

## Several issues on the limited liability trust under the revised Japanese Trust Code of 2006

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This presentation focuses on liability of a trustee of a limited liability trust, when a trust property is suffering soil contamination as prescribed in the Japanese Soil Contamination Countermeasures Law. The limited liability trust is a kind of trusts which the revised Japanese Trust Code of 2006 has enabled for the first time and which has never been existed under the Japanese Trust Code of 1922. The trustee of a limited liability trust should exempt personal liability for costs and liabilities incurred by the trustee in the course of the proper administration of the trust if he does not breach any fiduciary duties, and the trust property solely bears the liabilities. But there are some exceptions when the trustee of a limited liability trust commits torts and is personally at fault. On that occasion, §§ 217 i and 21(1)viii of the Trust Code of 2006 are applied to him, so that he can personally be liable. But whether §21(1)viii is applied not to negligent acts but to acts without fault is a question in controversy.

On the other hand, the Japanese Soil Contamination Countermeasures Law was enacted in 2002, as a counterpart of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in the U.S. Under the Act, an owner of the lot of the factory or the enterprise relating to abolished specified facilities using harmful substances, in which specific harmful substances are manufactured, used or treated, could be ordered by the prefectural governor to remove the contaminated soil, to prevent it from diffusing, and to take other necessary measures. The owner is liable even if he has never contaminated the lot, when the

polluter of the contaminated lot cannot be found. The Law is silent on whether the title holding trustee of the contaminated lot is held liable as if he were an owner of it.

Should the trustee personally bear owner liability for soil contamination in trust property he holds in trust under the Soil Contamination Countermeasures Law? If the owner liability imposed by the Law is thought to be of the nature of tort liability, it is possible that he must personally incur the liability when the trust estate is not sufficient to indemnify him. In the U.S., CERCLA was first silent about the issue and the case law about it developed referring to the Restatement (Second) of Trusts. 16 years after CERCLA was first enacted, the U.S. Congress solved the issue by adding prescriptions on trustee's liability for soil contamination in CERCLA. Now, trustees excluding commercial trustees are distinguished from owners in CERCLA context.

Also in Japan, prescriptions should be made concerning trustee liability for soil contamination in trust property to address the issue, too. But the Japanese rules for the trustee liability could be different from ones in the U.S., because the nature of the liability imposed by CERCLA differs from that imposed by the Soil Contamination Countermeasures Law. The former is derived from absolute liability by nuisance, while the latter is not. Response cost imposed by the Law is thought to be expenses from trust administration and imposed on a trustee only in his representative capacity.

Thus, the said issue in the Trust Code of 2006, that is, whether §21 (1)viii of the Code is applied not to negligent acts but to acts without fault, does not affect the also said issue whether the trustee personally bears owner liability for soil contamination in the trust property he holds under the Soil Contamination Countermeasures Law one another. However, I hope that the Law should have specific prescriptions on when a trustee is personally liable for his own behaviors and for the trust property he holds.