

Special Lecture on Trust Law

Lecture No.3

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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-affairs 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

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 delegation 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 with respect to how Trust Business Act regulating trust and Trust Law as a private law should play their roles.

Civil Trust (Gift Model): Estate Planning

Usage in U.S.: Dukeminier & Johanson, *Will, Trusts and Estates* 555 (6th ed., 2000, Aspen)

1 Revocable Trust

S→S=T Earnings to S while in life

Principal to be handed down to S's children at S's death

Purpose=Will substitution method

Means=Self-trust

Demand in our country

Usage

2 Marital Trust (marital deduction)

Marital trust: a typical example of family trust

S→T Earnings to the spouse W while in life

Principal to be handed down to S's children at W's death

Purpose=Carrying-over of inheritance tax

Spouse's livelihood/children from S's former marriage

Management by specialists

Means=Trust transfer/trust under will

Demand in our country

Usage

3 Trust for incompetent person

S→T Earnings to a child A being incompetent

Principal to be handed down to A's
descendants after A's death

If no descendants, down to another child
B and B's descendants

Purpose=Livelihood of an incompetent child
Management by specialists

Means=Trust transfer

Demand in our country

Usage

4 Trust for minor

$S \rightarrow T$ or $S = T$

Donation to minor up to \$10,000 per annum
=free of tax

To set up a trust, from thence \$10,000 being used for a minor child: to hand down the principal to the child when he becomes 21 years old

Purpose=Tax saving

Means=Self-trust/trust transfer

Demand in our country

Usage

5 Dynast trust

S→T

Lifetime beneficiary to S's children, after whose death, to be handed down to the grandchildren, and after whose death, the principal to be handed down to the great-grandchildren

Purpose=Carrying-over of inheritance tax, tax scheme for generation-skipping transfer, preservation of family property, usage of specialists, 100-year plan

Means=Trust transfer; permanence not impossible

Demand in our country

Usage

6 Discretionary trust

S→T Setup of the trust under will

Discretionary power on T; classifying a beneficiary B; in addition, allocation to B being on T's discretion albeit the specification of B

Purpose=Tax saving, protection of a beneficiary from his creditor, flexibility up to circumstantial changes

Means=Trust transfer, trust under will
(living trust being viable)

Demand in our country

Usage

7 Trust setup by self-trust (stock)

S=T Setup of 1000 shares of GE as trust fund;
dividend to be distributed to B during
lifetime

Means=Self-trust

Stock issuance not necessary

Document not necessary

Except for some states demanding a clear and
convincing proof for substantiation

Usage

8 Trust setup by self-trust (realty)

S=T Setup of realty as trust fund; earnings to S during his lifetime; the realty to be handed down to B at S's death

Invalid without a provision for a beneficiary of the principal

Purpose=Will substitution method; antemortem

Means=Self-trust

Demand in our country

After Revision to Trust Law

To what extent were hindrances to the civil trust dissolved?

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?

Exercise

Case of an entrustment with ¥100 million in cash and a building with leased commercial space in Ginza

What does a trustee do?

What obligations does he have?

→ *Notes on American Trust Law I, II, p.12*

- 1 When responding to this kind of consultation on trust setup
- 2 Judgment about accepting or not
- 3 If entrusted, what should he do?

What Civil Trust Is

- 1) Deposit type civil trust—loan trust, etc.
- 2) Investment type civil trust—designated money in trust (unit type), etc.
- 3) Conversion type civil trust—schemes called asset fluidization or securitization
- 4) Enterprise type civil trust—land trust, etc.

Case of Deposit Type: Loan Trust

S → T (trust bank) → B (=S)

To bank money for a period of 2 or 5 years

T (trust bank) jointly operates it, managing primarily by loan or bill discounting.

Settlor B himself is a beneficiary, taking the form of a self-benefit trust, and possesses a securitized beneficiary right.

- 1) System to be based on Loan Trust Law
- 2) Based on an adhesive terms and conditions, a trust bank is to raise fund by contracting with many investors (settlers).
- 3) Manner of operation is to be designated by law for the fund to be used for financing business companies.
- 4) While a beneficiary right being securitized, a transfer of a beneficiary right is not common, and a settlor-cum-beneficiary could cash in through asking the trust bank for buying out after the setup of trust.
- 5) Handling to closely resemble deposits like a contract for replacement of losses, etc.

Question: Is this really a trust? What is trust?

Case of Investment Type: Designated Money in Trust (Unit Type)

S → T (trust bank) → B

Settlor S entrusts money to T for a certain period.

T (trust bank) jointly manages the entrusted fund.

Settlor S and beneficiary B can be different parties, but the majority is self-interest trust.

- 1) Performance-based dividend type, with no projected returns or supplementary contract for replacement of losses; earnings dependent on operational results of the trust bank. Undoubtedly all earnings belongs to the beneficiary.
 - 2) This type can operate under more flexible regulations than loan trust, and parlay fund into securities like stocks/bonds and public bonds. This is said to allow flexible product designs, enabling trust periods, subjects for operation, and proportions of their operation to be set up by each fund for placing.
 - 3) Its provision approves an settlor to change a beneficiary, permitting not only self-interest trust but also trust for others' interest.
 - 4) The provision is not to approve transfer/pawning of the beneficiary right.
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Case of Conversion Type: Trust for Housing-Loan Credit

S → T (trust bank) → B

Settlor S, housing-loan business operator, transfers to T a variety of housing-loan credits.

Beneficiary B, investor, purchases the right of beneficiary, while S plans fund raising with the purchase money.

Actually, S manages housing-loan credits as before.

- 1) Roles of a trust bank T, trustee, are limited.
- 2) Problem regarding a trustee's obligation on executing own business
- 3) Beneficiary's right to accessing information on trust
- 4) Right of beneficiary becoming multitiered
- 5) Use of self-trust being possible
- 6) Its differences from a scheme of home-equity-loan backed securities

Case of Enterprise Type: Land Trust

S → T (trust bank) → B (=S, but changes possible)

Settlor S plans an effective utilization of a piece of land he owns as fiduciary property.

Trustee T borrows construction funds, puts up a building, and secures income from lease.

Defrayed out of the earnings are taxes and other public charges, administrative cost, trust fee, and repayment of borrowed money, and the remainder goes to the beneficiary.

Settlor S employs a format of self-trust as the initial beneficiary, but it can be trust for others' interest since S can transfer his beneficiary right.

The land and building are to be handed down to the beneficiary after the trust period.

Differences between Commercial Trust and Civil Trust

- 1 Reasons for making conscious of the distinction:
Conception of corpus of civil code and commercial code
In reality, commercial trust only
To cover deficiency in Trust Law by emphasizing commercial disposition

There is no such distinction in U.K./U.S.

If any, it's discrete: e.g., pension trust, ERISA commercial trust, family trust.

Yoshihisa Noumi: 3 Basic Principles of Revision to Trust Law

Yoshihisa Noumi, *General Remarks (points for the symposium on the revision to Trust Law)*,
Research on Revision to Trust Law, vol. 30, pp.3-21, (2006)

1 Comprehensive Trust Law

Inasmuch as the usage of trust in our country has leaned toward commercial trust, Trust Law itself has possessed an aspect of a strongly regulatory character just like an occupation law. However, the original trust can be utilized variedly, and it is important to clarify rules common to civil trust and commercial trust.

“Comprehensive Trust Law” is the first catchword.

2 Legislation of directory statute and promotion of liberal activities

Traditional Trust Law had many regulations nearly as a mandatory statute, which sometimes hindered free activities leveraging trust. This revision is to confirm that Trust Law is one kind of private law and its principle is a directory statute, which will enable to create various trusts. The catchwords are “legislating Trust Law into a directory statute” and “promotion of liberal activities” taking advantage of trusts.

3 Thorough protection of beneficiary

Although the traditional Trust Law was basically supposed to be the one to protect a beneficiary, the law was observed to have some points that were insufficient for the purpose. “Thorough protection of beneficiary” is the third catchword.

Differences between Commercial Trust and Civil Trust

- 1) Gift-type civil trust and deal-type commercial trust
- 2) Commercial trust presenting problems to many beneficiaries
- 3) Characteristics of the trustee-beneficiary relation:
 - ① Purpose of a trust and the settlor's intent
 - ② Form of setting up a trust
 - ③ Beneficiary as an investor
 - ④ Reward for the trustee
 - ⑤ Relaxation and tightening of the trustee's fiduciary obligation
 - ⑥ Change/termination of a trust