Legal Issues in relation to the Amicable (without litigation) International Debt Collection in Japan

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I. Who collects the foreign debts legally in Japan?

1. Introduction

Until quite recently, only a qualified attorney could collect the debts on behalf of the creditor in Japan under the Practicing Attorney Law (Law No. 205 of 1949). This was because the debt collection by a third party, in particular, illegal organizations, such as Yakuzas or Boryokudans cause many troubles. However, lack of the qualified lawyer who specialize debt collection in Japan has been requiring professional debt collection entity for a long time. Due to such demand, the servicer was introduced by the Servicer Act (Law No. 74 of 2008) recently. For the international amicable (without litigation) debt collection, the question is whether the servicer could collect the foreign debts or not. The short answer is no.

2. Practicing Attorney Law

2-1. Article 72 of the Practicing Attorney Law (Collection by Attorneys)

Under Article 72 of the Practicing Attorney Law, the debt is collected only by a qualified attorney [1]; "No person other than an attorney or a Legal Professional Corporation may, for the purpose of obtaining compensation, engage in the business of providing legal advice or representation, handling arbitration matters, aiding in conciliation, or providing other legal issues in connection with any lawsuits, non-contentious cases, or objections, requesting for re-examination, appeals and other petitions against administrative agencies, etc., or other general legal services, or acting as an intermediary in such matters." In brief, non-attorney is not allowed to, for the purpose of gaining profits, (i) engage in legal business of providing legal services and (ii) act as an intermediary in legal cases as his/her business.

This provision applies where the case falls into the following definition. Firstly, the case is related to "legal issues" where the subject debt cannot be satisfied under normal conditions, for example[2],

[1] Research Department of Japan Federation of Bar Associations "Commentary Attorney Act (the 3rd edition)", Koubundou Publishers Inc. 2003, pg 669.
[2] Those are officially approved in the Fukuoka High Court decision (11.17. 1961, criminal casebook 16 vol. issue 10 pg 1423),

where it is difficult to collect from the debtor because of the disagreement on the debt amount between the parties, where the creditor has some difficulty in claiming against the debtor because of the dispute about formation of the debt between both parties, or where it is difficult to collect the debt either because the debtor delayed in the payment or because the debt has become already a bad debt. Secondly, the person other than an attorney engages in "legal issues" as his/her business such as acts of "demanding, receiving the debt or made arrangement for exemption of debt etc. upon the assignment by the creditor"[3].

The purpose of this provision is, as the Supreme Court ruled, to prevent a person not qualified as an attorney from involving in the dispute between the parties for money, causing a trouble to the parties, and eventually harming fair and right legal systems in Japan[4].

2-2. Article 73 of the Attorney Act (Collection by Non-attorneys)

Article 73 of the Practicing Attorney Law provides that "No person shall engage in the business of obtaining the rights of others by assignment and enforcing such rights through lawsuits, mediation, conciliation or any other method." This provision was incorporated in order to "prevent undesirable effects from arising on the people's legal interest, for instance, by engaging a non-attorney to randomly file for lawsuits or fueling the dispute given the assignment from creditors, or any other act that circumvents the main sentence of Article 72 of the said law[5].

The terms "lawsuits, mediation, conciliation" here are just examples of the method. The provision includes the methods of not only using court procedures such as lawsuits, payment demanding, compulsory execution or petition filing for bankruptcy, but also using amicable arbitration out of the court. While the Article 73 requires the element of "for the purpose of obtaining compensation" to be met, the Article 72 does not.

2-3. Legal Consequences of Violation of Article 72 and 73 of the Practicing Attorney Law

In discussion of the legal consequence where the person violates the above provision, there are disputes over the effect of judicial act under the private law. However, the purpose of the said provision is, as mentioned above, to protect fair and fluidity of the people's legal life and to maintain legal order. Hence, within that context, it is interpreted that the Article 73 is regarded to a great

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which is the original ruling of the later Supreme Court decision (10.4.1962, criminal casebook 16 vol. issue 10 pg 1418).

[3] The example illustrated in the above decision.

[4] The Supreme Court decision in 7.14.1971 (criminal casebook 25 vol. issue 5 pg 690) rules as follows; "In our society, there are a quite number of people who are not qualified as an attorney does not follow the laws and randomly involve in other persons' legal matters as an intermediary just for their own interest. If we ever let them go as they want, the interest of the parties and other interested parties would be harmed, our legal lives, which should be fair and smooth, would be destroyed and perhaps disruption of the legal order would be caused. This provision was incorporated to prevent such situation."

[5] Supreme Court decision, 1.22.2002, Hanrei-Zhiho issue 1775, pg 46.

extent as a provision for public interest and any action against this provision is deemed to contrary to public order and be invalid (Article 90 of the Civil Code (Law No. 89 of 1896))[6]. On one hand, there is an exceptional case where the court ruled that even if the person by assignment exercise someone's debt on his/her behalf through lawsuits etc. and does that as his/her business, if such act does not pose any negative effect on the people's legal interest and is believed to be within the scope of lawful business from the socioeconomic aspect, such act is not deem to be violation of article 73 of the Practicing Attorney Law[7]. Any person who violates the provision shall be punished with imprisonment at a term of up to two years or a fine of up to three million yen (Article 77-3, 4 of the Practicing Attorney Law).

3. Servicer Act

3-1. Collection by Debts Collection Agencies

As mentioned earlier, articles 72 and 73 of the Practicing Attorney Act was introduced to prevent a person other than a qualified attorney, such as gangs or yakuza from involving in debt collection activities. However, a lot of financial institutions got burdened with a huge amount of bad debt after the collapse of the Japanese economic bubble and it was getting difficult and ineffective for only quite limited number of attorneys in Japan to deal with such bad debt collection matters. Thus the "Act on Special Measures concerning the Claims Servicing Business (the "Servicer Act)" was enacted in 1998 as a special provision of the Practicing Attorney Law[8].

While trying to eliminate gangs and yakuza who involves in debt collection activities and to protect creditors on the basis of the purpose of the Practicing Attorney Law, the Servicer Act enables private companies to enjoy its know-how and human recourses from attorneys in debt collection cases by establishing a system of permit for the issues only attorneys had been able to deal with so far. Under the Servicer Act, no person other than a stock company that has obtained a license from the Minister of Justice shall operate a debt management and collection business (Article 3 of the Servicer Act), but such permitted companies are called "Claim management and collection company" (Article 2-2 of the Servicer Act).

To obtain a license, the company must meet the following strict legal elements; (i) the company is a stock company with a stated capital of more than 500 million yen, (ii) the company is a stock company which have one or more attorney-at-law among its directors regularly engaged in its business, (iii) the company is a stock company whose business activities are not controlled by a member of an organized crime group or is unlikely to engage an organized crime group member in

[6] Supreme Court decision, 6.30.1963, Civil Code casebook 17 vol. issue 5, pg 744.
[7] Supreme Court Decision, supra, 1.22.2002
[8] Hiromu Kurokawa and Hiroki Ishikawa "Practice of Servicer Act with 225 questions" Shozihomu, 2002, pg.124.

its business, and (iv) there is no member of an organized crime group among the officers in the company. In this regards, the term of "a stock company" referred to in article 3 of the said law means a stock company that is governed by the domestic law of Japan and does not include foreign corporations. This is because it is necessary, in terms of eliminating gangs or yakuza, to locate headquarter of the company in the country and to establish structure that makes possible for management executive to respond in a responsible manner. With the above situation present, the Minister of Justice will be able to exercise his supervision authority in a timely, appropriate and strict manner.

As an effort to eliminate gangs and yakuza, the said law provides that (i) a person engaged in the business of a debt management and collection company shall not cause another person annoyance by intimidating the person or behaving in a way that disturbs his/her private life or business affairs (Article 17-1 of the said law), (ii) a debt management and collection company shall not engage an organized crime group member, etc. in its business or use one to assist with its business (Article 18-1 of the said law), and (iii) a debt management and collection company shall not assign a debt to an organized crime group member etc. (Article 19-2 of the said law).

3-2. Limitation on the collection capability of Servicer

Even if the company obtained a license in accordance with the Servicer Act, it is not allowed to make collection activities unconditionally. Such company can only deal with debt collection relating to a "specified monetary debt" (Article 2-1 of the said act). More specifically, the said law sets forth as a specified monetary debt a loan debt (item 1) that is held by financial institutions (banks, cooperatives, insurance companies etc.), or a loan debt held by foreign branch of the banks, local authorities, foreign insurance companies and security companies etc.

The term "foreign" here means a company with foreign capital and that has business address in Japan. It does not include foreign company that does business in other countries. Furthermore, there is no provision which specifies that a loan debt held by a person or corporation located overseas is included into a specified monetary debt. Therefore, the Servicer Act only applies where the executive is present in Japan, and the company is not allowed to collect debts which are held by someone in the other countries. Replying the inquiries by us, the Legal Affairs Bureau of Japan, the competent authority to supervise the implementation of the Servicer Act confirms that the above interpretation of the Servicer Act is correct.

5. Conclusion

Due to the enactment of the Servicer Act, a servicer who is not qualified as a lawyer can collect

debts in Japan now. However, collection of a foreign debt (a debt owned by a Japanese debtor to a foreign creditor) is still collected only by a Japanese qualified attorney pursuant to article 72 of the Practicing Attorney Law and the Servicer Act.

III. Referral of Debt Collection

1. Introduction

We are often requested by International Debts Collection Agencies to collect the debts owed by a Japanese debtor to a creditor located in the country where the international debt collection company is also located. Most of the International Debts Collection Agencies set the collection fee for the creditor and ask us whether we would accept the terms and conditions of the fees set by them. There are, however, a few companies, who let us decide the collection fee and request us to pay the introduction fee. The question here is whether we could pay the introduction fees to the International Debts Collection Agencies or not.

The answer is simple. A Japanese attorney is prohibited to pay a referral fee to a foreign debt collection company due to ethical obligation of attorney. Article 13 of the Practicing Attorney Law and the Basic Rules of Attorneys' Duties (Rule No. 70 of 2004) stipulates that "An attorney shall not pay reward or any other compensation for the referral of client".

The purpose of such provision is to follow through with the intent of the prohibition against collaboration with non-attorney. Collaboration with non-attorney hereby means that an attorney collaborates with non-attorney to be referred to debt collection cases and deliver whole or part of the payment. Article 27 of the Practicing Attorney Law stipulates that "an attorney shall not undertake any cases referred by a person who is in violation of any of the provisions of Articles 72 to 74 (inclusive), or allow such a person to utilize his/her name." "Referred" hereby means for the "person" to intervene between one of the parties of disputed case and an attorney and engage them to establish a delegation relationship or any other relationship between them (Decision of Kanazawa Branch, Nagoya High Court on February 19, 1959).

The purpose of this article is to prevent both attorneys and non-attorneys from violating the provisions of article 72 to article 74 of the Practicing Attorney Law by prohibiting attorney's act which enhance the violation directly or indirectly. A person who violates the said provisions shall be punished by imprisonment with work for not more than 2 years or a fine of not more than JPY 3 million pursuant to Article 77(1) of the Practicing Attorney Law.

IV. Governing Law

1. Introduction

International debt collection is made between the creditor and the debtors in two different countries where the applicable laws of the interest rates and the statute of limitation would be different. The issue here is which law, such as the laws of the creditor or the laws of the debtor, shall be the governing law of the foreign debt in Japan.

In the case of the debts owed by the debtors in Japan to the foreign creditors, eventually the litigation should be filed to the courts of Japan as the debtor is located in Japan. The conflict of the law of Japan would then apply in the courts of Japan as to which law should apply.

Followings are the general rules of the conflict of laws of Japan applicable in the court of Japan.

2. In Case Where the Parties Chose Governing Law

2-1. Explicit Choice

Article 7 of the Act on General Rules for Application of Laws (**"Application Law"**) stipulates that "the formation and effect of a juridical act shall be governed by the law of the place chosen by the parties at the time of the act". "At the time of the act" hereby means that the choice of law shall be made at the time of the judicial act or the time that should be deemed to be equal to such a time under normal social conventions, which includes the time when one of the parties agrees upon the governing law in the final stage of the conclusion of the contract, or the time when one of the parties inserted a clause to stipulate the governing law right after the conclusion of the contract[9].

2-2. Implicit Choice

Sometimes a contracting person indicates his/her intention to choose governing law implicitly. In such case, it is slightly problematic if governing law was chosen by the implicit declaration of intent. A contracting person can choose governing law by one of the following three ways[10].

(1) In case where a contracting person clearly specifies his/her choice of law by words or actions at the time of the judicial act.
(2) In case where the intention was not explicitly expressed outside, although a contracting person held intention to choose specific law at the time of the judicial act.
(3) In case where it is assumed that a specific law would have been chosen if contracting parties discussed the governing law, although contracting parties actually did not have intention to

[9] "Commentary: Act on General Rules for Application of Laws" (Shojihomu, 2009) p.81
[10] "Commentary: Act on General Rules for Application of Laws" (Shojihomu, 2009) p.81

choose a specific law.

Among the above cases, (1) and (2) are deemed as "Choices" of the governing law. Given the purpose of the Application Law to allow contracting parties to choose the governing law by themselves, it is rational to conclude that the contracting party chose the governing law in the case (2) as the party actually had intention to choose the governing law[11]. On the other hand, it shall be considered that the contracting party of the case (3) did not choose the governing law as he/she merely had tentative intention to choose the law[12].

To sum up, the contracting party who had intention to choose the governing law shall be deemed to have chosen the governing law. If the contracting party did not have actual intention to choose the governing law, on the other hand, the governing law shall be determined pursuant to article 8 of the Application Law.

3. Without Choice of Law / Law of the Place with Which the Act is Most Closely Connected

In case where the contracting party does not choose the governing law, it will be determined pursuant to article 8 of the Application Law. Article 8(1) of the Application Law stipulates that "In the absence of a choice of law under the preceding Article, the formation and effect of a juridical act shall be governed by the law of the place with which the act is most closely connected at the time of the judicial act"[13].

"The law of the place with which the act is most closely connected" literally means the place where the judicial act is most closely connected among the other related places. Under this article, the governing law shall be determined based on every related condition. Such condition includes objective factors such as the place of judicial act, place of performance and habitual residence of parties, and subjective factors such as intention of the contracting parties[14].

4. Presumption of Law of the Place with Which the Act is Most Closely Connected

As "law of the place with which the act is most closely connected" is too abstract and ambiguous as criteria, article 8 (2), 8(3) and 12(3) of the Application Law stipulates presumptive rules regarding the case (1) where only one of the parties is to provide a characteristic performance involved in the juridical act, (2) where the subject matter of the juridical act is real estate, and (3) where a work is provided under a labor contract.

[11] "Commentary: Act on General Rules for Application of Laws" (Shojihomu, 2009) p.82
[12] "Commentary: Act on General Rules for Application of Laws" (Shojihomu, 2009) p.82
[13] "Commentary: Act on General Rules for Application of Laws" (Shojihomu, 2009) p.106
[14] "Commentary: Act on General Rules for Application of Laws" (Shojihomu, 2009) p.106

As for the case (1), article 8(2) stipulates that, in the absence of a choice of law under article 7, if only one of the parties is to provide a characteristic performance involved in a juridical act, the law of the habitual residence of the party providing said performance shall be presumed to be the law of the place with which the act is most closely connected. This article adopted the principle of characteristic performance, which means that the place of the contracting party providing a characteristic performance that distinguishes the contract from the other contracts is deemed as the place with which the act is most closely connected[15]. For example, as for transaction agreement of movables, delivery of the movables is considered as a characteristic performance that distinguishes the contract from the other contracts (The counter performance is payment of money, which does not characterize types of the contracts). Therefore, the governing law of such contract shall be the law of the place where the creditor lives[16].

In a bilateral agreement, "characteristic performance" is a counter-performance of monetary obligation. In another word, as it is common for one of the parties to take on monetary obligation, the counter-performance of the monetary obligation the performance which characterizes the agreement. Such characteristic performance is the core of the agreement and criteria to identify the governing law of the agreement. Where one of the contracting parties provides a product or service and the other party pays for it, the laws of the location of the creditor is deemed as the law of the place with which the act is most closely connected[17].

In a unilateral agreement, characteristic performance is generally a performance of sole obligation. For example, loan agreement is a unilateral agreement under the Civil Code and its sole obligation is the borrower's obligation to return the object. In this agreement, the borrower's obligation to return the object is seems to be the characteristic performance. In Japan, a bilateral agreement is differentiated from a unilateral agreement from the viewpoint whether each party's obligation is a counter value to for the other party's obligation. However, such criteria shall not be directly applied to the principle of characteristic performance. Therefore, although a loan agreement is a unilateral agreement under the Civil Code of Japan, extension of loan is regarded as the characteristic performance and therefore the governing law of the location of the creditor is presumed to be the governing law of the loan agreement[18].

5. Conclusion

[15] "Commentary: Act on General Rules for Application of Laws" (Shojihomu, 2009) p.108
[16] "Commentary: Act on General Rules for Application of Laws" (Shojihomu, 2009) p.108
[17] Tadashi Kanzaki ""Commentary: Act on General Rules for Application of Laws" (Kobundo, 2006) p.66
[18] Tadashi Kanzaki ""Commentary: Act on General Rules for Application of Laws" (Kobundo, 2006) p.67

Governing law shall be the law chosen by the parties, or the law of the place with which the act is most closely connected if the parties do not choose the law. In addition, pursuant to the presumption clauses, the place where the creditor lives shall be the place with which the act is most closely connected.

V. Exchange Risk of Foreign Currency Debt

1. Issue

We sometimes collect debts against a debtor who failed to pay for the services (medical service or tuition fee etc.) in foreign countries (Hawaii etc) and returned to Japan. Such debts are inevitably denominated in foreign currencies (dollars or euro, etc.). In this case, the first question is whether the debt denominated in foreign currency is collectable in Japan.

The second question is whether the debtor is required to pay the debt in foreign currency.

The third question is who should take the foreign currency risk if the debtor may pay the debt in Japanese yen. The third question is important as the currency rate on the due date, the date of demand and the date of performance can be different. The question is unfortunately unclear under the laws of Japan.

2. Governing Law

Based on the principle of characteristics performance, characteristic performance in a bilateral agreement is a counter-performance of monetary debt. Therefore, in case where money is paid as a counter-performance of product price or service fee, the governing law is presumed to be the laws of the place where those products or services are provided.

Where money is paid as a counter-performance of medical service, since the medical service is characteristic performance, the governing law is the laws of the place where the medical service was provided (the laws of Hawaii).

3. In Case Where Governing Law is Laws of Japan

3-1. Introduction

As mentioned above, if a Japanese citizen takes a medical service overseas, the governing law of the debt is presumed to be the laws of the foreign country or state where the person takes the medical care. Therefore, exchange risk of foreign currency debt shall also be dealt with under the laws of the foreign country or state.

For your information, rules regarding exchange risk under the laws of Japan will be discussed in the

following article.

3-2. Collection of Foreign Currency Debt in Yen

There is no provision regarding the collection of foreign currency debt in yen in the Civil Code of Japan. However, the Supreme Court ruled that "A foreign currency debt is a voluntary debt. The creditor can demand the payment in either the foreign currency or Japanese yen." (Supreme Court Decision on July 15, 1975).

3-3. Payment of Foreign Currency Debt in Yen

It is unclear, where the creditor of foreign currency debts (USD) demands a payment in the foreign currency (USD), if the debtor shall make a payment in the foreign currency (USD) or the debtor is able to pay in Japanese Yen.

As explained in the said Supreme Court Decision, under the Civil Code of Japan, the debtor is able to make a payment in Japanese Yen for a foreign currency debt (USD) (Article 403 of the Civil Code).

3-4. Base Time of Conversion for Payment for Foreign Currency Debt in Yen

As mentioned above, the debtor can make a payment in Japanese Yen or a foreign currency debt (USD). Base time of the conversion shall be determined.

If the currency rate was USD 1 = JPY 100 on the due date, USD 1 = JPY 120 on the date of demand and 1 USD = JPY 80 on the date of payment, the debtor shall need to know which currency rate to apply.

The Supreme Court ruled that "If the debtor makes a payment in Yen for a foreign currency debt, the debtor shall apply the currency rate of the date of actual payment."

Based on this decision, the debtor can make the payment at the currency rate of the date of payment (USD 1 = JPY 80). Common belief explains the same[19]. However, this decision allows debtors to postpone the payment until the currency rate becomes more favourable (the debtor is able to impose exchange risk on the creditor). Therefore, there is a theory which says that the debtor is no longer able to apply the currency rate on the date of payment and has to apply the currency rate on the date of demand if he/she postpones the payment[20].

VI. The rate of the Default Interest

1. Introduction

[19] Commentary of the said Supreme Court Decision, p.333
[20] Commentary of the said Supreme Court Decision, p.329

We are normally requested to collect the debt not only the principal but also the default interest. The question her is what the default interest is. This question is also associated with the governing law of the debt.

Under the Application Law, pursuant to the principle of characteristic performance, the governing law is presumed to be the laws of the location of the creditor.

Followings are therefore mere reference for you in case where the debt is governed by the laws of Japan. Please note, however, the super high default interest under the foreign law would not be applicable to the debt owed by the debtor in Japan.

2. Agreed Interest Rate and Statutory Interest Rate

Under the laws of Japan, different interest rates are imposed on loan agreement based on its causative condition. (1) If the parties agree upon the interest rate, such agreed interest rates shall be applied (Agreed Interest Rate) (Article 404 of the Civil Code). (2) Unless the parties otherwise manifest their intention with respect to a debt which bears interest, the rate of such interest shall be 5% per annum (Statutory Interest Rate) (Article 404 of the Civil Code). (3) Unless the parties otherwise manifest their intention with respect to a debt which bears interest, the legal rate of interest related to obligations arising out of commercial activity shall be 6% (Commercial Statutory Interest Rate) (Article 514 of Commercial Code).

However, in case of the Debts Collection Agencies, the statutory interest rate is deemed to be 6% pursuant to the case (3) above because almost all creditors are deemed to be the merchant (Article 5 and 3(1) of the Commercial Act).

3. Default Interest (Default Charge)

Under the laws of Japan, default interest is also called default charge. Default charge is damages due to default of monetary debts (Article 415 of the Civil Code). The compensation shall be for all damages which would ordinarily arise from the default (Article 416 of the Civil Code). However, article 419 of the Civil Code provides special provisions for monetary debt which stipulates that "The amount of the damages for failure to perform any obligation for the delivery of any money shall be determined with reference to the statutory interest rate; provided, however, that, in cases the agreed interest rate exceeds the statutory interest rate, the agreed interest rate shall prevail".

As for International debt collections especially collection of monetary debts, therefore, the amount default interest shall be determined with reference to the statutory interest rates (5% per annum for private transactions and 6% per annum for commercial transactions) and if there is any agreed interest rates, the amount of default interest shall be determined with reference to the agreed interest

rate.

4. Interest Rate Restriction Act

Even if the parties agreed upon the interest rate, the creditor cannot demand unlimited interest amount from the debtor. Interest Rate Restriction Act stipulates the limitation on interest with the purpose to prevent the creditor from gouging. Article 1(1) of Interest Rate Restriction Act stipulates different limitation on interest rates depending on the principle amount (2% per annum for less than JPY 100,000, 1.8% per annum for JPY 100,000 or more and less than JPY 1 million, 1.5% per annum for JPY 1 million or more). If the interest amount exceeds the amount calculated based on the said interest rates, the interest amount which exceeds the said amount shall be invalid.

Article 4 of the Interest Rate Restriction Act stipulates that, if the amount of damages (default charge) arising from the default of loan agreement exceeds the 1.46-fold figure of the rate stipulated in article 1(1), interest amount which exceeds the said amount shall be invalid.

5. Act Regulating the Receipt of Contributions, Receipt of Deposits and Interest Rates

Number of victims who suffer high interest rate imposed by consumer finance did not decrease while after the introduction of the Interest Rate Restriction Act. In order to prevent the further damages, the Japanese government amended "Act Regulating the Receipt of Contributions, Receipt of Deposits and Interest Rates" (**"Contribution Regulation Act"**) in 1983. Contribution Regulation Act stipulates that if consumer financial institute agrees to receive or actually receive interest calculated based on the interest rate higher than 40.004% per annum (109.5% for the entity which is not consumer financial institute), the institute shall face a criminal charge.

The Contribution Regulation Act was amended again in 2003 and introduced article 5(3) which stipulates that a consumer financial institute which agrees upon interest rate higher than 109.5% per annum shall be punished by imprisonment with work for not more than 10 years or a fine of not more than JPY 30 million (Super high Interest Rate Crime). In addition, statutory penalty for the existing High Interest Rate Crime was also raised at the time of the amendment (period of imprisonment with work was prolonged from three years to five years, and the amount of time was expanded from JPY 3 million or less to JPY 10 million or less).

As mentioned above, the interest rate of monetary debts or default charges shall be determined based on the governing law. As for international monetary debt collection, the governing law shall be the laws of the location of the creditor; therefore the Civil Code, Commercial Act as well as Interest Rate Restriction Act of Japan shall not be applied.

However, the Contribution Restriction Act is a public law which stipulates punishment. As matters regarding the public law such as the Constitutional Law, Administrative Law and Criminal Law are outside the scope of conflict of law, from the viewpoint of the principle of territoriality of public laws, it is natural to apply such public laws compulsory within the country[21]. Therefore, in such case, the Contribution Regulation Act shall be applied and the collection of interest which conflicts with the Contribution Regulation Act shall be prohibited.

VII. Collection of Fees

1. Introduction

We often collect the debt owned by a debtor in Japan to the foreign creditor referred by foreign collection agencies. Some of the foreign collection agencies request us to collect not only the principal and default interest but also the cost and fees of the collection. Although the collection cost and fee is not collectable under the laws of Japan, it depends on the laws of the location of the creditors as they are the governing law of the debt.

Following are therefore mere reference for you in case where the debt is governed by the laws Japan.

2. Article 419 of Civil Code of Japan

Under the Japanese law, it is problematic for us to collect our fees as the damages (Article 415 of the Civil Code) for failure to perform monetary debt. Article 419 of the Civil Code, which is a special provision for monetary debt, stipulates that "the amount of the damages for failure to perform any obligation for the delivery of any money shall be determined with reference to the statutory interest rate; provided, however, that, in cases the agreed interest rate exceeds the statutory interest rate, the agreed interest rate shall prevail". Pursuant to article 419 of the Civil Code, it seems that the collection of attorneys' fee may not be allowed as excessive collection of interest.

Supreme Court Decision on October 11, 1973 ruled that "According to Article 419 of the Civil Code, the amount of the damages for failure to perform any obligation for the delivery of any money shall be determined with reference to the statutory interest rate or agreed interest rate, and the debtor shall not be required to prove his/her damages. On the other hand, even if the creditor proves that the amount of damages was larger than the amount calculated based on the said interest rates, the creditor cannot request more than the calculated amount. Therefore, it is logical to conclude that the creditor may not demand the attorneys' fee or any other expenses from the debtor." The court ruled

[21] Yoshio Tameike "Lecture of International Private Law [Second Edition]" (Yuhikaku, 1993) p. 205

that the creditor may not demand attorneys' fee as the damages for failure to perform monetary debt pursuant to article 419 of the Civil Code.

3. Conclusion

According to the Supreme Court Decision, the creditor may not to demand our fee as the damages for failure to perform monetary debt under article 419 of the Civil Code. In other words, our fee (and cost) of collection should be beard by the foreign creditor from the collection of the debts under the laws of Japan.

VIII. Statute of Limitation

1. Introduction

As mentioned above, the statute of limitation period of the laws of the location of the creditor and those of the location of the debtor would be different. The question here is which law would apply to the debt owned by the debtor in Japan to the foreign creditor.

Please note that the question here is not how long the statute of limitation of the debt but which law would apply to determine the statute of limitation of the debt under the laws of Japan.

2. Governing Law of Statute of Limitation

There are discussions if the parties of the contract or act can choose the governing law just like the governing law of debts.

In common law jurisdictions, as limitation of action, the governing law of statute of limitation is considered different from the governing law of debts. However, Tokushima District Court Decision on December 16, 1969 ruled that the governing law of statute of limitation of debt is the governing law of debt itself saying that "In common law jurisdiction, statute of limitations is often stipulated as extinction of the right of action. However, given the fact that statute of limitations is given to the debtor as a protection measure upon the expiration of a certain period and it shall be regarded as a legal system under the substantive law as the debt is discharged when the debtor revokes it, the matter of statute of limitations is the matter of existence of debts. Therefore, the formation and effect of the statute of limitations shall be governed by the governing law of the debt itself, which is determined by article 7 of the Application Law".

Based on the precedent, the governing law of the statute of limitation is the governing law of the debt (most likely the laws of the location of the foreign creditor).

It is possible that the rules of extinctive performance under the laws of the place where the creditor lives are completely different from the rules under the laws of Japan. For example, under the laws of Japan, any debt regarding the duties of an attorney, a legal professional corporation, or a notary public shall be extinguished if not exercised for two years, which is very short compared to the other statute of limitations, after the close of the case (time of payment) which was the cause of such debt (Article 172 (1) of the Civil Code). If the laws of the place where the creditor lives stipulate that the period of statute of limitations of any debt regarding the duties of an attorney is 20 years, it is unclear whether the application of the laws of the place where the creditor lives conflict with the public order of Japan (Article 42 of the Act on General Rules for Application of Laws). If so, instead of the laws of the place where the creditor lives, the short-term statute of limitations of two years under the Civil Code of Japan shall be applied.

Regarding this point, Tokushima District Court stated above ruled that application of the laws of the place where the creditor lives does not conflict with the public order of Japan, saying that "International public order is not same as "public order" stipulated in the Civil Code of Japan. Although statute of limitations shall be determined with reference to the governing law of the debt as the matter of existence of debt, application of longer-term statute of limitations does not immediately damage the statute of limitations system and civil legal order of Japan".

3. Statute of Limitations of Debt

3-1. Introduction

Statute of limitations of debt is often determined with reference to the laws of the place where the creditor lives. For your information, statute of limitations of system under the laws of Japan will be discussed in the following article.

3-2. Expiration of Period of Statute of Limitations and Invocation of Statute of Limitations

Article 145 of the Civil Code of Japan stipulates that "The court may not make a judgment relying on the prescription unless the party invokes it". It is unclear if the debt is extinguished automatically once the period of statute of limitations is expired or extinguished only if the debtor invokes it.

The Former Supreme Court ruled that statute of limitations is automatically extinguished once the period of statute of limitations is expired, saying that "statute of limitations is automatically extinguished once the period of statute of limitations is expired even if the debtor has not invoked it. It only means that the court is not able to make a judgment relying on the prescription unless the party invokes it." (Former Supreme Court Decision on July 4, 1920)

However, Supreme Court ruled that statute of limitations is extinguished only if the debtor invokes it, saying that "Statute of limitations comes into effect determinately only if the debtor invokes it." (Supreme Court Decision in 1986)

3-3. Waiver of Benefits of the Statute of Limitation

Article 146 of the Civil Code stipulates that "the benefits of the prescription may not be waived in advance", which is interpreted that the debtor is allowed to waive the benefits and make a payment after the period of statute of limitations has passed (Once the debtor waives the benefits, he/she is unable to demand the repayment of the paid amount as an unjust enrichment (Article 703 of the Civil Code)).

However, Supreme Court Decision ruled on June 23, 1960 that the waiver of benefits comes into effect if the debtor acknowledged the period of statute of limitations has passed. Based on this decision, the debtor was allowed to invoke statute of limitations after he/she made a payment without knowing the period of statute of limitations has passed. However, such operation harms the safe conduct of transactions in relation with the debtor who received a payment after the period of statute of limitations has passed. Therefore, Supreme Court ruled on April 20, 1966 ruled that "the debtor who acknowledged the existence of the debt is no longer able to invoke the statute of limitations in the context of principle of faith and trust, even if he or she was unaware of the fact that the period of statute of limitations has passed".

According to the Supreme Court Decision on April 20, 1966, the creditor is able to break the debtor's defense of statute of limitations by making the debtor to promise the postponement of payment or installment payment and to actually pay a part of it. Therefore, article 146 of the Civil Code has important meaning for debt collection.

3-4. Period of Statute of Limitations

Under the Civil Code of Japan, a debt shall be extinguished if not exercised for ten years (Article 167 (1) of the Civil Code). A debt arose from commercial transactions, which applies to the most of debts subject to international debt collection, shall be extinguished if not exercised for five years (Article 523 of the Commercial Code).

In addition, there are provisions that stipulate short-term statute of limitations of debt, including a debt regarding the duties of an attorney which shall be extinguished if not exercised for two years (Article 168 to 174 of the Civil Code).

VIX. Issues associated with the Credit Insurance Company

We have numerous experiences in acting for the credit insurance company collecting debts owed by the debtors in Japan. Although there are some differences from companies to companies, credit insurance companies are involved in the international debt collection as follows.

1. Payment Before Collection

In some cases, a credit insurance company pays the debts to the foreign creditor in accordance with the trade insurance policy before we actually collect the debt from the debtor in Japan. In this case, the debt is transferred from the foreign creditor to the credit insurance company (without any notice or consent to the debtor) under the laws of Japan, therefore it is theoretically necessary for us to collect the debt not for the foreign creditor but for the credit insurance company.

In this case, it is often problematic for us to explain the function of the credit insurance company to the debtor in Japan.

In most cases, however, the credit insurance company provides us with a power of attorney from the foreign creditor under which the credit insurance company is authorized to collect the debt under the name of the foreign creditor. Based on the power of attorney, the credit insurance company sometimes issues a power of attorney directly to us.

Although it is still problematic if the debt is governed by the laws of Japan, we normally follow the instruction of the credit insurance company as the debt (and insurance policy) is most likely governed by the laws of the foreign creditor.

2. Payment Guarantee

In other cases, the credit insurance company does not pay the debt until we fail to collect the debt but control or monitor the collection procedure in accordance with the insurance policy.

In this case, the debt is still held by the foreign creditor and we collect the debt not for the credit insurance company but the foreign creditor although we would, most likely, be require to follow the instructions from the credit insurance company, such as the investigation of the location and financial situation of the debtors, and periodical (most likely) requirements of collection report.