

Convention on the Law Applicable to Trusts and on their Recognition

Masato Dogauchi (The Univ. of Tokyo)

In October 1984, the Hague Conference on Private International Law adopted the draft Convention on the Law Applicable to Trusts and on their Recognition. Three countries signed the Convention on July 1, 1985, and it was so dated.

The purpose of the Convention is not to unify the substantive rules on trusts but to unify choice-of-law rules on trusts. A trust covered by the Convention (articles 2-4) shall be governed by the law chosen by the settler (article 6), and where no governing law has been chosen, the trust is governed by the law with which it is most closely connected (article 7). Dépeçage is admitted (article 10). When the chosen law by the settler does not have the intended category of trusts, the article 7 will be applied (article 6(2)). And when so designated law does not have the category of trusts involved again, the Convention itself will cease to be applied (article 5). The result of application of the governing law shall be recognised (article 11), provided there exists some restriction on such recognition. Thus, such recognition can be rejected in the following cases: (1) the settler has evaded the most connected law of the country which does not have trusts (article 13); (2) the application of the governing law on the trust conflicts with the application of the mandatory provisions of the law designated by the conflicts rules of the forum relating to other matters (article 15); (3) the laws of immediate application of the forum or of other country which has a sufficiently close connection with the case shall be applied (article 16); (4) the application of the governing law on the trusts manifestly incompatible with the public policy (article 18); (5) it prejudices the sovereign power in fiscal matter (article 19); (6) when the country has made reservation on reciprocity, the governing law is that of non-contracting state (article 21).

There are a lot of countries, especially in civil law countries, which do

not know trusts as their domestic substantive laws. Therefore, in comparison with other private international law conventions, the Convention has some unique provisions, such as article 2 (explanation of trusts covered by the Convention), article 5 and 6 (2) (provisions in the case where designated law does not have trusts) and article 11 (the natural consequences of the designation of the governing law are provided under the term of "recognition").

In Japan which has trust law introduced from Anglo-American trusts (*Shintakuho* or Trust Law, Law No. 62 of 1922, as amended in 1947 and 1979), trust banks, insurance companies and others are doing big business. Although there has been neither cases nor academic discussions on the governing law on trusts, without the above Convention, according to article 7(1) of *Horei* or General Law on Application of Laws, Law No. 10 of 1898 as amended, it is considered that the governing law on trust can be chosen by the settler, because it provides the party autonomy on the governing law of «*acte juridiques*» in general with exception of specific ones provided separately. And, on account of flexible interpretation in the case of unexpressed choice of governing law, similar result will be secured as the article 7 of the above Convention. Because, in such a case, instead of designating the law of the country where such act was done as provided in article 7(2) of *Horei*, all the circumstances concerned will be considered in order to decide the governing law (for example, the Supreme Court judgment of April 20, 1978. *Saiko-Saibansho Minji Hanrei-shu*, Vol. 32, No.3, p.616). But these interpretation will be attended with uncertainty because of the simple provisions of *Horei*.

Consequently, although more deliberate consideration will be required, it will be safe to say that becoming a party of the Convention will provide clear criteria in dealing international trusts in Japan without changing her present choice-of-law rules. And, in view of the internationalization of Japan, this Convention is considered to provide Japan with important legal infrastructure.