

Varying Degree of Duties and Responsibilities of Trustee in Financial Business

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Why is *Shintaku* (Japanese version of trust) not as flexible and, thus not so readily utilizable in modern day financial transactions, as a U.S. trust, although the origins of both can be traced back to trusts in England? This question would be asked by anyone who is familiar with structures employing trusts in American financial businesses, such as asset securitizations.

One major reason is the rigidity of the duty of loyalty to be borne by Japanese trustees. Their duty of loyalty is based upon the archaic and prohibitive Article 22 of the Trust Law, which was enacted in 1922, and its interpretation has been strongly influenced by the view expressed in the Restatement of the Law of Trusts (Second) of the United States.

Since the Restatement (Second), however, U.S. trust law has been modified to adjust itself to changing circumstances, most notably, increased use of trusts as a means for financial investments and a resulting wider investment discretion vested with trustees. In this process, fiduciary law evolved from traditional trust law.

Fiduciary law sets the duties of a trustee, taking into consideration powers given to the trustee, the breadth of discretion actually possessed by the trustee, and the protection to be afforded by law to the actual (as opposed to generic) beneficiary. This gives flexibility and discipline to the trust administration, and allows trusts to be used in a wide variety of financial transactions. At one end of the spectrum, trusts are merely a vehicle for holding and distributing assets, with the trustees owing little duties. At the other, trusts are used for the very purpose of protecting

beneficiaries (i.e., investors).

In Japan, it has been suggested in discussions about modernization of Japanese trust law that rules regarding the duty of loyalty be basically a default rule. While very few would oppose this suggestion, in order to provide adequate protection to beneficiaries with varying levels of sophistication, it may not be always desirable if the duty of loyalty can be completely waived solely by obtaining the consent of the beneficiary. A set of rules similar to fiduciary law, which would prescribe when the trustee owes the duty of loyalty and how the trustee may be relieved of such duty, should be established.