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Financial Law Board

Principle of Creditors' Equality under Reorganization Plan

1. Creditors' Equality in Insolvency Proceedings

(1) Substantial Equality

In insolvency proceedings, creditors vested with the same or similar rights under substantive laws should be treated equally in principle. This principle, known as "formal equality," is strictly observed in bankruptcy proceedings (Article 194, Paragraph 2 of Bankruptcy Act). In corporate reorganization proceedings which are restructuring-oriented proceedings, on the other hand, the terms concerning a change of rights in a reorganization plan should also ensure equality. In such cases, however, the co-existence of different terms for a change of rights is permitted in "cases where equity would not be impaired even if discrimination is otherwise set among the persons vested with the same or similar rights" (Article 168, Paragraph 1 of Corporate Reorganization Act). This is referred to as "substantial equality."[1] Traditionally, influential opinions have indicated certain general criteria stipulating, for example, the allowance of "the provision of difference, etc. by considering individual features of rights, including the manner of occurrence, repayment date, object of claims, difference in the time of occurrence," or "the provision of difference, etc. corresponding to the nature of the relevant rights, such as a subcontractor's claim, a claim of a supplier of material, energy, etc., or a claim under a loan agreement, etc."[2]

(2) Dividend rate for reorganization claims under reorganization plans and the graduated approach

If we strictly follow the principle of creditors' equality, we should use a uniform dividend rate for all claims in a reorganization plan without providing any distinction between reorganization creditors based on the values of their respective claims (fixed rate approach). In actual reorganization plans, however, the procedure commonly employs a graduated approach whereby the dividend rate varies according to the values

[1] The same applies to civil rehabilitation proceedings (Article 155, Paragraph 1 of Civil Rehabilitation Act).

[2] Akira Mikazuki et al., Hajime Kaneko (ed.), *Jokai Kaisha Koseiho – ge* (Annotated Corporate Reorganization Act – Part II), 1974 at 566.

of the claims held by the reorganization creditors.[3] The graduated approach is further classified into two types: the cumulative method (*tsumiage hoshiki*), a method which determines a separate dividend rate or amount for creditor claims in each size-range, and the unbalanced distribution method (*keisha haibun hoshiki*), a method which sets the dividend rates against the total value of the claims.

＜Example of cumulative method＞

Confirmed claims will be discharged according to the following classification:

Amount of confirmed claim (For each portion of claimed amount)	Discharge rate	Dividend rate
¥5 million or less	0%	100%
More than ¥5 million to ¥100 million or less	90%	10%
More than ¥100 million to ¥10 billion or less	95%	5%
More than ¥10 billion	96.5%	3.5%

＜Example of the unbalanced distribution method＞

Confirmed claims will be subject to a change of right as specified in the "Change of right - substance" column, according to the value of claims specified in the "Classification" column of the following [Table of Change of rights], and the remaining claims will then be discharged.

[Table of Change of rights]

Classification of claims	Change of right - substance
(i) ¥0.3 million or less	100%
(ii) More than ¥0.3 million to ¥1 million or less	¥0.3 million
(iii) More than ¥1 million to ¥20 million or less	30%
(iv) More than ¥20 million to ¥2 billion or less	5% + ¥5 million
(v) More than ¥2 billion to ¥10 billion or less	4% + ¥25 million
(vi) More than ¥10 billion to ¥100 billion or less	3% + ¥125 million
(vii) More than ¥100 billion	1.5% + ¥500 million

Reorganization plans that specify unbalanced dividend rates in proportion to the values of claims of individual creditors seem to have been approved as arrangements which, firstly, can be categorized as plans applicable to "cases where equity would not be impaired even if discrimination is otherwise set among the persons vested with the same or similar rights"; and secondly, as plans satisfying the requirements for approval to the effect that the "reorganization plan shall meet the provisions of laws and ordinances" (Article 199, Paragraph 2, Item 1 of Corporate Reorganization Act).

[3] For the following statements and an example of a reorganization plan, see Japanese Association for Business Recovery (ed.), *Kosei Keikaku No Jitsumu to Riron* (Practice and Theory of Reorganization Plan) 2004.

2. Reorganization claims held by trust banks and the graduated approach

A certain reorganized company adopted the unbalanced distribution method for general reorganization claims under a recently approved reorganization plan. In this case, the claims filed by the trust banks were classified based on the total value of the filed claims, and the change of rights was determined accordingly.[4] There now seem to be other reorganization plans in which the dividend rates for the reorganization claims held by the trust banks are determined similarly on the basis of the total value of the claims filed by the banks.

Reorganization claims held by trust banks consist of banking account portion and trust account portion. Some may wonder whether it might be more reasonable, when working with these two kinds of reorganization claims, to treat the trust account claims by the same method used to treat small-amount claims, in order to secure a higher dividend rate for the claims under the unbalanced distribution method, because trust account claims are considered to be substantively a pile of individual beneficiary's rights, and the amount of each beneficiary's claim is far smaller than the total amount of claims filed by the trust bank.

Here we will first take up the example of a reorganization of an entity operating a big retail store. If the trust banks in this case applied a scheme under which the banks sold beneficiary interests backed by trust assets consisting of monetary claims such as performance deposit for lease, the total amount of reorganization claims filed by the trust banks would be substantially larger then the amount of individual beneficiary's beneficiary interests. As a result, the dividend rate applied under the reorganization plan would fall below the rate which would have otherwise been applied to such beneficiary interests had such beneficiary interests been filed as individual beneficiary's rights. Generally speaking, if one trust has plural beneficiaries, a difference may arise between the value of rights forming the trust assets and the value of individual beneficiary's beneficiary interests. If this occurs, the difference will lead to a difference in the dividend rates applicable under the reorganization plan. With respect to the reorganization plan in the reorganization case referred to above, investors were reported to have invested several hundred million yen behind trust banks which filed reorganization claims ranging from approximately a billion to ten billion yen. If these claims were computed according to the "unbalanced distribution" formula mentioned above, claims amounting to several hundred million yen would be classified as level (iv) claims (entitled to a dividend calculated by the formula "5% + ¥5 million"), while

[4] Tokyo District Court 2001 (Mi), No. 4. Reorganization plan for the reorganized company Kabushiki Kaisha Maikaru (Approved on September 30, 2003).

claims of some ten billion yen would be classified as level (vi) claims (entitled to a dividend calculated by the formula “3% + ¥125 million”).

Secondly, even if a trust bank is entrusted with plural collective investment schemes, a difference may arise between the amount of individual trust assets and the total amount of reorganization claims filed by the trust bank. This, in turn, could generate a problem such as an application of a lower dividend rate as described above.

Thirdly, in case the banking account portion of the trust bank is significantly large and the bank files the sum of the trust account and banking account portions as one reorganization claim, the dividend rate applicable to the trust account portion of reorganization claim under the reorganization plan would be lower than the rate which would have been applied to such claims had they been filed separately.

While the principle of creditor equality is oriented to equality in terms of the value of the claims, the graduated approach focuses on the value of claim held by each creditor, paying more attention to the “creditor.” The question presented above comes from a concern as to how equal treatment of claims is related to the graduated approach, an approach that specifies dividend rates according to the total value of claims held by a specific creditor.

3. Reorganization claims based on corporate bonds and the graduated approach

A question similar to that stated above is embodied in the determination of the dividend rate under the unbalanced distribution method for individual reorganization claims involving corporate bonds. Being securities, corporate bonds are subject to continued negotiations both before and after the beginning of reorganization proceedings. Thus, their dividend rate cannot be determined on the basis of creditors.

In one recently approved reorganization plan, the existence of too many bondholders made it difficult to identify the bondholders. As a result, the policy in place dictated that the dividend rates had to be determined based on the face values. The dividend rates were therefore determined by dividing the total issue amount of specific series bonds by the number of bondholders to obtain the average amount of corporate bonds held by the bondholders, and then applying the results to the unbalanced distribution method.[5] To go into more detail, 1,555 bondholders held wholesale bonds amounting to ¥150 billion, with average holdings of approximately ¥100 million each. By applying the unbalanced distribution method mentioned in Section 1 to this average, the claims were classified as

[5] Japanese Association for Business Recovery (ed.) at 493-494 [Hideo Seto], See note (3) supra.

Level (iv) claims and the bondholders were entitled to receive dividends at approximately 10 percent of the par value of their claims. Similarly, 38,000 bondholders held retail bonds with a total issue amount of ¥90 billion, with average holdings of approximately ¥2.25 million per bondholder. According to the above-mentioned unbalanced distribution method, these figures were classified as Level (iii) claims and the bondholders were entitled to receive dividends at 30 percent of the par value of their claims.

Of course there might have been bondholders who held wholesale bonds in amounts of ¥20 million or less, or bondholders who held retail bonds in amounts exceeding ¥20 million. If we emphasize this possibility, we can conclude that compliance with the principle of creditor equality was nothing but constructive. As long as we rely on the unbalanced distribution method, however, we can assess that the above approach accords bondholders a treatment as equitable as possible alongside the other creditors.

If we were to rely on the positive evaluation mentioned above, we would come to doubt that the beneficiaries were favorably treated in the valuation of trust bank claims in the reorganization plan mentioned in Section 2 above, because we would even be unable to find a procedure to divide the total value of filed claims by the number of beneficiaries to determine the average size of beneficiary interests and apply the results to the unbalanced distribution formula.

4. Direction for solution — (1)

If we elect to use the graduated approach concerning the dividend rate in the reorganization plan, we can resolve the above doubt by dividing the value of trustees' confirmed claims by the number of beneficiaries to obtain data on the average beneficiary and the values of its right, and applying the results to the graduated approach.

It is of course theoretically possible to determine the individual beneficiary's right in the case of a trust, as it differs from that in the case of securitized corporate bonds which are subject to negotiation. Therefore, it might be possible for the trustees to file each beneficiary's name and its beneficiary interests, and apply the confirmed value of right to the graduated approach.

But considering the number of beneficiaries handled by typical trust banks, it is too unrealistic to exercise rights in this manner. Accordingly, we seem to have no choice but to consider that equality among interested parties is maintained by the arrangement based on the concept of the average beneficiary, as described above.

5. Direction for solution — (2)

(1) Grounds for the graduated approach

In the context of creditor's equality, some may question whether it is appropriate to adopt graduated approach to determine dividend rates specified in the reorganization plan.

The graduated approach has been accepted in light of creditors' equality for the following substantive reasons:

(i) If the parent company provided a loan in lieu of investment, its claim on the loan will be subordinated.
This is based on the following doctrine: if the controlling shareholder provides funds in the form of loans instead of investments at the time of the subsidiary's incorporation and in doing so causes undercapitalization of the subsidiary relative to the scale of its business, the claim on the loans shall be treated pari passu with investments in the insolvency proceedings.

(ii) If a creditor is the counterparty of a fraudulent transaction, the creditor's claim will be denied in the reorganization plan.
If a fraudulent act is committed during the debtor's critical period, the trustee in reorganization may take this approach and bring about effects economically similar to a claim denial by unfavorably treating the claim owned by the fraudulent party in the reorganization plan instead of exercising the right of denial and requesting the return of the lost assets.

(iii) If a business fails due to an erroneous exercise of substantive management control by the creditor as parent company, or by main banks, etc., such party shall assume liability for the results or implied guarantee.
If a party that has controlled debtor's management through dispatch of directors from the parent company, main banks, etc. causes a business failure due to inappropriate judgment (or deprives the subordinate company of its income opportunity), this approach allows an arrangement similar to an offsetting of the claims owned by the parent company, etc. by the failed company's claim for damages. Or, if the parent company, etc. is deemed to have provided an implied guarantee to its creditor, etc., this approach can be operated to bring an effect essentially the same as that brought about when the parent company, etc. has performed its guarantee for all creditors.
With respect to the three possible legal structures described above, the court precedents suggest that the courts have not taken a consistent view towards the grounds listed in (i) through (iii). Accordingly, we cannot conclude that sufficient

legal arguments have been provided so far on these possibilities.[6]

(iv) In addition, under the former economic background, the main banks had the financial strength to absorb losses resulting from subordination of their claims. We can clearly conclude that no such background can be expected today.

(2) Problems of graduated approach and direction for solution

The biggest problem in adopting graduated approach is a lack of transparency in the method used to determine the individual dividend rates specified in the reorganization plan. In the process of developing the reorganization plan, there is (actually) no opportunity for the trustee in reorganization and reorganization creditors, etc. to directly confront each other in addressing the factors mentioned in items (i) to (iii) above To solve this problem, the process to determine dividend rates shall be disclosed to the interested parties and straightforward discussions shall be commenced to resolve whether the possible considerations listed in Items (i) to (iii) can be effective as legal structures under Japanese law. If they can be applied to specific cases, the parties will determine the extent to which unfavorable treatment of creditor claims could be justified. If no argument can justify such unfavorable treatment, claims should be treated formally in as equitable a manner as possible according to the basic principle.

As of today, no comprehensive discussions have been made concerning the factors mentioned in Items (i) to (iii)[7]. It seems difficult to argue on these considerations squarely. In order to ensure the transparency of reorganization proceedings in the meantime, we should require that a trustee in reorganization be held accountable to the interested parties, to the maximum extent possible, with respect to the factors the trustee in reorganization has considered in adopting the graduated approach in the course of developing the draft plan for reorganization.

If we adopt the above attitude towards reorganization proceedings and the trustee in reorganization intends to prepare a draft plan of reorganization specifying lower dividend rates for trustees' rights on the grounds of largeness of their rights, the trustee in reorganization should disclose and account for substantive grounds for his reasoning to the maximum extent possible. Should the trustee in reorganization fail to do so, the dividend clause should be drafted to provide dividends at a fixed rate for reorganization claims of all sizes.

(3) Possibility of separate filing of trust account portions and banking account portions,

[6] See "Subordination doctrine for bankruptcy claims" in the [Attachment] below.

[7] For example, the point mentioned in Item (i) was discussed in the process of amending the bankruptcy-related laws but could not be expressly documented.

and the separate filing of individual trusts

In addition to the discussions in Section 5 (2) above, we can also consider a possible scheme that allows trust banks to file trust account portions and banking account portions separately in their filing of reorganization claims, and also to treat these two portions separately in the reorganization plans under the graduated approach. It would be particularly unreasonable to apply lower dividend rates to the trust account portion, as the trust bank has a larger banking account portion in its reorganization claims. Given that the trust account portion and banking account portion obviously belong to different creditors, these creditors should be at least entitled to the dividends at the rates corresponding to the values of their respective account portions.

Furthermore, if the separate filing mentioned above was to become possible, the reorganization proceeding should take further steps forward to approve the separate filing of claims for each trust. Even though we may have difficulties in identifying each beneficiary, filing by trust assets is possible. Compared with the case where the trust account portion is filed in aggregate value, this separate filing approach would more closely reflect the size of rights owned by beneficiaries which are beneficial owners.

[Attachment]

1. Subordination doctrine for insolvency claims

The doctrine of subordination of insolvency claims refers to a theory which stipulates subordinated treatment of certain claims against the intention of creditors in insolvency proceedings based on certain grounds.[8]

2. Judicial precedents

(1) Supreme Court judgment (First petty bench) dated December 21, 1995 (unpublished).

This Supreme Court judgment (First petty bench) dated December 21, 1995 (1994 (O) No. 683, in a case seeking confirmation of bankruptcy claim) is the only judgment in which the Supreme Court rules on the subordination doctrine for insolvency claims. In this case, a 100% parent company, X, filed a claim for indemnity against its bankrupt subsidiary as its claim in bankruptcy. X obtained the claim as a result of discharging its liability arising from the guarantee of the subsidiary's debt. When Y, another creditor, objected to X's claim, X instituted an action to seek confirmation of the claim. The objecting creditor Y pointed out thin capitalization and inadequate management as the grounds for subordinating the parent company's claim.

The trial court rejected Y's argument on the following grounds (Tokyo District Court judgment of December 16, 1991 (*Kinyu Shoji Hanrei*, Issue No. 903, p. 39): firstly, the claim in bankruptcy in this case did not fall within the category of a subordinated claim in bankruptcy as defined in Article 46 of the Bankruptcy Act, and for the purpose of Article 40 of the Bankruptcy Act, no claim in bankruptcy can be treated subordinately

[8] This doctrine was rooted as common law doctrine on the occasion of the Deep Rock judgment in 1939. Article 510 (c) established in the federal bankruptcy law, as amended in 1978, accepted the case law without modification. See, Kenjiro Egashira, *Kaisha Hojinkaku Hitei No Hori* (Doctrine denying juridical personality of companies), 1980 at 292-332, and Junichi Matsushita, *Ketsugo Kigyo no Tosan Hoteki Kiritsu (1)* (Discipline under bankruptcy law for United Corporations (1)), Hogaku Kyokai Magazine Vol. 107, Issue No. 11, at 1776-1848, 1990. Similar treatments are expressly accepted as "Doctrine of loan by members in lieu of capital investment" in the private company law and bankruptcy law of Germany. See Toshio Uehara, *Kaisha no Tosan to Naibu Saiken no Retsugoteki Shogu – Nish-Doitsu ni Okeru Shihon Daitaiteki Shain Kashitsuke no Hori (jo) (chu) (ge)*, (Corporate Bankruptcy and Subordinated Treatment of Internal Claims -- Doctrine of loan by members in lieu of capital investment in West Germany (I) (II) (III)), *Hanrei Jiho,* Issue No. 1277 at 3, No. 1280 at 3, No. 1283 at 3, 1988. The new German bankruptcy law enforced in January 1999 has an express provision reflecting this doctrine in Article 39, Paragraph 1, Item 5.

without express underlying provisions of law; secondly, the judgments asserted by Y as the precedents for approving subordination of claims (the judgments issued by the Tokyo High Court on February 11, 1965 and the Fukuoka High Court on December 21, 1981) were made in relation to corporate reorganization proceedings falling under the case covered by the proviso of Article 229 of the Corporate Reorganization Act, a proviso which expressly permitted discriminatory treatment, and they did not provide grounds for the subordination in this case. Y appealed.

The court of appeal dismissed the appeal on the following grounds (Tokyo High Court judgment of November 30, 1993): firstly, treatment under Article 229 of Corporate Reorganization Act was inapplicable to bankruptcy cases which did not fall under any express provision to justify such treatment, and even with the general principle of fairness and justice, the court could not make any legal interpretation equivalent to the creation of a new provision of law; secondly, the doctrine under US and German laws should be considered in Japan merely as reference in the legislation process, not as components of legal interpretations, and while the ideas of fairness and equity were common to all nations, we must be prudent in making legal interpretations which bring about effects equivalent to the establishment of new provisions of law solely on the basis of such ideas. Y appealed to the Supreme Court, but the court dismissed the appeal, holding that: "Based on the facts legally established in the original judgment, the original court's judgment on the arguments can be admitted as legitimate, and this court has found no illegality in the process as asserted by the plaintiff. The plaintiff's arguments, including the argument on unconstitutional treatment, only insisted that the law had been violated in the original judgment from the plaintiff's perspective. This court cannot adopt such a view."

(2) Hiroshima District Court (Fukuyama Branch) judgment dated March 6, 1998 (*Hanrei Jiho*, Issue No. 1660, p. 112)

A lower court recently made a judgment which adopted the substance of the Deep Rock Doctrine of the US bankruptcy common law as a principle of good faith while denying application of the doctrine. The details of the case were as follows:

Though X Corporation was not a parent company of bankrupt A Company in terms of capital relationship, X fully supported A in a financial aspect and controlled A's management in general terms during the two years preceding A's bankruptcy as X's exclusive subcontractor. Acting with full knowledge of the critical condition of A's business during this period and its inevitable collapse, X tried to prolong the survival of A, the bankrupt company, for X's own reasons (to enable A to continue carrying out the contracted work) and thereby shared culpability for the damage incurred by the

suppliers which received promissory notes drawn by the bankrupt company. When X filed, as its claim in bankruptcy, a monetary claim for indemnity against A Company which X obtained as a result of subrogated payment of A's debt, Y and others (other creditors and trustee in bankruptcy) submitted objections. In an action seeking confirmation of bankruptcy claim instituted by X Corporation, Y and others sought dismissal of the claim by invoking the Deep Rock Doctrine and claiming that X had violated the good faith principle.

The judgment indicated, firstly, with respect to the Deep Rock Doctrine, that "There is no provision which provides grounds for criteria similar to the one presented by the said doctrine in our country's Bankruptcy laws. Rather, claims in bankruptcy of the same rank shall be treated equally, with the exception of the preferred, subordinated, or other general claims in bankruptcy which are expressly provided for by law (Article 40 of Bankruptcy Act). Therefore, Y's argument for application of the said doctrine to the claim filed in this case is inappropriate by itself." The essence of the holding, if limited to this portion, corresponded to the one indicated in the Supreme Court (First petty bench) judgment of December 21, 1995 and the judgments of the related lower courts.

In the second part of its judgment, however, the court added the following general statement: "…but the 'principle of equality (equity)' underlying this doctrine is also appropriate in the bankruptcy proceedings of our country. There may be cases where some creditors formally regarded as general creditors in bankruptcy are not permitted to execute their claims to receive dividends from the bankrupt's estate on an equal basis with other general creditors in the bankruptcy proceedings, if such execution is done not 'in faith and in accordance with the principle of trust' (Article 1, Paragraph 2 of Civil Code) in light of their relationship with the bankrupt, manner or extent of their involvement in the bankrupt's business management, etc. Accordingly, by one interpretation, it can be concluded that Y's argument makes reference to a violation of the said good faith principle." On the grounds of this general idea, the court dismissed X's claim, stating that, based on the facts mentioned above, "X's execution of the filed claim of this case in order to receive dividends from the bankrupt's estate on an equal basis with other general creditors is against the principle of good faith and is not permissible because the bankrupt's estate cannot satisfy even the claims filed by other general creditors in bankruptcy."[9]

(3) Subordinated treatment in reorganization plan

[9] The legal structure to dismiss filing of claims as an abuse of right has been pointed out in academic theories. See Haruhiko Katagi, *Kasho Shihon Kaisha to Sono Kisei (II)* (Undercapitalized Companies and their Control (II), Hogaku Ronso, Vol. 112, Issue No. 2 at 96, note 12, 1982.

Doctrine concerning the subordination of insolvency claims has been argued not only in actions seeking confirmation of bankruptcy claims, but also in appeals against rulings approving reorganization plans which specify subordinated treatment of reorganization claims. The following is a decision rendered in a case where the relationship between a controlling company and subordinated company is examined.

(i) Fukuoka High Court decision of December 21, 1981 (*Hanrei Jiho*, Issue No. 1046, p. 127)

In this case, X Corporation, the de facto top shareholder of A company, a corporation in need of reorganization, controlled A's personnel affairs, business affairs, selling prices, etc. X filed an appeal against a ruling which approved a draft plan of reorganization in which the discharge rate applied to the reorganization claims filed by X exceeded the rate applied to other general reorganization claims. The court dismissed X's appeal on the grounds that X and A were in the parent-subsidiary relations, that X, the party characterized as being in the strongest relationship of control, was responsible for A's failure, and that the principle of fairness and equity would be satisfied by subordinating internal claims held by special interested parties like X.

This decision can be evaluated as a judicial precedent that allowed forced reduction of reorganization claims filed by the controlling company X in spite of X's appeal.

Looking into the issue of control over company in general, we find the following two precedents that referred to subordination of claims held by a controlling director.

(ii) Tokyo High Court decision of February 11, 1965 (*Lower Court Civil Case Report* (*Kamin)* Volume 16, Issue No. 2, p. 240)

In this case, a representative director filed an appeal against the original ruling approving a reorganization plan under which a half of the value of general reorganization claims held by the representative director were to be treated by accord and settlement with new shares and the other half were to be discharged, while the other general reorganization claims held by other creditor were entitled to repayment in the full amount by installment (partially by accord and settlement with new shares). The court of appeal dismissed the appeal, affirming the original decision for the following reasons: the original decision approved subordinated treatment of the controlling director's claims in the reorganization plan because the company's financial position worsened to the point where the corporate properties were substantively maintained at the risk of creditors, and the company's failure was solely attributable to poor management of the controlling director.[10]

[10] In a statement on this decision in *Tosan Hanrei Hyakusen* (Precedents in 100 Bankruptcy Cases), 1976 at 155, Hiroshi Takahashi opines that "to rationalize the difference etc. solely on

(iii) Nagoya High Court (Kanazawa Branch) decision of September 1, 1984 (*Hanrei Jiho*, Issue No. 1142, p. 141)

In this case, the appeal was filed against a ruling approving a reorganization plan in which a 20% discharge was specified for the representative director's general reorganization claims, while the other general reorganization claims held by other creditors were determined to be paid in full by installment. The court of appeal dismissed the original decision, holding that subordinated treatment in the reorganization plan could not be permitted solely on the grounds that management responsibility existed.

This decision seemed to deny subordination of reorganization claims on the grounds of management responsibility. However, this decision should be understood, as clarified in the reorganization plan approved by the original court[11], by considering that an action seeking damages in an amount larger than the value of claims filed by the representative director had been already brought and was pending against the representative director. As such, pursuing liability by way of subordination of his claim in the reorganization plan would expose the representative director double prejudice for one cause.[12] If we

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the grounds of management responsibility might be too emotional and insufficient as the basis for an argument." However, the author himself admits that "this does not mean that the conclusion of decision to dismiss the appeal is in itself dubious"; and continues, "in interpreting this case, we should consider … whether it is substantively equitable to treat claims of parent companies or main financial institutions on an equal basis with other creditors. Note that these parent companies or institutions have participated in the management, but had no statutory way of assessment." *Ibid*. Therefore, the above statement should not be construed as a complete denial of subordinated treatment of parent companies' claims on the grounds of management responsibility. Rather, the author assumes that there may be cases where subordinated treatment should be admitted for the claims of parent companies, main financial institutions, etc., and points out the need to have more specific reasons behind the decision to allow subordinated treatment. A mere reference to vague management responsibility, he maintains, is not enough to justify the treatment. In fact, the reference used by the author in this section (Mikazuki et al, Kaneko (ed.) at 555, See Note (2) supra) stated that the Deep Rock Doctrine could have been applied to the reorganization plan of the Tokyu Kurogane Kogyo case, a plan in which the parent company's claims were not subordinated. *Ibid* at 558.

[11] The original court's ruling to approve the reorganization plan (Fukui District Court decision of September 30, 1983 (Toyo Senko Kabushiki Kaisha) was published in the extra of Official Gazette of October 21, at 14, 1983.

[12] The following opinion was submitted to the ruling of the appeal court: "This may imply that a view not to admit management responsibility in the reorganization plan has become slightly stronger today than a view to pursue such responsibility in the reorganization plan." Masao Sakahara, *Shin Tosan Hanrei Hyakusen* (New Precedents in 100 Bankruptcy Cases), 1990 at 207. (However, it should be noted that the author himself supports subordinated treatment, saying: "Granting the need to reflect management responsibility in the organization plan, here we should consider the appropriate extent of difference to provide and the appropriate criteria to apply in order to make such treatment reasonable and lawful.") But it is questionable

understand this decision as an indication that subordinated treatment in the reorganization plan is not necessary so long as the management responsibility is clarified through separate judicial proceedings, it would be extremely inappropriate to regard this decision as a precedent against subordinated treatment of insolvency claims; and it would be natural to regard this decision as being consistent, in its intention, with (i) Fukuoka High Court decision of 1981 and (ii) Tokyo High Court decision of 1965.

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whether this kind of opinion was presented after the details of the reorganization plan had been duly considered. As far as I see, I have not found any opinion which has quoted the decision of this case to support a negative view towards subordinated treatment *and* which has referred to the pending separate action to claim damages.