

Establishing the Right of Pledge on Beneficial Interests in the Securitization of Real Estate

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In the securitization of real estate, it is the common practice in Japan that SPC collateralises its beneficial interest, which is purchased from the originator, for the loan lender of the purchase money. However, the articles relating to pledge in Japanese civil code are not clear enough to give reliable guidance to the parties, which can be a sincere obstacle of developing the real estate securitization. For building up a firm foundation, this report analyses the problem mainly from the following three points.

First is the legal situation before the enforcement of the pledge. The civil code has some articles on this problem. However, these articles primarily concern the pledge on debt and do not necessarily bring the suitable conclusion for the one on beneficial interest. It is inevitable to take various features of beneficial interest into account through examining the articles of the Trust Law, and the intention of the parties that the beneficiary should acquire profits from the trust at least before the enforcement.

The enforcement process is the second. In principle, the enforcement of the pledge should be carried through court process. However, the enforcement of the pledge on beneficial interest should be out-of-court one, which meets the need of the pledgor, the pledgee, and the trustee.

Third is the problem after the enforcement. The trust should not terminate automatically, because the enforcement does not necessarily bring the final incompleteness of the trust. Even the pledge itself can be

considered to survive on the property which is delivered to the pledgee as the content of the beneficial interest. These results can be brought through the construction of Japanese civil code and the Trust Law. However, the contracts by which the pledge is established should provide detailed provisions.