

# Limitation on the Liability of a Trustee to Third Parties

Hideto Nakanishi (The Mitsubishi Trust and Banking)

It is a great concern for the trustee to limit his liability in a reasonable way. But on the other hand the interest of the trust creditors must be also protected. The aim of my report is to examine the validity and the legal consequences of a contract between the trustee and the creditor which limits the trustee's personal liability.

## 1. The meaning of limiting trustee's liability

A contract clause which limits the trustee's liability to the extent of trust assets is valid under certain conditions. The purpose of this clause is to restrict the creditors' rights only to the value of the trust funds.

In the U. K. and in the USA, it is an essential prerequisite for the validity of an exemption clause that a trustee apparently denies his personal liability against the trust creditors.

Furthermore, to protect the creditor's interest, the extent and the amount of the trust assets should be shown clearly to the creditors.

## 2. Problems arising from limiting trustee's liability

### (1) The relation between the trust contract and the exemption clause

Under the Japanese trust law, the creditor has no remedial right against the trustee for his breach of trust. Therefore, in case the amount of the trust funds has been reduced because of the breach of trust by the trustee, it is necessary to add a clause which allows the creditor to pursue trustee's personal liability.

(2) Problems of multiple creditors

- (i) Coexistence of creditors who agree with the exemption clause and those who do not

Should the trustee limit his liability against all creditors, or is it allowed for the trustee to limit the liability only against a part of the creditors? When the latter is allowed the problem will arise that the amount of the creditors' satisfaction differs between the creditors who agreed with the exemption clause and those who did not.

- (ii) Seizure of the trust funds and the trustee's lien

Has the trustee's indemnity right priority over the creditor's seizure? This problem will be discussed from the standpoint of trust law and civil procedure law.

- (iii) 'Insolvency' of the trust assets

As for the right of creditors in case of insolvency of the trust assets, the difficult problem is what kind of right do the creditors have against assets is also an important issue to be discussed.