

Japan



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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 receivable “contract” be deemed to exist 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, so 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. A contract can be determined to exist from evidence including: the behaviour of the parties; past relationships; or commercial customs.

1.2 Consumer Protections. Do Japanese 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 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 (<i>per annum</i>)
Less than 100,000 Yen	Equal to or under 20 per cent
From 100,000 Yen to 1,000,000 Yen	Equal to or under 18 per cent
1,000,000 Yen or more	Equal to or under 15 per cent

Under the current Contributions Law, no person in the money lending business may charge interest at a rate exceeding 20 per cent *per annum*. 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 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 rate of 5 per cent *per annum* (6 per cent 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.

(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 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 characteristics of goods, rights, services, etc., 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 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. Also, such 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 sale and/or 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 Japan 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 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 obligor are both resident in Japan, and the transactions giving rise to the receivables and the payment of the receivables take place in Japan, and the seller and the obligor choose the law of Japan to govern the receivables contract, is there any reason why a court in Japan 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 a 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 will 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 Japan but the obligor is not, or if the obligor is resident in Japan 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 Japan give effect to the choice 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.

2.4 CISG. Is the United Nations Convention on the International Sale of Goods in effect in Japan?

Yes. The Convention came into effect in Japan on 1 August 2009.

3 Choice of Law - Receivables Purchase Agreement

3.1 Base Case. Does Japanese 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., Japanese 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 Japan, (b) the receivable is governed by the law of Japan, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of Japan to govern the receivables purchase agreement, and (e) the sale complies with the requirements of Japan, will a court in Japan 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 Japanese law is the governing 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 Japan, will a court in Japan 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.

3.4 Example 3: If (a) the seller is located in Japan 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 Japan 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 Japanese 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 Japan 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 Japan 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 Japanese 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 Japan (irrespective of the obligor’s location), (b) the receivable is governed by the law of Japan, (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 Japan 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 Japan 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 Japan 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 sales agreement with the purchaser in which the subject receivables need to be specified, and the sale is 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, which 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) 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 (nevertheless, 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 (*zuihansai*). 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 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 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 (*fuki-toki*) in the real estate registry.
- (y) 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 (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 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 corporations. The requirements for sale and perfection of these securities depend on their form.

(a) In case of JGBs

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

- (A-2) If in non-bearer form with physical certificates (*kimei 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) 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? 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? 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. Therefore, in such a case, naturally, a notification to the obligors would be required as a matter of fact. Otherwise, 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 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 (*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 obligor of the sale of the receivables by delivering a registered certificate (*touki jikou shoumeisho*), or obtain consent from the obligor thereby.

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 (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 obligors is a question of perfection against the obligors.

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 (with the exception of a waiver by the obligor).

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 against the obligor or the seller have commenced? 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, see questions 4.2 and 4.4.

As for the time limit for delivering a notice, while notice could be delivered after an insolvency proceeding has commenced against the obligor or the seller, such notice could be voided - if the notice had been delivered with the knowledge of either the fact that the obligor 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 4.10).

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)?

Both of the restrictions will be binding restrictions prohibiting a transfer of receivables by the seller to the purchaser absent the consent of the obligor.

4.7 Restrictions on Assignment; Liability to Obligor. If either or both of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables under the receivables contract, are such restrictions generally enforceable in Japan? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Japan recognises restrictions on sale or assignment 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 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 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 obligor will usually incur no damages as a result of the sale.

- 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 sales 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, this will not be the case if the seller's receivables include receivables that are restricted from sale or assignment; also, 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 4.9 for the assignability of future receivables.

- 4.9 Respect for Intent of Parties; Economic Effects on Sale. If the parties denominate their transaction as a sale and state their intent that it be a sale will this automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, 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; (c) control of collections of receivables; or (d) a right of repurchase/redemption without jeopardising perfection?**

Any transaction could be recharacterised 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 or control over the receivables) that is 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 as being susceptible to recharacterisation.

- 4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables (i.e., sales of receivables as and when they arise)?**

It is possible for the seller to agree to continuous sales of

receivables in an enforceable manner (at least prior to its insolvency), 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 or after the seller's insolvency?**

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 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); 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 and 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.

- 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 it receives notice of

a sale, but only if the notice is made by the seller (not the purchaser or any other party), and the obligor is generally believed to continue to have the ability to set-off any prior claims (i.e., claims that the seller owed to the obligor prior to the notice). The obligor's set-off rights will also terminate if, and when, the obligor consents to the sale, and unless the consent is with a reservation to retain its right to set-off, the obligor will no longer have any ability to set-off (including its prior claims).

5 Security Issues

5.1 Back-up Security. Is it customary in Japan 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, the 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 a financing rather than a sale (note that the purpose is different from the term "back-up" for a failure to 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 so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of Japan, 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 Japan to grant and perfect a security interest in purchased receivables governed by the laws of Japan 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, 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 must deliver 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 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, which notice or consent must 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 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, the following need to be satisfied:

- 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, and assignments thereof must not be prohibited under the relevant receivables contracts; and
- the same as with pledges of receivables, the assignor must deliver 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 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 (*kakutei-hizuke*) 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 Japan, and that security interest is valid and perfected under the laws of the purchaser's country, will it be treated as valid and perfected in Japan or must additional steps be taken in Japan?

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 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 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 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-saiken*), endorsement will be required in order to effect and perfect the transfer.

(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) 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 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.

(iv) Mortgaged loans

When a security interest is validly and effectively granted over, or in, a loan that 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 (*zuihansei*). 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 (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.

(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:

- (A) 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.

(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 must continuously keep custody of the physical certificates.

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

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 must be recorded in the bond registry (*shasai genbo*) in accordance with the Corporations Act.

(B) 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 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 Japan 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 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 Japan recognise escrow accounts? Can security be taken over a bank account located in Japan? If so, what is the typical method? Would courts in Japan recognise a foreign law grant of security (for example, an English law debenture) taken over a bank account located in Japan?

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 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, also as 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 Japanese insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "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, 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; however, 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 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 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 claw 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 ability to exercise its rights may be restricted by the insolvency proceedings (provided, that, as described in question 6.1, 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 insolvency proceeding? What are the lengths of the "suspect" or "preference" periods in Japan for (a) transactions between unrelated parties, and (b) transactions between related parties?

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 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 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.

(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 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 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) 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.

6.5 Effect of Proceedings on Future Receivables. If insolvency proceedings are commenced against the seller in Japan, 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 sales agreement. To the contrary, a sales 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 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

Yes, that 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 Japan establishing a legal framework for securitisation transactions? If so, what are the basics?

Yes: the Law Concerning Liquidation of Assets (the “Securitisation Law”). The statute permits the setting up of a special purpose company (*tokutei mokuteki gaisha*; “TMK”) and a special purpose trust (*tokutei mokutekishintaku*; “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 (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” 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 Japan 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, 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 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) 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 Limited-Recourse Clause. Will a court in Japan 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.

7.4 Non-Petition Clause. Will a court in Japan 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.

7.5 Priority of Payments “Waterfall”. Will a court in Japan 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 provision that contradicts the priority rules provided under the insolvency statutes will not be honoured by the competent court.

7.6 Independent Director. Will a court in Japan 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.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in Japan, 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 Japan? Does the answer to the preceding question change if the purchaser does business with other sellers in Japan?

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 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, the 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 litigation. However, the Supreme Court has opined that a purchase of receivables does not violate the 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); see question 8.3.

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 Japan 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 Japan? 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 Moneylenders' Law.

8.5 Currency Restrictions. Does Japan have laws restricting the exchange of Japanese currency for other currencies or the making of payments in Japanese 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 transfer of money to persons of certain countries such as countries subject to 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 obligors to the seller or the purchaser be subject to withholding taxes in Japan? 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?

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.

9.2 Seller Tax Accounting. Does Japan 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; although 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 Japan impose stamp duty or other documentary taxes on sales of receivables?

Stamp duty (*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 Japan 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 Japan, 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 Japan?

As for stamp duty, see question 9.3 (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.

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Hajime Ueno is renowned for his expertise in the areas of structured finance, reorganisation finance and international finance. He has been involved in numerous significant securitisation transactions concerning various structures - such as true sale and synthetic structures; master trust structures, ABCP programmes - and asset classes, including residential and commercial mortgages, trade receivables, export financing, nonperforming and sub-performing loans, bonds and bank loans, including small and medium enterprise loans, as well as other assets that are not monetary claims including real properties, movable properties, whole business and intellectual properties. His extensive practice also covers other international finance areas, such as banking, trust and securities regulation, as well as BIS regulations. He is a graduate of the University of Tokyo (LL.B., 1997) and Harvard Law School (LL.M., 2004). Fluent in both Japanese and English, Mr. Ueno has co-authored a number of international and domestic journals and publications.

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