

A Thesis on Trustee's Duty of Self-Execution (Duty-Not-To-Delegate)

Hiroshi Namba
(The Sumitomo Trust & Banking Co., Ltd.)

The use of third-party in connection with trust administration has been discussed among the scholars on the premise that the trustee has a duty to perform all administrative work personally (duty of self-execution or duty-not-to-delegate) and the focus of the discussion has been whether such third-party is deemed a *dainin* (an agent) or a *riko-hojosha* (an assistant). However, while it is problematic to determine whether the third-party performing a certain administrative work is a *dainin* or a *riko-hojosha*, the responsibilities of the trustee for using a *dainin* are significantly different from those for using a *riko-hojosha*, and, therefore, the trustee in actuality is put into a difficult position when he/she uses a third-party for the trust.

In order to address this issue, the U.S. trust law provides some guidance. In the U.S., with the recognition of the prudent investor rule, the rather strictly construed duty-not-to-delegate has been abolished and use of third-parties is now generally permitted unless such use breaches the trustee's duty of care. This development is said to reflect the advancement of specialization in every aspect of the society and the changes in the settlor's general intention, which is now interpreted to allow delegation to third-parties for efficient administration of trusts.

Because the advancement of specialization can be seen similarly in Japan, it is quite possible in Japan, too, to assume that the settlors generally intend to allow the use of third-parties for efficient administration of trusts. Upon this premise, the trustee's duty of self-execution in Japan

needs to be reconsidered so as to distinguish the functions which need be performed by the trustee in person (functions within the scope of duty of self-execution) and other functions which may be (or need be, in certain instances) performed by third-parties (functions out of the scope of duty of self-execution). The author proposes five objective standards and two subjective standards which should be applied to determine whether a certain function is within or out of the scope of the duty of self-execution.

Any third-party who performs a function out of the scope of duty of self-execution is none other than a third-party contractor. Accordingly, the trustee's obligation, under his/her duty of due care, should be limited to duly select an appropriate person for the task and to diligently enforce the contract. If, however, the trustee who has observed such care is held liable for the performance of such third-party, it is not because he/she has breached his/her duty of self-execution, but because he/she undertook the successful performance by such third-party.