CIVIL EXECUTION IN VIETNAM (3): WHAT CAN BE LEARNT FROM OUTSIDE?

LE THI KIM DZUNG*

1. Introduction

Civil execution can be organized differently in various legal systems. Among the varieties of civil execution around the world, the one in Japan has reasons for a closer look. First, the concern about the effectiveness of civil execution in Vietnam is shared by Japan(1) which is one of the Vietnam's top foreign investors,(2) and a close partner in various other relationships. This makes the study of Japan's case of great benefit to both countries. Second, since civil execution in Japan has already experienced what Vietnam is now taking into consideration, success or even failure of Japan (if there is any) may become a necessary lesson for Vietnam today. Third, as Vietnam is presently in the need of drafting the Law on Enforcement of Court Judgments, learning from the law that has already been successfully created for some decades would be a good idea. Moreover, the task to increase the quality of civil execution in Vietnam to an international standard may be satisfied by the example of Japan, which comes from the same civil law system, and Asian law group advanced by some strong points learned from the western legal system.

In addition, a reference to some other models, which the Japanese system learned from to see how Japan adopted foreign experience, shall be carried out. Since Vietnamese law was derived from the socialist system,(3) seeing how the former socialist, which are now developing economies adjust to the new situation would also be

beneficial for Vietnam today.

In this article, to that aim, an investigation into the history of developments of civil execution in Japan will be carried out, followed by an analysis of the current system and considerable intention will be paid to figuring out the main points of the civil execution procedures.

2. Historical developments of civil execution in Japan

Japan has experienced a long history of development in civil execution. Looking back at more than 100 year's of history, there can be noticed three remarkable changes.

2.1 Period of Shittatsuri system

The first important development of civil execution in Japan can be seen in the Meiji period.(4) Before that time, civil execution was very simple. Like Vietnam in the feudalistic stage, it was the duty of the village headmen to deal with civil execution.(5) Wishing to move into industrialization and modernization of its state, Japan was in urgent need to develop the legal system transparent to foreign investors. The choice made by the Meiji Government at that time was to westernize the legal system.(6) The question of which model for civil execution was also put on the table as the result of that smart imported choice. There was considerably sharp discussion on how to organize civil execution, or whether to give civil execution power to one or some agencies. Even though the structure of the sole agency that is in charge of civil execution was more acceptable from the viewpoint of law, the three-agency structure,(7) which comes from the German style, was introduced into Japan. Furthermore, in the process of drafting the Code of Civil Procedure there also was a formidable debate on whether to introduce a salary or commission based system. Despite the proposal of many scholars-drafters that the salaried position should be adopted,(8) the proposal of a commission-based system eventually came into force. Since 1890, by the Law on Court

Organization, in the role of main actor for civil execution was introduced *Shitatsuri* (使達吏) which came from the German Gerictsvollzieher, which in turn originated from French *Hussier*.[9]

One thing to note here is that having the same aim to stimulate the work of an executor, Japan does not shape civil execution exactly the same as the German model. While a German executor has been paid a salary from the state budget, plus approximately thirty percent of the commission received from the parties,[10] a Japanese executor receives commission as the main source of their income.

2.2 Period of *Shikkori* system

After some time of implementation, there was soon a talk of the reform with some strong and concrete proposals, even though the process of reform was not necessarily an easy and fast one.[11] Actual change could only take place after the war, in 1947 by the Law on Court Organization, when system of *Shittatsuri* was changed to *Shikkori* (執行吏). This new system was famous for three main characteristics listed as followed: 1) *Shikkori* was independent in responsibility and finance, having their own office separately from the court, bearing their own name. This characteristic made the basis of *Shikkori* operation (a public office character) 2) Each creditor as a principle could freely choose any *Shikkori* among the numbers of *Shikkori* available to affect compulsory execution (a free choice character) and 3) *Shikkori* did not receive salary from the state budget, but received a commission from the creditors as the main source of income; in case the commission did not reach certain amount, *Shikkori* could receive the difference from state (a commission character).[12]

This system was designed to avoid the inherent stagnancy of bureaucracy and for a quick enforcement to protect the interests of creditors.[13] Therefore, it allowed creditors and *Shikkori* to form direct relations, gave a *Shikkori* the right to bear responsibility and care about finance themselves, which hopefully would create a strong competition between them. At first glance, it can be said the aim of the legislators, to some extent had been reached. On the other hand,

despite the practice of training the *Shikkori* of self-righteousness (self-justified), the *Shikkori* system with public office produced too many problems.[14] The relation between the *Shikkori* and a creditor in the way that the former was the representative of the latter based on private law seemed unusual.[15] It was criticized that between the *Shikkori* and the creditor it was easily to form the favors, which produced doubt on reasonable fairness of professional duties. Moreover, with the overuse of the deputies system, the interference of the middlemen, the auction racketeers or underground service and the like, the system was seen as unjust and inefficient.[16] There also was criticism that supervision of the court was not strong enough to reach the operation of *Shikkori*. That was why the demand for reform of the system was so strong.

Admitting the *Shikkori* system's mess, which resulted mainly from the organizational structure, the drafting of the Law on Executors was given priority over of that of the Law on Civil Execution.[17] In the process of reform, although the details of one-agency structure, once again, were well considered, due to various circumstances that could not eventually be realized.[18]

2.3 Period of *Shikkokan* system

By the adoption of the Law on Executors, [19] the *Shikkori* system was replaced by the current *Shikkokan* (執行官) system. Therefore, from this point of time, almost all the problems of the *Shikkori* system in greater or lesser extent found their answers. The practice of the establishment of a separate from a court office with self-responsibility and finance was abolished; and the pure civil servant character was brought into the status of an executor.[20] In other words, two of the three, namely, the public office character and free choice character were abolished. The characteristics of the *Shikkori* as a representative for a creditor, based on contract or private law was washed out as an attempt to rationalize civil execution as a pure state agency. It was a switch of compulsory execution from a private service to a public work.[21] The executor was brought into the same government office building with the court, and the supervision of the court over

executors was also strengthened. The division of work, as principles, is decided by district courts, to which the executor attaches.[22] From now on, executors obtain the same status as other public servants.

What concerns the duties of an executor in Japan is that the work is not limited by compulsory execution, but includes also the delivery of court papers and other works. In France, the huisser also has similar competence and it is said that any attempt to replace the huisser's delivery of court papers by mail service has failed because of the doubt on the latter service.[23] For Vietnam, it can be considered that the possibility of enlarging the competence of executor will move in this direction in the future. At the present time, major effort and priority should be given to civil execution for a better performance. Among the interviewees for this paper, 64% share this idea (*see* **Annex II**).

Though being appointed and dismissed by district court, the executor in Japan is not an assistant of the court, but an independent judicial agency.[24] The independence is necessary for avoiding of interference of an interested agency or an individual into the professional duties of the executor, which may cause injustice or delay of the compulsory execution. Former socialist countries, such as Russia and Uzbekistan, have also changed the principle of organization of civil execution. Civil execution in Russia, which was belonged to the court system, is now a separate system,[25] managed by the Department of Executors at Ministry of Justice.[26] Similarly, in Uzbekistan, the civil execution becomes independent, and the management over the civil execution is carried out by a higher in hierarchy civil execution agency. This experience should be considered for Vietnam for the sake of a just and prompt civil execution. Among the Vietnamese practitioners who were interviewed by the author, 73 % suggest that civil execution in Vietnam, in order to avoid the interference, should not be managed by the local agency but by a hierarchy of civil execution agency (*see* **Annex II**).

Though the reform was quite fundamental, the third character of the *shikkori* system of Japan , namely, the commission system still

stays untouched. It is worthy to mention here the results of the survey on Japanese civil execution system conducted in 1955. Almost all of the professors (89%) and procurators (70%), who had been asked as whether to introduce a salary system or maintain the commission system for executors, supported the change from commission to the salary system. The majority of opinions among judges (48% against 9%) and even the *Shikkori* themselves (39% against 33%) also thought a salary system would be more suitable than a commission system.(27) Nevertheless, the commission system as a core point of the *Shikkori* system is still being maintained for various reasons.(28) While the need of a stimulus to rise up the energy for executors is necessary in order to suit the nature of civil execution itself is admitted,(29) the system of commission is strongly criticized as "the primary factor to cause most of the evil practice of civil execution".(30) The untouched commission system caused the criticism that "the reform is not sufficient yet" (31) or "the reform is not thorough", that the fact the "executor does not receive salary from the state but commission from parties is very strange".(32)

From above examined, the noticeable character of compulsory execution in Japan is that, the executors unlike their counterparts in Vietnam, currently do not receive salary from the state, but commission from parties when exercise any of 22 business affairs(33) and has the right to recover the expenses relating to compulsory execution.(34) Where the fees as an annual income for an executor do not reach a certain amount, the executor shall receive the difference from the National Treasury.(35)

The qualification of an applicant to be an executor has been much strengthened. To be an executor, an applicant must be a staff member of civil service grade seven or above, and be forty years of age or older.(36) The applicant, as principle, shall be appointed through a written examination and an interview conducted by a district court to determine whether an applicant possesses the aptitude, scholarly achievement and competence necessary to become an executor.(37) The appointed executor shall receive necessary training and be under the supervision of a judge of the district court.(38)

The other notice is that, presently, the number of executors in Japan has not increased much if compare with that in some decades ago. The average number of Shittatsuri nationwide between 1927 and 1936 was approximately 630,[39] while the number of executors as at April 1st, 2001 stands at just 638.[40]

Another notable point in the Japanese system is that the number of executors is surprisingly small compared with that of Vietnam. Japan with a population with approximately 1.5 times the population of Vietnam has only 1/3rd (or 1/7th when adding all other execution staffs) of the number of executors in Vietnam. Surely, the small portioning of human resources is the common character not only of civil execution, but also of the judicial system and other fields in Japan as well.[41] And, the fact that there are a small number of executors in Japan may also explain in the way that it results in a sharing of the work between executors and execution courts. However, this does not suggest any assumption that the number of fillings for compulsory execution per executor per year is accordingly small. In fact, it is high, for example, 741 fillings per executor were reported in 2000, and much higher that that in Vietnam.[42] Perhaps, Japan does not see an increase in human resources the most effective or correct way to gain the effectiveness in the system. Notably, it tends to solve practical problems by reconsidering the relevant procedures or structure. Thus, what can be deduced is that the large number of execution staff in Vietnam may be an indication of a bulky and ineffective administration. This is a beneficial experience for Vietnam towards a well functioning system.

3. Scope of the existing statutory regulations

Into the scope of the most important documents concerning civil execution in Japan can be listed the Law on Civil Execution, the Rules on Civil Execution, the Law on Executors, the Rules on Executors, the Code of Civil procedure, the Rule of Civil Procedure and others.

While the Law on Executors was promulgated in 1966, it took

another fifteen years latter for the Law on Civil execution to appear.[43] The drafting of the Law on Civil Execution took as long as thirty years[44] as "the result of a long and painstaking effort to modernize execution system".[45] The Law sets forth the proceedings for compulsory execution, which includes not only compulsory execution but also auctions as a mean to enforce hypothec rights and auctions to convert property based on the Civil Code and the Commercial Code.[46]

The Law No 4 consists of 198 articles ranging in four chapters, which include the General Provisions, Compulsory Execution, Official Auction as enforcement of security rights and Penal provisions. The main chapter is the chapter on Compulsory Execution, which contains the largest numbers of articles, from Articles 22 to 180. In this chapter, section 1 deals with general provisions, section 2 with monetary execution and section 3 with non-monetary execution.

The other important legal document concerning civil execution is the Rules for civil execution issued by the Supreme Court.[47] The Rules, the first rules on litigation procedure,[48] are a useful instrument in dealing with the necessary matters with regard to the civil execution procedures other than those set forth in the Law No 4. The Rules for civil execution consist of 181 articles and have the same structure as the Law No 4.

Furthermore, the provisions of the Code of Civil Procedure shall also apply to civil execution procedures unless otherwise specially provided.[49] Instances of provisions of the Code of Civil Procedure that apply *mutatis muntandis* to compulsory execution are provisions on exclusion, capacity, and period and so on. It can be deduced that compulsory execution has, at least, some similarities with civil litigation proceedings.[50]

The Law on Executors and the Rules on Executors[51] also contain, besides regulations on the status of an executor, some important provisions for an executor to carry out their duty in compulsory execution procedure.

Japan's experience shows that the laws for civil execution and

civil procedure are separately regulated. Though there was a time the Code of Civil Procedure solely regulated civil execution, the tendency that the procedure for compulsory execution should be separately prescribed has been seen around the world. This tendency would be well advised for Vietnam legislators when considering to what extent the civil execution procedure should be included into the content of the Code of Civil Procedure.(52) The Code of Civil Procedure should prescribe litigation up to the final stage the judgments rendered, including the appeal procedure. It should include, besides litigation, only those institutions closely relate to civil execution, such as delivery of court judgments, consequences of an appeal, clarification of unclearness of court judgments, claims of parties concerning the ownership and the like. The Law on Enforcement of Court Judgments shall describe the procedure for compulsory execution. Wherever necessary, the Law may refer to the Code of Civil Procedure.

4. Civil execution in Japan: Division of competency and Procedure for compulsory execution

4.1 Division of competency: Execution courts and executors

Compulsory realization of rights in Japan is exercised only by compulsory power of the state. In other words, self-help compulsory execution is strictly prohibited.(53) Japan, unlike Vietnam and many other countries, has two agencies, namely, execution court and executors, to carry out compulsory execution.

So, which court in Japan is the execution court? In short, it is ordinary court acting in the capacity of execution agency.(54) The capacity of execution court may be classified into three groups: 1) when a court acts as an execution organ as the law so provides, 2) when a court assists an executor in their work and 3) other works related to compulsory execution.(55)

In the same way, the duties of executors also can be classified into three groups: a) when an executor acts as an independent execution agency or unique authority;(56) b) when an executor acts under the

instruction of the court;[57] c) when an executor carries out other works assigned by the court, to which the executor belongs.[58]

Thus, if immovable objects are in the scope of power of execution courts, movables are in the purview of the executors. The division of duties might be explained by the fact that "immovable objects are more valuable, concerning the question of law, therefore, legislators assign them to the authority of the court, expecting executors to act or to deal with practical",[59] or "actual enforcement or that execution, which is in need of physical power".[60]

4.2 Title of obligation: A certification of a claim

All proceedings in respect to compulsory execution in Japan are, as principle, based on a title of obligation, which corroborates the existence of a claim for performance. The title of obligation includes final judgments, judgments with declaration of provisional execution, disposition for the litigation expenses, documents made by a public notary, rulings of foreign courts and arbitration awards, and other acts having the same effect as a judgment.[61]

It is noticeable from this provision that the scope of compulsory execution in Japan is much larger than that in Vietnam. In Japan, notary documents, drafted on the basis of facts concerning claims for the payments of a fixed amount of money, which state a declaration of a debtor to bind by compulsory execution are subject to compulsory execution. Other documents such as a written statement of conciliation, a court settlement and the like are also included into the scope of compulsory execution.[62] Yuji Koga is correct in saying that the content of performance of these documents is simple, the legal relationship is relatively self-evident, and therefore, these documents beneficially improve the relations between parties involved, and lift the burden of the formality of court. [63]

Concerning this issue, Japan is not the only country to adopt the concept. Other developed countries such as Sweden,[64] France,[65] Germany,[66] or even former socialist countries such as Russia[67] or Uzbekistan[68] are common in the same approach. Furthermore, while other countries require court's recognition, Russia allows arbitration

awards to be enforced without any formalities. Contrary to this, Vietnam's civil execution is restricted with merely judgments of people's courts. It leaves domestic arbitration awards without any means to be enforced. It does not have the concept of executive deeds. In the same manner, it leaves settlements of court and orders of executor or chief executor without a remedy. This paper believes that allowing the enforcement of arbitration awards, notary documents or settlements would encourage people more often seek to settle difference in a less tense environment, more economical way, which in turn produce a sense of harmony among the people in society. The order of monetary payment in indirect enforcement should also be subject to compulsory enforcement, since the power to impose the payment is already recognized by law and in need of timely enforcement. Though at first sight it is likely to add to the backlog of the executor, the picture may soon be different as the disputes to be settled though the court system accordingly will decline. Moreover, parties to these documents may have more willingness to coordinate in their performance.

A title of obligation itself, however, does not result in an immediate commencement of compulsory execution in Japan. There is a possibility that the executive power is lost after a title of obligation is formed. Therefore, the granting of an enforcement statement is necessary to confirm the actual existence of executive power of a title of obligation.(69) A person who possesses a title of obligation should first meet the requirements for granting of an enforcement statement, then make a petition and obtain the grant of enforcement statement. Agencies granting execution clauses can be court clerks of the court having the case recorded or a notary public, which keeps the original.(70)

Compulsory execution can be commenced based on a petition for compulsory execution with an original of the enforceable title of obligation attached. Thus, a basis structure of compulsory execution in Japan can be described as follows a) obtaining a title of obligation b) granting an enforcement statement c) petition for compulsory execution and d) compulsory execution.

4.3 Procedure for money execution: Immovable Objects

Compulsory execution on immovable objects is the competency of execution courts. There are two methods available: compulsory sale and compulsory administration.

Procedure for money execution by the method of compulsory sale starts by an attachment of assets followed by a conversion into money and completed by the distribution of proceeds. According to Japanese law, a creditor is required to indicate specific kinds of immovable objects of a debtor to be attached to satisfy their claims as well as to provide evidence to prove that the debtor owns the property.(71) This provision is effective as it lightens the burden of a civil execution agency as well as requires more responsibility from creditor when initiating compulsory execution.

The situation in Vietnam that a creditor has no duty in civil execution totally accumulates the burden of investigation on the whereabouts and assets of a debtor on the executor's shoulder. It creates a habit among the common people to wait for the favor from the state, relying on the state without caring about one's rights or interests. To avoid this situation, a creditor should be encouraged to be more active for their benefits. If in the litigation, a plaintiff is active in introducing evidences and requesting a grant of provisional measures, in the civil execution process, a creditor should be active in identifying debtor's whereabouts, and their assets. Nevertheless, the absence of such information should not be a ground for rejecting the petition. When the access to sources of information become more available to the general public, a duty to indicate specific asset to be attached as well as the method of compulsory execution should be added.

Once petitions for civil execution, a Japanese creditor has to prepay the amount as the expenses necessary for civil execution procedure, failure to do so may be a good reason for rejection of the petition.(72) This provision may be adapted to Vietnam as an example of the variants to solve the problems of lacking expenses necessary for compulsory execution. However, at the first stage, prepayment should

be an encouragement, a right, not a compulsory requirement.[73] Otherwise, it may exclude the chance of a poor creditor from petitioning for compulsory execution. It should not be a duty for some types of claims, which are in the list of the first priority of distribution. In addition, a failure to prepay the expenses should not be used for rejecting the petition.

Furthermore, in Japan, a creditor should not escape payment in employing the civil execution agency.[74] This approach is fair, while in Vietnam, a creditor is totally free to have their claims enforced by civil execution agencies. This paper advocates that a fee paid for using the service to cover part of the expenses that the state bears for the civil execution system should be introduced. In the survey conducted in Vietnam by this author, 73% of interviewees also suggest that a creditor should share with the state the funding for a better system. (*See* **Annex II**). Nevertheless, some factors should be taken into account when determining the fee, such as the general living level of the Vietnamese people, the kinds of claims that should enjoy exemption and so on. At the first stage, the execution fee should be generally low. For the sake of a timely execution, the fee should not be paid directly to the state's budget, but to an account of execution agency. The money should be available for prepayment (if prepayment from creditor is not available), for payment of expenses for compulsory execution in case the debtor enjoys a reduction or exemption. With the aim of speeding up enforcement for creditors, it also can be used for prepayment of such kinds of claims from the state budget, for instance, repayment of court fees. Depending upon the amount available, it also can be used as prepayment for compensation by a state agency for wrongdoings caused by staff. If such a kind of fee is introduced, it would on the one hand, lessen the burden of the state budget, stimulate executor's work while on the other hand, and speed up the civil execution.

According to Japanese law, after being attached, the assets are subject to prohibition of disposition, while the debtor is allowed to use and benefit from them in most cases.[75] For the attached immovable object, there shall be an investigation on its current situation con-

ducted by an executor,[76] followed by a valuation by an appraiser,[77] who is appointed by the execution court. Based on the appraisal, and taking into consideration others factors, the execution court shall decide the lowest sale price.[78] Thus, an appraisal is only of advisory value for a court to determine the minimum price, which later can be changed if the court deems it necessary. The Law No 4 also has very flexible provisions to cope with actual situation such as a permission to pay rent by creditor in lieu of the debtor or a revocation of compulsory auction based on the loss of immovable objects.[79]

Attached properties then shall be converted into money by the following methods: a) auction b) tender, which in turn has two types, namely, date bid and period bid, and c) other methods specified by the Rules of the Supreme Court.[80] Before the enactment of the Law No 4 in 1979, due to the fact that the auction was the common method of sale,[81] it was very often "auction racketeers" (競売屋) or intermediaries interfered and ascertained the benefits from the public auction process.[82] The simpler procedure of conversion of property into money is recognized useful for a successful compulsory execution. The Law gives the court a large number of choices at it's discretion to act to the utmost end, which is a fair and just execution. In practice, method of bid, especially, period bid is used most often,[83] as it solicits interested persons to purchase as well as avoids any forms of unfair collusion, threats or the like, which can easily happens with auction, where the purchaser must appear in person. In addition, the law also provides an executor with the power to apply those measures, such as restrictions on entry into or removal from the place of sale, or holdings of offers to purchase by such person to eliminate any attempt to reduce the price or prevent a fair sale.[84] Japanese law is even stricter when treating an obstruction of auction as criminally punished.[85] Moreover, the large amount of an assurance needed for the offers to buy the immovable objects[86] is also useful to guarantee a real offer.

Conversely, Vietnamese law does require a very low assurance (1% for housing, 2% for others), which is a cheap way for a debtor to buy time. It also fails to regulate the intervention in a fair auction the

only method to realize attached assets to ensure the enforcement. Unfortunately, there is no official data on the practice of pressing down the price for reselling the property later on at a higher price[87] or the intervening in the offer to buy the asset. Nevertheless, one could easily guess how a stubborn debtor acts, illegally and technically to avoid an enforcement to destroy the hope of a creditor in satisfaction of their claims. Therefore, a set of preventive measures, such as an increase in the assurance for buying assets, a right of an executor to maintain the order at sale place for avoiding interference of a fair auction would be of great benefit for improvement of efficiency of civil execution in Vietnam.

It should be noted that in Japan, the special sale is often used in case the immovable object cannot be sold either by tender or auction. The minimum price determined by the execution court is generally not reduced,[88] unless the court deems it necessary. Not having the attached asset sold by re-auction, the Law No 4 allows it to be sold by special sale, which is more flexible and economical.

The Law No 4 also clearly specifies a fixed period of time for demand of allotment as well as scope of creditors qualified for allotment.[89] The execution court shall determine a distribution date, make a distribution sheet, and effect the distribution for creditors. Unlike others countries such as Germany, Austria, England, and United States, which adopt preferential right, Japan, similar to Italy and France, adopted the equal rights principle.[90] Therefore, there is no priority for creditor, who initiated the compulsory execution as in United States,[91] nor priority based on the nature of claims as in Vietnam.

There are other movable objects in the real world, for instance, ships, aircrafts, automobiles, and construction machineries[92] that are required by laws to be registered as immovable objects. Therefore, compulsory execution in relation to them as so-called quasi-immovable is considered as an execution on immovable object. Basically the procedure for compulsory execution on immovable object is applied *mutatis muntandis* to quasi-immovable, though there are some special provisions with regard to them.

The other method of compulsory execution on immovable objects, besides the compulsory sale, is compulsory management. While compulsory sale is quite common in many countries, compulsory management provided for by Japanese law is a very new concept, at least, for Vietnamese legislation. This method is suitable for cases when debtor possess a rental property such as an apartment. This is applied by execution court to prohibit debtor from disposing of profits or to has third party pay the profits to a manager, which may be a bank, a trust company or other legal persons in the case a third party obliges to pay the debtor.(93) The manager may request assistance from executor to open a closed door or may cause the debtor part with possession of the real estate. The execution court may permit (as well as cancel the permission for) the debtor to use the building, or order the manager to distribute necessary money for the debtor if they are in considerable difficulty.(94) Though it is not very often used in Japan,(95) compulsory management sounds economical by avoiding unnecessary selling of the immovable. This method is also not so hard or so directly imposed on the normal life of a debtor.

4.4 Compulsory Execution on Claims

The Law No 4 sets a separate procedure for compulsory execution, of which the execution court is in charge, on various forms of claims and property, i.e. an obligation right that is owned to debtor by the third party. Once again, here the duty of a creditor in compulsory execution is noticeable. The Law No 4 requires a creditor to clearly indicate in the petition the third party debtor.(96) By an attachment order, the court prohibits the debtor from collecting or disposing of the claim and prohibits a third party obligor from providing satisfaction to the debtor.(97) The execution court does not investigate on whether claims exist or how much is the value. Rather, it leaves it to the execution creditor to petition the court clerk to issue a notice to request third party to make statements for themselves. Here the law appears rather strict, providing that the third party shall assume liability for damage if they fail to make a statement or make false statements to the notice of the court.(98)

The law strictly prohibits the attachment of an amount less than the amount considered as the necessary living expenses for a standard household. Moreover, it is also prohibited to attach three-fourths of the claim, which exceeds the standard amount.[99] This provision is useful as it ensures the normal living standard for the debtor according to public policy. On the other hand, the necessity of prohibition of the attachment of three-fourths of the payment, which exceeds the standard amount, is questionable. It seems to favor persons who earn more than the ordinary people, and the higher income, the higher level of favor they obtain. For example, if debtor A earns JP210,000 a month, then they are entitled to keep all as the necessary minimum for living. If debtor B earns JP500,000 per month, then they can enjoy 375,000 immune from attachment, while debtor C, who earns 2,000,000 can keep JP1,500,000 free of being liable for execution. Here, the level of living standard appears different for different people.

There are some methods available to affect the claim: collection by the creditor, deposit in trust by third party debtor, or assignment order. In case the creditor collects the claim, they should do so within one week, failure to do so may cause them to bear any damage occurring to debtor thereby. If a third party debtor fails to make payment, the execution creditor may file an action for collection against the third party debtor.[100] In case the third party debtor makes a deposit, they are required to notify the execution court thereof.[101] The execution court also may issue an order that a monetary claim attached as par in lieu of payment be transferred to the execution creditor.[102]

In Japan, a creditor may also satisfy their claim, if they petition, for instance, for a conversion of a telephone subscription right.[103] The deposit share certificates can also be converted by an order to transfer the shares in such deposit share certificates to the execution creditor instead of payment, or by an order requesting an executor and the relevant party to sell such obligation right.[104]

In sum, the Law No 4 creates, on one hand, a clear responsibility that creditors have to fulfill when they petition for compulsory

execution, on the other hand, a variety of methods enabling them to successfully satisfy their claims. That is what not yet available in current Vietnamese law, therefore, should be considered for a change toward a better system.

4.5 Compulsory execution on movables

In compulsory execution on movables, an executor can act individually and independently. On one hand, it is the duty of a creditor to indicate assets and their location when making a petition for compulsory execution[105] though it is, as the Supreme Court ruled, not necessary for creditor to specify concretely if they do not possess such information.[106] On the other hand, it is the discretion of an executor to independently, taking into consideration the real situation of the debtor while not to undermine the interests of creditors, decide which kind of movable to be attached.[107] As a principle, the executor possesses the attached movables, although they may allow the possessor of the movables to retain and use them. Hence, this provision avoids the possibility of dispersion of the assets by the debtor while facilitating the quick enforcement.

The Law No 4 specifies fourteen kinds of movables, which are immune from attachment.[108] It gives the execution court the right, based on the circumstances, to cancel all or part of the attachment or to permit attaching the movables, which are according to the law immune from attachment.[109] It also specifies the amount of the attachment that threatens debtor's subsistence, the instrument indispensable for professional work as well as things that have intellectual value for the debtor. This can be seen as a humanitarian policy or public policy not to push too hard on debtors but respect the person's intellectual image.

Nevertheless, despite the fact that Japanese law avoids pushing too hard on a debtor, it grants an executor the right to enter the locked residence, or open containers, and to search for valuables.[110] Interestingly, Japan is not the only country to grant this important right to executor. Many developed countries, such as France,[111] Germany,[112] and Sweden[113] where it is often said that democracy is

fully guaranteed or privacy is highly protected, share this idea. Even the former socialist currently are developing countries such as Russia[114] and Uzbekistan,[115] adopt this before un-known principle. What can be deduced from this trend is that granting executors the right to enter and to search is very important. The truth is very simple, without assets discovered, how can a monetary execution or delivery of an object be enforced? In Vietnam, if a debtor simply locks the door of the house, keeps the thing subject to deliver or money in a house or a container and the like, there is nothing that a Vietnamese executor can do.

Concerning the institution of witness of an execution act, the provision in Law No 4 of Japan is also worth considering. According to this provision, the executor shall, in case they can not meet the head of household, or his representative, or a relative living with the head, or a trade employee or other employee who is reasonable rational, cause a staff of city, town or village or a police officer, or any other person who are considered appropriate as witnesses to be witness of the compulsory execution. That is to say, the presence of only one and of any one of those listed above is sufficient for witnessing the compulsory execution. Uzbekistan[116] and Russian[117] recently enacted laws also adopt this idea, prescribe that any person, who have legal capacity, have no interests in compulsory execution and have no relations with parties involved in compulsory execution, can be witness. French law also shares similar approach.[118] Contrary to this, Vietnamese law requires the presence at the same time of some persons, namely, the debtor, or an adult living together with the debtor, a representative of city, town or village government and a debtor's neighbor. Without these three witnesses, the disposal of an executor shall deem illegal. The law forgets about a very possible possibility that there are many reasons why the presence of a staff of the local government or a neighbor is not always available. Therefore, this shortage should be eliminated and the above approach by the foreign countries can be studied to solve the problems.

Concerning the appraisal of the attached assets, if an executor deems necessary shall appoint an appraiser for assessing the value of

the attached assets. There also exist concrete provision on the price for sale of securities and precious metals. This provision of Japanese law grants great freedom for an execution agency on determining the price that speeds up compulsory execution while ensuring the appropriateness of the assessed value. Vietnamese law is far less advanced in this respect since it requires the set up of an appraisal committee, which composes, case by case, of representatives of different agencies. If the concerned agency is not kind enough to send a representative, there is nothing a civil execution agency can do. Moreover, there is no provision on what the assessment should be based or any provision to avoid the favors a member of the committee has when determining the value of the attached assets. Contrary to this, more flexible procedures can be found not only in laws of developed countries, but also those of developing economies such as Russian or Uzbekistan. Russian law has been unbelievable changed, even allows an executor themselves to evaluate the assets based on the market or government regulated price. In case deems the appraisal is difficult, the executor shall appoint an expert to do the job. If a party disagrees with the price set forth by an executor, the assets shall be re-evaluated by an expert on the expenses born by the claimed party.(119) Similarly, the right of an executor to do the evaluation of the attached assets has also newly been introduced by the law of Uzbekistan.(120)

Japanese law provides for three methods of conversion, namely auction, bid and special sale. It should be noted that there is a slight difference in compulsory execution on movables from compulsory execution of immovable objects that bid is limited to period bid, and if executor deems appropriate, other persons can affect the sale.(121)

What is new here in Japanese civil execution procedure is the method of bid, which is hard to find in many other foreign laws. The bid and auction methods are in someway similar in that they both offer assets to the public for a competitive price, but what is superior about the bid over other methods is that the purchaser does not have to be present in person, which can avoid attempts to affect the fair purchase, as well as save time for the executor to concentrate on other matters.

Besides the auction and bid, Japanese law also provides for special

method or other persons to realize assets. Also, it is of the discretion of an execution court and an executor to decide which method is more appropriate to realize the attached assets. The rationale for these three methods is that they create more chances for property, for example, low in value assets, second-hand assets, fresh and perishable goods and the unsuccessfully auctioned assets to be sold for the sake of compulsory execution. Contrary to this, auction, which is the only method that Vietnamese law provides for, limits the possibility of conversion of assets into money. Therefore, the diversity in method of realizing attached assets in compulsory execution in Japan should be taken into consideration by Vietnamese lawmakers when drafting the Law on Enforcement of Court Judgments.

4.6 Compulsory execution with regards to non-money execution

Non-monetary execution is regulated by five articles, ranging from Articles 168 to 172, which seem very modest when compared with those of monetary execution. Non-monetary execution includes a compulsory delivery of immovable or movable objects, compulsory execution of doing or not doing certain acts, and a declaration of intention.

The Law No 4 provides a relatively clear and concrete procedure for delivery of property. The delivery of an immovable object include the procedure to part the debtor from possession of subject matter and let the creditor acquire the possession thereof, the procedure of which requires the creditor to be present. The delivery of a movable object is that the executor shall take possession of the movable and transfer it to the creditor, the procedure of which does not necessarily require the presence of the creditor.

The Law gives an executor those rights, which help to effectively carry out compulsory execution, such as to carry out compulsory execution at night time, if necessary, or to have access to subject matter as opening a closed door, entering and searching the property, or to remove the movable property that is not subject to execution and deliver it to the debtor, other rational persons or to take custody of it themselves. Furthermore, if the object cannot be delivered, the

executor can sell it, and deposit the remaining amount after deducting the expenses for sale and custody.[122] In case the subject matters are in possession of a third party, it is the competency of an execution court to issue an order that debtor's claim for delivery against the third party is attached and the creditor is permitted to exercise the claim. All these provisions of compulsory execution seem useful to Vietnam as they enable an executor to effectively carry out the enforcement, even if the debtor tries to avoid it.

Compulsory execution of doing or not doing certain acts is under the competency of execution court. Here the execution by substitution and indirect execution are often used. The execution by substitution shall be used in case the debtor does not perform the act, which by the nature is possible to be performed by someone other than the debtor themselves. This method is also used to remove what has been done in violation of duty of refraining from doing certain acts. If such a case applies, debtor has to bear all the necessary expenses for the substitution execution. The court, based on the petition may order a debtor to prepay the expenses.[123] Once again, the Law No 4 makes all efforts to have the lawful interests of a creditor properly protected. To protect the legitimate interests of creditors, it foresees the possibility of an avoidance of an execution by a stubborn debtor, and therefore, creates appropriate measures to deal with.

In case an execution by substitution is impossible, the sanction as indirect execution shall be applied.[124] Unlike the American or English concept of Contempt of Court,[125] "Japanese law adopts the indirect execution equivalent to the French *Astreine*".[126] As a rule, obligation of not doing certain acts, which by the nature can be done only by the debtor, can be enforced only by this mean. In this case, the court shall issue an order that the debtor pay a fixed amount, usually daily, and sufficiently high, to the creditor until the debtor performs their obligation. "This is a useful method to attain the intended results," "the new important change in compulsory execution in Japan brought about by the Law on Civil Execution".[127]

The execution of declaration of intention is almost self-executory, as it does not have any execution agency involved in the action. The

Law No 4 provides for the grounds when a declaration of intention is deemed as has been declared.[128]

Vietnamese law is out of fashion in terms of provisions for non-monetary enforcement. It lacks of a clear procedure as well as effective sanctions to deal with non-compliance of the stubborn debtors, including debtor-agency.[129] This situation should be eliminated. In a contemporary modern industrialized society, where more and more legal rights are being recognized, the remedies other than the mere payment of money become more popular. "While the objective of the enforcement of money judgments is simply the use of the most appropriate legal method to obtain the money equivalent of the award, the objective of non-money judgments are more complex since they are aimed at achieving compliance with great variety of judgments...."[130] This trend is also can be well observed in Vietnam. Since the new laws grant, besides the money compensation, various remedies with non-monetary character, in many areas of law, such as family, labor, environment, intellectual property rights, a reconsideration of the concept of non-monetary enforcement shall be of great value.

4.7 Compulsory execution of security rights

A holder of a security right such as holder of a hypothec on a piece of land or on a building may obtain satisfaction of their obligation right by executing their security rights. Procedure for compulsory execution of security rights is in principle similar to that of compulsory execution. The Law No 4 has grouped subject matters in the same way as in compulsory execution. The procedure for compulsory execution of a security right includes the process of attachment, sale and distribution. The competence of compulsory execution is also the same of that of compulsory execution. Here a distinct characteristic of the Japanese legal system is that an officially recognized obligation title is not always necessary for compulsory execution of a security right.[131]

4.8 Measures to ensure a fair and effective compulsory execution

To ensure the fairness in compulsory execution, Japanese law clearly provides for the methods for a statement of dissatisfaction, the concrete cases an appeal to execution is permitted,[132] and a short time period[133] within which a party can make an appeal or an objection to the court. In addition, a petition of appeal or objection is valid without naming the opposing party. This is primarily aimed to ensure the quickness of progress of compulsory execution and the stability of the disposal of executors. Similarly, provisions on the third party action of objection concerning the ownership rights appears effective to protect the rights of the party concerned while avoiding the harm to a speedy compulsory execution. This provision of Japanese law should be a suggestion for Vietnamese law. Current Vietnamese statutory regulation on the objection and claims on civil execution appears unclear and ineffective. It lacks of any peremptory period for making claims, a concrete form and a fair procedure for resolving claims.

It should be noted that in Japan in resolving the claims of compulsory execution, the role of the court is emphasized. Compared with other countries, Japan has one more special feature in that civil execution remains the task of not only executor but also the execution court. Besides acting as the execution agency, the Japanese court assists executors in their operation. The court gives permission for executor to carry out duties during the holidays or nighttime, changes the scope of un-attachable assets of debtor, and hears the appeal of execution or objection on the civil execution and so on. Many other countries, for example, France, Germany, United States, Sweden, Uzbekistan and Russia, to a different extent, emphasize the role of the court, though countries are not necessarily the same in this respect. For example, in France, it is the doctrine of the execution judge,[134] in Japan or Germany,[135] it is of the execution court, in Russia[136] and Uzbekistan,[137] it is of the ordinary court. The emphasis on the role of the court may be a suggestion for Vietnam to define the extent of the role of the court in dealing with the claims of the parties in civil execution. It is advisable that the court should have a more active role in civil execution to deal with questions concerning legal matters.

Furthermore, for the sake of a quick compulsory execution, Japanese experience shows that there should be effective measures to eliminate the delay caused by the abuse of the right of appeal. In 1948, in Japan came the amendment of appeal procedure to discourage the losing party from filing an appeal solely for the purpose of delaying the enforcement or for harassing the other party.(138) This point should be studied by Vietnamese lawmakers. Current procedures allow a large scope of grounds, when an appeal can be taken, lots of authorized persons and authority to protest for the re-trial of a judgment. Together with this, the point view that the appeal is a right without any limitation and the fee for appeal is extremely low have often being overused by the parties. According to the current procedure, a judgment in Vietnam may be re-tried as many as nine times, even more if the decision of a cassation court is to retry the case from the first instance. The practice, where a case has been tried several times is very common practice. The current appeal procedure seems to create the feelings that the truth is like a ghost that is difficult to catch because when or where the litigation of a case stopped is not predictable. The practice reduces the trust of the general people in the fairness of the court system, and causes trouble for compulsory execution, therefore, should be eliminated.

5. Sub-conclusion

As examined above, Japanese civil execution experienced a long process of development from matters based on private law adjusted to state competence based on public law with some major changes for finding a suitable way to ensure a just, fair, and prompt execution.

Nevertheless, it is not suggested that the current Japanese model is perfect. Like elsewhere, there are still places for improvements. There is still the doubt that "even if plaintiff receives a favorable judgment, there is no guarantee he/she will get the payment".(139) There is also the assertion that some new special procedure for enforcement of small claims judgments should be introduced. The

need of an improvement of procedure for compulsory execution is also gained much attention by Japanese lawmakers.(140) In order to secure the effective realization of rights, new measures to promote performance by debtor, to identify their assets, to deal with obstruction of a real estate by illegal occupants are also be required to be reinforced.(141) Moreover, the theory of the status of *shikkokan*, possibly, as Nakata Juichi argued still might be revised again and the concept of a unitary civil execution is also a big subject to be considered in the future.(142)

Through the study of the past, present and the problems to be solved in the Japanese system in the near future, it can be noted that the Japan experience can serve as a suggestive model for Vietnam in many contexts. Some lessons from the history of development of civil execution in Japan from *Shittatsuri*, *Shikkori* to *Shikkokan* can be drawn for Vietnam to consider the pros and coins of structural reform of civil execution in Vietnam. The same, the Law No 4 with those provisions which can solve the problems that Vietnam now is facing with would be a suggestion for Vietnamese lawmakers when drafting the Law on Enforcement of Court Judgments and the Revised Ordinance on Civil Execution.

ANNEX I: THE RESULTS OF THE SURVEY ON THE EVALUATION OF THE CURRENT CIVIL EXECUTION SYSTEM

Issue I: General evaluation of current system:

a) It is well-functioned: 18 votes (8%)
b) Not well functioned: 185 (86%)
c) No opinion/other opinion: 11 (5%)

Issue II: The fact that the current system is funded by the State is

a) reasonable: 108 (50%). These interviewees reason that because the current system is a State agency.
b) b) unreasonable: 96 (45%). These interviewees explain that the State fund is limited, therefore affect the efficiency of civil execution.

c) No opinion: 10 (5%)

Issue III: What do you think about the necessity of executor's profession?

a) The profession is necessary, as important as other legal profession: 180 (84%)
b) Not important: 16 (7%)
c) Other opinion/ No opinion: 18 (8%)

Issue IV: How do you want to have the job as an executor?

Among 121 person who are now executor:

a) want to continue the job?: 104 (86%)
b) No: 17 (14%)

Among 93 persons having other profession, such as judges, court secretaries, public notaries, legal experts:

a) want to become an executor: 35 (38%)
b) No: 58 (62%)

For person looking for a job

a) is your first wish is to find a job in civil execution system?: Not available
b) No: Not available

Issue V: How do you think about the current salary for executor:

a) It is quite high compared with other similar work, enough for a standard level of living: 18 (8%)
b) Average, enough for a minimum living: 87 (41%)
c) Low, not enough for the living: 109 (51%)

ANNEX II: THE SURVEY ON THE SUGGESTIONS FOR THE FUTURE OF CIVIL EXECUTION

Issue I: Which status an executor should have?

a) a civil servant, a salaried man: 58 (27%)
b) a civil servant, a salaried man plus certain amount formed from the commission paid by creditors: 138 (64%)
c) a civil servant but receive only commission from creditors: 11 (5%)
d) not a civil servant, receive commission from creditors for the

service: 7 (3%)

Issue II: Which scope of duties an executor should have:

a) Status quo: 136 (64%)
b) Some other works should be added: 78 (36%)

Issue III: Measures for strengthen the civil execution work:

Civil execution work should be:

a) a private matter, a kind of service: 23 (11%)
b) a public service, provided by state: 191 (89%)

To give more power as well as increase the benefits for an executor?

a) Is necessary: 189 (88%)
b) Not necessary to do so / No opinion: 7/18 (3%/8%)

How about the duties of a creditor?

a) a creditor needs to bear certain fee when petitions for compulsory execution: 156 (73%)
b) Not necessary to do so / No opinion: 15/38 (7%/18%)

Is there the need to employ more sanctions to deal with debtors?

a) Need to employ more drastic sanctions: 186 (87%)
b) Not necessary to do so / No opinion: 3/25 (1%/12%)

Issue IV: Mechanism for management over civil execution work:

Civil execution agencies are

a) to be managed by judicial departments: 29 (14%)
b) to be managed by Court: 24 (11%)
c) to be managed by a higher in hierarchy civil execution agency: 157 (73%)
d) other opinion: 6 (2%)

Issue V: What do you think of possibility of reorganizing civil execution in the future:

For those who think civil execution should be a private matter or reorganized into a service for commission.

The reform in this way can be taken:

a) from now on, at present time: 6 (2%)
b) in 10-15 years: 25 (12%)
c) in 20-30 years: 18 (8%)
d) after 30 years: 20 (9%)

ENDNOTES

* L.L.M, a former student of Graduate School of Law, Nagoya University, Japan. Author would like to show her sincere thanks to Prof. Honma Yasunori for his valuable academic advice, Prof. Frank Bennett, Ms. Nakano and Mr. Moriya for their help concerning the materials in Japanese language, JICA for their wide supports for author to study in Japan. Special thanks to hear dear husband and two wonderful children for their warm hearts.

For a clear understanding of the current situation of effectiveness of civil execution in Vietnam today, *see Le Thi Kim Dzung, Civil Execution in Vietnam: From the Stages of Development to Current "Frozen" State*, Nagoya University Journal of Law and Politics, ... For a better understanding of what the law concerning the compulsory execution in Vietnam is in need of improvement, *see* Le Thi Kim Dzung, *Civil Execution in Vietnam: Do we need more muscles?*

(1) One of the three big concerns of Japanese investors on the legal systems in ASEAN countries (including Vietnam) is civil execution. *See* Nippon Keidanren, *Toward for the Creation of International Investment Rules and Improvement of the Japanese Investment Environment*, available online at http://www.keidanren.or.jp/english/policy/2002/042/proposal.html (last visited Jan. 29, 2003).

(2) In the last ten consecutive years, Japan was always on the top and presently on the third rank among the 60 investors in Vietnam. *See* THOI BAO KINH TE VIETNAM [VIETNAM CURRENT ECONOMY], *Ty trong dau truc tiep nuoc ngoai cua Nhat ban co nho dan? [Is that true that proportion of foreign direct investment of Japan is getting smaller?]*, July 21, 2002, available online at http://www.vneconomy.com.vn/Publications/tbktvn/ (last visited Jan. 22, 2003). Moreover, the projects where Japan is a partner are performed the most effectively. *See* DAU TU [INVESTMENT], So *du an co von dau tu cua Nhat ban trien khai hieu qua nhat [The projects with capital from Japan perform the most effective]*, available online at http://www.vir.com.vn/so119/119_1.html (last visited Jan. 12, 2003).

(3) Hoang Phuoc Hiep, *Buoc dau nghien cuu nhung vuong mac, bat cap trong to chuc va hoat dong thi hanh an co yeu to nuoc ngoai [First attempt to study the problems in enforcement of judgments with foreign elements]*, at 1 (unpublished research paper] (Aug. 10, 2000)

(on file with author).

(4) The Meiji era was commenced in the fall of 1868 and lasted until 1912. *See* Mikiso Hane, MODERN JAPAN: A HISTORICAL SURVEY, 91, 3ed., (2001) (*hereafter* Misiko Hane).

(5) Terada Jirou, MINJISOSHOUHOU KOUZA, 1068-1069 (1955) (*hereafter* Terada Jirou).

(6) Many scholars observe this process. *See*, for example, Hiroshi Oda, JAPANESE LAW, 26-27, Oxford, 2ed., (2001); Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 University of Chicago Law Reviews 41, 51 (2000) (*hereafter* Curtis J. Milhaupt & Mark D. West); Yukio Yanagida, et al eds., LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS, 33-35, 2ed., (2000); Misiko Hane, *supra* note 4, at 102-103.

(7) These three agencies were *shikkori*, execution court and juso court. *See* Takeshita Morio & Masahiro Suzuki, MINJI SHIKKOUHOU NO KIHONKOUZOU, 46 (1981) (*hereafter* Takeshita Morio & Masahiro Suzuki). It was considered that the *juso* court, that has record of the case, have competency of civil execution, since the knowledge of the case shall facilitate a successful compulsory execution.

(8) Terada Jirou, *supra* note 5, at 1070.

(9) Shindou Kouji & Takeshita Morio, MINJISHIKKOHOU WO MANABU, 36 (1981) (*hereafter* Shindou Kouji & Takeshita Morio).

(10) Terada Jirou, *supra* note 5, at 1074.

(11) Frank G. Bennett, *Civil Execution in Japan: the legal economics of perfect honesty*, 177 Nagoya University Journal of Law and Politics 1, 7-9 (1999) (*hereafter* Frank G. Bennett).

(12) Nakano Teiichirou, MINJISHIKKOUHOU, 53, 4ed., (2000) (*hereafter* Nakano Teiichirou 2000).

(13) Nakano Teichirou, MINJISHIKKOU. HOZENHOU GAISETSU, 31 (1991) (*hereafter* Nakano Teiichirou 1991). *See* also Nakano Teichirou, MINJISHIKKOUHOU, 51, 3ed., (1998) (*hereafter* Nakano Teiichirou 1998).

(14) Terada Jirou, *supra* note 5, at 1096.

(15) Nakano Teiichirou, *Shikkoukan no tetsuzukijou no chii*, in SHIKKOKAN, No1, Saikosaibansho jimushokioku 3, 4 (1969) (*hereafter* Nakano Teiichirou 1969).

(16) Frank G. Bennett, *supra* note 11, at 15-18. For more information, *see*

Curtis J. Milhaupt & Mark D. West, *supra* note 6, at 67. *See* also Mark D. West, *Information, institutions, and extortion in Japan and the United State: making sense of sokaiya racketeers*, 93 Northwestern University Law Review 767, 787(1999) (*hereafter* Mark D. West).

(17) Shindou Kouji & Takeshita Morio, *supra* note 9, at 35.

(18) Takeshita Morio & Masahiro Suzuki, *supra* note 7, at 46.

(19) Shikkoukan Hou [Law on Executors] was promulgated in 1966 (Showa 41) as the Law No 111 (*hereafter* Law 1966).

(20) Nakano Teiichirou 2000, *supra* note 12, at 53.

(21) Nakano Teiichirou 1969, *supra* note 15, at 4.

(22) Law 1966, *supra* note 19, at art. 2.

(23) Herzog Peter, CIVIL PROCEDURE IN FRANCE, 93 n153 (1967).

(24) Nakata Junichi, MINJISOSHOUHOU GAISETSU (2) (KYOUSEISHIKKO) 30 (1971) (*hereafter* Nakata Junichi). Kotsuki YamaKido also has in details discussed the characteristics of *shikkokan* system. *See* Kotsuki YamaKido, MINJISHKKOU. HOUZENHOU RONGI, 28-29 (1999).

(25) T. Andreeva, *Kommentary k federal'nomy zakony "Ob Isnolnitel'nom Proisvodstve: Zashita prav vzuskatelia, doljnika i drugix lis pri sovershenii isnolnitel'nux deistvii*, 4 Khozaistvo i pravo 18, 19 (1999).

(26) V.Shepctyuk, *Kommentary k federal'nomy zakony "Ob Isnolnitel'nom Proisvodstve: Osnovnuie polojenia i obshie uslovia sovershenia isnolnitel'nux deistvii*, 7 Khozaistvo i pravo 13, 19 (1998).

(27) Houmudaijin kanbou chousaka, SHIKKORI SEIDO KAIKAKU NI KANSURU IKENSHO, 136-139 (1955).

(28) Shozo Ota pointed out a subtle reason that bureaucratic "rationality" may play some role in the reform and that the bureaucratic agenda may work independently from societal needs. *See* Shozo Ota, *Reform of civil procedure in Japan*, 49 American Journal of Comparative Law 561, 566 (2001).

(29) Nakano Teiichiroo 1969, *supra* note 15, at 5-6. *See* also Shindou Kouji & Takeshita Morio, *supra* note 9, at 35. Nevertheless, it is also said that without commission, the effectiveness of civil execution may be even worse. *Email exchange* with Associate Professor Frank G. Bennett, Graduate School of Law, Nagoya University, Japan (July 3, 2002).

(30) Nakata Junichi, *supra* note 24, at 28.

(31) Shindou Kouji & Takeshita Morio, *supra* note 9, at 36.
(32) Nakano Teiichiroo 1969, *supra* note 15, at 5.
(33) Law 1966, *supra* note 19, at arts. 7-9.
(34) *Id.* at art. 10-16.
(35) Rules on Executors, art. 21. Rules on Executors were issued by the Supreme Court on November 8, 1966 as the Rules No 10 (*hereafter* Rules No 10). As principal, an annual income of a civil servant of 7 grades is JY3,764,440. It is very rare that an executor receives the difference from National Treasury because the commission they receive is much higher than the above mentioned amount. *Discussion* with Professor Honma Yasunori, Graduate School of Law, Nagoya University, Japan (March 28, 2002).
(36) Frank G. Bennett, *supra* note 11, at 14.
(37) Rules No 10, *supra* note 35, at arts. 1-2.
(38) *Id.* at art 3.
(39) Frank G. Bennett, *supra* note 11, at 5-6.
(40) Statistics were obtained from the Supreme Court of Japan through telephone by Professor Honma Yasunori, Graduate School of Law, Nagoya University, Japan (June 13, 2002).
(41) *See*, for example, Hiroshi Oda, Japanese Law, Butterworth's, 377 (1992) (mentioning the shortage of personnel, including judges as one of the primary cause of delay in litigation); Frank G. Bennett, *supra* note 11, at 24-25; THE NIKKEI WEEKLY, *Judicial system crying out for reform*, June 18, 2001(describing the need to increase in number of judges); JAPAN TODAY, *New electronic system to protect Japanese overseas developed*, available online at http://www.japantoday.com (last visited June 7, 2002) (saying the small portion of human resources is a common fact in Japan).
(42) It is divided by the number of execution matters (a sum of paid and unpaid cases) for the number of executors. For the statistics of execution matters, *see* Saiko Saibansho, JIMU SOUKIOKU, HEISEI 12 NEN/SHIHOU TOUKEI NENHOU 1 MINJI GYOSEI HEN, 60 (2000). In 1997, the number of fillings was 770. *See* Frank G. Bennett, *supra* note 11, at 2. In Vietnam, according to the General Department for Management of civil execution, the number of fillings also increases each year. In 2001, it was between 200 and 300.
(43) Law on Civil Execution was enacted March 30, 1979 as the Law No 4 and became effective from October 1, 1980, amended in 1989 and

1998 (*hereafter* Law No 4). Before the enactment, procedure for compulsory execution was stipulated in the Code of Civil Procedure in 1890, 6th compilation, and auction for enforcement of hypothec rights was stipulated in the Auction Act in 1898.

(44) Taniguchi Yasuhei, *The 1996 Code of Civil Procedure of Japan－a Procedure for the Coming Century?* 45 American Journal of Comparative Law 767, 768, 789 (1997).

(45) Taniguchi Yasuhei, *Regional report from Eastern Asia*, in TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS AND ORDERS, 141, 143 (1988) (*hereafter* Taniguchi Yasuhei).

(46) Law No 4, *supra* note 43, at art. 1.

(47) Rules on Civil Execution were issued by Supreme Court, November 8, 1979 as the Rules No 5 (*hereafter* Rules No 5), amended in 1980, 1982, 1984, 1987 and 1990.

(48) Miyake Hiroto, *Minjishikkohou Zemina*, Jurizto, at 5 (May, 1981).

(49) Law No 4, *supra* note 43, at art.20. The Code of Civil Procedure was promulgated June 26, 1996 as the Law No 109 and became effective from January 1, 1998.

(50) Judge Yuji Koga, at the workshop in Civil Executions Laws, in Hanoi, Vietnam, November 9-18, 1998, (*hereafter* Yuji Koga) commented that compulsory execution, in broad sense, is a civil litigation proceeding. *See* JICA, JAPANESE LAWS, Vol. III, 208 (1998) (on file with author). Russian law and Uzbekistan law even design the Law on Civil Execution in a way that civil execution is a process involved many parties, where the rights and duties of the parties and the procedures are basically similar to those of litigation proceedings. Here we can *see* provisions regulating the participation in civil execution with their concrete duties and rights of an interpreter, an expert, a legal representative and so on. *See* Zakon ob Isponnichel'nom Proisvodstve [Law on Civil Execution] (1997) (*hereafter* Law of Russia); Zakon ob Isnonnenii Sudebnuc Actov i Actov Drugic Organov [Law on Enforcement of Court Documents and Documents of Other Agencies] (2001) (*hereafter* Law of Uzbekistan). In Vietnam, some argue that civil execution is a further or continuing stage of litigation process, some, in contrast, describe it as a mere administrative procedure, while others say it is a mixed between the two. *See*, for example, Hoang Tho Khiem, *Mot so y kien ve cong tac thi hanh an dan su hien nay [Some thoughts concerning*

the contemporary civil execution work] in *Mo hinh quan ly thong nhat cong tac thi hanh an dan su [A clay model for management over court judgments enforcement work]* (a ministry-level scientific research) (2000); Le Minh Tam, *Thu ban may van de ly luan ve thi hanh an* [An attempt to discus some theoretical questions of court judgments enforcement] [2 Law Journal] (2001); Nguyen Cong Binh, *Van de thi hanh an dan su trong viec soan thao Bo luat to tung dan su [Civil execution in draft of Code of Civil Procedure]* [5 Law Journal] 43, 44 (1998); Le Xuan Hong, *Xa hoi hoa thi hanh an dan su [Socialization of civil execution]* [unpublished Law Master's Thesis] (2000) (on file with Hanoi Law University library) (*hereafter* Le Xuan Hong); Nguyen Cong Long, *Cac bien phap cuong che thi hanh an dan su: thuc tien va huong hoan thien [Measures of compulsory execution: practice and improvement]* [unpublished Law Master's Thesis] (2000) (on file with Hanoi Law University library) (*hereafter* Nguyen Cong Long).

(51) Rules No 10, *supra* note 35.

(52) When someone has asserted that the Code of Civil Procedure should include procedure for civil execution, Nguyen Cong Binh suggests otherwise. Though, his suggestions on the scope of civil execution to be included in the Code of Civil Procedure seem too broad. *See* Nguyen Cong Binh, *Van de thi hanh an dan su trong viec soan thao Bo luat to tung dan su [Civil execution in draft of Code of Civil Procedure]*, Tap chi Luat hoc so 5-1998 [5 Law Journal] 43, 44 (1998).

(53) Urano Yuukou, *Minjishikkohou joron*, 7 The hogaku seminar bessatsu No 150, 7, 3ed., (1997).

(54) Taniguchi Yasuhei, *supra* note 45, at 144.

(55) Nakano Teichirou 2000, *supra* note 12, at 54-55. For a clear understanding of competency of execution courts, *see* Law No 4, *supra* note 43, at arts. 44 (1,2), 188,195(execution of immovable objects); arts.113,189,195 (execution of quasi-immovable objects); arts. 144 (1, 2) 167 (1, 2) 193 (2) (execution on claims); art. 170 (execution when the object is in possession of a third person); art. 171 (1, 2) (execution of doing or not doing certain acts). art. 142 (implementation of an allotment); art. 8 (permission for execution on holidays or night time); art. 132 (change of scope in movables from a prohibited to an attached); art. 11 (hearing of objection to

execution); art. 36 (3), 38 (4) (issuing necessary decisions concerning the suspension of execution); art. 41 (2) (electing a representative in case of death of the debtor) and art. 198 (issuing a decision on non-penal fine). *See* also Rules No 5, *supra* note 47, at arts. 114 (2) (auction outside the jurisdiction), 121 (1) (other sale method than auction or bid), 122 (1) (the sale by another person).; art. 127 (3) (procedure for sale of movables in case of unable to deliver).

(56) Law No 4, *supra* note 43, at arts. 122, 190, 192, 195 (compulsory execution of movables in money execution or official auction of movables); arts. 168, 169 (delivery or surrender of real estate or movable property in non-money execution (except cases of a third person possession). It should be noted that movables here are those prescribed in the Civil Code of Japan: all other things than the land and the things firmly affixed there well as those obligations payable to a bearer. *See* Civil Code, art. 86 (2, 3) (1996).

(57) Law No 4, *supra* note 43, at arts 55 (2) 57, 64 (3) 121, 188-189, 195; arts. 96 (2) (providing that an executor shall assist a manager in the compulsory management to open a closed door); arts. 114-115 (1) (prescribing the duty in confiscating the certificate of a ship's nationality). *See* also Rules No 5, *supra* note 47, at arts. 84, 96, 98, 173-177 (prescribing the duties in investigation of the status of the assets, custody or sale of immovable objects or quasi-immovable objects...).

(58) These works may vary. For example, the work relates to the appointment of a manager in compulsory management, or the execution of performance of or forbearance of doing certain acts. *See* Nakano Teiichirou 1998, *supra* note 13, at 43.

(59) The explanation is of Professor Honma Yasunori, Graduate School of Law, Nagoya University, Japan (March 28, 2002)

(60) Taniguchi Yasuhei, *supra* note 45, at 144.

(61) Law No 4, *supra* note 43, at art. 22

(62) Code of Civil Procedure, art. 267 (998) (providing that a compromise, waiver or admission of a claim if described in a protocol, such description shall have the same effects as an irrevocable judgment).

(63) Yuji Koga, *supra* note 50, at 208. This viewpoint was also of that of Professor Zhivko Stalev when commenting the scope of the compulsory execution in Europe. *See* Zhivko Stalev, *Report from Continental Western Europe*, in TRENS IN THE ENFORCEMENT OF NON-

MONEY JUDGMENTS AND ORDERS, 236, 245(1988).

(64) Materials of the workshop on Swedish enforcement administration and legislation, in Vietnam, on February 18, 2000 (on file with author) (referring to the chapter 3 of Enforcement Code (1982) which prescribes the scope of documents to be enforced by compulsory execution).

(65) Law on Reform of Procedure of Compulsory Execution, art. 3 (1991).

(66) Matthew Bender & and company, Inc., a member of LexisNexis group, BUSINESS TRANSACTIONS IN GERMANY, Part I, Chapter 5: Litigation in Civil Courts, Enforcement-General Principles, 1-5 Business Transactions in Germany § 5.16, 8 (2002) (listing the types of tiles which can be enforced by compulsory execution) (refer to the Zivilprozessordnung/*ZPO* [Code of Civil Procedure], section 794).

(67) Law of Russia, *supra* note 50, at art. 7.

(68) Law of Uzbekistan, *supra* note 50, at art.5.

(69) Law No 4, *supra* note 43, at art.25 (prescribing that compulsory execution shall be enforced based on a title of obligation having an enforcement statement).

(70) *Id.* at art 26 (1).

(71) Rules No 5, *supra* note 47, at art. 23.

(72) Law No 4, *supra* note 43, at art 14. *See* also Law 1966, *supra* note 19, at art. 15.

(73) Law of former socialist countries also prescribes this provision. Russian Law provides prepayment by a creditor as a right. *See* Law of Russia, *supra* note 50, at art. 83. The same can be found in Uzbekistan law. *See* Law of Uzbekistan, *supra* note 50, at art. 76.

(74) Law 1966, *supra* note 19, at arts. 7-16.

(75) Law No 4, *supra* note 43, at arts. 46 (2), 123 (3, 4).

(76) *Id.* at art. 57.

(77) *Id.* at art. 58.

(78) *Id.* at art. 60.

(79) *Id.* at arts. 53, 56

(80) *Id.* at art. 64 (2); Rules No 5, *supra* note 47, at art. 34. Interestingly, in recent years, the rules on forced sale have also become more flexible in different legal systems. The court in its discretion may deviate from the public auction and choose the alternative of less formal methods of sale. For a detailed discussion on this practice, *see* Konstantinous D. Kerameus, *Conflict of Laws, Comparative law and*

Civil law: Sale or Collection of Assets Levied Upon, 60 Louisiana Law Review 1151, 1151-1159 (2000).

(81) Masahiro Iseki & Takayuki Higashi, *Civil Execution*, in DOING BUSINESS IN JAPAN, 6-22 (1980).

(82) Frank Bennett, *supra* note 11, at 16. For more information, *see* Curtis J. Milhaupt & Mark D. West, *supra* note 6, at 67. *See* also Mark D. West, *supra* note 16, at 787.

(83) Yuji Koga has noted this performance. *See* Yuji Koga, *supra* note 50, at 238. This performance was also so expected and noted by Masashiko Iseki & Takayuki Higashi. *See* Masashiko Iseki & Takayuki Higashi, *supra* note 81, at 6-22, 6-24.

(84) Law No 4, *supra* note 43, at art. 65

(85) Criminal Code, art. 96-3 (1996) (prescribing that a person, who commits an act prejudicial to the fair proceedings of public auction or bids by fraudulent means or threat shall be punished with penal servitude for not more than two years or a fine of not more than two millions and a half yen).

(86) Rules No 5, *supra* note 47, at art. 39 (specifying the assurance of two-tenths or even higher if execution court deems so necessary).

(87) Frank Bennett has in detailed described the form of intervention of outsiders into an auction in Japan in the period before the enactment of Law on Executors. *See* Frank J. Bennett, *supra* note 11, at 15-18.

(88) Yuji Koga, *supra* note 50, at 304-305.

(89) Law No 4, *supra* note 43, at art. 87.

(90) Preferential right principle gives priority for a creditor, who initiates an attachment while equal right principle does not. *See* Yuji Koga, *supra* note 50, at 249. Russian law, like Vietnamese law, though does not adopt preferential right for first attachments or equal right principle, recognizes priority based on the nature of the claims, that is to say, the order is based on the humanitarian principle. *See* Law of Russia, *supra* note 50, at art. 78.

(91) Dennis M. Ryan, *The Problem of Judgment Lien Priority and After-Acquired Property in Iowa: Kisterson v. Tate*, 69 Iowa University 825, 825-832 (1984).

(92) Civil Code, art. 86 (2) (1996).

(93) Rules No 5, *supra* note 47, at art. 93, 94.

(94) *Id.* at art. 97, 98.

(95) Yuji Koga, *supra* note 50, at 232.

(96) Law No 4, *supra* note 43, at art. 133.
(97) *Id.* at art. 145.
(98) *Id.* at art. 147.
(99) *Id.* at art. 152; *See* also Cabinet Order No 230, art 2 (2) (1980) (amended as No 285 in 1990). The amount considered as necessary living standards is JP210,000.
(100) Law No 4, *supra* note 43, at arts. 155, 158.
(101) *Id.* at art.156.
(102) *Id.* at art.159.
(103) Rules No 5, *supra* note 47, at arts. 146-149.
(104) *Id.* at art.150 (2).
(105) *Id.* at art. 99.
(106) Recently, the Supreme Court of Japan has ruled that a creditor does not have to specify the content of deposit box and it's existence. *See* Judgment of Supreme Court dated 1999.11.19, case number 1996 (0), No 556, available online at http://courtdomino2.courts.go.jp/promjudg.nsf/766e4f1d46701bec49256b8700435d2e/701daf2d5bb295f849256a94001c29e7?OpenDocument (last visited February 28, 2003).
(107) Rules No 5, *supra* note 47, at art. 100.
(108) Law No 4, *supra* note 43, at art. 131.
(109) *Id.* at art. 132.
(110) *Id.* at art. 123.
(111) Law on Reform of Procedure of Compulsory Execution, art. 20 (1991).
(112) Matthew Bender & Company, Inc., a member of LexisNexis group, BUSINESS TRANSACTIONS IN GERMANY, *Litigation in Civil Courts, Enforcement-General Principles*, 1-5 Business Transactions in Germany §5.16, 8 (2002) (noting that an executor has the right to enter the premise to search) (referring to the Zivilprozessordnung/ *ZPO* [Code of Civil Procedure], section 758).
(113) Materials of the *Workshop* on Swedish enforcement administration and legislation, held in Vietnam, February 18, 2000 (on file with author) (referring the right of an executor to break a lock, prescribed by Enforcement Code 1982).
(114) *See* Grajdanski Procesuanui Kodecks RSFSR [Code of Civil Procedure], art. 359 (1964) (last amended in 2001).
(115) *See* Law of Uzbekistan, *supra* note 50, at art. 84.

(116) *Id.* at art 18.
(117) Law of Russia, *supra* note 50, at art. 39.
(118) Law on Reform of Procedure of Compulsory Execution, art. 21 (1991).
(119) *See* Law of Russia, *supra* note 50, at art. 52.
(120) *See* Law of Uzbekistan, *supra* note 50, at art. 54.
(121) Law No 4, *supra* note 43, at art 134. *See* also Rules No 5, *supra* note 47, at arts. 20, 122.
(122) Law No 4, *supra* note 43, at arts. 168, 169.
(123) *Id.* at art. 171.
(124) *Id.* at art. 172.
(125) The supporters of the Contempt of Court argues, that without this rights, there would be no power in the court to enforce it's order; that to compel the judgment debtor to obey the order of the court is not imprisonment for debt, but only imprisonment for disobedience of an order with which he is able to comply. *See* John J. Cound, Jack H. Friedenthal, Arthur R. Miller & John E. Sexton, CIVIL PROCEDURE: CASES AND MATERIALS, 1055 (1989).
(126) Taniguchi Yasuhei, *supra* note 45, at 150. For a discussion on *Astreine*, *see* Peter Herzog, CIVIL PROCEDURE IN FRANCE, 560-564 (1967). For a discussion on Contempt Sanctions, *see* Margaret Meriwether Cordray, Contempt sanctions and the excessive fines clause, 76 North Carolina Law Review 407, 407-462 (1998).
(127) Taniguchi Yasuhei, *supra* note 45, at 146-147, 153.
(128) Law No 4, *supra* note 43, at art. 173.
(129) Concerning this point, former socialist countries adopt very strong approach. Uzbekistan law provides a server liability for the act of non-compliance by the authorized persons. *See* Law of Uzbekistan, *supra* note 50, at art. 82 (providing a liability of fifty minimum salary as maximum). Russian law has the same approach. *See* also Law of Russia, *supra* note 50, at art. 85 (1997) (providing a liability of two hundreds minimum salary as maximum, which next time shall be double; if the compliance still has not reached, administrative or criminal liability shall be applied).
(130) Jack Jacob, *General report, including Regional Report from Great Britain, in* TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS AND ORDERS, 3, 11 (1988).
(131) Masahiro Iseki& Takayuki Higashi, *Civil Execution, in* DOING

BUSINESS IN JAPAN, Zentaro Kitagawa, Mathew Bender, Chapter VI, 6-65 (1980).

(132) The old law (Code of Civil Procedure, art. 558) allowed an immediate claim. The new law (art. 10 (1) provides there cannot be any claim, if so not provided (art. 12 (1). *See* Takeshita Morio & Masahiro Suzuki, *supra* note 7, at art 55. For more on what is the difference between the two procedures, *see* Takeshita, *Minjishikkohou souron no mondaiten*, in Minjishikkohou zemina, Jurizto, 21-22 (May 1981).

(133) *See* Law No 4, *supra* note 43, at art. 10 (2) (providing a one-week peremptory period after the date of receiving a notice of decision).

(134) *See* Law on reform of procedure for civil execution, art. 7-8 (1991).

(135) Matthew Bender & Company, Inc., a member of LexisNexis group, BUSINESS TRANSACTIONS IN GERMANY, *Litigation in Civil Courts, Enforcement-General Principles*, 1-5 Business Transactions in Germany §5.16, 8 (2002)

(136) *See* Law of Russia, *supra* note 50, at art. 90.

(137) *See* Law of Uzbekistan, *supra* note 50, at art. 86, 88.

(138) *See* Yasuhei Taniguchi, *Good Faith and Abuse of Procedural Rights in Japanese Civil Procedure*, 8 Tulane Journal of International and Comparative Law 167, 180-181 (2000).

(139) Shozo Ota, *Reform of Civil Procedure in Japan*, 49 American Journal of Comparative Law, 561, 579 (2001)

(140) *Visit* the website of the Ministry of Justice of Japan, *see* discussions of the Tanbo. Shikkoseibukai, at http://www.moj.go.jp (last visited March 1, 2003).

(141) Justice System Reform Council, *For a Justice System to Support Japan in the 21st Century*, available online at http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last visited Feb. 28, 2003).

(142) Nakata Junichi, *supra* note 24, at 28. Here the author criticized that the three-agency structure is not yet to touch. This concern latter got some satisfaction by the Law on Compulsory Execution, which introduced two-agency structure. *See* Takeshita Morio & Masahiro Suzuki, *supra* note 7, at 46.

(143) Recently, some amendments to existing legal documents have been made. For example, Law on organizations of courts narrows the scope of authorized person who have the competence to protest effective judgments. The ordinance on

commercial arbitration provides that from now on arbitration awards be enforced by civil execution procedure. And the most important legal document concerning civil execution, the ordinance on civil execution has also been revised. Some points suggested by this paper have now been included into this new ordinance.