

## Indemnity from Beneficiaries

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In some cases, a trustee can properly borrow money in the administration of a trust. A trustee may also incur owner's liabilities arising from the fact that he or she hold the trust estate.

These liabilities are usually repaid from the trust estate, but may also be temporarily repaid from the trustee's own estate. When the repayment is made from the trustee's own estate, the trustee is entitled to indemnity from the trust estate, in accordance with Article 36 (1) of the Trust Law.

The trustee is also entitled to indemnity from the beneficiary in accordance with Article 36 (2) of the Trust Law. On the other hand, a beneficiary who has waived his or her rights is exempted from liability for indemnifying the trustee, in accordance with Article 36 (3) of the Trust Law.

Article 36 (3) is usually interpreted to mean that beneficiaries who release beneficial interest are exempted from liability to indemnify the trustee, even in cases in which liability was incurred prior to release.

I do not consider this interpretation reasonable. I would suggest that the Article should be interpreted to mean that beneficiaries who have disclaimed beneficial interest may be exempted from liability, but that beneficiaries who have accepted beneficial interest cannot be exempted from any liability which may have been incurred prior to release.

In cases in which the beneficiary acted as the settlor, the beneficiary is not permitted to disclaim beneficial interest, because it is the beneficiary who entrusted the estate as the settlor and has become the beneficiary for his or her own intention. In such a case the beneficiary is obliged to bear the risk of any loss which might arise notwithstanding despite the trustee's proper administration of the trust.

In cases in which the beneficiary did not act as the settlor, he or she is permitted to decide whether to accept or disclaim beneficial interest. The disclaimer has a retroactive effect, and is used in order to free the beneficiary of any liability as beneficiary. But once the beneficial interest is

accepted, the risk of any loss arising out of proper administration of the trust should be borne by the beneficiary who becomes the real owner of the trust rather than the trustee, provided of course that such loss is not the result of any error or neglect on the part of the trustee.

I believe that Article 36 (3) should be understood as specifying that only disclaiming beneficiaries are to be exempted from liability, and that a trustee is entitled to indemnity from beneficiaries who have accepted beneficial interest.