

On Various Issues Regarding Trusts of Security Interests -A Study of Trusts of a Mortgage or a Revolving Mortgage-

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The Trust Law in Japan amended in 2006 allows a person to establish a security interest for entrustment to a trustee.

A trust of a security interest enables the effective management of a security (such as cost saving and the smooth exercise of rights), as the secured party acts as the trustee. However, there are some issues that need to be solved for the actual use of a trust of a security interest, including the application of the Civil Code and other security law systems, and the adjustment of rights and obligations of the parties concerned.

This paper attempts to solve these types of issues when they arise upon the entrustment of a mortgage or a revolving mortgage. The following points are roughly discussed in this paper.

1. Various Issues Concerning the Application of the Civil Code and Other Security Law Systems

(1) Generally, a trust may be established between a settlor and a trustee. When a trust of a security interest is established, however, it may be necessary to involve creditors or mortgagors (persons other than the parties of the relevant trust agreement) in the establishment of the trust, depending on the manner of establishment, in order to ensure the effectiveness of the trust as a security.

(2) It must be provided that the beneficiary of the trust of a security interest is the creditor of the claim to be secured. This is because the beneficiary shall be the person who should reap the benefits of

the security. The beneficiary is not necessarily to be appointed in the name of a certain person, but even in such case, the beneficiary shall be the creditor of the claim to be secured at any time. As to the trust of a revolving mortgage in particular, there shall be no provisions under which a creditor unexpected to the person establishing the security interest becomes a beneficiary.

(3) In general, the mortgage may not be established such that the mortgage is jointly owned by persons holding different claims. Rather, the mortgage may be granted as jointly owned by beneficiaries having different claims when the trust of a mortgage terminates without foreclosure of the mortgage; provided, however, that such joint ownership may require the consent of the owner of the collateral.

(4) Even if one security interest secures two or more claims, the proceeds of such collateral are generally allocated to payment of such claims *pari passu* at auction. As for a trust of a security interest, however, the proceeds of such collateral may be allocated to payment of claims in different orders by beneficiaries.

2. Issues Concerning the Adjustment of Rights and Obligations of Parties Concerned

In order to make trust of a security interest work stably, the rights and obligations of the parties concerned need to be adjusted. For example, the settlor and the beneficiary generally hold their own respective rights, while their rights under the trust of a security interest should be limited within a certain scope.