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Financial Law Board

Interim Summation of Issues Concerning the Possibility of Applying Article 53(1) of the Bankruptcy Law to Trust Agreements with a Clause Specifying Payment of Commission by the Trustor

On December 15, 2006, the new Trust Law was promulgated, marking the first complete overhaul of the Trust Law in 80 years (the "New Trust Law"). Even the New Trust Law left to interpretation the issue of whether it was possible to use Article 53 of the Bankruptcy Law to rescind a trust agreement with a clause stipulating payment of commission by the trustor, which was an issue that had been discussed for some time. The Financial Law Board has on this occasion published its "Interim Summation of Issues Concerning the Possibility of Applying Article 53(1) of the Bankruptcy Law to Trust Agreements With a Clause Specifying That the Trustor Will Pay a Commission to the Trustee," as a contract for which neither party has performed its obligations. The relevant discussion of issues is an attempt to make a study in the form of an interim presentation of the relevant issues.

I. Issues

There has been discussion from the time of enactment of the current trust law as well as the former Bankruptcy Law regarding whether a bankruptcy administrator of the trustor is able to use Article 53 of the Bankruptcy Law to rescind a trust agreement with a clause stipulating payment of commission by a trustor to a trustee (hereinafter a "Commission Payable Trust Agreement," or "CPTA"), as a bilateral contract for which performance has not been made by either party (the "Relevant Issues"). There is a particularly increasing necessity to study this issue since at the present time trust beneficial interests are used widely as a financial product, and the desire has been expressed to impose a requirement on the trustor to pay the trust commission.[1] The New Trust Law does not contain any direct clause addressing this issue, with Article 163(viii) only giving indirect reference to the effect that if a trustor receives a ruling of commencement of bankruptcy proceedings, and the trustor has trust agreements for which obligations are still outstanding, it may be possible that the bankruptcy trustee of the trustor may cancel the trust agreement, by virtue of Article 53(1) of the Bankruptcy Law. The question of what type of trust contract may be rescinded pursuant to Article

[1] Since the presentation of the Relevant Issues, this option has been eliminated in practical use, and restrictions have been imposed on trust schemes that offer an advantage of flexibility. For practical purposes, in most cases schemes are formulated with stipulations such as that the trust commission is to be collected from the trust assets, or a separate trust is created for expenses, thereby minimizing the remaining obligations of the trustor.

53(1) of the Bankruptcy Law is understood as having been left to interpretation.[234] It is conceivable that rescission under Article 53(1) of the Bankruptcy Law will be carried out in connection with a trust agreement for which the trustor has not performed on its debts in connection with delivering trust assets (in the event that there are trust assets that the trustor has not delivered to the trustee after executing a trust agreement), or a trust agreement in which the trustor has a duty to add to the trust, as long as the trust constitutes a bilateral contract for which performance has not been made by either party. It remains difficult to state how rescission under Article 53(1) of the Bankruptcy Law is to be handled in connection with a CPTA, which is the subject of discussion in this essay (hereinafter the position that rescission is possible shall be referred to as the *supporting doctrine*, and the position which holds that rescission is not permitted shall be referred to as the *denial doctrine*).

In order to prevent the discussion from becoming two broad-ranging, the discussion below will assume a situation in which the trustor is the originator in a securitization scheme, and promises to pay a trust fee to the trustee during the period of a trust, in accordance with a trust agreement that is entered into with a trustor for the purposes of securitization, with the trust being created in the form of a grantor trust,

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[2] HÔMU SHÔ MINJIKYOKU SANJIKANSHITSU (Advisory Office of the Civil Affairs Bureau of the Ministry of Justice), SHINTAKU HÔ KAISEI YOKÔ SHIAN HOSOKU SETSUMEI (Supplemental Explanation Concerning the Proposed Outline of the Amendment to the Trust Law), 27–28.

[3] With respect to whether Article 53 of the Bankruptcy Law would apply in the event of a ruling of commencement of bankruptcy proceedings or if other insolvency proceedings are commenced against the trustee, for the following reasons it would appear that rescission of the trust agreement by a person such as the bankruptcy administrator was not envisioned, even if the trust agreement were to constitute a bilateral contract for which performance has not been made by either party: (i) since the issuing of a ruling of commencement of bankruptcy proceedings against a trustee would constitute cause for termination of the duties of the trustee (New Trust Law Article 56(1)(iii) and (iv)), a situation in which a person such as the bankruptcy administrator would use Article 53 of the Bankruptcy Law to rescind a trust agreement is not foreseeable; and (ii) the issuing of a ruling to commence rehabilitation procedures or a ruling to commence reorganization procedures in connection with the trustee will not terminate the duties of the trustee except as otherwise prescribed in the deed of trust (Bankruptcy Law Article 56(5), and (7)), but if continuation of the duties as a trustee would impede the progress of the insolvency proceedings, the trustee may resign from its position after obtaining consent from the trustor and the beneficiary(ies) or if permission is obtained from the court (Trust Law Article 57(1) and (2)).

[4] In the interpretation by the legislative drafting officer, the statement was made with respect to the Relevant Issues that, as assumed in this essay, when a portion of a grantor trust is assigned to beneficiaries after the creation of the trust, "normally a securitization scheme involves numerous beneficiaries to beneficiary rights of more than one layer, and consequently it would be difficult to view the rights that the trustor has as a beneficiary (author's note: this would appear to mean the rights in connection with matters such as the duty of the trustee to continue trust administration) to be the same as the rights of a trustor," implying that even if the trustor had a duty to pay trust commissions, the possibility of terminating the trust agreement as being a bilateral contract for which performance has not been made by either party would appear to be unlikely (Teramoto, Masahiro, *Shin Shintaku Hô no Kaisetsu (2)* (Interpretation of New Trust Law (2)) in KINYÛ HÔMU JIJÔ 1794 at 29). Moreover, the article cited in the preceding sentence also makes the point that it is "not easy to envision a situation in which the right of termination of a bilateral contract for which performance by either party has not been made would actually be executed" because arrangements would be made under contract with respect to the Relevant Issue, "since it would be possible to cause the voiding (of the obligation to continue trust administration) by having the trustor lose its right as trustor through stipulation in the deed of trust, it would appear that in practice as a result of stipulating clauses such as these it would not be likely that a situation would occur under which the right of rescission could be executed after the fact in contradiction to expectation."

while the trust beneficial interests will be assigned to third party investors, for valuable consideration. As a consequence the trustor, the trustee, and the beneficiaries exist as different entities, with the trustor as originator having fallen into bankruptcy and having entered into bankruptcy proceedings.[5] The approaches discussed herein are believed to apply equally to the relevant clauses in the Civil Rehabilitation Law as well as the Corporate Reorganization Law, but for the purposes of simplicity and clarification the following discussion is limited to the Bankruptcy Law.

II. Evaluation from the Perspective of Trust Law and Contract Law

1. Academic Commentary Related to Trust Law in Connection With the Relevant Issues

The relevant issues have long been discussed in detail within the field of trust law, and although the supporting doctrine[6] and the denial doctrine[7] stand in juxtaposition, the denial doctrine has become the mainstream interpretation in recent years. It should be noted here, however, that with the exception of Takashi Saitô and Kazuo Shinomiya, discussions have focused on whether the trust contract by its nature can be considered to be a bilateral contract, as well as that traditionally academic commentary has assumed as a basis for discussion that a trustor has fallen into bankruptcy in a situation in which the trustor in a grantor trust is the beneficiary (most academic commentary has taken as a precondition for discussion that it would naturally not apply in the case of a trust that is made for the benefit of another party, i.e., one that is not a grantor trust). At the time that these commentaries were made, a securitization situation as presumed in this essay which by its nature is close to a non-grantor trust[8] was not envisioned,[9] and it

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[5] For the purposes of simplification we have referred to a situation of securitization, but in the current New Trust Law, it is now permitted to make an explicit statement of a security trust, so that in this case the beneficiary would be the secured creditor, while the trustor would be the creator of the security interest, and it is quite possible to envision that the creator of the security interest would pay the trust commission. In this case it is clear that taking the position that because of the bankruptcy of the trustor a trust contract may be rescinded as a bilateral contract for which performance has not been made by either party would be an inappropriate direction to take.

[6] For commentary by those taking the supporting position, see Saitô, Tsunesaburo, *Hasan Oyobi Wagi to Shintaku* (Bankruptcy, Composition of Creditors, and Trusts) in 44 KOKUMIN KEIZAI ZASSHI 2 (February 1,1928) 25, and Saitô, Iwao, *Shintaku Keiyku to Hasan Hô Dai 59 Jô to no Kankei* (Relation Between Trust Contracts and Article 59 of the Bankruptcy Law) in HÔRITSU SHINBUN 332 (July 15, 1933) (it is interesting that in this article the author states that there are court precedents that adopt the *denial doctrine*. See also Hosoya, Yûji, *Shintaku to Hôtei Seiri Seisan no Kankei (2)* (Relationship Between Trusts and Legal Restructuring and Liquidation (2)) in 9 SHINTAKU KYÔKAI KAIHÔ at 51 (October 28, 1935).

[7] For articles supporting the *denial doctrine*, see Sugawara, Kenji, KANSAI SHINTAKU JIHÔ 40 (July 10, 1927); HAMADA, TOKKAI, SHINTAKUHÔ GAIRON (Jichikan) 171 (February 28, 1934; Nakazawa, Susumu, *Shintaku Keiyaku no Seishitsu*, in SHINTAKU FUKKAN 63, at 115 (1965); Shinomiya, Kazuo, *Shintaku Keiyaku no Yôbussei ni Tsuite (2)* (Regarding the Characteristics of Trust Contracts as Real Contracts (2)), in SHINTAKU FUKKAN 65, at 6 (1966) (see also SHINOMIYA KAZUO, SHINTAKU HÔ (SHINPAN) (Trust Law (New Edition)) (Yûhikaku, 1989) 95, on which page the statement is made in connection with rescission pursuant to Article 59 of the Bankruptcy Law (Article 53 of the present Bankruptcy Law) that "this would not apply because of the unique nature of a delegation or trust.")

[8] For a discussion of this issue, see Tokitomo, Toshirô, *Shintaku wo Riyô Shita Shisan Ryûdôka–Shôkenka ni Kan Suru Ichi Kôsatsu* (An Inquiry in Connection With Factoring or Securitization

may be surmised that for this reason as well the previous commentary tended towards the dominant view of the denial doctrine in connection with the relevant issues.

2. Consideration of the Bilateral Nature of a CPTA

Since Article 53(1) of the Bankruptcy Law (or Article 59(1) of the previous version of the Bankruptcy Law) applies only to *bilateral contracts* for which obligations on the part of both parties have yet to be performed, it is necessary to consider whether a CPTA would constitute a bilateral contract. The term *bilateral contract* in Article 53(1) of the Bankruptcy Law is used in the same sense as this term is used under the Civil Code, so that a bilateral contract has the meaning here of a contract that imposes a duty on both parties that has the significance of valuable consideration to the other party, while other contracts are referred to as *unilateral contracts*.[10] Regarding the question of whether a CPTA is of the nature of a bilateral contract, traditional academic commentary consists of (i) the view that overall trust contract is a unilateral contract, viewing the clause specifying payment of the trust commission as being subordinate in nature;[11] (ii) the view that the overall trust contract is a unilateral contract, emphasizing the portion involving a change in assets;[12] (iii) the view that the overall trust contract is a bilateral trust, emphasizing the juxtaposition of trustee's duty to manage and dispose of the trust assets, and the trustor's duty to pay the commission;[13] and (iv) the view that the portion involving a change in the property rights and the portion involving a delegation are both of a nature of a bilateral contract.[14] All of these views make the presumption that a trust agreement is different from a normal bilateral contract, in that the portion involving a change in the property rights cannot be viewed as being an obligation that has a relationship of consideration that stands in juxtaposition to, inter alia, a duty of the trustor in creating the trust, so that this is a unilateral obligation, while at the same time the portion involving a delegation in the trust contract does present a relationship of juxtaposition between the trustor's duty to pay the trust commission, and the trustee's duty to manage the trust assets, which can to some extent be viewed as having a bilateral nature. Since in a trust agreement the portion involving a transfer of the assets and the portion involving the delegation cannot be separated, an approach which takes the position that the determination is to be made on the basis of which of these aspects is to be emphasized would lead to the conclusion that the delegation portion only has a status of being a vehicle to achieve the trust objectives, and that the essential feature of the trust contract is in its transfer of title in the form of

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Using Trusts), SHINTAKU KENKYÛ 19, at 18; and HOSHINO, YUTAKA, SHINTAKU HÔ RIRON NO KEISEI TO ÔYÔ (Shinoyama Shinpanban, 2004), at 185.

[9] Nakazawa, s*upra* note 7, at 115.

[10] See WAGATSUMA SAKAE, SAIKEN KAKURON JÔKAN (Discussions of Claims, First Volume) at 49 (Iwanami Shoten, 1954).

[11] Hosoya, *supra note* 6, at 51.

[12] Nakazawa, *supra* note 7, at 114.

[13] Hamada, *supra* note 7, at 117.

[14] Shinomiya, *supra* note 7, in *Shintaku Keiyaku no Yôbussei ni Tsuite (2)*, at 49, as stated above, however, the cited essay supports the *denial doctrine*.

separating title from the trustor while the property rights continue to be bound by the trust objectives, so that consequently the overall trust contract cannot be viewed as being a bilateral agreement.[15]

If it is not possible to separate these obligations, then this leads to the position that the question of which obligation is paramount has no significance, which in turn leads to the consideration from the perspective of what are the relationships that the trustor and the trustee have in connection with each of their claims. Studying the opposing relationships of the duty of the trustor to pay the trust commission, and the duty of the trustee to manage the trust assets shows that normally the trustee does not manage and dispose of the trust assets for the benefit of the trustor, but rather for the beneficiary. That being the case, a review of the relationship between the trustor and the trustee shows that in essence the trustee only has a duty to pay the trust commission to the trustee. There is no relationship in which the trustor receives payments or other benefits as consideration for the duty to pay a trust commission, as envisioned in a bilateral contract, and for this reason it would also appear that it is not possible to state that there is a relationship of opposing obligations between the trustor and the beneficiary either. Moreover, in principle it is assumed under the Trust Law that the trust commission will be collected from the Trust Assets (New Trust Law Article 54). And if the clause stipulating that the trustor will incur an obligation to pay the trust commission can be viewed as being outside of the scope of the Trust Law, then it would not appear to be possible to view the obligation of the trustor to pay the trust commission to constitute an opposing relationship under a bilateral contract. From this perspective as long as even the delegation portion cannot be viewed as being a bilateral nature in its essence, it would appear possible to take the position that a CPTA cannot be considered in its entirety to be a bilateral contract.[16]

III. Evaluation from the Perspective of Bankruptcy Law

1. Intent of Article 53 and Meaning of a "Bilateral Contract" as Prescribed in Said Article

As discussed above, the bilateral contractual nature as considered under the Trust Law has a different structure than that of a normal bilateral contract under the Civil Code. It is therefore necessary to study whether on the basis of the intent of Article 53 of the Bankruptcy Law this different structure is covered under the function filled by the term bilateral contract as prescribed in this Article. While the academic commentary on this Article 53 of the Bankruptcy Law (and Article 59 of the former Bankruptcy Law is turgid and complex,[17] the underlying premise for

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[15] Shinomiya, *supra* note 7, in *Shintaku Keiyaku no Yôbussei ni Tsuite (2)*, at 3, and Nakazawa, *supra* note 7, at 112.

[16] Nakazawa, *supra* note 7, at 115.

[17] Nakanishi, Masashi, *Sôhô Mirikô Sômu Keiyaku no Hasan Hô Jô no Toriatuskai* (Treatment Under Bankruptcy Law of Contracts That Have Not Been Performed by Either Party), GENDAI MINJI SHIHÔ NO SHOSÔ - TANIGUCHI YASUHEI SENSEI KOKI SHUKUGA (Various Aspects of Civil Justice—70th Birthday

the discussion is not simply whether obligations exist between both parties to a contract, but rather the relationship of consideration, which does not simply have the meaning of a contract for valuable consideration, but rather whether there is a relationship in which both obligations secure each other, meaning that there is a relationship in which a right of protest exists for simultaneous performance, or even if a relationship of this nature is not connected under substantive law, that the relationship is one in which simultaneous enforceability can be expected. This view is also supported by case precedent.[18] Here the duty of the trustee to pay the trust commission under a CPTA and the trustee's duty to carry out trust administration, cannot be found to have a relationship in which a right of protest exists for simultaneous performance, or in which simultaneous enforceability can be expected,[19] and moreover, since the duty of the trustee is to the beneficiary, these duties cannot be found to have a relationship in which both obligations secure each other. From this perspective as well, a CPTA can be viewed as not being covered under a bilateral contract as set forth in Article 53 of the Bankruptcy Law.[20]

2. Consequences if a Trust Agreement Were to Be Covered by Application of Article 53 of the Bankruptcy Law

If Article 53 of the Bankruptcy Law were to apply, a verification must be conducted of whether a result would be achieved that would be consistent with the true intent of this Article.

Assuming the Trust Law as it presently stands, there is no express stipulation concerning the outcome of a trust agreement if it is rescinded as set forth in Article 53 thereof, and since rescission under this Article is generally understood to be retroactive, this would result in the trust assets being returned to the bankruptcy administrator. Nevertheless it is not possible to make a finding of commensurate property that is to be delivered from the trustor to the trustee, or to recognize a substitute right of redemption as a creditor of the estate, leading to a result which has a striking lack of equity.[21]

Under the New Trust Law this will take the form of following the procedure for termination and liquidation of the trust as an effect of rescission pursuant to

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Commemoration of Professor Yasuhei Taniguchi) 498 et seq. (Seibundô, 2005); Itô, Makoto, HASAN HÔ (DAI 4 HAN, HOTEIBAN) (Bankruptcy Law (4th ed. Supplemented) 252 et seq. (Yûhikaku, 2006).

[18] Supreme Court Judgment of November 26, 1987 by the First Petty Bench, 41 MINSHÛ (Collected Civil Court Judgments) 8, at 1585; and Nakata, Hiroyasu, *Keiyaku Tôjisha no Tôsan* (Bankruptcy of Parties to a Contract), in TÔSAN TETSUZUKI TO MINJI JITAI HÔ, Supplement NBL 60 at 38.

[19] Nakazawa *supra* note 7, at 115.

[20] Whether there is a relationship of consideration is not an issue of interpreting the intention of the parties, but rather is a matter that should be determined on the basis of the contractual categorization. Consequently the conclusion would not differ depending on the type of stipulations in the trust contract. Supreme Court Judgment of December 22, 1981 by the Third Petty Bench, HANREI JIHÔ 1032 at 59.

[21] Moreover, according to the approach in case precedents and standard commentary, the status of the beneficiary in a trust would not be one of a third party as set forth in the proviso to Article 545(1) of the Civil Code.

Article 53 of the Bankruptcy Law,[22] but this is would be a termination of the trust in a form that would never have been envisioned by the beneficiaries of the trust that are its investors. Moreover, although the beneficiaries who are the investors acquire beneficial interests by paying consideration to the initial trustor and beneficiary, and if they are designated as beneficiaries of the residual assets can obtain relief to that extent, they cannot intervene in the trust contract and so are not protected by that contract, creating an unexpected and unreasonable result. The consequences of this would also be reason to support the proposition that Article 53 of the Bankruptcy Law does not apply to a CPTA.

3. Possibility That a Trust Agreement Would Be Covered by Article 56 of the Bankruptcy Law

The Bankruptcy Law does codify exceptions, categorized by the type of contract, to Article 53 thereof. Article 56 is one of these clauses, and stipulates exceptions in the event of a bankruptcy of a person such as a lessor in a lease agreement. The following discussion reviews whether this clause or its intent would cover a CPTA as well.

Article 56 imposes a restriction on rescission by a bankruptcy administrator, in the event that the perfecting requirements are satisfied for rights that are of a nature of a *right in personam* under a contract which creates a right of use (such as a lease agreement or a license agreement). The intention of this limitation is interpreted as being that of protecting that are *quasi-rights in personam.*[23] Although the relationship between Article 53 and Article 56 of the Bankruptcy Law and trust agreements appears not to have been discussed during the legislation process,[24] in view of the trust system in which title is caused to inure to the trustee in line with the purposes of the trust, it may be said to be necessary to provide at least the level of protection to the trustee who is the counter party, and moreover to the beneficiary who is the substantive counter party, as is provided for rights that have a nature of a *right in personam* under, inter alia, a lease, so that the trust contract is caused to continue in existence even in the case of bankruptcy of the trustor, and the trust assets in possession of the trustee are protected from bankruptcy by the trustor. It would therefore appear that an interpretation that holds that a trust agreement would also be covered under or would be similar to a "contract that creates a right with an objective of use or of income" would be consistent with the intent of the legislation.

4. Applying Supreme Court Case Precedent to Trust Agreements

A judgment of February 29, 2000 by the Third Petty Bench of the Supreme

[22] New Trust Law Article 175, et seq.
[23] Ogawa, Hideki, *Shin Hasan Hô no Kaisetsu (3)* (Interpretation of New Bankruptcy Law (3)) NBL 790, at 24.
[24] Record on deliberations of the National Diet concerning the Bankruptcy Law.

Court[25] states that "even if both parties in a bilateral contract have outstanding obligations at the time of the bankruptcy declaration, the bankruptcy administrator shall not be permitted to exercise the right of rescission (pursuant to Article 59(1) of the former Bankruptcy Law (text added by author)) if this would create a situation that is significantly unfair to a party as a result of the contract being rescinded." Thus as a legal principle of Article 59 of the former Bankruptcy Law (and Article 53 of the present Bankruptcy Law), if rescission of an agreement would be significantly unfair to a party, then exercise of the right of rescission would not be permitted. This then requires a study of fairness from a comprehensive perspective of the various circumstances including (i) the balance in the restoration to the original condition for which both parties are responsible as a result of the rescission; (ii) the extent of the adverse consequences to the other party as a result of the rescission, and (iii) whether the outstanding obligations of the obligors are essential and core obligations, or subordinate obligations. When applying these standards in considering a CPTA, it should be understood that although in form the counter party is the trustee, the beneficiary is an important counter party from a substantive sense when making a determination of the situation of interests. It is therefore necessary to make a separate consideration respectively of the trustee and the beneficiary. In this case, however, (i) the result of the rescission is not one of collecting from the trustor (even though having the beneficiaries retrieve the consideration that they have paid for the purpose of acquiring the beneficial interests would be the result that would be consistent with fairness), but instead the only effect is that the trust assets are to be returned to the trustor as a result of rescission of the CPTA, so that double enrichment is permitted resulting only in a significantly unfair increase in the bankruptcy estate; (ii) as discussed above, the extent of elimination of the adverse consequences on the counter parties as an effect of the rescission is not one of enabling the beneficiary who is a substantive counterparty to make any recovery (or if the

[25] Supreme Court Judgment of February 29, 2000, by Petty Bench No. 3, 54 MINSHÛ 2 at 553. This case involved the bankruptcy of a member of a members' only golf club with deposits for which annual fees were prescribed. The Bankruptcy Administrator rescinded the membership agreement pursuant to Article 59(1) of the Bankruptcy Law, and demanded the immediate return of the deposit. The judgment accepted that the duty of the golf course management company to enable members to use the golf course and the duty of the member to pay annual fees constituted unperformed obligations of both parties as set forth in this paragraph, but denied the exercise of the right of rescission by the bankruptcy administrator, stating that "even if both parties in a bilateral contract have outstanding obligations at the time of the bankruptcy declaration, if this would create a situation that is significantly unfair to a party as a result of the contract being rescinded," the bankruptcy administrator shall not be permitted to exercise the right of rescission. The determination of whether this type of situation would occur should be made through a comprehensive decision of various circumstances such as (i) the balance in the content of the payments to be made by both parties for reason such as restoration to the original condition as a result of the rescission, (ii) the extent by which the adverse consequences to the other party will be corrected by way of the stipulations set forth in, inter alia, Article 60 of the Bankruptcy Law, and (iii) whether the unperformed obligations on the part of the bankrupting party constitute essential and core components or subordinate components of the bilateral contract. This judgment made a study in view of these determination criteria, and found that (iv) allowing rescission in which the value of converting of the membership rights to cash would be lower than the amount of funds on deposit would create a significantly unfair situation, and (v) the bankruptcy administrator did have a means for being released from the obligation to pay annual fees, by taking the procedures to withdraw from the membership. Consequently the court denied the exercise of the right of rescission by the bankruptcy administrator (Nakata, *supra* note 18, at 17).

trustor has a duty to continue to pay the trust commission because rescission is not permitted, the trustor would continue to incur adverse consequences since it would be unable to expect any compensation in return, which presents a remaining issue of how this is to be resolved); and (iii) when compared to, inter alia, the duty of the trustee and the various terms in connection with the trust assets, it is clear that the duty to pay trust commission is not an essential or core component but is of a subordinate nature. Consequently even following the criteria stated in the case precedent, a CPTA can be held to be a contract category that would create a significantly unfair situation if rescission of the CPTA were to be permitted.

IV. Summary

Despite the extensive discussion above, rather than it being possible to take the position that both the supporting doctrine and the denial doctrine can be held as interpretations in connection with the applicability of Article 53 of the Bankruptcy Law to a CPTA, an interpretation of denial appears to be more reasonable from the standpoint of theory, of the situation of interests, and from the logical conclusion.[26]

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[26] If the conclusion is reached that rescission is not permitted, it is then necessary to study (i) what approach should be taken towards the duty of the bankrupt trustor to pay future trust commissions, as well as (ii) whether the trustee should continue the trust if it is unable to collect the commissions in their entirety. With respect to this issue, it would be possible to build on, inter alia, the New Trust Law in principle presumes that collection will be made from the trust assets (New Trust Law Article 54, as well as the concept that a clause specifying that a trustor has a duty to pay the trust commission is outside of the scope of the Trust Law, and on this basis to take the view that a trustee would be able to collect the trust commission from the trust assets in a situation in which satisfaction of the trust commission cannot be obtained from the trustee, while if the trust assets are not sufficient to pay the trust commission the trustee would be able to terminate the trust agreement.