

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C 36, AS AMENDED**

**AND IN THE MATTER OF TK HOLDINGS INC., AND THOSE OTHER
COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Chapter 11 Debtors")**

**APPLICATION OF TK HOLDINGS INC. UNDER SECTION 46 OF THE
*COMPANIES' CREDITORS ARRANGEMENT ACT***

**FACTUM OF THE MOVING PARTIES
(Re: Recognition of Japanese Proceedings and Court Orders)
(Returnable September 1, 2017)**

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TO: THE SERVICE LIST

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PART I. OVERVIEW

1. This is a motion brought by TK Holdings Inc. in its capacity as foreign representative of the Chapter 11 Debtors (the "**U.S. Foreign Representative**") and Takata Corporation ("**TKJP**") in its capacity as foreign representative (the "**Japanese Foreign Representative**" and together with the U.S. Foreign Representative, the "**Foreign Representatives**") of TKJP and those companies listed on Schedule "B" hereto (the "**Japanese Debtors**", and collectively with the Chapter 11 Debtors, the "**Debtors**"), for an order that, among other things, recognizes the petition commenced by the Japanese Debtors with the 20th Department of the Civil Division of the Tokyo District Court pursuant to Article 21(1) of the Civil Rehabilitation Act of Japan (the "**Japanese Proceedings**") as "foreign main proceedings" and grants related relief.

2. TKJP and its subsidiaries are collectively one of the world's leading automotive safety systems companies. Its products, including seat belts and airbag systems, have saved countless lives. While Takata has no business or operations in Canada, its products appear in vehicles in Canada since Takata sells its products to original equipment manufacturer customers (the

“**OEMs**” or the “**Customers**”) who in turn manufacture and sell automobiles containing Takata component parts in Canada.¹

3. Notwithstanding its long history of leadership and excellence in the automotive safety market, Takata has experienced financial distress due to issues relating to certain of its products. Specifically, certain airbag inflators containing phase-stabilized ammonium nitrate (the “**PSAN Inflators**”) manufactured by Takata have ruptured during deployment of the airbag. This has prompted wide-ranging recalls of vehicles in the United States, Canada and elsewhere.²

4. Although substantial work has been done, and continues to be done to implement and complete the unprecedented recalls of non-desiccated PSAN Inflators, Takata nevertheless faces insurmountable claims and liabilities arising out of or relating to the recalls. This includes litigation in Canada in which Takata entities are named defendants in a number of actions relating to PSAN Inflators, including the Canadian Class Actions (defined herein).³

5. It is anticipated that Takata will seek to implement a global sale transaction (the “**Global Transaction**”) that resulted from a thorough marketing and sale process conducted prior to the commencement of the Chapter 11 and Japanese Proceedings. It is further anticipated that the Global Transaction will provide the best recovery to creditors, continued employment of substantially all of Takata’s employees, and continued production of PSAN Inflators for customers who need them, including to fulfill recalls in Canada and elsewhere.⁴

6. This Court has recognized the Chapter 11 Proceedings underway in the United States as “foreign main proceedings” under the CCAA and has granted related relief to the Chapter 11 Debtors. Recognizing the Japanese Proceedings as foreign main proceedings, recognizing and giving effect to certain provisions of the Japanese Court Orders, and providing the same protections to the Japanese Debtors that was granted to the Chapter 11 Debtors is appropriate because:

- i. the centre of main interests of the Japanese Debtors is in Japan;

¹ Affidavit of Scott Caudill, sworn June 27, 2017 at para. 8 (“**Caudill Affidavit**”), Application Record (re: Interim Recognition Order and Supplemental Recognition Order) dated June 27, 2017 (“**TKH Application Record**”), Tab 3.

² Caudill Affidavit at para. 9, TKH Application Record, Tab 3.

³ Caudill Affidavit at paras. 11 and 12, TKH Application Record, Tab 3.

⁴ Caudill Affidavit at paras. 15 to 17, TKH Application Record, Tab 3.

- ii. the Japanese Court has taken jurisdiction over the Japanese Debtors and has granted relief in the Japanese Proceedings and, therefore, determined that the relief requested in the Japanese Court Orders is appropriate and reasonable in the circumstances;
- iii. TKJP has been authorized to act as a foreign representative for the Japanese Proceedings by the court-appointed supervisor in the Japanese Proceedings (the “**Supervisor**”) acting in accordance with the authority granted to him by the Japanese Court;
- iv. recognition of the Japanese Proceedings and certain provisions of the Japanese Court Orders and allowing the requested relief will allow the Japanese Debtors breathing room to work toward implementation of the Global Transaction for the benefit of the creditors and stakeholders of the Japanese Debtors and Chapter 11 Debtors and therefore protect the Japanese Debtors’ property and protect the interests of their creditors;
- v. Canadian claimants with claims against the Japanese Debtors will be treated in the same manner as similarly situated creditors in the Japanese Proceedings; and
- vi. the Information Officer has agreed to the proposed relief and to act as information officer with respect to the Japanese Proceedings to ensure administrative efficiency.

7. All capitalized terms used but not otherwise defined in this factum have the meanings given to them in the affidavit of Scott E. Caudill sworn June 27, 2017 (the “**Caudill Affidavit**”) or the Affidavit of Hiroshi Shimizu, to be sworn.

PART II. FACTS

8. On June 28, 2017, this Court issued orders pursuant to Part IV of the CCAA that, among other things, recognized the proceedings commenced by the Chapter 11 Debtors in the United

States Bankruptcy Court, District of Delaware as a “foreign main proceeding” and appointed the Information Officer.⁵

9. This motion is brought to, among other things, recognize the Japanese Proceedings commenced by the Japanese Debtors in Japan on June 26, 2017.⁶

10. Pursuant to orders issued June 26, 2017 (the “**Supervisor Appointment Orders**”), the Japanese Court has appointed the Supervisor to supervise the Japanese Proceedings.⁷

11. On June 28, 2017, the Japanese Court issued orders approving the commencement of the Japanese Debtors’ proceedings under the Civil Rehabilitation Act (the “**Commencement Orders**”, and collectively with the Supervisor Appointment Orders, the “**Japanese Court Orders**”).⁸ The Japanese Court Orders established a schedule for the civil rehabilitation proceedings which, among other things, requires rehabilitation claims to be filed by August 25, 2017, or October 30, 2017 if the filing of such claim is approved by the Japanese Court. However, the Japanese Foreign Representative is not seeking recognition of the provisions of the Japanese Court Orders that established that schedule at this time.⁹

12. On August 7, 2017, the Supervisor, pursuant to the powers conferred upon him, issued a consent authorizing the Japanese Debtors to obtain recognition of the Japanese Proceedings and the Japanese Court Orders in the United States and in Canada, and appointing and authorizing TKJP to act as the foreign representative of the Japanese Debtors.¹⁰

⁵ Affidavit of Hiroshi Shimizu, sworn August 24, 2017 at para. 5 (“**Shimizu Affidavit**”), Motion Record of the Foreign Representatives (Re: Recognition of Japanese Proceedings and Court Orders), dated August 24, 2017 (“**TKJP Motion Record**”), Tab 2.

⁶ Shimizu Affidavit at para. 10, TKJP Motion Record, Tab 2.

⁷ Shimizu Affidavit at para. 11, TKJP Motion Record, Tab 2.

⁸ Shimizu Affidavit at para. 13, TKJP Motion Record, Tab 2.

⁹ Shimizu Affidavit at para. 21, TKJP Motion Record, Tab 2.

¹⁰ Shimizu Affidavit at para. 17, TKJP Motion Record, Tab 2.

A. *The Operations of the Japanese Debtors are Situated in Japan*

13. Each of the Japanese Debtors is incorporated pursuant to the laws of Japan and has its registered head office in Japan.¹¹ TKJP is the direct and indirect parent company of the global Takata enterprise.¹² The operations of the Japanese Debtors are headquartered in Tokyo, Japan.

14. TKJP is a public company that has been listed on the Tokyo Stock Exchange since 2006.¹³ The shares of TKJP common stock were de-listed on July 27, 2017 as a result of the commencement of the Japanese Proceedings and related stock market regulations of the Tokyo Stock Exchange.¹⁴

15. The Japanese Head Office is the nerve centre of the Japanese Debtors' management, business and operations. Key functions, including strategic operating and policy decisions, human resources functions, information technology systems administration, corporate governance, public reporting and investor relations are performed out of the Japanese Head Office.¹⁵ All of the officers and directors of the Japanese Debtors are based in Japan.¹⁶

16. The Japanese Debtors operate seven manufacturing plants and one research and development facility in Japan and employ approximately 1,300 employees in Japan. The Japanese Debtors do not directly conduct any business in Canada, nor do they have any employees in Canada.¹⁷

17. The principal assets of the Japanese Debtors are in Japan.¹⁸ The Japanese Debtors do not have any assets situated in Canada other than a retainer with professionals in Canada, including with its counsel McCarthy Tetrault LLP, held on behalf of each Japanese Debtor.¹⁹

¹¹ Shimizu Affidavit at para. 25, TKJP Motion Record, Tab 2.

¹² Shimizu Affidavit at para. 9, TKJP Motion Record, Tab 2; Caudill Affidavit at para. 27, TKH Application Record, Tab 3.

¹³ Shimizu Affidavit at para. 26, TKJP Motion Record, Tab 2.

¹⁴ Shimizu Affidavit at para. 26, TKJP Motion Record, Tab 2.

¹⁵ Shimizu Affidavit at para. 27, TKJP Motion Record, Tab 2.

¹⁶ Shimizu Affidavit at para. 28, TKJP Motion Record, Tab 2.

¹⁷ Shimizu Affidavit at para. 31, TKJP Motion Record, Tab 2.

¹⁸ Shimizu Affidavit at para. 29, TKJP Motion Record, Tab 2.

¹⁹ Shimizu Affidavit at paras. 24 and 31, TKJP Motion Record, Tab 2.

B. Canadian Liabilities of the Japanese Debtors

18. Many of the creditors of the Japanese Debtors are based in Japan.²⁰ Their creditors in Canada are chiefly plaintiffs in various litigation proceedings commenced in Canada (the “**Canadian Actions**”) against TKJP:

- i. TKJP has been named as a defendant in 14 proposed class proceedings in Canada (the “**Canadian Class Actions**”), five of which are active and have been consolidated into national class actions proceeding in Ontario (the “**Continuing Actions**”), none of which have a date scheduled to be certified.²¹ The Continuing Actions are stayed against TKJP on the basis that, among other things, TKJP has not attorned to the jurisdiction of the Ontario courts.²² TKH is also a defendant in the Canadian Class Actions.²³
- ii. TKJP is a defendant in putative competition class actions in four (4) Canadian provinces (British Columbia, Ontario, Saskatchewan, and Quebec) (the “**Canadian Competition Class Actions**”). TKH and certain OEMs are also defendants in the Canadian Competition Actions. No deadlines for class certification motions have been set in any of the actions.²⁴
- iii. TKJP and TKH are named as defendants in a personal injury action brought by Bryant Hallett in which CDN \$1.5 million in damages are claimed (the “**Hallett Action**”).²⁵
- iv. It has come to the attention of TKJP that it is named as a defendant in a personal injury action commenced on June 19, 2017 by Desmond Gordon in which CDN \$1.0 million in damages is claimed (the “**Gordon Action**”). TKJP has not been

²⁰ Shimizu Affidavit at para. 30, TKJP Motion Record, Tab 2.

²¹ Shimizu Affidavit at para. 32, TKJP Motion Record, Tab 2.

²² Shimizu Affidavit at para. 33, TKJP Motion Record, Tab 2.

²³ Shimizu Affidavit at para. 32, TKJP Motion Record, Tab 2.

²⁴ Shimizu Affidavit at paras. 35-37, TKJP Motion Record, Tab 2.

²⁵ Shimizu Affidavit at para. 34, TKJP Motion Record, Tab 2.

properly served with the Statement of Claim in this action and has not delivered any pleadings as a result.²⁶

19. It is intended that all claimants situated in Canada will be treated in the same manner as other similarly situated creditors in Japan and will be entitled to participate in any claims process conducted in the Japanese Proceedings. No separate claims process will be conducted in Canada.²⁷

C. *Global Transaction*

20. As described in the Caudill Affidavit filed in support of the Chapter 11 recognition proceedings, Takata is close to finalizing the terms of a global transaction with Key Safety Systems, Inc. (“**KSS**” and, collectively with one or more of its current or newly formed subsidiaries or designated affiliates, the “**Plan Sponsor**”) for the sale of substantially all of Takata’s global operations after an expansive sale and marketing process.²⁸

21. The Global Transaction is expected to provide for the sale of substantially all of Takata’s assets to the Plan Sponsor other than assets dedicated to the manufacture or sale of PSAN Inflators and other excluded assets through the coordinated foreign proceedings and out-of-court asset and stock purchase transactions.²⁹

22. While Takata is close to finalizing the Global Transaction, its liquidity position was not sustainable without an insolvency filing in light of vendor reaction to news of a then-pending bankruptcy filing.³⁰

23. Recognition of the Japanese Proceedings and certain provisions of the Japanese Court Orders is appropriate under the circumstances and is necessary for the protection of the Japanese Debtors’ property and continuity of operations while the Japanese Debtors progress toward implementing the Global Transaction.³¹

²⁶ Shimizu Affidavit at para. 34, TKJP Motion Record, Tab 2.

²⁷ Shimizu Affidavit at para. 39, TKJP Motion Record, Tab 2.

²⁸ Caudill Affidavit at para. 15, TKH Application Record, Tab 3.

²⁹ Caudill Affidavit at paras. 84-87, TKH Application Record, Tab 3.

³⁰ Caudill Affidavit at para. 95, TKH Application Record, Tab 3.

³¹ Shimizu Affidavit at para. 41, TKJP Motion Record, Tab 2.

24. Requiring the Japanese Debtors to continue defending the Canadian Actions would undermine any efforts of the Debtors to restructure. The Japanese Debtors would be forced to direct time, energy and resources towards the defence of the actions, taking away from their ability to negotiate and execute the Global Transaction and move forward with the Japanese Proceedings. Recognition of certain provisions of the Japanese Court Orders and granting the relief sought herein is important and necessary for the restructuring and protection of the Debtors' property. It is consistent with the interests of creditors to preserve and maximize value of that property.³²

25. There is significant overlap in claims against the Chapter 11 Debtors and Japanese Debtors. Since the overwhelming majority of known potential creditors of TKJP in Canada are also potential creditors of TKH, amending the Canadian Recognition Orders to add the Japanese Debtors as applicants in the existing Canadian recognition proceedings will reduce administrative inefficiency and ensure that potential creditors are apprised of both foreign proceedings.³³

26. To allow the efficient, expedient and equitable progress of the restructuring of Takata as a whole and the completion of the Global Transaction, TKH and TKJP, in their capacities as foreign representatives in their respective foreign proceedings, seek that the Japanese Proceedings be recognized in Canada and be combined with the recognition proceedings already commenced by TKH.³⁴

27. The relief sought is supported by the Information Officer, which has reviewed and consented to the proposed amendments to the Canadian Recognition Orders.³⁵

28. This motion is made on notice to counsel to the proposed representative plaintiffs in the Canadian Class Actions and the Canadian Competition Class Actions and the plaintiffs in the Hallett Action and the Gordon Action.³⁶

³² Shimizu Affidavit at para. 42, TKJP Motion Record, Tab 2.

³³ Shimizu Affidavit at para. 46, TKJP Motion Record, Tab 2.

³⁴ Shimizu Affidavit at para. 44, TKJP Motion Record, Tab 2.

³⁵ Shimizu Affidavit at para. 47, TKJP Motion Record, Tab 2.

³⁶ Shimizu Affidavit at para. 50, TKJP Motion Record, Tab 2.

PART III. ISSUES AND THE LAW

29. The issues to be determined on this motion are as follows:

- i. Should this Court allow the proposed amendments to the Canadian Recognition Orders:
 - (i) recognizing the Japanese Proceedings as “foreign main proceedings” under Part IV of the CCAA;
 - (ii) ordering and declaring that the Japanese Foreign Representative is a “foreign representative” as defined in s. 45 of the CCAA in respect of the Japanese Proceedings;
 - (iii) extending the mandatory relief set out in s. 48(1) of the CCAA to the Japanese Debtors;
 - (iv) recognizing and giving full force and effect in all provinces and territories of Canada to certain provisions of the Japanese Court Orders;
 - (v) extending the mandate of the Information Officer to the Japanese Debtors and the Japanese Proceedings; and
 - (vi) extending the stays and protections consistent with the Model Supplemental Recognition Order in Ontario to the Japanese Debtors?

30. The Foreign Representatives submit that these questions should be answered in the affirmative and that it is appropriate to grant the relief requested on this motion.

B. *Recognition of the Japanese Proceedings as “Foreign Main Proceedings” is Appropriate*

31. The stated purpose of Part IV of the CCAA is to, among other things, “provide mechanisms for dealing with cases of cross-border insolvencies”.³⁷ Comity is a central principle of the CCAA and courts have long recognized the need to coordinate proceedings.³⁸

32. Part IV of the CCAA provides a structure for the recognition of foreign proceedings and mandates that, if the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court “shall” make an order recognizing the foreign proceeding.³⁹ In such an order, the Court must specify whether the proceeding is a “foreign main proceeding” or a “foreign non-main proceeding”.

(a) Ontario is the proper forum and this Court has jurisdiction to recognize the Japanese Proceedings

33. The Japanese Debtors are each “debtor companies” to which the CCAA applies:

- i. Each is a corporation that has assets in Ontario.⁴⁰ The assets held in trust for the Japanese Debtors in retainers with professionals are assets of the Japanese Debtors in Canada. The CCAA does not contain any restriction upon the type of assets held by a company in Canada, nor does it mandate any minimum threshold or require that the assets in Canada be held in the company’s normal course of business.⁴¹

³⁷ CCAA, s. 44.

³⁸ *Babcock & Wilcox Canada Ltd.*, 2000 CanLII 22482 (ONSC) paras. 4 to 13, Brief of Authorities of the Foreign Representatives (Re: Recognition of Japanese Proceedings and Court Orders), dated August 22, 2017 (“BOA”), Tab 1; *Matlack Inc., Re*, 2001 CanLII 28467 (ONSC) at para. 4 [*Matlack*], BOA, Tab 2; *Lear Canada (Re)*, 2009 CanLII 37931 (ONSC) at para. 11-12, BOA, Tab 3.

³⁹ CCAA, s.47.

⁴⁰ Shimizu Affidavit at paras. 24 and 31, TKJP Motion Record, Tab 2; section 2 of the CCAA “company” includes any company “having assets or doing business in Canada, wherever incorporated...”.

⁴¹ Section 9 of the CCAA, to the extent it applies to a recognition proceeding, provides that an application under the CCAA may be made, if the company has no place of business in Canada, to the court that has jurisdiction in any province in which any assets of the company are situated. The Applicant has assets in the form of a retainer with its professionals, including counsel. See *Global Light Telecommunications Ltd. (Re)*, 2004 BCSC 745 at paras. 20, 21 and 24, BOA, Tab 4; see also *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000), p. 8, BOA, Tab 5.

- ii. Each is insolvent, facing an impending liquidity crisis due to insurmountable claims and liabilities arising out of or relating to the recalls of PSAN Inflators and vendor contraction,⁴² and having commenced insolvency proceedings in Japan under the Civil Rehabilitation Act.⁴³

34. In *MtGox Co., Ltd. (Re)*, this Court recognized a Japanese foreign proceeding in Ontario under substantially similar provisions of the *Bankruptcy and Insolvency Act* in circumstances in which the debtor had no assets or operations located in Canada but was subject to a pending class action filed in the Ontario Superior Court of Justice.⁴⁴

35. As was the case in *MtGox*, the Japanese Debtors face actions in Canada, including class actions in which the Continuing Actions have been consolidated into national class actions proceeding in Ontario, managed by Justice Perell of the Ontario Superior Court of Justice.⁴⁵ It is appropriate to recognize the Japanese Proceedings in Ontario and this Court has jurisdiction to do so, to permit the Japanese Debtors to address the Canadian litigation as part of their restructuring efforts, in the same jurisdiction as the chief liabilities against them.

36. It is also appropriate to permit the Canadian recognition of both the Chapter 11 Proceedings and the Japanese Proceeding to proceed in the same application, as a procedural matter to ensure administrative efficiency and to keep creditors of both the Chapter 11 Debtors and Japanese Debtors, which substantially overlap, apprised of both proceedings.

37. The Information Officer has consented to the proposed amendments to the Chapter 11 Recognition Orders and has agreed act as Information Officer for the Japanese Proceedings if the relief sought is granted.

(b) *Criteria for Recognition as a “Foreign Main Proceeding” is Met*

38. The CCAA requires the court to make an order recognizing a foreign proceeding if the court is satisfied that:

⁴² Shimizu Affidavit at para. 24, TKJP Motion Record, Tab 2.

⁴³ *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 at paras 21-26, BOA, Tab 6.

⁴⁴ *MtGox Co., Ltd. (Re)*, 2014 ONSC 5811 at paras. 22-23, BOA, Tab 7 [*MtGox*]. See also *Microbiz Corp. v. Classic Software Systems Inc.* 1996 CanLII 7276 (ONSC) at para. 3, BOA, Tab 8 and *Tucker v. Aero Inventory (UK) Ltd.*, 2009 CanLII 63138 (ONSC) at para 12, BOA, Tab 9.

⁴⁵ Caudill Affidavit at para 12, TKH Application Record, Tab 3.

- i. the application for recognition relates to a “foreign proceeding”, and
- ii. the applicant is a “foreign representative” in respect of that foreign proceeding.⁴⁶

39. With respect to the first requirement, the Japanese Proceedings are “foreign proceedings”.

40. A “foreign proceeding” is defined in the CCAA to include

a judicial or administrative proceeding in a jurisdiction outside Canada dealing with creditors’ collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company’s business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.⁴⁷

41. The evidence establishes that the Japanese Proceedings are judicial proceedings that deal with creditors’ collective interests generally under a law relating to bankruptcy or insolvency in which the Japanese Debtors’ business and financial affairs are subject to control or supervision by the respective courts for the purpose of reorganization.⁴⁸

42. Moreover, Japanese insolvency proceedings have been recognized as “foreign proceedings” in Canada. In *MtGox*, a Japanese bankruptcy proceeding (which had been commenced under the Civil Rehabilitation Act but converted to a bankruptcy) was recognized in Canada as a “foreign main proceeding”.⁴⁹

43. Japanese Civil Rehabilitation Act proceedings have also been specifically recognized as “foreign proceedings” in recognition proceedings under the United States Code (the “**Bankruptcy Code**”), in which the definition of “foreign proceeding” is functionally similar to the CCAA definition of “foreign proceeding”.⁵⁰

⁴⁶ CCAA, s. 47(1).

⁴⁷ CCAA, s. 45 “foreign proceeding”.

⁴⁸ Shimizu Affidavit at para. 23, TKJP Motion Record, Tab 2.

⁴⁹ *MtGox* at para 23, BOA, Tab 7.

⁵⁰ The Bankruptcy Code defines a “foreign proceeding” as a “collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.” (*Bankruptcy Code*, 11 U.S.C. § 101). See the US Court’s decision recognizing a Japanese proceeding under the Civil Rehabilitation Act: *In re Daiichi Chuo Kisen Kaisha, No. 15-121650* (*Bankr. S.D.N.Y. 2015*, BOA, Tab 10.

44. With respect to the second requirement under Section 44 of the CCAA, TKJP is a “foreign representative” in respect of the Japanese Proceeding.

45. The CCAA defines a “foreign representative” as a person who is authorized in a foreign proceeding in respect of a debtor company to:

- i. monitor the debtor’s business and financial affairs for the purpose of a reorganization, or
- ii. act as a representative in respect of the foreign proceeding.⁵¹

46. The Supervisor in the Japanese Proceedings has issued a consent authorizing the Japanese Debtors to obtain recognition of the Japanese Proceedings and the Japanese Court Orders in the United States and in Canada and appointing and authorizing TKJP to act as the foreign representative of the Japanese Proceedings.⁵²

47. The appointment and authorization of TKJP by the Supervisor to act as a foreign representative of the Japanese Proceedings is sufficient to authorize TKJP to act as the “foreign representative” under the CCAA. The CCAA does not require the foreign representative to be appointed by order of the court but rather to be authorized in the foreign proceeding to act as the foreign representative.⁵³ TKJP has been authorized in the Japanese Proceedings by the court-appointed Supervisor.

48. Once a court is satisfied that the application relates to a “foreign proceeding” and a “foreign representative” has been appointed, it is mandatory that the court issue a recognition order.⁵⁴

(c) *The Japanese Debtors’ COMI is in Japan*

49. The CCAA also directs the court to specify in the order whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding.”⁵⁵ The CCAA defines a

⁵¹ CCAA, s. 45 “foreign representative”.

⁵² Shimizu Affidavit at para. 17, TKJP Motion Record, Tab 2.

⁵³ *Re Caesars Entertainment Operating Co.*, 2015 ONSC 712 at para 25, BOA, Tab 11.

⁵⁴ CCAA, s. 47(1).

⁵⁵ CCAA, s.47(2)

“foreign main proceeding” as a foreign proceeding in a jurisdiction in which the debtor company has its centre of main interests (“COMI”).⁵⁶

50. The CCAA does not define “COMI” but it provides in section 45(2) that in the absence of proof to the contrary, the debtor’s COMI is the jurisdiction in which the debtor has its registered office.⁵⁷

51. In this case, the presumptive COMI of each of the Japanese Debtors is in Japan. Each of the Japanese Debtors is incorporated pursuant to Japanese law and have its registered office in Japan, therefore the presumption in section 45(2) applies.⁵⁸

52. If it is necessary to look beyond the presumption, Ontario courts have held that the following “principal factors” tend to indicate the location of the debtor’s COMI, when considered as a whole:

- i. the location that is readily ascertainable by creditors;
- ii. the location where the debtor’s principal assets or operations are found; and
- iii. the location where the management of the debtor takes place.⁵⁹

53. These two tests support a finding that Japan is the COMI of the Japanese Debtors. The Japanese Debtors’ strategic operating decisions, key policy decisions, human resources functions, information technology systems, corporate governance, public company reporting and investor relations take place out of the Japanese Head Office in Tokyo.⁶⁰ Further, all directors and officers of the Japanese Debtors are based in Japan.⁶¹ The Japanese Debtors have no direct operations, assets or employees outside Japan.⁶²

54. Accordingly, the Applicant submits that the Japanese Debtors’ COMI is in Japan and the Japanese Proceedings are “foreign main proceedings”.

⁵⁶ CCAA, s. 45 “foreign main proceeding”.

⁵⁷ CCAA, s. 45(2).

⁵⁸ Shimizu Affidavit at para. 25, TKJP Motion Record, Tab 2.

⁵⁹ *Lightsquared LP (Re)*, 2012 ONSC 2994 at para. 25, BOA, Tab 12.

⁶⁰ Shimizu Affidavit at para. 27, TKJP Motion Record, Tab 2.

⁶¹ Shimizu Affidavit at para. 28, TKJP Motion Record, Tab 2.

⁶² Shimizu Affidavit at para. 29, TKJP Motion Record, Tab 2.

C. *The Stays and Protections granted by Canadian Recognition Orders should be Extended to the Japanese Debtors*

55. Section 48(1) of the CCAA requires the Court to grant mandatory relief once a proceeding is found to be a foreign main proceeding, including:

- i. staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- ii. restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
- iii. prohibiting, unless otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
- iv. prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.⁶³

56. Not only is the stay of proceedings mandatory once the Japanese Proceedings are recognized as “foreign main proceedings” but also, in the circumstances it is both fair and necessary to allow the Japanese Debtors to proceed with implementation of the Global Transaction. This Court has determined that it was appropriate to grant the mandatory relief provided by s. 48(1) of the CCAA to the Chapter 11 Debtors and it is equally appropriate to extend such relief to the Japanese Debtors.

57. With respect to the recognition of the Japanese Court Orders, this Court has overarching powers under the CCAA to make discretionary orders in a recognition proceeding. Section 49 of the CCAA provides that a court may make any order that it considers appropriate if it is

⁶³ CCAA, s. 48(1).

necessary for the protection of the debtor company's property or the interests of a creditor or creditors.⁶⁴

58. On June 28, 2017, this Court recognized and gave effect to the U.S. First Day Orders in Canada. It is equally appropriate and necessary to grant similar recognition and give effect to the specified provisions of the Japanese Court Orders.⁶⁵ The Japanese Foreign Representative anticipates seeking recognition of the balance of the Japanese Court Orders on a subsequent motion.⁶⁶

59. The Japanese Court Orders grant relief in the Japanese Proceedings that is appropriate and necessary for the protection of the Japanese Debtors' property.⁶⁷ They are necessary to maintain continuity of the Japanese Debtors' operations with minimal disruption or loss of productivity and value, while assisting the Japanese Debtors in their progress toward the implementation of the Global Transaction.⁶⁸ A successful implementation of the Global Transaction would benefit all of the Japanese Debtors' creditors and stakeholders, including the Canadian claimants.

60. Where a cross-border proceeding is most closely connected to another jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings.⁶⁹

61. The Japanese Court has determined that it was necessary to grant the Japanese Court Orders in the Japanese Proceedings. It is therefore just and reasonable that this Court recognize the specified provisions of the Japanese Court Orders, which were granted by the Court of principal jurisdiction and that are in keeping with the spirit and purpose of the CCAA.

PART IV. ORDER REQUESTED

62. Accordingly, the Foreign Representatives seek to amend the Chapter 11 Recognition Orders to extend the relief therein to the Japanese Debtors, to recognize the Japanese

⁶⁴ CCAA, s. 49.

⁶⁵ Shimizu Affidavit at paras. 40 and 41, TKJP Motion Record, Tab 2.

⁶⁶ Shimizu Affidavit at para. 21, TKJP Motion Record, Tab 2.

⁶⁷ Shimizu Affidavit at para. 41, TKJP Motion Record, Tab 2.

⁶⁸ Shimizu Affidavit at para. 41, TKJP Motion Record, Tab 2.

⁶⁹ *Matlack* at paras 7-8, BOA, Tab 2.

Proceedings as foreign main proceedings, and to recognize the specified provisions of the Japanese Court Orders.

63. The relief sought herein is appropriate and necessary and will provide the Japanese Debtors with the breathing room necessary to move towards finalizing the terms of the Global Transaction in a manner that is fair, equitable and in the best interests of the estates of the Debtors and the safety of the driving public, and it ought to be approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of August, 2017.



McCarthy Tétrauld LLP

Lawyers for the Foreign Representatives

Schedule “A” – Chapter 11 Debtors

1. TK Holdings Inc.
2. Takata Americas
3. TK Finance, LLC
4. TK China, LLC
5. TK Mexico Inc.
6. TK Mexico LLC
7. Interiors in Flight, Inc.
8. Takata Protection Systems Inc.
9. TK Holdings de Mexico S. de R.L. de C.V.
10. Industrias Irvin de Mexico, S.A. de C.V.
11. Takata de Mexico, S.A. de C.V.
12. Strosshe-Mex, S. de R.L. de C.V.

Schedule “B” – Japanese Debtors

1. Takata Corporation
2. Takata Kyushu Corporation
3. Takata Service Corporation

Schedule “C” – List of Authorities

1. *Babcock & Wilcox Canada Ltd.*, 2000 CanLII 22482 (ONSC)
2. *Global Light Telecommunications Ltd. (Re)*, 2004 BCSC 745
3. *Global Ocean Carriers Ltd.*, 251 B.R.
4. *In re Daiichi Chuo Kisen Kaisha, No. 15-121650*
5. *Lear Canada (Re)*, 2009 CanLII 37931 (ONSC)
6. *Lightsquared LP (Re)*, 2012 ONSC 2995
7. *Matlack Inc., Re*, 2001 CanLII 28467 (ONSC)
8. *Microbiz Corp. v. Classic Software Systems Inc.* 1996 CanLII 7276 (ONSC)
9. *MtGox Co., Ltd. (Re)*, 2014 ONSC 5811
10. *Re Caesars Entertainment Operating Co.*, 2015 ONSC 712
11. *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299
12. *Tucker v. Aero Inventory (UK) Ltd.*, 2009 CanLII 63138 (ONSC)

Schedule “D” – Statutes Cited

Companies’ Creditors Arrangement Act, R.S.C., 1985, c. C-36

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

PART IV: Cross-border Insolvencies

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company’s property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

2005, c. 47, s. 131.

Definitions

45 (1) The following definitions apply in this Part.

foreign court means a judicial or other authority competent to control or supervise a foreign proceeding. (*tribunal étranger*)

foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. (*principale*)

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding. (*secondaire*)

foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors’ collective

interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. (*instance étrangère*)

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding. (*représentant étranger*)

Centre of debtor company's main interests

45 (2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

Application for recognition of a foreign proceeding

46 (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Order recognizing foreign proceeding

47 (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

47 (2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Order relating to recognition of a foreign main proceeding

48 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Other orders

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Terms and conditions of orders

50 An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE MOVING PARTIES
(Re: Recognition of Japanese Proceedings
and Court Orders)
(Returnable September 1, 2017)**

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