

An Attempt at Comparing Compulsory Execution in Japanese and Myanmar Law

Execution against Real Property based on Monetary Claims – Views from an Operational Efficiency Standpoint

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I. INTRODUCTION

Each nation has its own civil execution system which reflects its history and social/economic system. On the other hand, I think, to a certain degree, there are similar devices e.g. attachment and sale. And especially for developing countries, civil execution system will change with the advance of internationalization. Also, the relationship between Japan and Myanmar will be deepened through investment and other interaction. I think, at the moment, trying to compare the civil execution systems in Japanese and Myanmar law is relevant in considering the reform of law in the future in both countries.

Compulsory execution in Japan deals primarily with the execution of monetary claims and the compulsory execution law addresses primarily about execution against real property. Further, the structure of attachment and the sale of real property is thought of as being to some extent a versatile process even in compulsory execution systems outside of Japan. On this occasion, limited to the above situation, this paper will attempt to compare points noticed in the processes under Japanese and Myanmar law, primarily focusing on the efficiency of execution. However, due to limitations in the

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available materials and lack of examination, some misunderstandings may remain, and I await other researchers' findings and will accept them as future areas of examination.

Please note that this examination does not enter into a deep structural comparison of execution law or the underlying substantive details; rather, it is confined to limited findings based on a practical standpoint.

II. MYANMAR'S COMPULSORY EXECUTION SYSTEM

Myanmar's compulsory execution system¹ is defined in the *Code of Civil Procedure* (India Act V of 1908) as contained in Volume XII of the *Burma Code* (hereinafter referred to as "the CPC", as is customary); besides the main clauses of the CPC, compulsory execution is primarily prescribed in the Rules contained in Order 21. (In this paper, the main clauses of the CPC are referred to as "Sections" and Rules within an Order will be referred to by the Order and Rule number; however, regarding compulsory execution the Rules in Order 21 will be referred to simply as "Rules" and will omit "Order 21"). The materials examined include (1) the "Status Paper" and "Report" mentioned in Footnote 1, (2) a document received from the Yangon Western District Court (a pamphlet titled "The Procedure of the Court in Execution" written by Judge Daw Swe of the same Court, hereinafter referred to as the "District Court Pamphlet") during our visit to Myanmar in February 2017,² and (3) knowledge obtained from a discussion with judges of the same Court at a roundtable meeting that was arranged during the same visit.³ Discussion of the compulsory execution system within Japan will be limited in this paper to providing a brief explanation where necessary. In Japan, the number of cases concerning compulsory execution against real property is decreasing (according to the judicial statistics for Fiscal Year 2015 there were 2,278 pending cases that year), and although there were more cases of exercising security interests via auction of real property (21,222 pending cases according to the same statistics), the execu-

1 Regarding Myanmar's execution system, refer to NISHIMURA & ASAH, Status Paper on the Civil and Commercial Dispute Resolution System in Myanmar (2015) pp. 45 ff. (hereinafter referred to as the "Status Paper") and MORI HAMADA & MATSUMOTO, Report on the Legal System in the Republic of the Union of Myanmar, Chapter 5 "Civil Procedure and Arbitration Law in Myanmar" (2013) pp. 204 ff. (hereinafter referred to as the "Report").

2 The author studied the Myanmar legal system in a group of three with Professor Yuka Kaneko, Graduate School of International Cooperation Studies, Kōbe University, and Professor Shiro Kawashima, Faculty of Law, Dōshisha University

3 If there are errors in this paper concerning the results of the discussion, such errors are the responsibility of the author.

tion of security is subject to the compulsory execution provisions. Regarding the execution of security in Japan, even if there is no document that evidences the right to make a claim (Title of Obligation), a creditor can apply for an auction sale if there is a document that evidences the security interest (e.g. a certificate of registered matters). On this point, in Myanmar execution based on a mortgage is prescribed in Order 34, but there does not appear to be any provisions that allows execution based on a security interest itself without a Decree, therefore it is necessary to sue for a Decree that orders an auction and the amount to be repaid.⁴ This scenario will be excluded from this examination.

1. *The Purpose and Scope of Compulsory Execution for Monetary Claims*

In Japan, compulsory execution is a process to compulsorily realize a claim (monetary claim), and the debtor's property is subject to execution of a monetary claim.

In Myanmar also, the purpose of execution is to realize a monetary claim that was determined by way of a court judgment, but in the CPC it is described as the execution of a Decree (Section 38).⁵ Decrees for the payment of money can be executed by detention in a civil prison or attachment and sale of the judgment-debtor's property (Rule 30) (the "judgment-debtor" is hereinafter referred to as the "debtor"). Accordingly, both the debtor's property and the debtor's physical self are within the scope of execution.⁶

"Decree" is defined in Section 2 (2)(9) as a formal expression of an adjudication which determines the rights of the parties that are contesting a suit in the Court and which is issued by a judge based on a judgment. Further, Order 20 Rule 6 (1) defines that a decree must contain the name of the suit, the names of the parties, particulars of the claim, and clear specification of the relief granted or any other determination of the suit. A decree is not the judgment itself, but it is understood as an order for execution based on the judgment.⁷

4 See "Status Paper", *supra* note 1, at 62 ff.

5 In the CPC, general provisions concerning compulsory execution are defined in Section 36 onwards, and detailed provisions are defined in the Rules of Order 21.

6 T. NAKANO, *Minji Shikkō-hō* [Civil Execution Act] (Supplementary Edition 6, Tōkyō 2010) at 6, says: "Execution that makes a person (their life, body or labour) the subject of execution (i.e. execution against the person) is not only inconsistent with our cultural notions, but because of its ineffectiveness it is generally concealed in the shadows."

7 K. KOMATSU, *Adversary System in Myanmar Civil Trials* (1), ICD News No. 68, 73. For a specific example of a decree, see Attachment IV-2-15 of the "Status Paper".

In Japan, a Title of Obligation, such as that issued pursuant to a final judgment, is a requirement for execution, and it is a document that notarizes a right of claim for the purpose of execution; because a decree itself is expressed as being for the purpose of execution, it can be thought of as being a little different in concept from a Title of Obligation. However, as a decree is a public document that describes the details of the relief that should be realized via execution and is executed on this basis, it may be appropriate to say that it corresponds in function to a Title of Execution (a Title of Obligation with a certificate of execution attached).⁸

2. *Jurisdiction*

In Japan there is exclusive jurisdiction (Article 19 of the Civil Execution Act). Therefore, for execution against real property for a monetary claim, the District Court that has jurisdiction over the location in which the real property is located has jurisdiction, but when several pieces of land and or buildings are subject to execution, discretionary transfer is permitted (Article 44 of the same act). In Myanmar the court that issues a decree has jurisdiction, but when executing against real property outside of the court's geographical jurisdiction, the decree may be sent to another court upon the application of the decree-holder (Sections 38, 39) (The "decree-holder" here refers to a judgment-creditor, but this person will hereinafter be referred to as the "creditor"). Also, where the real property is located across the jurisdiction of two or more courts, it is provided that any court may order the attachment and sale of the entire real property (Rule 3). Therefore, jurisdiction lies with both the judgment court and the court where the real property is located, but it is thought that in principle the court with jurisdiction is the one that delivers the judgment. In Myanmar, there is a time limit for applying for execution, which in principle is 3 years from the day that the decree is issued but may be extended to 12 years in some circumstances, after which time an order for execution cannot be issued (it will be dismissed pursuant to Section 48 and Articles 182, 183 of the First Schedule of the Limitation Act). In Japan, execution is possible as long as the right of claim has not been extinguished by a time limitation, and whether the time period has lapsed is determined not by the execution court, but by the institution that issued the Certificate of Execution (e.g. the clerk of the judgment court) (Articles 25, 26 of the Civil Execution Act).⁹

8 Of course, this is a figurative expression and there is no process for granting a certificate of execution.

9 On the other hand, I think ascertaining the lapse of a time period is easy to judge, so, if the execution court ascertains a lapse of the time period, the court can also, in my opinion, dismiss the application.

3. *Executive Agency*

In Japan the executive agency is the execution court and the court execution officer (Article 2 of the Civil Execution Act). The execution court differs from the court that formulated the final judgment or other Title of Obligation (judgment court). The execution court performs execution with the aim of effectively realizing the relevant right of claim based on the Title of Obligation formed from the judgment.

As described above, in Myanmar the execution court is in principle the court that issued the decree (and a court which receives transfer of a decree) (Section 38), and the court which issues a decree is the same court that delivers judgment. Therefore, during the execution process the execution court must also determine substantive objections and the court has accumulated large discretion to order a stay of the execution, which can be thought of as a background factor for causing delays. In Myanmar, the division of the roles of the execution court and the court execution officer are not clearly defined in the legislation.

4. *Appeals/Objections and Stay (Suspension) of Proceedings*

In Japan, objections to the disposition of an execution and appeals against disposition of an execution are the avenues of appeal against procedural issues. Such objections and appeals do not have the effect of staying execution as a matter of course (the court has the authority to stay execution pursuant to Articles 10 (6) and 11 (1) of the Civil Execution Act). In an appeal against disposition of an execution, there is a provision for the court to dismiss the appeal if it has been filed for the purpose of delaying the execution procedure (Article 10 (5) of the same act).

Avenues for appeal based on substantive reasons (e.g. absence or extinguishment of a right of claim, or a third party possessing a right that obstructs the delivery of the property subject to execution) include actions to oppose execution (Article 35 of the Civil Execution Act), third-party actions against execution (Article 38 of the same act), and actions to oppose a grant of a certificate of execution (Article 34 of the same act). Actions to oppose execution and third-party actions against execution are lawsuits where the creditor is the opposing party (An action to oppose execution disputes, for example, whether there is a right to claim, and it is filed in the court that delivered judgment. A third-party action against execution is a claim that the third party has ownership or some other right over the subject property which obstructs assignment of the property and seeks rejection of the compulsory execution; it is filed in the execution court.). These actions do not stay the execution as a matter of course, but the person who raises the objection may apply to the court hearing the objection for a provisional stay of

execution (Article 36 (1) of the same act) or must submit an authenticated copy of a successful judgment to the executive agency and request a stay or revocation of the execution (Articles 39 (1) and 40 (1) of the same act).

In Myanmar, it appears that procedural objections and substantive objections are not clearly separated in the legislation in the way that they are in Japanese law. This may be because the execution court and judgment court are not separated. Also, it appears that the provisions for staying execution when an objection is filed are not as organized as they are under Japanese law. In Myanmar, there are provisions for third-party objections to an attachment (Rules 58-62), and Rule 63 specifies that a person dissatisfied with the determination of an objection may commence a lawsuit.¹⁰ According to Rule 58 (1), when investigating a third-party objection, the court can examine the parties and other relevant persons in the same manner as a lawsuit, and as a result has the authority to postpone the sale of property (Rule 58 (2)), which in practice does not differ greatly from the Japanese law. However, the creditor is not named as a party to the objection like in Japan, but instead it is a process of objecting to execution; further, there are no provisions regarding stay or revocation of the process that are individually defined for each of the methods of objection. There is a provision for dismissing an objection that is filed for the purpose of delaying execution (Rule 58 (1)).

In Myanmar law, stays of the execution process are defined in Rules 26–29. According to these rules, the court that receives a decree for the purpose of execution will, upon sufficient cause being shown, stay the execution for a reasonable time to enable the debtor to apply to the court that issued the decree or to a court of appellate jurisdiction for a stay of execution (Rule 26). Further, if a suit is pending between the creditor and debtor, the court may accept a security and stay execution until the pending suit is decided (Rule 29). The court therefore has a very large scope of authority to stay execution (according to Section 151, in Myanmar the court generally has wide discretion to make orders necessary for the ends of justice or to prevent abuse of the process of the court.). However, the relationship a stay of execution has with substantive objections and suits is not clear, and it seems that the substantive provisions regarding when a stay should be ordered and for how long are insufficient (but there are individual provisions such as Rule 58 (2) mentioned above).

In Japan, excluding stays under the authority of the court (for example, in appeals against a disposition of execution under Article 10 (6) and in actions to oppose a grant of a certificate of execution under Article 32 (2) of the Civil Execution Act), execution may be stayed based on an application for a provisional stay of execution (Article 36 (1) of the same act) and

¹⁰ See pp. 208–209 of the “Report”.

when a document staying execution is submitted to the execution court (Article 39 of the same act). Other than the authority to stay an execution that derives from an objection to a disposition of execution, the execution court does not make a substantive decision regarding a stay of execution; rather the substantive decision is left to the judgment of the appeal court or the court that receives the action to oppose execution, etc. In other words, even if an appeal against the execution process is submitted, the execution is not stayed as a matter of course on the basis of the appeal submission itself. This is due to considerations for the efficient progression of the execution process.

In Myanmar, unlike under Japanese law, regardless of whether it is a procedural objection or substantive objection, the submission of an order staying execution is not required to stay the execution, and if an objection is submitted or there is another pending suit between the creditor and debtor, the execution court is either obliged to stay execution or has the discretion to do so (however, the wording of Rule 29 can be read as the court mentioned in the Rule refers to the court that received the objection). Then, if waiting for the result of the objection or appeal takes a considerable amount of time, this too can be said to be a factor in causing delay. That the execution court and judgment court are not separated may be thought of as a background factor, but establishing requirements for a stay of execution based on the filing of an appeal or the submission of an objection are desirable.

In Myanmar, when an objection is submitted concerning a procedural issue and the decision is appealed, the entire record of the case is sent to the responsible court, meaning the execution process cannot practically proceed (information received during the discussion with the Yangon Western District Court judges). On this point, in Japan, Article 7 of the Rules of Civil Execution provides that "If an appeal against a disposition of execution is filed and the execution court finds no need to send the record of the civil execution case, it is sufficient for the court clerk of the execution court to send only the record of the appeal case to the court clerk of the court of appeal." This is done in order to prevent suspension of the process.

In Japan, appeals against a decision on an objection to a disposition of execution are in principle not allowed (as an exception, Article 12 (1) of the Civil Execution Act allows an appeal against an order to rescind a civil execution procedure) and re-appealing an appeal against a disposition of execution is also in principle not allowed (as an exception, Article 10 (8) of the same act allows an appeal against a dismissal). It seems that no such limits apply in Myanmar.

5. *Classification of Subject and Mode of Compulsory Execution*

In Japan, monetary execution and non-monetary execution (delivery, surrender, manifestation of intention, action/inaction) are separated by the type of Title of Obligation (type of right of claim); monetary execution is further classified into execution against real property, execution against movables, and execution against a claim based on the type of property that is subject to the execution. Modes of execution against real property are compulsory auction (attachment and sale) and compulsory administration.

In Myanmar, under the heading of “Procedure of Execution” in the CPC, the authority of the court is to, upon application of a creditor to execute a decree, order the (1) delivery of property, (2) attachment and sale or sale without attachment of property (3) civil detention, (4) appointment of a receiver, or (5) other action appropriate to the nature of the relief granted (Section 51). Within these, in (1) and (5) the details of the right of claim can be considered consistent with the mode of execution, but (2), (3), and (4) are not details of a right of claim but a mode of execution. Further, within Order 21 under the heading of “Mode of Execution”, Rule 30 onwards defines execution methods corresponding to the classification of the contents of the decree. That is, decrees are classified into decrees for the payment of money (Rule 30); decrees for specific movable property (Rule 31); decrees for specific performance of a contract, restitution of conjugal rights, or an injunction (Rules 32, 33); decrees concerning a document or negotiable instrument (Rule 34); decrees for delivery of real property (Rule 35) and decrees for delivery of real property in the occupancy of a tenant (Rule 36), with execution methods defined for each type of decree. Amongst those, concerning a decree for the payment of money (monetary claim), it is prescribed that attachment and sale of the debtor’s property, civil detention, or both can be applied.¹¹ According to the “District Court Pamphlet”, beyond that an order for payment in installments (over a period of six months) is also a stand-alone execution method for a monetary claim. Decrees for payment in installments are defined in Order 20, Rule 11, and according to this provision, when issuing a decree for the payment of money, the court may order payment in installments; also, after issuance of a decree for the payment of money, upon application of the debtor and after notice to the creditor, the court may order payment in installments after adding such conditions as the attachment of the debtor’s property or the taking of a security. According to the discussion with the Yangon Western District Court judges, in most cases the debtor will apply for payment in installments, and the court often allows this. There are also often objections

¹¹ See pages 205–207 of the “Report” for a translation of this part of the CPC.

from both the creditor and debtor regarding the order for payment in installments (the debtor objecting to the conditions of the installments), and awaiting the result of the investigation, decision, and appeal of the decision requires time, which becomes a cause of delay. Further, as the creditor must wait (for six months) to see whether the debtor defaults on the payment of the installments before being able to execute, this is also a cause of delay.

Concerning modes of execution, Section 51 contains general provisions and Order 21 Rule 30 onwards contains separate provisions applicable to specific decrees, but the relationship between the right of claim and execution method is not always clear; apart from the legislation there are execution methods that are used in practice (e.g. payment in installments), which gives the feeling that, different from the law in Japan, there is a deficiency regarding classification based on the right of claim and subject of execution. However, in Myanmar, such classification is, from a practical standpoint, prescribed in detailed execution methods that correspond to the specific contents of the decree.

Regarding payment in installments, in the case of a Title of Obligation for payment in installments in Japan, the creditor can seek execution on a certificate of execution alone, without having to allege or prove that the debtor has failed to make installment payments (Supreme Court decision delivered 15 December 1966 reported in *Minshū* 20-10, 20). Further, regarding a Title of Obligation for simple repayment, the execution court cannot permit a change to payment by installments *ex officio*. The parties may reach an agreement between themselves, but in such case, the creditor must withdraw the execution, or the debtor must prepare and submit to the court a record of proceedings of settle the case (Article 39 (1)(iv) of the Civil Execution Act), or a document granting a grace of performance (Clause (1)(viii) of the same article) in order to obtain a stay of execution.

6. *Flow of the Compulsory Execution Process for Execution against Real Property for Monetary Claims*

a) *In Japan, the sale of real property is generally performed in accord with the following pattern: (Article numbers refer to the Civil Execution Act except where specified)*

- (1) The creditor sends the Title of Obligation (e.g. final judgment) and Certificate of Execution to the debtor, identifies the real property that is subject to execution, and applies for compulsory execution to the court that has jurisdiction over the location of the real property (Articles 22, 26, 29, 43 and 44).
- (2) The court issues a commencement order for compulsory execution and an attachment declaration (Article 45).

- (3) Court investigation of claim: The court determines and gives public notice of a time limit for demands for liquidating distribution and also a notice requiring the notification of claims (Article 49)
- (4) Court preparation for sale: Investigation of the current conditions (court execution officer), order for appraisal (appraiser), description of the property (court clerk) (Articles 57, 58 and 62)
- (5) The court determines a standard sales price (Article 60)
- (6) The sale is performed (court clerk, court execution officer) (Article 64, etc.)
- (7) Bidding and bid opening (Article 66, Rules of Civil Execution Articles 44–48, etc.)
- (8) Permission for sale is determined (Articles 69–71, etc.)
- (9) Payment of the purchase price (Article 78)
- (10) Delivery order (Article 83)
- (11) Distribution of the proceeds (Article 84)

b) Comparison with Myanmar System (Identification of points from a comparative law stance, following the pattern of execution in Japan described above)

- (1) Concerning decrees for payment of money, the creditor applies for compulsory execution with the court that issued the decree, with a copy of the decree attached (Section 38 and Rules 10, 11),¹² and the court issues a process to commence execution; the process must bear the date on which it was issued, be signed by the judge, be sealed with the seal of the court, and delivered to the “proper officer” (it is unclear whether this means an execution officer) (Rule 24).

The order for an execution commencement process can be thought of as corresponding to the commencement order for compulsory execution under Japanese law, but according to the above Rule, unlike in Japan, it appears that an order for attachment of the real property subject to execution is not described in the execution commencement process. This may instead be according to the order for attachment issued in relation to the separately conducted application for attachment (Rule 54).

An application for compulsory execution is in principle made in writing (Rule 11(2)). Within the application, the creditor selects from the execution modes defined in Section 51 (in cases of execution against real property pursuant to Rule 11 (2)(j), the options are attachment and sale or sale without attachment, civil detention, or both). If the creditor selects attachment and sale of the real property, it applies

¹² See Attachment IV-10-(5)-(b) of the “Status Paper” for an actual example.

for attachment and specifies the applicable real property by identifying the lot number or attaching a map (Rule 13 (1)).¹³

- (2) A court which receives an application (in principle the court of first instance that issued the decree) is to summon the parties.¹⁴

Concerning the summons, Rule 22 defines that where an application is made more than three years since the date the decree was issued, the court is to give notice to the person against whom the application is made and require them to provide a reason why the decree should not be executed. However, rather than being limited to these circumstances, summons are widely used as a preliminary process before commencing execution (page 49 of the “Status Paper”, and information obtained from the discussion with the Yangon Western District Court judges); the debtor rarely appears at this time, but often appears after the execution commencement process has been issued (page 49 of the “Status Paper”). Regarding summons, where a decree is for the payment of money and the creditor selects civil detention, the debtor must be summoned as a preliminary process in order to be given notice and have the opportunity to be heard (Section 51, Rule 40); it is further prescribed that when attachment is selected, the creditor can apply for the debtor or other person to be summoned to attend court for oral examination regarding whether the debtor has any property or other means of satisfying the decree (Rule 41). These provisions can be read as being performed after execution has commenced and where civil detention or attachment is used as the individual execution method, and they are separate from the general summons issued at the time of commencing the execution procedure.

Japan’s system does not have a summons as a process to commence execution, but this is because the subject of execution is the debtor’s property, which the creditor specifies when applying to commence execution. Thus, summoning the debtor is unnecessary. In Myanmar, it is inferred that a summons is a prerequisite to the decision to commence execution. But when looking at the practice described above, it is actually more often performed after execution has commenced, so it seems that the difference from the above-mentioned summons issued when detention or attachment is selected is unclear. When the operation of the above-mentioned payment in installments is also considered, in Myanmar the court’s discretion in the operation of the execution process is large, and the circumstances of the debtor are given as much

13 See Attachment IV-10-(6) of the “Status Paper” for an actual example.

14 See pages 48–49 of the “Status Paper”.

consideration as possible. But the role of the summons system and a detailed description of its operation in the provisions seem insufficient. In its operation, the time required for a summons seems a factor causing delay in the process.

A summons for an attachment can also be read as being used as a property disclosure method; on this point Japan has a similar property disclosure procedure (Civil Execution Act Article 196 onwards). However, the system is not used often, and there are strong opinions that the conditions for non-fulfillment and sanctions (a non-penal fine of 300,000 yen or less) should be revised. Further, currently in executions against a claim, a system is being considered where the court can make enquires with banks and other institutions regarding the savings account information of a debtor who breaches an obligation to pay money. The status of the use of Rule 41 in Myanmar is a point of interest.

(3) Attachment

In Japan, when commencement is ordered the attachment of the subject real property is declared and registration of the attachment is commissioned (Articles 45 (1) and 48 of the Civil Execution Act). During this it is proclaimed that the auction process has been commenced. The attachment becomes effective when the debtor is served with the commencement order, or when the attachment is registered, whichever is earlier (Article 46 (1) of the same act).

Registration as a public notice is important as any further transfer, offering the property as security or a grant of usufructory rights between the debtor and a third party essentially cannot countervail the execution process.

In Myanmar, there appears to be no provisions defined regarding the registration of attachment based on the authority of the court (Section 17 (1) of the Registration Act includes “order of a court that contains a limit on a right related to immovable property” as a document subject to mandatory registration, which seems to apply to attachment¹⁵ but is not interpreted that way in Myanmar). Therefore, in Myanmar, even if an attachment order is issued as a compulsory execution method, it seems the public notice of such cannot be said to be sufficient. In Myanmar, the provisions on attachment prohibit actions, such as the debtor transferring rights in the subject property to a third party or setting the property as security, have the effect of prohibiting a third party from gaining a benefit from any such actions by the debtor, and they

15 See MORI HAMADA & MATSUMOTO (Yangon office), *Front Line of Myanmar Law*, p. 225.

specify that the attachment is to be proclaimed by traditional methods such as beating a drum and by affixing a copy of the attachment order to the subject property (Rule 54 (2)); however this system of public notification cannot be thought of as sufficient. The attachment becomes effective against transferees of the property without consideration of the date of the attachment order, and against all other persons from the time they reasonably should have had knowledge of the attachment order or the time that the order was proclaimed by the beating of a drum or other method defined in Rule 54 (2), whichever is the earlier (Rule 54 (3)). However, according to the above provisions, it seems that in many cases persons who receive a transfer of rights or a security via a transaction with the debtor (who conceals the existence of the attachment) are actually unaware of the existence of the attachment order at the time of the transaction.¹⁶ Further, because the attachment is not registered, it seems that persons who acquire ownership of the subject property from the debtor after the attachment order is made, for example via a contract of sale, can register the contract of sale, and subsequent acquirers can inspect the register and conduct subsequent good faith transactions regarding rights in the property. In that case, because the acquisition of rights after the attachment order become invalid or cannot act against the buyer of the property at auction, regardless of the good or bad faith of the acquirer, and because there is insufficient public notice of the attachment, one can ask if this doesn't have severe results for a good faith acquirer of rights. In particular, following future economic development, whether problems will occur if transactions are conducted without always inspecting the property subject to the transaction is a point of interest. In Japan, the acquisition of rights after attachment is effective between the parties to the transaction, but it is ignored by the execution process; that is, it will not prevail against the purchaser of the subject property.

(4) Preparation for Sale

In Myanmar, there does not appear to be any provisions in a form similar to Japan's for a survey and appraisal of the property's value as initiated by the court, nor does there appear to be the preparation of documents by the court regarding the relationship of rights. However, according to Rule 66 (2) and (3), the court must prepare a notice that details the revenue assessed against the property, any encumbrances, the

¹⁶ According to p. 60 of the "Status Paper", as regards land, the execution officer erects upon the land a notice with the attachment order affixed, so if the site is inspected then the existence of the attachment should be clear.

amount for the recovery, and any other thing that is important for the purchaser to know. Also, as the court has the authority to summons any person to court for examination and require the submission of necessary documents pursuant to Rule 66 (4), the court does proactively investigate the property subject to sale. Further, according to pages 60–61 of the “Status Paper”, the debtor submits the grant, map, price information, etc. concerning the subject real property, and an expert conducts an appraisal, upon which the court determines the minimum bid price. In this way, it can be thought that in practice the court takes the lead in having the debtor submit documentation and preparing for sale. But instructions regarding specific tasks such as an execution officer inspecting the site and reporting are unclear, and the establishment of provisions is desirable.

(5) Sale process

In Japan, the sale process is conducted by an execution officer, and currently most cases are by way of period bidding (Article 34 of the Rules of Civil Execution). In Myanmar, the sale (auction) is conducted by an execution officer or deputy execution officer (Bailiff or Deputy Bailiff), and all sales appear to be via auction. Other provisions regarding the sale process are defined in Rules 64 to 68 (a Japanese translation is in pages 55–56 and 60–61 of the “Status Paper”).

In Myanmar, if the amount of the decree may be raised (via mortgage, lease or private sale of the property), the debtor can apply to the court for postponement of the sale and the court may consider the reason and postpone the sale for an appropriate period (Rule 83). This point also gives consideration to the debtor’s circumstances, but the discretion of the court is large and can be thought of as being linked to delay of the process.

(6) Payment of the purchase price and acquisition of ownership by the purchaser

In Japan the purchaser acquires ownership upon payment of the purchase price (Article 79 of the Civil Execution Act). In Myanmar ownership is transferred at the time of sale (Section 65), which does not seem to differ from Japan (however, the relationship with the system for later cancellation of the sale is unclear). However, regarding payment of the purchase price in Myanmar, the purchaser must pay a 25% deposit at the time of declaration of purchase and pay the balance within 15 days; if such payment is not made, the property will be re-sold (Rules 84-87). In effect, this means that payment in installments is accepted, which seems to give instability to the sale process and invite delay in the process. On

this point in Japan, payment in installments of the purchase price is not accepted. However, in the case of a creditor who is to receive a distribution, it may pay the difference in price after deducting the amount they are to be distributed or receive (Article 78 (4) of the Civil Execution Act); in Myanmar the same provision exists (Rule 72).

In Japan, the effect of the purchaser acquiring ownership via payment of the purchase price is not affected even if the right of claim in the Title of Obligation is non-existent or extinguished. Justifiably, if A and B conspire to defraud a title of obligation (an order for payment declared provisionally executory) against C, the effect will be that it is invalid against C, and if A applies for compulsory execution against the property of C on the basis of the title of obligation and D is the successful bidder, D will not acquire title to the relevant real property.¹⁷ Also, where the debtor did not have ownership of the real property subject to execution in the first place, the successful bidder will not acquire ownership as there is no basis for acquiring such ownership. In Myanmar, the thinking in such cases is unclear, but it appears the same considerations are given in the procedure for subsequent cancellation of a sale.

(7) Cancellation (setting aside) of sale

In Myanmar, persons with certain interests may apply for the sale to be set aside if a certain amount is paid as a deposit, or for the reason of there being a fraud or major irregularity in the process (see Rules 89–90 and pages 57–58 of the “Status Paper”). In the case where the debtor did not own a sellable interest in the property, the purchaser can apply to the court for the sale to be set aside (Rule 91). An application under the above Rule 89 or 90 seems to be possible even after the purchase price has been paid and it is unclear whether there is a time limit (According to pages 61–62 of the “Status Paper”, objections related to the auction may be submitted within 30 days after payment of the purchase price, therefore it seems the same time limit would apply to setting aside, but it is unclear in the provisions). Regarding fraud and procedural irregularity, it depends on the specific reasons, but the acceptance of circumstances outside of the execution process as a reason to set aside the sale may make the process unstable and become a factor in causing delay. The provisions for allowing objections within the above-mentioned 30-day period can be thought of in the same way. Defining specific conditions for setting aside the sale and submitting objections may be beneficial for avoiding complications. In Japan, as de-

¹⁷ Supreme Court decision 27 February 1968, *Minshū* Vol. 22, No. 2, p. 316.

scribed in (6) above, acquisition by the purchaser via payment of the purchase price (Article 79 of the Civil Execution Act) is not affected by the absence of an executable claim, but ownership will not be acquired if (1) the debtor was defrauded of a Title of Obligation, or (2) the debtor did not have ownership of the subject real property. On this point, the provisions of Myanmar's Rule 91 can be said to be based on the same reasoning as (2). If Myanmar's provisions in Rule 90 concerning setting aside the sale due to procedural irregularity or fraud are said to have the same reasoning as (1), then it shares the effect of the Japanese case precedents. However, the specific conditions are not clear within the provisions.

(8) Confirmation of sale

In Myanmar, when the sale is confirmed, the court grants a certificate to the purchaser identifying the purchased property and the purchaser, a copy is sent to the Sub-Registrar within the district in which the relevant land is located, and the purchaser's information is certified by the superintendent of land records (Rules 94, 94A, 94B). If this carries the meaning that a purchase via auction is described in the land registrar or is registered under the authority of the Registration Act,¹⁸ then it has the same meaning as the commissioning of registration in Japan (Article 82 of the Civil Execution Act). Provisionally, if the result of public sale is mandatory registration under the court's authority, then registration of the attachment under the court's authority at the commencement of the execution process would be more consistent and avoid confusion in transactions concerning the real property subject to the attachment. However, according to page 62 of the "Status Paper", if the debtor does not respond to the change of title, the purchaser can apply to the court for a change of title, and the execution officer (bailiff) can sign and issue documents instead of the debtor (obligee) and take them to the government office for registration; it appears as if there is not a system of registration under the authority of the court.

18 Regarding registration in Myanmar, according to p. 218 onwards of "Front Line of Myanmar Law" (*supra*, note 15), when transferring or leasing real estate the two processes of registration under the Registration Act and changing the contents of the Land Record are necessary. Concerning the history of land rights and registration systems in Myanmar, *see* I. OKAMOTO, Land Tax Systems and Land Ownership in Colonial-Period Burma, in: Institute of Developing Economies (ed.), Southeast Asian Economic Development and Land Systems.

(9) Distribution

When there are multiple creditors in Japan, the creditors other than the person who applied for compulsory execution can request and receive a distribution (Article 87 (1) of the Civil Execution Act).

In Myanmar, when there are several persons holding a decree for the payment of money, they may receive a proportional distribution by applying to the court for compulsory auction (Section 73 (1)). That means multiple applications for auction are required in order to receive a distribution; if a separate execution process is performed for each application, this may hinder the efficiency of the process, but in essence an application for auction may achieve the same function as a request for distribution. In Japan, if there are multiple applications to commence an auction the applications will be received, but processing of the first application will occur first, and the subsequent application will be processed in the case that the first is ended due to withdrawal etc. (Article 47 of the Civil Execution Act).

(10) Order for delivery (Rule 95)

In Myanmar, the court may order delivery to the purchaser even when a tenant or other person is entitled to occupy the property (Rule 96). On this point, in Japan, an order for delivery cannot be made against a tenant who occupied the property prior to attachment if there is no mortgage, and occupancy by a tenant who has occupied the property after a mortgage was provided but prior to attachment will be recognized for a period limited to 6 months (Article 83 of the Civil Execution Act, Article 395 (1)(1) of the Civil Code). Myanmar's provisions can be read as allowing an order of delivery against an occupant who is entitled to occupy the property, but in practice the occupancy is recognized until the end of the tenancy period (according to the discussion with the Yangon Western District Court judges). Consistency between practice and provisions is desirable.

(11) Obstruction of Transfer of Possession

Rules 97–99 provide for the civil detention of the debtor or others who obstruct the purchaser from obtaining possession (see page 59 of the “Status Paper”). Described in practical terms, the same provisions may be inferred as having the effect of providing indirect compulsion (the impression gained from the roundtable meeting with the Yangon Western District Court judges). In Japan, police assistance can be received in cases of malicious interference (Article 6 (1) of the Civil Execution Act), but in Myanmar there is not an impression of smooth cooperation with the police. If this is the case, improvement on this point is desirable.

III. CONCLUSION

1. Under Myanmar law, there is a system of civil detention, which is touched upon in pages 207-208 of the “Report” and pages 51-52 of the “Status Paper” (the “Status Paper” says that civil detention is used but not frequently, as the creditor must bear the debtor’s living expenses). The author heard from the Yangon Western District Court judges that they had not experienced receiving an application for civil detention, so it seems civil detention is rarely used, at least in Yangon city. From the point of view of Japanese law, as described in Footnote 5, there is no room for the adoption of a similar system, but it can be thought that its practical function in Myanmar is not large (although the impression from the roundtable meeting with the Yangon Western District Court judges was that it has a practical function of indirect compulsion). This point is a question for future examination within Myanmar.
2. In Myanmar, the fundamental law is the CPC based on the India Act V of 1908, and other provisions have been subsequently established based on practical requirements. In practice, the circumstances of the parties are given consideration, which is an aspect that should be regarded highly. However, following social and economic development, there are some areas where the contents of the legislation and the actual practice are not always consistent. On this point, it appears necessary to make the operations and regulations consistent. Further, the legislation itself has a complex structure, being divided into general provisions and Rules under Orders, and they are not always well-organized.

Also, because the room for judicial discretion is large and because detailed requirements for practical processes are not clear, the consequences of the parties submitting various applications and objections are difficult to see, which places a heavy burden on the court and may be a factor in bringing out delays in the process.

3. A few other points that were noticed are summarized as follows:

Establishment of a system for submitting appeals and objections that is appropriate to each stage of the process is desirable.

Further, clarification of the relationship between the submission of appeals and objections and a stay of execution seems to be necessary. Also, practical measures concerning sending the record of the case to other courts seem to be required. Limiting the circumstances where the decision on an objection can be appealed should also be examined for the purpose of efficient execution.

The role of the procedure for summoning people within the execution process needs to be clarified.

The practice of payment in installments and its role seems to require clarification, including whether it is an order of the court (and should be granted in a decree) or done by agreement between the parties.

In relation to the current status of the registration system in Myanmar, if the registration of land transactions under the Registration Act has become common practice (as according to the discussion with the Yangon Western District Court judges), then it may be good to consider the registration of attachments under the authority of the court also.

It seems the provisions regarding the acquisition of rights after attachment and coordination with security holders and tenants are insufficient. Even if it is not much of a problem at present, instances of acquiring ownership, security or tenancy without knowledge of the existence of an attachment will increase as real estate transactions become more dynamic, which means coordination with the execution process will become necessary. On this point, the Japanese system for addressing rights that compete against the attachment may be a helpful reference. In any case, examination of the public proclamations of attachment may be necessary.

Establishment of a process for investigating the current conditions in respect of the real property subject to execution and the relationship of rights is desirable.

Regarding the sales process, an examination of the following matters is desirable, including whether to retain the provisions for postponing sale upon the debtor's request, the practice of paying the purchase price in installments and the system for setting aside a sale; with this comes the establishment of conditions if such provisions are retained, as well as the establishment of conditions for distribution when there are multiple creditors.

4. This paper has examined Myanmar's compulsory execution law from the procedural aspect of efficient operation, having comparison with Japanese law as a benchmark. However, it has been limited to relatively superficial observations without knowledge of the actual practices within Myanmar, and there may be many points based upon misunderstandings that do not conform with the actual circumstances. About these points I would like to receive all of your findings and advice, and conduct further examination in the future.

Outline comparison of Japanese and Myanmar Law regarding compulsory execution against real property for a claim of payment of money

(Provisional outline) March 2017

	Japan	Myanmar
	Civil Execution Act (CEA) Rules of Civil Execution (RCE)	Code of Civil Procedure (CPC) Sections and Order (esp.21)-Rules
1 Classification of compulsory execution	<p>1 – Monetary claim (CEA- Art. 34 onwards) “CEA” hereinafter omitted (Subject of execution)</p> <ul style="list-style-type: none"> – Assets of debtor i.e. <ul style="list-style-type: none"> – Immovable property – Movable property – Claim etc. <p>(Mode of execution)</p> <ul style="list-style-type: none"> – Attachment and sale – Compulsory administration – Collection of monetary claim etc. <p>2 – Non-monetary claim (Art. 168 onwards) (Categories)</p> <ul style="list-style-type: none"> – Delivery/vacation – Manifestation of intention (registration process) – Performance/ Non- performance of an action <p>(Modes of execution)</p> <ul style="list-style-type: none"> – Direct execution (delivery etc.) – Execution by substitute (removal of a house etc.) – Indirect compulsory execu- tion 	<p>1 – Monetary claim – Decree for payment of money (Order 21, Rule 30) “Order21” hereinafter omitted (Subject of execution)</p> <ul style="list-style-type: none"> – Assets of debtor – Body of debtor <p>(Mode of execution)</p> <ul style="list-style-type: none"> – Attachment and sale – Detention in civil prison – Other manner as the nature of the relief granted may require (sec- tion 51(e)) Installment? <p>2 – Non-Monetary claim (Sec. 51, Rule 31 onwards) (Categories)</p> <ul style="list-style-type: none"> – Delivery/vacation – Performance /non-performance – Execution of document of en- dorsement of negotiable instru- ment etc. <p>(Mods of execution)</p> <ul style="list-style-type: none"> – Direct execution – Appointing a receiver – Detention in civil prison (effect of indirect compulsory execution?) – Attachment and sale (as substitu- tion measures?) etc.
2 Base of execution	Title of obligation + Grant of a certificate of execution (Arts. 22, 26)	Decree (Sec. 36–38)
3 Executive agency	Execution court (including clerk) different court than the judg- ment court Enforcement officer (Art. 2)	Execution court – same court as the judgment court (Enforcement officer?) (Sec. 2(2), 38)

<p>4 Jurisdiction</p>	<p>Principal: – The district court having jurisdiction over the location (where the real property is situated) – Transfer to another court is possible (Arts. 19, 44)</p>	<p>Principal: – The district court which issued the Decree (same as the judgment court) – Transfer of decree to another court is possible (Sec. 37~39) – Where immovable property is situated within the jurisdictions of two or more courts, any court may attach and sell the property. (Rule 3)</p>
<p>5 Objections and appeals</p>	<p>1 – Substantive objection – Action to oppose execution (Art. 35) – Third party action against execution (Art. 38) 2 – Procedural objection – Appeal against a disposition of execution (Art. 10) (When specially provided) Within one week – Objection to a disposition of execution (Art. 11)</p>	<p>1 – Substantive objection – Action to oppose execution (Separate suit between creditor and debtor)? – Third party objection against execution (Rules 58~63) 2 – Procedural objection There are not any concrete provisions?</p>
<p>6 Stay of procedure (suspension)</p>	<p>1 – Due to substantive objection: A The court upon a petition may order a stay until the final judgment. (Art. 36 (1)) B Mandatory Stay or Revocation due to submission of the certain documents (Arts. 39(1), 40) 2 – Due to procedural objection A court of appeal or an execution court may order stay. (Arts. 10(6),11(2))</p>	<p>The court has the general authority to stay the execution. (Rule 26(1)) 1 – Due to substantive objection: a Where a suit is pending against the decree holder ~ the court may stay execution until the pending suit has been decided. (Rule 29) b Third party objection against execution The court has authority to postpone the sale. (Rule 58(2)) 2 – In case of appeal Order of stay by appellate court or the court which passed the decree (Order 41 Rule 5(1)and (2))</p>

7 Restriction of appeal against judgment of objection	1 – Appeal is possible against a judgment about a substantive objection. 2 – Judgment about a procedural objection – Against the decision of <i>appeal</i> against a disposition of execution → As a rule re-appeal is impossible (Exception Art. 10(8)) – Against the decision of <i>objection</i> against a disposition of execution → As a rule appeal is impossible (Exception Art. 12)	There are no restrictions on appeal? The court may restrict an appeal if the court thinks it is an abuse or delays the procedure? (Sec. 151)
8 Application for execution	By written application (RCE. Art. 1) Submission of a copy of title of obligation with a certificate of execution Identification of subject of attachment by creditor (RCE. Art. 21)	As a rule by written application Submission of a copy of Decree (Rule 11) Selection of mode of execution (when attachment is selected, identification of subject of attachment by creditor is necessary) (Rule 13(1))
9 Commence- ment order	When the required preliminary measures have been taken, execution court issues a commencement order and declares an attachment of the real property. (Art. 45(1))	The court executing the decree issues a notice to the debtor for requiring him to show cause why the decree should not be executed. (Rule 22) When the required preliminary measures have been taken, the court issues its process for the execution of the decree. (Rule 24)
10 Attachment	Creditor identifies subject of attachment beforehand, and applies for execution. RCE. Art. 21) An execution court declares an attachment pertaining a commencement order. Art. 45(1) A court clerk commissions registration of the attachment. (Art. 48)	When the creditor chooses attachment as a mode of execution, the creditor must identify the subject of attachment beforehand. (Rule 13(1)) Summoning and examination of the debtor upon an application of the creditor. (Rule 41) Notification by beating of drum or other customary mode and affixment of a copy of the order on a conspicuous part of the property etc. (Rule 54(2))

	Any transaction between the debtor and a third party after an attachment is valid, but the outcome of that transaction cannot prevail over the creditor and the purchaser through the execution process. (Art. 46 etc.)	Whether the attachment is effective between the parties is unclear. (Rule 54(1))
11 Preparation for sale	Court – lead procedure (Arts. 57 ~62) – Investigation of the current conditions (enforcement officer) (Art. 57) – Appraisal (appraiser) (Art. 58) – Making the description of the property (court clerk) (Art. 62)	Court – lead procedure? The Court may summon any person and examine him in respect to any matters (material things for a purchaser to know) and require him to produce any document in his possession. (Rule 66(2)~(4)) (The role of the enforcement officer is unclear, and as a whole, the investigation procedure is not as clear)
12 Sale procedure	A court clerk specifies the method of sale, and an enforcement officer implements the sale. (Art. 64(1)(3)) In practice, period bidding is adopted in almost all cases (CER. Arts. 46–48) Next-highest purchaser offer system is adopted. (Art.67) Appeal against an order of permission or non-permission of sale (Art. 74)	Bailiff or deputy bailiff implements the sale. (Rule 65(1)) (Rules 64 ~68) Public auction at the site (provisions for period bidding etc. do not exist.) Re-sale on default (Rules 84(1), 86, 87) Postponement of sale to enable debtor to raise amount of decree (Rule 83) Application to set aside sale (Rules 89, 90) Objection against auction (30 days)?
13 Payment of the price	Acquisition of ownership of the property by purchaser (Art. 79) Acquisition of ownership is not affected by non-existence of an obligation. (Exceptions) 1 When the debtor did not have ownership (due to lack of grounds for acquiring ownership) 2 When the title of obligation was obtained by deception	Acquisition of ownership of the property by purchaser. (Sec. 65) Whether acquisition of ownership is affected by non-existence of the obligation is unclear. 1 When the debtor did not have ownership, the purchaser may apply to the court to set aside the sale. (Rule 91) 2 Any person whose interests are affected by the sale may apply to

	<p>(because the debtor as the owner of the subject property has been excluded from the execution procedure) (Supreme court precedent) Commission of registration (Art. 82)</p>	<p>the court to set aside the sale on the ground of a material irregularity or fraud. (what constitutes a material irregularity or fraud is not clear) Registration by official authority is not performed Deposit by purchaser (payment by installment) is adopted. (Rules 84-87)</p>
14 Delivery order	<p>Arrangement between the possession (occupancy) by the tenant and the attachment or the setting of a mortgage (based on the timing of the contract and the order of the attachment and setting of the mortgage) (Art. 83, Civil Code 395(1)(-1))</p> <p>Delivery order is a title of obligation (Art. 22(-3)). Purchaser can apply the court to execute the delivery upon a delivery order.</p>	<p>Arrangement between the possession(occupancy) by the tenant and the attachment is not clear. In practice, the possession (occupancy) of the tenant before the attachment has priority over the purchaser? (Rules 95, 96)</p> <p>Purchaser must file a suit to remove the person?</p>