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New Method of International Debt Collection

I. Introduction

Haraguchi International Law Office has engaged in international debt collection as a major business field since the establishment of the office in 2003. Our clients in the early age were foreign debt collection agencies in the United States. Our recent clients are shifting dramatically to Asian collection agencies and trade insurance companies, in particular, the collection agencies, state-owned trade insurance companies and foreign creditors in China and South Korea. Especially, last year we handled 60 cases (total debt amounts exceeding 2 billion JPY) from China and we collected 500 million JPY debts on behalf of Chinese Company. The features of Chinese clients can be summarized to 2 points; abundant cash and quick decision making. We took advantage of such merits, and conducted various debt collections such as provisional attachment against claims, provisional disposition prohibiting transfer of possession of movables, statutory liens over movables, and extension of security interest to proceeds of collateral, etc. This Article provides a brief explanation of several debt collection methods which we recently utilized for our Chinese client, a solar panel maker.

II. The Practice of Sales and Purchase of Solar Panels

Viewing the sales practice of solar panels by a Chinese manufacturer, solar panels are often sold not solely but combining power conditioner (instruments converting DC to AC so that solar generated electricity may be transmitted), and connection cable as a solar power generation system.

A contractor of the solar panel generation system, often the purchaser of the solar panels, often proceed construction pursuant to agreement with the employee to (1) prepare for the land, (2) to implant concrete poll, (3) to set frame, (4) to place solar panels on frame, (5) to set power conditioner under panels, (6) to gravel for preventing weeds, and (7) to build wall.

Both frames and power conditioners are connected to panels by just screws, thus neither panel nor power conditioners are not under accession to either frames or land, and shall remain independent movable.

Resale price of solar power generation system correspond to 30-40 percent of total construction price.

Panels tend to be delivered to solar power generation site (or to warehouses located next to the site) in accordance with orders by employees, and remuneration shall be paid by the end of following month. Therefore, those panels may be placed in project site before the payment is completed. Panel manufacturers reserve ownership of its products until the payment is done. However, since those panels are considered as individual movables, there is a risk that the employer may obtain ownership of the panels upon the delivery of the panels to the employer as the bona-fide purchaser (Article 192 of Civil Code).

III. Collection of Unpaid Purchase Price of Panels

Considering the above mentioned, the initial legal action for panels manufacturer to collect unpaid purchase price would be to file motion of provisional disposition prohibiting transfer of possession of panels which are delivered to warehouses, and prevent the employee from obtaining the ownership of the panel as the bona-fide purchaser.

Then it is necessary to stop payment of purchase price. Recent solar power generation system construction agreements often provide that such system shall be regarded to be delivered to employer after employer test the system and find sufficient.

Since special agreement of reserving ownership of the panels between the seller and purchaser is rare to be explicit, the employee often purchases the solar power

generation system without any knowledge of such special agreement and therefore trust that the contractor is the owner of the solar panel. Therefore the employee would obtain the ownership of the panels even if the contractor does not own the ownership of the solar panels as the bona fide purchaser. In order to prevent this result, it is important to file motion of provisional attachment which prohibits the employee to pay the purchase price to the employee.

Moreover, the statutory lien is created in the solar panels in accordance with Article 311(v) of Civil Code to secure the payment obligation of the purchaser to the seller (solar panel maker) (Article 321 of Civil Code).

The solar panel maker therefore enforces the statutory lien in the solar panel until the ownership of the solar panel is obtained by the employer as the bona fide purchaser.

The solar panel maker is entitled to request the employer to pay the remuneration for the construction of the solar panel generation system upon the default of the payment obligation of the purchaser of the solar panel (and the contractor of the construction of the solar panel generation system) in accordance with Article 304(1) of Civil Code as the statutory lien holder in the solar panels sold by the solar panel maker to the contractor.

The solar panels maker shall note the risk of the bankruptcy of the purchaser of the solar panels (contractor) as the provisional attachment to collect the payment obligation of the purchase price shall be invalidated upon the commencement of the bankruptcy procedure of the purchaser under Article 42 of Bankruptcy Act.

IV. Issues in Each Procedure

The issue of provisional disposition prohibiting transfer of possession of movables based on the remained ownership of the solar panel under the special agreement is whether it is necessary to terminate the sales and purchase agreement of the solar panel.

Although the general understanding in practice requires the termination of the sales and purchase agreement for the solar panel maker to exercise the ownership right in the solar panel, it is not a good method to collect the purchase price. This is because the statutory lien is created to secure the payment obligation of the purchaser to the seller under the sale and purchase agreement of the solar panels, the termination of the

sales and purchase agreement would terminate the statutory lien as well.

Moreover, some courts require the hearing of the purchaser in determining the issuance of the provisional disposition prohibiting transfer of the possession of solar panels allowing court execution officer to possess the solar panels. This is because the provisional disposition, in particular, allowing court execution officer to possess the solar panel could cause the detrimental damage to the purchaser (and contractor) of the solar panel (see Article 23(4) of Civil Provisional Remedies Act). This procedure may cause material delay of the issuance of the provisional disposition order, which leads to completion of the construction by using the solar panel and employee's acquisition of the ownership of the solar panels as the bona fide purchaser.

We were luckily able to obtain the provisional disposition order prohibiting transfer of possession of movables without either termination or debtors hearing.

The enforcement of the statutory lien is in general required to provide the movables (solar panels) to the court execution officer or to obtain the written consent of the possessor of the movables approving the enforcement of the statutory lien in the movables (foreclosure sales) under Article 190 (1)-(i) and (ii) of Civil Execution Act). The statutory lien may, however, be enforceable if the execution court approves it in accordance with Article 190 (1)-(iii) and (2) of Civil Execution Act. However, in case solar panels are set up at solar power generation system located in the third party's land, there is a possibility that the order of statutory liens may not be issued because the panels are not under seller's possession (Article 190 (2) and 123 (2) of Civil Execution Act).

We luckily conquered these challenges, and obtained the order by the court, and proceeded to the enforcement of statutory liens in the solar panels attached in the frame of the solar power generation system located in the project site of the employer.

Although the solar panel maker is entitled to request the employer to pay the remuneration for the construction of the solar panel generation system as the statutory lien holder in the solar panels, the solar panel maker is required to obtain the attachment and transfer order from the court before the remuneration is paid by the employer to the contractor (solar panel purchaser).

To obtain the attachment and transfer order from the court is quite difficult under the recent Supreme Court judgment held on December 18, 1998..

The Supreme Court held that the seller of the movables used in the construction project is in general not entitled to request the employer to pay the remuneration to be payable to the contractor, provided however, the seller of the movables may prove the special circumstances where all or part of the remuneration of the construction project is deemed to be equal to the resale price of the movables in consideration of the portion of the sales price of the movables in the entire remuneration of the construction project and content of the obligation of the contractor in the construction project.

In the Supreme Court case, the portion of the sales price of movables is more than 80% of the remuneration of the construction project.

We, however, luckily succeeded to prove the “special circumstances” and achieve the court order to request the employer to pay the remuneration to the solar panel maker even where the portion of the resale price of the solar panel is only 35% of the remuneration of the construction project.

V. Conclusion

As mentioned above, we successfully obtained various judgments from the relevant courts on behalf of fast-moving, cash-rich solar panels maker from China. Please note that the collection techniques used for the solar panel maker is not easily obtained as mentioned above. These techniques shall requires extensive knowledge of the practice of the techniques with the flexible and creative ideas within a very limited times. This filed is still quite new and surely challenging.

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