

# Considerations for Issues and Measures of “Non-Commercial Trust” Undertaken by Trustees as Individuals

Yusuke Noguchi  
(Resona Bank, Ltd.)

“Private trust” can be referred to a scheme for the following two purposes. (1) For the purpose of property management in the aged society. (2) For the purpose of succession the property after the death of him/her.

Turning to the trustee, “private trust” can be classified into two patterns. (1) “Commercial Trust” pattern: Trustee is corporate fiduciary (trust bank or trust company). (2) “Non-Commercial Trust” pattern: Trustee could be relatives of settlor, specialists including certified public accountant tax specialist, and lawyer (*bengoshi and shihoushoshi*).

The central consideration in this report is “private trust” of “Non-Commercial Trust” pattern (and the relatives of settlor who do not have particular expertise, as trustee).

The benefits of trust (in case of trustees as individuals) are considered the following three points. (1) The trustee may administer trust affairs very close to the beneficiaries or the settlors, with understanding of the status of beneficiaries or the original intentions of the settlors. (2) It may be possible to target trust properties which have difficulty in terms of volume and type when handling by the corporate trustee. (3) The experts may undertake trust in a private capacity, and administer trust affairs with utilizing their expertise.

On the other hand, the disadvantage is considered the following

two points.

(1) If trustees as individuals lack of know-how to operate and manage trust properties properly, at the same time various obligations are unconditionally relaxed, it may be concerned about abuse of trust by the trustee against settlor's intention.

(2) If trustees as individuals who do not recognize that the trustee had room to relax the obligation, assume a strict obligation not meeting their management capacity, it may be concerned about committing a breach of duty unconsciously in administering trust affairs.

These concerns are based on the following matters. Under 2006 New Trust Act, duties of a trustee (ex; Duty of Care, Duty to Segregate Property, Duty of Loyalty) can be relaxed if terms of trust otherwise provide. Duties of corporate trustee are never mitigated under the restrictions of the Trust Business Act.

On the other hand, trustees as individuals are not subject to the trustee of the Trust Business Act regulations, and to comply with the provisions of the Trust Act as a default rule; trustees as individuals can enjoy the full benefits of relaxation of duties.

In light of the foregoing disadvantages, it also showed awareness of the issues below. (1) Party autonomy which has been emphasized in the New Trust Act can be exhibited through relaxation/weighting the duties properly in case of trustees as individuals? (2) To protect beneficiaries, the guideline for administering trust affairs is needed? In addition, is there suggestion for development of "Non-Commercial Trust" through this report?

Upon consideration of the issues, two standpoints of eligibility required for trustees as individuals are shown. These are "means test" and "continuing strength".

Subsequently, the levels of relaxation/weighting the duties based

on the each contents of the trust administration are considered.

Through the assumption of three cases, and analyzing the duty of the trustees as individuals in each part of the typical trust administration, “the risks behind mitigation” are divided into three levels of terms.

Based on these studies, the following two points have been proposed as the direction of solving the problem of the trust (in case of trustees as individuals).

(1) Mutually complementary relationship between trustees as individuals and corporate trustees is desired; Trustees as individuals undertake trust with a simple scheme rooted in the daily life of elderly persons. Corporate trustees undertake trust with complex and long-term schemes (in order to across the generations).

(2) To support the trustees as individuals, advices from the experts (as follows) are desired; lawyers (*bengoshi and shihoushoshi*) (designated as the supervisor of trust), certified public accountants and tax specialists (pre-planning, during the period).

Also, the views of “Non-Commercial Trust in the future” are shown; taking advantage of the trust units based on community (the applications of the British public trust system, civil use of trust as a reconstruction from “Eastern Japan Severe Earthquake Disaster”).

Finally, in order to discern the limits of the relaxation of duty of trustee, the future progress of academic discussion about “essential elements of trust” is expected.

