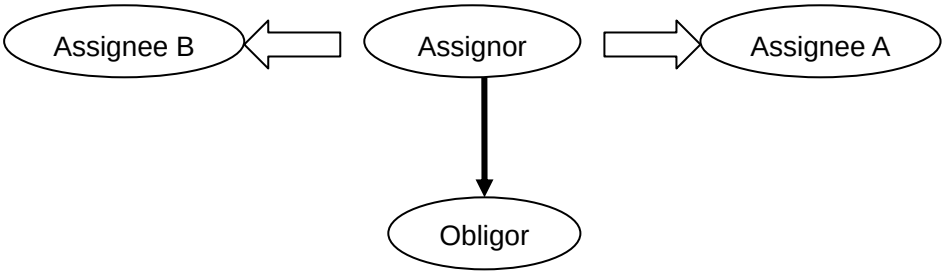
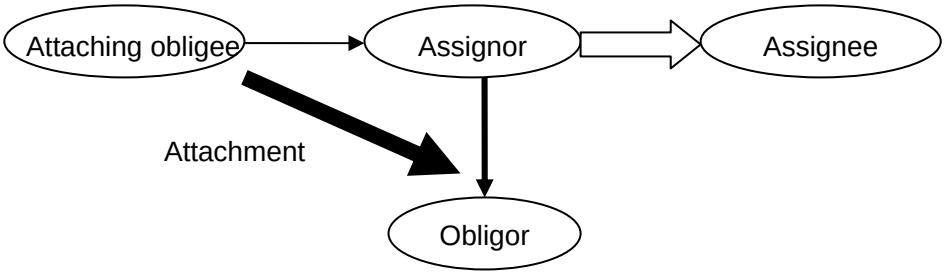
Items to be discussed for the Civil Code (law of obligations) reform (4)

Part I. Assignment of claims

【Competing claims assignment (double assignment)】



【Competition of claims assignment and attachment】



1. General discussion

Recently, an importance of claims assignment as a method of financing for business enterprises is increasing. Accordingly, legislative proposals on the claims assignment system are actively presented in a direction to enhance stability of claims assignment. Especially, various theoretical discussions are also developing on future assignment of claims after significant decisions were consecutively made at the Supreme Court. It is considered that in reviewing the claims assignment system we need to pay due considerations to these case laws and discussions, reconsider the provisions of Articles 466-468 of the current Civil Code (*see,* 2-4), and examine whether to stipulate provisions on future assignment of claims (*see,* 5). In addition, what kind of point do we need to consider in thoroughly reviewing the claims assignment system?

2. Special provisions on the prohibition of claims assignment (CC Art.466)

(1) Effects of special provisions on the prohibition of claims assignment

Under the current Civil Code, while people can assign claims freely as a principle, it is understood that it is possible to limit assignment through an agreement of the

parties (special provisions on the prohibition of claims assignment, hereinafter "SPPCA")(CC Art.466), and effect of claims assignment which violates such agreement is void among the parties of assignment.

On this regulation, it has been strongly asserted since the time of legislation that the assignability of claims should not be limited. In addition, while the purpose of allowing such agreement is explained to protect the obligor who is in a weak position, it is pointed that today the obligor in a stronger position tends to use the provision, which may not be regarded as reasonably necessary. In addition, while the importance of claims assignment as a method of financing for business enterprises is increasing today, it is pointed that existence of such special provisions is an obstacle of claims assignment transactions which are conducted for the purpose of financing.

Based on these issues, one idea[1] is proposed that the effect of the SPPCA is that, for example, while assignment is effective among the parties of the assignment, the obligor can assert the effect of the special provision against the assignee when the assignee has the knowledge on the provision (whether to include the case where the assignee is grossly negligent is discussed later at "Part I, 2(2)A").

(Related issues)

1 Distribution of the burden of allegation and proof on the assignee's subjective requirement

Regardless of whether to support current status (the absolute effect proposal) or the relative effect proposal on the effects of special provisions on the prohibition of claims assignment, it becomes a problem that which should owe the burden of allegation and proof over the subjective requirement such as assignee's good faith or knowledge, the assignee and the obligor. Following two proposals are possible:

[Proposal A] The obligor can assert against the assignee the effect of the SPPCA through alleging and proofing the asignee's knowledge on existence of the SPPCA.

[Proposal B] While the obligor can assert against the assignee the effect of the SPPCA as a general rule, the obligors cannot assert that effect against the assignee if the assignee alleges and proves his or her innocent of the existence the SPPCA.

2 An idea which always denies the effects of the SPPCA as to certain transaction type of claims

There is an idea that the effect of the SPPCA should be always denied as to the claims arising from certain transaction type which especially requires assurance of flowability of claims regardless of whether to support the absolute effect proposal or the relative effect

[1] In this material, for convenience, we call this idea "relative effect proposal" and the idea that considers assignment void even among the parties of the assignment "absolute effect proposal."

proposal.

3 Treatment of claims arising with the SPPCA after assigning future claims

There is an issue that whether the effect of the SPPCA reaches the claims concretely arising in the future when a future claim of which the obligor is unidentified (for example, the rent claim against the person who will stay at the specific building in the future) is assigned, and thereafter in forming the original contract creating the claim (for example, a lease contract), the SPPCA is attached. Some points out that it is desirable to clarify the relationship between assignment of future claims and the effect of the SPPCA through legislation from the aspect to enhance stability of future claims assignment.

(2) Circumstances where the effect of the SPPCA cannot be asserted against the assignee.

A. Where the assignee is grossly negligent

While proviso of Article 466 (2) of the current Civil Code provides that the effect of the SPPCA "may not be asserted against a third party without knowledge," there is an issue whether this "third party without knowledge" includes a third party with negligence or gross negligence. This issue is applicable in terms of the effect of the SPPCA not only to where the absolute effect proposal is supported but also to where the relative effect proposal is supported. The Supreme Court decided that the effect of the SPPCA could not be denied when the assignee was grossly negligent even when the assignee was innocent of the existence of the SPPCA, and theories generally support the conclusion of this case except for some objections.

Accordingly, based on this case law theory, there is a view that it should be clearly stated in the letter of law that the effect of the SPPCA is enforceable not only where the assignee knows the existence of the SPPCA but also where the assignee was grossly negligent in not knowing that existence.

B. Where the obligor consents to assignment

Under the current Civil Code, it is considered that even when a claim with the SPPCA is assigned, if the obligor gives consent to the assignment, the assignment becomes effective retroactively. If the absolute effect proposal is adopted about the effect of the SPPCA, it may be better to stipulate that effect in the provisions of law.

On the other hand, if the relative effect proposal is adopted about the effect of the SPPCA, there is no necessity to grant retroactive effect. However, even so, there is a view that it is preferable to clearly state in the provisions of law that the effect of the SPPCA cannot be asserted against the assignee when the obligor gives consent to the assignment.

C. When an insolvency proceedings over the assignor is initiated

From the view adopting the relative effect proposal as to the effect of the SPPCA, it is proposed that, as a new circumstance that the effect of the SPPCA cannot be asserted against the assignee, the obligor should be barred from asserting the effect of the SPPCA against the assignee who obtains third-party perfection requirements when the insolvency proceedings are initiated over the assignor.

(3) Transfer of claims through attachment or assignment order of the claim with the SPPCA

Case law admits transfer of claims through attachment or assignment order even if the claim is accompanied with the SPPCA regardless of knowledge of the attaching obligee, and the theories do not raise particular objection on this point. Accordingly, there is a view that this case law theory should be clearly stipulated in the letter of law.

3. Requirements for assertion of claims assignment (CC. Art.467)

(1) General discussion and reviewing requirements for assertion against the third party

The system of requirements for assertion of claims assignment under the current Civil Code expects the fact of claims assignment is made known to the public through making the obligor perform the function of information center. However, various problems are pointed to this system such as that the system does not function if the obligor does not give answer as to existence of claims assignment, and certified date performs only limited role. In addition, the Act on Special Provisions of the Civil Code Concerning the Perfection Requirements for the Assignment of Movables and Claims (*hereinafter* “Act on Special Provisions”) enabled corporations to fulfill requirements for assertion of monetary claims by registration. Accordingly, there exists systems of requirements for assertion in the Civil Code and the Act on Special Provisions, which makes the situation complex because one has to confirm whether the claim is doubly assigned through both making reference and checking registration.

Based on such conditions, to which direction should we advance discussion basically as to the system of requirements for assertion of claims assignment? For example, the following proposals are possible.

[Proposal A] Expanding the scope which the registration system is available (e.g., individuals can also use the system), the requirement for assertion of claims assignment against the third party in that scope is unified to registration.

[Proposal B] A new system of requirements for assertion of claims assignment which does not make the obligor the information center should be established (e.g., a contract for assignment with certified date becomes the requirement for assertion against a third party in stead

of notice with certified date or acknowledgement under the current Civil Code).

[Proposal C] Maintaining current dual system of requirements for assertion basically, necessary modification should be made.

(Related issues)

1 Issues to be discussed when [Proposal A] is adopted

(1) Scope of claims to be unified under registration

There is a view that, if [Proposal A] is adopted, it is preferable to limit the object of claims over which registration becomes the requirement for assertion of assignment against the third party to monetary claims only, same as the Act on Special Provisions.

If we adopt the above-stated view, it is necessary to consider the requirement for assertion of assignment over non-monetary claims. It is possible to adopt [Proposal B] or [Proposal C] for such claims.

(2) Scope of the assignor subject to unification under registration

If [Proposal A] is adopted, there arises an issue whether the requirement for assertion of claims assignment in which individuals become assignor should be unified under registration. The following proposals are possible on this point.

[Proposal A-a] The requirement for assertion of claims assignment of individuals should be also unified under registration.

[Proposal A-b] While the requirement for assertion of claims assignment of corporations should be unified under registration, the requirement for assertion of individuals' claims assignment should be the method other than registration.

(3) Treatment of attached claims

If [Proposal A] is adopted, there is a view that it is preferable to adopt a system to decide superiority or inferiority through the order of registration when attachment of a claim and the claim assignment are competing through requiring registration for attachment of a claim. The following proposals are possible on this point.

[Proposal A-c] Registration should be required for claims attachment, and it should be regarded that the effect of attachment arises at the time of registration.

[Proposal A-d] Registration is unnecessary for claims attachment, and the effect of attachment arises, as is under the current law, at the time of service of attachment order.

(4) Issues to be further discussed in order to adopt [Proposal A]

In order to adopt [Proposal A], it is necessary to consider the following issues: (1) While under the current registration system, registration can be applied through the teller window of

the registration office of claims assignment (Tokyo Legal Affairs Bureau), mail application or online application, it is necessary to enhance convenience of registration through increasing the number of registration offices for claims assignment which would be the contact points for registration application; (2) It is necessary to accommodate with financing practice such as in case of syndicate loan, multiple obligees cannot establish the same-rank of pledge under the current system; (3) The registration system under the current Act on Special Provisions does not examine the content of registration and thus the officer cannot refuse application even if the application involves description which is different from reality. It may be necessary to require applicants to submit documents which prove truthfulness of application and to grant the office to examine the contents of application; (4) It may be necessary to allow applicants to correct or modify contents of registration after they applied.

In order to deal with these issues, it is also important to equip the present registration system of claims assignment and the human infrastructure. Accordingly, it is also inevitable to examine this problem from the cost-benefit point of view. What else should we pay attention in reviewing the system?

2 Issues to be discussed when [Proposal B] is adopted

A concrete proposal to adopt [Proposal B] is to adopt [Proposal B] for assignment of non-monetary claims while adopting [Proposal A] for assignment of monetary claims. How do we consider this view?

3 Issues to be discussed when [Proposal C] is adopted

(1) Review of requirements for assertion against a third party through notification with certified date or acknowledgement

In order to adopt [Proposal C], it is necessary to thoroughly respect the principle under the current law that the obligor is the information center, and to consider whether to make a document that can notarize the time of notification arrival or acknowledgement a requirement for assertion against the third party.

(2) Method of notification and acknowledgement

Rules on method of notification and acknowledgement such as that notification to the obligor must be done by the assignor but acknowledgment from the obligor can be made to either the assignor or the assignee, or notification to the obligor cannot be made in advance but acknowledgment by the obligor can be made in advance, are not necessarily clear from the provisions of law. It may be necessary to clarify these rules in the text of law.

(2) Reviewing assertion requirements against the obligor (requirements to exercise rights)

Assertion requirements under the current Civil Code and the Act on Special

Provisions both require notification from the obligee or acknowledgment from the obligor (CC Art.467 (1), Act on Special Provisions Art.4(2)). It is pointed out about acknowledgment from the obligor that, when the assignor and the assignee who are the parties of the claim assignment purport to remain to make the assignor the obligee in relation to the obligor and choose not to make notification to the obligor (not preparing the requirement for assertion against the obligor), if the obligor acknowledges the claim assignment, it is possible that the obligor makes payment to the assignee, which is against the will of the assignor and the assignee.

In order to correspond to the problem pointed above, it is proposed that acknowledgment of the obligor should not be a requirement of assertion against the obligor.

(Related issues)

1 Arrangement of the concept of assertion requirements

It is possible to arrange language of Article 467 (1) and (2) by making the relationship with the obligor a requirement to exercise the right and making the relationship with the third party other than the obligor an assertion requirement.

2 How the assertion requirement should be when [Proposal A] is adopted under "Part I.3(1) General discussion and reviewing requirements for assertion against the third party"

Aside from the issue of whether acknowledgment of the obligor should not be a requirement for assertion against the obligor, the following proposals are possible about how the assertion requirement against the obligor should be when [Proposal A] is adopted under aforementioned "Part I.3(1) General discussion and reviewing requirements for assertion against the third party".

[Proposal A-e] Notification upon delivery of the certificate of registered matters from the assignor or assignee should be the only requirement for assertion against the obligor.

[Proposal A-f] Notification upon delivery of the certificate of registered matters from the assignor or assignee should be the requirement for assertion against the obligor as a general rule, but notification without such certificate from the assignor should also be granted as a requirement for assertion against the obligor, and if both notifications compete, the notification with the certificate should be prioritized.

(3) Clarification of provisions to protect the obligor

It is necessary to make consideration to minimize disadvantage of the obligor as much as possible because it is inevitable to impose on the obligor certain disadvantage through claims assignment which is conducted without participation of the obligor. From this point of view, there are some legislative proposals.

For example, the following is proposed from the view of maintaining current requirements for assertion basically: It should be clearly stipulated in the text of law

through putting the case law theory in the statutory form that what is the rules of conduct when several claims assignment are competing with each other, especially (1) when multiple assignors fulfill the assertion requirements against the third party at the same time, or (2) when it is unclear who has first fulfilled the requirement.

On the other hand, while the problem of abovementioned (2) will not arise from the view to review current assertion requirements (for example, a view to expand the scope which the registration system is available and to unify the assertion requirement against the third party for such scope into registration), such view also proposes to adjust rules of conduct and clarify them in the text of law on to whom the obligor should make payment under competing claims assignment in order to prevent the obligor from wrongful payment.

Based on these proposals, how should we consider adjustment of the rules of conduct of the obligor and clarification of texts of law from the viewpoint of protecting the obligor?

(Related issues)

1 When all multiple assignees do not fulfill requirements for assertion against the third party and the obligor

There is a view that the law should be clearly stated that the obligor should not make payment to the assignees when all multiple assignees do not fulfill requirements for assertion against a third party and the obligee, from the view that acknowledgment of the obligor should not be a requirement for assertion against the obligor as proposed above.

2 Relationship between the assignees

There is a view that it is unclear from current case law or theories whether received money can be divided among multiple assignees if one assignee receive full amount of the claim when multiple assignees fulfill the requirement for assertion against the third party or when multiple assignees fulfill the requirement for assertion against the obligor but not against the third party, and thus legislation should resolve this issue.

3 Necessity to regulate occasions where attachment and assignment of a claim are competing

There is a view that the standard rule should be clearly stipulated in the text of law on the occasion where attachment and assignment of a claim are competing.

4. Disconnection of defense (CC Art. 468)

Under the current law, Article 468 of the Civil Code (1) bars defenses from the obligor against the assignee which could have been otherwise available if the obligor has given the acknowledgement without objection. This acknowledgment without objection is regarded as notification that the obligor has recognized the claim assignment (conceptual notification). However, various theories are opposing each

other on this issue because it is not necessarily clear why simple notification of such recognition has an important effect of disconnection of defense. Accordingly, there is a view that, base on aforementioned issue, the system of acknowledgment without objection should be abolished and a new regulation should be established that disconnection of a defense becomes effective through manifestation of intent to abandon the defense.

(Related issues)

1 Method of conduct for disconnecting defenses

There is a view that it is preferable to require certain method of conduct for disconnecting defenses.

2 Claims assignment and defense of set-off

There are opposing views in theories as to the scope that the obligor can assert defense of set-off against the assignee, and it is pointed that legislation should resolve this issue. However, it is possible to leave this issue to the occasion to consider regulation on statutory set-off and laws of attachment.

5. Assignment of future claims

(1) Necessity of provision that allows assignment of a future claim

Recent case law clarifies that assignment of a claim accruing in the future ("future claim") is effective as a general rule and can assert against the third party through fulfilling assertion requirements of claims assignment. Accordingly, there is a view that it is desirable to stipulate effectiveness and assertion requirements of future claim assignment based on such case law theory.

(Related issues)

Limitation of effect of future claim assignment from the viewpoint of public policy

While it is undisputable from the case law and theory that there is an occasion that assignment of a future claim is ineffective from the viewpoint of public policy, it is unclear under what kind of occasion the effect of future claim assignment is denied in concrete. Accordingly, in order to raise foreseeability in practice, there is a view that a more concrete standard should be set forth.

(2) Limitation of defense power of future claim assignment accompanying with change of status of the assignor

There is an issue that there should be certain limitation to the scope that the effect of future claim assignment can be asserted against the third party when the status of assignor is changed after such future claim assignment has made. For example, a future claim is a rent claim of real estate. If the lessor assigned the real property to B after assigning the rent claim to A, to whom does the rent claim belong? While

various discussions are made in theory putting diverse aspects in mind, there are still opposing views. Based on such situation, there is a view that legislation should make clear the scope which future claim assignment can be asserted against the third party.

Part II. Provisions on securities-like claims

1. Necessity of provisions on securities-like claims (CC. Art.469-473)

While it is academically explained that Articles 469-483 are the provisions on securities-like claims, there are several understandings on meaning of securities-like claims (in relation to negotiable instruments), and the coverage of these provisions is not necessarily clear. However, regardless of understanding on meaning of securities-like claims, the view that the original provision on securities-like claims is necessary in order to distinguish from negotiable instruments is not particularly asserted. Accordingly, there is a view that adjustment of provisions should be made in a direction that such original provision is not stipulated (the regulation of negotiable instruments will be considered in other part).

(Related issues)

Treatment of Article 86 (3) of the Civil Code

When the original provision on securities-like claims to distinguish from negotiable instruments is supposedly not stipulated, there is a view that the provision on bearer certificate of claims (CC Art.473) and Article 86 (3) should be deleted.

2. Necessity of provisions on negotiable instruments (CC. Art. 469-473)

When adjustment of provisions are supposedly made in a direction that the original provision on securities-like claims to distinguish from negotiable instruments is not stipulated, there arises an issue whether Articles 469 to 473 should be deleted or revised as provisions of negotiable instruments as necessary. There is an understanding that Articles 470 to 473 are applied to negotiable instruments because there is no provision on disconnection of defense or exemption of payment with regard to negotiable instruments in the Commercial Code. Based on such understanding, some points that problems would arise if these provisions are simply deleted.

In addition, it is criticized that, if the view to revise Articles 469 to 473 are revised as provisions of negotiable instruments is adopted and leave those provisions which were stipulated in the Civil Code are revised in the Civil Code and those provisions which were stipulated in the Commercial Code are revised in the Commercial Code, general rules of negotiable instruments are stipulated in both the Civil Code and Commercial Code separately and complicatedness of provisions is not resolved. Accordingly, the next issue is how to unify the group of provisions on general rules of negotiable instruments. There is a view that such unified provisions should be established in the Civil Code.

3. Contents of provisions which are generally applied to negotiable

instruments

[Note] In the following, for the reference purpose for aforementioned 2, issues of (1) to (6) below are examined in order to concretely discuss what kind of contents should be stipulated in the text of law supposing that the view to unify provisions of general rules on negotiable instruments under the Civil Code is adopted.

(1) Necessity of definition of negotiable instruments and scope of application of such provision

If a provision of general rules on negotiable instruments is set forth, should we stipulate definition of negotiable instruments? If so, what is the scope of application of such provision?

(Related issues)

Necessity of a provision on registered securities

There is a view that even if a provision of general rules on negotiable instruments is stipulated, registered securities should not be subject to such provision.

(2) Provision on requirements for assignment of negotiable instruments

Article 469 of the current Civil Code provides that the requirement for assertion of assignment of debt payable to order is the endorsement of assignment and tender of such certificate. However, it is generally accepted that assignment of negotiable instrument becomes effective through tender of the instruments (and the endorsement of assignment). Accordingly, there is a view that a provision which makes tender of the instruments (and the endorsement of assignment) the requirement to make the assignment effective should be stipulated.

(3) Provision on acquisition of negotiable instruments in good faith

From the viewpoint of protecting float of negotiable instruments, there is a necessity to protect the assignee of the instruments from a person without right through good faith acquisition. However, under the current Civil Code, instant acquisition is applied to only bearer certificate of claims which is regarded as property, and there is no provision on other securities-like claims. Accordingly, there is a view that, referring to Article 21 of the Check Act which is applied *mutatis mutandis* in Article 519 of the Commercial Code, a provision to allow good faith acquisition should be stipulated.

(Related issues)

1 Clarification of meaning to grant formal qualification

There is a view that, in stipulating a provision that allows a possessor of a negotiable

instrument with uninterrupted series of endorsements the formal qualification, it should be clearly stated that such formal qualification merely assumes that the possessor is the person entitled to the negotiable instrument.

2 Scope that acquisition in good faith is granted

Article 21 of the Check Act provides that good faith acquisition is granted "when there is a person who loses possession of a check regardless of its reason," and clearly states that an assignee from a person without right is the subject of good faith possession. However, there are opposing views on whether good faith acquisition cures the defects when the assignor's manifestation of intent involves a defect or when the agency has no legal authority, if the assignor is a person with limited capacity. Based on these opposing views, how should we consider the scope which grants good faith acquisition?

3 Criterion on existence of uninterrupted series of endorsements

It is pointed out that under the Check Act and the Negotiable Instruments Act good faith acquisition should be granted if substantial transfer of right is established as to the part which lacks uninterrupted series of endorsements even when there is a part which endorsement is interrupted. In addition, case law (Supreme Court Decision of December 5, 1957, Minshu Vol.11, No.13, p.2060), explains that the time to decide whether uninterrupted series of endorsements exists is the time of closing oral argument, and thus there is a possibility that good faith acquisition is granted even if endorsement is interrupted. Based on these case law and theories, there is a view that criteria of uninterruptedness of endorsements as a requirement of granting good faith acquisition should be clarified.

(4) Provision on disconnection of defenses of the obligor of negotiable instruments

Under the current law, it is understood that defenses other than matters written in the negotiable instrument and results which automatically arises from the nature of instruments cannot be asserted against the acquisitor of the negotiable instrument for the purpose of protecting the security of transactions and promoting float of instruments. Accordingly, there is a view that a provision should be stipulated on such disconnection of defenses.

(Related issues)

Subjective requirement of the assignee for disconnecting defenses

Comparing provisions on disconnecting defenses between the Civil Code and the Security Instruments Act, the following two aspects are different: (1) burden of proof on the subjective view of the assignee (while the assignee has to assert and prove its own good faith by itself in the Civil Code, the obligor has to assert and prove the wrongful intent of the assignee in the Security Instruments Act; and (2) the personal view of the assignee in order to disconnect defenses. In stipulating general rules of negotiable instruments, there is a view that such provision should follow, in both aspects of (1) and (2), provisions of the Security Instruments

Act and its interpretation.

(5) Provision on performance of obligations of negotiable instruments

While the Civil Code does not have special provision on performance of obligations regarding securities-like claims, it is understood that exercise of rights on negotiable instruments requires presentation and redemption of the instrument and its nature is collecting debts, which is different from general principle of the Civil Code.

On the other hand, Articles 470 and 471 provide duty of care of the obligor and requirements to exempt from payment as to debts payable to order, but there is no provision on bearer claims, and the Commercial Code does not have provision on negotiable instruments. Accordingly, there is a view that, if general rules on negotiable instruments are stipulated in the Civil Code, provisions should be prepared with regard to performance of obligations on negotiable instruments such as redemption of the instrument is necessary.

(Related issues)

1 Content of the duty of care of the obligor of the debt payable to order

There is a view that, in stipulating general rules of negotiable instruments, the provision of Article 470 which grants the obligor the right of investigation about the grounds other than interruptedness of endorsements should be revised from the viewpoint of protecting float of negotiable instruments through securing prompt settlement.

2 Content of the duty of care of the obligor of a bearer instrument

There is a view that, in stipulating general rules of negotiable instruments, the same content proposed above 1 should be stipulated as to bearer instruments and selective bearer instruments.

3 Subjective requirement to allow exemption of payment

There is a view that, in stipulating general rules of negotiable instruments, interpretation under the Negotiable Instruments Act should be incorporated with regard to subjective requirement of the obligor (wrongful intention or gross negligence) which is the subject of payment exemption.

(6) Provision on treatment when negotiable instruments are lost

When a negotiable instrument is lost, it is necessary to separate the instrument and the right according to the procedure separating rights in order to exercise the right on that negotiable instrument. Under the current law, Article 57 of the Act to Enforce the Civil Code provides that the procedure separating rights can nullify the instrument, and Article 518 provides that the method of exercising the right after filing public notice of the procedure separating rights. There is a view that, in stipulating general rules of negotiable instruments under the Civil Code, it is desirable to stipulate similar

provision to them in the Civil Code.

(Related issues)

1 Necessity to grant use of the public notice procedure for registered securities

Article 57 of the Act to Enforce the Civil Code provides that securities payable to order, bearer securities, and securities payable to holder can be nullified through public notice, but registered securities is not the subject of this provision. There is a view that it should be clearly stated that registered securities are also the subject of the public notice procedure because holders of registered securities cannot exercise the right when they lose the security if the law bars use of the public notice procedure for registered securities.

2 Scope of negotiable instruments which become the subject of the public notice procedure

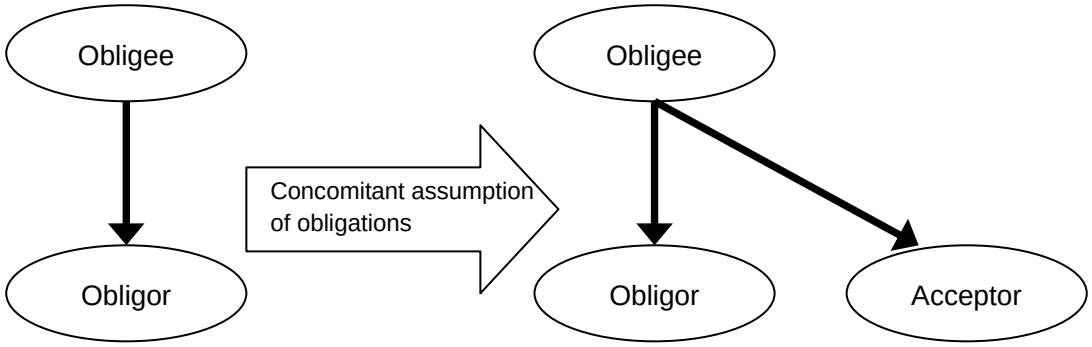
There is a view that, other than what is mentioned in above 1, the scope of negotiable instruments which are the subject of the public notice procedure should be same as the scope under Article 57 of the Act to Enforce the Civil Code, regardless of the scope of general application of general provisions of negotiable instruments.

4. Necessity of provisions on exempt securities

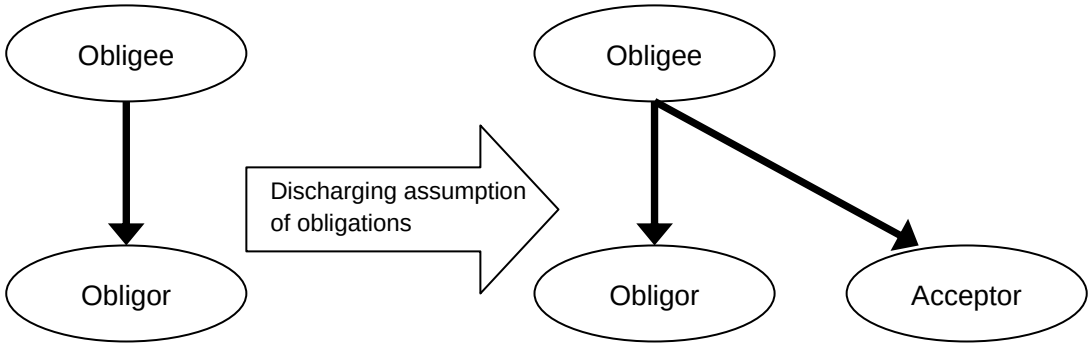
While there is no provision under the current law, it is academically explained that there exists exempt securities as a concept which is different from negotiable instruments or securities-like claims. When payment is made in good faith to the holder of an exempt security, such payment is protected. There is a view that a provision which clearly states that payment to the holder of an exempt security is protected should be stipulated because such kinds of securities are widely used in practice.

Part III. Assumption of Obligations

【Concomitant assumption of obligations】



【Discharging assumption of obligations】



1. General discussion (Necessity of a provision on assumption of obligations)

While there is no provision on assumption of obligations under the current Civil Code, there seems to be no objection on that assumption of obligations is possible. In practice, too, there exist many cases explained with the concept of assumption of obligations such as the case where security deposit is succeeded upon assignment of the lease property, or the case where assumption of obligations by financial institutions through lump sum clearance, and its importance is substantially recognized. However, there is a problem that the requirement and effects of assumption of obligations are not necessarily clear because there are no written provisions on this concept under the current Civil Code.

Accordingly, there is a view that a clear provision should be stipulated in order to confirm that assumption of obligations is possible and to clearly state its requirements and effects. In addition, while it is possible that if such provision is stipulated, it is possible to consider requirements and effects on concomitant assumption of obligations and discharging assumption of obligations, what kinds of point should we pay attention in examining these issues?

(Related Issues)

Necessity of a provision on assumption of performance

There is a view that a provision on assumption of performance should be stipulated.

2. Concomitant assumption of obligations

(1) Requirement to assume obligations concomitantly

There seems to be no objection on that concomitant assumption of obligations is effective as one form of assumption of obligations. In addition, it is generally accepted that, as its requirement, an agreement between the three parties (the obligee, the obligor, and the acceptor) is not necessarily required and concomitant assumption of obligations is possible through (1) an agreement between the obligor and the acceptor (however, the obligee's manifestation of intention to receive the benefit is necessary in order for the obligee to acquire the claim vis-à-vis the acceptor because the agreement constitutes a contract for the third party), or (2) an agreement between the obligee and the acceptor. Accordingly, there is a view that a provision should be stipulated on concomitant assumption of obligations and its requirements written above (1) and (2).

(2) Effects of assuming obligations concomitantly

As to the relationship between the obligation assumed by the acceptor upon concomitant assumption of the obligation and the obligation which is originally bore by the obligor, while the case law explains that they form a joint and several obligation, a view has been strongly asserted by the theory that they are unauthentic joint and several obligation (*fu shinsei rentai saimu*) as a general rule from the viewpoint that the grounds which have absolute effects between the obligor and the acceptor should be limited. Accordingly, there is a view that a provision should be stipulated in a direction to state that the relationship of the obligations between the obligor and the acceptor is a joint and several obligation (yet with limited grounds for absolute effects). In addition, there is another view that one of the important effects of assumption of obligations is that the defenses which the obligor has against the obligee can be asserted by the acceptor against the obligee, and therefore this should be clearly stated in the law. Based on these views, how should we consider stipulation of provisions on the effects of concomitant assumption of obligations?

(Related issues)

Relationship with the regulation on guarantees

While concomitant assumption of obligations has common function with guarantees in a point to secure performance of obligations, they have different requirements and obligations,

such as a guarantee contract requires to form in writing (CC Art.446 (2)). Accordingly, when the obligee and a third party (acceptor) agree that the acceptor bears the same obligation with the obligor's obligation, there arises a problem that whether this agreement is concomitant assumption of the obligation or a guarantee. Accordingly, it is pointed that, if we stipulate a provision on concomitant assumption of obligations, we need to consider how to adjust the relationship between the provision on guarantees and the provision on concomitant assumption of obligations.

3. Discharging assumption of obligations

(1) Requirements of discharging assumption of obligations

There is no objection that discharging assumption of obligation is effective as one form of assumption of obligations. As to its requirement, it is generally considered that an agreement between the three parties (the obligee, the obligor, and the acceptor) is not necessarily required, and discharging assumption of obligations is possible through (1) an agreement between the obligor and the acceptor (however, only when the obligor acknowledges the agreement), or (2) an agreement between the obligee and the acceptor (however, there is a debate whether it should be limited to when this agreement does not conflict with the obligee's intention). However, another view is recently proposed that, considering the legal nature of discharging assumption of obligations that it is concomitant assumption of obligations plus manifestation of intent to discharge the obligation of the obligor by the obligee, the requirements of discharging assumption of obligations should be reconsidered. Based on these issues, how should be consider stipulating a provision on discharging assumption of obligations?

(2) Effects of discharging assumption of obligations

While it is considered that, as an effect of discharging assumption of obligations, a security attached by a third party other than the obligee is extinguished, here is a debate whether a security attached by the obligee is extinguished or transferred as a security to secure the obligation of the acceptor. It is pointed that a clear rule should be stipulated on this issue because this is one of important effects of discharging assumption of obligations.

In addition, there is another proposal that, as an effect of discharging assumption of obligations, a clear rule should be established on when the effect of assumption arises, and whether the acceptor can assert the defenses which the obligor possessed. Based on these points, how should we consider stipulation of provisions on discharging assumption of obligations?

Part IV. Transfer (Assignment) of Contractual Status

1. General discussion (Necessity of a provision on transfer (assignment) of contractual status)

While there is no provision on transfer (assignment) of contractual status, it is stated that there is no objection both under the case law and theory that it is effective. In addition, in practice transfer of contractual status is often conducted such as where the status of a party who is in a continuous transactional relationship is transferred to a third party for the future. Accordingly, there is a view that its requirements and effects should be clarified through having a provision on transfer of contractual status in the Civil Code.

On the other hand, there is another view that the concept of transfer of contractual status is unnecessary because it is simply the sum of assumption of claims and assumption of obligations. In addition, it is also pointed that, even if it is desirable to stipulate a provision on transfer of contractual status, it may be difficult to stipulate a substantially meaningful provision which can cover various types of contracts. Based on these issues, how should we consider the necessity of a provision on transfer of contractual status? In addition, if a provision is stipulated, what kind of points should we pay attention in addition to its requirements (below 2), effects (below 3) and requirements for assertion against the third party (below 4)?

2. Requirement to transfer contractual status

There is no objection that transfer of contractual status is effective not only when the three parties (the assignor, the assignee and the other party of the contract) agree to that effect but also when there is an agreement between the assignor and the assignee and the other party of the contract acknowledges that effect. In addition, acknowledgment of the other party of the contract is not necessarily usually required. For example, when the status of the lesser is transferred upon assignment of the lease property, it is considered that the acknowledgment of the lessee is unnecessary.

Accordingly, when a provision is stipulated on requirements to transfer contractual status, it is necessary that there are exceptional cases where acknowledgment of the other party is not necessary. However, it is pointed that it is difficult to clearly formulate the requirements for such exceptional cases putting various forms of contracts in mind, and thus there is a proposal to simply state that there are cases where acknowledgment is unnecessary owing to the nature of the contract.

3. Effects of transferring contractual status

When transfer of contractual status occurs, the status of the party in the contract is comprehensively succeeded to the assignee including the right to change legal

relations such as the right of cancellation or rescission. However, it is unclear whether existed claims and obligations are also transferred to the assignee. In addition, while it is considered that the security on the obligation of the assignor is not automatically transferred to the assignee upon transfer of the contractual status, it is pointed that it is necessary to examine the method to transfer the security maintaining its rank order. Based on these points, how should we consider the effect of transferring contractual status?

(Related issues)

Admissibility to discharge the assignor upon transfer of contractual status

There are following conflicting opinions on whether the assigner is automatically discharged upon transfer of the contractual status: (1) while acknowledgment of the other party in the contract is required for the transfer, separate from such acknowledgment, if the other party does not manifest its intent to discharge the assignor, the assignor concomitantly owes the responsibility; and (2) transfer of contractual status includes the meaning of discharging assumption of obligations and thus it requires acknowledgment of the other party as its requirement, and accordingly transfer of contractual status is the concept to automatically release the assignor from the contractual relationship.

4. System of requirement for assertion against a third party

There is theoretical debate over what is necessary to assert transfer of contractual status against a third party. Case law decides that, about a case of transferring a golf membership, applying Article 467 of the Civil Code, it is necessary to prepare the requirements under Article 467 in order to assert the transfer against the third party. On the other hand, in a case of competing assignment of lease property, the case law requires registration under Article 177 of the Civil Code as a requirement for assertion against the lessee. Like this, the case law decides this issue differently base on contractual type. As a legislative policy, it is pointed that contractual status can be doubly assigned and thus the system of requirements for assertion against a third party should be established. On the other hand, there is a passive view that it is difficult to create such system which is generally applicable to all types of contracts.