

## **The Law Applicable to the Assignment of Receivables: Japanese Conflict-of-Law Rules in the Age of Securitization,**

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### **SUMMARY**

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It is generally accepted that the conflict-of-laws rules are the rules of indirect regulation that determine the applicable substantive law, which in turn directly regulates the legal relationship in question. However, the conflict-of-laws rules are by no means a body of autonomous rules independent of reality. In fact, the 1989 revision of the *Horei*<sup>i</sup> introduced many new rules in family relationships, reflecting the developments in the substantive values, such as the equality of the sexes and the consideration of international harmonization.

The proposed rule, which refers to the law of the assignor's domicile, is intended as a response to the developments in financing practice and the law of securitization. It is also in harmony with the recent attempt by the United Nations Commission on International Trade Law (UNCITRAL) to prepare a uniform law on assignment in receivables financing.

Under the proposed scheme, however, the law of the debtor's domicile provided by the current rule of the *Horei* still governs the assignment of a right which is not registered. For example, a large bank loan or a right to repayment of the large tenancy deposit for a shopping center may be included in this category. In these cases, it could be much easier and less costly to simply notify the debtor or acquire its consent in accordance with the Civil Code than to consummate the registration procedure provided by the Act for the Special Rules of the Civil Code concerning the Opposability of Assignment.<sup>ii</sup> Likewise, even in a bulk assignment case, the debtors are protected by the law of their domicile. The possible fragmentation of applicable laws may not be so serious as to threaten the success of the receivables financing,

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<sup>i</sup> *Horei* (1898 Act No.10) is the basic legislation of the Japanese conflict of laws. For the English text of *Horei*, see 39 *The Japanese Annual of International Law* (1996), pp.186-191.

<sup>ii</sup> *Saiken-Joto no Taikoh-Yohken ni kansuru Minpo no Tokurei-toh ni kansuru Horitsu*, 1998 Act No.104. For the text of the pertinent provision, see *infra* text following note 35. For the meaning of "opposability," see text accompanying note 19 and text following note 35.

since the jurisdictions involved may be limited and predictable and the protection of debtors could not affect the viability of the financing scheme.

Unlike the protection of debtors, the priority question is likely to affect the success of the financing. It can be a zero-sum game between the competing parties or otherwise cause to the value of the assigned asset to diminish. The priority question between the other third parties is determined by the law of the assignor's domicile, or in effect, the law of its place of business.

In sum, the proposed rule refers to the law of the assignor to determine the question of priority, while the protection of the debtor is left to the law of the debtor as provided by the current rule under the *Horei*. It is pointed out in the foregoing discussion that the question of method and effect of public notice is an important public policy for a regulating state. Viewed from the traditional principle of the closest connection, the present approach may be explained as an attempt to connect the question of public notice with the jurisdiction where the information in question is most readily accessible by the interested parties. In contrast, the question of the protection of debtor has the closest relationship with the state of the debtor's domicile under the notification system of assignment. That state doubtlessly has a greater interest to protect the debtor, and its interest is greatest where the debtor is the economically weak, such as a consumer.