

# Trust and Contract

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1. Trust is distinct from contract under the American law of trusts. Trust law belongs to the law of property in categorical terms. Trust relations, usually called fiduciary relations, are different from contractual ones.

In contrast, Japanese scholars have understood that our trusts are based upon contract. Civil lawyers have found it difficult to assimilate a trust relation to their neat scheme of legal system. That is a part of reasons why Japanese academics regard trust law as part of contract laws.

Professor John Langbein of Yale Law School, however, published an article titled "The Contractarian Basis of the Law of Trusts" 105 Yale L. J. 625 (1995) in which he claimed that American trusts are also understood as contracts, more specifically a kind of contracts for the third party beneficiary. It seems that he is unconsciously trying to bridge the gap between Japanese trust law and American one. To analyze his claims from a comparative viewpoint could therefore reveal the meanings, if any, of our traditional conception that Japanese trusts are contracts.

2. Professor Langbein submits four pieces of evidence to support his conclusion. The first are historical explanations. As Chancellor Kent Professor of Legal History at Yale, he agrees with Maitland that "the common law of contract was too primitive" to assimilate the trust in the fourteenth century. Also he sees a historical transformation of trust, from a conveyance device originally for holding real property to a management regime for a portfolio of financial assets in modern days. It is the latter which requires us to see trust as a sort of contracts.

He then examines prevalent doctrines, functional similarity between contract and trust, and finally European continental laws from a comparative

point of view. These examinations reveal that American trusts are, and should be understood as contracts. He emphasizes that almost all the rules of trust law are default terms and parties could change as they like. In addition, he points out two practical considerations that would be derived from his idea of trust as contract. A settlor could enforce trust under contract theory, and courts should be more circumspect when they find a breach of fiduciary duty, duty of loyalty in particular.

3. Professor Langbein's article is stimulating and important to Japanese academics at least in two ways.

First, we should reconsider our traditional doctrine that many of provisions of trust law are mandatory terms. At the same time we should note that, since we have found no inconsistency between our contractarian perception of trust and mandatory terms in trust law, it would show an important difference of the conception of contract itself from an American counterpart.

Second, I do not believe, however, that Professor Langbein's argument would win approval from other academics or lawyers in the United States. If my belief is correct, it would show the strength of idea in the States that trust is a fiduciary relation, quite distinct from contracts. We should then reconsider our own perception of trust relations as well as contractual ones in Japan.