rescue people from heavy debt. Even though it created tension with the contractual customs in everyday life which was given the full respect at the King's court,[8] it appears that it formed the basis for paternalistic legal intervention. Even now, as Myanmar's judicial branch bears an execution process that gives consideration to personal circumstances, civil relations exist where people have relationships in which parties are mutually visible. This can be considered an appropriate culture of dispute resolution for an agricultural society where sympathy and forgiveness can intervene in debt collection and specific performance.

However, as Myanmar's future economy is at the stage where it must accept the advancement of foreign investment and respond to the demands for efficient enforcement of contracts, the judiciary may have to discard its role as a living, paternalistic dispute resolution organization and step forward as a dispassionate and formal executive agency.

3. Effect and Registration of Attachment

(1) Attachment Method

In the judgment execution process based on the premise of an idyllic agricultural society, one aspect which appears to be lacking is criteria to resolve the conflicting relationship between attachment by the execution court and a third-party transferee of the property subject to attachment. In dealings based on personal obligation, where farmers temporarily granted security interests in their ancestral land for day-to-day loans from other individuals, there was probably little need to envision the appearance of a third-party transferee. However, with the introduction of a Torrens System for registration of farming rights in the 2012 Farmland Law, and in the modern world that encourages greater liquidity in real estate, multiple transferable mortgages can be placed on one parcel of farmland, which has become subject to the power of sales, and the possibility of abstract real rights that are separated from personal relationships being transferred often is increasing.[9] The

execution court needs to give some consideration to this in order to secure the precedence of attachment in relation to a competing third-party transferee.

According to Order 21 of the Code of Civil Procedure (Rule 54 (1)-(2)), the attachment of immovable property is made by an order prohibiting the transfer or charging of the property. Public notice of the order is via a series of physical acts, namely proclamation by a single beat of a drum or other customary method, and a copy of the order being displayed at the property, the court house and land tax collector's office (district administration office). However, can public notice via these customary actions and display of the order be described as objective notice capable of providing a sufficient source of countervailing power for the attachment to compete against a third-party transferee?

(2) Priority of Bona Fide Purchaser with Consideration

The attachment order has priority against third-party transferees without consideration that receive the transfer after the attachment order, and all persons after the time they become aware of the attachment order, or the time that the attachment is proclaimed, whichever is earlier (Order 21, Rule 54 (3)). Examining this in detail provides these complex rules: (1) the attachment cannot prevail over any transferees prior to the attachment order, regardless of their being bona fide or mala fide, and regardless of whether there is consideration (in other words, with or without payment of value). (2) Where there is a time lag between issuance and proclamation of the attachment order, the attachment cannot prevail over any bona fide purchasers for consideration during this period either. (3) During the period of time lag, the attachment will prevail over any transferees without consideration, regardless of whether the transferee is bona fide or mala fide. (4) The attachment will prevail over all persons following the proclamation.

According to the author's abovementioned interview of judges at the Yangon Western District Court, this question of priority is the matter of burden of proof by the third-party transferees concerning the timing of transfer, the bona fides of the transferee, consideration, etc. In the case of transfer in the period between the making of the attachment order and its proclamation, the focal point is the bona fides of the transferee and whether there was any consideration. However, Order 21 does

not address at what time the right is presumed to have been transferred or what evidence is conclusive to establish the chronological precedence.

(3) The Registration System in Practice

Concerning this problem of precedence in relation to the timing of the attachment, it is difficult to compare the varying proclamation methods used in each region, so a dispute based on the chronology of registration at the same register should be clearer. However, in the author's interviews at the Yangon Western District Court on 24 January 2017, all six judges said that proclamation of the attachment order in itself concludes the matter, and that they neither register attachment orders nor consider registration necessary.

On 27 January 2017, the author had the opportunity to conduct an in-depth interview about the current operation of the registration system at the land registration office under the Office of Agricultural Land Management and Statistics of Myeik District in Tanintharyi Region, with Mr. Su Min Htun, director of the bureau, and Mr. Yen Lon, a registration officer. According to them, the registration office manages a registration system of seven books of certificates under the 1909 Registration Act, as well as the separate system for registering the cultivation rights of the farmlands (Form 5) based on the 2012 Farmland Act. Within the former registration system of seven books of certificate, the primary register book is a chronological register of certificates related to urban land and buildings. The contents of certificates are transcribed word-for-word by hand by the registration officer to avoid errors, the signatures of all parties are confirmed on the book, and two originals of the registration certificate (Form 105) are issued, with one being pasted into the register. Further, based on the original data from the primary register book, registration records are compiled and managed for each proprietor of real property (Record 1A) and each geographical area (Record 1B). If an attachment order is issued by a court, the attachment order is sent from the court to the registration office together with a registration request. Upon receipt, the registration office transcribes the details into the primary register and adds a supplementary note of the attachment to the Record 1A register compiled for each proprietor of the real property. The author viewed and took photographs of actual examples of the transcription and

supplementary notes of attachment orders in the registry, as well as filed records of requests and attachment orders received from the court. The director of the bureau and registration officer explained that as they are transferred around the country approximately once every three years, this process of registration is being implemented consistently throughout the country. However, as previously mentioned, this primary register relates only to urban land and buildings. Regarding agricultural land, although the 2012 Farmland Law removed the ban on providing security and transfers, the actual practice of registration has not been commenced because no regulations have been defined for registering security rights, attachments, etc.

So if the registration office is, at a minimum, strictly registering attachment orders against urban land and buildings, the uniform claim by the Yangon Western District Court judges that "attachment orders are not being registered" is incomprehensible. The author requested the opportunity to visit a registration office within Yangon city while conducting research, but gave up when told that the court could not arrange such a visit.

Under the Indian law that provides the basis for Myanmar law, High Court precedents in some states have clarified the land registration systems (land tax registries, regional government registries, farming rights registries at the village level, etc.) which are subject to the attachment order in Order 21, Rule 54 (1)-(2).[10] In the Myanmar law also, Rule 54 (2) requires that proclamation occur at the office of the Collector (administrator) of the district. As seen in the aforementioned register of the Myeik registration office, it can be thought that execution courts in at least some regions use this legislative provision as the reason for sending registration requests to registration offices, in order to reflect the proclamation of attachment orders in the registration office's primary register, which fulfills the proclamation function that used to be fulfilled by the district Collector's office during the period of British rule. On the other hand however, the text of Order 21 of India's Code of Civil Procedure does not contain a provision concerning prevalence of a bona fide transferee for consideration that corresponds with Order 21, Rule 54 (3) of the Myanmar law; instead it is limited to the High Court in some states issuing amendments to the law.[11] Under the Indian law, the problem of competing priority between an attachment and a third-party transferee is addressed via the registration system in some states, and

via the burden of proof by the third-party in other states. The practice the author saw in Myeik came under the former, but Yangon Western District Court judges seemed to take the latter.

Does this difference in choices reflect a difference in the level of trust that judges have in the registration system? Myanmar's registration is highlighted by loud criticism amongst Japanese investors and lawyers for problems such as corruption and high registration fees, but there is a misconception regarding the system's structure. The system's structure as witnessed by the author in Myeik District of the Tanintharyi Region is an antique system of certificate registration, but the stringency and accuracy of its operation left a good impression. One cannot avoid the sense that there is a problem of self-righteousness in the attitude of the judiciary that claims the attachment order itself has preferential effect and neglects proclamation of the attachment via registration. The Myanmar courts must not lapse into the self-righteousness of neglecting the registration of attachment orders on the presupposed lack of faith in their own country's registration system, but rather it is necessary that they respond to society's economic requirements by recognizing the necessity of increasing the ability to proclaim attachments and making improvements towards increasing the effectiveness of judgment executions.

4. Interface with the Bankruptcy Procedure

(1) Execution by Multiple Creditors

Myanmar does not have a bankruptcy act, and as of 2017 it is still at the stage of drafting an insolvency law with the support of the World Bank, Asian Development Bank and Japan; corporate bankruptcy currently uses the corporate liquidation process under the 1913 Burma Companies Act. However, as explained in (2) below, the corporate liquidation process is inconvenient for debt collection as it lacks the flexibility to be commenced upon the initiative of a creditor, instead consisting of processes such as judicial liquidation and voluntary liquidation that a creditor does not have the right to commence. In order to avoid the result of being relegated behind the preferred payment of tax claims and employee wages under these processes, there is a trend for secured creditors to rush to commence mortgage foreclosure (Order 34) or private enforcement of the security. Furthermore, where

there are several unsecured creditors competing to recover their debts, it seems that there is incentive to promptly make individual claims ahead of other creditors before the debtor lapses into insolvency.

There are no provisions in the Code of Civil Procedure or Order 21 for the situation of competing execution by multiple creditors. The Code of Civil Procedure (Section 73) presumes the right of exclusive preference of secured creditors (clauses (a) to (c)), and the balance goes to; first, the cost of auctioning the debtor's property; second, to the decree-holder whose judgment was executed; third, to discharge any additional principal or interest owed; and fourth, any remainder is distributed equally between other holders of decrees who applied to the court for execution prior to the sale of the property. That is, in a competition between creditors that hold multiple different decrees, the first decree-holder receives their full amount as a preferential payment and the second and subsequent decree-holders receive only a portion of the remainder, yet the rules for deciding the order are not clear in the legislation. Order 21 (Rule 52) defines only that where property is placed in the control of a court, the priority between the decree-holder and other rights holders shall be decided by the applicable court. According to an explanation from a Myanmar judge, the first priority is a question of the order of arrival at the execution court via the judgment court, and which of the second and subsequent decree-holders are eligible to receive a division of the remainder is a question of whether a claim for execution had been submitted to the judgment court at the time of auction. When this is put into practice, the speed at which the judgment court transmits the execution documents to the execution court largely decides the issue of debt recovery amongst multiple decree-holders, which raises the question whether this can be called an appropriate system design.

In comparative law, the treatment of multiple creditors during civil execution is debated in terms of the extent that bankruptcy law provides for principles of equality between creditors. That is, in France and Italy, because the bankruptcy law has a mercantile insolvency principle that only applies when the debtor is a merchant, there is also an intention for equality between creditors in general debt recovery from people other than merchants, and the civil execution system adopts a principle of equality between multiple creditors. By comparison, English law and German bankruptcy law has general bankruptcy principles regardless of whether

the debtor is a merchant, so the civil execution system uses a principle of priority for the first creditor to arrive, without giving particular consideration to principles of equality. Myanmar law's principle of priority for the first creditor can be said to draw from the flow of English law, but as the compromise of equality between second and subsequent creditors makes the priority of the first creditor more conspicuous, it seems that the system's design gives even greater motive for creditors to become first in priority. This kind of design is capable of inviting an unnecessarily ruthless attitude towards debt recovery. With Myanmar's economic development, financial institutions are expected to play a role in providing flexible production financing that responds to the debtor's business circumstances, but there is apprehension that is will become an institutional barrier.

(2) Relationship between the new insolvency law bill and the civil execution process

It is clear that it is possible to overcome the ill effects of the preference given to priority in the civil execution system by designing a sound and egalitarian insolvency law. However, as of 2017, looking at the draft insolvency law being prepared by Myanmar with support from the Asian Development Bank and other institutions, it is strongly influenced by the World Bank's Principles on Insolvency Law (1999/2006) and displays an intention to give preference to rehabilitative processes that prioritize providing relief to the management of insolvent corporations, which goes a step further than the United States' Chapter 11 proceedings. Within this process, a system design can be seen which classifies the group of creditors in a complicated manner and forcibly decides upon debt reduction in what can be called a cram down process. By putting this principle of preference for rehabilitative processes into legislation, existing creditors will be unable to exercise the option of liquidation in circumstances where it is the most economically rational option, and will be confronted with the adoption of a rehabilitation plan prepared by the insolvent corporation's management and the loss of rights of exclusion and debt reduction regardless of whether they are secured or unsecured creditors. There is no time to even talk of debt recovery under the principle of equality of creditors.

If the new insolvency law progresses with the principle of preference for rehabilitation processes made to help the insolvent corporation's management, the

need to reform the civil execution system to give equality to creditors will arise because it cannot be expected that the insolvency law will have a disciplined and egalitarian debt recovery function.

(3) Relationship with the Corporate Liquidation Process

Until the new insolvency law is introduced, the liquidation process defined in Part 5 of the current 1913 Companies Act serves as a debt recovery process against corporate debtors. There are three categories of liquidation process; a judicial liquidation process led by an Official Liquidator appointed by the court, a voluntary liquidation process conducted by the parties, and a voluntary liquidation process under the supervision of the court (Companies Act, section 155). From the point of view of being an opportunity for debt recovery, the judicial liquidation process which can be commenced by a creditor and the voluntary liquidation process which involves the creditors in the rehabilitation process led by the company both attract attention. The former option is premised upon equality within each group of creditors and shareholders (Section 167), but the latter does not have any provision in this regard.

One of the grounds for commencing judicial liquidation proceedings is "inability to pay debts" (Section 162 (v)), or put simply a bankruptcy process. The inability to pay debts is presumed as circumstances where an individual creditor does not receive payment for more than three weeks after serving a demand for payment, the execution of a final judgment or order by a Court is returned unsatisfied, or the court is certifies that the company is unable to pay its debts (Section 163). The right to apply for judicial liquidation lies with the company itself, a single or multiple creditors, a single or multiple shareholders, or the corporate Registrar upon confirming that the company is unable to pay its debts based on objective evidence such as the company's balance sheet or an inspector's report (Section 166(aa)). During the judicial liquidation process, the Official Liquidator has flexible discretionary authority that includes using rehabilitative methods such as provisionally carrying on the company's business and obtaining new funds (Section 179), while the court having only a guardian role and endows the Official Liquidator with discretionary powers (Section 180).

On the other hand, voluntary liquidation can be commenced by the company

deciding by extraordinary resolution at a general meeting (section 203 (3)), but where the management declares that the company will be able to pay its debt in full within three years of disclosure of the company auditor's report,[12] it becomes a "members' voluntary winding up process" with an Official Liquidator appointed at a general meeting (Section 207), or alternatively if no such declaration is made and the company commences long-term rehabilitative liquidation, it becomes a "creditors' voluntary winding up process" with an Official Liquidator appointed at a meeting of creditors (section 209B). In either process the Official Liquidator has large discretionary powers, with only minimal procedural provisions such as reporting upon the progress to the company's general meeting and creditors' meeting. In the "creditors' voluntary winding up process", if the creditors' meeting and the company nominate different candidates during the process to appoint an Official Liquidator, in principle the creditors' candidate will be appointed, although the company can apply to the court within seven days for an order appointing the company's candidate as Official Liquidator. Further, the company can appoint members to the committee of inspection that supervises the Official Liquidator (Section 209C). In spite of its name, this "creditors' voluntary winding up process" can be a method of extending the life of the company by continuing to operate for three or more years, and there is a concern it can be abused due partly to the fact that the opportunity to commence the process is in the hands of the company.

Alternatively, the process of voluntary liquidation under the supervision of the court (Sections 221-226) is commenced via extraordinary resolution at a general meeting and is a straightforward liquidation process performed by an Official Liquidator directly appointed by the court.

How should the junction between the civil execution system and these corporate liquidation processes be considered? If the execution process, which normally develops over a long time span of more than 12 years for each decree-holder, is taken as the time axis, then the sense of difference with the image of the judicial liquidation and voluntary liquidation processes where the Official Liquidator can boldly wield their discretion to in an emergency of collective debt recovery is too great. The trend in using these procedures in Myanmar overwhelmingly favours the "judicial liquidation process" that is commenced by the creditors only at the stage

of advanced insolvency of a company.[13] At the stage of commencing this process, the remaining assets of the company are already insufficient and the risk of the company's assets being unjustly dispersed is high, yet the system for recovering dispersed funds relies upon criminal prosecution and cannot be said to be sufficient.[14] If a collective rehabilitative debt recovery system functions so that creditors can assist the debtor's regeneration at an earlier stage prior to arriving at these terminal conditions, then in combination with the recovery of dispersed assets and pursing the responsibility of the management, the effectiveness of the debt recovery should improve.

In Japanese law, the attitude towards thoroughness of equality principles within both the civil execution system and the general bankruptcy principles is doubted, but in actual economic activity by companies under free competition, there will normally be multiple interlinked credit and debt relationships, so group debt recovery is resigned to being an extension of stand-alone debt recovery. In Myanmar's economic situation, when recollecting the image of development from idyllic person-to-person debt relationships towards relationships that develop large industrial financing involving multiple transactional relationships that mutually circulate equipment and operating funds and share the same fate, a bankruptcy system that healthily maintains the center of that industrial financing while addressing and continually nourishing the suffering periphery at an early stage would seem to have a role in the substantive economy, and in a sense serves a role as an immunity system. It seems necessary to also develop the engagement of the civil execution system where it interacts with that immunity system. The civil execution system requires revisitation based upon observation of the economic system's needs in order to consider what degree a claim should be prioritized in the relationship between individual claims and the secured claims, priority claims and various unsecured claims that arise from everyday transactions, and from what point the principles of equality are desirable.

5. Conclusion and Future Topics

In the author's January 2017 meeting at the Yangon Western District Court which has been frequently mentioned in this article, the point that left the strongest

impression was how the six judges uniformly said that reform of the current execution process is unnecessary. The process which allows the judgment-creditor to freely choose from material and personal execution methods can be described as the judicial system carrying out private punishments, but the judges assured they can avoid any problem because there is a framework of due process. Stays of execution that occur whenever the debtor files an objection or separate action were considered unavoidable as part of the due process. The "mediatory" judgment and execution practices which take into consideration the debtor's circumstances and order payment in installments do not appear in the legislation, yet no discomfort was expressed. On the other hand, the civil detention system which appears to be inhumane was considered essential due to its effect of stopping the avoidance of repaying debts. It was asserted that attachment orders take priority as a matter of course without registration, and the relationship with third-party acquirers was considered a matter of producing evidence of bona fides and consideration. There were no opinions expressed regarding improving the process from the aspect of multiple creditors competing during debtor recovery and enforcement of security. The Myanmar judicial branch adheres to the British colonial laws imposed a century earlier and appeared to fear reform.

Civil execution in the era of increasing foreign investment must not remain as a system where the government conducts private punishments that send debtors to jail as revenge for not repaying debts. Even if the role of civil execution was limited under a "command" economy in which the government controlled the cropping of agricultural land and exchange of commodities, under the current Constitution which declares a "market economy" (Section 35), the economic activities played out by all economic entities in every aspect of everyday life are driven by "promises", and the civil execution system is entrusted to act as the ultimate governmental guardian function that makes a promise what it is. The operation of the current Myanmar law that has come to be coloured by human factors (punishment, introspection, reduction and release from debts, etc.) can be called very interesting, but there is no mistake that the civil execution system, which is a cornerstone to the future liberalization and improvement of the economic system, must undergo an ideological transformation

towards the direct abstraction and formalization that a promise is binding.

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Notes

1 The Supreme Court of the Union of Myanmar launched a 3-year-plan of judicial reform titled "Advancing Justice Together: Judiciary Strategic Plan 2015-2017" (Supreme Court of the Union of Myanmar 2015).

2 Concerning Order 21, Rule 29 in the Indian law, there is court precedent that says a stay of execution is limited to exceptional circumstances. Universal Law Publishing (2003 edition), Order 21, Rule 29.

3 According to a survey of the Osaka District Court's Execution Center, in the 2015 fiscal year there were approximately 9,000 execution cases (approximately 2,000 cases of execution against real property and approximately 7,000 cases against monetary claims), against which there were 32 appeals against a disposition of execution and 6 objections to a disposition of execution. Actions to oppose execution and third party actions occurred at a rate of approximately 1-2 per 300 cases.

4 See Niranjan, V. (2016).

5 The Code of Civil Procedure 1908 along with State and High Court Amendments and Short Notes and Subject Index, section 11 (1). (Universal Law Publishing Co. Pvt. Ltd. 2003 version)

6 Presentation by Judge Swe Swe at the Yangon Western District Court on 17 March 2016. Also according to the interview of six Yangon Western District Court judges on 24 January 2017.

7 As of the collapse of the Combaung Dynasty, it is said 57 versions of *Dhammathat* together with 82 books of judicial precedents (*Hpyathton*) were found kept at the King's library, from which *Manugye Dhammathat* was translated into English by Richardson, assistant to the Tenaserim administrator, and became most influential.

8 See Okudaira (1986) p.114-124.

9 According to the author's January 2017 interviews of Tanintharyi Region's Minister for Agriculture, Dawei District's chief, Myeik District's chief and others, in spite of the stream of commercialization in the Dawei Special Economic Zone, there is a focus on guaranteeing the lifestyle of farmers, and the use of agricultural land for purposes other than farming is strictly regulated, and it seems this policy will be maintained for the time being.

10 Bombay High Court judgment and other judgments related to Rule 54 (2).

11 Ahmadabad High Court judgment and other judgments related to Rule 54 (3).

12 The declaration of ability to repay debts in full during a "members' voluntary winding up process" does not appear to mean the directors' guarantee to repay debts. Refer to the separate provisions regarding the unlimited liability of directors of limited liability companies (Section 157).

13 There are provisions concerning the unlimited liability of directors during the liquidation of a limited liability company (Section 157), but this may only apply to the concealment of insolvency.

14 As a system for recovering unjustly dispersed assets, there is a provision to invalidate unjust actions (Section 231), but because there is a lack of detailed rules in many countries regarding what sort of actions are within the scope of the provisions and the estimated time period, they cannot be easily applied in practice. There are no specific provisions for the invalidation of insider trading either. Further, there is the court's authority to examine (Section 195) and the Official Liquidator's ability to request examination in instances of fraudulent actions by management (Section 196), and orders for restitution or the payment of damages by directors and other related parties (Section 235) would appear to be the consequences. However in practice, the focus is upon punishment via criminal prosecution rather than these civil processes intended to recover dispersed funds. Criminal provisions have been established against aggravated breach of trust relating to the embezzlement or unjust distribution of company assets by the directors and others related to management, and although they are primarily limited to the 12 month period prior to the commencement of the liquidation process, the punishment is somewhat severe (Section 238A) and there are also provisions that apply to the opposing party of the unjust transaction (Section 238A (2)). Regarding these, both the Official Liquidator and Registrar have the authority to instigate prosecution (Section 237).