

Symposium : Perspective and Issues on the Reform of Trust Law

Yoshihisa Nomi
Hideki Kanda
Kazuaki Tanaka
Satoshi Inoue
Takako Amemiya

Introduction

Presently, in the Law Reform Committee in the Ministry of Justice revision of the Trust Act is under discussion. In July this year the contour of the new trust law and the key issues will be made public in the internet for public opinions. And at the end of this year the essence of the draft of the new trust law is expected to be completed. This will be the most important revision since the present Trust Act has been enacted in 1922. Therefore in today's symposium we would like to discuss academically the issues related to the basic problems on this reform.

Basic issues

1. Basic ideas of the reform of trust law

(1) Comprehensive rules for private trust and commercial trust

One the purpose for revising the present Trust Act was to reflect the recent developments of trust law in the field of commercial trust into the Trust Act. Although the Trust Act in Japan has followed the Anglo-American trust law which is basically aimed at family trust, the actual use of trust in Japan was seen only in commercial businesses. There was a gap between the Act and the practice. Therefore it became

necessary to reflect the developments in the commercial trust for in the new Trust Act. In doing so the crucial problem was whether we should have comprehensive trust law including private trust and commercial trust or independent rules for each type of the trust. We think it is better to have a comprehensive trust law.

(2) Default rules instead of mandatory rules

Trust law in Japan has, although constituting a part of private law, many provisions of mandatory nature. This was because the government at that time of enacting the Trust Act in 1922 wanted to regulate the trust companies rather than to give a basis for free development of trust.

An example of this is the provision in the Trust Act which prohibits self dealing. The art. 22 of the Trust Act sets a mandatory rule on self-dealing which cannot be changed by a trust instrument or upon agreement with the beneficiary. But it has become apparent that from the experience of commercial trust it is sometimes necessary for the interest of the beneficiaries to transfer trust assets to the trustee or vice versa. Therefore our task is now to make default rules instead of mandatory rules.

(3) More protection for beneficiaries

Even though the rules of the trust law should be basically default rules, and this basic principle is supported, the problem is the content of the rules. Here we should think about the interest of the beneficiaries and set up favorable rules for the beneficiaries. In present Trust Act the beneficiaries have an obligation to reimburse the expenses caused in the course of management of the trust. But such expenses should be reimbursed from the trust assets and not from the beneficiaries. Therefore we need to change the rule.

2. Some specific problems of importance

There are many problems to be discussed. But I shall focus only on three big issues.

(1) Duty of loyalty

As mentioned above the present provision on the prohibition of self-dealing will be revised. The new provision will be based on a broader and comprehensive concept of fiduciary duty. And this rule will allow self-dealing under certain conditions. But what are the conditions, and what is the consequence of being discharged of the duty of loyalty under certain conditions? Is there a liability for the trustee who conducted a self-dealing but in fact done damage to the trust assets?

(2) No-profit rule and the liability to return the unauthorized benefit to the trust asset

If there was actually a breach of duty of loyalty the liability of the trustee is to compensate the damages of the trust assets or to invalidate the transaction in some cases. We are discussing whether the trustee should return the unauthorized benefit he gained from the trust assets. There are pros and cons for this new rule.

(3) Right of reimbursement of the trustee

Present Trust Act gives the trustee right to reimburse his expenses not only from the trust assets but also from the beneficiary. But this is not appropriate, especially when the beneficiary has no power to control the trustee. Majority of the academics argue for the restriction of the reimbursement right of the trustee, but the practice is against this.

(4) Limited Liability Trust

It has been argued from the practice that a new type of trust, the

so-called Limited Liability Trust should be introduced in the new Trust Act. This trust limits the liability of the trustee only to the amount of the trust assets, not only against trust creditors in contract but also against trust creditors in tort. I personally disagree establishing such an institution which cannot be said as a true "trust", but the business world strongly supports this new type of trust.