Fiduciary Duty of Asset Investment & Management Institutes

～ focusing on the analysis of the duty of diversification of portfolio ～

Kazuhito Yukizawa (Kobe University)

Recently, in the present state of declining capital market the governmental urgent task is to let the huge individual money kept in the indirect financial market as the depositary asset at the banks or post office shift to direct capital or security market as mutual fund, stock-bond investment, or defined contribution pension etc, which have been the important key player for increasing the fluidity and commerciality of security market in US. However, in Japan, despite of the fact that such vehicles, for direct security market's sound growth have been arranged, actually the situation has not been so much improved. The main reason for that seems to be the persistent distrust among many people or investors in asset investment or management institutes such as security brokers, dealers, investment managers, or investment advisers, which should connect between the financial needs of enterprises and the investment needs of the individual investors as the key player of direct capital market.

To recover and build the confidentiality of such institutes, full disclosure and establishment of the fiduciary concept seems to be crucially important. And in this article, I focus on the theme of fiduciary concept of investment and management institutes.

The concept of fiduciary is originally Anglo-American law's and the duty of fiduciary is thought to be divided into two categories, i.e. the duty of prudence as the standard for care and the duty of loyalty which is mainly aimed to the prohibiting conflict of interest.

By the way, in introducing the concept of fiduciary to Japanese legal professions, by far, in most cases, the duty of loyalty and prohibition of conflict of interest has been focused. And in the field of new industrial legislations for the money intermediating market, we can find the strong trend that they never fail to incorporate the concept of the duty of loyalty of the money market players, and the wellarranged system of prohibition of conflict of interest. However, in the respect of the duty of prudence as another part of fiduciary duty, I do not think we have been able to absorb well enough the accumulation of theories and experiences about the duty of prudence in US. fiduciary law. And I think that is because we, as far, treated it as the problem of the law of mandate and civil law area, and did too easily the problem of the duty of prudence for fiduciary as just one of the issues in the theory of duty of reasonable care in the contract law.

In this article, I would focus on the duty of prudence as fiduciary, especially on the issue of prudent investor rule of the asset investment and management institutes. It is because the theoretical development of this area contribute for the individual investors to pursue the liability of such institutes especially in the respect of their performances themselves as the professional player in the market. By far, besides the case of conflict of interest like churning by security brokers, almost cases in which the individual investors sued the financial institutes are based on the ground of misrepresentation by failure of providing enough explanation or information to the customers in the phase of sale of financial commodities. However, if we would dig into such cases deeper, there could be many in which the real problem lies not in the sale's action but in the bad faith performance or incompetence of the fund manager. So,why do the investors would choose not bad faith performance but misrepresentation in sale's phase as the ground of litigation against fund managers One of the main reasons seems to be the

lack of the theoretical tools for analyzing the problems of their performances themselues and suing their liability.

In such a perspective, I would analyze the structure of prudent investor rule in its heterogenous characteristics to the duty of reasonable care in civil-mandate law, rather than in its familiarity with it. Then I would choose the case law analysis of the duty of diversification which is one of the main essence in the concept of prudent investor rule.

Through that, I would come to the theme that how we would plant such concept of fiduciary or prudent investor rule into our Japanese comprehensive private law system. In introducing a few theories of civil and trust law scholars for that task, I would finally agree with the proposition of making new legal category as the inherent fiduciary relationship, while it would be based on the law of mandate as statutory foundation, to grasp the social realities which need close and interdependent business relationship and in which confidence for the profession is crucially important.