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Issues Concerning Validity of Prior Consent of Debtor with a Deed Bearing a Certified Date, as a Means of Perfecting an Assignment of Claims against Third Parties

I. Issues

While Civil Code Art.467, Para.1 stipulates that a notice to a debtor or a consent of the debtor is required for perfecting an assignment of claims against the debtor, Art.467, Para.2 stipulates that an assignment will be valid as perfected against third parties if the notice or consent is made by means of a deed bearing a "certified date" (*kakutei hizuke*). In addition to notice and consent, which are the two methods of perfection, Civil Code Enforcement Law Art.5 enumerates several methods for obtaining a certified date. Because of this, it is necessary to clarify the rules regarding such issues as the problem of a time-gap between the notice/consent and the obtaining of the certified date; evaluation of the situations in which the notice/consent is made prior to the execution of assignment agreement, or after the execution of the agreement but prior to implementing the assignment; the problem of the specific contents of the notice/consent; and the problems of specification involving the act of assigning, including specification of the assignee as well as specification of the date of assignment, in order that the rules conform with the needs of actual business practice. Among the issues mentioned above, in the present article we will consider the validity of prior consent as a means of perfecting against third parties.

Traditionally the dominant interpretation has held that when assignment is perfected against third parties by means of notice bearing a certified date the perfection becomes effective at the certified date. Nevertheless the judgment of March 7, 1979 by the First Petty Bench of the Supreme Court (28 MINSHŪ no. 2, at 174. Hereinafter "1979 Supreme Court Judgment") ruled that the time at which the perfection becomes effective is determined based on the time that the notice is delivered to the debtor, rather than the time of the certified date (the "doctrine of time of delivery"). This case precedent found as its reasoning for the judgment that a debtor functions as an information center (the "doctrine of an information center").[1] Nevertheless the case involved this precedent was one that concerned the precedence of service of a provisional attachment order and a notice of assignment of claims, and several issues are not necessarily clear with respect to the treatment in the event of perfection by means of consent. These issues include how to consider the doctrine of time of delivery or the doctrine of an information center in connection with a consent; whether there should be a difference of interpretation between a notice and a consent; and although it is understood that a notice prior to an assignment is not valid as a means of perfection

[1] The 1974 Supreme Court Decision states as follows: "the system of perfecting assignment of claims as prescribed under the Civil Code is based on the idea that the debtor to the claims in question is able to inform a third party of the debtor's awareness in connection with the existence of an assignment of the claims," and continues by stating "the intent in paragraph (2) of said Article of requiring a deed bearing a certified date is to the extent possible to prevent acts such as the former creditor making a double assignment of the claims to another party, or colluding with the debtor and backdating the time at which the notice or consent of the assignment was made, and thereby injuring the rights of said third party."

against the debtor, how to consider this issue in connection with a consent prior to an assignment.

It is also true, however, that the judgment of November 27, 2001 by the Third Petty Bench of the Supreme Court (55 MINSHÛ no. 6, at 1090. Hereinafter the "2001 Supreme Court Judgment") held, in connection with a written consent of a preliminary agreement to assign claims bearing a certified date, that the consent was not valid as a means of perfection against third parties since it was merely a promise to assign and thus the debtor did not have knowledge of the fact of assignment.[2] This precedent has sparked tremendous discussion concerning how to view a consent of a debtor of an assignment, particularly in the impact that it may have on preliminary agreements for packaged assignments as security which are used in actual business practice. Interpretation and range of the 2001 Supreme Court Judgment are likely to have a significant impact on lending practices if arguments are to be presented that a prior consent of assignment of claims, which differs from a preliminary agreement of assignment, is not valid in any circumstances. As an example many credit-card agreements are structured so that when the credit-card company assigns its claims against consumers, the assignment is perfected by a prior consent of the debtor, within the credit-card agreement. Moreover, asset finance transactions, which have recently been increasing its importance, are implemented through financing being extended based on the value of the claims to be assigned or the claims to be assigned as security. Consequently, in order to perfect the assignment, a consent of the debtor with a deed bearing a certified date is necessarily required at the same time as or prior to the assignment of claims (naturally to avoid doubts it is possible to use a method in which the assignment is made in advance, but in this case the seller will incur the risks of implementing the assignment in advance).

This article considers issues for which previous discussion has not necessarily been sufficient. The issues include what differences exist between a notice and a consent as a means of perfection against third parties; if these differences would result in differences in discussions concerning a prior consent and a prior notice, and whether there are indeed conditions in which a prior consent should be held to be valid in certain situations, taking into consideration the prior content. It is also doubtful that it is possible to characterize being *in advance* or *prior* simply by these terms without making any consideration of the various conditions that may apply. For instance, (i) "prior consent" may mean a consent immediately prior to the fact or a consent in advance of a future assignment of claims without any knowledge of when the assignment will be implemented; (ii) there are cases in which the future date of assignment of the claims has been identified regardless of how long in the future this may be, and cases in which this date is not identified; (iii) there are cases in which the debtor is aware of the fact of the assignment, and cases in which the debtor is not aware

[2] The 2001 Supreme Court Judgment states that "at the time that only a preliminary agreement has been made, the awareness of the debtor is at most no more than an awareness of a possibility that an assignment will be made in the future (at the time of the preliminary agreement it is not clear whether the right of completion will be exercised and if so when it will be exercised). It is essentially impossible on the basis of this awareness to make a statement to a third party of a fact of the assignment itself (and even if this statement were to be made it would be a statement that did not comply with the facts). The reasonable interpretation is that it is not possible to use a consent bearing a certified date, at the time of the preliminary agreement, as a substitute for the means of perfection of an assignment that is subsequently made by exercising the right of completion."

of this fact, regardless of the amount of time that may elapse or whether the assignment date has been identified; (iv) in connection with acquiring a certified date, there are cases in which the debtor is aware that the certified date will be obtained, and cases in which the debtor is not aware; and from a different perspective (v) whether the assignment of claims is specified or is a comprehensive assignment. It would seem that discussions of the validity of a prior consent as a means of perfection should make a more precise and analytical study of the meaning of *prior* or *in advance*.[3]

II. Cases in Which a Prior Consent is Required

Academic commentary does not contain a clear discussion of the validity of a consent of the debtor on an assignment of claims prior to the assignment as a method of perfecting the assignment against third parties (except where explicitly stated to the contrary, the discussion below concerns consents for which a certified date has been obtained). If, however, a prior consent of the debtor can be considered as valid as a means of perfection against third parties in the event of a true assignment of claims or an assignment of the claims as security, the purchaser will be able to have a sense of security in accepting the assignment of claims as the perfection against third parties will be preserved. Moreover, this would facilitate the providing of loans that are commensurate with the consideration for credit assignment or the assignment of claims as security, which would also facilitate the seller in obtaining financing.[4]

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[3] Even the interpretation that denies the validity of a prior consent of the debtor as a means of perfection against third parties does not appear to be a denial that the debtor has made a statement of intent in the form of consenting that the creditor will assign the relevant claims in the future. Consequently regardless of the interpretation, the prior consent of the debtor will have some type of legal effect, and in principle would seem to have the effect of terminating a clause which prohibits assignment of the claims if such a clause exists, or consenting to the disclosure of personal information of the debtor in association with the assignment of claims (although the personal information of the debtor in connection with claims in association with the assignment would be only that information which is within the limits for which it is possible to presume the consent of the debtor itself, and it would appear to be fully possible to make the interpretation that there is no need to obtain a further consent from the debtor for the purpose of offering information of this nature to a purchaser at a time of assignment of clams). It is also possible to draw the interpretation that this prior consent will have effect as an expression of intent which will preclude subsequent protest (against the assignment), and from this perspective it is also possible to make arguments that would make a distinction between a prior consent in the form of a conceptual notice such as a consent as a means of perfecting an assignment of claims, and a prior consent as an expression of intent, and would consider to what extent it is appropriate to establish a difference between the legal effect of a conceptual notice and an expression of intent, even though the provisions under the Civil Code would apply in connection with a conceptual notice, although this would involve a problem of interpretation of the expression of intent based on the specific facts involved. Moreover, it is stated that consents would include a consent that (the debtor) will not voice an objection, and if the debtor makes a *prior* consent that the debtor will not voice an objection, this would seem to mean that this would have the effect of cutting off all objections as set forth in Civil Code Art.468, Para.1, on the assumption that the prior consent is valid as a means of perfection. This however, presents the question of whether this is truly a reasonable interpretation or if certain restrictions should apply. Moreover, some interpretations, within the approach that a prior consent should not be allowed as a means of perfection, also hold that a consent as an expression of intent by the debtor that it will not voice an objection should be permitted, which presents the problem of what is the scope of protest for which the debtor has not withheld its reservation.

[4] In preparing this paper we had the Administrative Department of the Bank of Japan conduct interviews with the cooperation of firms such as leasing and credit companies, with the cooperation of the Ministry of Economy, Trade and Industry. The responses were that when they use a consent

Furthermore, in many cases, there are clauses that prohibit assignment of sales receivables and other claims, and when considering a scheme that covers a pool formed from many claims, it would be beneficial for the formulation of schemes of this nature to permit a prior consent of the debtor as a means of perfection against third parties, which would cover both terminating the prohibition against assignment and would perfect the same. It is also a necessary requirement to terminate the right of protest in order to perfect against the debtor, prior to the assignment of the claims, and allowing the validity of perfection against the debtor in the same manner as perfection against third parties would be useful in achieving smooth implementation of these schemes.

In fact schemes which appear to assume this validity do actually exist. One example would be loans that are made on the assumption of a collateralized loan obligation (CLO). If the subsequent (trust) assignment of the loan receivables can be perfected by having the borrower agree to this (trust) assignment at the stage of execution of the loan agreement between the financial institution and the borrower, then this would achieve an early termination of the right of protest in the CLO scheme and would simplify administrative procedures in connection with perfection.[5]

In general in a group settlement (factoring)[6] vehicle the following steps are taken:

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of a debtor as a means of perfecting an assignment of claims they take steps including for example (i) confirming the intention of the consent on an oral basis with the debtor prior to executing the agreement to assign claims, and obtaining a letter of consent from the debtor on the date of execution of the agreement. They then obtain a certified date as soon as possible after the execution date; (ii) implementing the assignment of claims in advance and subsequently obtaining a letter of consent from the debtor. They then obtain a certified date and extend the financing; (iii) having the debtor itself obtain the certified date, or furnishing a copy of the certified date after it is obtained. Moreover, in schemes such as when investors ultimately acquire the claims, they may demand consent in writing from the debtor from the perspective of precluding the right of protest, but in order to avoid the insecurity of being unable to know whether the consent can be obtained by the assignment date, in actual practice they may also take the step of obtaining a prior written consent from the debtor.

[5] To the extent that can be observed from publicly available information, in the case of Tokyo CLO (Crystal Springs CLO Special Purpose Corporation) which Mizuho Bank formed as the arranger in March 2003, each financial institution obtains a consent from the small and medium sized enterprises (SMEs), at the stage that each financial institution executions a loan agreement with an SME, that the SME will not voice any objection against the assignment into trust of the loan claims, which assignment is made by each of the financial institutions to the trust bank. Moreover, and this is also to the extent available from public information, in the case of Tokyo Stellar Finance Corporation, which was packaged in March 2002 with Tokyo Star Bank as the originator, as part of the vision of creating a Tokyo Bond Market, a conservative approach is taken in which prior consent is obtained that the debtors will not voice an objection, followed by a subsequent registration of assignment of the claims, to obtain a double pronged means of perfection (this is required as a prescribed method under the Special Measures Law in Connection With Assignment of Claims, as a method of perfection against the debtor in the event that perfecting against a third party has been accomplished by means of registration of the assignment of claims. Thus their interpretation, although there are some objections, is that a prior consent as a means of perfection against a debtor, which is not made on the basis of an awareness of the existence of a registration of assignment of claims, would not function as perfecting against third parties or perfecting against the debtor on the basis of registration of the assignment).

[6] Regarding group settlement, see Ikeda, Masao. *Chûshô Kigyô no Ryûdôka–Minpôteki Sokumen kara no Hyôka to Kadai* (Factoring of Receivables of SMEs–Evaluation and Issues from the Perspective of the Civil Code) JURIST 1201, at 38. Also Ono, Masaru. *Kinyuhôteki Sokumen kara no*

i. A basic agreement is executed among the delivering company, the paying company and the trustee financial institution;
ii. Individual agreements for the assignment of claims are executed among the delivering company, the paying company and the trustee financial institution, and the sales receivables held by the delivering company against the paying company which will fall due within a certain time in the future (for example one year) are assigned to the trustee bank;
iii. A consent that the paying company will not voice an objection is obtained and a certified date is obtained in connection with (ii) above; and
iv. Steps (ii) and (iii) are repeated.

If there are no doubts about the validity of perfection by means of a prior consent, however, then the consent can be obtained from the paying company at the time of executing the basic agreement, thereby perfecting the subsequent individual assignments of claim, which would enable the preventing of double assignment which would have priority under the Special Exceptions Law for the Assignment of Claims, and would also achieve a significant simplification of administrative procedures.[7] As shown above, permitting the validity of a prior consent of the debtor as a means of perfecting an assignment against third parties would have many advantages from the viewpoint of the scheme. It would also reduce the amount of unreasonable steps the actors are forced to take from having to adopt a conservative position during the period in which the validity of the prior consent is not certain.

III. Validity of a Prior Consent as a Means of Perfection against the Debtor

As an assumption for considering the issue of validity as a means of perfection against third parties, a review of academic theory in connection with the validity of a prior consent as a means of perfection against the debtor shows that the standard interpretation is that a prior consent of the debtor of an assignment of claims would be a valid perfection against the debtor since the system for perfecting against the debtor is a system for the purpose of protecting the debtor, and the debtor itself has given its consent.[8] This stands in contrast to the interpretation that a notice by the assignor of

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Hyôka to Kadai–Ryûdôka Kanren no Hôteki Mondaiten no Bunseki/Kentô (Evaluation and Issues from a Financial Law Perspective–Analysis and Study of Legal Issues in Connection With Factoring) JURIST 1201, at 46.

[7] When introducing the conception of a current assignment of future claims, although it is not necessarily to particularly discuss a prior consent, but this does present an issue of prior consents in connection with each future execution of an assignment within the structure of a current agreement to the effect of assignment of claims as a condition precedent, meaning that an assignment of these claims will be made when they come into existence. In actual practice there are many contracts that can be interpreted either way, which can be said to show that the discussion of validity or non-validity of perfection by means of a prior consent are in fact built on a very weak basis.

[8] Hiroto Dôgauchi, in his interpretation of the 2001 Supreme Court Judgment (Dôgauchi Hiroto. *Shimei Saiken Jôto no Yoyaku ni Tsuite no Kakutei Hizuke no Aru Shôsho no yoru Saimusha ni Taisuru Tsûchi mata ha Saiumusha no Shôdaku wo Motte Yoyaku no Kanketsu ni Yoru Saiken Joto no Kôryoku wo Daisansha ni Taikô Suru Koto no Kahi* (Possibility of Using a Notice to the Debtor or the Debtor's Acknowledgment by Means of a Deed Bearing a Certified Date in Connection with a Promise to Assign Nominative Claims to Perfect the Validity of an Assignment of Claims Against Third Parties) KINPO 1652 at 21 (hereinafter "Dôgauchi")) stated in connection with the 1953 Supreme Court Judgment discussed below which many academic commentaries quote that "this is

claims in advance to the debtor that the claims will be assigned in the future would not have any effect. A prior consent would be effective against the debtor even if the date of assignment is undetermined or a prior consent is made to assignment to an unspecified party.[9] Moreover, a special clause stating that the requirements for perfecting are not necessary would also be valid against the debtor since the debtor can be said to have waived its right to protection from the requirements to perfect.[10]

The judgment of May 29, 1953 of the Supreme Court Petty Bench (7 MINSHÛ no. 5, at 608. Hereinafter the "1953 Supreme Court Judgment") held, in connection with the validity of perfection by means of a prior consent of the debtor, that "if either the claims to be assigned or the purchaser is specified, and the debtor gives its prior consent to the assignment, then the reasonable interpretation is that the assignment of the claims may be set up against the debtor even if a notice or consent has not been given as set forth in Civil Code Art.467, Para.1. Ultimately even if the interpretation is made that the assignment of claims may be set up against the debtor in this case, there is no risk to the debtor of any uncertainty concerning the vesting of the claims and making double payment, or other unforeseeable loss" thereby allowing the validity of this consent (however it is necessary to be aware this is a case in which both the claims and the purchaser were specified).

During the discussion at the time of enactment of the Civil Code, the question was made in connection with Art.467, Para.1 of whether in fact there was no need to specify consent of the debtor as a requirement of perfecting against the debtor in addition to notice by the assignor, since there would be no possibility of a consent without a notice of assignment in order for the debtor to acknowledge the assignment of a claim in which the creditor has been named (*shimei saiken*. Hereinafter "nominative claim"). To this question Professor Kenjirô Ume responded "having the debtor's consent or even having consent prior to the assignment would be a good thing. In some cases this would involve notifying the debtor prior to the fact that (the creditor) will be selling its rights to someone else and asking if the debtor has any objection, and then

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truly a judgment concerning a case in which "there is no likelihood of uncertainty concerning the vesting of claims and the debtor's incurring double payment or other unforeseeable loss' for which prior consent is requested at the time of attempting to assign a claim, and should not be understood in an expanded sense such as a general title that a *prior consent is valid*." He further stated that "it should not be held to mean that there is no dispute concerning a *prior consent* being a valid means of perfection against the debtor." Moreover Shiomi, Yoshio. *Tanpo no Tame ni Suru Saiken Jôto ni Okeru Saiken no Kizoku Henkô to Daisansha Taikô Yôken* (Change of Vesting of Claims in an Assignment of Claims for the Purpose of Security, and Perfecting Against Third Parties) in SHINTAKU TORIHIKI TO MINPO HÔRI (Trust Transactions and Theory of Civil Law) at 85 (hereinafter "Shiomi") expresses doubts about the consistency between the 1953 Supreme Court Judgment and the 2001 Supreme Court Judgment and states that there would be value in reexamining the justification even of the portion that is held to be the gist of the 1953 Supreme Court Judgment.

[9] WAGATSUMA, SAKAE. SHINTEI SAIKEN SÔRON (General Lectures on *Jus in Personam*) at 533 (hereinafter "Wagatsuma"). AKESHI, SABURÔ. 11 CHÛSHAKU MINPÔ (Annotated Civil Code) at 375 (hereinafter "Annotated Civil Code").

[10] Wagatsuma, *supra*, at 533., and Annotated Civil Code, *supra*, at 376. However, there is an old precedent which denies a clause of this nature on the grounds that Civil Code Art.467, Para.1 is a mandatory provision (Court of Great Judicature Judgment of February 9, 1921 (27 MINROKU at 244). Professor Dôgauchi states that while the position of academic commentary is that Civil Code Art.467, Para.1 is an optional clause, case precedent has taken a different position (see Dôgauchi, *supra*).

after this has been stated the contract would be made with the purchaser. This would not be a notice of assignment, since a notice of assignment would be a notice of the assignment after it has been made. It would only be a notice that (the creditor) is thinking of assigning and asking if the debtor has any objections. There would be a difference in the effect of a notice and a consent."[11] This supports a difference between notification and consent as intended by the drafters, and assumes that a prior consent of a debtor is possible as a means of perfecting against the debtor.

As stated above there does not appear to be any dispute concerning the validity of a prior consent of the debtor as a means of perfection against the debtor in cases where at least the claims to be assigned and the purchaser have been specified, although it is necessary to give some consideration to protecting a debtor who is unaware of the assignment date. Moreover, the dominant interpretation holds that a debtor's comprehensive prior consent of assignment of the claims would also be valid as a means of perfection against the debtor. And from the language of Civil Code Art.467, as long as consent is effective in perfecting against the debtor, then it would appear that obtaining a certified date on this consent would render it effective in setting up against a third party. Nevertheless as stated above academic commentary and case precedents have not necessarily probed this issue. A brief study of the validity of a prior consent of a debtor as a means of perfection against the debtor has been made in IV.1 (2) below.

IV. Effect of a Prior Consent as a Means of Perfection against Third Parties

Traditional academic commentary on a prior consent of a debtor has focused almost exclusively on the validity of a prior consent as a means of perfection against the debtor. Possibly it is because it was thought that as long as this was valid as a means of perfection against the debtor then obtaining a certified date would make it valid. It was not possible to find any direct discussion on a prior consent of the debtor as a means of perfection against a third party (other than the debtor).[12]

The following briefly covers the circumstances of the judgment of June 30, 1983 by the First Petty Bench of the Supreme Court (37 MINSHÛ no. 5, at 835. Hereinafter the "1983 Supreme Court Judgment") as well as the 2001 Supreme Court Judgment which addressed the validity of a consent of a debtor under a commitment to assign claims, and the 1974 Supreme Court Judgment that the 2001 Supreme Court Judgment took as its base.

1. Discussions in Connection With the 1983 Judgment

[11] 3 HÔTEN CHÔSAKAI MINPÔ GIJI SOKKIROKU (Stenotype Record of Civil Code Deliberations of the Study Commission on the Legal Code) at 530.

[12] OBO, FUJIO. SAIKEN SÔRON SHINPAN (General Discussion of Claims, New Edition) at 318. Also OKUDA, MASAMICHI. SAIKEN SÔRON (General Discussion of Claims) pt. 2 at 454. These state that if a notice of assignment with a certified date has been made prior to the assignment of claims, then it can be set up against third parties from the time of the assignment, and quote the Supreme Court Judgment of August 2, 1978 (22 MINSHÛ 8 at 1558). This judgment is a precedent concerning the assignment of claims held by a third party, and finds that "even in the case of assigning a right of another which is not one's own right, if a notice of assignment of this claim bearing a certified date has been made to the debtor . . . said claim will automatically be transferred to the purchaser without any special expression of intent being necessary that said claim inures to the assignor, and the purchaser can use said notice to satisfy the requirements for perfecting as set forth in Civil Code Art.467, para.2."

(1) Summary of Case

i. Party A rented the first floor of a building owned by Party B, and deposited ¥5 million as a security deposit (the "Security Deposit").

ii. Around the end of August 1976, a pledge right was made in favor of Party Y over the right to demand the return of ¥4 million out of the Security Deposit. Around this time Party B delivered to Party A letter of consent that the right to demand return of the Security Deposit would be furnished to another party as collateral. This letter of consent did not state the form of the collateral, and did not specify who would be the holder of the security interest. It merely stated that Party B acknowledged that Party A would deposit the right to demand return of the Security Deposit with another party, as collateral for Party A's obligations.

iii. On September 10, 1976, a certified date was obtained for the letter of consent.

iv. On October 21, 1976, Party A terminated the lease agreement with Party B's consent, and assigned the right to demand return of the Security Deposit to Party X. At this time, Party X acting as Party A's agent gave notice of the assignment of the claims by mail that arrived on October 22, 1976.

In connection with the above course of events, the court of the first instance found that since Party Y had obtained a certified date, Party Y could set up the pledge right against the debtor and other third parties since Civil Code Art.364 states that methods of perfecting a pledge of rights are to comply with Civil Code Art.467 and since the intent of requiring (notice to the debtor as well as) the consent of the debtor is to protect the debtor, a consent given by the debtor without specifying the holder of the pledge right should be deemed to be valid.

The appeals court, however, held that the consent of the debtor as a means of perfection "is the standard for the purpose of determining the precedence of the legal status between a specific holder of a pledge right and third parties such as other holders of pledge rights and the purchaser of the claims which are the object of the pledge right," and thus the consent in this case should be held to be invalid as a means of perfection against third parties. Consequently Party Y cannot set up the pledge right against Party X.[13]

[13] This High Court Judgment finds that "it is reasonable to make the interpretation that a notice or consent . . . as a means of perfecting a pledge of a nominative claim must be made at the same time or subsequent to the creation of the pledge." Nevertheless this finding is evaluated as follows "the section of this finding is only a supporting argument, since the original Judgment merely confirmed the fact that the letter of consent was provided around the time of creation of the pledge and did not

In the final appeal deliberations, the Supreme Court rejected the appeal, stating that the system for perfection against third parties by means of notice and consent "comes into existence on the core assumption that the tertiary debtor (the debtor of assigned claim) will be aware of the fact of creation of the pledge right, and that it is possible for this to be stated to third parties by the tertiary debtor. If the tertiary debtor is asked by a third party about circumstances such as the relationship of the vesting of these claims, which are the objectives of the pledge right and which the third party is attempting to make into the objects of the transaction, the tertiary debtor can give notice of or disclose the existence of the creation of the pledge and who holds the pledge, and the assumption is that this action will be taken thereby having the third party take appropriate steps and to attempt to prevent said person from suffering unfair adverse consequences. Consequently it should be held that a notice or consent to said tertiary debtor which may be a means of perfection in the relationship with third parties must be a notice or consent in connection with a creation of a pledge right in favor of a specific person."

(2) Arguments Concerning Validity of a Prior Consent as a Means of Perfecting Against Third Parties

The main issue in this case was the validity of consent of the debtor which was made without specifying the holder of the pledge right, as a means of perfection against third parties.[14] It was not directly the issue of

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make a factual finding that a prior consent was made" (ENDÔ, KENJI. *Shimei Saiken ni Taisuru Shichiken Settei wo Daisansha ni Taikô Shiuru Yôken Toshite no Daisan Saimusha ni Taisuru Tsûchi Mata ha Sono Shôdaku to Shichikensha Tokutei no Yôhi* (Notice or Consent to a Tertiary Debtor as a Requirement to Perfect, Against a Third Party, the Creation of a Pledge in Connection With a Nominative Claim, and Whether It Is Necessary to Identify the Holder of the Pledge) in SAIKÔ SAIBANSHO HANREI KAISETSU MINJI HEN (Annotated Supreme Court Judgments, Civil Edition) at 300 (1978) (Hereinafter "ENDÔ").

[14] For interpretations which hold that identification of the holder of the pledge is required with respect to this issue, see ENDÔ, *supra*, at 290; as well as Koike, Nobuyuki. *Shimei Saiken ni Taisuru Shichiken Settei wo Daisansha ni Taiko Shiuru Yôken Toshite no Daisan Saimusha ni Taisuru Tsûchi Mata ha Sono Shôdaku to Shichikensha no Tokutei no Yôhi* (Notice to Tertiary Debtor or Consent as a Requirement for Perfecting Against Third Parties of a Creation of a Pledge Over a Nominative Claim), KINYU HÔMU JIJÔ (Financial Law Affairs) 1058 at 32 (hereinafter "Koike"); Hideo, Morii. *Tanpo* (Security) HANREI TIMES 514 at 158 (hereinafter "Morii"); Sono, Hirô. *Saikô Saibansho Hanrei Kenkyû* (Study of Supreme Court Case Precedents) in 39 HOKU DAI HÔGAKU RONSHÛ (Collected Essays of Hokkaido University Legal Department) 4 at 1201 (hereinafter "Sono"); Matsushima, Hideki *Shimei Saiken Shichiken Settei Shôdaku ni Okeru Shichikensha Tokutei no Yôhi* (Necessity of Identifying a Holder of a Pledge Right in a Consent of Creation of a Pledge Over a Nominative Claim), JURIST supp. ed. *Tanpo No Hanrei (1)* (Case Precedents on Security (1)) at 291; Kawakami, Masatoshi. *Shimei Saiken Shichi no Settei ni Tsuite Shichikensha wo tokutei Shinaide Shita Daishan Saimusha no Shôdaku to Daisansha ni Taisuru Kôryoku* (Consent of Tertiary Debtor in Connection with Creation of a Pledge over a Nominative Claim, Without Identifying the Holder of the Pledge, and Effect Against Third Parties), KINYUHÔMU JIJÔ 987 at 12 (hereinafter "Kawakami"); Matsui, Hirôki. *Shimei Saiken Shichi Settei no Taikô Yôken to Nari Uru Shôdaku no Naiyô* (Content of Consents That May Be Used to Perfect the Creation of a Pledge Right Over a Nominative Claim), 53 HÔRITSU JIHÔ (Legal Affairs) 9 at 149 (hereinafter "Matsui"). But for interpretations which hold that identification of the holder of the pledge right is

the validity of a prior consent as a means of perfecting against third parties,[15] which is the topic of this essay. Nevertheless, the appeals court held that "the reasonable interpretation is that a notice or consent as a means of perfecting a pledge of a nominative claim must be made at the same time or after the creation of the pledge right in connection with the creation of a specific pledge right", which indicated an interpretation that denied the prior consent, and contained discussions in connection with the validity of a prior consent of a debtor of the validity as a means of perfection against third parties.

a. Doctrine of Denial

The following reasons are given for the interpretation which absolutely denies the validity of a prior consent as a means of perfection against third parties: (i) it is not clear from the prior consent whether the pledge right will in fact be created, and a failure to identify the holder of the pledge right will have adverse consequences for third parties;[16] and (ii) if a pledge right is to be created and to be perfected from the time of its creation, then in order to finalize its perfection the date on which the pledge was created must be certified in addition to obtaining the certified date. Consequently the pledge will be lacking in the requirement of a certified date and cannot be set up against a third party.[17] There is a further interpretation which denies the validity of a prior consent as a means of perfection against third parties, but states that it will be made perfect and valid by the subsequent creation of the pledge right on the grounds that "while the precedence in time of a notice or consent is the standard for determining the superiority of notices or consents that bear a certified date, it is possible to make the interpretation that even if a notice or consent is invalid because it fails to meet this requirement, if it subsequently satisfies this requirement then it would be perfected from that time, and consequently it is not impossible to hold that a notice or consent that is made prior to the creation of a pledge would be perfected from the time the pledge is created.[18]"

b. Doctrine of Validity Conditional on Identification of the Creditor

This doctrine holds that if the holder of the pledge right is identified, then the validity of the prior consent as a means of perfection against third

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not necessary see Suzuki, Rokuya. *Saikin Tanpohô Hanrei Zakkô* (Miscellanous Considerations of Recent Case Precedents in Law on Security (pt. 12)), HANREI TIMES 521 at 27 (which states that explicit statement of the amount of the secured claim would be more necessary); and Onodera, Norio. *Shimei Saiken Shichi Settei no Taikô Yôken to Nariuru Shôdaku no Naiyô* (Content of Consents That May Be Used to Perfect the Creation of a Pledge Right Over a Nominative Claim), HANREI TIMES 472 at 46.

[15] It would appear to appropriate to take the same approach in considering the validity as a means of perfecting a pledge of claims against third parties, and in considering the validity of perfecting an assignment of claims against third parties.

[16] Matsui, *supra*, at 152.

[17] Kawakami, *supra*, at 14

[18] ENDÔ, *supra*, at 300.

parties may be allowed for the following reasons: (i) a prior consent that identifies the holder of the pledge right is valid on the assumption that "perfecting determines the priority among related parties that are actually identified and consequently a pledge of claims must also at least identify the holders of the pledge rights";[19] and (ii) if a holder of the pledge rights is identified, then "the prior notice or consent would function as a standard to determine priority, although this assumes that the actual factual relationships do come into existence" and although the accurate response when the tertiary creditor is asked by a third party would be that the tertiary creditor has received a notice (or prior consent) stating that a pledge right will be created and that the debtor does not know if in fact the pledge right has been established, the third party will on hearing this be able to avoid pursuing the transaction, and consequently the notice (or prior consent) will function as public notice (however the perfecting will only come into effect when the contract that creates the pledge is executed or the pledge right is created).[20]

c. Doctrine of Validity on Condition That Notice of Creation of the Pledge Is Received

Another doctrine holds that even when a prior consent is not specifying the name of a pledge "if a notice of creation of a pledge is subsequently made, said notice and the prior consent would together constitute a valid means of perfection, for at the very least it informs a person who intends to make the claims into the object of a transaction that there is a possibility that the claims have been pledged to someone, and does function as a warning against entering into the transaction. Consequently it cannot be dismissed as being a meaningless consent even when considering the relationship with third parties." Thus, "as long as the tertiary debtor is subsequently notified that the pledge right has actually been created over the claims, the tertiary debtor will be able to state to third parties the fact that a pledge right has been created over the claims. Consequently, if a certified date has been obtained for the consent, then together with this prior consent the overall structure should be interpreted as functioning as a method of public notice as required by the Civil Code."[21] This interpretation holds that the subsequent notice of creation of the pledge "need not necessarily be made by the creditor of the claims in question, and is not required to have a certified date."

2. Discussions in Connection With the 2001 Supreme Court Judgment

(1) Summary of Case

i. On July 3, 1984, Party A promised to assign a golf course membership as a security for obligations that it had to Party Z.

[19] Morii, *supra*, at 166.
[20] Sono, *supra*, at 1209.
[21] Koike, *supra*, at 36.

The debtor, Golf Course Company Y made its consent of the promise to assign, in a deed bearing a certified date.

ii. On October 5, 2001, Party Z stated its intention to execute on the promise to assign, but no notice or consent was made in a deed bearing a certified date.

iii. On October 9, 2001, Party X attached the golf course membership of Party A as a disposition for arrears.

iv. On June 1, 1996 Party A liquidated, resulting in a claim for return of the deposit.

With respect to the above case, the judgment of the first instance and the appeals judgment allowed Party X's claim for return of the deposit on the grounds that the consent bearing the certified date in connection with the promise to assign the claim was an consent of the possibility of a future assignment of which the debtor was aware, and was not a consent of a transfer of the claims by means of an assignment. Consequently it did not perfect the transfer of the claim.

In the final appeal proceedings, the Supreme Court dismissed Party Y's appeal, by ruling that "even if a notice or a consent was made against the debtor by means of a deed bearing a certified date in connection with the promise to assign a nominative claim, this is merely notice of a possibility that the vesting of said claim may change in the future through exercise of the right of execution on the promise, and does not represent an awareness of the fact that a change to the vesting of the claim has occurred. Consequently the aforementioned notice or consent cannot be used to set up the effect of the assignment of the claim by execution on said promise, against a third party.

(2) Arguments in This Case

Although one issue in this case was whether the consent of the debtor in connection with the promise to assign the claim constituted perfecting the assignment of the claim against third parties, as with the 1983 Supreme Court Judgment[22] this cannot be said to be a precedent that directly

[22] For interpretations of this Judgment see Dogauchi, *supra*. Also see *Kozumi, Kensaburô. Saiken Jôto Yoyaku e no Saimusha no Shôdaku ni Yoru Jôto no Taikô no Kahi* (Possibility of Using a Consent to a Promise to Assign Nominative Claims to Perfect an Assignment), HÔGAKU SEMINAR (Legal Seminar) 570 at 108; Ikeda, Masao. *Shimei Saiken Jôto no Yoyaku ni Tuite no Kakutei Hizuke no Aru Tsûchi/Shôdaku to Yoyaku Kanketsu ni Yoru Saiken Jôto no Kôryoku no Daisansha e no Taikô* (Setting Up an Assignment of Claims Against Third Parties by Means of Notice or Consent Bearing a Certified Date in Connection With a Promise to Assign Nominative Claims, and Execution on the Promise), NBL 741 at 26 (hereinafter "Shin Ikeda, NBL"); Ônishi, Takeshi. *Saiken Jôto Yoyaku no Shôdaku to Yoyaku Kanketsu no Taikô Yôken* (Consent of Promise to Assign Claims and Perfecting the Execution of the Promise) HANREI TIMES 1091 at 26 (hereinafter "Ônishi"); Tadaka, Hirotaka. *Yoyakugata Saiken JôtoTanpo no Daisansha Taikô Yôken* (Perfecting Preliminary Type Assignments of Claim as Security Against Third Parties), HANREI TIMES 1091, at 44; Ikeda, Seiji. *Shimei Saiken Jôto no Yoyaku ni Tsuite no Kakute Hizuke Aru Shôsho ni Yoru Saimusha no Shôdaku wo Motte Yoyaku Kanketsu ni Yoru Saiken Jôto no Kôryoku wo Daisansha ni Taikô Suru Koto no Kahi* (Possibility of Perfecting Against Third Parties an Assignment of Claims, by Means of Execution on a Promise for Which a Consent From the Debtor Has Been Obtained in a

addresses the problem of prior consent since "in a promise to assign claims it is not clear (i) whether the promise will be executed and the claims will be assigned, or (ii) whether even if the assignment is made, at what point in time the promise will be executed, and in this sense a *disposition of the claim in the form of an assignment of claims* is not carried out, and consequently there is no room to present *prior notice or prior consent* as an issue in a promise to assign claims from the perspective of notifying or making someone aware *before the fact* of an *event of an assignment of claims*."[23] Nevertheless arguments were made in connection with the validity of a prior consent as a means of perfecting against third parties in connection with this case as well, or even if they were not explicitly stated it appears to be possible to deduce these discussions, which we have introduced below.

a. Interpretation Which Views an Consent of a Promise to Assign as Being the Same as a Prior Consent, but Denies Its Validity as a Means of Perfecting

One interpretation holds that the consent of the promise to assign was viewed as being a *prior consent of the assignment* and states that "this judgment can be understood as taking the position that a prior consent or consent, at a stage in which it is not certain whether the assignment will be made, cannot in principle be allowed as a means of perfecting against third parties, since based on application of Art.467 the debtor is required to have knowledge of a change in the vesting of the claims.[24]

Deed Bearing a Certified Date in Connection With a Promise to Assign Nominative Claims) HÔGAKU KYÔSHITSU (Legal Classroom) 265 at 138 (hereinafter "Seiji Ikeda"); Ikeda, Masao. *Shimei Saiken Jôto no Kahi ni Tsuite no Kakutei Hizuke no Aru Shôsho ni Yoru Saimusha ni Taisuru Tsûchi Mata ha Saimusha no Shôdaku wo Motte Yoyaku no Kanketsu ni Yoru Saiken Jôto no Kôryoku wo Saikensha ni Taikô Suru Koto no Kahi* (Possibility of Perfecting an Assignment of Claims Against Third Parties, by Means of Execution on a Promise With a Notice to the Debtor or a Consent of the debtor in a Deed Bearing a Certified Date in Connection With the Possibility of Assignment of Claims) HANREI JIHÔ 1788 at 174 (hereinafter "Shin Ikeda, HANREI JIHÔ"); Ishida, Takeshi. *Shimei Saiken no Jôto Yoyaku ni Taisuru Saimusha no Kakutei Hizuke no Aru Shôdaku to Jôto no Daisansha Taikôryoku* (Debtor's Consent Bearing a Certified Date in Connection With a Promise to Assign Nominative Claims, and the Validity Against Third Parties of the Assignment) JURIST No 1224 at 78 (hereinafter "Ishida"), *Tomikoshi, Kazuhiro. Shimei Saiken Jôto no Yoyaku ni Tsuite no Kakutei Hizuke no Aru Shôsho ni Yoru Saimusha ni Taisuru Tsûchi Mata wa Saimusha no Shôdaku wo Motte Yoyaku no Kanketsu ni Yoru Saiken Jôto no Kôryoku wo Daisansha ni Taikô Suru Koto no Kahi* (Notice to Debtor or Debtor's Consent in a Deed Bearing a Certified Date in Connection With a Promise to Assign Nominative Claims, and the Possibility of Perfecting Against Third Parties the Validity of the Assignment of Claims by Means of Execution on the Promise) JURIST 1228 at 258. All of these conclude by supporting the finding that consent of a promise to assign claims cannot satisfy the requirements for perfecting the assignment of claims against third parties. Moreover for an interpretation of the judgment of the first instance, see Ishida, Takeshi. *Golf Kaiin Ken Jôto Yoyaku no Kakutei Hizuke Aru Shôsho ni Yoru Shôdaku no Kôryoku* (Effect of Consent, by Means of A Deed Bearing a Certified Date, of a Promise to Assign Membership in a Golf Course) HANREI TIMES 965 at 42.

[23] Mitsubayashi, Hiroshi. *Minpôten ni Kitei ga Nai Gainen/Seido (4)–Shûgô Jôto Tanpo* (Concepts and Systems That Are not Stipulated in the Civil Code (4)–Group Assignment of Claims as Security) NBL 766 at 93.

[24] Ishida, *supra*, at 78.

Nevertheless as stated above, the dominant interpretation is that the debtor's consent in this case was consent of a promise to assign, which cannot be accepted as a prior consent of the actual assignment of the claim.

b. Interpretation Which Reasons from This Precedent to Deny the Validity of a Prior Consent as a Means of Perfecting Against Third Parties

Based on the fact that case precedent and academic commentary does not make a distinction between perfecting against the debtor and perfecting against third parties in that both depend on the conception that they constitute perfecting with the debtor acting as an information center, some have taken an approach that denies prior consent as a means of perfecting against either the debtor or a third party, arguing as follows with respect to the relationship between the precedent we are currently discussing, and the 1953 Supreme Court Judgment that allowed the validity of a prior consent as a means of perfecting against the debtor:

> If as stated in the present judgment "a notice or consent at the stage of the promise in the event of a promise to assign does not constitute an act of informing that a change has occurred in the vesting of the claim, and consequently cannot have meaning as a means of perfecting" then in a situation of "future assignment of current claims" for which a promise to assign has not even been made, this would not by itself give rise to an awareness on the part of the debtor that there is a change in the vesting of the claims, even if the purchaser of the claims to be assigned is identified." Consequently there will be a lack of consistency with the principle unless we accept the rule that "a consent prior to assignment cannot constitute perfecting even in the relationship with the debtor." There would be value in reexamining the justification even of the portion that is held to be the gist of the 1953 Supreme Court Judgment.[25]

Moreover, a further interpretation of this precedent "holds that it is impossible for a consent of a promise to assign claims to constitute a means of perfecting, reasoning that the mere consent of a promise to assign claims represents nothing more than an awareness of the possibility that the vesting of the claims will change in the future, and the debtor cannot be expected to function effectively as an information center.[26] This

[25] Shiomi, *supra*, at 85.

[26] Ônishi, *supra*, at 29. In this interpretation the annotations are quoted, and then the statement is made "with respect to eligibility of a prior notice or consent of an assignment of claims, the position of both case precedent and common interpretation is that a prior consent of the debtor is only eligible as a means of perfection within the relationship with the debtor. A prior notice is not eligible as a means of perfection either in the relationship with the debtor or with a third party." It does not, however, appear to be possible to assert categorically that case precedent and common interpretation particularly takes the position that a prior notice does not have any eligibility as a means of perfection against third parties.

interpretation appears to lead to the conclusion that even if the debtor makes a prior consent of assignment of claims, this represents nothing more than that the debtor is aware of a possibility that the vesting of the claims will change in the future, and cannot constitute a means of perfecting against third parties.

c. Interpretation That a Prior Consent Should Be Regarded as a Valid Means of Perfecting Depending on the Nature of the Prior Consent

It is possible to take the position that in contrast to a promise to assign claims, this precedent leaves room for allowing the validity of prior consent as a means of perfection against a third party as long as there is a high probability that the assignment of claims will be executed in the future, without drawing any clear standards of the relationship between an information center and the prior consent, such as what type of understanding on the part of the debtor would enable a sufficient expectation that the debtor would function as an information center, even while emphasizing this role as an information center.[27]

d. Interpretation That Denies the Validity of a Prior Consent as a Means of Perfecting against Third Parties, on the Grounds that the Act of Assignment Does Not Exist

A further interpretation holds that "in the event of a *promise* to enter into an agreement of assignment, the act of assignment in itself has not yet come into existence and it therefore must be said that it is impossible to fulfill the requirements for perfecting an assignment that does not in fact exist."[28] This interpretation appears to lead to the conclusion that even if the debtor makes a prior consent of an assignment of claims, this consent cannot constitute a valid means of perfection since the act of assignment does not itself exist. Nevertheless, the interpretation does not discuss the effect in the event that the act of assignment subsequently occurs, and does not determine whether there is room to accept subsequent completion of the act.

3. Relationship between the Information Center Doctrine and Consent by a Debtor

In principle all of these interpretations can be accepted as presenting arguments concerning the validity of a prior consent, as a means of perfection against third parties, on the basis of the doctrine of an information center which

[27] Dôgauchi argues in support of the effect of the validity of a prior consent as a means of perfection against a debtor or a third party stating "although it is stated that 'the relationship of vesting of rights is unclear and there is a possibility of the debtor's incurring double payment or other unforeseeable loss' as it is not possible to know when the assignment of claims will actually take place, and doubts are voiced about the validity of a prior consent as a means of perfection against the debtor or a third party in this case, "even if the assignment of claims can be set up against the debtor, there is no possibility of the relationship of the vesting of rights being unclear, and the debtor's incurring double payment or other unforeseeable loss." See note 43.

[28] Shin Ikeda, NBL, *supra*, at 69.

was adopted by the 1974 Supreme Court Judgment which emphasized the awareness of the debtor and the function of public notice based on said awareness. Moreover, the effect as a means of perfecting against third parties would be determined in accordance with the level of awareness of the debtor which each of these commentators have held to be necessary in order to perfect. As stated above, the term *prior* encompasses a variety of situations, and if the debtor believes that it is highly likely that the assignment will be made even if the consent is made in a time frame that is before the assignment (in an extreme case this could be immediately before the assignment) then it is possible that there would be circumstances in which a prior consent would be accepted as long as the approaches of 2(2)(a) or 2(2)(d) are not adopted in their strictest meaning (interpretation 2(2)(c) clearly states this position).

The case precedent adopts the doctrine of *time of service* based on the precedence or subsequence of arrival of the *notice*, in accordance with the information center doctrine, with respect to the priority of rights in the event of a double assignment of the claims. This has become the dominant interpretation,[29,30] although even among interpretations that adopt the time of service[31] the most common interpretation is that in situations in which the

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[29] UCHIDA, TAKASHI. MINPÔ III (Civil Code Vol. III) at 204; 4 MINPÔ KÔZA (Lectures on the Civil Code) at 302 (Hoshino, Eichi, ed.) (hereinafter "Hoshino") et al. Formerly the standard was the precedence or subsequence of the certified date (annotation at 382, WAGATSUMA, at 544).

[30] As a comparatively recent academic commentary that criticizes the information center doctrine, see Shimizu, Makoto *Shimei Saiken no Taikô Yôken ni Tsuite no Kôsatsu* (Examination of Perfection of an Assignment of Nominative Claims) 30 KANAGAWA HÔGAKU 2 at 1. Professor Shimizu, with respect to the method of using a notice or consent bearing a certified date to satisfy the requirements for perfecting against third parties, i.e., the formation of a method of public notice, that "if the interpretation is taken that it is necessary to demonstrate by means of a certified date that a notice or consent has been issued, as in prior case precedent (March 30, 1903, 9 MINROKU at 361), then the difficulty of this issue can be considerably reduced, but the December 22, 1914 judgment of the Joint Panel of the Court of Great Judicature (20 MINROKU at 1146) changed the interpretation so that only a certified date on the notice or consent itself must be obtained. It must be said to be a truly forced fiction to treat this as a method of public notice," and continues that "the idea that public disclosure is satisfied by having a third party inquire with the debtor (as to whether a notice with a certified date has been received, or whether it has made a consent with a certified date) further compounds this unreasonable fiction, and is mistaken (what about cases in which the debtor does not respond truthfully?)" According to Professor Shimizu "Using the time of arrival of the notice as the standard, which would be a contingency and would be difficult to prove, cannot be considered to be reasonable. I believe that it was completely unnecessary to adopt the doctrine of the time of service which renders as meaningless the certified date demanded by the drafters of the legislation." He further states that the priority in the event that double payment of the claims occurs should be determined on the basis of the precedence or subsequence of the certified date. Moreover, the 1974 Supreme Court Judgment which is widely considered to be the basis for the doctrine of the time of service only has the meaning as a precedent in determining the priority of precedence or subsequence of delivery in the event of certified dates having the same date. With respect to the interpretation based on the doctrine of an information center as well, there are statements concerning the uncertainty of public notice based on the awareness of the debtor, and if the role of the debtor as an information center is flatly denied in the manner asserted by Professor Shimizu, then as long as a consent with a certified date occurs then this would appear to be sufficient as public notice of an assignment of claims, and it is possible to reach the conclusion that validity as a means of perfection should be allowed for a prior consent by the creditor.

[31] This case precedent explicitly finds in connection with the notice with respect to the standard of time of the perfecting against third parties that "this is the date and time on which a notice with a

consent of the debtor can be a valid means of perfection against third parties,[32] the priority should be determined on the basis of the time that the certified date was obtained, and even if the certified date was obtained subsequently it is not necessary to inquire into the specific awareness of the debtor concerning the certified date itself, possibly because the very consent clearly states the awareness of the debtor.

Attorney Masao Kobiki has stated the following criticism of this common interpretation. According to the dominant interpretation as stated above, if the debtor makes a consent which does not bear a certified date, then the requirements for perfection against third parties will have been satisfied in connection with an assignment of claims at the time that the certified date is obtained if the assignor or purchaser of the claims subsequently obtains a certified date on the letter of consent. In this event, however, if a third party inquires with the debtor concerning the claims, the debtor would be expected to respond that the debtor has received consent by means of a letter of consent that does not bear a certified date. It is not possible for the debtor to fulfill a role as an information center in connection with perfecting the assignment of the claims to the extent of the debtor even being aware of the certified date by means such as the fact of obtaining a certified date on the letter of consent being notified to the debtor itself. Consequently as long as the information center doctrine applies, then perfecting against third parties should be held to have not taken place until such time as the debtor is aware that the certified date has been obtained for the consent, and can respond to inquiring third parties to that effect.[33]

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certified date arrives at the debtor." With respect to a consent, however, the expression is used "the date and time of the consent of the debtor bearing a certified date," and while in actual practice a certified date is subsequently obtained in connection with a consent as long it is not a notarial deed, it is not clear solely from the gist of this finding what precisely is meant by the information center doctrine.

[32] Hoshino, *supra*, at 291. Adachi, Mikio. *Shimei Saiken no Nijû Jôto no Yûretsu no Kijun* (Standards for Priority in a Double Assignment of Nominative Claims), JURIST 590 at 64, states that the finding in the 1974 Supreme Court Judgment that the priority "should be determined according to the precedence or subsequence of a consent of the debtor bearing a certified date" is merely a supporting argument, and if the debtor's consent is valid as a means of perfection then "as long as a consent bearing a certified date is sent, then given the external form of the consent at which the statement is made in the form of preparation of the consent should be the standard for determining priority. Moreover if the consent is made in the form of a personal document and then the certified date is subsequently obtained, then in view of the intent of Civil Code Art.468, Para.2 and Civil Code Enforcement Law Art.4 of preventing collusion between the parties to backdate the date, the time at which the certified date was obtained should be understood to be the standard and not the time that the personal document was prepared. A case precedent already exists that accepts this in a case in which a certified date was subsequently affixed to consent by means of a personal document, after the document was delivered to the purchaser." Both of these are quotations from the February 9, 1915, judgment of the Court of Great Judicature (21 MINROKU at 93).

[33] Kobiki, Masao. *Sono Go no Kakutei Hizuke de, Goanshin no Minnasama e* (Reassuring People About Certified Dates Obtained at a Later Time), NBL 399 at 38. With respect to the February 9, 1915, judgment of the Court of Great Judicature that is quoted in standard interpretation "(i) it is not clear whether the debtor is the person who obtained the certified date, or whether this is a case in which this was not the debtor, but the debtor was aware that the certified date had been obtained. Moreover it is not clear (ii) whether this was a case in which the debtor was not aware that the certified date had subsequently been obtained. If case (i) applies then since the *debtor as the information center was aware* then it is only natural that this was allowed as a valid perfecting as of

Regardless of the validity of this criticism, as the criticism makes clear it is possible to understand that the information center doctrine is not strictly applied to all situations when a debtor's consent can be used as a valid means of perfection against third parties.[34] Consequently, even if the information center doctrine is deemed to be the basis for considering the validity of a prior consent of a debtor as a means of perfection against third parties, there is still room for a flexible interpretation of the debtor's awareness of the assignment of the claims, based on the fact of the consent.

4. Review of Arguments and Study of Prior Consent as a Means of Perfecting against Third Parties

(1) Review of Arguments

In the preceding paragraphs we have presented an overview of case precedents and academic commentary in connection with the validity of a prior consent of the debtor of an assignment of claims as a means of perfection against third parties.

As discussed above a review of the arguments shows that the interpretations which deny the validity of a debtor's prior consent as a means of perfecting against third parties give reasons such as the following:

i. A prior consent represents nothing more than an awareness by the debtor of the possibility that a change in the vesting of the claims will occur in the future, and it is unknown whether an actual assignment has taken place;
ii. if as an effect of the prior consent, validity in the form of perfecting is held to have come into existence from the time that the assignment of the claim actually takes place, then this should be defined as the date of assignment of the claims separately from the certified date of the prior consent, and there is no meaning in discussing the validity of a prior consent; and
iii. since no act of assignment has come into existence even though the prior consent has been made, it is impossible for the consent to satisfy the conditions for perfecting.

Nevertheless arguments that a prior consent cannot constitute a means of perfection because the assignment has not yet been executed, or

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the time that the certified date was obtained. If case (ii) applies, then the debtor as information center was not aware, and consequently allowing this as a valid perfecting at a time when the debtor was unaware is not consistent with the intent of the 1974 Supreme Court Judgment."

[34] The probable reason for the distinction that the standard interpretation makes between notices depending on the standard date is that a notice is generally sent by contents certified mail, or is delivered directly as a written notice bearing a certified date from a notary public, so that at the time of delivery a notice normally already has a certified date. In the case of a consent, however, the certified date is normally obtained from a notary public on the letter of consent, after the letter is prepared in the name of the debtor, and consequently the consent usually does not have a certified date at the time that the consent is made.

that it is unknown whether the assignment will actually take place, are not arguments that apply to a situation in which the debtor is aware that the assignment will definitely take place, and consequently based on the intent of the information center doctrine adopted by the 1974 Supreme Court Judgment as well as the 2001 Supreme Court Judgment, it would appear to be necessary to discuss the validity of a prior consent as a means of perfection, in a manner that corresponds to the possible situations of *prior* or *in advance* that can be classified.

It is possible to expect that the debtor will function as information center if the debtor is aware to a certain extent of the probability of an assignment of claims even if the consent is given prior to the fact, and it should be held to be possible to make the interpretation that a prior consent of the debtor would be a valid means of perfection against third parties, since (i) understanding that the information doctrine is not strictly applied to all situations, and (ii) even when an consent is given after the fact this does not necessarily mean that the debtor has received proof that a valid assignment of claims has been made and there are likely to be differences in the extent of the debtors awareness of the assignment of the claims depending on each case.[35] This would then lead to giving consideration to the form in which the prior consent was made, in order to determine whether it was possible for the debtor to have this awareness.

(2) Observation in Connection with the Consent Being Made in Advance

A study of the situations in which a consent is made in advance reveals that there are likely to be cases in which (1)(i) the assignment of claims will be made immediately after the prior consent;[36] or (ii) the purchaser has been identified and the actual date of the transfer of the claims is identified in advance or subsequently, and the debtor is aware of both the purchaser and the date on which the claims will be transferred.[37] In

[35] Kobiki, Masao. *Shimei Saiken Jôto no Daisansha Taikô Yôken wo Meguru Nanmon* (Difficult Issues Surrounding Perfecting of an Assignment of Nominative Claims, Against Third Parties) (pt. 3), NBL 183 at 14. In this article Kobiki states with respect to notices made prior to the transfer of claims that "the notice is made in order to inform Debtor X of a change in the creditor and to prevent uncertainty and confusion. Consequently there would be no problem if the notice is made after the effect of the transfer of claims has come into existence, but if the notice is made prior to the transfer of claims taking effect, then a notice which does not enable Debtor X to be apprised of when the creditor will change is not appropriate as a notice." He therefore denied the effect only of (those notices) that do not inform Debtor X of when the creditor will change. From this perspective even if a notice or consent is made prior to the agreement for the assignment of claims, if the debtor is able to be aware of when the creditor will change, through means such as identifying the actual date and time when the transfer of claims will take place, then the notice or consent cannot be said to create uncertainty or confusion on the part of the debtor, and it would not be impossible to argue that a notice or consent of this type would be valid as a means of perfecting an assignment of claims against third parties.

[36] In the cases as the prior consent and the assignment of claims can be viewed as being one act, it is possible to make the argument that the validity of the consent should be allowed as being a consent that is made simultaneously with the assignment of claims.

[37] With respect to this issue, if there is an extended period such as several months or years between the prior consent and the assignment of claims, it would appear to be possible to argue that the prior

these cases, it would seem to be reasonable to allow the validity of a prior consent of the debtor as a means of perfection against third parties, since the debtor can be aware of the certainty of the assignment of the claims.

In addition, there are also likely to be cases in which (2)(i) the debtor is aware from customary transactions that all of the relevant claims are to be assigned to a certain specific purchaser, and (ii) the transaction that caused the relevant claims has been made between the assignor and the debtor on the assumption that the relevant claims will be assigned to a specific purchaser. In these cases it is possible to make the assessment that it will not be possible for a situation to occur such as cherry picking by the assignor. Consequently even if the time of assignment of the claims is not fully identified or if the debtor cannot be said to be fully aware,[38] the debtor will be aware of the probability of the assignment of claims and can be expected to function in its role as an information center, and therefore in

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consent should not be allowed as a valid means of perfection. Nevertheless, even if the period of time from the prior consent through the assignment of claims is an extended period, as long as the date of the transfer is specifically identified, then it would seem that the debtor would be fully able to function as an information center. On the other hand even if there is only a brief period of time between the prior consent and the assignment of claims, if the date of the assignment of claims is not specified then it would seem that the debtor would not have the awareness necessary to function as an information center. Consequently it would appear to be possible to classify the length or brevity of the period of time between the prior consent and the assignment of claims as in practice being a problem of identifying the time of the assignment of claims in which the longer the period of time the easier it is for difficulty to be faced in identifying the time of assignment. From the perspective of the debtor functioning as an information center as well, it would not appear to be absolutely necessary for the debtor to be aware at all times of the specific date of assignment at the time of the prior consent. If for example at the time of the consent the debtor is informed that the claims will be assigned in March of the following year, and is only told that the notice of the specific date and time will be given by March 1 of the year of assignment, and if notice is then given to the debtor informing the debtor of the precise date and time, then the assignment would not have been made before the debtor receives the notice, and the debtor would be aware that the notice required for the debtor to be specifically informed of the actual date of the assignment would be sent by March 1. After the debtor receives the notice the debtor would have specific knowledge of the time of the assignment of claims, and it would appear to be fully possible for the debtor to function as an information center in a manner that is sufficient for the purpose of allowing the effect of a prior consent of the debtor as a means of perfection against third parties. In actual agreements to assign claims there are cases in which it is stated that the date of transfer of the claims will be after the execution of the agreement, and state a condition precedent concerning the validity of the transfer of the claims on this date for transfer of claims. In addressing cases of this nature, it would appear to be acceptable to allow a prior consent of the debtor to be valid as a means of perfection against third parties since the debtor would be aware of the probability of the assignment of the claims in situations such as when the purchaser is identified and the actual date of the transfer of the claims is identified in advance or subsequently, and the debtor itself is aware that the conditions precedent have actually been met on the scheduled date of transfer of claims, or in cases in which the debtor itself is not able to be aware, but is informed that the assignment of claims has come into effect through means such as informing the debtor that the conditions precedent have been met or that the actual assignment of claims has come into effect.

[38] It is necessary to study each individual case in order to identify under what level of specific identification or what range of awareness it would be possible to allow the validity as a means of perfection against third parties. This would involve a study from the perspective of what level of burden each of the debtor, assignor and purchaser should bear in connection with public notice of an assignment of claims in view of the consent and nature of the debt assignment in each particular case.

these situations it would seem to be reasonable to allow the validity of a prior consent of the debtor as a means of perfection against third parties. Specific examples would include: credit-card agreements which use a means of assignment of claims in connection with advancing payment; auto loans in which the standard terms stipulate that the debtor acknowledges that the claims under the auto loan will be assigned to a specific special purpose company or trust bank, without specifying the date on which the assignment is to take place; and a loan agreement that is executed on the assumption that a CLO scheme will be formulated, and in which the loan agreement stipulates that the debtor gives its consent in connection with assignment of the loan receivables to a specific special purpose company or a trust bank. It would appear to be possible to take the position that prior consent by debtors of this nature would be allowed as being a valid means of perfecting against third parties.

Moreover, in cases other than (1) and (2) above, it would also appear to be possible to interpret the prior consent of a debtor as being a valid means of perfection against third parties in situations such as (3) where there are special circumstances by means of which the debtor is able to be aware of the probability of the assignment of the claims, to the extent that the debtor can be fully expected to function as an information center.[39] [40]

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[39] Art.147, Para.1 of the Code of Civil Procedure and Art.135, Para.1 of the Civil Procedure Code Enforcement Regulations can be listed as clauses that are of reference in studying the nature of the necessary awareness on the part of the debtor in order to fulfill the debtor's function as an information center. These clauses require a tertiary debtor to give testimony in connection with the attached claims if an order of attachment of claims has been served. Art.135, Para.1 of the Civil Procedure Code Enforcement Regulations states that the tertiary debtor is to be warned to give testimony concerning the existence, type and amount of the attached claims (item (i)); intent to pay, amount to be paid and reason for not paying (item (ii)); persons who have a right in connection with the attached claims that has precedence over the attachment, and the type and extent of said right (item (iii)); cases in connection with enforcement of the attached claims, the creditors, the date of service and the extent of enforcement (item (iv)); and name and address of government or other office involved in a disposition for arrears against the attached claims as well as the date of service of the attachment notice and the extent of attachment (item (v));. These clauses do not require the tertiary debtor to give testimony concerning the vesting of the attached claims, and consequently if these clauses are considered to be parallel to the function of a debtor as an information center in an assignment of claims, the debtor is not required to disclose the person to whom the claims have been assigned as long as the debtor discloses, to persons who have inquired about the holder of the rights to the relevant claims, that the claims have been assigned to another person. From this perspective it appears to be fully possible to argue that having definitive knowledge of who is the purchaser of the claims does not constitute an indispensable element in order for the debtor to fulfill its role as an information center to the extent required to allow the validity of a consent as a means of perfection against third parties.

[40] It is difficult to state that there has been sufficient discussion in the past of the particulars of the role of an information center. From this perspective, when examining the function as an information center that is to be fulfilled by a debtor who has made a prior consent center, when a third party inquires concerning the vesting of claims it would appear to be sufficient for the debtor to respond to the extent that the debtor is aware. If from this response the third party is able to be apprised of the vesting of the claims, on the basis of the third party's conducting its own study, then it would appear to be fully possible to argue that the debtor has fulfilled its role as an information center. According to this interpretation, if a debtor receives an inquiry from a third party, the debtor only needs to respond that the debtor has made a prior consent, and it would be sufficient to give this type of

Even if the 2001 Supreme Court Judgment took the position that a consent of a promise to assign is the same as a prior consent, since this was a case in which seven years had elapsed from the execution of the promise to assign before the right of completion was exercised, it is possible to interpret this as not falling under the situations set forth in (1) through (3) above, and consequently that the intent of this judgment does not extend to the above discussion.

With respect to this issue some agreements that are actually executed do state that the date of transfer of the claims is to be after the execution of the agreement, and stipulate conditions precedent in connection with the occurring of the effect of the transfer of claims on said transfer date. Even if a condition precedent applies to the occurring of the effect of the transfer of claims, in situations in which the condition precedent is only a formal condition for the purpose of protecting the assignor, such as that certain documents have been prepared, or that the representations and warranties in the agreement are truthful, it is almost certain that the conditions precedent will be satisfied on the date of the transfer of claims. In these situations it is possible to take the position that the existence of these conditions precedent do not have any impact on the awareness of the debtor in connection with the probability of the assignment of claims, that consequently the attachment of these conditions precedent is covered by the consent of the debtor and the prior consent will constitute a valid means of perfection against third parties without it being necessary for the debtor to have knowledge that said conditions precedent were satisfied. Moreover, even if it is not certain that a condition precedent of this nature will be satisfied on the date of transfer of the claims, if the debtor itself is able to have knowledge that the condition precedent was actually satisfied on that date, then the debtor would have knowledge of the certainty of the assignment of the claims, and consequently it would be possible to allow the validity of the prior consent of the debtor as a means of perfection against third parties.[41]

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response even in the case of a form of prior consent that is accepted as a valid means of perfection against third parties.

[41] Kobiki, *supra*, at 17, which implies that in the case of perfection by means of a notice, a situation in which the assignment date is not specified, but for which the debtor will be able to be aware of whether the conditions precedent are satisfied even though satisfaction of these is not guaranteed, it is possible for a notice that is made prior to satisfaction of this condition to be accepted as a valid measure of perfection against third parties. A possible example of this would be a clause stating "at such time as Debtor A obtains (the relevant) permit from the mayor" (nevertheless an opinion is also added that the reasoning in order to distinguish between cases in connection with the time of the notice would be convoluted, and it may be that this would not conform to the intent of perfection which is that of simplicity). In contrast to this, Shin Ikeda, HANREI JIHÔ, *supra*, at 178, implies the interpretation that the requirements for perfecting prior to the satisfaction of the conditions precedent in a conditional assignment of claims should be treated in the same manner as that for a promise to assign the claims, commenting within his interpretation of the 2001 Supreme Court Judgment that "it would seem that in principle conditions precedent should also be treated in the same manner as in the present promise type of arrangement, but as stated above, in theory as well it is not impossible that they would create a separate category, and consequently it would probably best to take a cautious stance and wait for the judgments of the final appeals to the aforementioned

As stated above the most common interpretation concerning perfection against the debtor is that the debtor's consent is valid regardless of the form it takes. Nevertheless Civil Code Art.467 appears to be straightforward in its language in stating that if a notice or consent that stands as valid in perfecting against the debtor is made by means of a deed bearing a certified date, then it will also stand as valid in perfecting against third parties. Moreover, it is also possible to take the approach that an even more cautious judgment should be made of the awareness of the debtor in connection with perfection against the debtor since the debtor itself may suffer immeasurable loss depending on how the requirements for perfecting against the debtor are satisfied, whereas perfection against third parties is merely an issue of deciding the priority among third parties and thus only requires that there be some objective standard. On the basis of the above discussions, it is possible to take the approach that a prior consent of the debtor should only be accepted as a valid means of perfection against the debtor to the same extent as the validity as a means of perfection against third parties would be permitted, as stated above.[42]

(3) Date on Which Perfecting Takes Effect

If a prior consent of the debtor is to be allowed as a valid means of perfecting against third parties, the next issue is the time at which the validity comes into effect. With respect to this issue, it would appear to be necessary for the assignment of claims to have been carried out since this is the factual relationship that is the basis for permitting the validity of perfecting,[43] and consequently the reasonable approach would appear to be

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High Court Precedents (author's note: Osaka High Court Judgment of July 31, 1998, and Osaka High Court Judgment of September 2, 1998)." Nevertheless the conditional assignment of claims discussed in this article is one of a condition precedent that cause has occurred such as suspension of payment by the debtor, and the assignment date is not specified. Consequently this appears to be a case in which the debtor would be unable to be aware of the probability of the assignment of claims.

[42] Naturally in connection with perfecting against the debtor there is an aspect that the debtor has waived its own rights by means of the prior consent, which is given as the reason in the standard interpretation, and it is possible to argue that this differs from perfecting against third parties. Moreover, even with respect to the form of a prior consent which is not accepted as a valid means of perfection against the debtor, this should be accepted as having some effect depending on the case as a result of its being an expression of intent as stated in note 3 above, and not simply considered to be of no effect. In some circumstances it might have an effect that is close to that of accepting the prior consent as being a means of perfection against the debtor.

[43] Dôgauchi, *supra*, at 20, argues that in a situation of a promise to assign, in the event that the holder of the execution right makes an expression of intent to exercise this right of execution after payment is received from the person who makes a duplicating purchase of the rights prior to the execution of on the promise, that "it clearly would not be possible to accept the allowing of the notice of the promise to assign to have an effect that is similar to a provisional registration for the purpose of preserving priority," since this would have an adverse impact on the second purchaser in which that person would have as duty to return unjust earnings to the holder of the execution right (see also Seiji Ikeda, *supra*, at 139, who also takes the interpretation of denying the acceptance of a notice or consent of a promise to assign as having validity in preserving priority that is similar to a provisional registration). As argued in these articles, it would seem that the conclusion would be that it would be difficult to allow validity in a prior consent prior to the fulfillment of the factual relationships consisting of the assignment of the claims.

that the date of effect of the perfection against third parties by means of the prior consent would be whichever is later of the date on which the certified date was obtained, or the date of assignment of the claims.[44] With respect to this approach it is possible to refer to the dominant interpretation which holds that the time of effect of perfecting of a current assignment of future claims is the time at which the requirements for perfection are satisfied,[45] and to argue that the time in which the perfection against third parties becomes valid and in effect is not when the claims are assigned, but when

[44] According to this interpretation, it is possible to take the following three approaches concerning the validity of a prior consent, assuming that the assignment of claims is made after the certified date is obtained:

i. The prior consent becomes valid as a means of perfection against third parties from the time that the assignment of claims is made;

ii. The prior consent becomes valid as a means of perfection against third parties, on the date that the assignment of claims is made, but retroactive to the time that the certified date is obtained; and

iii. The prior consent has an effect of preserving priority that is similar to a provisional registration from the time that the certified date is obtained, and has complete validity as a means of perfection against third parties, from the time that the transfer of claims occurs.

Different conclusions would be reached between i., ii., and iii., above if during the period that is after the certified date is obtained and prior to the time the claims are to be assigned, the assignor assigns the relevant claims to a third party and this satisfies the requirements for perfecting against third parties, or if during this period the relevant claims are attached by a third party, or in the relationship with a person such as the bankruptcy administrator if the assignor goes bankrupt or other legal bankruptcy proceeding commences. According to theory i., in this case as well the third party or bankruptcy administrator, etc., would have priority; while according to ii. and iii., the assignment of claims in connection with the prior consent would have precedence. As discussed below this presents the same issue as when the prior consent is held to have effect from the time that the requirements for perfecting are satisfied (it is also possible to interpret this in a manner that protects the third party in accordance with the doctrine of Civil Code Art.116, while at the same time adopting the reasoning of theory ii.) Moreover, the same criticism as made by Dôgauchi, *supra*, at 20, and Seiji Ikeda, *supra*, at 139, in connection with allowing a promise to assign to have a similar effect as a provisional registration, as quoted in note 43, also applies to allowing a prior consent to have an effect that is similar to a provisional registration.

[45] From its conclusion the Supreme Court Judgment January 29, 1999 (53 MINSHÛ 1 at 151) should be interpreted as meaning, although this is not explicitly stated, that the time of commencement of effect as a perfection against third parties in an assignment of future claims is based on the time that the requirements for perfecting are satisfied, and not the time at which the future claims occur (Naoi, Yoshinori. *Saikô Saibansho Minji Hanrei Kenkyû* (Study of Civil Case Precedents of the Supreme Court) 119 HÔGAKU KYÔKAI ZASSHI (Magazine of the Law Association) 4 at 775; Hiroto Dôgauchi. *Shorai Saiken no Hôkatsuteki Jôto no Yûkôsei to Taikô Yôken* (Validity and Perfecting of Comprehensive Assignment of Future Claims) JURIST 1165 at 78; and IKEDA, MASAO. SAIKEN JÔTO HÔRI NO TENKAI (Developments in Legal Theory on Assignment of Claims) at 379.) Professor Ikeda argues that "in the aforementioned case precedent of 1999, the purchaser received the assignment of future claims from 1982 through 1991 and a notice of this assignment was made. The attaching creditor attached claims coming into existence from July 1989. The court held that the purchaser had priority over the attaching creditor, and consequently the time of effect as a valid means of perfecting an assignment of future claims, against third parties, should be determined to be based on the time at which the requirements for perfecting are satisfied and not the time at which each future claim comes into existence. . . That being the case, in order for the above logic to be consistent, then the time of transfer of claims in the event of an assignment of future claims must be the time of the agreement to assign and not the time that each of the future claims comes into existence, since it would be logically inconsistent if only the requirements to perfect were to be held to have been satisfied in advance in connection with rights that have not yet been acquired."

the requirements for perfection are satisfied, and that for a prior consent this would be when the certified date is obtained. There are doubts, however, about the conclusion that is drawn by the latter interpretation, since if the claims are attached after the prior consent but prior to their assignment, or if the (person who would be) the assignor goes bankrupt then it would not be possible for a person such as the attaching creditor or the bankruptcy trustee to contest the prior consent and they would be unable to obtain their right to distribution of the assets.[46]

With respect to the question of whether the time of the certified date should be the standard or whether this should be the date on which the (debtor) became aware that the certified date was obtained, the above discussions argue that this should be the time of the certified date, because if this were to be the time at which the debtor became aware that the certified date had been obtained, then it would be necessary to resend to the debtor the letter of consent bearing the certified date as evidence of this date, by contents certified mail, and disputes concerning the time at which the debtor became aware would result if this was not sent. It would also contradict the intent of preventing collusion to manipulate the time at which the requirements to perfect were satisfied, which was the original reason for requiring a certified date. As long as the debtor is actually aware through its prior consent that the claims will be assigned in the future, then the debtor would also be aware that a certified date may be obtained. Consequently it would be possible to ask the date of the certified date, and thus it would appear that there would not be any problem in making the interpretation that the requirements for perfection against third parties would be satisfied as of the time that the certified date was obtained.

Once the certified date has been obtained, it would not be impossible to take the position that the perfecting would be valid retroactive to the time of consent. Nevertheless it would appear to be difficult to adopt this interpretation of making the validity retroactive to the time of consent, as it is likely that this would result in uncertainty in legal relationships in a situation in which a third party attaches the relevant claims after the prior consent and thereafter the certified date concerning the prior consent is obtained, thereby reversing the priority of the person who received the prior consent and the attaching creditor, together with the change in the time.[47]

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[46] Dôgauchi, Hiroto. *Saiken Jôto Tokureihô 5 Jô 1Kô ni Iu "Jôto ni Kakawaru Saiken no Sôgaku" ni Tsuite* (Concerning the "Total Amount of Claims in Connection with an Assignment" as set forth in §5.1 of the Special Measures Law Concerning the Assignment of Claims) KINPÔ 1567 at 58. In this article Professor Dôgauchi argues that "in an assignment of future claims the act of disposition has already occurred before the claims have come into existence and consequently the effect of the disposition has already come into existence. Precisely for this reason the requirements for perfecting can be said to be satisfied at this time." In considering that the act of disposition, which constitutes the factual relationship, has already been made in a situation of a current assignment of future claims as stated in this interpretation, it is likely that the bases for the assumptions would be different from those that would apply in a situation of a prior consent in which the factual relationships have not yet come into existence.

[47] In relationship to the timing of ensuing of effect, if with certain constraints the validity of a prior consent is accepted as a means of perfection, and therefore the validity is accepted, within limits, of a consent made in advance by the debtor that the debtor will not raise any objection, then is possible

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to argue about when the effect of Civil Code Art.468, Para.1 as stated above would come into existence. From the perspective that respect should be afforded to the effect of the public reliance that is created by a consent that an objection will not be made, and that a person who relied on this consent and purchased the rights should be protected, it would seem that the conclusion would be that as long as the debtor has made a consent that the debtor will not make an objection, the debtor will be unable to make any protest against a good faith purchaser of the claims, including any right of protest that comes into existence after the consent, and that a protest of this nature should be resolved between the debtor and the assignor. Nevertheless since at the time of the debtor's consent that it will not make an objection, it is impossible for the debtor to lodge an objection in connection with a right of protest that has not come into existence at the time the consent is made, it would seem that prohibiting the debtor from setting up a protest of this nature against the purchaser would impose an inordinate burden on the debtor. It is therefore possible to come to the conclusion that the protests which the debtor is estopped from making, by means of consent that it will not make an objection, should be limited to a right of protest that has come into existence at the time of the consent (although estoppel against protest after the claims are transferred would naturally be an effect of the consent). It would appear, however, that the former interpretation is the more reasonable except in circumstances where this would contravene social order and mores, as it accepts the effect of Civil Code Art.468, Para.1 regardless of whether the debtor was aware of a right of protest, even in the event of a consent that an objection will not be raised after the assignment of claims.