

Special Lecture on Trust Law

Lecture No.2

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Review of Last Class

- ❑ Kaiti Higashiyama's "Road"
- ❑ How to plan its effective management
- ❑ One way being commission (reservation of proprietary rights)
- ❑ Another being trust (cession of proprietary rights)
- ❑ What are differences?
- ❑ Which way should be selected?
- ❑ Feasibility of the choice

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 Service—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”

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 settlor 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 guardianship-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 one 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

They are entirely different in U.K. and U.S.
Trust is older than contract.

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

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

Bibliography

Epoch of Fiduciary, Yuhido, 1999

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

Introduction to Trust and Trust Law,
Kobundo, 2007

Image of New Trustee in U.S. (1)

① Traditional Image

Limited to authorities set forth in the trust articles

Emphasis on no infringement of fiduciary obligation → Weak against circumstantial changes

Free of charge in principle

Strict duty of loyalty (Self-serving profit being beside the question)

Image of New Trustee in U.S. (2)

② New Image

More positive use of authorities

Emphasis on trustee's technical discretion

→ But fiduciary obligation is imposed.

Onerous in principle

To verify duty of loyalty being an arbitrary stipulation

To approve limited liability/indemnity for negligence

Image of New Trustee in U.S. (3)

◆ Current Trend

Image transforming to the pastoral one in previous times

Upon employing a specialist, one can expect results of a sort, but no responsibility for consequences or excessive faithfulness
→ Trust as a sort of contract/deal

★ Significance and limitation of a “boxed scheme arrangement”

And yet, the earth moves.

And yet, trust is different from contract.

If trust is used as the arrangement;

- 1) Duty of royalty: Cannot be dissolved completely
- 2) Spilling out of profit with the relief: Cannot be dissolved
- 3) Earmarking of properties

The limits of the contract-based idea will come into clear view in due course.

Why do people entrust?

Circumstances of the origination of trust in U.K.

- 1 Two characteristics of the medieval feudalism
 - ① Stability of land ownership
Primogeniture at common law
 - ② Tribute/incidence from land owners
Feudal incidents: relief, wardship, marriage, escheat

Origin of Trust and Trust Law

S → T → B1, B2, B3

① Beneficiary right from land to be receivable by others in addition to the eldest son

② Way to get away from feudal incidents

Two restrictions as long as S owns the land

→ Possible to evade by relinquishing it

Transferred the title only to T

Problem incurred with T's treachery → Rejected by the court of common law

Lord Chancellor to examine → Formation of the equity court

Use of Trust in Medieval U.K.

In the background of feudalism:

Expanded S's liberal right of ownership
(liberty of disposition);

Lightened/abolished S's improper incidence.

Problem was T's treachery:

Protection of B by the equity court

Equity operates interpersonally

Although the owner is T under the common
law...

T has fiduciary duty (conscience/ morals).

★ Effectiveness being property-based → To begin
with, what is "property-based"?

Nature of Trustee Responsibility and Trust Property

Development of legal principles of precedents for equity

1 Grave responsibility on trustee

Duties of loyalty, care, separate management, etc.

2 Property in trust

a) Trustee being placed under distraint by his personal creditor: X

b) Death of trustee → Inherited property: X

c) Trustee with publicly unlimited liability, and with inherent property in the short term: ©

Origin of Japanese Trust

Mortgage Bond Trust Law

Joint-stock company being distrustful

Guarantee → Cost of registration

Management of guarantee

Centralized control → Trust transfer

Under a trustee

To begin with, what is trust? → Trust Law, Trust Business Act in 1922

Japanese trust = Commercial in nature, expedient in nature

Use of Trust Today

Why do people entrust? = Meaning of their existence (beyond the one in the medieval period)

S → T

To entrust property: Why?

Benefit to B (offer of benefit)

Why isn't it a direct hand over?

Reasons for Use of Trust

- 1 B's no/lack of ability at property administration
→Age of specialists, means of social division of labor
- 2 Nonexistence of B→Expansion of disposing capacity
- 3 B in plural number wishing to set the order
→Expansion of disposing capacity
- 4 B in plural number to differentiate profit: preferred/
subordinated
→Multitier/conditioning of beneficiary right
- 5 Limbering up benefit provided to B: Discretion (of
specialist)

What Trust Makes Possible

- 1 Use of specialists→Age of specialists/division of labor
- 2 Making right of ownership from singular to plural number
→Trustee's right of ownership/beneficiary's right of ownership
- 3 Expansion of the settlor's intention/right of control—time/object
- 4 Beneficiary=Unrestricted real right →Credit theory being the common view in Japan→The real-right statutory principle
- 5 Secure property in trust, bankruptcy remote, etc.
- 6 Tax saving in limited bounds

Why American-style Civil Trust Wasn't Employed

Although rules were drawn up in Trust Law clearly assuming a civil trust like a testamentary trust?

Reasons that hindered:

1 Obscurity of civil-affairs laws

E.g., the testamentary trust: Is beneficiary consecution approved?

Relation to the portion to which an heir is legally entitled; Relation to the inheritance procedure

2 Relation to an occupation law→Approval for a trust company

3 Biggest being the tax law: Who should be taxed and how?

What changed with the revision to Trust Law
