7. The Treatment of Liability to Refund Overpayment in Case of Assignment of Operating Assets of the Moneylender

Kazuma Yamashiro
(**Assistant Professor, Faculty of Law**)

1. Overview of the facts

X and A entered into a framework agreement on cash loan for consumption in 1989. Since then, X and A have repeatedly entered into transactions of lending and repayment. On 29 January 2002, A concluded an assignment agreement with Y on bulk assignment of A's assets to Y, including receivables relating to its consumer cash loan operations, with the closing date as of 28 February 2002, 1 p.m. The referred assignment agreement provided for the following:

Clause 1.3 : The obligations assumed by Y are 'any and all obligations arising under the contracts stipulated by the assets subject to assignment (limited to those obligations that arise after the closing date and that relate to the period starting on and after the closing date)'.

Clause 1.4(a) : Y 'does not assume A's obligations or liabilities (including the right to claim refund of paid interests) under the cash loan agreements which constitute the source of receivables included in the assets subject to assignment'.

Clause 9.6(b) : 'As to the claims for refund of overpaid interest brought against the assignee (Y) or jointly against the assignee (Y) and the assignor (A), which are made in a written form for the first time following the closing date, the assignee (Y) shall, upon its sole and absolute discretion and on its own expense, defend, settle or implement such claims. The assignee shall not claim indemnification or contribution on the part of the assignor in respect of such claims.

X filed a claim for refund of overpayment, claiming that on the basis of the above provisions, Y assumed the liability to refund overpayment arising under the cash loan transactions entered into between X and A. The courts of first and second instance both upheld X's claim, and Y

appealed.

2. The Judgment

Reversed and remanded.

It is clearly stipulated under the Clause 1.3 and 1.4(a) of the assignment agreement that Y does not assume the liability concerned, and it is obvious that the Clause 9.6(b) of the assignment agreement, in contrast with the said provisions, provides for the relationship between parties with respect to demand of compensation, in case Y performs obligations on behalf of the obligor. One cannot interpret the existence of this provision as providing a basis for cumulative assumption by Y of the liability concerned.

In addition, in case where a lender agrees with other lender to make a bulk assignment of its receivables to the latter, it is the content of the agreement that determines the scope of the assignor's assets that become subject to such assignment. Therefore, it shall not be interpreted that the assignee automatically assumes the contractual status of the lender under a cash loan contract between the assignor and the borrower, even if the character of such assignment can be regarded as assignment of business operations. In the present case, the assignment agreement clearly stipulates that Y will not assume the liability concerned, and there is nothing to indicate that the contents of the agreement concern the transfer of the contractual status under the cash loan agreement concluded between X and A.

3. Opinion

In Japan, moneylenders have long played a leading role in financing aimed at small and medium-sized enterprises and consumers. However, from the 1980's onwards, as excessive consumer-lending and the practice of pitiless debts collection became a social issue, the regulatory environment concerning moneylenders has gradually been tightened (the examples include strict construction applied by the Supreme Court with regard to provisions limiting interest rates as well as introduction by an amended Money Lending Act of a lowered cap interest rate in 2007). In addition, the recent financial situation following the Lehman Shock has prompted a considerable number of lenders to assign their operational

assets to another entity as part of a business restructuring(as a consequence of ongoing restructuring, the number of registered lending entities has dropped to 2350 by the end of March 2012 from 30290 in March 1999). Under these circumstances, an increasing number of lawsuits have been brought to the court, seeking to establish the instances in which the borrower is entitled to demand the return of unjust enrichment to the assignee, on the premise that along with the assignment of the lender's operating assets, the assignee has also assumed the lender's liability to refund overpayments which have occurred prior to the assignment taking place.

With regard to this issue, some lower-court judgments have opined that the liability to refund overpayments is transferred, at all times, to the assignee of the operating assets with a view of protecting the borrower who fell into the state of overpayment. The underlying logic was explained as follows: the receivables(repayment of debt)the lender is entitled to and his liability towards the borrower to refund overpayments form the "two sides of the same coin", and therefore so long as an assignee assumes the receivables he shall also assume the liability to refund overpayments. Some scholars have also agreed to this view of the court, on the grounds that it is against the principle of good faith(art.1 sec.2 of the Civil Code), if the assignment of assets by the assignee does not entail the assignment of the receivables. According to these views, even if the parties to the assignment agreement would agree that the liability to refund overpayments shall not be assumed by the assignee, such clauses shall become deemed void.

In contrast with the above, the court in the present case has rejected to take such borrower-protective approach. That is to say, the court has indicated that the interpretation of the agreement shall prevail, by saying that 'it is the content of the agreement that determines the scope of the assignor's assets that become subject to the assignment concerned'. Moreover, it confirmed the position that the greatest importance shall be attached to the existence of an 'obvious provision' in interpreting the content of an agreement. This can be regarded as an application to the present case of general principles long maintained by the commerce law

doctrine regarding assignment of operating assets and the civil law doctrine regarding the contract interpretation. According to this position, in the case where the parties agree that the assignee does not assume the liability to refund overpayments in an agreement on assignment of operational assets, the only possible instances where the assumption of liability will be deemed effective is through the application of specific legal provisions such as the responsibility of the assignee of business operations (continuation of use of the firm name: art.17 of the Commercial Law Act, art.22 of the Companies Act; advertisement of assignment of obligations: art.18 of the Commercial Law Act, art.23 of the Companies Act), the right to demand avoidance of fraudulent act (art.424 of the Civil Code) and the principle of disregard of the corporate fiction.

The present ruling has received attention as one of the disputes concerning the right to demand refund of overpayments. Nevertheless, the judgment contains some theoretical inconsistencies with regard to the understanding of assignment of business operations. This issue is also heavily discussed among the law-makers in connection with the anticipated revision of the commercial law and civil law. Further developments at both legislative and doctrinal levels are awaited.

(on 8 December 2012)

8. Supreme Court Decision on the 'Winny' Case

Decision of the Supreme Court from 19 December 2011, Keishu Vol. 65, No. 9, Item 1380

Soichiro Shimada
(**Professor, Faculty of Law**)

I.

The defendant has been indicted on a charge of abetting breach of the Copyright Act (a crime of infringing rights by enabling public