

Applicable Law on Transfer of Receivables in Swiss Private International Law (summary)

Mao UEMATSU

Associate Professor of Law at Kagawa University

1. In the Japanese codes on Private International Law, there is only one express provision, which concerns with the transfer of receivables⁽¹⁾: Art. 12 of "HOREI"⁽²⁾ designates the law applicable to the third parties involved in the assignment of receivables. The Swiss Federal Act on Private International Law of December 18, 1987 (hereinafter SPIL) contains three Articles designating the applicable law to the transfer of receivables, which are in part different from those of the ECC Convention on the Law Applicable to Contractual Obligations of June 19, 1980.

2. According to Art. 145(4)SPIL, questions relating exclusively to the parties of an assignment are governed by the law applicable to the contract or other legal relationship underlying the assignment. The other questions relating to the assignment (including its form) are governed by the law chosen by the parties and, in the absence of a choice of law, by the law applicable to the assigned right (Art. 145(1) and (3)SPIL). A choice of law by the parties can have, however, no binding effect on the debtor without his consent (Art. 145(1), second sentence SPIL). With regard to the assignment of an employee's right, a choice of law by the parties is limited to the extent permitted Art. 121(3), which relates to employment contracts (Art. 145(2)SPIL). This regulation expresses the underlying purpose of protecting the debtor from the unexpected application of the law to his rights relating to assignment. The law seems to leave some uncertainty, with regard to non-debtor third parties concerning the effects of party autonomy permitted by Art. 145(1)SPIL. As regards the problem of priority in cases of multiple assignments of the same receivable, a clear discussion could not be found. Only a few authors say that the law applicable to the assigned receivable should govern this problem, even if the debtor has given the consent to the choice of law by the party to the assignment. Opinions are presented as to the other conflicts regarding priority between the right of the assignee in the assigned receivable and the competing right of a claimant, e.g. that of the assignor's creditor or the bank-

ruptcy administration of the insolvent assignor: i) The chosen law by the parties to the assignment should govern this kind of priority problem, no matter whether the debtor has given a consent to that choice or not; ii) The law applicable to the assigned receivable should regulate this priority conflicts, even if the debtor has given his consent to the parties choice of law; iii) Special regulation is not necessary because the right of non-debtor third parties can be protected by the law applicable to that right.

3. Art 144 SPIL is a *lex specialis* to Art. 146 SIPR. According to Art. 144(1) SIPR, a debtor has an action for recovery against a co-debtor, either directly⁽³⁾ or by subrogation, only to the extent that the laws governing both obligations allow such an action. This cumulative application of both laws is justified in order to protect the co-debtor from an unexpected action for recovery supported only by the applicable law to the debt of another, who has paid to the common creditor. Some authors suggest the application of the law governing the debt of the claimed co-debtor for recover is sufficient to protect him. If there is an obvious relationship between the debtor who claims and the co-debtor claiming for recovery, the law governing this relationship can be exceptionally applied providing that the case has a much closer connection to this law (Art. 15 SPIL).

4. The other assignment by operation of law is governed by the law applicable to the original relationship between the former and the new creditor and, in the absence of such a relationship, by the law governing the transferred receivable (Art. 146(1)SPIL). The application of the provisions of the applicable law to the transferred receivable which are intended to protect the debtor is reserved, if the law governing the assignment by operation of law is different from the applicable law to the transferred receivable. Whether the provision which prohibit the assignment by operation of law is intended to protect the debtor or not, is on discussion.

- (1) The transfer of rights in relation to succession and the merging of companies and the transfer of securities are excluded here.
- (2) Act on the Application of Laws (General), Law No. 10, 1898, as amended.
- (3) A direct action for recovery against a co-debtor is not a kind of transfer of a receivable in a strict sense. It is mentioned here together with subrogation, which is a sort of transfer of a receivable.