

A Study on Transition of Doctrinal Views as to Legal Structure and Characteristics of Trusts in Japan

Akira KAMO
(The University of Tokyo)

The first Japanese Trust Act and Trust Business Act were enacted in 1922. Since then, trusts have been used mainly for commercial purposes. Trust banks have primarily served as trustee and have developed new areas of trust business. In the early 21st century the new Trust Business Act (2004) and Trust Act (2006) were consecutively introduced to replace old legislation, intended to increase the use of trusts in practice.

For the past 100 years, legal scholars have been engaged in discussion as to what kind of legal structure and which legal characteristics trusts have. Initially, the nature of beneficiaries' rights attracted academic interests. The Trust Act 1922 was drafted on the basis of "Obligation Theory," which derived from a leading textbook on the Japanese Secured Bond Trust Act 1904 (TORAJIRO IKEDA, SECURED BOND TRUST ACT (1909)). According to Obligation Theory, a trustee is the owner of trust property, and beneficiaries have a claim against the trustee, not a property right over trust property.

Influenced by English case law, however, the Trust Act 1922 contained provisions that were difficult to be explained by Obligation Theory: trust property is not included in trustee's estate on the death of trustee (Art. 15); personal creditors of trustee cannot attach trust property (Art. 16 (1)). This led to criticism against Obligation Theory. In his 1941 article, Kazuo Shinomiya, one of the leading trust

law scholars in Japan, proposed to consider beneficiaries as having a proprietary right of trust property, whereas a trustee has only the title and administrative powers of trust property (Kazuo Shinomiya, *Fiduziarisches Rechtsgeschäft and Trust* (1941), *reprinted in* A STUDY ON TRUST LAW 3 (1965)).

In the postwar era Shinomiya took a further step. Receiving valuable insights from a study of French jurist (PIERRE LEPAULLE, *TRAITÉ THÉORIQUE ET PRATIQUE DES TRUSTS EN DROIT INTERNE, EN DROIT FISCAL ET EN DROIT INTERNATIONAL* (1932)), Shinomiya argued that a trust property should be regarded as a "substantial" legal entity (KAZUO SHINOMIYA, *TRUST LAW* (1958)). Although his doctrinal view was admittedly useful for explaining the legal structure of trusts, it was criticized on the ground that a trust property was not recognized as a legal entity under Japanese private law.

After a relatively stable situation of scholarly discussion in the 70s and 80s, several new views on the legal structure and characteristics of trusts were advanced in the 90s. On the one hand, the legal nature of beneficial interests came back into the limelight. It was pointed out that beneficiaries have an obligatory right against trustee, but also enjoy a legal status comparable to ownership of trust property, which is approved by the Trust Act (HIROTO DOGAUCHI, *TRUST DOCTRINE AND PRIVATE LAW SYSTEM* (1996)). On the other, the unique nature of trustee's duties caught academic attention. It was proposed to establish the law of fiduciary relationships which have characteristics distinct from contractual relationships (NORIO HIGUCHI, *THE ERA OF FIDUCIARY RELATION* (1999)).

In the 2000s scholarly interests were turned toward the legal status of trust property which constitutes an aggregate of assets and is distinguished from the rest of the trustee's property (Mika Yokoyama, *Patrimony*, 791 *NEW BUSINESS LAW* 16 (2004); HATSURU MORITA, *INFORMA-*

TION AND LEGAL RULES IN FINANCIAL TRANSACTION (2009)). Although a trustee is the owner of trust property, she is forbidden to benefit from trust property. A trust property belongs to trustee, but is treated as an autonomous patrimony. Viewed in this light, trusts are considered useful as a legal technique of asset partitioning, whereas the existence of trust property should be disclosed to third parties through effective notification.

As explained above, trust business in Japan has been regulated by the Trust Business Act and commercial trusts have mostly been administered by trust banks subject to regulatory supervision. It was relatively easy to detect the presence of trust property and to prevent trustee from obtaining unlawful benefits. After enactment of the Trust Act 2006, however, the use of family trust is now increasing, where lay persons free of the regulatory framework may serve as trustee. In this context, academic discussion as to the legal structure and characteristics of trusts takes on practical significance. It is essential for further development of family trusts in Japan to establish effective ways to prohibit a trustee from benefiting from trust property and to inform third parties of the existence of trust property.