

The Bankruptcy Remoteness in the Trust

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It is well recognized that the trust can be used to separate credit risks of settlors, trustees, and any related parties in the trust transactions from the entrusted assets, playing the important function of the bankruptcy remoteness, as is often observed in the asset securitization structures. However, it is not necessarily clearly settled that the legal relations among the trustee, the successor trustee, the settlor, and beneficiary of the trust, in the case of the bankruptcy of the trustee or the settlor. Accordingly, this article is aimed to cover and analyze this issue of bankruptcy remoteness with two aspects of remoteness both from the trustee and that from the settlor. The executive summary of this article is as follows.

First, from the viewpoint of the bankruptcy remoteness regarding the trustee, the issue whether the public notice of the trust is required when the successor trustee insists to the trustee in bankruptcy that the asset belongs to the trust is discussed. Although it is dominant opinion that the public notice is required, this article concludes that the public notice of the trust can be unnecessary because of the interpretation of the article 42-2 of the Trust Law and the validity of conclusion, creditor must not expect trust assets as trustee's assets.

Second, from the viewpoint of the bankruptcy remoteness regarding the settlor, the bankruptcy remoteness in the asset securitization and the trust for the security purpose secured interests are discussed.

The concerns regarding the bankruptcy remoteness from the settlor's credit risk is usually discussed in the two contexts. First, in the

context of the comparison of trust structure with the SPC(Special Purpose Companies) structure and second, in the context that the general concept of the bankruptcy remoteness of the trust and the discussion based on the assumption the securitization cannot always meet the bankruptcy remoteness. As the former issue, it is concluded that the trust structure is different from the SPC structure in that the trust must be examined in the cases of both entrustment and evaluation of the trust and that once trust is validly constituted, the trust is never recognized as secured interests. As for the latter, it is concluded that the as long as the trust is constituted, the bankruptcy remoteness must be accomplished and there found no inconsistency between general concept of the trust and securitization transaction.

Regarding the trust for the security purpose, there is concern about the bankruptcy remoteness whether the trust for the security purpose may be subject to the bankruptcy procedure on the ground that the trust for the security purpose is aimed to preserve the specific credits and it has the same function as the secured interests. With this regard, the criteria to judge whether such trust may be subject to the bankruptcy regulations is up to whether the entrusted assets may compose the settlor's assets and it is concluded that even the trust for the security purpose has no ground for the compliance to the bankruptcy procedures as the assets are validly transferred to the trustee and the settlor retains no liability upon the assets.