

Japan

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1 Receivables Contracts

- 1.1 Formalities.** In order to create an enforceable debt obligation of the debtor 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 receivable "contract" be deemed to exist as a result of historic relationships?

It is not necessary for a sale of goods or services to be evidenced by a formal contract, so long as there is a legally binding, effective and valid contract, whether oral or implicit. Whether invoices alone would be sufficient as evidence of the existence of an enforceable debt obligation depends on the facts of each circumstance to be determined by courts. A contract can be determined to exist from evidence including past relationships or commercial customs.

- 1.2 Consumer Protections.** Do your country'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; or (c) provide other noteworthy rights to consumers with respect to receivables owing by them?

(a) There are usury laws which restrict the rate of interest on loans (which can include various forms of credit extension), namely the Interest Rate Restriction Law (the "IRR Law"), the Law for Control of Acceptance of Contributions, Money Deposit and Interest, Etc. (the "Contributions Law") and the Law Concerning Regulations of Money Lending Business (the "Moneylenders 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 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	Equal to or under 20%
From 100,000 Yen to 1,000,000 Yen	Equal to or under 18%
1,000,000 Yen or more	Equal to or under 15%

Under the current Contributions Law, no person in the money lending business may charge interest at a rate exceeding 29.2% per annum for a loan originated after 1 June, 2000. Charging or receiving interest at a rate in excess of such rate is subject to criminal penalties. Similarly with the IRR Law, in calculating the

interest rate, any payment 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 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. The Moneylenders Law is scheduled to be amended and following the amendment becoming effective, there will be no interest rate restriction under the statute (which means that the Contributions Law will control). 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 contradiction with the public order of Japan pursuant to the general Civil Code.

(b) There are statutory rights 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 monetary obligation at a rate of 5% per annum (6% per annum, in cases of monetary obligations arising out of commercial conduct, as provided under the Commercial Code).

(c) For certain consumer contracts such as instalment sales 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 rights to cancel contracts during the cooling-off period mandated by the law. 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 twenty days from such written demand) and the consumer fails to so pay the instalment within such period. In addition, the Consumer Contracts Law (the "CCL") provides, among other things, consumers with rights 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 content of goods, rights, services or other subject matters of such 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 of 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. Therefore, although there is no specific statutory requirement, consent of the government or the governmental agency would likely be contractually required for the sale of receivables.

2 Choice of Law - Receivables Contracts

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

The Application of Laws (General) Act (the "ALGA") which came into effect on January 1, 2007 provides that if the parties to a contract do not specifically agree on a choice of law, the law of jurisdiction having the closest relevance with the contract will govern the contract. However, it is generally regarded that a Japanese court will still follow a Supreme Court ruling, made prior to the introduction of the Act, 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 Act also stipulates that if the contracting parties had 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 debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, and the seller and the debtor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your country would not give effect to their choice of law?

Given the 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, if the subject of the receivables contract is a movable the ownership of which is to be registered, and which is located outside of Japan, then under the ALGA, the law of the jurisdiction in which the movable is located will govern the matters relating to the transfer of ownership.

- 2.3 Freedom to Choose Other Law.** If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country's law to govern the receivables contract and the receivables?

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 debtor may choose a foreign law to govern the receivables contract. Provided, however, that if the application of the chosen law would result in drawing a conclusion

that would be against the public welfare or interest of Japan, then a court would not apply the chosen law as the governing law. In addition, different sets of rules under the ALGA would be applied to consumer contracts to protect the interest of consumers.

- 2.4 Seller Resident.** If the seller is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Yes, but as noted in question 2.3 above, if the debtor 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 debtor) could have demanded that the law of the jurisdiction in which he/she resides be the governing law.

- 2.5 Debtor Resident.** If the debtor is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Yes, but as noted in question 2.3 above, if the seller is a consumer (as defined in the ALGA) and the debtor is a business operator (also as defined in the ALGA), then the consumer (i.e., the seller) could have demanded that the law of the jurisdiction in which he/she resides be the governing law.

3 Choice of Law - Receivables Purchase Agreement

- 3.1 Freedom to Choose Other Law.** If your country's law governs the receivables, and the seller sells the receivables to a purchaser in another country, and the seller and the purchaser choose the law of the purchaser's country or a third country to govern their sale agreement, will a court in your country give effect to their choice of law?

Under the ALGA, the effects of a transfer of a receivable against the debtor and other third parties are to be governed by the law governing the receivable itself. Therefore, a Japanese court would determine the effects of the sale of the receivables (e.g., whether the receivables are effectively transferred) on the basis that Japanese law is the governing law. Provided, however, that 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.

- 3.2 Other Advantages.** Conversely, if another country's law governs the receivables, and the seller is resident in your country, are there circumstances where it would be beneficial to choose the law of your country to govern the sale agreement?

Firstly, as noted in question 3.1 above, the effects of a transfer of a receivable against the debtor and other third parties are to be governed by the law governing the receivable itself, regardless of the law chosen as the law governing the sale agreement. Secondly, there is no clear and absolute benefit in choosing Japanese law as the law governing the sale agreement, but as a matter of course,

there could be circumstances where it would be beneficial to choose Japanese law but it would depend on the content of the law of other jurisdictions. The fact that the party suing the counterparty in Japan would not need to make an extra effort to prove before the court the effects under a foreign law if the sale agreement is governed by Japanese law, and could be regarded as a benefit, but it is only a relative benefit.

3.3 Effectiveness. In either of the cases described in questions 3.1 or 3.2, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser; (ii) whether the sale is perfected; and/or (iii) whether the sale is effective and enforceable against the debtors?

As noted in question 3.1 above, under the ALGA, the law governing the receivables will be the law governing the effects of a transfer of a receivable against the debtor and other third parties, irrespective of a different choice of law governing the sales agreement. Therefore, (i) whether the receivables are effectively transferred from the seller to the purchaser (although, as noted above in question 3.1, other effects of the sale agreement as between the seller and the purchaser would be governed by Japanese law), (ii) whether the sale is perfected and (iii) whether the sale is effective and enforceable against the debtors, would all be matters to be determined with the law governing the receivables themselves as the governing law.

4 Asset Sales

4.1 Sale Methods Generally. In your country what is (are) the customary method(s) for a seller to sell accounts receivables to a purchaser?

Under the current system, the customary method for a seller to sell accounts receivables is to enter into a sale agreement with the purchaser in which the subject accounts receivables need to be specified, and the sale be perfected through one of the methods described in question 4.2 below. There are cases where the continuous sales method is adopted.

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

Perfection of a sale of accounts receivables is generally made by one of the following methods:

- (a) the seller delivering notice to the debtors respectively, or the seller or purchaser obtaining consent from the debtors respectively, which notice or consent must each 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 accounts 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").

So long as a method noted above is duly taken, there is no additional formality 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 debtor and third parties is by the seller endorsing the promissory notes and delivering the same to the purchaser.

(ii) Consumer loans

While there are no additional or different requirements for perfection of sales of consumer loans, see question 8.3 for regulations regarding sales of loans extended by moneylenders regulated under the Moneylenders Law (provided, that the regulations apply not only to consumer loans but to all loans (including mortgage loans) extended by a moneylender).

(iii) 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:

- (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 (but 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 transfer to be perfected, either of the following methods needs to be used:

- (x) For an effective transfer of an umbrella hypothec without crystallisation, the debtor 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 a transfer of an umbrella hypothec without crystallisation, the transfer needs to be registered through a supplemental registration (*fuki-toki*) in the real estate registry.
- (y) For an effective transfer of a loan with a hypothec resulting from a crystallisation of an umbrella hypothec which 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 (x) 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.

(iv) Marketable debt securities

While there is no legal concept equivalent of "marketable debt securities" or any legal distinction between marketable securities

and non-marketable securities under Japanese law, we will focus on a sale and perfection of Japanese government bonds ("JGBs") and bonds issued by corporations. The requirements for sale and perfection of these securities depend on the forms thereof.

(a) In case of JGBs

(A) if in bearer form with physical certificates (*mukimeiki kokusai shouken*)

For 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.

(B) 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.

(C) 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

(A-1) if in bearer form with physical certificates (*mukimeiki 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.

(A-2) if in non-bearer form with physical certificates (*kimeiki shasaiken*)

The same as (A-1) 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.

(B) Registered bonds under the Registered Bonds Law (*touroku shasai*)

In order to perfect a sale and transfer of a registered bond under the Law Regarding Registration of Bonds, Etc. (the "Registered Bonds Law") against third parties and the issuer company, the transfer needs to be registered with the registrar thereof in accordance with the Registered Bonds Law.

(C) 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 Debtor Notification. Must the seller or the purchaser notify debtors of the sale of receivables in order for the sale to be an effective sale against the debtors?

Where the receivables contract prohibits a sale of the receivables thereunder without the consent of the debtor, consent of the debtor will be required. Therefore, in such case, naturally, a notification to the debtors would be required as a matter of fact. Otherwise, whether or not the sale is effective against the debtors is a question

of perfection against the debtors. That is, if the sale is perfected against the debtors, then the sale is an effective sale against the debtors. Once the sale of receivables is perfected against the debtors, for example, the purchaser will be allowed to enforce the debts directly against the debtors and the debtors will be required to pay the purchaser rather than the seller. In order to perfect a sale of a receivable against the debtor thereof, one of the following methods needs to be used:

- (a) the seller delivers a notice to the debtor or obtains consent from the debtor (in contrast to the perfection against third parties, there is no need for the notice/consent to bear an officially certified date (*kakutei-hizuke*)); 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 debtor of the sale of the receivables by delivering a registered certificate (*touki jikou shoumeisho*), or obtain consent from the debtor thereby.

4.5 Debtor Consent. Must the seller or the purchaser obtain the debtors' consent to the sale of receivables in order for the sale to be an effective sale against the debtors? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment?

Same as question 4.4 above, where the receivables contract prohibits a sale of the receivables thereunder without the consent of the debtor, consent of the debtor will be required (the question is whether or not the contract prohibits assignments rather than whether the contract permits assignments). Otherwise, whether or not the sale is effective against the debtors is a question of perfection against the debtors. Please see question 4.4 above for methods to perfect a sale of a receivable against the debtor thereof.

4.6 Liability to Debtor. If the seller sells receivables to the purchaser even though the receivables contract expressly prohibits assignment, will the seller be liable to the debtor for breach of contract?

Yes, the seller will be liable to the debtor if any damage is incurred. Provided, however, that a sale of a receivable the receivables contract in respect of which expressly prohibits assignment thereof will not constitute a valid and effective transfer 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 will be given effect, the debtor will usually incur no damage as a result of the sale.

4.7 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., debtor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics?

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 debtor 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.

4.8 Economic Effects on Sale. What economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; and (c) control of collections of receivables without jeopardizing perfection?

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, for so long as 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 or control over the receivables) that is inconsistent with the characteristics of sale transactions may result in recharacterisation.

4.9 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables?

It is possible for the seller to agree to continuous sales of receivables in an enforceable manner (at least prior to its insolvency), provided that such continuous sales would be subject to rights of insolvency officials to rescind.

4.10 Future Receivables. Can the seller commit in an enforceable manner (both prior to and after its insolvency) to sell receivables to the purchaser that come into existence after the date of the sale contract (as in a "future flow" securitisation)?

Following a Supreme Court case ruling in 1999, the general belief is that it is possible for the seller to commit to sell future receivables for so long as the receivables are sufficiently specified and identified (by, for example, the debtors thereof, the transactions from which the receivables are generated, the amounts of the receivables and/or the dates on which receivables are respectively generated); provided, that, the sale of the receivables, 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.

4.11 Related Security. What additional formalities must be fulfilled for the concurrent transfer of related security to be enforceable? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

For so long as 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 debtor or any other party who granted the security in order to transfer the umbrella security as an umbrella security to the purchaser.

5 Security Interests

5.1 Back-up Security. Is it customary in your country to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

Under Japanese law, methods to perfect a sale of receivables and methods to 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 financing rather than a sale (note that the purpose is different from "back-up" for a failure to perfect a sale), since the creation of a "back-up" security interest would seem to contradict with 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 regarded 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 so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

Seller Security is not applicable in Japan.

5.3 Purchaser Security. What are the formalities for the purchaser granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

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

(i) Pledge

In order to effectively pledge receivables to the creditor, the following need to be satisfied:

- 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, and assignments thereof must not be prohibited under the relevant receivables contracts; and
- the pledgor delivering to the pledgee the instruments evidencing such receivables if such instruments need to be delivered in order to effect an assignment of such receivables.

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

- (a) the pledgor delivering notice to the debtors respectively, or the pledgor or pledgee obtaining consent from the debtors respectively, which notice or consent must each bear an officially certified date (*kakutei-hizuke*) 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 debtors but not against third parties); or
 - (b) if the pledgee is a corporation, the pledgee registering 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, the following need to be satisfied:

- while there is no formality requirement for a security assignment agreement, in the agreement, the same as sales of receivables, receivables to be assigned for security purposes must be specified, and assignments thereof must not be prohibited under the relevant receivables contracts; and
- the same as pledges of receivables, the assignor delivering to the assignee the instruments evidencing such receivables if such instruments need to be delivered in order to effect an assignment of such receivables.

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

- (a) the assignor delivering notice to the debtors respectively, or the assignor or assignee obtaining consent from the debtors respectively, which notice or consent must each bear an officially certified date (*kakutei-hizuke*) by means prescribed under law in order to perfect against third parties; or
- (b) if the assignor is a corporation, the assignor registering 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 the receivables under the laws of the purchaser's country or a third country, and that security interest is valid and perfected under the laws of that other country, will it be treated as valid and perfected in your country?

The newly introduced 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 did 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 debtor'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 debtor's domicile governed the perfection of an assignment of a receivable, the ALGA amended the rule and provides that the governing law of the receivable itself governs the perfection of an assignment of the receivable. Rather, it is believed that the governing law of the receivables will govern the perfection of a security interest in the receivables. Therefore, if the purchaser perfects a security interest in the receivables 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 governed by the same country's law.

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

(i) **Promissory notes**

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

(ii) **Consumer loans**

Unlike the sale of (consumer) loans, regulations regarding sales of loans extended by moneylenders regulated under the Moneylenders Law (see question 8.3) do not apply to the granting of security interests on (consumer) loans even if extended by a moneylender unless and until the security interests are foreclosed.

(iii) **Mortgaged loans**

When a security interest is validly and effectively granted over or in a loan which itself is secured by a hypothec (*teito-ken*) (but not in the case of an umbrella hypothec (*ne-teito-ken*)), 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 (*zuihansai*). Provided, 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 the grantee acquires as a result of the granting of the security interest over or 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 (provided however, it is generally believed that the grantee of the security interest in a mortgaged 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) 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:

(A) If in bearer form with physical certificates (*mukimei kokusai shouken*)

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

(B) 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.

(C) If in book-entry form under the Transfer Law (*furikae kokusai*)

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:

(A-1) If in bearer form with physical certificates (*mukimei shasaiken*)

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 needs to continuously keep custody of the physical certificates.

(A-2) If in non-bearer form with physical certificates (*kimei shasaiken*)

The same as (A-1) above, under the Corporations Act and the general Civil Code, 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 need to be recorded in the bond registry (*shasai genbo*) in accordance with the

Corporations Act.

(B) If registered bonds under the Registered Bonds Law (*touroku shasai*)

In order to perfect a pledge of a registered bond under the Registered Bonds Law against third parties and the issuer company, the pledge needs to be registered with the registrar thereof in accordance with the Registered Bonds Law.

(C) If book-entry bonds under the Transfer Law (*furikae shasai*)

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 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 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.

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 country's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables ("automatic stay")? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected?

Under Japanese law, there is no system or mechanism equivalent of an automatic stay. Neither the filing of the petition for insolvency proceedings itself nor the commencement of such proceedings automatically prohibits creditors from exercising or enforcing their rights; provided, however, Japanese insolvency courts will customarily issue stay orders as to payments on or performance of obligations of the insolvent. 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; provided, however, that secured creditors will basically be allowed to enforce/foreclose on their security interest if the insolvency proceeding is either a bankruptcy proceeding under the Bankruptcy Code or a rehabilitation proceeding under the Civil Rehabilitation Law, in each case 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 abilities 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 rights and abilities 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 automatic stay, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of rights (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 crawl back 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 abilities to exercise its rights may be restricted by the insolvency proceedings (provided, that, as described in question 6.1, if the purchaser is deemed as 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. 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 insolvency proceeding?

Separately from insolvency officials' rights 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 Reorganization Law provide for avoidance rights of insolvency officials with respect to acts of the insolvent that took place after the earlier of the suspension of payments in general and the 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 insolvent's inability to pay its obligations and the 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 for so long as 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 6 months before the earlier of the two can be avoided by the insolvency official.

(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.

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?

No legal concept or theory that is equivalent or similar to the theory of substantial consolidation under the U.S. 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 the 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), 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.

6.5 Effect of Proceedings on Future Receivables. What is the effect of the initiation of insolvency proceedings on (a) sales of receivables that have not yet occurred or (b) on sales of receivables that have not yet come into existence?

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.

7 Special Rules

7.1 Securitisation Law. Does your country have laws specifically providing for securitisation transactions? If so, what are the basics?

Yes: the Law Concerning Liquidation of Assets (the "Securitization Law"). The statute permits the setting up of a special purpose company (*tokutei mokuteki gaisha*; "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 Securitization Law was first introduced, following the series of amendments to the general corporations law, a lot 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 enlisted 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 Securities and Exchange Act. 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" 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.

7.2 Securitisation Entities. Does your country 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 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, see question 7.1.

(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 to let the TMK engage in its "securitisation business," among other requirements, a "business commencement statement" (*gyoumu-kaishi-todokede*) of the TMK must be filed 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 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.

(b) 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 Non-Recourse Clause. Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?

The general belief is that non-recourse provisions will be upheld as valid at least prior to the insolvency of the debtor. 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 insolvency of the debtor are not clear under Japanese law.

7.4 Non-Petition Clause. Will a court in your country give effect to a contractual provision (even if the contract'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 1 year and 1 day after the payment in full to the investors); provided, however, a Japanese court may treat a petition made in violation of a non-petition provision 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.

7.5 Independent Director. Will a court in your country give effect to a contractual provision (even if the contract'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 done 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.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your country, 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 license or its being subject to regulation as a financial institution in your country? Does the answer to the preceding question change if the purchaser does business with other sellers in your country?

First, under Japanese law, there is no concept of a qualification to do business in Japan applicable to foreign corporations; provided, that foreign corporations will be required to (1) appoint at least one representative officer/director who resides in Japan and (2) register itself 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; provided, however that 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 Lawyers 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, purchase of receivables may be deemed a violation of the code, for example, if all of the purchased receivables are destined to be enforced through litigations; provided, however, that the Supreme Court has opined that a purchase of receivables does not violate the code if the purchase does not harm the debtors' 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); see question 8.3.

8.2 Data Protection. Does your country have laws restricting the use or dissemination of data about or provided by debtors? If so, do these laws apply only to consumer debtors 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.

8.3 Consumer Protection. If the debtors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your country? 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 debtor, 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 debtor every time the purchaser receives a payment from the debtor in accordance with the Moneylenders Law.

8.4 Currency Restrictions. Does your country have laws restricting the exchange of your country's currency for other currencies or the making of payments in your country'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; provided that there are certain after-the-fact reporting requirements.

(ii) Under the same statute, the making of payments or other transfer of money to persons of certain countries such as countries the subject of economic sanctions is 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 such 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 a hundred million yen).

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the debtors to the seller or the purchaser be subject to withholding taxes in your country? 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?

The issue 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 debtor is made within Japan.

9.2 Seller Tax Accounting. Does your country 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 control; provided that 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 country impose stamp duty or other documentary taxes on sales of receivables?

Stamp tax (*inshi-zei*) of 200 Yen is imposed on a contract whereby a receivable is assigned (e.g., a receivables sale agreement) with a sale value equal to or greater than 10,000 yen.

9.4 Value Added Taxes. Does your country 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 against the purchaser or on the receivables or collections for the unpaid tax?

(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.



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Yoshihiko Kawakami is renowned for his expertise in the areas of securitisation, structured finance and international finance. He has been involved in numerous significant securitisation transactions concerning various structures (both true sale and synthetic structures, master trust structures, ABCP programmes, and hybrid structures). These transactions have included various underlying assets, such as residential and commercial mortgages, trade receivables, export financing, consumer credit receivables, non-performing and sub-performing loans, distressed assets, bonds and bank loans (including CDO of CDOs), as well as consumer and small and medium enterprise loans. Mr. Kawakami's practice also covers the securitisation of other underlying assets that are not monetary claims, including movable properties, whole business and intellectual properties, and other international finance areas, such as banking, trust and securities regulation and equity and mezzanine finance, including BIS finance. Mr. Kawakami is also a recognised authority on real estate finance and a pioneer in the securitisation of real properties. He joined Nishimura & Partners in 1990, and has been a partner since 1999. He is a member of the Japanese and New York Bar Associations, having been admitted in 1990 and 1996 respectively, and has worked for the New York firm, Davis Polk & Wardwell (1995 to 1996). Mr. Kawakami is a graduate of the University of Tokyo (LL.B., 1988) and Harvard Law School (LL.M., 1995), and is fluent in both Japanese and English. He is the author of *Securitization of Mortgage Loans*, Kinyu Homu Jijo (1997), and co-author of *Corpus Juris Finance Update*, Shojihomu (2006) and *New Development of Securitization of Real Estate*, Saiken Kanri (2001).

9.6 **Doing Business.** Assuming that the purchaser conducts no other business in your country, 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 debtors, make it liable to tax in your country?

As for stamp tax, see question 9.5 (stamp tax 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 debtors 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, rules described above might be amended thereby.

NOTES BY AUTHORS

Despite the definition of "perfected" in the Defined Terms above, we do not imply that a sale is a true sale even when we call it "perfected." Under Japanese law, whether a sale is perfected and whether a sale is a true sale are separate and different questions.



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In 1999, Hajime Ueno first joined Nishimura & Partners, where he is an associate working predominantly in the area of financial transactions, with an emphasis on structured finance and acquisition finance. He is a graduate of the University of Tokyo (LL.B., 1997) and Harvard Law School (LL.M., 2004), and has worked on secondment at the New York firm, Skadden, Arps, Slate, Meagher & Flom (2004-2005). Fluent in both Japanese and English, Mr. Ueno has co-authored a number of international and domestic journals and publications. He is a member of the Japan Bar and New York Bar, having been admitted in 1999 and 2005 respectively.

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