

The Trust and its Potentials

Masayuki Tamaruya
(The University of Tokyo)

As introduced in 2006, the new Trust Act expressly authorized the creation of trusts as a will-substitute and for successive beneficiaries. Beginning in around 2010 there have been growing interests in the use of trusts, often called family trusts, for the purpose of asset management and succession planning. In this context, trusts can be useful in at least three respects. First, the use of trust can achieve consistent management of assets from acquisition (even for those who lack competence) through disposition and succession across generations. Second, trust assets can be managed by fiduciaries who possess a range of professional expertise. Third, the trustees generally owe the duty of prudent investment, where the trustees must diversify the investment as appropriate for the beneficiaries' circumstance.

It appears from the review of recent court cases, however, that the current trust practices are undermining the potentials of trusts. There are at least three reasons. First, the haphazard financial regulation and tax incentives hinders the use of trusts to cover a broad range of individuals' assets on a long-term basis. Second, different professionals are entering the market and there is very little coordination, making it difficult for potential settlors and trustees to receive appropriate advice. Third, the trusts are created with a very limited foresight, and as a consequence, some trusts have failed to realize what the settlors really wanted to achieve.

Against this background, one can identify at least four issues that need to be addressed. First, a greater thought must be devoted

to resolve the structural conflict of interests that frequently occur in family trusts. Second, we must consider how to conceptualize the role of the professionals and their responsibilities in serving the trust in various capacities. The third issue concerns remedies in the event of breach of trust and dissipation of assets. The fourth and final issue involves the abuse of the trust. Trusts have been used to evade the restriction of succession law, and in the cross-border contexts, the Financial Action Task Force has also expressed concern that the family trust and foreign trusts are susceptible to abuse.

These concerns are not confined within the national border but implicate various cross-border issues. Only when we begin to adequately address these issues can we expect that the trust, used for asset management and succession purposes, will begin to realize its full potential.