

Special Lecture on Trust Law

Lecture No.1

Classroom 22 on October 7, 2008 at 10:20

Faculty of Law, University of Tokyo

Norio Higuchi

nhiguchi@j.u-tokyo.ac.jp

Ref.→<http://ocw.u-tokyo.ac.jp/>

Lecture Schedule 2008-2009

5-5-3 Lineup

For the lectures No.1 through 5 (five lectures), Higuchi will give the course in the perspective on trust using "Introduction to Trust and Trust Law."

As to those from No.6 to 10 (five lectures), the businesspersons will be invited to discuss operation examples of trust.

Regarding No.11 through 13 (three lectures), Professor Kanda plans to lecture on the fundamental structure of Commercial Trust Law.

Higuchi's lectures: No.1 on Oct. 7, no lecture on 14th, No.2 on 21, No.3 on 28, No.4 on Nov. 4, and No.5 on 11

Nov. 18: First class by businessperson Orihara (Trust Association) re "Trust Business and its Regulations"

Nov. 25: Second businessperson Hayasaka (Sumitomo Trust and Banking Company) re "Managerial Trust—and Trust for Floating Pecuniary Claim"

Dec. 2 : Third businessperson Sasaki (Mizuho Trust & Banking) re "Realty Business and Trust"

Dec. 9 : Fourth businessperson Yoshitani (Mitsubishi UFJ Trust & Banking) re "Trust for Personal Property (Inheritance/Presentation and Trust)"

Dec.16: Fifth businessperson Tanaka (Chuo Mitsui Trust and Banking) re "Trust For Business Per Se"

Professor Kanda's lectures: No.1 on Jan. 13, No.2 on 20, No.3 on 27

Trust Law's Backlash Alignment in Our Nation

New Trust Law enforced in 2007

Planning process

Enactment of laws relevant to Trust Law from Meiji to Taisho periods

- 1) Trust Law as s protégé of Civil Law
 - 2) Trust Law exploited in reality for commercial objectives
 - 3) Anglo-American laws as the origins
Trilateral Joint lectures at University of Tokyo from 10 years ago
-

Table of Contents

**1 Questions in Examination of Trust
Law**

2 Trust and Commision

3 Trust and Contract

I Examination Questions in Trust Law for Law Department Graduate Course of 9/5/06

- 1 Explain about the difference between the trust and the commission contract.

- 2 With respect to trust in our nation, it is said that the traditional Trust Law was basically assumed on the civil trust which was strongly regulated albeit private statute. In addition, it's said that, while the majority of trusts implemented in Japan has been commercial, an appropriate discussion on their legal principles has been missing.
 - 1) Accordingly, explain how the commercial trust is different from the civil trust.
 - 2) Further, discuss correlations and distinctions as to how Trust Business Act regulating trust and Trust Law as a private law should play their roles.

Commission Contract and Trust

Example: Another piece of “Road” by Kaii Higashiyama is found.

Commission → Treatment of copyright, lending, etc.

Trust → Treatment of copyright, lending, etc.

What are differences?

Figure our points of difference and indicate as many as possible.

What if subject property is realty, money...?

Differences at Gateway to Relationship: 2 Differences

Differences at Gateway to Relationship: 2 Differences

1 Trust is possible without contract.

2 Delinking from contractual capability

Differences after Establishment of Relationship: 6 Points

Differences after Establishment of Relationship: 6 Points

- 3 Bankruptcy remoteness of property in trust
 - 4 Cut and divide of creditworthiness
 - 5 Security of the trustee's creditworthiness and transaction
 - 6 Appointee's rights to own judgment and waiting to be instructed
 - 7 Beneficiary's rights
 - 8 Trustee's obligations
-

Differences at/after Termination of Relationship: 2 Points

Differences on/after Termination of Relationship: 2 Points

- 9 Commission being stoppable anytime vs. unstoppable trust
- 10 Commission to terminate upon death vs. trust to last even after death

Anglo-American Law

Consensus is different from contract.

Why?

Narrowness of Anglo-American concept of contract

Conversely, broadness/ambiguity of contract in
Japanese laws

American Contract/Japanese Contract

1995 Supreme Court decision on the case of the notification of cancer:

The case where the doctor did not notify the patient about the latter gallbladder suspected of being cancerous

Lawsuit for the default of obligation (Accountability is an obligation.)

Counterargument from the doctor's side (Accountability is excluded, or, in this case, it's the doctor's discretion.)

Is there any question as to the above explanation?

→Experience in a class at University of Michigan

Characters of Doctor-Patient Relationship

Commonly accepted theory: Quasi-commission contract

Laws regulating medical doctors:

contract law, tort law, occupation law (Medical Practitioners Law, etc.)

Dreary understanding of laws

→ Need for fiduciary law

Norio Higuchi, *Consideration of Medical Care and Law—Ambulance and Righteousness*, Yuhikaku, 2007

Lawyer-Client Relationship

Makoto Ito and others, ed., *Ethics of Legal Profession*, Yuhikaku

◆ Relationship between Hamilton and Madison Law Firm:

Traffic accident of a hauling truck of Coca-Cola that collided to a school bus, resulting in 21 dead children and the hospitalized driver Hamilton; A Lawyer dispatched from Coca-Cola.

◆ The accident's situation was told to the prosecution through the lawyer who heard of it at the sickbed. The driver was prosecuted on charges of professional negligence resulting in the death. He took the lawyer to the law.

◆ Nonexistence of contractual relationship as defense → Fiducial relationship

Contract to Cover All in Japan

Isn't it useful to have another legal concept of fiducial relationship/fiducial obligation?

→ Is it a new concept unfamiliar to Japan?

→ Actually, it has been in Trust Law for the last 80 years.

American Trust/Japanese Trust

Importance of Trust Law in America

In Japan, trust has been put in the spotlight, for:

- 1 Schoolwork on trust
- 2 Revision of Trust Law/revision of Trust Business Act
- 3 Spread of trust

Attention to “trustee responsibility”

Trustee Is a Hard Work.

“What I feel is that a trustee’s job is not something that brings about a happy destiny. He always finds himself in dire straits in exchange for a modest reward. And, written in the trustee’s bible is the following rule: ‘You’re always in fault.’ Come to think of it, how could anyone wish to become a trustee?” *

- Schuyler, *The Fiduciary Must Know the Law*, 56 N.W.U.L.Rev. 177, 189 (1961)

Contractual Relationship and Fiduciary Relationship

Contract

- 1 self-responsibility
- 2 limited obligation
- 3 relief=restitution
- 4 private autonomy
- 5 achronatic property

Trust

- reliant relation
- extensive obligation
- spilling out of gains & bunch
- public intervention possible
- earmarked property

1 Self-responsibility/Reliant Relation

Contractual relation in U.S.

- clarification of allocation of risk = means to limit responsibility
- mutual pursuit of self interest to be in conformity
- self-responsibility for each

Fiduciary relation

- a party depends on the other party in terms of authority/asset
 - fiduciary obligation on the trustee's part = fiduciary responsibility
-

2 Limited Obligation/Extensive Obligation

Contract

Scheme to limit obligations

To bear agreed-on obligations only

Trust

Determinate content albeit discretionary provision

★care duty ★duty of separate management

★duty of loyalty

★information-related duties (duty of confidentiality,
duty of provision of information)

Examples of Difference in Duty

- E.g.1: One seller A, while under a continual sales contract with a person B, negotiated with another vendor C regarding a new contract after the maturity of the existing one with B. Is there any problem in A's action in light of the relation with B being still in a contractual relation with A? What if B presents a new price to C?
- E.g.2: A person T who has been entrusted with a piece of land and the power of its sale. The settlor desired to sell it at Yen100 million. While looking for a purchaser, however, T found the land was worth Yen 150 million. Is it OK for him to sell it at Yen 100 million? How about T buying it for himself?

3 Relief

Restitution/Spilling Out of Gains and Bunch

Relief for breach of contract

Restitution being basic (to indemnify for loss with money)

Relief for breach of trust (U.S., * for Japan)

Restitution *

(except for the variance in base point in time)

Spilling out of profit (gain)

Relief having an effect over the third party *

(Additionally, punitive restitution is not improbable)

4 Private Autonomy/Possible Public Intervention

Contract=private autonomy

Principle of self-responsibility being kept, thus limiting intervention by court of law and other public institutions

Trust=reliant relation, i.e., relation between the strong and the weak

Public intervention is not improbable to protect the weak.

While being in the same private relation, Trust Law has developed as a wardship-type role (of court) has been acknowledged.

5 Achromatic Property/Earmarked Property

Contract=credit relationship

Related properties are common assets, too.

Competitive to other creditors

Property in trust=earmarked as property of the beneficiary

Segregation from the settlor's property

Segregation from the trustee's property

Segregation from the beneficiary's property

Bankruptcy remote=nobody's property

Contract and Trust

In U.K. and U.S., they are entirely different.
Trust is older than contract.

In Japan, contract is the very nucleus, and
trust is a part of contract.

In Japan, the particularity of trust chiefly
lies in a special treatment regarding
trust property.

Bibliography

Epoch of Fiduciary, Yuhikaku, 1999

Notes on American Trust Law I, II,
Kobundo, 2000, 2003

Introduction to Trust and Trust Law,
Kobundo, 2007