

Legal Principles on Commercial Trust

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The major part of trust businesses in Japan consists of “commercial trusts”. These trusts show several distinctive characteristics that do not exist in trusts in other countries. The traditional legal scholarship on trusts fails to present proper theories or analyses concerning these commercial trusts. This article is an attempt to challenge the traditional scholarship, and present a new framework for examining the commercial trusts in Japan.

To develop a useful framework on commercial trusts, an analytical focus must be shifted from the trust property and the intent of the settlor to the trust arrangement and the intent of all participants in the market place. That is, the traditional approach on trusts views the essence of trust as a property arrangement based on the intent of the settlor. But if this approach is applied to commercial trusts, it fails to identify the very nature and essence of commercial trusts. Deemphasizing on the trust property and the intent of the settlor would lead to a proper understanding of commercial trusts.

Viewed this way, it is useful to classify a variety of commercial trusts in Japan into four distinct categories: (1) trust as a scheme for like deposit taking (e.g., loan trust), (2) trust for asset management (e.g., collective money trust), (3) trust for asset securitization (e.g., residential mortgage trust), and (4) trust for business undertaking (e.g., land trust).

The legal principles applicable to commercial trusts can be properly identified in accordance with these four types. For instance, in trusts for asset management, the beneficiaries should enjoy limit liability, which is not clear under current trust law in Japan. Also, when assets are provided from many investors, collective management should be permitted, and rules on the rights of the beneficiaries should be refined to reflect the collective nature of the trust. For trusts used for securitization, the beneficial interests should be permitted to be “paperized” into negotiable instruments, which, according to

the prevailing view, is not permitted under current trust law. For land trusts, the trustee should have power to borrow, and the risk associated with the business should be allocated between the trustee and the beneficiary in the trust agreement.

Future research on commercial trusts should be undertaken by focusing on the nature and characteristics of the arrangement involved rather than the nature of the trust property and the intent of the settlor.