

# Examining the problems in establishing a Trust

Atsuko Kimura  
(Kyoto University)

## I Problems in establishing a family trust

The Trust Act permits certain matters that are otherwise provided for by the terms of the trust. In this regard, it may establish default rules that are different from those provided for by the Trust Act. A trust with family members as trustees may include clauses in its terms that require the consent of trustees for trust modification or termination, trustee dismissal, and change in beneficiaries. However, the validity of the terms of a trust may be questionable in many instances, considering the relationship between the parties involved and the circumstances existing at the time of creation. Therefore, the question arises as to how one should consider the validity of the terms of the trust that differ from the default rules provided for by the Trust Act.

## II Validity of the clauses of the terms of the trust (1)—In view of Article 8 of the Trust Act

Article 8 of the Trust Act provides that a trustees may not benefit from a trust under any name, unless the trustee benefits from the trust as a beneficiary. The feature of a trust is that the trustee holds the legal title of the trust property for its administration or disposal. In view of this feature, the prohibition of the trustee's beneficiary, as set forth in Article 8 of the Trust Act, is an essential and fundamental principle of trusts. According to the basic principles of trusts provided

in Article 8 of the Trust Act, the clause that allows the trustee to benefit from a trust violates the prohibition on the trustee receiving any benefits. If the terms of the trust violate Article 8 of the Trust Act in the abstract, unless the specific clause is found reasonably necessary to achieve the purpose of a trust (see Article 31 (2) (iv) of the Trust Act), its validity should be denied. For example, if the trustee is designated as the holder of a vested right upon termination of the trust (Article 182 (1) (ii)), a clause requiring the consent of the trustee to terminate the trust would allow him/her to benefit from the trust. In such cases, unless the clause is deemed to have been established to support the decision-making of the beneficiary in the event of his or her impaired judgment, it may be denied validity on the grounds of violation of Article 8 of the Trust Act.

III Validity of the clauses of the terms of trusts (2) in view of the comparison between actual wills and trusts as substitutes for wills

Article 90 (1) of the Trust Act grants trustees the right to change beneficiaries when the trust functions as a will substitute. However, if otherwise provided by the terms of the trust, the clause prevails (Article 90 (1) proviso) . If the trustee is designated as a beneficiary for residual assets (Article 182 (1) (i)), the question arises whether the trust provisions can limit the right to change beneficiaries. Indeed, according to the explanation provided at the time of the legislation of the Trust Act in force, the right to change beneficiaries is granted to the trustee in case the trust acts as substitute will because the trustee usually has the same intention as in a gift contract on the donor's death, where withdrawal of the contract is permitted under judicial precedents. However, considering the difference in legal structure between a trust as a will-substitute and a contract of gift on the donor's death, these should not be viewed as being comparable. Furthermore,

in the case of a will, which is made by a single act, respect for the final will of the testator is required, whereas in the case of a trust as a will-substitute, beneficiaries are determined by an agreement between the settlor and the trustee. In the latter case, the scheme of property succession can be fixed through an agreement between the parties in the form of a trust agreement that limits or excludes the right to change beneficiaries. Based on the above, in the case of a trust as a will-substitute, the clause in the terms that limits or excludes the right to change beneficiaries can be considered valid.

#### IV Validity of the clause providing for the trust to receive instructions from a third party

In family trusts, the Trust Act may grant the authority of direction or consent to a third party in order to preempt the impaired judgment or to strengthen the supervisory role of the beneficiary. In such cases, the validity of the clause of terms of trust must be determined based on whether the rights or authority held by beneficiaries are restricted by such trust acts.

#### IV Conclusion

Even where the Trust Act permits to be otherwise provided for by the terms of the trust, clauses are not always recognized as valid in light of the basic principles of trust, such as the prohibition of a trustee's benefit (Article 8).

Especially in the case of a trust set up among family members, it is necessary that the concerned parties, including experts, recognize the necessity of using trusts based on their nature and content, as indicated in Article 8 of the Trust Act and other relevant articles.