

Representative for Beneficiary in the Trust

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1. Introduction

Before the Trust Act in Japan (1922) was reformed in 2006, there was a “Trust Administrator”. And after the reformation, there are “Trust Administrator”, “Trust Supervisor”, and “Agent for Beneficiary”. I call these four organizations generally as “Representative for Beneficiary”, and would like to analyze their characteristics compared to those in the Trust Laws abroad (to know whether it is a strange system unique in Japan, as often said), and foresee their expected role.

2. Outline History of “Trust Administrator” before reformation.

In the former Trust Act in Japan, the Trust Administrator could be appointed when the beneficiary was indefinite or not in existence, and it had the power to act in stead of the beneficiary on both judicial and in-judicial matters.

The former Trust Act was said to have been made following mainly Indian Trust Act (1882) and California Civil Code (1872). But both of them had no such organization as Trust Administrator. And public trust in England or United States did not have such an organization, either. Thus, the origin of the Trust Administrator is unknown. Some scholars say it was made because of the lack of intervention by the court in Japan compared to Anglo-America.

3. Similar existences in Anglo-American trusts.

(1) In the Uniform Trust Code (UTC) of the US, there is a “Rep-

resentation” in Article 3. It basically represents settlor or beneficiary. Before UTC, there was no statutory organization to represent anyone in the trust. One of the reason why representation was introduced is to promote dispute resolution out of the court. Not only “Representation”, there is other existence of “a person to enforce the trust” in the section 408 (Trust for Care of Animal) and section 409 (Non charitable trust without Ascertainable Beneficiary) of UTC. One of the drafter of UTC says that these articles were made because of the fact that in many cases of US trust, a person is appointed as advisor or protector of trust and nowadays plays an important role in trust administration.

(2) In many cases of offshore asset protection trusts, there are “Enforcer”, or “Protector” (or in other names) which has the right to change the trustee or veto on acts of the trustee. And the Principles of European Trust Law has the provision about the enforcer of a trust for purposes in the Article III, etc.

(3) These are the “fourth” players of the trust to come next to settlor, trustee, and beneficiary. The needs for such existence are often said as the necessity of someone to enforce the trust. But enforcer itself cannot acquire the benefit of trust, so trust cannot be treated as valid without beneficiary for whom trust is to be executed. It is called “Beneficiary Principle”. Enforcer or protector plays just a role to help to enforce the trust for the beneficiary and cannot alter the existence of the beneficiary.

4. Introduction of concerned provisions of new Trust Act and interpretation for some problems.

In the new Trust Act in Japan (2006), Trust Administrator (Article 123) is nearly the same as that of former Trust Act and appointed when the beneficiary is indefinite or not in existence and represents beneficiary’s interest. Trust Supervisor (Article 131) exercises part of beneficiary’s important power in parallel with the beneficiary in existence.

Agent for Beneficiary (Article 138) acts as an agent for beneficiary (so far as the beneficiary for whom he is assigned to represent), and exercises beneficiary's rights instead of the beneficiary he represents.

These three are made separately for each supposed case (for example, beneficiary is in existence or not), but the difference of their usage is not clear because their power and coverage of beneficiaries can be widen or reduced.

5. Suggestions for use of Representative for Beneficiary.

Representative for beneficiary can be used as the tool to reflect settlor's intention to the trust. It is similar to the use of co-trustee which has the power to control the trust to reflect the settlor's intention or cope with changes unexpected when the trust was settled in asset protection trust in Anglo-American trusts. Compared to co-trustee, representative can be free of the burden of the responsibility as trustee. The representative can be an expert in special area to advise for the trustee. And especially in the commercial trust, the representative can be used to monitor the trust to be managed properly instead of beneficiaries who are too many or too busy to execute their power promptly.

Trust Administrator can be appointed in the public trust or purpose trust to enforce the trust, but lack of beneficiary cannot be recovered. To manage the trust properly, we must consider total effectiveness of trust management system (including control by the government and perpetuity period).

