

Some Comments on Securitization of Real Property from the Civil Law's Point of View

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Currently so-called "securitization" attracts a number of businessmen, economists and lawyers. Securitization of real property is one of their favorite subject to discuss. Securitization of real property was certainly a herald of more influential securitization of financing in the United States as well as in developed European countries. However, it seems to me that discussions on this topic in Japan has been focused mainly on financing or tax aspects, and that the side of real property has been mostly neglected. Securitization needs highly complex scheme and the idea is abstract itself. But real property is "real" and is subject to actual use, management and disposition.

In this article, I looked into several phases of securitization of real property, namely, securitization of debt type, equity type and hybrid type. The first one, debt type securitization of real property is in fact securitization of debt secured with hypothec created on real property. Typical is hypothec bill. The second type, equity type, means subdividing of ownership right of real property. Typical are "land trust" and co-ownership of commercial buildings. The third, hybrid type is something mixed with debt and equity. That is, for instance, convertible mortgage in the United States. I added the fourth type, namely, membership right of golf or resort club which represents equities in the club facilities, although this type is rarely discussed under the heading of securitization.

Among three aspects of real property, that is ownership, use and management, ownership is originally ideal, and is easily fit for securitization. Management is real, and indispensable even if the property is securitized. As to use aspect, use of exchange value of real property as security is suitable for securitization, though use of utility value is real. Securitization of real property has been promoted as an investment method, depending on ideal nature of real

property in ownership and security. Therefore, though a holder of securitized real property is characterized as a real right holder under Japanese civil law, he is in fact nothing but a creditor with a right of preference.

On the other hand, people acquire membership right of resort club for the purpose of both investment and self-use. Though members with equities in club facilities have right to decide how to manage their own property, they cannot manage it, because of the large number of co-owners. The same may be said of subdividing of real property through "land trust" or co-ownership of commercial building. Subdividing without management might cause deterioration of the property. Trust is a useful way to unify wills of a number of co-owners with respect of management and disposition of the property.

As indicated here and there in this article, trust plays a great role in securitization of real property. A role of trust in managing the property as a unit should be regarded as important as well as the role of vehicle for securitization.