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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller: (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a binding contract arise as a result of the behaviour of the parties?

It is not necessary for the sale of goods or services to be evidenced by a formal contract, as long as there is a legally binding, effective and valid contract, whether oral or implied. Whether invoices alone would be sufficient as evidence of the existence of an enforceable debt obligation would depend on the facts of each case and would be determined by the courts. The same can be said with respect to a result of the behaviour of the parties; i.e., a binding contract can be proven to exist (if there is sufficient evidence to establish) as a result of the behaviour of the parties, past relationships, or commercial customs.

1.2 Consumer Protections. Do your jurisdiction's laws: (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

(a) There are usury laws that restrict the rate of interest on loans (which can include various forms of credit extension), namely the Interest Rate Restriction Law (the "IRR Law") and the Law for Control of Acceptance of Contributions, Money Deposits and Interest, etc. (the "Contributions Law"). The IRR Law provides that a contractual clause providing for interest on a loan at a rate exceeding a certain prescribed rate (described below) is null and void with respect to the portion exceeding such rate. Significantly, fees, default interest and other amounts except the principal amounts received by a lender in connection with the loan will be treated as interest payments for the purpose of calculating the rate of interest.

Principal	Maximum Rate of Interest (*per annum*)
Less than 100,000 Yen	20%
From 100,000 Yen to 1 million Yen	18%
1 million Yen or more	15%

Under the current Contributions Law, no person in the money-lending business may charge interest at a rate exceeding 20% *per annum*. Charging or receiving interest at a rate in excess of this rate is subject to criminal penalties. Similarly, with the IRR Law, in calculating the interest rate, any payment except the principal repayment that the lender receives in connection with the lending will be deemed to be part of the interest payment. The Moneylenders' Law is a regulatory statute governing non-bank finance companies. The Moneylenders' Law requires registration of those who engage in the business of lending money, and regulates various lending practices, including marketing and collection practices, as well as the rate of interest charged on loans extended by moneylenders. Lastly, a prohibitively high rate of interest on (or interest on late repayments of) credit or other kinds of receivables may possibly be determined as void due to public policy reasons pursuant to the general Civil Code.

(b) There is a statutory right to interest on late payments; specifically, the general Civil Code provides that, unless otherwise agreed by the parties, interest will accrue following a late payment of a monetary obligation at a statutory interest rate. The amendment of the general Civil Code that became effective on April 1, 2020 (the "Civil Code Amendment") has: (i) reduced the statutory annual interest rate from 5% (6% *per annum*, in cases of monetary obligations arising out of commercial conduct, as provided under the pre-amended Commercial Code) to 3%; and (ii) introduced a fluctuation system where the statutory interest rate automatically increases and decreases every three years, taking into account the average domestic short-term loan interest rates for the past five years.

(c) For certain consumer contracts such as instalment sale agreements (i.e., sale and purchase agreements for which payments of purchase amounts are in instalments) in respect of certain types of products (including, without limitation, life insurance policies purchased outside of the insurance company's premises), the Instalment Sales Law (the "ISL") provides consumers with the right to cancel contracts during the cooling-off period mandated by the law.

(d) The ISL also provides consumers with protection against provisions providing for the business operator's right to terminate the contract, or to declare that the consumer's obligation to pay all unpaid instalments has become immediately due and payable, even if the consumer does not pay an instalment, unless: the business operator makes a demand against the consumer in writing to pay the instalment within a period prescribed in such written demand (which must be a reasonable period and may not be less than 20 days from

such written demand); and the consumer fails to pay the instalment within such period. In addition, the Consumer Contracts Law (the "CCL") provides consumers with, among other things, the right to rescind consumer contracts, for example, if the consumer had mistakenly manifested his/her intention to enter into the contract as a result of any misrepresentation by the business operator (who is the counterparty to the consumer contract) with respect to material matters such as quality, purpose and other characteristics of goods, rights, services, etc., of such a consumer contract.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

As a matter of practice, when the government or a governmental agency enters into a receivables contract, the contract would likely include a provision that prohibits transfers/assignments of rights thereunder by the counterparty, without the prior consent of the government or the governmental agency, as the case may be. Following the Civil Code Amendment, such a provision does not hinder the validity of the transfer of the rights even where the seller does not obtain the prior consent of the government or the governmental agency. However, in such cases, the seller, and possibly the purchaser, would be primarily liable for the damages incurred by the government or the governmental agency. Accordingly, the seller would require that the consent of the government or the governmental agency be obtained in order for the seller and purchaser to avoid being liable for these damages. For details, please see question 4.7 below.

Also, such a receivables contract may include a provision requiring that no third party be appointed as a collection servicer without the prior consent of the government. Therefore, although there is no specific statutory requirement, consent of the government or the governmental agency would likely be contractually required for the collection of receivables.

2 Choice of Law – Receivables Contracts

2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in your jurisdiction that will determine the governing law of the contract?

The Application of Laws (General) Act (the "ALGA"), which came into effect on 1 January 2007, provides that if the parties to a contract do not specifically agree on a choice of law, the law of the jurisdiction having the closest relevance with the contract will govern the contract. However, it is generally assumed that a Japanese court will still follow a Supreme Court ruling, made prior to the introduction of the ALGA, to the effect that courts should first determine if the parties had implicitly agreed on the choice of law before applying the principle above. The ALGA also stipulates that if the contracting parties have not specifically agreed on a choice of law, and if the contract obligates a party to undertake a characteristic performance, then the law of such party's residence (or primary office) will be presumed to be the law of the jurisdiction having the closest relevance.

2.2 Base Case. If the seller and the obligor are both resident in your jurisdiction, and the transactions giving rise to the receivables and the payment of the receivables take place in your jurisdiction, and the seller and the obligor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your jurisdiction would not give effect to their choice of law?

In such a case, it would be very unlikely for a court not to uphold the parties' choice of law, at least judging from the published court decisions; provided, however, that if the subject of the receivables contract is movable, the ownership of which is to be registered, and which is located outside Japan, then under the ALGA, the law of the jurisdiction in which the movable is located could govern the matters relating to the transfer of ownership.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in your jurisdiction give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?

Under the ALGA, parties to a contract are allowed to choose the governing law to be applied to their contractual obligations. Accordingly, the seller and the obligor may choose a foreign law to govern the receivables contract. However, if the application of the chosen law would result in a situation that would be against the public welfare or interests of Japan, then a court would not apply the chosen law as the governing law. In addition, different sets of rules under the ALGA are applied to consumer contracts to protect the interests of consumers. For example, if the obligor is a consumer (as defined in the ALGA) and the seller is a business operator (also as defined in the ALGA), then the consumer (i.e., the obligor) may demand that the law of the jurisdiction in which he/she resides be the governing law.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does your jurisdiction's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., your jurisdiction's laws or foreign laws)?

The ALGA does not specifically require that the sale agreement/contract under which receivables are sold be governed by the same law as the law governing the receivables themselves. However, under the ALGA, the "effects of a transfer" in terms of a transfer of a receivable (as opposed to contractual agreements stated in the sale agreement or surrounding the sale) against the obligor and other third parties are to be governed by the law governing the receivable itself, as noted in question 3.2 below.

3.2 Example 1: If (a) the seller and the obligor are located in your jurisdiction, (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of your jurisdiction to govern the receivables purchase agreement, and (e) the sale complies with the requirements of your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

Under the ALGA, the effects of a transfer of a receivable against the obligor and other third parties are governed by the law governing the receivable itself. Therefore, a Japanese court would determine the effects of the transfer resulting from the sale of the receivables (e.g., whether the receivables are effectively transferred) on the basis that the governing law is Japanese law. Thus, in this "Example 1" case, courts in Japan will recognise the sale as being effective against the seller, the obligor and other third parties.

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor's country or the purchaser's country (or both) be taken into account?

The ALGA does not take into account the requirements of the law of the obligor's country or the purchaser's country; and, as noted in question 3.2 above, the effects of a transfer of a receivable against the obligor and other third parties are governed by the law governing the receivable itself. Thus, in this "Example 2" case, courts in Japan will also recognise the sale as being effective against the seller and other third parties.

3.4 Example 3: If (a) the seller is located in your jurisdiction but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with your jurisdiction's own sale requirements?

As noted in question 3.2 above, the effects of a transfer of a receivable against the obligor and other third parties are governed by the law governing the receivable itself; therefore, under the ALGA, the sale of the receivable is governed by the law of the obligor's country. Thus, while there is no need to comply with Japan's own sale requirements, a court in Japan will not recognise the sale as being effective against the seller and other third parties, unless the requirements under the law of the obligor's country are complied with. However, this does not necessarily mean that the choice of law under the sale agreement will immediately be deemed void, since the effects of rights and obligations arising directly out of the sale agreement (e.g., whether an act of the seller would constitute a breach of contract giving rise to an indemnification obligation of the seller) would be determined in accordance with the law chosen as the governing law under the agreement, subject to the public welfare or interest doctrine described in question 2.3 above.

3.5 Example 4: If (a) the obligor is located in your jurisdiction but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in your jurisdiction recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with your jurisdiction's own sale requirements?

As noted in question 3.2 above, the effects of a transfer of a receivable against the obligor and other third parties are governed by the law governing the receivable itself. Thus, in this "Example 4" case, courts in Japan will recognise the sale as being effective against the seller, the obligor and other third parties without the need to comply with sale requirements under Japanese law.

3.6 Example 5: If (a) the seller is located in your jurisdiction (irrespective of the obligor's location), (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in your jurisdiction and any third party creditor or insolvency administrator of any such obligor)?

As noted in question 3.2 above, the effects of a transfer of a receivable against the obligor and other third parties are governed by the law governing the receivable itself; therefore, the sale of the receivable needs to be, under the ALGA, governed by the law of Japan. Thus, unless the sale is governed by the law of Japan, a court in Japan will not recognise the sale as being effective against the seller and other third parties. However, this does not necessarily mean that the choice of law under the sale agreement will immediately be deemed void, since the effects of rights and obligations arising directly out of the sale agreement (e.g., whether an act of the seller would constitute a breach of contract giving rise to an indemnification obligation of the seller) would be determined in accordance with the law chosen as the governing law under the agreement, subject to the public welfare or interest doctrine described in question 2.3 above.

4 Asset Sales

4.1 Sale Methods Generally. In your jurisdiction what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology – is it called a sale, transfer, assignment or something else?

Under the current system, the customary method for a seller to sell receivables is to enter into a sale agreement with the purchaser

in which the subject receivables need to be specified, and the sale be perfected through one of the methods described in question 4.2 below. In some cases, the continuous sales method is adopted. The terminology in the Japanese language is "*baibai*" (a simple translation would be "sale") or "*joto*" (a simple translation would be "assignment").

4.2 Perfection Generally. What formalities are required generally for perfecting a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables from the seller?

The perfection of a sale of receivables is generally made by one of the following methods:

(a) the seller delivering notice to the obligors, or the seller or purchaser obtaining consent from the obligors, where notice or consent must bear an officially certified date ("*kakutei-hizuke*") by means prescribed under law in order to perfect against third parties; or

(b) where the seller is a corporation, the seller registering the sale of receivables in a claim assignment registration file in accordance with the Law Prescribing Exceptions, etc., to the Civil Code Requirements for Perfection of Transfers of Movables and Receivables (the "Perfection Exception Law").

Provided one of the methods noted above is duly taken, there are no additional formalities required for perfection against subsequent purchasers.

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

(i) Promissory notes

Under the Promissory Notes Law, the general method of sale and perfection against the obligor and third parties is by the seller endorsing the promissory notes and delivering the same to the purchaser.

(ii) Mortgage loans

For the perfection of a sale of a loan secured by a hypothec ("*teito-ken*") or umbrella hypothec ("*ne-teito-ken*"), the following will be necessary as additional requirements to those described in questions 4.1 and 4.2 above.

(a) In case of a loan secured by a hypothec

In order for the hypothec to be concurrently transferred to the purchaser with the sale of a loan (secured by the hypothec), no additional action is necessary other than the requirement for the valid and effective sale of the loan itself ("*zuihansei*"). For perfection of the transfer of the hypothec as a result of the sale of the loan, the transfer of the hypothec needs to be registered through a supplemental registration ("*fuki-toki*") in the real estate registry (however, such registration is generally believed to be unnecessary to perfect against a third party who is a transferee of the hypothec together with the loan secured thereby).

(b) In case of a loan secured by an umbrella hypothec

In order for a loan to be transferred together with an umbrella hypothec (or the hypothec resulting from crystallisation of the umbrella hypothec), and for such a transfer to be perfected, either of the following methods need to be used:

(i) For an effective transfer of an umbrella hypothec without crystallisation, the obligor or any other party who created the umbrella hypothec must consent to the transfer (and consent to amend the scope of obligations secured by the umbrella hypothec might also be necessary depending on the terms thereof). For perfection of the transfer of an umbrella hypothec without crystallisation, the transfer needs to be registered through a supplemental registration in the real estate registry.

(ii) For an effective transfer of a loan with a hypothec resulting from the crystallisation of an umbrella hypothec that originally secured the loan, the obligations secured by such umbrella hypothec need to be crystallised ("*kakutei*") in accordance with the general Civil Code prior to the sale becoming effective (if not crystallised, and if the consent described in (b)(i) above is not obtained, the relevant loan will be transferred as an unsecured loan). For perfection of the transfer of the hypothec (occurring together with the transfer of the loan secured thereby) resulting from the crystallisation, the requirement described in (a) above applies.

(iii) Consumer loans

While there are no additional or different requirements for perfection of sales of consumer loans, please see question 8.4 below for regulations regarding sales of loans extended by moneylenders regulated under the Moneylenders' Law (nevertheless, the regulations apply not only to consumer loans but to all loans (including mortgage loans) extended by a moneylender).

(iv) Marketable debt securities

While there is no legal concept equivalent to "marketable debt securities" or any legal distinction between marketable securities and non-marketable securities under Japanese law, we will focus on the sale and perfection of Japanese government bonds ("JGBs") and bonds issued by Japanese corporations. The requirements for the sale and perfection of these securities depend on their form.

(a) In the case of JGBs

(i) If in bearer form with physical certificates ("*mukimeikokusai shouken*"):

For the effective sale and perfection, the seller and purchaser must agree to sell and purchase the JGBs and the seller should deliver the physical certificates to the purchaser. In general, there is no prohibition on the transfer of bearer JGBs.

(ii) If registered JGBs ("*touroku kokusai*"):

For perfection against third parties as well as the government, the transfer needs to be registered in the JGB registry at the Bank of Japan in accordance with the Law Regarding Japanese Government Bonds and rules promulgated thereunder.

(iii) If in book-entry form under the Transfer Law ("*furikae kokusai*"):

For sale and perfection against the government and third parties, the amount of the JGBs assigned to the purchaser as a result of the sale needs to be entered into the purchaser's account book in accordance with the Law Concerning Book-Entry Transfer of Corporate Bonds, etc. (the "Transfer Law").

(b) Corporate bonds

(i) If in bearer form with physical certificates ("*mukimei shasaiken*"):

Under the Corporations Act, no transfer will be effected without the physical delivery to the purchaser of the certificate in case of certificated bonds.

(ii) If in non-bearer form with physical certificates ("*kimei shasaiken*"):
The same as (b)(i) above; under the Corporations Act, no transfer will be effected without the physical delivery to the purchaser of the certificate in case of certificated bonds. In addition, in cases of non-bearer bonds issued pursuant to the Corporations Act, in order to perfect the transfer against third parties and against the issuer company, the purchaser's name and address need to be recorded in the bond registry ("*shasai genbo*") in accordance with the Corporations Act.

(iii) Book-entry bonds under the Transfer Law ("*furikae shasai*"):
For sale and perfection against the issuer company and third parties, the amount of the book-entry bonds assigned to the purchaser as a result of the sale needs to be entered into the purchaser's account book in accordance with the Transfer Law.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Whether or not notice is required to perfect a sale, are there any benefits to giving notice – such as cutting off obligor set-off rights and other obligor defences?

Where the receivables contract prohibits a sale of the receivables thereunder without the consent of the obligor, the consent of the obligor will be required in order for the seller to avoid the need to compensate the damages incurred by the obligor as a result of the breach of the contract. However, as noted in question 4.7 below, following the Civil Code Amendment, the transfer is still effective even if the receivables contract contains such a contractual prohibition. Accordingly, the seller may decide not to obtain the obligor's consent if it bears the risk of being claimed for such compensation by the obligor. It should be noted that as the purchaser is possible to be liable for the obligor's damages, especially where it knew such a prohibition, the purchaser and other parties in securitisation transactions may require the seller to obtain the obligor's consent in accordance with securitisation practices to evolve based on the amended general Civil Code.

On the other hand, where no contractual prohibition is stipulated in the receivables contract, whether or not the sale is effective against the obligors is a question of perfection against the obligors. That is, if the sale is perfected against the obligors, then the sale is an effective sale against the obligors. Once the sale of receivables is perfected against the obligors, for example, the purchaser will be allowed to enforce the debts directly against the obligors and the obligors will be required to pay the purchaser rather than the seller. In order to perfect the sale of a receivable against the obligor thereof, one of the following methods needs to be used:

(a) the seller must deliver a notice to the obligor, or the seller or purchaser must obtain consent from the obligor (in contrast to the perfection against third parties, there is no need for the notice/consent to bear an officially certified date); or

(b) where the assignment of the receivables is perfected against third parties by registration under the Perfection Exception Law, the seller or purchaser must either use the method noted above in (a) or notify the obligor of the sale of the receivables by delivering a registered certificate ("*touki jikou shoumeisho*") or obtain consent from the obligor thereby.
There is no legal limitation regarding the purchaser notifying the obligor of the sale of receivables after the insolvency of the seller or the obligor; in fact, the customary contractual arrangement in securitisation transactions is that the purchaser will be allowed to notify the obligor of the sale once the seller or the obligor becomes insolvent.
Unless a sale of a receivable is perfected, the obligor will retain set-off rights and other obligor defences; therefore, perfection would be required to prevent those defences. For the avoidance of doubt, set-off rights and other defences that preceded the perfection would remain effective (provided that they will no longer be effective in cases where the obligor waives them). In this connection, please note that the Civil Code Amendment has abolished the obligor's "deemed waiver" regime, under which the obligor is deemed, at the time of a transfer of receivables, to have waived set-off rights or other defences that it had or would have had against the seller had there not been any transfer in cases where it consents to the transfer of receivables without noting an objection or referring to any defence.

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective – for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings have commenced against the obligor or the seller? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

With respect to the form of the notice, please see questions 4.2 and 4.4 above.

As for the time limit for delivering a notice, notice could be delivered after an insolvency proceeding has commenced against (i) the obligor, or (ii) the seller. In the case of (ii), however, such notice could be voided – if the notice had been delivered with the knowledge of either the fact that the seller ceased payments or the fact that the petition for the commencement of the insolvency proceedings had been filed – by avoidance rights of insolvency trustees, unless the delivery had been made within 15 calendar days from the sale (as opposed to the commencement date of the insolvency proceedings). While a notice can be applied to future receivables, future receivables do need to be specified in a certain manner for the notice to be legal and valid (see question 4.11 below).

4.6 Restrictions on Assignment – General Interpretation. Will a restriction in a receivables contract to the effect that "None of the [seller's] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]" be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says "This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says "The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights)?

Each of the first two restrictions will be binding restrictions

prohibiting a transfer of receivables by the seller to the purchaser, absent the consent of the obligor, while the third restriction will not be treated as a restriction that prohibits the seller from transferring its receivables to the purchaser.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or "seller's rights" under the receivables contract, are such restrictions generally enforceable in your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction recognises restrictions on sale or assignment of receivables and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or tort, or on any other basis?

There is no general restriction on receivables contracts prohibiting the sale or assignment of receivables, even between commercial entities. As prohibitions on the sale or assignment provided under receivables contracts are recognised, the seller will be liable to the obligor if any damage is incurred by the obligor when the seller breaches the prohibition.

However, the rules on whether the sale of a receivable (the receivables contract in respect of which prohibits assignment thereof) constitutes a valid and effective transfer have been modified in the Civil Code Amendment. Previously, none of such sales was valid and effective, unless the purchaser, in the absence of both the knowledge of such prohibition and gross negligence in having no knowledge of the prohibition, purchased the receivables from the seller. Therefore, in cases where no transfer was given effect, the obligor usually incurred no damages as a result of the sale. On the other hand, following the Civil Code Amendment, an agreement between the seller and the obligator that prohibits assignment of the seller's receivable does not hinder the validity of the transfer even where the seller breaches that agreement, and the sale of such a receivable constitutes a valid and effective transfer, regardless of the knowledge of the purchaser. Accordingly, while certain statutory measures will be taken to protect the interests of obligors, the obligor will be likely to incur damages as a result of the sale (e.g., increased cost of payment). While the seller will be primarily liable for such damages incurred by the obligor, the purchaser is also possible to be liable for these damages on ground of a tort, under certain circumstances, especially where it knew such a prohibition.

Furthermore, the amended general Civil Code provides protective measures with both the obligor and the purchaser in relation to the sale of such a receivable. The obligor may (i) refuse to pay the purchaser and retain set-off rights and other defences where the purchaser knew or was grossly negligent in not knowing of such prohibition, and (ii) deposit the amount of the receivable in an official depository. The purchaser may demand that the obligor shall pay the amount of the receivable to the seller within a reasonable period of time and if the obligor has not paid this amount within that period, the obligor no longer retains the right stated in (i) above (i.e., the obligor must pay the purchaser and may not claim set-off or other defences toward the purchaser). In addition, where an insolvency proceeding has commenced with respect to the seller, the purchaser who has acquired all the amount of the receivable and has perfected the transfer may cause the obligor to deposit the amount of the receivable in an official depository.

4.8 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

The sale agreement must specifically identify the receivables in order for the receivables to be validly sold. There is no minimum or specific legal requirement in identifying the receivables and it will vary depending upon the types of receivables and receivables contracts; receivables can be identified by information such as obligor names, amounts of the receivables, invoice numbers, the contract dates and/or the terms of the receivables. For so long as the receivables sold under a sale agreement are sufficiently identified, the receivables sold under the agreement do not need to share objective characteristics. Depending on the nature of the seller, it could be possible to construe that identification of receivables is sufficient if the seller sells all of its receivables; however, if the sale includes the sale of future receivables, the sale may be deemed void. The same will apply with respect to cases where the seller sells all of its receivables, other than receivables owing, by one or more specifically identified obligors. Please see question 4.11 below for the assignability of future receivables.

4.9 Recharacterisation Risk. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent automatically be respected or is there a risk that the transaction could be characterised by a court as a loan with (or without) security? If recharacterisation risk exists, what characteristics of the transaction might prevent the transfer from being treated as an outright sale? Among other things, to what extent may the seller retain any of the following without jeopardising treatment as an outright sale: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; (d) a right of repurchase/redemption; (e) a right to the residual profits within the purchaser; or (f) any other term?

Any transaction could be recharacterised as, for example, a loan with or without security by a court based on its economic characteristics regardless of the parties' designation of a transaction as a sale or any statement of such intent; on the other hand, economic characteristics of a sale will not prevent the sale from being perfected, unless the characteristics hinder the nature of the transaction and result in recharacterisation thereof. In other words, under Japanese law, provided a transaction is not recharacterised as a loan or any other transaction, economic characteristics will not prevent a sale from being perfected. On the other hand, any characteristics (which may include the seller retaining too much credit risk, interest rate risk, control over the receivables, a right of repurchase/redemption or a right to the residual profits within the purchaser) that are inconsistent with the characteristics of sales transactions, may result in recharacterisation; in this connection, retaining a right of repurchase/redemption could be viewed as generally making the transaction susceptible to recharacterisation.

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller's insolvency?

It is possible for the seller to agree to continuous sales of receivables in an enforceable manner; however, such continuous sales would be subject to the insolvency officials' right to rescind.

4.11 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to *versus* after the seller's insolvency?

The amended general Civil Code sets out that it is possible for the seller to commit to sell future receivables and to perfect the transfer thereof in accordance with the same methods as in general receivables (please see question 4.2 above). Although it is not clearly stipulated in the statute, the general belief is that the sale of future receivables is effective so long as the receivables are sufficiently specified and identified (by, for example, the obligors thereof, the transactions from which the receivables are generated, the amounts of the receivables and/or the dates on which receivables are, respectively, generated) and that such a sale, in whole or in part, may be deemed or determined to be void due to a contradiction with the public welfare/interest or for any other reasons. Furthermore, there also is a possibility of the sale of future receivables being subject to rights of insolvency officials to rescind, especially with regard to receivables arising after the seller's insolvency.

4.12 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Provided the transfer of the receivables is enforceable and perfected against third parties, it is generally believed that a related security (other than an umbrella security interest such as an umbrella hypothec) securing the transferred receivables will also automatically be recognised as being concurrently transferred in a perfected manner (see question 4.3 above). Provided, however, with respect to certain security interests that can be registered, such as a hypothec, the concurrent transfer of the hypothec will not be perfected against a third party that acquires the related security (without acquiring the obligation secured thereby) unless the concurrent transfer is separately perfected; for example, in the case of a hypothec, perfected by registration in the relevant real estate registry through a supplemental registration.

As for umbrella securities, crystallisation thereof will be required in order to provide the purchaser with the benefits of the security (although following a crystallisation, an umbrella security will no longer be an umbrella security but a regular security) or obtain the consent of the obligor or any other party who granted the security, in order to transfer the umbrella security as an umbrella security to the purchaser. Just to be clear, a guarantee is typically not classified as a security, and, in case of an umbrella guarantee, no crystallisation will be necessary unless otherwise agreed upon under a Supreme Court ruling.

4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor's set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor's set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?

The obligor's set-off rights will terminate once a receivables sale is perfected (i.e., the obligor receives notice of the sale that is made by the seller (rather than the purchaser or any other party) or the obligor consents to the sale).

Under the pre-amended general Civil Code, while the obligor continues to have the ability to set off any prior claims (i.e., claims that the seller owed to the obligor prior to the perfection), it is unclear whether this rule applies where such a prior claim becomes due and payable after the obligation transferred has become due and payable. The Civil Code Amendment has articulated that even in such a case, the obligor retains its set-off right. In addition, the amended general Civil Code permits the obligor to set off the claim owed by the purchaser that the obligor has obtained subsequent to the perfection and either (i) as a result of an event that had occurred prior to the perfection, or (ii) under the same contract under which the obligor owes receivables transferred to the seller, unless the obligor's claim has been transferred from a third party following the perfection.

Furthermore, as noted in question 4.4 above, the Civil Code Amendment has abolished the obligor's "deemed waiver" regime, under which the obligor was deemed, at the time of a transfer of receivables, to have waived set-off rights or other defences that it had or would have had against the seller had there not been any transfer in cases where it consented to the transfer of receivables without noting an objection or referring to any defence.

4.14 Profit Extraction. What methods are typically used in your jurisdiction to extract residual profits from the purchaser?

Generally speaking, for the purpose of mitigating the recharacterisation risk, it would be best for the seller to avoid retaining a right to residual profits from the purchaser to the extent possible (see question 4.9 above). However, one of the options for the seller to enjoy residual profits from the purchaser is to create a trust. In usual cases, a trust is created and the trustee thereof acquires the receivables, and most parts of the trust beneficial interests thereof are sold by the seller to third parties. In such instances, if the seller retains a certain portion of the trust beneficial interests (typically, the subordinate trust beneficial interest), the seller may enjoy residual profits from the purchaser (i.e., the trustee) to a certain extent. In any case, it should be noted that the ratio of the subordinate trust beneficial interest retained by the seller must be appropriate in comparison to the actual value of the receivables to be assigned to the trustee.

Also, a "*tokumei kumiai*" (a simple translation would be "anonymous partnership" or "silent partnership") would be an alternative. A *tokumei kumiai* is a contractual relationship between the operator and the investor, where the operator conducts certain business specified in the contract in its own name and the investor makes a contribution to the operator for the purpose

of the said business, and the profit and loss generated from the said business will be allocated to the investor. In this regard, if the seller invests in the purchaser in the form of a *tokumei kumiai*, then the seller may extract residual profits from the purchaser. In such instances, it would also be important to determine the amount of *tokumei kumiai* contribution in a manner that would not increase the recharacterisation risk above.

Further, use of a *tokutei mokuteki kaisha* ("TMK") could be an option. For more details regarding TMKs, please see question 7.1 below.

5 Security Issues

5.1 Back-up Security. Is it customary in your jurisdiction to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected (see question 4.9 above)?

Under Japanese law, the methods to execute and perfect a sale of receivables and methods to create, and perfect the creation of, a security interest over receivables, are basically the same. Therefore, it is not customary in Japan to take a "back-up" security interest. While there have been arguments about taking a "back-up" security interest in order to protect the interest of the purchaser in the event that the sale is recharacterised as a financing rather than a sale (note that the purpose is different from the term "back-up" for a failure to execute or perfect a sale), since the creation of a "back-up" security interest would seem to contradict the parties' intention to effect a true sale and also because, even if recharacterised, transactions would likely be recharacterised as secured lending with a perfected security, it is generally assumed that the taking of a "back-up" security interest would not add much protection but, at the same time, run the risk of working against the true sale nature of the transactions and, therefore, parties customarily do not create any "back-up" security interest.

5.2 Seller Security. If it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your jurisdiction, and for such security interest to be perfected?

Seller security is not applicable in Japan.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in your jurisdiction to grant and perfect a security interest in purchased receivables governed by the laws of your jurisdiction and the related security?

Under Japanese law, there is no simple way to grant a security over "all assets" of the purchaser. The purchaser must grant specific security over each specific asset class/type separately. Therefore, if receivables constitute a part of the purchaser's "all assets", then to effect and/or perfect a security interest over such receivables, the following formalities must be complied with:

For granting a security interest in receivables, a "pledge" ("*shichiken*") or a "security assignment" ("*jyoto-tampo*") is normally used in Japan.

(i) Pledge

In order to effectively pledge receivables to the creditor, while there is no formality requirement for a pledge agreement, in the agreement, the same as sales of receivables, receivables to be pledged must be specified.

Pledges may not be created over the rights that cannot be assigned to others. Before the amendment of the general Civil Code, it was generally believed that receivables could not be pledged where assignments thereof were prohibited under the relevant receivables contracts and therefore none of such assignments were valid or effective. On the other hand, the Civil Code Amendment has articulated that such a contractual prohibition does not hinder the validity of a transfer of rights. Therefore, although not clearly stipulated in the statute, a pledge could be created over receivables regardless of such a contractual prohibition. Please see question 4.7 above for assignments of receivables.

In order to perfect the creation of the pledge against third parties and obligors, one of the following methods needs to be undertaken:

(a) the pledgor must deliver notice to the obligors, or the pledgor or pledgee must obtain consent from the obligors, where notice or consent must bear an officially certified date by means prescribed under law in order to perfect against third parties (if no officially certified date is affixed, then the creation of the pledge will still be perfected against the obligors but not against third parties); or

(b) if the pledgee is a corporation, the pledgee must register the creation of the pledge in a claim assignment registration file in accordance with the Perfection Exception Law.

(ii) Security assignment

In order to effectively assign receivables for security purposes, while there is no formality requirement for a security assignment agreement, in the agreement, the same as with sales of receivables, receivables to be assigned for security purposes must be specified. A contractual prohibition on assignment of the receivables would not hinder the effectiveness of an assignment of the receivables for security purposes.

In order to perfect the creation of the security assignment against third parties and obligors, one of the following measures needs to be undertaken:

(a) the assignor must deliver notice to the obligors, or the assignor or assignee must obtain consent from the obligors, which notice or consent must bear an officially certified date by means prescribed under law in order to perfect against third parties; or

(b) if the assignor is a corporation, the assignor must register the assignment of receivables in a claim assignment registration file in accordance with the Perfection Exception Law.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of your jurisdiction, and that security interest is valid and perfected under the laws of the purchaser's jurisdiction, will the security be treated as valid and perfected in your jurisdiction or must additional steps be taken in your jurisdiction?

The ALGA, which is the law a Japanese court would apply in determining the applicable governing law, does not explicitly provide for rules relating to the choice of governing law in respect of security interests over receivables. However, according to the general interpretation of the statute that provided for the rules relating to the choice of governing law and which was replaced by the ALGA (which also does not explicitly provide for rules

relating to the law governing security interests over receivables), the law governing a creation/granting of a pledge or a security assignment in a receivable is the law governing such receivable. The general notion is that this interpretation will remain the controlling interpretation even after the introduction of the ALGA. Therefore, if the purchaser grants a security interest in the receivables under the laws of the purchaser's country or a third country, even if the security interest is valid under the laws of that country, Japanese courts will not treat the security interest as valid unless the subject receivables are governed by the same country's law.

As for the governing law regarding perfection of a security interest in a receivable, neither the ALGA nor the statute replaced thereby provides or provided any express rule. While the general interpretation under the replaced statute was that the perfection would be governed by the law of the obligor's domicile, it is not expected that the same interpretation will be controlling after the introduction of the ALGA. This is because, while the interpretation was reasoned upon the fact that the replaced statute expressly provided that the law of the obligor's domicile governed the perfection of an assignment of a receivable, the ALGA amended the rule and now provides that the governing law of the receivable itself governs the perfection of an assignment of the receivable. Thus, it is believed that the governing law of the receivable will also govern the perfection of a security interest in the receivable. Therefore, if the purchaser perfects a security interest in the receivables (which are governed by the laws of Japan) under the laws of the purchaser's country or a third country, even if the security interest is determined to be perfected under the laws of that country, Japanese courts will not treat the security interest as perfected unless the subject receivables are perfected under the laws of Japan as well.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities?

(i) Insurance policies

There is no additional or different requirement specifically applicable only to insurance policies under Japanese law, provided, however, that for those insurance policies that are payable to order (i.e., those that fall under the definition of "*sashizu-shoken*"), endorsement and delivery to the security interest holders will be required in order to effect and perfect security interests.

(ii) Promissory notes

Under the Promissory Notes Law, the general method of granting security interests on promissory notes and perfection against the obligor and third parties is by the grantor endorsing the promissory notes and delivering the same to the grantee.

(iii) Mortgage loans

When a security interest is validly and effectively granted over, or in, a loan that itself is secured by a hypothec (but not in the case of an umbrella hypothec), the grantee will automatically benefit from the hypothec as the security interest will grasp the loan as a secured loan without any additional or different requirement. However, this does not mean that the grantee would be entitled to directly enforce/foreclose on the hypothec or umbrella hypothec. The security interest granted over, or in, the loan secured by the hypothec or umbrella hypothec must first be enforced/foreclosed. Thereafter, if the grantee acquires the loan secured by the hypothec or umbrella hypothec himself/herself as a result of such enforcement/foreclosure, then the grantee will be able to enforce/foreclose on the hypothec or umbrella hypothec (but only if the loan is due and payable). In order to perfect the interest that the grantee acquires as a result of the granting of the security interest over/in the loan secured by the hypothec against third parties who gain interest in the hypothec after the granting of the security interest, a registration (if the security interest is a pledge, in the form of an amendment registration and if the security interest is a security assignment, in the form of a supplemental registration) needs to be made in the relevant real estate registry (however, it is generally believed that the grantee of the security interest in a mortgage loan will prevail over a third party who acquires the mortgage loan for so long as the granting of the security interest to the grantee is first perfected (even if the registration is not made or was made after the third party's acquisition of the mortgage loan)).

In cases where the loan over which the security interest is created is secured by an umbrella hypothec, in contrast to the above, the grantee will not benefit from the umbrella hypothec as an umbrella hypothec will not be transferred unless, and until, it is crystallised into a regular hypothec.

(iv) Consumer loans

Unlike the sale of (consumer) loans, regulations regarding sales of loans extended by moneylenders regulated under the Moneylenders' Law (see question 8.4 below) do not apply to the grantee of the security interests on (consumer) loans, even if the loans are extended by a moneylender, unless, and until, the security interests are foreclosed.

(v) Marketable debt securities

Similarly to question 4.3 above, we will focus on the granting of a pledge or a security assignment over or in JGBs or corporate bonds and perfection thereof. The requirements for the granting/creation of security interests in respect of these securities and perfection thereof depend on the form of the JGBs and the bonds.

(a) In case of JGBs

In order to pledge JGBs and to perfect such pledge, the following is required:

(i) If in bearer form with physical certificates ("*mukimei kokusai shouken*"):

- the pledgor and the pledgee must agree on the creation of the pledge of JGBs and the pledgor must deliver the physical certificates to the pledgee; and
- for continued perfection against third parties, the pledgee must continuously keep custody of the physical certificates.

(ii) If registered JGBs ("*toroku kokusai*"):

An effective pledge of registered JGBs will arise if the seller and the purchaser agree to the creation of the pledge, provided that the JGBs do not prohibit the transfer thereof. For perfection against third parties, as well as the government, the transfer needs to be registered in the JGB registry at the Bank of Japan in accordance with the Law Regarding Japanese Government Bonds and rules promulgated thereunder.

(iii) If in book-entry form under the Transfer Law:

For the creation of a pledge over such JGBs and perfection against the government and third parties, the amount of the JGBs pledged to the pledgee needs to be entered into the pledgee's account book in accordance with the Transfer Law.

The requirements for the effective granting of a security assignment of JGBs and perfection thereof are basically the same as the requirements for the effective sale and perfection thereof as outlined in question 4.3 above.

(b) Corporate bonds

In order to pledge corporate bonds and to perfect such pledge, the following is required:

(i) If in bearer form with physical certificates:
Under the Corporations Act and the general Civil Code, no creation of a pledge will be effected without the physical delivery to the pledgee of the certificate in case of certificated bonds issued pursuant to the Corporations Act. For continued perfection against third parties, the pledgee must continuously keep custody of the physical certificates.

(ii) If in non-bearer form with physical certificates:
The same as (b)(i) above, under the Corporations Act, no pledge will be effected without the physical delivery to the pledgee of the certificates in case of certificated bonds issued pursuant to the Corporations Act. In addition, in cases of non-bearer bonds issued pursuant to the Corporations Act, in order to perfect the transfer against third parties and against the issuer company, the pledgee's name and address must be recorded in the bond registry in accordance with the Corporations Act.

(iii) If book-entry bonds under the Transfer Law:
In order to pledge book-entry bonds and to perfect against the issuer company and third parties, the amount of the book-entry bonds pledged to the pledgee must be entered into the pledgee's account book in accordance with the Transfer Law.
The requirements for the effective granting of a security assignment of corporate bonds and perfection thereof are basically the same as the requirements for the effective sale and perfection thereof as outlined in question 4.3 above.

5.6 Trusts. Does your jurisdiction recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets (so that they are not part of the seller's insolvency estate) until turned over to the purchaser?

Yes, trusts are recognised under Japanese law. In fact, a statute entitled the Trust Law governs and sets the statutory rules (some of which are mandatory rules rather than default rules).

5.7 Bank Accounts. Does your jurisdiction recognise escrow accounts? Can security be taken over a bank account located in your jurisdiction? If so, what is the typical method? Would courts in your jurisdiction recognise a foreign law grant of security taken over a bank account located in your jurisdiction?

Escrow arrangements may take several forms under Japanese law as there is no legal concept of "escrow" *per se*. A trust would be one of the major legal forms that could be utilised for an escrow arrangement.

While a security interest can be created over rights of the holder of a bank account owing money to a bank in Japan, it is not a security over the bank account *per se*; rather, it is a security over a monetary claim – a claim to receive a refund of the deposit – against the bank. Also, there is an argument that a security interest created over the rights of the holder of a bank account would become invalid or unperfected each time the balance of the account changes.

5.8 Enforcement over Bank Accounts. If security over a bank account is possible and the secured party enforces that security, does the secured party control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full, or are there limitations? If there are limitations, what are they?

No. Since, as described in question 5.7 above, a security interest over a bank account is a security over a monetary claim against the bank rather than a security over the account *per se*, the secured party will not control all cash flowing into the bank account from the enforcement forward. Technically, it may be possible – although there is, as also described in question 5.7 above, an argument that a security interest created over the rights of the holder of a bank account would become invalid or unperfected each time the balance of the account changes – to create a security interest purporting to cover any and all cash flowing into a bank account, formal foreclosure of such security would need to be made with a specific amount of deposit.

5.9 Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?

That may be possible, but there is an argument to the contrary (see questions 5.7 and 5.8 above for more details).

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your jurisdiction's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? If so, what generally is the length of that stay of action? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

Under Japanese law, there is no system or mechanism equivalent to an automatic stay. Neither the filing of the petition for insolvency proceedings, nor the commencement of such proceedings, automatically prohibit creditors from exercising or enforcing their rights; however, once the commencement of insolvency proceedings is petitioned, Japanese insolvency courts will customarily issue stay orders as to payments on, or performance of, obligations of the insolvent up to the commencement of insolvency proceedings. Also, upon and after the commencement of the insolvency proceedings, the creditors to the insolvent will be subjected to such proceedings and will be prohibited from exercising or enforcing their rights outside such proceedings; however, secured creditors will basically be allowed to enforce/foreclose on their security interest if the insolvency proceeding is either (1) a bankruptcy proceeding under the Bankruptcy Code, or (2) a rehabilitation proceeding under the Civil Rehabilitation Law. In each case, this will be subject to certain rights of the insolvency official to extinguish the security interest and/or to stay the foreclosure process of the security interest.

More importantly, if the sale of the receivables prior to the commencement of the insolvency proceeding is perfected, and for so long as the sale is not recharacterised as a lending transaction rather than a true sale, the purchaser will not be a creditor to

the insolvent in connection with the purchased receivables and, therefore, will have the rights and ability to collect, transfer or otherwise exercise ownership rights over the purchased receivables (note, however, that whether or not the purchaser will have the ability to terminate a servicing agreement (entered into with the seller, if any, in order to let the originator/seller service the receivables) upon the seller becoming subject to the insolvency proceeding is a separate question; if the servicing agreement cannot be terminated, the insolvent seller may remain entitled to collect the receivables, although the purchaser otherwise has the right and ability to collect the receivables).

Conversely, insolvency officials tend to challenge the true sale nature of securitisation transactions in an effort to preclude the purchaser from exercising ownership rights over the receivables and/or challenge that the purchaser may not terminate the servicing agreement, if any, so that the insolvency officials will remain in control of the collection procedures.

6.2 Insolvency Official's Powers. If there is no stay of action, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of its ownership rights over the receivables (by means of injunction, stay order or other action)?

If the sale of receivables is perfected and is a true sale, then the purchaser will not be prohibited from exercising its ownership rights over, or other rights in respect of, the purchased receivables (save for the uncertainty as to the termination of the servicing agreement).

To the contrary, if the sale is not perfected prior to the insolvency or if the sale is not a true sale, then the purchaser's exercise of rights may be prohibited or restricted. Firstly, if the sale was a true sale but not perfected, then the insolvency official would effectively rescind the sale, as a result of which the receivables would clawback to the insolvent's estate. Furthermore, if the sale was not a true sale, then, irrespective of whether or not the transaction was perfected, the purchaser would be a creditor, as a result of which the purchaser's ability to exercise its rights may be restricted by the insolvency proceedings (provided that, as described in question 6.1 above, if the purchaser is deemed a secured creditor with a perfected security interest, and if the insolvency proceeding was either a bankruptcy proceeding or a rehabilitation proceeding, then the purchaser as a secured creditor would be entitled to enforce/foreclose on its security interest save for limited exceptions).

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the seller's insolvency proceedings? What are the lengths of the "suspect" or "preference" periods in your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties? If the purchaser is majority-owned or controlled by the seller or an affiliate of the seller, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period? If a parent company of the seller guarantee's the performance by the seller of its obligations under contracts with the purchaser, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period?

Separately from insolvency officials' right to avoid intentional acts of the insolvent that are harmful to, or that hinder, the insolvent's creditors, the Bankruptcy Code, the Civil Rehabilitation Law and the Corporate Reorganisation Law provide for avoidance rights of insolvency officials with respect to acts of the insolvent that took place after the earlier of the: (i) suspension of payments in general; and (ii) filing of a petition for the commencement of the insolvency proceedings, subject to certain conditions such as a requirement that relates to the relevant creditor's state of mind being satisfied; provided, however, that with respect to actions of the insolvent that relate to the granting of a security interest or discharging of an obligation of the insolvent, the insolvency official is entitled to avoid actions that took place after the earlier of the (a) insolvent's inability to pay its obligations, and (b) filing of a petition for the commencement of the insolvency proceedings, subject to certain conditions such as a requirement that relates to the relevant creditor's state of mind being satisfied (if the insolvent had no legal obligation to grant the security interest or to discharge its obligation at the time, then the insolvency official may also avoid the relevant action, provided it took place within 30 days before the insolvent's inability to pay its obligations). Furthermore, any gratuitous act (including acts that are deemed to be gratuitous) that took place after the suspension of payments or the filing of a petition for the commencement of the insolvency proceedings or within six months before the earlier of the two, can be avoided by the insolvency official. Since, as to the above-described rules, there is no special provision applicable only to transactions between unrelated parties or transactions between related parties under Japanese law, the same rules will apply to both types of transactions.

(Please note that there are certain exceptions to the above-described rules.)

In addition to the above, creditors of the insolvent may rescind actions of the insolvent that would prejudice creditors, if certain conditions required under the general Civil Code are satisfied. The pre-amended general Civil Code only required that the subject action be harmful to the creditors and for the insolvent to be aware of it, and therefore, it was unclear whether creditors are entitled to rescind an action that would not be subject to avoidance rights of insolvency officials stated above. On the other hand, while the amended general Civil Code remains the basic requirements for the rescindment, it has stipulated more specific conditions under which the subject action falling into certain categories could be rescinded. For instance, with respect to actions of the insolvent that relate to the granting of a security interest or discharging of an obligation of the insolvent, creditors of the insolvent are entitled to rescind an action that took place (x) following the insolvent's inability to pay its obligations, and (y) with the insolvent's intention of unfairly benefitting a particular creditor by colluding with the creditor and hindering other creditors (if the insolvent had no legal obligation to grant the security interest or to discharge its obligation at the time, then creditors of the insolvent may also avoid the relevant action, provided it took place within 30 days before the insolvent's inability to pay its obligations and with the insolvent's intention noted in (y) above).

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding? If the purchaser is owned by the seller or by an affiliate of the seller, does that affect the consolidation analysis?

No legal concept or theory that is equivalent or similar to the theory of substantial consolidation under US law exists under Japanese law. However, the insolvency official may be able to

achieve a similar result through the application of the Japanese version of piercing the corporate veil doctrine. That is, if the corporate veil of the purchaser is pierced, since all the assets of the purchaser would be deemed part of the seller's (or its affiliate's) assets, a similar result would be achieved. According to case law, a corporate veil will be pierced only when: (a) the legal entity is a sham; or (b) the legal entity is abused so as to avoid certain legal provisions. Note that, while there are certain factors that are to be taken into account in determining whether or not the doctrine should be applied, a recent court judgment suggested that the corporate veil of an SPC would not be pierced merely because it was a paper company. If the purchaser is owned by the seller or by the seller's affiliate, the Japanese version of the piercing of the corporate veil doctrine could be more likely to be applied.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in your jurisdiction, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings, or (b) on sales of receivables that only come into existence after the commencement of such proceedings?

In a bankruptcy proceeding, a rehabilitation proceeding or a reorganisation proceeding, the relevant insolvency official has the ability to rescind the insolvent's obligations under a bilateral contract in respect of which both parties' obligations are yet to be fulfilled.

If an insolvency proceeding is initiated prior to the transfer of receivables resulting from the sales thereof and if the sales price has not been paid, then the insolvency official will have the ability to rescind the sale agreement. To the contrary, a sale agreement of future receivables will not be rescinded simply because the receivables are future receivables. Sales of future receivables may be rescinded if the sale was through a continuous sale in connection with which the sales price for the future receivables has not been paid.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.4 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

Yes, this is possible if the debtor owes any obligation that will not be extinguished via limited recourse provisions.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in your jurisdiction establishing a legal framework for securitisation transactions? If so, what are the basics? Is there a regulatory authority responsible for regulating securitisation transactions in your jurisdiction? Does your jurisdiction define what type of transaction constitutes a securitisation?

(1) Special securitisation law

Yes: the Law Concerning Liquidation of Assets (the "Securitisation Law"). The Securitisation Law permits the setting up of a special purpose company ("TMK") and a special purpose trust (*tokutei mokuteki shintaku*; "TMS").

While there were a number of benefits in comparison to corporations incorporated under the general corporations law used for SPCs when the Securitisation Law was first introduced, following a series of amendments to the general corporations law, many of the benefits were lost, as they no longer belong only to TMKs. The primary benefits that still remain are: the pass-through tax status; beneficial tax treatment in connection especially with real estate taxes; and withholding tax on securities. Characteristically, a TMK is allowed to acquire only certain types of assets listed under the statute and the rules promulgated thereunder. In addition, TMKs are required to obtain evaluation(s) of the assets that each will acquire prior to the actual acquisitions thereof and the evaluations are required to be made by certain individuals/entities satisfying the qualifications stipulated in the statute. TMKs are allowed to issue bonds ("*tokutei shasai*"), physical CPs ("*tokutei yakusoku tegata*") and book-entry CPs ("*tokutei tanki shasai*") and preferred equity securities ("*yusen shusshi*") to finance their acquisition of assets to be securitised. While a TMK may borrow money to finance such acquisition, some tax benefits would be lost if not from lenders that are qualified institutional investors defined under the Financial Instruments and Exchange Act of Japan (the "FIEA") (which is the main body of securities regulations of Japan). Since TMKs are designed to be SPCs in nature, the statute prohibits TMKs from certain matters, such as hiring employees, having a branch office, not appointing an underwriter/dealer in respect of its securities, doing business other than its "securitisation business" (see (3) below) and not delegating the management (including sale and other dispositions) of its assets to qualified third parties.

A TMS has almost never been used due to its inflexibility in connection with structuring and the absence of tax benefits in respect of withholding tax, etc.

(2) Regulatory authority

In a manner of speaking, yes there is a regulatory authority, but only covering certain types of securitisations and certain aspects of securitisation transactions: the Financial Services Agency (the "FSA") oversees the securities regulations aspect of securitisation transactions. In addition, although the Securitisation Law or other statutes do not specifically state that the FSA is responsible for securitisation transactions, the FSA plays a relatively big role in the regulation of securitisation transactions by administering policymaking concerning the financial system in Japan, supervising financial institutions and other entities, including TMKs, and surveying compliance with a number of statutes related to securitisation transactions, such as the FIEA and the Securitisation Law. Furthermore, in cases of securitisation transactions utilising TMKs, certain regulatory oversight is provided for under the Securitisation Law; for example, certain periodical reports are required to be filed with the competent Local Finance Bureau regarding their business and financials.

(3) Definition of securitisation

While a general definition of a securitisation is not provided in any Japanese statutes, there are specific definitions thereof in relation to specific regulations. Firstly, the Securitisation Law defines a "securitisation of assets", which functions as a limitation on the scope of business that TMKs are permitted to conduct (i.e., "securitisation business"; business pertaining to "securitisation of assets"), as a set of transactions that essentially consists of: (a) the acquiring of assets by using funds financed through the issuance of bonds, physical CPs or preferred equity securities, or borrowing ("*tokutei kariire*") (in cases of TMS, the entrustment of assets and the issuance of trust beneficial interests ("*jyueki shoken*")); and (b) paying the interest and redeeming the principal with regard to the above-mentioned securities,

or borrowing from the gain by the administration and disposition of these assets. To clarify, this definition is only relevant and applicable in transactions that utilise the statute. Secondly, FSA-issued notices that require a capital adequacy ratio for banks and certain financial institutions define a "securitisation transaction", in relation to the application of such requirement, as any transaction in which the risk inherent in original assets is tranched into two or more senior/subordinated exposures and part or all of these exposures are transferred to a third party, save for certain loans such as project finance and commodities finance. Again, this would be relevant and applicable only in the context of bank regulations.

7.2 Securitisation Entities. Does your jurisdiction have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

Yes, please see question 7.1 above.

(a) While there are not many special requirements in establishing a TMK other than to name it a TMK in accordance with the statute, in order for a TMK to engage in the "securitisation business", among other requirements, the TMK must file a "business commencement statement" ("*gyoumu-kaishi-todokede*") with a governmental agency prior to initiation of the TMK's "securitisation business"; an "asset liquidation plan" ("*shisan-ryuudouka-keikaku*"), which identifies the assets to be securitised and the terms and conditions of asset-backed securities to be issued and/or asset-backed loans to be borrowed to finance the acquisition of such assets by the TMK, must be attached to the statement as part of the exhibits thereto.

As for the management of TMKs, the statute provides certain rules in terms of the corporate governance regime, such as the requirement that no director ("*torishimariyaku*") or statutory auditor ("*kansayaku*") of a TMK may be a director of the entity that sells assets to the TMK, as well as the requirement that an accountant or an accountancy firm be appointed as the TMK's statutory accounting auditor ("*kaikei kansanin*") when certain conditions are met.

(b) Please see question 7.1 above.

(c) While there is no positive requirement/qualification for the status of a director or of a shareholder specifically stipulated under the statute, corporations in general, and certain persons, are barred from becoming a director (the list includes the seller or directors of the seller, bankrupt individuals receiving no rehabilitation order, individuals convicted of certain financial crimes, etc.).

7.3 Location and form of Securitisation Entities. Is it typical to establish the special purpose entity in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the special purpose entity in your jurisdiction? If offshore, where are special purpose entities typically located for securitisations in your jurisdiction? What are the forms that the special purpose entity would normally take in your jurisdiction and how would such entity usually be owned?

In the past, offshore entities were more often used as SPCs, but in recent years, it has become common practice to establish SPCs in Japan, at both the asset holding level and the parent level. Based on the current legislation, it is relatively easy and more cost-efficient to establish an SPC with bankruptcy remoteness in Japan. In addition, in the case where an SPC is an offshore entity and a non-resident of Japan, depending on the nature of the receivables, the proceeds of the receivables may be subject to withholding tax that would not apply if the SPC were a domestic entity (see question 9.1 below). Therefore, domestic entities are preferable and more suitable for SPCs in most cases.

The two most common forms that SPCs take are *godo kaisha* ("GK") and trusts. A GK is one of the types of corporate entities under the Companies Act. In some respects, it is similar to an LLC in the United States; however, it is not itself a pass-through entity for tax purposes. A GK is usually owned by an *ippan shadan hojin* ("ISH"), another type of corporate entity under special legislation, whose officers are, in cases where the entity is used for this purpose, accountants or other persons who have no interest in certain transactions in order to ensure the GK's bankruptcy remoteness. In such cases, the ISH is not supposed to receive dividends or residual assets from the GK; instead, a *tokumei kumiai* contract is normally entered into between the GK, as the operator, and an investor, and the GK distributes profits from the GK's business (if any) or refunds the *tokumei kumiai* principal to the investor. For more details regarding *tokumei kumiai*, please see question 4.14 above.

Another typical entity is a trust created in accordance with the Trust Law. In many cases, the trustor and the original holder of the trust beneficial interest is the seller (but in some cases, the arranger of the transaction or a bankruptcy-remote SPC), and the trustee, which legally holds receivables or other assets as a result of entrustment or transfer, is either a commercial bank or a trust company that has a licence to conduct "trust business". In usual cases, trust beneficial interests are divided and sold to the investors, and as a result, the trust is owned by the investors, but in some cases, the initial trustor retains ownership of a part of the trust beneficial interests, up until the end of the securitisation transaction, in which case, the investors invest in the trust by advancing a loan to the trust.

7.4 Limited-Recourse Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

The general belief is that non-recourse provisions will be upheld as valid at least prior to the insolvency of the obligor. The same applies with most types of contracts even if a given contract is governed by non-Japanese law, so long as the provision is valid under that governing law. To the contrary, validity and legal effects of non-recourse provisions upon the insolvency of the obligor are not clear under Japanese law.

7.5 Non-Petition Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

The general belief is that non-petition provisions will be upheld as valid for so long as the scope of a provision is reasonable (such as the effective term of the provision being limited to one year and one day after the payment in full to the investors); however, a Japanese court may treat a petition made in violation of a

non-petition as a valid petition and determine that the remedy for the violation is to be provided through monetary compensation rather than dismissing the petition.

Since the matter concerns proceedings under the Japanese legal system, the governing law of non-petition provisions should be Japanese law. Whether Japanese courts will uphold non-petition provisions governed by non-Japanese law is unclear.

7.6 Priority of Payments "Waterfall". Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

Yes, but excluding insolvency courts. If an insolvency proceeding is commenced in connection with the debtor, then the relevant insolvency statutes will come into effect, in which case, certain waterfall provisions that contradict the priority rules provided under the insolvency statutes will not be honoured by the competent court.

7.7 Independent Director. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

The general belief is that such arrangements cannot be made under the Japanese legal environment, and therefore, in most cases, a Japanese SPC will have a sole independent director rather than having multiple directors that may include non-independent directors.

7.8 Location of Purchaser. Is it typical to establish the purchaser in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the purchaser in your jurisdiction? If offshore, where are purchasers typically located for securitisations in your jurisdiction?

It is typical to establish purchasing vehicles in Japan. Please see question 7.3 above for more details.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in your jurisdiction? Does the answer to the preceding question change if the purchaser does business with more than one seller in your jurisdiction?

First, under Japanese law, there is no concept of a qualification to do business in Japan applicable to foreign corporations; however, foreign corporations are required to (1) appoint at least one representative officer/director who resides in Japan, and (2) register with a governmental agency, if they are to continuously do business in Japan; provided, further, that a foreign corporation whose primary purpose is to do business in Japan may not continuously do business in Japan, and a foreign corporation whose head office is located in Japan also may not continuously do business in Japan. Whether a one-time purchase and ownership or its collection and enforcement of receivables by a foreign SPC will be deemed a "continuous business" remains a subtle question; the answer to which is unclear (but if the foreign SPC does business with other sellers, then there is a chance that it will be deemed as doing continuous business in Japan; however, the governmental authority has suggested that the regulation is not intended to be applied to foreign corporations used as vehicles in securitisation transactions).

Separately, regardless of whether the purchaser is a foreign entity or a domestic entity, the purchaser may be prohibited from purchasing receivables depending on the asset class. That is, since the Lawyer's Code provides that no person may engage in the business of purchasing or otherwise acquiring receivables to enforce the receivables by means of litigation, mediation, conciliation or other means, the purchase of receivables may be deemed a violation of the Lawyer's Code, for example, if all of the purchased receivables are destined to be enforced through litigation. However, the Supreme Court has opined that a purchase of receivables does not violate the Lawyer's Code if the purchase does not harm the obligors' or public citizens' rights and legal interests and if the purchase falls within socially and economically justified business.

In addition, if the receivables to be purchased are, or include, a loan or loans extended by a moneylender regulated under the Moneylenders' Law, then certain provisions of the statute will become applicable to the purchaser (even if the purchaser is a foreign entity); please see question 8.4 below.

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third-party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

There is no general restriction on a seller of receivables continuing to collect receivables following their sale to the purchaser; however, collection activities of the seller are legally permissible only to the extent that they do not constitute or involve "legal affairs", which include appearance before a court.

Save for limited exceptions available to judicial scriveners and the exception made available to licensed special servicers, only an attorney or a legal corporation (which is an incorporated law firm) can represent a third party and appear before a court. Therefore, unless the seller is a special servicer licensed under the Servicer Law (the Act on Special Measures concerning Business of Management and Collection of Claims), the seller will not be able to appear before a court in enforcing the receivables sold to the purchaser.

8.3 Data Protection. Does your jurisdiction have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

Yes. The Law Concerning the Protection of Personal Information regulates the: (i) acquisition; (ii) management and use; and (iii) disclosure of personal information about individuals ("*kojin-jyoho*"), by certain enterprises/individuals handling such personal information ("*kojin-jyoho-toriatukai-gyousha*"). The statute protects information in respect of individuals but not of corporations.

In addition, certain businesses, such as financial institutions and banks, are required to maintain and otherwise handle information and data about, or provided by, its clients (especially individuals, but not excluding corporations or other enterprises) with the due care of professionals, and maintain adequate confidentiality.

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your jurisdiction? Briefly, what is required?

If the receivables are loans extended by moneylenders regulated under the Moneylenders' Law, the purchaser thereof will be subject to certain provisions of the statute, including, without limitation, the provisions providing for the following requirements:

- the purchaser will be required to deliver to each obligor, without delay, a notice that clearly indicates certain details of the relevant loan as required under the statute and rules promulgated thereunder upon the purchase of such receivables; and
- the purchaser will be required to furnish a receipt to each obligor every time the purchaser receives a payment from the obligor in accordance with the statute.

8.5 Currency Restrictions. Does your jurisdiction have laws restricting the exchange of your jurisdiction's currency for other currencies or the making of payments in your jurisdiction's currency to persons outside the country?

(i) The Foreign Exchange and Foreign Trade Law, which is the statute primarily governing exchanges of currency, does not restrict the exchange of Japanese currency for other currencies; however, there are certain after-the-fact reporting requirements.

(ii) Under the same statute, the making of payments or other transfers of money to persons of certain countries, such as countries subject to economic sanctions, are subject to approval by the government. Also, if a payment or other transfer of money to persons outside of the country is made by a resident of Japan, then the resident will be required to make an after-the-fact report to the relevant authority, except for cases prescribed in the relevant rules (such as a payment of less than 100 million Yen).

8.6 Risk Retention. Does your jurisdiction have laws or regulations relating to "risk retention"? How are securitisation transactions in your jurisdiction usually structured to satisfy those risk retention requirements?

Yes, the FSA has recently set forth new rules pertaining to risk retention in relation to securitisation products held by banks and certain financial institutions. This regulation does not directly impose an obligation on the originator to retain a certain risk; rather, it adopts an indirect compliance regime by placing a higher risk weight on securitisation exposure held by banks and certain financial institutions, under which they must allocate a triple risk weight for securitisation exposure, unless they have confirmed that the originator: (i) retains 5% or more of the aggregate amount of exposure for the original assets calculated in accordance with a designated method; or (ii) has continuous securitisation exposure in such a way that the credit risk held by it is greater than the credit risk in the case of (i) above, provided, however, that the above rule will not apply unless the original assets are considered not to have been inadequately formed. In addition, under certain guidelines for supervision of financial institutions by the FSA, when financial institutions (including insurance companies) hold securitisation products, the risk of which is not held by the seller at all, the financial institutions are practically mandated to analyse such risk more carefully. Furthermore, practically speaking, regardless of whether or not the securitisation products are held by financial institutions, it is often the case that the seller will keep holding the subordinate portions of the securitisation products after selling the securitised assets to an SPC for the seller's economic benefit or at the request of a rating agency or other players in the securitisation transaction. On the other hand, there is a concern under Japanese law in connection with true-sale analysis if a seller retains too much risk (and profits or interests) after selling the securitised assets (see also question 4.14 above).

8.7 Regulatory Developments. Have there been any regulatory developments in your jurisdiction which are likely to have a material impact on securitisation transactions in your jurisdiction?

(i) Introduction of new rules relating to risk retention

As of 15 March 2019, the FSA published new rules pertaining to risk retention in relation to securitisation products held by banks and certain financial institutions, which apply to securitisation products acquired by banks and certain financial institutions on or after 1 April 2019 (subject to certain grandfathering provisions). For further details, please refer to question 8.6 above.

(ii) Amendments to the general Civil Code

The legislation concerning contracts and obligations in the general Civil Code was amended in a material way in 2017 for the first time since it was enacted in 1896, and the amendment already became effective from 1 April 2020. The amendment includes material changes to general rules relating to transfers of claims, guarantees and standard terms and conditions applied to similar transactions, etc.; although the wording of the amendment itself is not believed to provide any significant setbacks or obstacles to securitisation practices in Japan, how the new rules are interpreted should be carefully monitored.

(iii) Amendment of the Act on the Protection of Personal Information

According to the supplementary provisions of the Act on Partial Revision of the Act on the Protection of Personal Information and Act on the Use of Numbers to Identify Specific Individuals in Administrative Procedures that became effective on 30 May 2017, the Act on the Protection of Personal Information should be reviewed every three years in light of significant advancements in information technology. The latest amendment of the act became effective on 1 April 2022. An outline of this amendment was published on 13 December 2019; the amendment, among others, expanded individual rights regarding personal data by easing the requirements to cease utilisation, delete and cease provision to a third party, promote digitalisation in disclosures, extend the scope of retained personal data subject to demands for disclosure and strengthen the opt-out regulation, etc. Furthermore, reinforcement of penalties became effective from 12 December 2020.

(iv) Amendment of the FIEA

In response to a diverse range of financial instruments and investment schemes emerging as digital technology develops, and the

financial sector going through digital transformations, amendments of the FIEA and the Payment Services Act were enforced on 1 May 2020. This amendment established regulations for Security Token Offerings, including continuous disclosure obligations addressing information asymmetry between issuers and investors. The applicable regulations depend on whether the offered security token falls under "Electronically Recorded Transfer Claims", a new concept established under this amendment.

(v) Act on the Development of Related Laws for the Formation of a Digital Society

The Act on the Development of Related Laws for the Formation of a Digital Society became effective from 1 September 2021. This act includes several amendments of regulations so that seals and delivery of the certain written documents, especially for real estate transactions, such as documents explaining important matters under the Real Estate Brokerage Act and fixed-term land/building lease agreements, may be omitted. Although the majority of securitisation transactions in Japan still use written agreements, this new regulation would likely help real estate securitisation transactions, especially for smaller deal-sized transactions.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in your jurisdiction? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest? If withholding taxes might apply, what are the typical methods for eliminating or reducing withholding taxes?

Whether withholding tax will be imposed depends on a number of factors, such as the nature of the receivables, whether they bear interest, whether the seller (or the purchaser) is a resident of Japan, whether there is a tax treaty between Japan and the country or jurisdiction of the seller (or the purchaser), and whether the payment by the obligor is made within Japan.

In the case of a sale of trade receivables at a discount, there is a high possibility that the discount will be recharacterised as interest. And, in the case of a sale of trade receivables where the payment of the purchase price is conditioned upon collection of the receivables, there is a risk/possibility that the deferred purchase price will be recharacterised as interest.

Insofar as the nature of the receivables calls for a withholding tax, generally speaking, there is no legal way to eliminate or reduce withholding tax. However, even in cases where withholding tax applies, any amount in excess of applicable income tax at the year-end that has been withheld can be refunded later with a proper filing. In other words, whether or not withholding tax applies, the total amount of tax imposed on the purchaser will not change and withholding tax will influence only on the timing of the cash flow. Therefore, the influence on the cash flow resulting from withholding tax can be structurally dealt with if the economics of the deal allow, for example, by reserving a necessary amount of funds in advance.

9.2 Seller Tax Accounting. Does your jurisdiction require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

The Corporations Tax Law generally requires corporations to adopt the Japanese GAAP unless otherwise required by law. Since there is no statute that specifically provides for an accounting policy for the seller or the purchaser in the context of a securitisation transaction, the Japanese GAAP will generally have control; however, there are certain matters for which tax law requires modifications to the accounting principles. For securitisation of receivables, the Accounting Policy regarding Financial Products introduced by the Accounting Standards Board of Japan, as well as the Practical Policy regarding Financial Products Accounting and Q&A for the Financial Products Accounting published by a committee of the Japanese Institute of Certified Public Accountants, provide the accounting rules.

9.3 Stamp Duty, etc. Does your jurisdiction impose stamp duty or other transfer or documentary taxes on sales of receivables?

Stamp duty ("*inshi-zei*") of 200 Yen is imposed on each original copy of a sales contract whereby a receivable is assigned (e.g., a receivables sale agreement) with a sale value equal to or greater than 10,000 Yen. Just to be clear, stamp duty is not required for contracts that are electronically delivered.

9.4 Value Added Taxes. Does your jurisdiction impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

Consumption tax ("*shohi-zei*") and local consumption tax ("*chiho-shohi-zei*") are imposed on the sale of goods or services otherwise exempted by relevant laws or regulations. With respect to sales of receivables, no consumption tax is imposed, whereas consumption tax and local consumption tax will be imposed on fees for collection agent services.

9.5 Purchaser Liability. If the seller is required to pay value-added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?

(i) Stamp duty

The purchaser is liable jointly and severally with the seller, if both the purchaser and the seller have prepared the documents together.

(ii) Consumption tax and local consumption tax

The taxing authority cannot make claims against the purchaser or on the receivables (so long as the sale is a true and perfected sale) for the unpaid tax.

9.6 Doing Business. Assuming that the purchaser conducts no other business in your jurisdiction, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in your jurisdiction?

As for stamp duty, please see question 9.5 above (stamp duty will be imposed irrespective of the status of the purchaser). With respect to income tax, if the purchaser is a foreign corporation or a non-resident of Japan, the income from the collection of the receivables will be taxable in Japan (and, if the purchaser has no "permanent establishment" in Japan, then withholding tax would generally be imposed with respect to certain income from receivables such as interest on loans). As for corporate tax, the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors will not generally make it liable to corporate tax in Japan, as long as the purchaser conducts no other business in Japan and is treated as having no permanent establishment nor its agent/representative in Japan with certain authority to act on behalf of the purchaser.

Note that if there is a tax treaty between Japan and the jurisdiction of the foreign corporation, the rules described above might be amended thereby.

9.7 Taxable Income. If a purchaser located in your jurisdiction receives debt relief as the result of a limited recourse clause (see question 7.4 above), is that debt relief liable to tax in your jurisdiction?

Yes. Under Japanese tax law, for example, loan proceeds are not treated as taxable income at the time when the loan is advanced, and in turn, if the purchaser received debt relief with respect to repayment of the said loan, then such debt relief will be treated as taxable income, whether or not the relief is as a result of a limited recourse clause.

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