



## Kobre & Kim's Cross-Border Disputes Team

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## Mitigating Korean Investors' U.S. Commercial Real Estate Losses

**Many Korean and other Asian investors have poured money into the U.S. commercial real estate market, whether investing directly in property or through commercial mortgage-backed securities (CMBS) or real estate investment trusts (REITs). The recent chilling of this market has left investors vulnerable to mortgage defaults and lower valuations on their investments. Below, our team walks through proactive measures these investors could take to mitigate any potential losses on their investments.**

Many Korean and other Asian investors have poured money into the U.S. commercial real estate market, whether investing directly in property or development projects, or through commercial mortgage-backed securities (CMBS) or real estate investment trusts (REITs). The pandemic, the fastest interest rate hike in decades and a drawback from risk-taking by U.S. regional banks in the wake of bank failures have dealt grievous blows to the market. This rapidly changing environment is leaving many investors vulnerable to mortgage defaults and lower valuations on their investments.

Rather than bearing the losses, Asia-based investors can often limit the damage and obtain recoveries if they deploy proactive or counteroffensive strategies to enforce their legal rights, even against the biggest industry players. Below are some examples of what some investors may consider.

### U.S. Commercial Real Estate Disputes

**Establishing losses in a joint venture.** Many Korean and other Asian investors invest directly in U.S. commercial real estate property or development projects through a joint venture. With the market instability, many partnerships see losses as they struggle to lease or sell their properties. This comes at the same time as many mortgage payments come due.

The question then becomes: how should these losses be shared? Surprisingly, many joint venture contracts are written without contemplating such a scenario, especially given complex voting and equity rules in many of these partnerships. Investors should consider deploying creative, cross-border strategies against major players to protect their interests.

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**Holding deal participants accountable.** With mortgage delinquencies and defaults rising, many commercial mortgage-backed securities (CMBS) will likely come under special servicing.

The pooling and servicing agreement enables certificate holders with a certain percentage of voting rights (normally above 25%) to direct the trustee to sue the special servicer. With approval from the trustee, the directing holder, , can often direct the special servicer or appoint a successor special servicer to pursue a variety of claims regarding the underlying mortgage loans and the “reps and warranties” that accompanied them.

**Challenging valuations.** The valuation of the collateral underlying a CMBS—i.e., the commercial mortgage loans it holds—greatly impacts bondholders’ loss position, control rights and in turn ability to maximize recoveries. Asia-based investors need to be willing to stand up to other bondholders – even industry giants – regarding valuation of the CMBS portfolio to protect their financial interests. To the extent that investors can demonstrate that a valuation was artificially depressed or did not follow standard valuation methodologies, they may be able to bring claims to recover value for the trust.

**Waterfall Disputes.** As losses begin to accumulate, who bears those losses can be a source of friction to holders in a trust’s capital structure. Having a clear understanding of who bears different types of losses, can be a significant advantage when trying to recover the cash flows coming into a trust. Moreover, parties may wish to pay particular attention to how the trust administrator is applying the waterfall provisions to ensure full compliance with its terms.

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As the U.S. commercial real estate market continues to chill, Asia-based investors would do well to consider their options as early as possible. Rather than passively accepting their losses, they should consider protecting their legitimate legal and business interests to ensure a more favorable outcome.

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## About Kobre & Kim

Kobre & Kim is a conflict-free global law firm focused on disputes and investigations, often involving fraud and misconduct.

Our team:

- Represents major corporations, investment funds and portfolio companies in high-stakes trials and other commercial disputes adverse to major financial institutions and other market constituents.
- Acts in a variety of high-stakes creditor disputes, high-value M&A and corporate governance disputes, independent investigations on behalf of corporate boards, and in disputes involving equity and fixed income securities and complex derivatives.
- Offers deep experience coordinating strategies across jurisdictions, often involving clients, assets and adversaries in Korea and other Asian countries, with lawyers admitted across the U.S., Asia, UK, EMEA, Latin America and key offshore financial centers.