

Comments from the Perspective of Commercial Trusts

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1. Hong Kong: Comments on Professor HO's Presentation

As regards the share of trusts in Hong Kong, Professor Ho reports that pension trusts comprise 35%, and investment trusts comprise 25%. What is the basis for these numbers? Trust assets? If so, the share of commercial trusts seems too low.

Are individuals eligible to be "professional trustees"? If so, do regulations on professional trustees apply equally to such individuals and other corporate trustees? Also, is it permitted to engage in trust business if not serving as a professional trustee? If so, are there any applicable public regulations?

As regards commercial trusts, are there any public regulations or special statutes for specific areas (such as REITs) in Hong Kong? Are banks permitted to engage in trust business in Hong Kong? Under what conditions?

2. PRC: Comment on Professor LOU's presentation

Shengghon Mansion Trust. It is interesting that beneficial interests are divided under a senior-subordinate structure for credit enhancement. The scheme makes economic sense.

Qi Hang Plan. It is interesting that beneficial interests are divided and senior units are listed on an exchange and traded among institu-

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tional investors. What are the obstacles for such units to be traded among general public investors?

Under these two trust schemes, there must be many beneficiaries, and because different classes of beneficial interests are created, conflicts of interest among beneficiaries may arise. What is the legal rule as to the exercise of rights of beneficiaries? Is the majority rule adopted?

Yongqiao District. The main purpose seems to be to get finance, and not property management. If so, it is understandable that the trust scheme is not intended to transfer the management right itself.

Kunshan Chungao case. As the courts point out, the issue should be the interpretation of what the parties agreed.

In Japan, the Chinese examples mentioned above would all be labeled trust schemes for securitization, intended to obtain finance in capital markets. In Japan, trust schemes for collective investment were developed before those for securitization, and there were more legal issues in the latter than in the former. This implies that in China, if trust schemes for collective investment are developed in the future, there will be fewer legal issues for the industry to face.

China Trust Security Fund. This is understood to be a safety net for trust companies. This means that as far as trustees comply with laws and trust contracts, even if trust property is impaired, beneficiaries cannot make a claim against the own assets of the trustee, and thus cannot make a claim against this security fund. Is this correct? In other words, is it correct to say that this fund is to protect trust companies, not beneficiaries?

3. Singapore: Comments on Professor TANG's presentation

In Singapore, aside from general trust law (statutes and case law), are there any public regulations? Are banks permitted to engage in trust businesses? If so, under what conditions?

Is a scheme involving business trusts limited to assets other than real property? Or could it include real estate trusts (perhaps other than REITs, which may be regulated by a separate statute)? Is it possible for a business trust to invest in both real estate and other assets, such as shares and bonds?

Professor Tang reports that business trusts enjoy more favorable treatment than corporations in relation to dividends. Is this difference reasonable? What about REITs? Why are trusts rather than corporations used? In Japan, for public REITs regulated under a special statute, the corporate form, not the trust form, is used, and its shares are listed and traded on stock exchanges.

In REITs in Singapore, are investors beneficiaries and not settlors? Or are they settlors and beneficiaries at the same time? When units (investors' interests) are transferred, what will be transferred? The status of the beneficiary as a whole? Or some specific rights of the beneficiary? If investors are viewed as settlors and beneficiaries at the same time, is the status of settlor transferred, too, when an investor transfers his/her units?

As regards the management of trust assets, outsourcing is important and necessary for global investments in today's capital markets. Yet in Singapore, this seems to be restricted. How is this problem dealt with in practice?

4. Korea: Comments on Professor RHO's presentation

In Korea, in addition to trust law (as a private law) and the CMFIBA, are there special statutes covering specific areas, such as REITs?

Why does the CMFIBA provide a limited list of qualified trust assets? Do those assets mean "initial" trust assets? Would it be permitted that money is given into a trust initially, and then it changes to shares later, that is, after the trust is set up? Is it permitted that money is initially put in, which is changed to real property? Even after the trust

is set up, must trust assets be within the list of the CMFIBA?

Would it be permitted for a money trust and a real estate trust to be in one trust? Would it be permitted that in a given trust, part of the trust assets are money, and the rest is real property?

Would it be possible that the scheme using four types of real estate trust is done in the form of a corporation? Do trusts enjoy more favorable treatment than corporations? Legally or under tax treatment? Why?

As regards trusts for security purposes, how about bonds with security (secured bonds) in Korea? In Japan, there is a separate special statute for corporate bonds.

In Korea, is it correct that under the Trust Act loans from the own account to the trust account are permitted if it is expressly provided for in the trust contract, but they are not permitted under the CMFIBA?

As is discussed in the report by Professor Rho, if the "no-profit rule" is applied, the trustee should not be profited, so not only 5% but 4% should not be claimed. It seems controversial if even 3% can be claimed. In Japan, this issue is generally dealt with by the rules concerning conflicts of interest transactions. Loans from the own account is permitted if certain conditions are met. If loans are made from both an outsider and the own account, most scholars take the position that those claims are ranked *pari passu*.

Reimbursement claim against beneficiary. In Korea, would it be valid if the trust contract provides that a waiver right does not exist? And would it be valid if the trust contract explicitly provides the trustee with the right of reimbursement against beneficiaries? In Japan, under the current Trust Act of 2006 (effective from September 30, 2007), reimbursement against beneficiary is permitted only if so provided in the trust contract. Under the old Trust Act, such reimbursement is permitted even if it is not expressly written in the trust contract.

In Korea, are there "collective" trusts, for example, those similar to Japanese money trusts? There, a trust contract exists for each beneficiary (that is, each trust is set up for each beneficiary) but all property is commingled and managed collectively, so that there is only one fund or undivided trust property in practice. Are there any special regulations on these type of trusts in Korea? Where a trust contract needs to be amended, what would be the legal rule? Would an amendment by the decision of majority of the beneficiaries be permitted under a special statute (as in Japan) or otherwise?

5. Other Comments

Under the scheme of trusts for investment purposes, mergers or divisions of trust funds are sometimes called for in practice. How legally can they be made in each jurisdiction?

I think that there are two hurdles which might prevent developments of trust schemes. One is that a trust may make it possible to do what cannot be done using other legal forms, such as a corporation or a contract other than a trust contract. The other is that some of the traditional principles regarding trusts may operate as obstacles where a trust is used to satisfy demands in modern society. I thought from experience in Japan that the former was really for the development of civil trusts and the latter was important for the development of commercial trusts. However, I now have the feeling that even for civil trusts, where they compete with offshore trusts, how to resolve the latter obstacles seems to be the key.

For the duty and liability of trustees in commercial trusts, the relevant situations should be classified into certain categories from the perspective of what arrangements are called for in economic substance. The legal rules regarding the duty and liability of trustees should not be the same in all contexts in commercial trusts, and should be considered depending on the relevant category where trusts are deployed.