

Acquisition of Japanese loans by non-Japanese financial institutions

September 15 2017 | Contributed by [Nagashima Ohno & Tsunematsu](#)

Transferring receivables – general rule and exception

Transfer of receivables not novation

Restriction on money lending operations

Acquisition of loans from registered money lenders

Perfection

Civil Code reform

Financial institutions that have no operations in Japan can readily acquire loans made to Japanese borrowers by purchasing the receivables relating to such loans. This update provides an overview of the requirements and considerations that must be taken into account when transferring loan receivables.

Transferring receivables – general rule and exception

The Civil Code provides that a transfer of receivables generally becomes effective when the existing creditor, as seller, and the party acquiring the receivable (ie, the successor creditor), as purchaser, agree to the terms of such transfer. Provided that this general rule applies, consent is not required from the subject obligor (ie, the debtor) for the purpose of effectuating the transfer. However, this general principle may not apply if the underlying loan agreement prohibits the transfer of the loan receivables. In such case, any attempted transfer of a receivable in violation of such prohibition will be null and void, unless the debtor consents to the transfer. Thus, review of the relevant loan agreement is essential when considering an acquisition of loan receivables. Even if the loan agreement contains no express prohibition against transfers, it may require that additional procedures be followed and documentation be provided or executed in relation to any transfer of receivables arising from the loan created under the agreement, such as the execution of a transfer certificate in a prescribed form. That said, it is common practice to involve the debtor when transferring loan receivables from the seller to the purchaser by obtaining the debtor's consent (for the reason outlined in the Perfection section below).

Transfer of receivables not novation

In general, this process does not take the form of, and is not considered to be, novation under Japanese law. Although the Civil Code recognises novation, under the code, the receivable existing before novation is extinguished and a new receivable is created in its place. As novation would not effect a transfer of an existing receivable, it is not generally used for sale of receivable transactions.

Restriction on money lending operations

Some non-Japanese institutions may wish to make loans using funds from their own accounts rather than purchasing existing assets (eg, loan receivables) through transactions with third-party sellers. In this regard, it must be determined whether such institution is qualified to conduct money lending operations in Japan. In general, to engage in money lending operations in Japan, an institution must be either licensed as a certain financial institution (eg, a bank) or registered as a money lender under the applicable financial regulations. Without such qualification, an institution will be unable to make loans and should acquire loan receivables through a sale and purchase transaction with a qualified

AUTHOR

[Takashi Tsukioka](#)



lender.

Acquisition of loans from registered money lenders

When acquiring loan receivables, care should be taken with regard to the seller's qualification. Under the Money Lending Business Act, registered money lenders are subject to various procedural requirements concerning the operation of their money lending operations. Such requirements include an obligation to deliver documents setting out details of the loan to the debtor on various occasions, such as before signing and on signing and repayment. Once receivables under a loan subject to the Money Lending Business Act are transferred, the purchaser succeeds to these obligations (originally owed by the seller), even if the purchaser is not registered as a money lender under the act. For example, the purchaser must give written notice to the debtor without delay on its acquisition of loan receivables from a seller which is a registered money lender under the act. Under the act, when a non-Japanese institution acquires loan receivables from a registered money lender, as seller, it must provide a written explanation of the applicable regulations.

Perfection

As is the case in many other jurisdictions, perfection is required in Japan for a purchaser to legally establish its claim and rights to a receivable with regard to any third party that subsequently acquires the same receivable. In Japan, the process by which a purchaser establishes its legal right to an acquired receivable with regard to the debtor is also called perfection. While various methods to achieve perfection in relation to a receivable transfer exist, the most common way, in the context of loan receivables (especially if the relevant parties are transferring a single loan receivable as opposed to securitising thousands of loans at the same time), is to obtain written consent from the debtor. If a certified date is attached to such written consent by a Japanese notary public (the cost for which is Y700 (approximately \$6) per document), the transfer is perfected with regard to the debtor and all third parties. In addition, in accordance with the existing Civil Code and relevant court cases, if this consent is given without any objection, the debtor is precluded from asserting defences (eg. set-off) which were not known to the purchaser (acting without negligence) at the time of such consent. For this reason, acquiring the consent of debtors in relation to transfers of loan receivables is common practice in Japan, even though such consent is not required to effectuate the receivables transfer under the Civil Code. Although many purchasers insist on obtaining the debtor's consent "without any objection", the inclusion of such words in the consent document does not always protect the rights of the purchasers, as Japanese court judgments have limited the scope of their effect. A case in which a purchaser acted with negligence is one example of a court narrowing the effect of this rule.

Civil Code reform

The above discussion is based on the existing Civil Code. However, the relevant provisions of the code have been amended by the National Diet (the government's legislative body). The amendments will take effect by 2020 and may affect the explanations provided herein. For example, under the amendments, a prohibition in a loan agreement against the transfer of receivables will not result in nullification of an effectuated transfer of such receivables, provided that the purchaser cannot assert its right to such receivables with regard to the debtor. In addition, the rule concerning a debtor's consent without any objection has been abolished under the reformed code, which envisages improved protection of debtors' rights.

For further information on this topic please contact [Takashi Tsukioka](#) at Nagashima Ohno & Tsunematsu by telephone (+81 3 6889 7000) or email (t_tsukioka@noandt.com). The Nagashima Ohno & Tsunematsu website can be accessed at www.noandt.com.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).