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Law of Trusts
of Japan

Yutaka Hoshino

2011

Introduction

This book is intended to explain elementary knowledges on the trust law of Japan, and theoretically to consider its interpretation problems.

As for the Trust Act of Japan, there had been not much discussion on it for a long time since Taisho 11 (1922) when the statute was established. But it has suddenly got notices from legal students and practitioners since a judgement of Japanese Supreme Court in Heisei 14 (2002) which referred to a general theory of trusts. In addition, there have been established the amendment of Trust Business Act in Heisei 16 (2004) and the revision of the Trust Act at the end of Heisei 18 (2006) sequentially, so that the number and volume of provisions and rules in the Trust Act and its related statutes have been exploded. Especially, in the body of the Trust Act far more detailed provisions than those in the predecessor have been contained with explicit form. The provisions are so detailed that if you write down whole the text of the statute in the form of normal sentences, you could get a trust law book of standard volume as a textbook on the subject.

But, whatever detailed provisions are introduced, theoretical possibilities of interpretation of trust law shall be beyond the expectation of the legislator. And there are certainly left some interpretational problems, including fundamental ones, out of the scope of usual arguments up to the legislation. So, in learning and studying law of trusts it is necessary to consider how theoretically to grasp the trust relation and from what point of view the interpretation should be done, without sticking to the verbal text of the Trust Act, as well as to try to systematically understand the concrete contents of the provisions and the relations among them. It is nothing but a continuation of the most fundamental mission of the legal study in general, not restricted to the area of trust law, that is, to investigate the theoretical foundation provided in the provisions to give resolutions on conflicts, so as to give a basic orientation for the interpretation in case of some unexpected problems.

Considering all described above, in this book I tried to explain the elementary facts on the provisions of the Trust Act and to unite arguments from theoretical points of view on Trusts with the interpretations of those provisions. Whether, by doing so, the law of trusts is made easier or harder to understand should be left to the criticisms by each reader. By the way, I published a dissertation “Theories on the Law of Trusts and Their Applications” (Yutaka Hishino: Shinzansya 2004). Although that book is for the interpretations of the obsoleted Trust Act, it contains considerations on the mutual relations between theoretical points of view on trust relationship and the concrete interpretational problems of the provisions. When you want to study deeper the contents of this book or are interested in the relation between Trust Theories and Trust Law, please refer that dissertation, too.

Besides, while the text of the Trust Act quoted in this book is current at the time of the publication, Heisei 23 (2011), as for the amendments and additional issues to

happen after then, please refer the introductory supplementary article titled “星野豊『信託法』(信山社、2011年)【INTRODUCTIONS & APPENDIX】” on “Tsukuba Repository” Site administered by Tsukuba University Library, which shall be updated as necessary. The URL is:

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The content of this book is newly written, but its base and presuppositions have been founded on my experience as a lecturer in the Training Lesson Plan on Law of Trusts operated at Mitsui Trust Bank run from Heisei 3 (1991) to Heisei 6 (1994) and the lectures and exercises on Law of Trusts given at Social Science Group and its graduate school in Tsukuba University. In addition, I have got much benefit from the discussion at the periodical meetings for studying Law of Trusts operated together with Mizuho Trust Bank (named Yasuda Trust Bank at the start time of the meeting) since Heisei 7 (1995). Further, from Naohiro Sakurada, Yasuo Kondo, Masahiko Nakayama and Satoshi Niibe, I could get many theoretical and/or practical advices on the draft of this book. I wishes to thank again the students and practitioners who patiently followed my never easy to understand discussion. I hope the publication of this book can pay some part of the debts to those people. Finally, special thanks are due to the Shinzan-Sha and the stuffs who continuously encourage and support my writing during the long time it has taken from the planing to the publication of this book.

*[Acknowledgement for English translation] As for the current legal provisions, the English translation of Japanese Law by Japanese Law Translation Council at Ministry of Justice of Japan is made use of throughout this translation with small nominal modifications. The source is publicly available from here through the internet.

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Chapter 1

The Definition and Nature of Trusts

1.1 Definition of Trust

(1) Wide Variety of the Definitions of Trust

“What is Trust?” This problem is the starting point and, at the same time, the ultimate goal for the study on Trusts. Most legal concepts have usually their generally accepted definitions, even if there may be room for some objections to them. But as far as Trust Law is concerned, as we will see below, the aspect of the argument radically varies according to from which side the institute is considered for what purpose. One of the causes that are making the arguments on trusts difficult to understand is, we may say, the fact that there are several definitions of trust, of which we cannot select logically the best.

We can classify the theoretical points of view concerning the definition of trust roughly into three. The first is a thought to focus on the wills of the parties to form a trust in analyzing their actions in the formation process of the trust. The former Trust Act had adopted such a view in its definition of trust. The second is a thought to focus on the structure of the rights and duties already formed among trust parties. The Restatement of Trusts of the USA is adopting such a view. The current Trust Act of Japan also could be said to belong to this latter class. The third, and with a bit different nature from the other two, is a thought to focus on the objectively appropriate legal relations concerning a specified property, for the realization of which a court has given the remedies to a party from the view of the social ethics or justice irrespective of the actual situation of the rights and obligations which the parties formed and activated. The traditional concept of Trust in England has been formed on this thought.

Those three ways of thought above are not explicitly contradictory with each

other. But which stand point one adopts will make a big difference in the direction of interpretation concerning the definition and the theoretical nature of trust.

From the first point of view, what is theoretically the most important is the agreement to settle the trust relation among the trust parties, especially between the settlor and the trustee, so that the determination of the content of the agreement formed by the trust parties would be principally sought for in interpreting the trust relationship by a court of justice. Therefore, from this view point, since a trust is formed by the wills of the trust parties, even in the case in which some lacks are recognized in the wills of the parties, analogical application of the provisions of Trust Act would be unallowable as a rule.

From the second point of view, since whether a trust has been formed depends on the objective structure of the already existing rights and duties relation between the relevant parties, for the definition of trust how that legal relationship would be formed is not important. It is true that it is necessary to interpret the wills of the parties when the existing rights and duties relations was formed according to the wills. However, in the cases where the conditions of the rights and duties relation between the present trust parties have been discrepant from the wills of the parties at the time of settlement of the trust (even such a case is not rare that the parties at settling time and those at running time are different), the interpretation should not stick to the wills of the parties at the settling time, but take, first of all, the present condition of the rights and duties relation into consideration. In addition, under this view, even though the existing rights and duties relation has never been based on the wills of the trust parties, rules of trusts may be applicable to such cases. On the other hand, it is, as a rule, not allowable for a court to force on the trust parties any legal relation different from the existing rights and duties between the parties.

In contrast to all above, under the third point of view, it is a court that decides whether a legal relationship constitutes a trust or not. A court would confirm an appropriate legal relationship on the disputed property guided by the thought of ethics or justice and force it to the trust party. But, in such considerations, whether the legal relation between parties was built according to the wills of the parties, or what is the structure of the legal relationship existing among the parties is quite irrelevant. In other words, from this point of view, the trust relation is set not by the trust parties, but by the court, where the confirmation of the trust by the court is everything. The reason why it is allowed for trust parties to set the trusts or why legal relations like a trust have existed, is nothing but the fact that the court has confirmed that to be suitable from the thought of ethics or justice. In sum, this stand point sees the trust institute as a mean to realize legal relationships appropriate in ethical or justifiable thought. In this sense, this point of view is qualitatively different from the first or second view point.

As we will see below, Japanese Trust Act has had the provisions explicitly defining a trust since the old Trust Act in Taisho era. So, if one takes the terms of the

provision as the absolute definition of trust, there would be no need to discuss about definitions of a trust. However, in such a situation that some disputations on the definition of trust happen, the parties cannot reach some new agreement based on the relationship of their mutual confidence, as they are disputing one another on whether some legal relationship belongs to the trust relation or not. Under such a condition, the interpretation of the provisions on the definition of trust would considerably change in the orientation depending on which of the view points described above the interpreter adopts to define a trust. In addition, as described above, the third view point is surely different in the orientation of the thought from the first and second ones. When one stands on the third stand point, a trust should be made use of, in effect, as a means to establish legal relationships appropriate in ethics or justice since Law or legal study should aim at the realization of Social Justice in the end, so that the definition of trust itself would be considered as a mere means. There seems to be no reason in theory to exclude such a stand point. For example, allowing Family Court rather wide range of discretion by analogical interpretations of trust law on the problem of family property administration would be practically suitable in many cases, although such problems are not fully discussed in Japan.

Anyway, as we have seen, we should be conscious through discussions on problems of trusts to the facts that there coexists plural stand points on the definition of trust and that the orientation of interpretation depends on which point one stands on.

(2) The Provisions Defining a Trust in Trust Act

The former Trust Act before the amendment in Heisei 18 (2006) defined a trust as “to do transfer or the other disposition of certain property rights so as to have the other person administer or dispose of the property in accordance with a certain purpose”¹. This definition gives attention to the fact that the settlor establishes the trust relation through the transfer or the other disposition of the property right and has the trustee as “the other party” administer the property in accord with the purpose of the trust, namely, to the settling act of the trust relation by the settlor with the trustee. In this meaning, the stand point of this definition is similar to the first point of view described above. This definition has been kept since the establishment of Japanese Trust Act in Taisho 11 (1922) until the major amendment of the statute in Heisei 18 (2006). By the way, the definition was based on the jus-in-personam theory of Trust (for details including contents of the other trust theories, see Chapter 1 Section 4), which was strongly insisted in England and in the United States of America at the time of the preparation for the legislation. Since ago, they had pointed out some

¹Article 1 of the former Trust Act Trust in this statute means to do transfer or the other disposition of certain property rights so as to have the other person administer or dispose of the property in accordance with a certain purpose.

problems in the definition in the former statute that took the process of the settling the trust between the settlor and trustee, like following.

First, since the trustee was prescribed as “the other person”, whether a “declaration of trust (Self Trust)” was doubtful to be called a trust in the former provision. For in a declaration of trust the settlor declares that a part of his/her own properties be the trust property and the settlor him/herself administers the property as the trustee.

Second, since the provision prescribes to do “transfer or the other disposition of certain property rights”, one influential opinion insisted that there must exist certain trust properties at the time of the settlement of the trust and that a trust couldn’t be established by a mere agreement settling the trust. According to the opinion, the timing of the settlement in a certain type of large scale investment trust would be delayed until the real payment of the whole capital money, so that there happens interpretational debates on how the rights of already paying investors could be protected. For many investors would take part in such a trust so that it usually takes long time to collect all the capitals.(see Chapter 2 Section 1 (1))

Thirdly, in view of the clause saying that the settlor does transfer or the other disposition of “property rights”, a doctrine influentially insists that the property constituting a trust should be, as a rule, restricted to certain positive properties and that the negative properties in trust property, if any, should be exceeded by the positive properties there in the sum. According to the opinion, when the trust property consists of whole assets of an enterprise or of a heritage, since such assets are usually a mixture of positive and negative properties so that a considerable amount of recalculations is needed to make the financial conditions clear, the settlement of a trust with such asset would be practically very difficult.(as for positive and negative properties, see Chapter 2 Section 2 (3))

In contrast to all above, the current Trust Act amended in Heisei 18 (2006) defines a trust as that “a specific person, by employing any of the methods listed in the items of the following Article, administers or disposes of property in accordance with a certain purpose ... and conducts any other acts that are necessary to achieve such purpose”². As for the methods to settle a trust, a conclusion of a trust contract, a will to settle a trust and a notarial deed of a declaration of trust are enumerated³.

²(Definition)[Excerpt] Article 2 ① The term “trust” as used in this Act means an arrangement in which a specific person, by employing any of the methods listed in the items of the following Article, administers or disposes of property in accordance with a certain purpose (excluding the purpose of exclusively promoting the person’s own interests; the same shall apply in said Article) and conducts any other acts that are necessary to achieve such purpose.

³(Methods to Create a Trust)

Article 3 A trust shall be created by any of the following methods:

1. by concluding an agreement with a specific person to the effect that the person will be assigned property, that the person will be granted a security interest in property, or that property will otherwise be disposed of to the person, and that said specific person should administer or dispose

Comparing the definition with the former definition, except for the restrictions on the method to settle a trust by the paragraphs of Article 3, the present states of the administration of the trust property according to the trust purpose by the trustee is paid the exclusive attention in Article 2 paragraph 1 that directly prescribes the definition of Trust. So, we can say this definition stands on the second stand point described in the previous page.

If so, the interpretation problems in the former provision would be solved in the current one like following.

Firstly, as for a declaration of trust, it is confirmed as one of methods to settle a trust in Article 3 item 3. In addition to that, viewing from the wording structure of the definition in Article 2 paragraph 1, there is no need for the trustee to be a different person from the settlor. So, we can conclude that a declaration of trust should be included in Trust.

Secondly, as for the timing of the establishment of a trust, since Article 2 paragraph 1 concentrates on the state where a trust has already been established, the timing itself cannot logically deduce from the provision. In view of such a condition, the current statute sets explicit provisions on this timing problem, in which the timing of the establishment of a trust is: at the time of the conclusion of the contract as to a trust contract, at the time of taking effect of the will as to a trust settling will, and at the time of drawing the notarial deed up as to a declaration of trust⁴.

of such property in accordance with a certain purpose and carry out any other acts that are necessary for achieving such purpose (hereinafter referred to as a “trust agreement”);

2. by making a will to the effect that property will be assigned to a specific person, that a specific person will granted a security interest in property, or that property will otherwise be disposed of to a specific person, and that the specific person should administer or dispose of such property in accordance with a certain purpose and carry out any other acts that are necessary for achieving such purpose; or

3. by manifestation of an intention for a specific person to administer or dispose of a certain portion of the property that the person holds in accordance with a certain purpose and for the person to conduct any other acts that are necessary for achieving such purpose by the person, with the manifestation of such intention being evidenced by a notarial deed or any other document or electromagnetic record (meaning a record made in an electronic form, a magnetic form, or any other form not recognizable to human perception and which is used in information processing by computers as specified by Ordinance of the Ministry of Justice; the same shall apply hereinafter) in which said purpose, the matters necessary for specifying said property, and other matters specified by Ordinance of the Ministry of Justice have been stated or recorded.

⁴(Effectuation of a Trust)

Article 4 ① A trust created by the method set forth in item 1 of the preceding Article shall become effective when a trust agreement is concluded between the person who is to be the settlor and another person who is to be the trustee.

② A trust created by the method set forth in item 2 of the preceding Article shall become effective when the will takes effect.

③ A trust created by the method set forth in item 3 of the preceding Article shall become effective when the events specified in the following items take place for the cases listed in the respective items:

Thirdly, as for the component ratio of the positive and negative properties, there is no mention in the definition in Article 2. Therefore, a trust will be valid whenever the settlement has been done by a method prescribed in Article 3 irrespective of the component ratio of positive and negative properties in the trust property. However, on the other hand, such a trust would have problems concerning the continuation and termination of trust regulated by Trust law. In practice, a trust in which the negative properties exceeds the positive properties of the trust property in sum would be applied to the bankruptcy proceeding according to Chapter 10-2 of Bankruptcy Act (Article 244-2 and after), so that the trust relation will be terminated at the time of the bankruptcy order⁵.

By the way, the definition of trust in the current statute has following characters and problems.

First, as described above, the current provision defines a trust merely for the trustee to administer the trust property according to the trust purpose. So, any structural relations of rights and duties between the trust parties would be allowable by the trust definition. That is the most distinct character of the current definition compared with the former one which was based on the *jus-in-personam* theory so that there might be theoretical conflicts between the provisions and the other trust theories than the *jus-in-personam* theory. Such a character of the current statute might lead to a kind of “legal stability”. For it allows for the provisions of the Trust Act to be applied to wide varieties of “trust relations” existing in practice so that the most part of the practical problems could be administered with the very provisions. However, at the same time, as the current provision allows in the nature all kinds of legal relations on trust, the fundamental legal theoretical constructs of Trust cannot be logically decided from it, so that the theoretical distinction between trust and the other legal relations is blurred. We should note that it could lead to serious

1. where the trust is created by means of a notarial deed or any other document or electromagnetic record authenticated by a notary (hereinafter referred to as a “notarial deed, etc.” in this item and the following item): when the notarial deed, etc. is executed; or

2. where the trust is created by means of a document or electromagnetic record other than a notarial deed, etc.: when notice is given by means of an instrument bearing a fixed date to the third party designated as the person who is to be the beneficiary (if there are two or more such third parties, to one of them), with regard to the fact that the trust has been created and the contents thereof.

④ Notwithstanding the provisions of the preceding three paragraphs, when a trust is subject to a condition precedent or a designated time of commencement by the terms of trust, said trust shall become effective when the condition precedent is fulfilled or when the time of commencement arrives.

⁵(Causes of Termination of a Trust)[Excerpt]

Article 163 In addition to cases under the provisions of the following Article, a trust shall terminate in the following cases:

...

7. where an order for the commencement of bankruptcy proceedings has been entered against the trust property;

difficulties.

The next problem is whether the methods to settle a trust prescribed in each paragraph of Article 3 are so exclusive that no exceptional method could be allowed in relation to the definition of trust. This book stands on the position that the prescribed methods should be interpreted as subsidiary because the administration of Trust property by the Trustee according to the Trust Purpose should be the most important part of the definition of trust, which will be argued more detailed in Chapter 1 Section 4 (3) below. Then, the Trust Act should be at least analogically applied even to the case in which the trust was established not by the will of the “settlor” as far as the legal relation on which a administrator administers certain property according to a certain purpose is confirmed. Instead, if one thinks that the methods of settlement in paragraphs of Article 3 are indispensable parts of the definition of trust, it would be considered as generally unallowable to apply by analogy the provisions of the Trust Act to legal relations which were set not by the intention of a settlor.

Anyway, as referred to above, the current statutory definition of trust as well as the former one has its own characteristic and problems. Any explicit provision couldn't exclude the room of questions nor the need of arguments. It may be rather proper to think that the current provision tends to cause interpretational difficulties more than the former since it has made the domain of a trust broader and thinner at the same time in the respective senses.

As we have seen above, there can be no definitive definition of trust. The current statutory definition of trust is also never providing a theoretically complete answer. So, as implied at the beginning of this book, we should consider throughout this book how to define a trust. Therefore, in following, we will proceed with the discussion on the standing point that the theoretically most important character of Trust is the fact that the administration acts of the trust property are bound by the trust purpose(Chapter 1 Section 4 (3)) , although paying full considerations to the definition of trust in Article 2 of the current Trust Act.

1.2 History of Trust and Trust Institute

There are various doctrines on the historical origin of Trust. However, we can say it is the case law having been formed in England and the United States of America that was most directly influential to the establishment of the Japanese Trust Law. Since we will mostly concentrate on the Japanese Trust Law as the object of the considerations in this book, we will give some review on the history of the forming and development of the trust institute in England and the United States as far as it is necessary for our discussion on the Japanese law. Then, we will consider the former and current Japanese Statutes of Trusts (Trust Act) in their characteristics as legal

institutes⁶.

(1) Formation of Trust Institute in England

The fundamental definition of trust in England and the United States of America defines a trust as a relation with respect to certain property subjecting the trustee who holds title to the property to equitable duties and responsibilities for the beneficiary who should get the benefits from the property⁷. Contrary to the current trust institute in Japan, there has been traditionally coexisting Common Law that is case law and Equity that pursuit to resolve cases by concrete justice and fairness, the historical origins of which are quite different. The trust institute definable like above could be seen to have been generated from certain conflicts of judgements among such two different justices belonging to the two different legal institutions respectively.

That means: A Common Law Court judges that the trustee holds the title of certain trust property. Against which, the Equity Court (Chancellor) issues a decree that orders the trustee, the title holder of the property, to keep the property for the benefit of the beneficiary from the viewpoint of justice and equity. Then, owing to such contradictory judgements, the equitable interests of the property belongs to the beneficiary, separated from the Common Law title of it which belongs to the trustee. Such conditions have historically generated Trust Relation.

Such case institute as Trusts is said to have been formed by the time around the fifteen century in England. We should note the following natures in such a traditional case law.

First, it was only after the sixteenth century that various cases concerning equity began to be collected as the “case book” and systematized. The conflict resolutions in Equity Court could be said an accumulation of various concrete decisions in its theory. Therefore, excepting the later ages where the case book collection has been established, it would be wrong to say as if early judgement in each case concerning equitable institutes had been decided in prospect of the future establishment of the institute.

Second, from the viewpoint of the definitions of a trust described above, decrees by Equity Court have been playing the most important part for the creation of the traditional trust relation. That directly represents the third stand point of the definition of Trust (see Section 1 (1)) which defines a trust for Court to force the preferable rights and duties relation on certain property from the viewpoint of the justice and equity, irrespective of the existing right-obligation relationship formed by the parties. So, in the traditional case law of England, a trust was nothing but the relation that the court judged is “appropriate for being a trust relation” and it was not until later

⁶As to details of the following descriptions, see Hoshino “Theory of Trusts” Chapter 1 and 2.

⁷Restatement (3rd) of Trusts, s.2. *The wording was modified a little.

that the settlement act of the trust relation by the trust parties came to be taken as important.

In sum, in the historical origin of the trust relation in Enland law there are its peculiar legal system and characteristic split of the role of Courts, which are qualitatively different from the foundation of the current Japanese legal system. So, it is a matter of course that the traditional case law of England was directly incorporated into Japanese legal system without any modifications at the time of the establishment of Japanese Trust Act. In reality, even in England or the United States of America, the theoretical characteristics of Trusts have been considerably changed especially in and after the nineteenth century.

(2) Judicial Reform and the Historical Roll of the Jus-In-Personam Theory

In “English Legal System” coexist plural laws, Common Law and Equity, of which the respective courts have the jurisdictions. However, such a legal system had become criticized in various respects as the social relations was developed especially since the nineteenth century. Some examples of the criticisms to Equity Court were : ① The dilation of the number of applications and the short of the judges are causing terrible delay of the procedures there. ② The expensiveness of the procedure fees and the corruption of the court clerks. ③ The indefiniteness and incoherence of equity institutes itself. Those defects were mutually so connected that the abuses got worse.

As the result of the judicial reform having lasted over the nineteenth century, the Judicature Act of 1873 integrated Equity Court into Common Law Court, the jurisdiction on Trusts has been shared with Common Law Court. A common explanation of the reason of the reform is the fact that the efficiency of the procedure in court has become required by the social development and, especially, the growth of the commerce. However, in view of the fact that the “abuses” in Equity Court was so strongly accused as to get to the abolishment of the court, the source of the criticisms should be not merely the inefficiency but rather some strong doubts to the very justice and equity in the procedure of Equity court.

If so was the real situation, some theoretical reconstruction concerning the traditional characteristics of the case institute of Trust referred to above would be considered necessary. The traditional case institute was seen as a accumulation of the judgement based on the considerations of the justice and equity in each concrete case. However, since the very legitimacy of judgements by the court was thought dubious, the radical reconsideration of the fundamental theoretical constitution of the trust relation became necessary to give the institute a legal theoretical legitimacy. It was the jus-in-personam theory of Trust by F. W. Maitland that fulfilled such a part as a trust theory. The theory gave a great influence also on the former statutory trust

theory of Japan.

The basic thought of the *jus-in-personam* theory is, in short, that it is the will of the settlor to settle the trust and the acceptance of it by the trustee, and that such will is the most important in theory for the formation of the trust relation, so that the confirmation of the trust by a court is a mere recognition of the agreement between the settlor and the trustee. The *jus-in-personam* theory gave a coherent explanation of the case law at that time based on the above view point and concluded the already formed trust institute to be still legitimate after the judicial reform. Though, the explanation from the standpoint of the *jus-in-personam* theory is now rarely quoted as a ground of the legitimacy of the Trust institute, for the confidence in the judgements of court has been restored after the judicial reform. So, the explanation that the ground of the legitimacy of the Trust institute is the system of the justice and equity built by courts is still powerful in England.

(3) Development of the Trust Institute in the United States of America

The trust institute of the United States of America was inherited from England. It was explicitly systematized by “Restatement of Trusts” edited since 1930’s. The third edition of the Restatement had been concluded with the chapter concerning the obligations of trustees and the rights of beneficiaries in 2007. However, the Trust Institute of the United States has quite different theoretical characteristics from that of England in the very fundamental part.

The fundamental characteristics of the Trust Institute of the United States are: First, the practical phases of the usage of Trusts have been greatly modified such as the growth of commercial trusts in large scale projects. Second, the way of understanding of the legal system concerning the relation between Common Law and Equity and some fundamental legal concepts like “Property” or “Interest” have been shifted as commercial trusts has grown, so that the trust institute has been developed taking such trust relations into considerations as pursuing an augmentation of abstract economic benefit not based on the property itself as a matter. Third, the thought that situates a trust in the “Fiduciary Relationships” institute for the general property administration similar to Trusts in the functionalities has been established, without sticking to the strict historical origin.

The trust institute of the United States, in contrast to that of England, doesn’t rigidly rely on the roll sharing between Common Law and Equity. So it is not rare that a conclusion of the court deviates from the principle of the traditional Equity. In addition, not a few established conclusions of the traditional English trust institute have been modified as a result of the considerations on the change of the economic values of trust property during investment acts. Moreover, some doctrine insists even

a wholly reconstruction of the interpretation of the legal system including the relation of Trust with Contract or the other legal institutes, regardless of the historical origins.

In sum, the trust institute of the United States has been flexibly changed according to the realities of the society and commerce in the United States. We could say, trust theories in the United States is playing the role to provide theoretical points of view to give some reasonable explanations to such changes. However, because of such flexible changes in accord with the social realities, the coherence and legitimacy of the Trust institute would become difficult to be deduced from the contents of the case law. So, some additional source of the theoretical foundation of Trust would be needed. At present, most of the trust theories in the United States seems to be setting the foundations on its economic rationality. But such a tendency also might be changed as the change of the times. We should watch the trends.

(4) The Basic Features of the Former Trust Act of Japan

The earliest legislation on Trusts in Japan was “Act of Secured Corporate Bond Trust” (Act no.52 of Meiji 38 (1905)). The former Trust Act established in Taisho 11 (1922) was said to be legislated for putting the concept of Trust restrictively introduced in the law theoretically in order. Torajiro Ikeda, the drafter of the statute, basically supported in the drafting of the statute the *jus-in-personam* theory newly insisted in England or the United States at the time. So, he put it on the center of the construction of the theory that the settlor creates the trust relationship by doing transfer or the other dispositions of the trust property to the trustee and that the absolute title of the trust property belongs to the trustee. As the result, the nature of the right of the beneficiary became a right in *personam*. We could say, such a fundamental idea of the former Trust Act was suitable to the purpose to place the trust concept coherently in the Japanese legal system that is radically different from that of England or of the United States.

Being based on such an idea, the former Trust Act had following features:

Firstly, while the absolute title of the trust property was given to the trustee, the duties and responsibilities of the trustee was strengthened to the maximum and very cautious regulations were put against the possibilities of the pursuit of self-interests by the trustee. Those regulations later got the strong criticisms from practitioners of trust banks that they impeded the flexible trust relationship too much, which led to the recent amendment of the Trust Act. We will discuss that below.

Secondly, as related to the first feature above, the distinction between the trust property and the private property of the trustee was rigidly required as a reflection of the absolute title of the trust property of the trustee. Then, various provisions were presupposing the independence of the trust property. Based on this characteristic, in spite that the former statute explicitly adopted the *jus-in-personam* theory, the trust-property-as-substantive-legal-subject theory that puts the independence of trust

property in the center of the theoretical construction has got a strong influence on the arguments on Japanese trust theories.

Thirdly, as the former Trust Act had the purpose to give a theoretical unity of the trust concept with Japanese legal system, it gave a general provision concerning the fundamental idea of the trust relationship, which was applied to all kinds of trusts irrespective of the mutual difference of the purposes or forms of trusts. On the other hand, nonprofit trusts didn't spread in practical businesses and commercial trusts in which trust banks as trustees pursued the played the central part of the trust business. Such conditions had a great influence on interpretations of the former Trust Act. As the result, the provisions of the former statute that supposed also nonprofit trusts, especially those which greatly restricts the discretion of trustees concerning the duties and responsibilities, were exposed to severe criticisms by practitioners of trust banks as professional trustees.

(5) Fundamental Characteristics of the Current Trust Act

The former Trust Act had been kept with almost no major amendments until the legislation of the current Trust Act, which is the major amendment of the former Statute, took the place in Heisei 18 (2006). However, the criticisms to and the demands of the reform of the former Trust Act from the trust bank practitioners as referred to above had been grown further in Heisei era.

However, since the trust bank practitioners were supposing commercial trusts to pursue economic profits through making use of trust property as described above, it might have been an alternative to legislate "Commercial Trust Act" as a special law of the Trust Act. But, in reality, the established current Trust Act are regulating both of nonprofit and commercial trusts, provided that only some technically peculiar provisions in the former Trust Act concerning trust relationships having public interests as the purposes are left current by giving them the form of a special law.

The current Trust Act is a rather large-scale code having totally 271 articles classified in 13 chapters. Of the whole 13 chapters, chapters from 1 to 7 includes 184 articles concerning general matters in Trusts, chapters from 8 to 11 newly introduced rules concerning exceptional matters in certain kinds of trust relationships, chapters 12 and 13 miscellaneous rules and penal regulations. From a simple comparison of the numbers of articles, it has substantially about four times as many articles as the former statute had totally 75 articles of which 65 articles concerning private interest trusts were the objects of the amendment. Even when the comparison is restricted on the general provision part from the chapter 1 to 7, 184 articles are three times as many as the total article number of the former statute. The cause of such a bloating of the number of articles is, in short, that the contents of the most articles have been much more detailed than the former and rather many new provisions have been also introduced. The bloating has happened not only on the number of the articles, but

also on the content of each article. The former provisions were written very briefly including functionally important ones. By contrast, the current provisions rather minutely define the conditions of the applications intending to give rather concrete solutions at the level of the law.

Taking all described above into consideration, we could think of the legal position and characteristic of the current Trust Act like follows.

First, the current Trust Act could be seen having been maintaining since the former statute the nature of the fundamental law of Trusts concerning the theoretical view point on Trust institute as the scope of the regulations includes widely both nonprofit and commercial trusts, except for the some technical rules prescribed in the special Act for public interest trusts. However, the current Trust Act is avoiding any definition which may have affinity with one of theoretical constructions of trust so as to stick to the stand point of the “complete neutrality” to trust theories. So, the current statute could be said to be a “colorless, transparent existence” in both good and bad senses for theoretical interpretation problem like the fundamental legal structure of Trust. That means, we might have to say, it lacks, in the bad meaning, any theoretical base that may give the insights and orientations to the practitioners facing practical problems.

Second, as we will see later in some details, the current Trust Act has incorporated typical contract formats and practical conventions trust bank practitioners have carried out under the former statute according to their own judgements, directly into the provisions in rather concrete forms. In this respect, the current Trust Act is, in contrast to the former statute, akin to a regulative law intimately connected to concrete practices of trust banks, rather than a fundamental law of Trusts to provide the legal theoretical standpoint. But, compared with many other financial regulations, there is almost no provision that delegates the details to Cabinet Orders in the current Trust Act. Almost all details are concretely inscribed in the body of the Trust Act as the provisions. We need to watch what effects such a characteristic of the current Trust Act will have in the future.

Third, again as we will see later, the current Trust Act allows to extend very largely the range of discretions on office works concerning a trust only by an agreement between the trustee and the beneficiary, in contrast to the former statute. In other words, the current statute is supposing that the beneficiary will put confidence in the character and ability of the trustee, and basically refraining from legal interventions in the trust relationship between parties, being contrary to the former statute. This is a rather intended result responding to the criticisms and the demand of amendments by trust bank practitioners to the former statute. But such a characteristic, coupled with the fact that the current Trust Act doesn't provide any definite theoretical perspective on Trust institute, may, anyway, dilute the significance of the existence of the current Trust Act to the existing trust relationships in the real world.

However, such an apprehension may be only theoretical. Since, for trust practi-

tioners, many of the practical conventions and contract formats that had been built on their own judgements and responsibilities now have been adopted as the statutory provisions, practitioners would be positively evaluating the establishment of the current provisions through the active utilization of the social significance of the statutory legitimization of their own practical conventions and contract formats in the current law. So, this honeymoon situation between the current Trust Act and the trust bank practice will continue for some time, unless further change of the social conditions creates the demands from the practical business contradicting to the provisions of the current Trust Act.

1.3 Trust and the Other Competing Institutes

One of helpful ways to think about the fundamental characteristics of Trust is the comparison with the other similar legal institutes or institutions. In addition to that, it will be also instructive to think about how some of recent cases concerning property administration would be resolved by an application of the rules of trusts, or to consider the interpretation problems in the case that similar legal conflicts happens concerning a trust relationship, in order to clearly understand the characteristics of Trust.

In following, we shall compare trust with the other similar institutes at first, then discuss the possibility of the application of the trust law to the cases in which some property administration troubles were brought into court⁸.

(1) Comparative Study of Trust with the Other Competing Institutes

Institutes similar to trusts can be classified into three categories according to from what point of view they are “similar” to trusts.

The first category includes Agencies disclosed and undisclosed, Deposit, Commission and so forth. These institutes have the common nature in that the title holder of certain property entrusts the administration of the property to the other person, the administrator.

The second category includes Corporation, Union, Partnership, Unincorporated Association and so forth. These institutes have the common nature in that the administration of certain properties is done to accomplish some prescribed purpose.

The third category includes Mortgage and similar institutes. These institutes have the common nature in that the outward title holders of certain property disagrees with the substantial one.

⁸As for the descriptions following in this section, see Hoshino, Trust Law Theory ch. 4, sect. 3.

In following, we will survey those institutes similar to trusts according to the classification into three categories.

(a) Disclosed Agency

“Agency” means the legal position that is created by a statutory provision or delegating agreement between the parties, in which the legal effects of the acts of the agent should belong to the principal.

As the differences between Trust and Agency, the standard discipline enumerates following three points. Firstly, while Trust concerns the administration or disposition of certain specified property, the range of the power delegated to an agent will not be necessarily restricted on the administration or dispositions of such specified property. Secondly, while the legal effect of the acts of an agent directly affects the principal, that of the acts of a trustee, as a general rule, will not affect the beneficiary by default. Thirdly, while it is a general rule that a trustee becomes the title holder of the trust property, an agent will not become the title holder of the property for her/him to administer based on the power delegated through the agency agreement.

Like above, the differences between trusts and agency tends to be emphasized based on the differences in the contents of the confidence relationships and the rights and duties structures between the parties, although both have the common nature in being based on a confidence relation. However, supposing that we understand the nature of the agency relationship as to make the legal effects of the acts of the agent belong to the principal as referred to above, it is not theoretically impossible for trust and agency relationships to coexist in one same legal relation. Such a consideration may open up a new perspective concerning the rights and duties relation between a beneficiary and the third party (see Chapter 5 Section 3 (1)).

(b) Undisclosed Agency

“Undisclosed agency (indirect agency)” means to deal in the agent’s name but in the other person’s account. It is called also “agency in economy”. In undisclosed agency, contrary to the disclosed agency (direct agency) referred to above, all of the legal effects concerning the transferred property, at first, belong completely to the agent, then those effects will be transferred to the consigner. When the agent has gone into bankruptcy before the transfer of the property to the consigner, the consigner has the right of the return claim of the object property of the undisclosed agency (Supreme Court Judgement, Showa 43 (1968) Sept. 11 (civil case collection vol. 22 no. 7 p.1462)). Also in a trust, the legal effects of the acts of a trustee belong to the trustee her/himself or the trust property, but not immediately to the beneficiary. And at the time of the bankruptcy of the trustee her/himself, the trust property doesn’t

constitute a part of the bankruptcy assets⁹.

From those described above, usual arguments fully emphasized the resemblance between Undisclosed Agency and Trust, so that the rule of the supreme court referred to above is applicable by analogy to the return claim of the beneficiary in case of the bankruptcy of the trustee. Such arguments were in the end adopted in the current Trust Act. However, in the case of the supreme court judgement, the administrator of the bankruptcy of the agent explicitly admitted that the property in dispute was substantially belonging to the beneficiary. From the viewpoint of the legal natures, whether the arguments on undisclosed agency institute could be applicable by analogy to Trust institute should be a little more cautiously reconsidered taking also the other relevant legal rules into consideration (see Chapter 4 Section 6 (2)).

(c) Deposit

“Deposit” means for a depositary, based on a contract between the depositary and a depositor, to keep some property in the custody for the depositor. It is, on one hand, similar to Trust in that it is established by a contract and the object property is specified property. On the other hand, it is deferent from Trust in that the title of the property is kept to the depositor, not transferred to the depositary, even in the outward appearance. In addition, there are considerable differences in the duties and responsibilities between the legal position of a depositor to keep the deposited property in the custody and that of a trustee to administer the trust property.

(d) Commission

“Commission” means a contract to entrust a commission agent with a juridical act or a business by a commission giver based on a confidential relation, not rarely endowed with a power of a disclosed/undisclosed agency. The differences of Commission from Trust are similar to those of Disclosed Agency described above. First, the range of the power from the commission contract would not be restricted on the administration of certain specified property. Second, a commission agent would not, as a rule, become the title holder of the property. But, as for the theoretical possibility, we could point out the same thing as referred to in the paragraph for Disclosed Agency.

(e) Corporation

“Corporation” means such a juridical person with the purpose to make profits as established according to the provisions of “Corporation Act” (Heisei 17 (2005) Act

⁹(Relationship between Trust Property and Bankruptcy Proceedings, etc. Against a Trustee)[excerpt]

Article 25④ Even where an order for the commencement of bankruptcy is entered against a trustee, no property that belongs to the trust property shall be included in the bankruptcy estate.

no. 86.). A corporation is an association to trade in its name and account pursuing to make profits. It is required in both theory and law for it to have its own property separated from those owned by each of its members. Therefore, a corporate is in its nature quite similar to a trust in that it does trading actions concerning specified property pursuing profits. So, whether certain asset management should be done in the form of a trust or a corporation is often considered as alternatives in practical businesses.

On the other hand, the often enumerated differences between a corporation and a trust are: First, a corporation has its own legal personality, but trust property doesn't. Second, the ways of distribution of gains and of supervision of the management in a corporation are regulated by rather concrete rules to protect the interests of the shareholders or the creditors, while those in a trust are largely left to the wills of the trust parties described in the trust contract. In those respects, there are concretely prescribed provisions in the current Trust Act in contrast to the former. It is true, we could conclude that in the basic point of view there is no big change in the current statute from the past. But some careful considerations may be required whether, as a legal system design in the future, no significant discrepancy should be made between a corporation and a trust or, instead, some explicit qualitative differences between Corporation and Trust should be introduced in the legal system to distinguish those institutes.

(f) Union

“Union” is a contract to do a cooperative business based on the investments by few persons. A union doesn't have the legal personality. The assets of a union are owned jointly by the members. But in case of the bankruptcy of a union or the enforcement auction on the assets of a union, the assets of the union are considered as substantially separated from the personal properties of the members. In addition, since a union is created by a contract, the rules concerning the way of administration or management can be determined largely by a discretionary agreement among the parties. By the way, while in a union of the Civil Code all members owe the unlimited responsibilities for the obligations of the union, in a union of the commercial code only some specified members owe the unlimited responsibilities and the other members owe only limited responsibilities. A union of the commercial code is called “Anonymous Union”.

As we saw, a union is, on one hand, considerably similar to a trust in that the union's assets are separated from the personal assets of the members and that trading actions are done based on the union's assets. On the other hand, the biggest difference between a union and a trust may be that the member of a union can get a refund of the investment from the union when she/he withdraws from the union (Article 681 of Civil Code), while a beneficiary cannot get a part of the trust property without a special agreement to allow it in the trust contract even when the beneficiary withdraws

from the trust relationship. The only way for a beneficiary of a trust to recover the her/his own investment is to sell the beneficial right.

(g) Partnership

“Partnership” means a legal relation in which few persons invest some capitals to perform a business and an administrator selected among the parties has the power as the executive and owes the responsibilities on the management. In Japanese legal system, a partnership is interpreted as a kind of union, so that in the “Act on the Contract of Limited Liability Union for Investment Business” (Act law no. 90 of Heisei 10 (1998)), for example, a relation equivalent to a partnership is prescribed as a kind of union. By the way, Partnership includes a “general partnership” all members of which owe the unlimited responsibilities and a “limited partnership” in which only some specified members owes the unlimited responsibilities and the other member owes only the limited responsibilities. They could be thought corresponding to a union of the Civil Code and an anonymous union of commercial code respectively in Japanese legal system.

Still, in the usual legal doctrines of England and the Unites States, the duties and responsibilities of a trustee are analogically applied to the management acts by the executives of a partnership. Also in Japanese law, the analogical applications of the regulations on a trust in the Trust Act to a partnership relation would be worth to be considered in future, since the provisions of the Trust Act are far more detailed than those of the Civil Code concerning Union.

(h) Unincorporated Association

“Unincorporated association” means a group associated under a certain purpose (association) but not having its legal personality. In the case law, necessary conditions to be recognized as an unincorporated association are: First, it has some definitiveness as an association. Second, its official works and the decision making process are based on the principle of decision by the majority. Third, its identity is kept unchanged in spite of the changes of the members. The assets of a unincorporated association have certain independency from those of the members. But since such an association doesn’t have its own legal personality, the right on an asset for which the registration is required to hold should be registered in the name of all the members jointly or in the name of the representative in person.

As we can see, the asset management in an unincorporated association is very similar to the property administration in a trust in that the association itself has no legal personality, that the association has its own certain purpose and that the property of the association is separated from the property of the member in person. However, such interpretations concerning Unincorporated Association have been built

as the case law and considerable details in both internal and external relations have been made clear by many judgements by courts. But those decisions were based on neither direct nor analogical application of the provisions of the Trust Act. Going together with that, the predominant doctrine under the former Trust Act was negative about the application of the Trust Law by analogy to the case of an unincorporated association. As the result, there have not been sufficient discussions concerning the similarity between Unincorporated Association and Trust. However, to consider to what extent the concrete provisions of the current Trust Act are applicable to the case of an unincorporated association would give certain useful suggestion in thinking of the consistency in the case law or in considering interpretation problems in the area where there has been no judgement by a court yet.

(i) Mortgage

“Mortgage” means a type of security in which the title of the object property is nominally transferred to the mortgagee based on the contract between the mortgagee and the mortgager. Although there is no provision on Mortgage in Japanese Civil Code, the validity has been admitted by courts since ago and Mortgage is still widely utilized in practical business.

In the case law and legal disciplines before the Second World War, a mortgage was understood as a relation in which an excessive right (the ownership), meaning it exceeds the appropriate right in the situation (the right for security), is given to the mortgagee by the agreement. Therefore, some doctrine tried to limit the power of the mortgagee, calling a mortgage “a transfer in trust” in comparing to a trust relationship in which a right (the ownership) which exceeds the right appropriate to the situation (an administration right) is made belong to a trustee. In sum, the similarity of Mortgage to Trust was remarked in that the outward assignment of the legal title of certain property disagreed with the substantial economic assignment of the title.

By contrast, at the present time the most influential discipline insists that a mortgage is just a security relation for a credit given by the mortgagee while a trust is a legal relationship for the purpose of property administration for the benefit of the beneficiary based on the confidence relation between the parties. As for a mortgage, since many case judgements have already made the contents of the legal relation clear up to the details, it is only a few doctrines at present that claim the analogical application of the trust law to a mortgage or that emphasize the similarity between Mortgage and Trust.

(2) Cases on Property Administrations and Application of Trust Law

It is not rare that a property administration relation is tried in a court and it is more often than not for a certain legal relationship similar to a trust to be disputed in a court.

In followings, we will consider six types of cases as examples for the applications of the law of trusts one by one. Those are: First, a question of to whom the account exclusively for premiums of an insurance belongs; Second, a question of the nature of the legal relation on the money in deposit for the expenses of the maintenance of an apartment house; Third, an interpretation problem of, so called, “the disposition of property to the next successor under a will”. Fourth, a question of the power of the administrator of inheritance to select the legatee; Fifth, an interpretation problem of the act in conflict of interest between a parent and the child; Sixth, a question of the legal relation concerning a deposit of an advance payment for a public contract work.

(a) Assignment of an Account Exclusively for Premiums of an Insurance

An insurance agent that is concluding an agency contract with an insurance company should keep the premiums got paid by insurance contractors in custody clearly separated from its own assets according to the law concerning regulations on invitations of insurance (Act no. 171 of Showa 23 (1948), abbreviated as LRII in following. This law had been abolished by being incorporated into Insurance Business Act in Heisei 8 (1996)). In cases of Tokyo district court judgement Showa 63 (1988) March 29 (Hanrei Jiho (abbreviated as HJ in following) no. 1306 p. 121) and of Tokyo district court judgement Showa 63 (1988) September 27 (Kin-yu Homu (abbreviated as KH in following) no. 1220 p.34) it was disputed whether that deposited money belonged to the bankruptcy assets in bankruptcy of an agent the accounts of which were set for the payment of the premiums or substitutions of insurances in the name of “an agent of... insurance company” or “an account of the indemnity insurance agent” (the agent is common in both cases). Tokyo district court confirmed the return claim by the insurance company of the money of the equivalent sum to the deposited one against the bankruptcy administrator in both cases, grounded ① it was clear from the account name that the deposited money in the specialized account was separated from the general assets of the insurance agent; ② the deposited money could not be diverted for the general financial purpose of the agent and, in fact, there seemed from evidence to have never happened such a diversion; ③ the part of substitutions by the agent was made clear in that the sum agreed with that of delayed payments in the balance sheet concerning unpaid premiums on the insurance; so that the deposited money didn't belong to the general assets of the agent.

There are two types of interpretation on those judgements by Tokyo district court.

One is that because of the fact that the deposited money in the specialized account was clearly corresponding to the premiums of the insurances viewing from the name or the substantial management conditions, the deposited money should belong to the insurance company. According to this interpretation, the grounds of the affirmation of the return claim of certain assets from the insurance company are, in short, that the special assets are separately administered from the other assets and that the fact is publicly noticed inclusively to the third party in some form. In contrast to that interpretation, another is that because the effect of the LRII covers the creation and administration of a special account for premiums, the bankruptcy administrator should return the money deposited in the account to the insurance company. According to this latter interpretation, the grounds of the affirmation of the return claim by an insurance company are the existence of the public regulations in the LRII and the duty of a bankruptcy administrator to comply the public law. Under this interpretation, the rule by Tokyo district court couldn't be simply applied to the case of Chiba district court judgement Heisei 8 (1996) March 26 (KH no. 1456 p.44), which is similar to the cases of Tokyo district court described above but the return claim on deposited money in a special account by a insurance company was tried before the bankruptcy of an insurance agent, or to some cases where an asset management is not under any public regulation like the LRII.

(b) Legal Relation Concerning Deposited Money for the Maintenance of an Apartment House

The issue of the cases of Tokyo district court judgement Heisei 8 (1996) May 10 HJ no. 1596 p.70 and of Tokyo high court judgement Heisei 11 (1999) August 31 HJ no. 1684 p.39 was whether the ownership of an bank account could be insisted against the third party by simply giving it the account name implying the special usage when there is no public regulation like the LRII. In both cases, a care-taking union of an apartment house disputed the ownership of the deposited money in a bank account against the management company (or its bankruptcy administrator) of the apartment house. In which the management company was entrusted with the reserved money for the the cost of the maintenances or care-takings of apartment houses from plural care-taking unions and kept the money in custody in the name of the management company with the apartment houses' name attached. Tokyo district court judged that the deposited money in the account belonged to the management company as the account holder since it could hardly say that the deposited money was separately administered from the assets of the management company in person. On the other hand, Tokyo high court judged that the deposited money belonged to the care-taking union viewed from the nature of the care-taking cost reserves and the circumstances of the management acts of the management company.

The fact that the disputed account was not separately handled from the other

deposits of the apartment house management company may become a hinderance for the care-taking union of the apartment house to execute its own right on the account. But it may be strange that a sloppy handling of the account gives the management company to use the money in the account for its own profits. So the logic in the judgement of Tokyo district court was a little faulty. On the other hand, the judgement of Tokyo high court confirmed the deposited money as specified property grounded on the reason that the account was being handled by the management company prima facie separately from the other assets since the name of the apartment house was added to the account name. However, viewing from the facts that bank account name can be freely set by the depositor and that the actual states on the handling of a bank account cannot be easily know for the outside, whether it is appropriate to determine the substantial depositor of a bank account based on if the account is separately handled from the other assets seems to be still questionable.

(c) Interpretation of a Will to Dispose Property to the Next Successor

“Disposition of Property to the Next Successor under a Will” means a testamentary gift including a paragraph like “bequeath goods to A, then, after A’s death, the goods be bequeathed to B”. Since such a bequest that is trying to prescribe the assignment of the inheritance even after the death of the legatee is clearly a restriction of the freedom of disposition of good that the legatee could have, the present common opinion takes such a will generally invalid. The paragraph like above is generally interpreted as an expression of a mere hope of the testator. However, the supreme court judgement Showa 58 (1983) March 18 Kasai Geppo (abbreviated as KG in following) vol. 36 no. 3 p.143 returned the case to the court of the original jurisdiction by ruling that there were the other various possible way of interpretations on the will to dispose property to the next successor than that as an expression of a hope of the testator, for example, as an onerous legacy to the first legatee, a legacy on a suspensive condition to the second legatee or a legacy with an indefinite term to the second legatee giving the first legatee only a usufructuary right on the property, so all possibilities of the interpretations should have been tried in the consideration.

If one thinks the possibility to settle a trust on certain property in a legacy and to “bequeath” the beneficial right, the conclusion to be deduced could be considerably different from that of the common opinion described above. That is: Trust Act itself doesn’t put any limitation on the contents of the beneficial right. So a sequential setting of a beneficial right like “the beneficial right is given to A at first, then, after the death of A, the right would be given to B, then, after the death of B given to C”, will be valid from the viewpoint of the trust law. Moreover, since the power of the beneficiary to dispose the trust property can be freely restricted by the trust arrangement, the will of the testator concerning the belonging of the legacy could be kept considerably longer after the death of the testator when a trust is settled on the

legacy than when the property is directly transferred by a testament. However, the argument means that any restrictions will not be deduced from the trust law only. Whether such a trust relationship described above can be taken as valid without reservation should be carefully considered from various respects.

(d) The Power of the Administrator of Inheritance to Select the Legatee

On a question whether a testator can delegate the power of selection of the legatee to the executor of the will, there were a negative judgement of Daishin-in (Daishin-in judgement Showa 14 (1939) October 13 Minji Hanreisyu (abbreviated as MH in following) vol. 18 p.1137) and legal disciplines were also tend to be negative. Contrary to that, the supreme court judgement Heisei 5 (1993) MH vol. 47 no. 1 p.1 judged that a testament that described “all (the inheritance) shall be donated to public” should be interpreted as a legacy to some association to pursuing public interests as the purpose, so it was valid as a will to give the executor the power to select a concrete legatee.

Since such a situation is possible that a testator cannot select appropriately the legatee, it could be said reasonable for the supreme court to confirm the validity of the power of the executor to select the legatee. But the judgement didn't mention who could supervise the executor or how to regulate the juristic act of the executor in a situation of a conflict of interest. Moreover, there is almost no provision to regulate the abuse of the power or to supervise the exercise of the power of an executor in the part concerning the execution of a will in the Civil Code. So, in general thought, it seems to be helpful to consider a possibility of application of the provisions in the Trust Act to the execution of a will by analogy. However, the conclusions to a problem may differ depending on how one thinks of the similarity of a trust to an administration of an inheritance for an execution of a will.

(e) Interpretation of a Juristic Act in Case of a Conflict of Interests between a Parent and the Child

Family asset management, typically between parents and the children, is recognized as a archetypical form for the trust institute to be applied to in England and the United States. Trust has been fulfilling there a role in the social policy that intends, on the one hand, to prevent an extravagance of a young or old who has not enough ability for the asset management by restricting the disposing acts through a trust purpose and, on the other hand, to protect such a young or old against exploitation by the others. By contrast, Japanese Civil Code is giving parents (or a person with parental authority) a comprehensive power to administer the assets of the child (the Civil Code Article 824) but one provision (Civil Code Article 826) that prescribes an assignment of a special agent in case of conflict of interests between parents and

the child. Viewing from that, restrictions or bindings on the power of parents in the administration of the assets of the child are very weak in Japanese Civil Code. In addition, although a juristic act as an agent in conflict of interest is generally considered as void as an act with no agency power in case law, the supreme court judgement Heisei 4 (1992) December 10 MH vol. 46 no. 9 p.2727 ruled that when the person with a parental authority provides only property of the child for a mortgage to secure a credit to the third party who is a relative, since there is no explicit conflict of interests between the parent and the child, it shall not be an abuse of the parental power as a rule.

The reason why a disposition by a parent in conflict of interest is generally voided as an abuse of the parental power is the objective high risk to harm the interest of the child. So, it should be clearly more suitable to base the judgement whether it is an abuse of a parental power, on an objective evaluation the probability to profit or to harm the assets of a child in the course of the property management than on an outward existence of a conflict of interest. Then, it would be worth to consider the possibility to apply the trust institute that restricts such a disposition by a parent according to some purpose.

(f) The Legal Relation Concerning a Deposit of a Payment in Advance for a Public Contract Work

The supreme court judgement Heisei 14 (2002) January 17 MH vol. 56 no. 1 p.20 judged that the advance money that a contractor of a construction of a public facility was paid from a public organization with a security by an insurance business company shall not belong to the bankruptcy assets of the contractor because a trust relationship had been established on the advance money between the public organization, the settlor and beneficiary, and the contractor, the trustee. In a public construction which a public organization ordered, the cost needed for the construction can be paid in advance provided such insurance company stands a security for it that has got an authorized registration from Minister of Construction (now, Minister of Land, Infrastructure, Transport and Tourism) under the Act of Insurance Business on Advance Payment in Public Construction (Showa 27 (1952) law no. 184). According to the public engineering contract ordered from a non litigant, Prefecture A, it was stipulated that the sum of an advance payment shall be within the quarter of the contract price, that an insurance contract complying with the Act of Insurance Business shall be concluded so that the insurance certificate shall be deposited to the ordering prefecture and that the contractor shall not expend the money paid in advance for any other purposes than the necessary cost for this engineering work. Moreover, in the provisions of the insurance contract concluded under the law of Insurance business between the contractor, non litigant B, and the insurance company Y, were prescribed the followings: ① When the contractor receives the advance pay-

ment, the money should be deposited in a specialized account for an ordinary deposit of the bank selected by the contractor among the banks that have concluded agency contracts with the insurance company in advance; ② The contractor owes the obligation properly to use the advance money according to the purpose prescribed in the letter of application of the insurance, so that the contractor couldn't withdraw the money in the specialized account unless the materials for showing the proper expenditures are presented to and confirmed by the bank to which the money is deposited; ③ The insurance company has the power of investigations concerning the engineering contract to supervise the expenditure of the advance, so can ask the contractor or the orderer for reports, explanations or proves of the expenditure; ④ The insurance company can ask the bank to which the advance is deposited for freezing the specialized account or taking the other measures when some inappropriate expenditure of the money for the advance payment has been recognized. These typical provisions of an insurance contract had been notified to every public organization at the prefecture level from the Ministry of Construction at that date (in the present, Ministry of Land, Infrastructure, Transport and Tourism).

The judgement at the first trial rejected the claim for repayment of the money for the advance payment from the bankruptcy administrator X of the bankrupt B by an analogical application of the article 16 of the former Trust Act¹⁰ on the ground that concerning the money for the advanced payment paid by B to A prefecture, there has been established, at least substantially, a legal relationship that can be seen as a trust relationship. By contrast, the second jurisdiction, although it also rejected the claim in conclusion, grounded the judgement on that the defendant Y has the exemption claim of the money from the bankruptcy property because a right of pledge on the named obligation or the other security right for the fulfillment of the insurance obligation had been established for Y on the advance payment. Then, the supreme court rejected the appeal, as referred to above, on the ground that since a trust contract had been settled on the advance payment money, a mere sending money to the special account couldn't be the payment of the cost of the contract work and since it would belong to the property of B as the payment of the cost of the contract work only after B had withdrawn the money from the account, the advance payment money shouldn't belong to the bankruptcy assets of B, and that the same should be applied to the case in which a legal trust was existing after the termination of a trust by article 63 of the former Trust Act¹¹.

¹⁰Article 16 of the former Trust Act [excerpt]

① An Execution, attachment or interim order or compulsory sale on trust property shall not be processed unless such a procedure is applied for a right whose cause was established on some trust property before the settling of the trust or to collect the business cost of that trust.

¹¹Article 63 of the former Trust Act [excerpt]

In terminating a trust, the trust shall be considered to be continuing to exist until the trust properties have been transferred to the title holders.

This case is remarkable in that the supreme court explicitly admitted an establishment of a trust relationship on the specified property bound to a certain purpose. However, the interpretation of the provisions on trusts by the supreme court in the case may cause not a few problems to be critically reconsidered. For instance, it is true that there was a general provision concerning the binding purpose of the advance payment money in the clauses of the contract concluded between the prefecture A and the contractor B, but the way of the concrete dispositions of the money was prescribed in the insurance contract between B and Y, so it is problematic whether the content of a “trust contract” between A and B could be complemented by another contract between B and Y. In addition, although the judgement was based on an interpretation of the clauses of the contract concerning a public engineering work under the laws of Local Autonomy and of Insurance Business, it is another problem whether an establishment of a trust contract concerning certain property could be recognized only by existence of a binding purpose of the property under certain different conditions where the contents of contracts are similar but under no statutory regulations.

Moreover, the judgement of the supreme court that interpreted a property management contract that was not specially expressed as “a trust contract” to be a trust contract may lead to an interpretational theory that whether a contract is a trust depends on the objective conditions including existence of binding purpose concerning the management of the property, not on the expression as “a trust” in the contract by the parties. According to such a theory, a court may deny the establishment of a trust relationship depending on the concrete situations of the management of the property or the binding conditions on the property to the purpose even when the contract is expressed as a trust contract by the parties.

1.4 Theoretical Characteristic of Trusts

(1) Relations between Definitions and Fundamental Structure of Trust

At least three persons, namely, the settlor, the trustee and the beneficiary, are, mutually or independently, forming respective legal relations in a trust relationship, so that disciplinary disputations tend to occur over how theoretically to see the rights and duties relations among the parties.

Roughly classified, there are four (substantially five) representative trust theories concerning the fundamental legal structure of trust. They are: double-ownership-on-trust-property theory, jus-in-personam one, jus-in-rem one (as will be mentioned later, this theory includes two substantially different theories) and trust-property-as-a-substantial-legal-subject one.

In following, we will discuss the outline and characteristic of each of those trust theories concentrating on two aspects in which the characteristic of trust most vividly appears. The first of the two is the “inner relationship” of a trust. We will give considerations there on the legal relationship among three persons, the settlor, trustee and beneficiary, especially on the legal nature of the beneficial right given to the beneficiary in a trust relationship. The second is the “outer relationship” of a trust. We will consider there a suppositional case in which some trust property is transferred to a third party in a condition failing to comply the trust purpose (in breach of trust) by the trustee, to discuss on the interest adjustment problem between the beneficiary and the third party.

(a) Double-Ownership-on-Trust-Property Theory

The “double-ownership-on-trust-property theory” thinks that the trustee and the beneficiary of a trust have mutually different kind of possessive rights on the trust property. This theory adopts as the element of its theoretical construction directly the historical development of the institute of trusts in which a trustee who is the title holder on the property in common law is forced to administer the property for the benefit of the beneficiary who has an equitable interest on the trust property by the equity court that has the exclusive jurisdiction on equity. As the background, there is the fact that there had been plural case laws applied independently by Common Law Court and by Equity Court in England up to the nineteenth century. So, there seems to be no legal doctrine directly supporting this theoretical construction as the trust theory in Japan, for Japanese legal system is not seen as split into two, like Common Law and Equity in England. However, if one could reinterpret a common law title into a outward legal right and an equitable interest into a substantial right on the principle of faith, the theoretical construction that the trustee and the beneficiary are doubly possessing the trust property would be reasonable enough as an interpretation of a trust relationship even in Japanese trust law.

(b) Jus-in-Personam Theory

The “jus-in-personam” theory thinks that the right on trust property completely belongs to the trustee and that the beneficiary has a right not in rem but in personam to claim against the trustee the benefits from the property administration by the trustee. This doctrine was advocated in the time from the end of the nineteenth century to the beginning of the twentieth century almost at the same time in England and the United States, and had been adopted by the drafter of the former Trust Act of Japan as the theoretical basis, so that it was the common legal doctrinal opinion under the former statute.

According to the jus-in-rem theory, a trust relationship is established by a will

of the settlor to settle the trust and the acceptance of the trust relationship by the trustee. However, there is a disagreement within this theory on whether the will of the settlor and the acceptance by the trustee constitutes a “contract”. By the establishment of a trust, the trustee gets the complete title of the property and, at the same time, an obligation to the beneficiary to administer the property for the benefit of the beneficiary. Viewing from such a theoretical construction of the jus-in-personam theory, a juristic act for property administration in breach of trust by a trustee would constitute a tort or a nonfulfillment of the obligation by the trustee to the beneficiary, but the juristic act itself would be, as a general rule, valid irrespective of the breach of trust since it is an administrative act by the complete title holder of the property. Therefore, under the jus-in-personam theory, even in the case of the in breach of trust disposition the beneficiary cannot claim the effect of the beneficial right against any other person than the trustee in principle and that the voiding power of the beneficiary to make an act in breach of trust invalid is a right the trust law exceptionally admits for the protection of the interest of the beneficiary. However, even under the jus-in-personam theory, when a third party is in bad faith concerning the breach of trust, it is admissible for the beneficiary to claim the third party the beneficial right since such a third party could be considered as cooperating with the trustee in the breach of trust so that the third party could be regarded in the same light as the trustee.

So, the theoretical construction of the jus-in-personam theory does not necessarily lead to a conclusion that is insufficient for the protection of interests of a beneficiary compares with the other trust theories. Rather, in some cases taking a beneficial right as a right in personam can lead to the better protection of the beneficial right than the other way of thinking. Some careful considerations are necessary to evaluate the jus-in-personam theory as a trust doctrine.

(c) Jus-in-Rem Theory of England (beneficiary-as-the-substantial-owner doctrine)

The “jus-in-rem” theory says that a beneficial right is a real right or a right in rem on the trust property. However, the jus-in-rem of England and that of the United States of America are mutually considerably different in their contents and characteristics. We will explain the jus-in-rem theory of England first.

The “jus-in-rem” theory of England thinks that the beneficial right a beneficiary has on the trust property is substantially an ownership on the property. Viewing from which, the theory might be better to be called the “beneficiary-as-the-substantial-owner” doctrine. According to this theory, a trustee is an only formal or outward title holder on the trust property and has only a administrative power restricted within the range given in the trust relationship. Therefore, when a trustee disposed some trust property in exceeding the power given to it, such a disposition is invalid

since it is not within the power, so that the beneficiary can claim the effect of the trust relationship on the property against a third party who got it from the trust property in breach of trust. On the other hand, a trustee is the “title holder”, although only formally or outwardly, of the trust property, so when a third party who got certain trust property in breach of trust was in good faith without negligence concerning the breach of trust, the right the third party got on the trust property is exceptionally protected so that the beneficiary cannot claim the effect of the beneficial right against the third party.

In sum, under the theoretical construction by the *jus-in-rem* theory of England (the beneficiary-as-the-substantial-owner doctrine), when a trustee did an administrative act in breach of the trust which is invalid because it is unauthorized, to what extent a third party who was the other party of the act should be protected is considered, so the protection of the beneficial right of the beneficiary as the substantive owner of the trust property is thought as the flip side of the protection the third party could get. By the way, the “*jus-in-rem*” theory of Japan thinks that trust property belongs legally outwardly to the trustee, but economically substantially to the beneficiary, so that the beneficial right should be thought to be the substantial ownership. From this respect, the *jus-in-rem* theory of Japan could be said to be almost same as that of England.

The characteristic of the *jus-in-rem* theory (the beneficiary-as-the-substantial-owner doctrine) is in that its theoretical construction tries to understand a trust relationship economically substantially, not legally outwardly. Such a fundamental policy of the interpretation will not cause any feel of incongruity by itself as far as the purpose of a trust administration can be thought to be only to give the beneficiary the benefits from the trust relationship. However, the problem to be carefully considered is why the third party who is not a party of a trust relationship should be forced to such an “economically substantial interpretation” of the trust relationship presupposed by the *jus-in-rem* theory. In addition, an emphasis of the ownership of a beneficiary could diminish the difference between trusts and the other competing institutes like agency so that one may come close to the thought that the problem is a interest adjustment between a beneficiary as the “principal” and a third party in a general asset management context. We should note that such a thought contradicts the emphasis of the peculiarity of the trust institute.

(d) Jus-in-Rem Theory of the United States of America

The “*jus-in-rem*” theory of the United States thinks that all rights including ownership that constitute trust property belong to the trustee and that although the beneficial right is different from the ownership, it is still a right in rem on the trust property. In other words, under this theory, in spite that a beneficial right is formally categorized as a right in rem in the meaning that it is a right concerning the trust property, the

substantial content of the right is some relative right on trust property to get the benefit from the trust relationship. According to this theory, the interest adjustment between a beneficiary and a third party in the case of a breach of trust is done like following.

Since the trustee holds the ownership or the other rights that constitute the trust property, a third party can validly get a transference of the rights from the trustee, so that the third party gets a certain right on the trust property even when in breach of the trust. On the other hand, the beneficiary also has a certain right in rem, namely, the beneficial right, on the transferred trust property, which is parallel to the rights of the trustee, so that both the beneficiary and the third party have the respective rights on the trust property. Therefore, the interest adjustment between the beneficiary and the third party in such case would be done through a weighing various conditions concerning rights of the beneficiary and the third party on the trust property. According to a traditional case institute, the in-good-faith-for-value principle, when the third party was in good faith with the transference in breach of the trust by the trustee and got certain trust property for value, the right of the third party has priority over the beneficial right on the property and otherwise, namely, when the third party was in bad faith with the transference in breach of the trust or got some trust property for no value, the beneficial right has priority to the right of the third party.

The theoretical characteristic of the jus-in-rem theory of the United States is essentially same as that of the trust-property-as-a-substantial-legal-subject theory to be described in following, so we will explain it together with the trust-property-as-a-substantial-legal-subject theory in the next paragraph.

(e) Trust-Property-as-a-Substantial-Legal-Subject Theory

The theoretical construction of the trust-property-as-a-substantial-legal-subject theory is a little complicated but, in the gist, like following. A trust is a kind of the form of property administration institute in which a trustee who has the title and the exclusive administration power on the trust property that has its own legal personality independent of those of both the trustee and the beneficiary administers the property according to the purpose of the trust. In such a relationship, the beneficial right the beneficiary has is not an ownership of the trust property but a right in personam toward the trust property as a substantial legal subject. However, it is also a kind of real right in that it has a certain material correlation with the trust property. As for the interest adjustment between a beneficiary and a third party in the case of a disposition of some trust property in breach of the trust, Kazuo Shinomiya who proposed the trust-property-as-a-substantial-legal-subject doctrine argued as follows. A juristic act exceeding the power of the trustee is invalid as in the jus-in-rem theory, so the main problem to be considered is the grounds why the protection of the third

party's interest is required. So, the protection of the interest of the beneficiary is its reflective effect. In that it admits whole trust property the nature of a substantial legal subject, the relation between trust property and the trustee seems to be thought like that between a principal and the agent or between a corporation and the director.

As we have seen just above, the theoretical construction of the trust-property-as-a-substantial-legal-subject theory is essentially same as that of the jus-in-rem theory of the United States in that a beneficial right in a trust relationship is thought to be a kind of right in rem on the trust property other than the ownership, but to be also, so to speak, a "right in personam toward the trust property" whose content is to get benefits from the trust relationship. Since a beneficial right is thought not to be the ownership, when a third party got the ownership of a part of trust property in breach of trust, an establishment of mutually exclusive double "ownerships" on one property is denied. And, since the right a third party got does not necessarily cause some legal contradicts with the beneficial right of beneficiary, there is no need to think that the beneficial right must shrink reflectively by the fact that the third party has got the title of certain trust property. Rather, under the theoretical construction that beneficial right is a kind of right in personam toward trust property, it seems suitable to think like the jus-in-rem theory of the United States that the interest adjustment between a beneficiary and a third party should be done through weighing of the rights and interests the beneficiary and the third party have respectively on the property transferred in breach of trust, from the viewpoint of the legal nature the trust-as-a-substantial-legal-subject theory gives to a beneficial right.

As explained above, the common characteristic between the jus-in-rem theory of the United States and the trust-property-as-a-substantial-legal-subject theory is that they put the importance in the theoretical constructions on the "trust property", not the trust parties as persons. For example, the arguments for the institutional purpose or functionalities of trusts in both of these doctrines have been developed putting the interest sharing concerning trust property in the center, but not the legal relationship between a trustee and a beneficiary. As for the interest adjustment between a beneficiary and a third party in the case of breach of trust, the arguments concentrate more on what a way to share the rights or interests that socially exist on the transferred property would be suitable with the justice and fairness in the world of business, rather than on what kind of rights the beneficiary and the third party have respectively in essence and how to treat the insufficiencies of the concepts of the rights. In other words, we could say both of the doctrines push such a thought toward theoretically the most radically that Trust is a property administration institution for the purpose of benefitting the beneficiary.

(2) Relations between the Fundamental Structure of Trust and the Characteristic of Trust Institution

Among the five trust theories which we have seen up to here, three theories, namely, the *jus-in-personam* theory, the *jus-in-rem* (beneficiary-as-the-substantial-owner) theory and the trust-property-as-a-substantial-legal-subject theory, may be important in interpretation problems of Japanese trust law. So, we will comparatively consider those three doctrines so as theoretically to discuss characteristics of the trust institute.

There are some ways of thinking on what part of the fundamental structure of Trust should be emphasized.

If one thinks that the most important feature of trusts is placed on the settlement of the property administration relationship by the agreement among the trust parties, a trust would be an institute concerning certain property management relationship that is based on the confidential relation between the parties, so that there is no theoretically essential difference in Trusts from Agency, Commission or the other property management institutions in Japanese legal system. From this way of thinking, on one hand, interpretation problems of the trust law would be those of the agreement between trust parties, and, on the other hand, the effect of the agreement between the parties would not reach a third party as a general interpretational rule. Therefore, as for the resolution of problems between a beneficiary and a third party, it would be considered to be important in the legal interpretation how the legal relation outwardly appeared to the third party. The most suitable construction to such a thought is that of the *jus-in-personam* theory.

Instead, if one thinks that the most important feature of trusts is put on the property management relation bound with a certain purpose concerning specified trust property, a trust would be an institute regulating property management relations centered on the trust property, so that its similarity to Corporation would be emphasized. Under this thought, it tends to be insisted that, since the interpretation of a trust relationship should be thought as a problem about according to what criteria the interests generated from the administration of the trust property should be shared between the trust parties, objective criteria should be applied prior to the contents of the agreement between the trust parties in the applications. And, if such an objective criterion was applied, it will bind also a third party as a general rule, oppositely to the case that the agreement between the parties would be applied as the criterion. Therefore, in the resolution of the conflict between a trust party and a third party concerning the trust property, it is important whether the disputed property objectively maintained its specificity as the trust property. The most suitable theoretical construction to such a thought is that of the trust-property-as-a-substantial-legal-subject theory.

On the other hand, if one thinks that the characteristic of trusts is in discrepancies

between the form and substance in belonging of property rights, trusts would be seen as an institute for protecting the substantial ownership of the beneficiary, so that the common property between Trusts and Mortgage would be emphasized in the argument. Under this thought, it would become important to protect as much as possible the substantial ownership of a beneficiary who outwardly doesn't have the ownership. And in the phase of the concrete interpretation problems, certain objective criterions to protect the substantial ownership of a beneficiary should be obeyed rather than the agreement between the trust parties. However, whether an application of such a policy is appropriate depends on whether there is any theoretical ground for the protection of the interest of the beneficiary that is stubborn enough to appeal against the general rule that the effects of the judgements or acts by the formal and explicit title holder should reach the implicit substantial owner, the beneficiary. In this respect, the mortgage would not meet so much difficulty because there is the generally accepted ground for protection of mortgagees that disadvantages of mortgagees caused from mere lacks of the appropriate statutory measures for personal property mortgages should be avoided. Contrary to that, as for trusts, the ground for the protection of the interest of beneficiary seems not to be enough in general unless there is some special reason socially to protect the beneficiary because of the lack of the property management ability as the beneficiary is an infant or mentally retarded person or the like. By the way, the most suitable theoretical construction to this thought described above is that of the *jus-in-rem* (beneficiary-as-the-substantial-owner) theory.

(3) The Standpoint Taken in This Book Concerning Characteristics of Trust Theory

As we will see through this book in some detail, the theoretical oppositions among the trust theories that have given essential influences to the standard interpretational argumentation on trust law in Japan have the main battle fields at the following three questions.

The first: Whether the theoretical ground of the establishment of trust relationship is in the agreement between the trust parties (*jus-in-personam* and *jus-in-rem*[beneficiary-as-the-substantial-owner] theories) or in the independence of the trust property (trust-property-as-a-substantial-legal-subject theory). The part that would most significantly get influenced from this respect is the judgement on the time of establishment of a trust or the evaluation of the legal positions of the parties concerning a trust. But, not only in that, the argument could also affects considerably the way of interpretation of the fiducial duties or the obligation of care.

The second: Whether trust property is thought to be independent of the legal persons of the trust parties (trust-property-as-a-substantially-legal-subject theory)

or to be belonging to someone of the trust parties (jus-in-personam and jus-in-rem [beneficiary-as-the-substantial-owner] theories). The most critical point in this respect is the interpretation problem on the range and its dynamical change of the trust property. In addition to that, an interpretation on the admissibility of the set-off against trust property may also be affected.

The third: Whether the legal position of a beneficiary is considered as the substantial owner of the trust property (jus-in-rem [beneficiary-as-the-substantial-owner] theory) or as a creditor or a benefit taker (jus-in-personam and trust-property-as-a-substantial-legal-subject theories). The most significantly influenced aspect from this respect is the interpretational problem of the existence and the range of duties and responsibilities, especially, of the beneficiary against a third party concerning a trust. In addition, this respect may cause some significant difference in interpretations in the case of a trust with performance-based dividend type or in the conclusions on interpretational problems of the responsibility of a beneficiary to third parties based on the information disclosure.

As we have just seen, the oppositional structure among the trust theories influential to Japanese trust law is not one dimensional. In addition, the effects of the similarities and differences among the theoretical constructions of the trust theories are involutely intertwined in each interpretational respect. So, in interpreting trust law, we must say, whichever of the trust theory one adopts, one cannot always deduce the best conclusion in all respects of interpretational problems compared with the other theories in that it most suitably reflects the characteristic of Trust institute in the result.

If so, we may think that the most appropriate stand point to understand the mutual relations among the trust theories would be that on which one can most flexibly treat of various types of trusts. In order to get to such a stand point, we would abstract the common characteristic of all the trust theories as the essential nature of Trust institute and reposition and reevaluate the trust theories evenly in relation to the abstracted essential nature. At present, we can see as the commonly accepted characteristic of trusts that the contents of the rights and duties or interests and responsibilities of trust parties concerning the trust property are settled being based on the trust purpose and regulated or restricted through the purpose. That might be named “the purpose-boundedness of Trust”. We think that the peculiarity of the trust institute compared with the other competing institutes is also just in this respect.

Seeing from the stand point described just above, the rights or interests of trust parties concerning the trust property are some restrictive ones bound to the trust purpose, which are alien to Japanese legal system where ownership with the absoluteness and completeness is typical in property rights. Therefore, as for the positioning of trust institute in Japanese legal system, we would say that trust institute gives trust parties powers freely to create various flexible legal relations that would be placed in

a different sphere from already statutory prescribed rights.

Chapter 2

Settlement of a Trust and Trust Property

In this chapter, we discuss interpretational problems concerning the settlement of a trust and the trust property.

Problems around a settling of a trust include one concerning from what point of view Trust should be distinguished from the other legal institutes. Those problems have much to do intimately with the arguments concerning definitions and characteristics of trusts that have been discussed in Chapter 1. By the way, Trust property existing as certain specified property is one of the most remarkable characteristic in doing outward comparisons with legal institutes other than trusts. How the provisions in the Trust Act which prescribes some special treatments on trust property would be positioned in the theoretical construction has a great influence on the argument concerning the fundamental structure or theoretical characteristics of trusts.

2.1 Settlement of a Trust

There are, roughly classified, three types in the interpretational problems concerning settlement of a trust. The first problem is whether some legal relationship could be interpreted as a “trust relationship” at all. The second is when a legal relationship between parties becomes a “trust relationship” so that trust law becomes applicable to the rights and duties relation between the parties. The third is to what extent the contents of a trust, especially the content of the right of the beneficiary, can be freely determined by the trust parties, especially by the settlor and trustee, in settling the trust.

Among them, the first problem has already been discussed in some degree at the section for definitions of trusts in Chapter 1 when we argued there that allowable methods for settling a trust may depend on how to concept the definition of trusts, but

a declaration of trust which was questioned of the validity under the former statute are now explicitly prescribed as a valid method to settle a trust by the trust definition putting an importance on the relation between the trustee and the beneficiary in the current Trust Act. So, in following, we will mainly discuss the second problem, namely, the time when a trust is established, and the third one, namely, the effective power of the agreement between trust parties.

(1) Theoretical Considerations on the Time of Establishment of a Trust

How to think over the time when a trust is established in theory depends on which characteristic of trusts one put theoretical importance on.

First, when one thinks the feature of trust is in the existence of specified trust property, the time when the trust property is specified to come into existence is the time of the settling of the trust. Therefore, in all the cases of a trust contract, a testament trust and a declaration of trust, a trust relationship will not be established only by a conclusion of the contract, the death of the testator/testatrix or the declaration by the settlor-trustee unless certain specified trust property comes into existence. This way of thinking was dominant under the former Trust Act. While, there were strong criticisms to it from the practical business world because there are rooms of involutions of timing between the transfer of the property to be the trust property to the trustee and the beginning of transactions according to the trust.

Second, when one thinks the feature of trust is in the will of the trust parties to create a trust relationship, the establishment time of a trust relationship is simply the time when the will to create the trust has been definitely expressed by the trust parties. So it is the time of the conclusion of the contract in the case of a trust contract, the time when the testament comes into effect in a testament trust and the time of the declaration in a declaration of trust. The current Trust Act adopts almost same solutions as these, with taking care of the notices to third parties¹.

¹(Effectuation of a trust)

Article 4 ① A trust created by the method set forth in item 1 of the preceding Article shall become effective when a trust agreement is concluded between the person who is to be the settlor and another person who is to be the trustee.

② A trust created by the method set forth in item 2 of the preceding Article shall become effective when the will takes effect.

③ A trust created by the method set forth in item 3 of the preceding Article shall become effective when the events specified in the following items take place for the cases listed in the respective items:

1. where the trust is created by means of a notarial deed or any other document or electromagnetic record authenticated by a notary (hereinafter referred to as a “notarial deed, etc.” in this item and the following item): when the notarial deed, etc. is executed; or

2. where the trust is created by means of a document or electromagnetic record other than a notarial deed, etc.: when notice is given by means of an instrument bearing a fixed date to the third

Third, when one thinks the feature of trust is in the fact that it is a mean for a court to realize the justice and fairness, the establishment time of a trust is when the court confirms the establishment in the case where the parties dispute each other concerning the existence of a trust relationship, irrespective of its concrete type of the settlement. But, as we referred to in Chapter 1, there are only few doctrines in Japan that support the philosophy this thought presupposes in considering the definition of trust or the characteristic of trusts, so we will discuss only the first and second thoughts in following.

The fundamental difference between the first and the second thoughts is theoretically in whether the existence of certain specified trust property is required at the “establishment” time. But it is a rather critical problem in practical business.

For example, in a trust relationship in which a profit is shared being based on balancing loss and gain after managing the trust property during a certain period, the specification of the range of the trust property is practically not necessary strictly at the time of the beginning of the managing transaction. There would happen no problem if the profits to be shared is specified at the time of the balancing the account. If the existence of certain specified trust property at the time of the beginning of the trust is required also in such a case, it may be so restrictive that the mobility of transaction could be unnecessarily hampered. In addition, in a trust relationship in which the trust property is build through payments or transfers of assets from indefinite many investors, there are plural possible interpretations concerning the establishment time of the trust depending on whether one thinks the trust is wholly established by the first payment has been done and the succeeding payments are additional investments to the already established trust, or each payment or transfer of the asset establishes a new trust relationship individually with the investor and the total invested assets are managed in combination or unification for the trust purpose.

However, some specified “trust property” could be admitted, at least conceptually, at the time when a trust contract is concluded but no real payment nor transfer of a asset according to the contents of the agreement is done yet. For if a creation of the trust relationship is agreed and the settlor or the other persons are owing the obligations to pay or transfer the asset promised in the agreement, then the trustee would perform the rights to claim fulfillments of the payments or transfers against the settlor or other obligors. We can interpret, in the end, such a situation that the rights to claim the payments or transfers promised in the agreement constitutes the trust property there. So, the first thought described above, namely, one that

party designated as the person who is to be the beneficiary (if there are two or more such third parties, to one of them), with regard to the fact that the trust has been created and the contents thereof.

④ Notwithstanding the provisions of the preceding three paragraphs, when a trust is subject to a condition precedent or a designated time of commencement by the terms of trust, said trust shall become effective when the condition precedent is fulfilled or when the time of commencement arrives.

requires the existence of specified trust property at the time of the establishment of the trust are not causing so big obstacles to the practical business unless there is a special paragraph in the trust contract or the other some special conditions by which a priority should be put on the real payments or transfers of the promised assets to the management acts targeted by the trust contract.

By the way, according to the philosophy of this book, namely, the thought that the main feature of trust is its binding trust purpose, the establishment time of a trust would be the time when the binding force of the trust purpose has taken effect, namely, when the trust purpose is decided and effectuated by the agreement between the trust parties. So, we would not require the existence of specified trust property, at least, at the beginning time.

(2) An Effect of the Agreement between the Parties on the Establishment of a Trust

A trust relationship is a legal relationship build formally by three persons, the settlor, trustee and beneficiary. Among them, it is the settlor and the trustee that can make their wills substantially reflected into the relationship in settling a trust since a trust contract is concluded by the agreement between the settlor. Moreover, the settlor and the trustee are one same person in a declaration of trust, so the will of the settlor-trustee would be directly reflected in the content of the trust relationship. A testament trust is legally settled being based on the will of the settlor, but the acceptance by the trustee is required in order for the trust really to be carried out²,

²(Call to Undertake the Trust by Will)

Article 5 ① Where a trust is created by the method set forth in Article 3, item 2, if the will contains a provision designating a particular person to be the trustee, any interested party may specify a reasonable period of time and call on the person designated as the one who is to be the trustee to give a definite answer within that period of time with regard to whether the specific person will undertake the trust; provided, however, that if the will designates a condition precedent or a time of commencement for the provision, this may only be done after the condition precedent is fulfilled or after the time of commencement arrives.

② Where a call for an answer is made under the provisions of the preceding paragraph, if the person designated as the one who is to be the trustee fails to give a definite answer to the settlor's heir within the period set forth in said paragraph, it shall be deemed that such person does not undertake the trust.

③ For the purpose of the application of the provisions of the preceding paragraph in cases where the settlor has no heir at the time in question, the phrase "the settlor's heir" in said paragraph shall be deemed to be replaced with "the beneficiary (if there are two or more beneficiaries at that time, to one of them, and if there is a trust caretaker at that time, to the trust caretaker)."

(Appointment of a Trustee by the Court in the Case of a Testamentary Trust)

Article 6 ① Where a trust is created by the method set forth in Article 3, item 2, if the will contains no provision concerning the designation of a trustee or if the person designated as the one who is

so a trust relationship would be unavoidably terminated before the achievement of the purpose if the to-be trustee will not accept the status³. So, in forming a trust relationship, the trustee can also, in addition to the settlor, make its own will reflected in the trust relationship. In that meaning, a trust relationship could be said to be substantially formed on the agreement between the two.

The problem there is to what extent the beneficiary should be bound with the content of the trust, especially concerning the content of the beneficial right, that was substantially determined by the agreement between the settlor and the trustee. For, except for a “self-benefit trust” in which the settlor becomes the beneficiary, there is no room for the beneficiary to make his/her own will reflected in the formation of the trust relationship in the case of a “non-self-benefit trust” in which the settlor is another person than the beneficiary.

Under the former Trust Act, the settlor who could make the will reflected in forming the trust relationship legally kept the supervising power rather widely on the execution of the trust thereafter. So, even if the right of the beneficiary had been restricted in the agreement to settle the trust, there may happen no problem since all the power and responsibility to correct the acts for the administration or pursuit of the trust purpose belong to the settlor. However, under the current statute, the status of a settlor is only a creator of the trust relationship and supervising power over the execution of the trust or the attainment of the trust purpose is entrusted to the trustee, so that the supervising power of the settlor can be excluded by the terms of trust at the time of the settlement⁴. So, if it is allowed that the right of the beneficiary is freely restricted by the contents of the trust relationship that is

to be the trustee does not undertake or is unable to undertake the trust, the court may appoint a trustee on the petition of an interested party.

② The judicial decision on the petition set forth in the preceding paragraph shall include the reasons for said decision.

③ A beneficiary or the current trustee may file an immediate appeal against a judicial decision on the appointment of a trustee under the provisions of paragraph ①.

④ The immediate appeal set forth in the preceding paragraph shall have the effect of a stay of execution.

³(Causes of termination of a trust)[excerpt]

Article 163 In addition to cases under the provisions of the following Article, a trust shall terminate in the following cases:

1. where the purpose of the trust has been achieved or where it has become impossible to achieve the purpose of the trust;

...

3. where the trust lacks a trustee and the office has not been filled with a new trustee for one year;

...

⁴(Settlor's rights, etc.)[excerpt]

Article 145 ① Terms of trust may provide for a settlor not to have all or part of the rights under the provisions of this Act.

formed substantially by the agreement between the settlor and the trustee, it might become difficult to control the trustee's arbitrary trust operations since the settlor is not planned to stand on the position of the supervisor.

Surely, it is possible and socially appropriate to stick to the interpretation that, apart from rights to get benefits from the trust property, the supervising power of the beneficiary over the trust operations cannot be restricted in the settling act in order to secure the appropriateness of the execution of the trust. But the supervising power of a beneficiary includes those which may have so extensive effects to the rights of the other beneficiaries of the same trust that the rights of the beneficiaries may conflict one another⁵. Taking such situations into account, putting some rational restriction on the power of a beneficiary may be desirable for a reasonable execution of the trust to accomplish the trust purpose. In addition, much could not be expected for a beneficiary to operate the supervising power properly to secure the appropriateness of the executive acts of the trust, especially in the case in which that beneficiary doesn't feel any its own interests or benefits.

Taking all above into consideration, in contrast to the era under the former Trust Act, it may be appropriate to force some limit on the freedom of the agreement between the settlor and the trustee to restrict the contents of the rights of the beneficiary, although such restrictions cannot be completely inhibited as an interpretation of the provision of the current statute. However, there is, surely, no such provision in the current statute that is explicitly giving any ground or any clue for a criterion to delimit a rational range of the freedom. So, we should make up for the lack by an interpretational theory to get some rational criterion. But it is difficult to find a theoretical ground that can legitimately have all the interested parties obey one standard since how to restrict the right of a beneficiary would deeply involves the interests of all the trust parties and the conflicts of interests and opinions could be supposed in all respects, namely, between the settlor and the beneficiary, between the trustee and the beneficiary and among plural beneficiaries. According to the usual argument, if we adopts the agreement of the interested parties as the theoretical ground, the settlement of a trust should be reconstructed as if it consists of an agreement by three persons including not only the settlor and the trustee but also the beneficiary. But such an interpretation would be too discrepant from the presupposition of the settling methods prescribed in the current Trust Act. Since the feature of the independence of the trust property would not lead, from its theoretical nature, to any restrictions

⁵(Rescission of acts conducted by trustee beyond the powers)[excerpt]

Article 27 ① Where an act conducted by a trustee for the trust property does not fall within the scope of the trustee's powers, a beneficiary may rescind such act, if all of the following conditions are met:

...

③ When any one of the two or more beneficiaries has exercised the right to rescind under the provisions of the preceding two paragraphs, the rescission shall also be effective for other beneficiaries.

on the profit sharing from the trust property or on the way to create rights and duties relations on the property, such a feature also cannot be expected to provide any point of view for the resolutions of the problems of this type.

In the end, there seems to be no other way than to interpret the problems based on the fundamental philosophy of this book, namely, the thought that the essential feature of trusts is in its restricted nature bound with the trust purpose. A trust relationship is bound with the trust purpose. The binding effect extends over not only the settlor and trustee but also the beneficiary. So, why some restrictions on the right of the beneficiary are “rational” is because they are necessary and useful for the accomplishment of the trust purpose, not because of the effect of the agreement between the settlor and trustee. On the flip side, whether some restrictions that the settlor and the trustee put on the beneficial right being based on their substantial agreement at the time of settling is “irrational” should be judged on a criterion whether such restrictions on the rights of the beneficiary to draw benefits from the trust relation or to supervise the execution of the trust are unnecessary and irrelevant for the trust purpose.

A question to such an interpretation may be whether it is appropriate to separate the purpose setting part in a trust agreement from the other contents of the agreement since the trust purpose also, in the end, is set by the substantial agreement between the settlor and the trustee. However, our interpretation doesn't meant to be an obstacle to a free agreement between the settlor and the trustee on the trust relationship but only to require the contents of the agreement to be logically consistent in relation to the trust purpose. This way of interpretation would, on the one hand, allow a settlor and a trustee freely to create a flexible trust relationship according to the trust purpose and, on the other hand, make it possible to give reasonable resolutions on the problems by pursuing certain theoretical consistency with the trust purpose in case of inconsistent or unjustifiable trust agreements in concrete conditions.

Similar arguments would be applicable not only to non-self-benefit trusts but also to self-benefit trusts since the criterion of the problem resolutions described above is deduced from a objective consistency with the trust purpose, not from the wills of the parties.

2.2 Trust Property

(1) Concept of Trust Property

“Trust Property” means specified property that constitutes the object of a trust relationship⁶. Viewing from the fundamental thought of this book, we could say,

⁶(Definition)[excerpt]
Article 2 ③ The term “trust property” as used in this Act means any and all property which belongs

“Trust property” means objective property bound with a trust purpose. According to the definition, the concrete property that constitutes the trust property can include any “property” irrespective of its kind whether its economic value can be estimated. By the way, the former Trust Business Act enumerated restrictively the kinds of the property that is allowed to be received as trust property for a business trustee. Because of such restrictive provisions, some interpretational tricks were necessary to include, for example, intellectual property or the like into trust property. But under the current law, there is practically no restriction on possible trust property.

As we saw in Chapter 1, it is theoretically possible to see the main feature of trust in the existence of certain specified trust property and, in fact, such a thought was dominant under the former Trust Act. By contrast, the current Trust Act prescribes, in connection with the definition of trust, simply that the trustee takes the responsibilities of the administrative acts on the trust property in the already established trust relationship to the beneficiary⁷ and that the effectuation of a trust occurs, in short, at the time when the will to form the trust relationship takes effect⁸. So, the specification of the trust property at the time of the settlement of the trust is not required under the current statute. Therefore, a problem questionable under the former statute, namely, whether a “trust relationship” is established just after the

to a trustee and which should be administered or disposed of through a trust.

⁷(definition)[excerpt]

Article 2 ① The term “trust” as used in this Act means an arrangement in which a specific person, by employing any of the methods listed in the items of the following Article, administers or disposes of property in accordance with a certain purpose (excluding the purpose of exclusively promoting the person’s own interests; the same shall apply in said Article) and conducts any other acts that are necessary to achieve such purpose.

⁸(Effectuation of a trust)

Article 4 ① A trust created by the method set forth in item 1 of the preceding Article shall become effective when a trust agreement is concluded between the person who is to be the settlor and another person who is to be the trustee.

② A trust created by the method set forth in item 2 of the preceding Article shall become effective when the will takes effect.

③ A trust created by the method set forth in item 3 of the preceding Article shall become effective when the events specified in the following items take place for the cases listed in the respective items:

1. where the trust is created by means of a notarial deed or any other document or electromagnetic record authenticated by a notary (hereinafter referred to as a “notarial deed, etc.” in this item and the following item): when the notarial deed, etc. is executed; or

2. where the trust is created by means of a document or electromagnetic record other than a notarial deed, etc.: when notice is given by means of an instrument bearing a fixed date to the third party designated as the person who is to be the beneficiary (if there are two or more such third parties, to one of them), with regard to the fact that the trust has been created and the contents thereof.

④ Notwithstanding the provisions of the preceding three paragraphs, when a trust is subject to a condition precedent or a designated time of commencement by the terms of trust, said trust shall become effective when the condition precedent is fulfilled or when the time of commencement arrives.

conclusion of a trust contract before promised assets are really paid or transferred to the trust was resolved as a trust relationship is established at the time of the trust agreement. So, it would be sufficient that the payment or transfer of trust property is done at any time unless the delay causes a trouble for the administration of the trust.

However, at the same time, since Article 2 of the current statute takes as the definition of trust the fact that the trustee has the obligation concerning “the administration or disposition of trust property”, a thing like a “trust relationship” without trust property is not assumed under the current statute. Therefore, when the promised payment or transfer of trust property by the settlor was, in the end, not completed, or when the trust property was annulled by some cause and no compensation was done, the trust would be terminated as the accomplishment of the purpose had turned out to be impossible⁹.

As we have just seen, the existence of trust property is still indispensable for the establishment of a trust under the current statute but the doctrine that a trust relationship doesn’t exist before the existence of certain specified trust property, which was the dominant theory under the former statute, should have been relaxed.

(2) Combined Administration of Trust Property

The concept of “trust property” has the significance not only in the question, which part of existing property constitutes the trust property and is bound with the trust purpose, but also in the legal states of the rights and duties relations among the trust parties. In fact, all powers or responsibilities of a trustee in a trust relationship concern the trust property in that trust relationship, and all the rights of the beneficiary for getting benefits or supervising also concern only the trust property from which the beneficiary can get benefits in the trust relationship. Therefore, when there is a room for different interpretations concerning concretely what range of property constitutes the trust property in the trust relationship, the definitions of the contents of the rights and duties relations among the trust parties may be involved in the dispute.

Typical situation in which such a dispute would occur is the case that properties of plural trusts are put on the “combined administration” or the case of consolidation of trusts or split of a trust where the range of the trust property may be changed. Of the two, as for the consolidation and split of trust, we will explain the procedures along with the relevant provisions of the current statute in Chapter 6, Section 1, so,

⁹(Causes of Termination of Trust)[Excerpt]

Article 163 In addition to cases under the provisions of the following Article, a trust shall terminate in the following cases:

1. where the purpose of the trust has been achieved or where it has become impossible to achieve the purpose of the trust;

in following, we are going to discuss the interpretation problems on the range of the trust property in a combined administration.

Combined Administration of trust properties is allowed as an exception of the duty of separate administration a trustee has¹⁰. There is no question that it is possible to allow it in the trust contract or the other agreement on the trust. But the problem is the interpretation of the legal relationship concerning the combined administration of the trust properties, namely, how to think the relation of the combined trust property group with each “trust property” each settlor puts in the trust relationship. The difference of interpretation on this problem would lead to considerable difference of the results in following respects. Firstly, how to share the gain or loss from the combined administration to each trust property would depend on how to interpret the relation between the combined property and each trust property. Secondly, as we mentioned above, since the range of the power of a beneficiary to supervise the trustee on the trust relationship is limited within the “trust property” on which the beneficiary has the beneficial right, the valid range of the supervising power would also depend on how to interpret the legal relation between the combined property and each trust property.

With taking those above into consideration, we will discuss the legal relation between the combined trust property and each trust property in the combined administration. There are three possible interpretations.

The first is the interpretation that in “combined administration” of trust properties, plural trust properties are respectively administered, but virtually simultaneously according to one common administrative policy. Under this interpretation, “combined

¹⁰(Duty to segregate property)

Article 34 ① A trustee shall segregate property that belongs to the trust property from property that belongs to the trustee’s own property and that which belongs to the trust property of other trusts by the method specified in each of the following items for the categories of property listed in the respective items; provided, however, that if the terms of trust otherwise provides for the method of segregation, such provisions shall prevail:

1. property for which a trust registration set forth in Article 14 may be made (excluding the property set forth in item 3): by said trust registration;

2. property for which a trust registration set forth in Article 14 may not be made (excluding the property set forth in the following item): either of the methods specified in (a) or (b) below for the categories of property listed in (a) or (b), respectively:

(a) movables (excluding monies): by retaining property that belongs to the trust property separately from property that belongs to the trustee’s own property and the trust property of other trusts in the manner whereby they can be distinguished from each other on sight; or

(b) monies and any property other than those set forth in (a): by clarifying the accounting thereof; or

3. property specified by Ordinance of the Ministry of Justice: by a method specified by Ordinance of the Ministry of Justice for the appropriate segregation of the property.

② Notwithstanding the provisions of the proviso to the preceding paragraph, a trustee shall not be exempted from the duty for trust registration set forth in Article 14 for the property set forth in item 1 of said paragraph.

property group” is a mere aggregation of plural trust properties, so that the gains and losses as the results of the combined administration have the same character as those from each trust administration. Therefore, the gains or losses from one trust property that is administered in combination with the other trust properties should not affect those from the other trust properties combined with it. In addition, according to this interpretation, since the concept of “combined property group” as distinguished from each trust property is not theoretically admitted, the supervising power of a beneficiary over the trustee, for example, the right to claim disclosure of the information concerning management or disposition on the trust property is restricted within the facts concerning the trust property on which the beneficiary has the beneficial right, so that it doesn’t reach the facts concerning the other trust properties administered in combination with it. However, whether a trust property is administered combined with other trust properties or not would be in itself decided as an administrative judgement of the each trust, so the information disclosure could be claimed not only for the policy of the combined administration but also for with which of the other trust properties the trust property is administered in combination.

The second is the interpretation that, in combined administration of trust properties, one combined “trust property” is constructed so that each beneficial right becomes the right on this combined trust property. Under this interpretation, since the combined trust properties are considered as one unified trust property, gain or loss that occurs on a part of the trust property would affect all the beneficial rights. The supervising power of a beneficiary over the trustee would comprehend the whole combined trust property, so the range of the information disclosure claim would be extended over all the combined administration acts.

The third is the interpretation that each trust property is invested in the combined property group as a way of administration of each trust property, so that each trust property, not its beneficiary, gets the beneficial right on the combined property. Under this interpretation, when some gain or loss occurs in the combined administration, that result is “shared” to each trust property through its own beneficial right. So, in contrast to the last two interpretations, whether, for example, the loss from the combined administration should be borne by a beneficiary depends not on the decision by each beneficiary but on the judgement by the beneficiary of the combined trust property, namely, the trustee of the each trust property on which each beneficiary has the beneficial right. The beneficial right of each beneficiary doesn’t reach the combined trust property group. So, the supervising power of each beneficiary is also restricted to the propriety of disposition of each trust property, namely, whether it is appropriate to invest each trust property into the combined administration, so that it is not allowed to claim information disclosure on the combined administration itself. Still less, there is no room for a beneficiary to claim information disclosure concerning the administration of the property that is administered in combination with the trust property for the beneficiary but belongs to another trust. By the way, this way of

thought supposes a stratified trust relation for the property management. As for the general problems properly coming from a stratified trust relation, we will discuss them later in (4) of this section.

As described above, combined administration is allowed, as a general rule, freely by determining in a trust contract or the other agreement. The legal ground of a combined administration is the “agreement” between the parties, including implicit but substantial one. Therefore, the appropriateness of those interpretations above should be judged on the each concrete agreement in each trust. But a problem difficult to be solved may be caused from that.

For instance, one problem is whether the “agreement” between the settlor and trustee concerning a “combined administration of the trust property” exists as each trust agreement between each settlor and the trustee, or should be considered as one comprehensive “agreement” involving all the settlors taken like a settlor union and the trustee. If one thinks like the former, a cancellation of the contract, for example, could be freely done by the agreement between each settlor and the trustee, but, when the contents of agreements vary with every trust agreement, very complicated interpretational problem may occur in combined trust administration case. On the other hand, the latter way of thinking may lead interpretations concerning the combined trust administration to some stability, but it would be possible to criticize the thought to construct a settlors union is too fictional.

Moreover, what interpretation one thinks is appropriate concerning the range of the objects on which a disclosure claim is admitted or the way of the distribution of the gain or loss in combined trust administration would depend on the stand point and environmental conditions of the person. It is undecidable which interpretation brings the optimal profit to which party in what situation. Therefore, for trust business in which various and variable stand positions or interests distribution must be taken into account, it would be no other way but to cope with concrete aspects of contractual problem by foreseeing the effect of the act in every concrete situation, with taking into consideration even how the act would be evaluated by third parties.

(3) Positive Property and Negative Property

“Positive Property” means the property of all kinds that augments the value of the right or interest on it, in sum, another name of the right or interest. In contrast, “Negative Property” means the property that diminishes the value of the right or interest on it, or, so to speak, “minus assets”, and its typical phenomenon is an obligation or responsibility.

Under the former Trust Act, since the doctrine that saw the fundamental feature of trust in the independence of the trust property was dominant, the interpretational theory which insisted that a trust property at the establish time should consist only of positive properties was very influential. This opinion was supported by the political

presupposition that the trust property should be secured for the sake of the beneficiary, so that the trust property could keep its stably positive value. However, as the rigidity of the opinion had been questioned in the practical appropriateness and there had appeared some negative judgements by the supreme court, the oppositional opinion like following appeared.

It says that if the property in which both positive and negative properties are mixed could be strictly never placed in trust, a real property with obligation to repay the deposit or guaranty money could not be a trust property, and that, viewing from the nature of a deposit or guaranty money, however, such an interpretation is unrealistic. After such an opinion had become to find many supports, there appeared a judgement by the supreme court in which the supreme court admitted the entrustment of a real property with obligation to repay the guaranty money prescribed in the lease contract was valid so that the trustee was responsible for the repayment of the guaranty money in the case of the bankruptcy of the settlor who was the lessor (The supreme court judgement Heisei 11 March 25, HJ no. 1674, p.61). On the other hand, even the doctrine that doesn't allow negative property as trust property was admitting that trust property owes some obligation after its valid establishment. As the result, the doctrine had almost lost the main merit that it would secure the stable value of trust property. In fact, when one thinks about what the legal theoretical ground of the opinion that it is undesirable for trust property to be charged with debts is at all, what one could give as a sound ground would be the protection of the creditors on the trust property or the prevention of the confusions at the insolvency of the trust property, but even those could not be very strong supports of the appropriateness of the opinion. For if only positive property of the settlor incorporated into the trust property, only the negative property part would remain in the settlor's private property, so that it would be unfairly disadvantageous to the creditors of the settlor. Moreover, also as for the interest adjustment at the insolvency, it is not the only solution to avoid the establishment of the trust since there are other ways, for example, to consider the trust as terminated by the unattainability of the trust purpose after the establishment or to keep the trust valid by the assumption of indebtedness by the trustee, so and so. Therefore, it is not necessary for the trust that includes some negative property always to be considered as void.

As to the problem discussed above, the current Trust Act provides an explicit provision prescribing the range of the debts a trust property should owe, by which it has become possible to place the property that includes some negative property into a trust by the trust contract¹¹. According to that, if a trust is thought as a legal

¹¹(Scope of obligations covered by the trust property)[excerpt]

Article 21 ① Obligations pertaining to the following claims shall be obligations covered by the trust property:

...

3. a claim arising against the settlor prior to the creation of the trust, for which it is provided

relationship to give the beneficiary profits from the trust property, the positive part should, in effect, surpass the negative part in a trust property, but even when it has turned out that the negative part surpasses the positive part in a trust property, the trust relationship doesn't become void immediately, merely the trust may be possibly liquidated through the bankruptcy procedure to be terminated. When a settlement of trust including negative property constitutes a fraudulent conveyance to the creditors of the settlor, the trust is voidable as a fraudulent trust¹², so that the trust itself would be voided. But the condition would be quite same if the trust property consisted of only positive property, so it is no logical contradiction.

(4) Stratified Trust Relationship

A “stratified trust relationship” is build trough the process that a part or whole of one trust property (called “basic trust” temporarily in this section) is entrusted to another trust (called “higher trust” temporarily in this section) for the former basic trust to get a beneficial right to the latter higher trust. So, it involves plural trust relationships, so that those two trusts are mutually related to in effect. In such a stratified trust relationship, it is more often than not in practice that the trustee on the higher trust and the trustee of the basic are one same person. However, as the trust relationship in higher trust and that in the basic trust are formally independent trust relationships, some complicated interpretation problem would occur concerning the way to distribute the profit or loss to the beneficial right of the basic trust, or the range and the method of execution of the supervising power of the beneficiary of the basic trust.

This relation were called a “double trust” under the former statute and there was a provision prescribing that the trustee cannot get the benefit of such a trust unless she/he is a co-beneficiary¹³, so the validity of a stratified trust itself was questioned and disputed in legal doctrines. However, to construct a stratified trust relationship is

by the terms of trust that the obligation pertaining to said claim is an obligation covered by the trust property;

¹²(Cancellation of fraudulent trusts, etc.)[excerpt]

Article 11 ① Where a settlor has created a trust with the knowledge that it would harm the settlor's creditor, the creditor may, irrespective of whether or not the trustee had knowledge of the fact that the creditor would be harmed, request the court for a rescission under the provisions of Article 424, paragraph 1 of the Civil Code (Act No. 89 of 1896), with the trustee as the defendant; provided, however, that this shall not apply where there are any beneficiaries at the time, all or some of who had no knowledge of the fact that the creditor would be harmed at the time when they became aware that they had been designated as beneficiaries (meaning being designated as an initial beneficiary or new beneficiary after a change in the provisions of the terms of trust or as a result of the exercise of the right to designate or change a beneficiary prescribed in Article 89, paragraph 1; the same shall apply hereinafter) or when they acquired beneficial interests.

¹³Article 9 of the obsoleted Trust Act A trustee cannot get any benefit in any name or title from the trust unless the trustee is named as one of the co-beneficiaries of the trust.

useful to create a large scale trust in which flexible and efficient investment activities is made possible to the extent that would be impossible to attain in each small trust administration. Moreover, through compensations of an accidental loss in investment activities by profits from large scale operations of whole the trust properties, it would become possible to provide certain stable profits to the beneficiaries. For this reason, the opinion that there is no problem in a stratified trust as a way of investment if it is admitted in each trust agreement of the base trust was dominant even under the former statute, in spite of the provision of the obsoleted article 9.

However, since the basic thought concerning the fundamental structure of a trust under that opinion was constructed by placing the independent trust property into the center of the legal relations, and thought that the trustee did not own the trust property but only had a status of the administrator of each trust property. So, the opinion supposed that even if the trustee is one same person both in the basic trust and the higher trust, since the trust properties are different one another in those trusts, there is no problem to establish certain legal relationship between those trust properties. And if a stratified trust relationship was avoided by the obsoleted article 9, the stratified trust relation would be considered as theoretically non-existent, so that each beneficiary merely could directly benefit from or exercise the supervising right over the each original trust property being made use of as one of higher trust property. So, it would not be especially disadvantageous to the beneficiaries even if a stratified trust relationship is allowed if its formation was agreed in each trust agreement. It might have been one of the supports for the dominant opinion under the former statute.

In contrast, the current Trust Act prescribes that a trustee can get the profit of the trust if he/she is also the beneficiary¹⁴so that the exception condition is relaxed from a “co-beneficiary” in the former provision to a “beneficiary”. As the result, a stratified trust relationship has become, generally, not against the provision of the statute also outwardly. By the way, the current Trust Act prescribes that if the trustee have acquired whole the beneficial right as the private property and the situation has lasted for one year, the trust shall be terminated¹⁵. The acquisition of the beneficial right by the trustee in a stratified trust relationship doesn’t fall under the termination condition of the trust prescribed in the statute as far as the formation of such a trust

¹⁴(Prohibition on the Trustee’s Enjoyment of Benefit)

Article 8 No trustee may benefit from the trust under any name, except where the trustee benefits from the trust as its beneficiary.

¹⁵(Causes of Termination of a Trust)[excerpt]

Article 163 In addition to cases under the provisions of the following Article, a trust shall terminate in the following cases:

...

2. where the trustee has continuously held all beneficial interests in the form of the trustee’s own property for one year;

relationship is agreed both in the basic and the higher trust acts. For, it is true that the trustee and the beneficiary may mutually agree in certain stratified trust relationship. But the trustee acquires the beneficial right not as the private property and still keeps the administrative power on the trust property as the administrator in such a case.

However, allowing a free formation of a stratified trust relationship may, on the one hand, heighten the flexibility and efficiency of the administration of the trust property, but, on the other hand, the power of the supervision or enjoying benefits through the beneficial right may become so indirect that the beneficiary in a basic trust relationship cannot help entirely relying on the faithfulness of the trustee, for the basic trust property must be considered as constituting a part of another higher trust property. How to evaluate such a situation would depend on what role in the society one thinks trust relationships should play. And the evaluation may also change depending on who is the beneficiary in which concrete situation.

As we could see typically in this problem, the current Trust Act seems to presuppose like following. Namely, a beneficial right is usually made use of for the economic profits by the beneficiary, so, since a beneficiary and a trustee make a “mutual agreement” in order to optimize their own profits respectively, it would be done based on their free wills in their own responsibilities, so that the damages or responsibilities coming from it should be appropriately shared between them. However, whether such an “agreement” is really made by taking all probable risks of the stratified trust relationship enough into consideration in a concrete case, it should be carefully examined with taking especially the character or ability of the beneficiary into account. Moreover, viewing from the condition that an execution of the supervising power of the settlor can be excluded in the trust agreement under the current statute, one may question whether a beneficiary and a trustee can arrive at the “agreement” on an equal footing at all. So, it may be emergent to establish theoretically some reasonable standard of the interpretation of an “agreement” concerning a trust relationship.

(5) Changes of Trust Property

After the settlement of a trust the concrete goods that constitute the trust property would be incessantly changed through trades or the like unless the trust aims at the maintenance of the trust property. Especially in a trust relationship by which economic profits are sought for, the trustee would be required to trade aiming at the realization of the economically most valuable assets constitution. So, the incessant changes of the trust property is rather suitable to the purpose of such a trust.

The legal theoretical construction for the changes of trust property is not greatly changed depending on the way to understand the fundamental structure of trust. They say, a change of trust property consists of a twofold process in which a part or whole of the property which had constituted a trust property leaves the trust property

and certain property which did not constitute the trust property comes into a part of the trust property. Then, if a compensational or some other relation is recognized between the having left property and the coming in property, the contribution of positive or negative values on the trust property can be judged by considering only the mutual relation between concrete properties, to which it is irrelevant how to think of the legal theoretical construction of the rights and duties relation between the trustee and the beneficiary in the trust. The current Trust Act enumerates concrete legal causes of the change of trust property¹⁶. But, since it is natural that changes of trust property occur in most of trusts, as referred to above, suitably to the trust purposes, a property in compensatory relation with another property leaving the trust property should be granted to be a part of the trust property.

Practically rather important problem in the case of the change of trust property is whether each concrete change is suitable to the trust purpose. Especially in a trust relationship to pursuit economic profits, the change of the trust for the trust purpose is frequent, so that the evaluation of the change is often put in question. In following, as typical examples, we will consider the change of trust property for the purpose to heighten the total income through making use of plural trust properties in unification, and that for the purpose of the efficient pursuit of profits through making an independently administered property by separating the part especially efficient for the pursuit of profits from the whole trust property.

As there was no concrete provision concerning a consolidation or split of trust property in the former Trust Act, the range of rights, interests or losses to be attributed to each beneficiaries had largely depended on what legal construction is adopted. Thinking straightforwardly, the consolidation or split of trust property could be thought as a combination of the termination of all or a part of the existing trust with a settlement of a new trust. But if the existing trust should be terminated once, certain legal problems are not avoidable, for example, how to treat the legal relations including the creditors to the trust to be terminated or how to do the evaluation on the trust property in the suppositional liquidation process. So, the “change”

¹⁶(Scope of Trust Property)

Article 16 In addition to property specified by the terms of trust as being among trust property, the following property shall be among the trust property:

1. any property obtained by the trustee as a result of the administration, disposition, loss or damage of, or any other events occurring to property that belongs to the trust property; and
2. any property that has come to be among the trust property pursuant to the provisions of the following Article, Article 18, Article 19 (including cases where applied mutatis mutandis by replacing the relevant terms and phrases pursuant to the provisions of Article 84; hereinafter the same shall apply in this item), Article 226, paragraph ③, Article 228, paragraph ③, and Article 254, paragraph ② (including any co-ownership interest that is deemed to be among the trust property pursuant to the provisions of Article 18, paragraph ① (including cases where applied mutatis mutandis pursuant to paragraph ③ of said Article) and any property that is made to be among the trust property as a result of the division under the provisions of Article 19).

of the trust property had been selected in order to keep the continuity of the trust conceptually by following measures: ① Administration through de facto consolidation or split without legally formal consolidation or split of a trust property; ② To concentrate trust properties to one trust through a transfer of property from another trust in trade for the beneficial right on the concentrated trust property; ③ Settlement of a new trust in the form of stratified trust relationship, by which the substantial properties are concentrated to the newly settled trust and the existing trust properties get the beneficial rights. In contrast to those, under the current Trust Act, rather detailed provisions for consolidation and split of a trust property are provided (see Chapter 6 section 1 (2)(3) for the details). However, the current statute categorized a consolidation or split of a trust trust property as “change of trust”, viewing from which it is clear that the detailed prescriptions of the current statute has adopted the doctrine in which the change of trust is considered as a combination of a termination of existing trust and a settlement of a new trust. Since such a procedural complicity is the main problem for the practice, the practical problem will not disappear by the current statute. In this meaning, the legislation of the current Trust Act is far from the radical resolution of the problem in this respect, so that various endeavors of legal constructions like described above will be still continued in practical business.

When one observe the change of a trust in detail at the level of each goods, one will find in most cases that all of concrete properties which constituted the one trust property are transferred to another trust property and in exchange of which the former trust property gets the beneficial right on the trust property. In such a case of the change of trust property, the balance between the value of the transferred property and that of the beneficial right would be important for creditors to the preexisting trust. In practice it is mostly at the time of the bankruptcy of a trust that the “value” of a beneficial right is concerned. When the newly settled trust went to insolvency, the value of the beneficial right to that would rarely exceed the pure value of the transferred property, so the switch of the concrete trust property to the beneficial right on the new trust property would be in most cases judged to diminish the value of the preexisting trust property. In contrast, when the newly settled trust relationship is not terminated yet, as the management cost for the beneficial right is mostly far lower than that for concrete properties, the beneficial right may be evaluated rather higher than the total sum of the values of the transferred concrete properties.

So, the evaluation of the change of trust property is not really simple. This problem is one of the typical unsolved problems in legal studies at present, namely, how to think of “economic value” in legal interpretation problems. This problem is critical in some trust theories, so we should pursuit a theoretical framework to radically reconsider this problem in detail.

(6) Setoff Concerning Trust

A “setoff concerning a trust” means a setoff against a credit or a debt belonging to a trust property. Offset is a simple method of settling two oppositional credits and has an effective security for the credit. It has been widely used in practical business. But offsets concerning a trust requires certain technical interpretation on the legal subject to which the credit belongs as well as the validity itself of the liquidation of a credit in a trust property by a setoff could be questioned in relation to the trust property.

The former Trust Act had a provision explicitly to inhibit a setoff concerning a trust in a certain situation¹⁷, and there was an influential doctrine that added cases for a setoff to be inhibited to the provisional one, so that a setoff concerning a trust was considered to be inhibited in rather wide area. This type of argument has two characteristic points. The one is to consider the provision of the former article 17 as prescribing only on the setoff by law. That means, the inhibition provision would not be applied as it is to the case of contractual setoff. The two is to insist that if the trustee gets some personal profits, even temporarily, from the setoff, it may constitute a violation of the fiducial duty so that the setoff should be invalid even when it is not inhibited by the former article 17, whether the setoff is contractual or by law.

That influential doctrine under the former statute emphasizes the risk that the trustee becomes with no means during the liquidation process by setoffs against the trust property and that the trustee has the superior status for, though temporarily, collecting substantially her/his own property through setoffs against the trust property to the other creditors to the trust. In addition, the doctrine thought that the inhibition of setoff by the former article 17 should not be applied to the debt of the trustee or the trust property to a third party, on the ground that the provision of the former article 17 was not definite concerning the case and a debt generally should be paid. As we can see from those above, the former statute and the influential doctrine basically didn't place any trust on the personality or means of the trustee, and, as the result, they tied firstly to prevent the trustee from getting her/his personal profits by means of setoff.

However, there were criticisms from practical business under the former statute that such an interpretation would lead to inappropriate conclusions in certain situations. In fact, that doctrine might lead to a conclusion by which the “interests” of a trust property or a beneficiary was not appropriately “protected”, like following.

It is when the creditor whose credit will be liquidated lacks her measures that the setoff against such a creditor gives an advantage to a creditor who claims the setoff. It is quite difficult to foresee definitely at the time of trading when who may possibly become with no measures. Under such a condition, if the interests of a

¹⁷Article 17 (the former statute) a setoff shall not be allowed between a credit belonging to a trust property and a debt not belonging to the trust property.

trust property or a beneficiary should be protected, it would be rather necessary for the trust property to be able to prevent its own credit from becoming valueless through flexible use of setoffs by considering who in the debtors including the trustee has the economically stable measures according to concrete situations. The former article 17 and the doctrine that support a general inhibition of the setoff concerning a trust property cannot be said to “protect” the “interests” of the trust property or the beneficiary in the end. Moreover, while the doctrine described above generally admits a setoff against a third parties credit to the trust property with a credit the trustee personally has to the third party, the trustee gets personal benefit, in reality, from the setoff when the third party fall into no measure situation, since the insolvency of the credit of the trustee to the third party is avoided by the setoff. The doctrine didn’t give any definite explanation to whether such a conclusion leads to the result “for the trustee to get personal profits concerning the setoff”.

However, the mainstream in the practical business under the former statute was critical to the doctrine. They thought that in the trust business, the the risk to fall in short of measures was considerably higher on the side of third party who traded with a trust than on the trust bank as the trustee, presupposing that since a trust bank becomes a trustee as its business, it should be rare for a trust bank intensionally to betray the beneficiary or the trust property for its own private interests. We can see that the image of the typical trustee or the economic point of view to an insolvency risk is qualitatively different between the former statute or the former influential doctrine and the criticisms to those from the trust business. Although the image of a typical trustee at the time of the legislation of the former statute in Taisho era should not simply be compared to that at present time, if the substantial advantage of a setoff is thought to be the reduction of the risk of the credit collection at the insolvency of the debtor, the criticisms from the trust business would be supportable since an economic insolvency could, theoretically, occur on everyone.

The current statute still formally keeps the general inhibition of a setoff concerning a trust like the former article 17, but prescribes also an exception that a setoff concerning a trust property is valid when the trustee accepts it¹⁸. That provision has

¹⁸(Restriction on the setoff claims etc. that are among the trust property)

Article 22 ① A person who holds a claim pertaining to an obligation which the trustee is liable to perform only by using property that belongs to trustee’s own property or the trust property of another trust (referred to as the “trustee’s own property, etc.” in item 1) (such obligations shall be referred to as “obligations covered by trustee’s own property only, etc.” in item 1 and item 2) may not use said claim to set off the obligation pertaining to a claim belonging to the trust property; provided, however, that this shall not apply in the following cases:

1. where, either at the time when a person acquired the claim or at the time when a person assumed the obligation pertaining to a claim belonging to the trust property, whichever occurred later, the said person who holds the claim pertaining to the obligation covered by the trustee’s own property only, etc. did not know and was not negligent in failing to know that the claim belonging to the trust property did not belong to the trustee’s own property, etc.; or

certain consistency and reasonability from the viewpoint of the criticisms described above, which have insisted that some flexible permissions of setoffs concerning a trust property are necessary since complicated trading relations between trust property and the private property of the trustee occur more often than not in modern trust bank business and, in addition, it is the trustee in person who has the administration power of the trust property that do the concrete judgements on whether doing setoff is substantially advantageous for the trust property or the beneficiary. However, since the proof of the subjective condition that the other party didn't know the attribution of the credit without negligence or the ex post facto acceptance of the trustee is necessary in order for the exceptional paragraph to be applied, the legal status of the other party would unavoidably become unstable in each concrete situation. In addition, we should note that the evaluation of the appropriateness of the judgement of the trustee on the acceptance of a setoff would be difficult in some cases since economic conditions are incessantly changing so that an economic collapse may burst out in the manner unforeseen at the time of the judgement.

(7) Independency of Trust Property

The "independency of trust property" means for a trust property to be treated as if it belongs to a substantially different subject from the trust parties in relation to the trust parties' own properties. Since the jus-in-personam theory was adopted as the fundamental structure of trust in the former Trust Act, it was in relation to the private property of the trustee that the independency of a trust property was considered¹⁹.

2. where, either at the time when a person acquired a claim or at the time when a person assumed the obligation pertaining to a claim belonging to the trust property, whichever occurred later, the person who holds the claim pertaining to the obligation covered by the trustee's own property only, etc. did not know and was not negligent in failing to know that the obligation covered by the trustee's own property only, etc. is liable was not an obligation covered by the trust property.

② The provisions of the main clause of the preceding paragraph shall not apply in the cases listed in the items of Article 31, paragraph ② in which the trustee has approved the set-off set forth in said paragraph.

③ A person who holds a claim pertaining to an obligation covered by the trust property (limited to an obligation that the trustee is liable to perform only by using property that belongs to the trust property) may not use said claim to set off against the person's obligation pertaining to a claim belonging to the trustee's own property; provided, however, that this shall not apply where, at the time when said person acquired the claim or when the person assumed the obligation pertaining to the claim belonging to the trustee's own property, whichever occurred later, the person who holds the claim pertaining to the obligation covered by the trust property did not know and was not negligent in failing to know that the claim belonging to the trustee's own property did not belong to the trust property.

④ The provisions of the main clause of the preceding paragraph shall not apply where the trustee has approved the set-off set forth in said paragraph.

¹⁹Former Article 15 Trust property shall not belong to the legacy of the trustee.

Also under the current statute, explicit provisions concerning the independence of trust property are provided only in relation to the private property of the trustee, in the situations like the adjunction²⁰ or a confusion²¹ between a trust property and the trustee's private property, the setoff concerning a trust property²², the execution

Former Article 16 [excerpt] ① An execution, attachment or interim order or compulsory sale on trust property shall not be processed unless such a procedure is applied for a right whose cause was established on some trust property before the settling of the trust or to collect the business cost of that trust.

Former Article 17 a setoff shall not be allowed between a credit belonging to a trust property and a debt not belonging to the trust property.

Former Article 18 When a trust property is a property right other than the ownership, even if the trustee acquired that objective property, the right shall not be extinguished by the merger of estates.

Former Article 30 When adjunction, mingling or modification occurred on a trust property, provisions of Civil Code from articles 242 to 248 shall be applied by considering as if the trust property and the private property belong respectively to different owners.

²⁰(Accession, etc. of property that belongs to trust property)

Article 17 Where property that belongs to trust property is joined by accession to or mixture with the trustee's own property or any property that belongs to the trust property of another trust, or where processing is conducted using these properties as materials, those properties that are among the trust properties of the respective trusts and the property that belongs to the trustee's own property shall be deemed to belong to their respective owners, and the provisions of Article 242 to Article 248 of the Civil Code shall apply.

²¹(Special rules for the confusion of property that belongs to trust property)

Article 20 ① Where ownership and any other real right existing on a single property have each come to be among either the trust property and the trustee's own property or among the trust property of another trust, such other real right shall not be extinguished, notwithstanding the provisions of the main clause of Article 179, paragraph 1 of the Civil Code.

② Where any real right other than ownership and any other right for which the said real right is the object have come to exist with respect to the trust property and the trustee's own property or among the trust property of another trust, such other right shall not be extinguished, notwithstanding the provisions of the first sentence of Article 179, paragraph ② of the Civil Code.

③ In the following cases, the claim set forth therein shall not be extinguished, notwithstanding the provisions of the main clause of Article 520 of the Civil Code:

1. where an obligation pertaining to a claim belonging to the trust property has vested in the trustee (excluding the case where such obligation has become an obligation covered by the trust property);

2. where a claim pertaining to an obligation covered by the trust property has vested in the trustee (excluding the case where such claim has come to belong to the trust property);

3. where an obligation pertaining to a claim belonging to the trustee's own property or the trust property of another trust has vested in the trustee (limited to the case where such obligation has become an obligation covered by the trust property); and

4. where a claim pertaining to a trustee's obligation (excluding an obligation covered by the trust property) has vested in the trustee (limited to the case where such claim has come to belong to the trust property).

²²(Restriction on the setoff of claims, etc. that are among the trust property)

Article 22 ① A person who holds a claim pertaining to an obligation which the trustee is liable

to perform only by using property that belongs to trustee's own property or the trust property of another trust (referred to as the "trustee's own property, etc." in item 1) (such obligations shall be referred to as "obligations covered by trustee's own property only, etc." in item 1 and item 2) may not use said claim to set off the obligation pertaining to a claim belonging to the trust property; provided, however, that this shall not apply in the following cases:

1. where, either at the time when a person acquired the claim or at the time when a person assumed the obligation pertaining to a claim belonging to the trust property, whichever occurred later, the said person who holds the claim pertaining to the obligation covered by the trustee's own property only, etc. did not know and was not negligent in failing to know that the claim belonging to the trust property did not belong to the trustee's own property, etc.; or

2. where, either at the time when a person acquired a claim or at the time when a person assumed the obligation pertaining to a claim belonging to the trust property, whichever occurred later, the person who holds the claim pertaining to the obligation covered by the trustee's own property only, etc. did not know and was not negligent in failing to know that the obligation covered by the trustee's own property only, etc. is liable was not an obligation covered by the trust property.

② The provisions of the main clause of the preceding paragraph shall not apply in the cases listed in the items of Article 31, paragraph ② in which the trustee has approved the set-off set forth in said paragraph.

③ A person who holds a claim pertaining to an obligation covered by the trust property (limited to an obligation that the trustee is liable to perform only by using property that belongs to the trust property) may not use said claim to setoff against the person's obligation pertaining to a claim belonging to the trustee's own property; provided, however, that this shall not apply where, at the time when said person acquired the claim or when the person assumed the obligation pertaining to the claim belonging to the trustee's own property, whichever occurred later, the person who holds the claim pertaining to the obligation covered by the trust property did not know and was not negligent in failing to know that the claim belonging to the trustee's own property did not belong to the trust property.

④ The provisions of the main clause of the preceding paragraph shall not apply where the trustee has approved the set-off set forth in said paragraph.

procedure on trust property²³, the bankruptcy procedure on trust property²⁴, the

²³(Restriction, etc. on Execution, etc. Against Property that Belongs to Trust Property)

Article 23 ① Except where based on a claim pertaining to an obligation covered by the trust property (including a right arising with respect to property that belongs to the trust property; the same shall apply in the following paragraph), no execution, provisional seizure, provisional disposition, or exercise of a security interest or an auction (excluding an auction for the exercise of a security interest; the same shall apply hereinafter) nor collection proceedings for delinquent national tax (including a procedure to be enforced pursuant to the provisions on collection proceedings for delinquent national tax; the same shall apply hereinafter) may be enforced against property that belongs to the trust property.

② In addition to a creditor who holds a claim pertaining to an obligation covered by the trust property, where a trust has been created by the method set forth in Article 3, item 3, if the settlor has created the trust with the knowledge that it would harm settlor's creditor(s), notwithstanding the provisions of the preceding paragraph, a person who holds a claim against the settlor (limited to cases where the settlor is a trustee) which has arisen prior to the creation of the trust may commence an execution, provisional seizure, provisional disposition or exercise of a security interest, or an auction, or may commence collection proceedings for delinquent national tax against property that belongs to the trust property; provided, however, that this shall not apply where there are beneficiaries at the time in question, and when all or some of those beneficiaries did not know, at the time when they became aware that they had been designated as beneficiaries or when they acquired beneficial interests, of the fact that the creditor would be harmed.

③ The provisions of Article 11, paragraph ⑦ and paragraph ⑧ shall apply mutatis mutandis to the application of the provisions of the preceding paragraph.

④ The provisions of the preceding two paragraphs shall not apply when two years have elapsed since the trust set forth in paragraph ② was created.

⑤ A trustee or beneficiary may assert an objection to the execution, provisional seizure, provisional disposition or exercise of a security interest, or auction that is being commenced in violation of the provisions of paragraph ① or paragraph ②. In this case, the provisions of Article 38 of the Civil Execution Act (Act No. 4 of 1979) and the provisions of Article 45 of the Civil Provisional Remedies Act (Act No. 91 of 1989) shall apply mutatis mutandis.

⑥ A trustee or beneficiary may assert an objection to the collection proceeding for delinquent national tax that are being enforced in violation of the provisions of paragraph ① or paragraph ②. In this case, the assertion of the objection shall be made by entering an appeal against the collection proceedings of delinquent national tax.

²⁴(Relationship between Trust Property and Bankruptcy Proceedings, etc. against a Trustee)

Article 25 ① Even where an order for the commencement of bankruptcy is entered against a trustee, no property that belongs to the trust property shall be included in the bankruptcy estate.

② In the case referred to in the preceding paragraph, no distribution claim as a beneficiary shall be the bankruptcy claims. The same shall apply to a trust claim that the trustee is liable to satisfy only by using property that belongs to the trust property.

③ In the case referred to in paragraph ①, discharge of an obligation pertaining to a trust claim (excluding a trust claim prescribed in the preceding paragraph) based on a discharge order as set forth in Article 252, paragraph ① of the Bankruptcy Act may not be asserted to the trust property.

④ Even where an order for the commencement of rehabilitation proceedings is entered against a trustee, no trust property shall be included in the rehabilitation debtor's assets.

⑤ In the case referred to in the preceding paragraph, no distribution claim as a beneficiary shall be included in the rehabilitation claims. The same shall apply to a trust claim that the trustee is liable to satisfy only by using property that belongs to the trust property.

succession procedure on trust property²⁵. However, the current Trust Act is not

⑥ In the case referred to in paragraph ④, a discharge of or modification to an obligation pertaining to a trust claim (excluding a trust claim as prescribed in the preceding paragraph) by a rehabilitation plan, an order for the confirmation of the rehabilitation plan, or discharge order set forth in Article 235, paragraph ① of the Civil Rehabilitation Act may not be asserted to the trust property.

⑦ The provisions of the preceding three paragraphs shall apply mutatis mutandis where an order for the commencement of reorganization is entered against a trustee. In this case, the term “rehabilitation debtor’s assets” in paragraph ④ shall be deemed to be replaced with “of reorganization company’s assets (meaning the assets of a company under reorganization as prescribed in Article 2, paragraph ⑭ of the Corporate Reorganization Act or the assets of a company in reorganization as prescribed in Article 169, paragraph ⑭ of the Act on Special Rules, etc. for Reorganization Proceedings for Financial Institutions, etc.) or the assets of a cooperative financial institution under reorganization (meaning the assets of a cooperative financial institution under reorganization as prescribed in Article 4, paragraph ⑭ of the Act on Special Rules, etc. for Reorganization Proceedings for Financial Institutions, etc.),” the term “rehabilitation claims” in paragraph ⑤ shall be deemed to be replaced with “reorganization claims or secured reorganization claims,” and the phrase “rehabilitation plan, an order for the confirmation of the rehabilitation plan, or an order of discharge set forth in Article 235, paragraph ① of the Civil Rehabilitation Act” in the preceding paragraph shall be deemed to be replaced with “reorganization plan or an order for the confirmation of the reorganization plan.”

²⁵(Grounds for Termination of a Trustee’s Duty as Trustee)[Excerpt]

Article 56 ① A trustee’s duty as trustee shall terminate on the following grounds, in addition to the completion of the liquidation of the trust; provided, however, that in the case of the termination on the grounds set forth in item 3, if the terms of trust otherwise provides, such provisions shall prevail:

1. the death of the individual who is the trustee:
2. a ruling for commencement of guardianship or commencement of curatorship against the individual who is the trustee:

...

(Duty of the Former Trustee’s Heir to Give Notice and Retain Property, etc.)

Article 60 ① Where a trustee’s duty as trustee has been terminated on any of the grounds listed in Article 56, paragraph ①, item 1 or item 2, if the former trustee’s heir (if there is a statutory agent at the time in question, the statutory agent) or guardian or curator of an adult trustee (hereinafter collectively referred to as the “former trustee’s heir, etc.” in this Section) knows such a fact, the former trustee’s heir, etc. shall give notice of the fact to a known beneficiary; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

② Where a trustee’s duty as trustee has been terminated on any of the grounds listed in Article 56, paragraph ①, item 1 or item 2, the former trustee’s heir, etc. shall continue to retain property that belongs to the trust property until a new trustee, etc. or an incorporated trust property administrator becomes able to administer trust affairs, and shall carry out the necessary actions for the transfer of trust affairs.

③ In the case referred to in the preceding paragraph, if the former trustee’s heir, etc. attempts to dispose of property that belongs to the trust property, a beneficiary may demand that the former trustee’s heir, etc. cease to dispose of the property; provided, however, that this shall not apply after a new trustee, etc. or an incorporated trust property administrator becomes able to administer trust affairs. ④ Where a trustee’s duty as trustee has been terminated on the grounds listed in Article 56, paragraph ①, item 3, the bankruptcy trustee shall continue to retain property that belongs to the trust property until a new trustee, etc. becomes able to administer trust affairs, and shall carry

adopting, in contrast to the former statute, any trust theory, so possible disputes involving trust property and the private properties of trust parties would not be restricted to that with the trustee. For example, when a settlor settled a self-benefit trust by setting her/himself the only beneficiary, there may happen some dispute on whether some trust property should be considered as a part of the private property of the settlor in reality. And if one thinks a beneficiary is the substantial owner of the trust property, some interpretation problem may occur on the relation between the private property of a beneficiary and the trust property.

It is the trust-property-as-a-substantial-legal-subject theory that gives the most clear view on the independence of trust property. Since trust property doesn't belong to anyone of the trust parties and is substantially independent property according to this theory, it is natural for the current statute to have explicit provisions concerning the independence of trust property in relation to the trustee. And, the substantial independence of trust property should be attained also in relation to the settlor or the beneficiary as well as to the trustee according to that theory.

In contrast to that, the *jus-in-personam* and the *jus-in-rem* (beneficiary-as-the-substantial-owner) theories would give different interpretations on the significance or function of the provisions of the current statute concerning the independence of trust property. Viewing from the stand point of the *jus-in-personam* theory, while trust property belongs to the trustee, since the trustee has the duties to administer the trust property conforming to the trust purpose, the trust property should be treated differently from the private property of the trustee, so the provisions concerning the independence of trust property explicitly prescribes such conditions. But, according to this theory, since trust property never belongs to the settlor or the beneficiary, there is no use to repeat "the independence" of trust property in relation to the settlor or the beneficiary. On the other hand, viewing from the stand point of the *jus-in-rem* (beneficiary-as-the-substantial-owner) theory, while trust property substantially belongs to the beneficiary, since the formal title holder of trust property is the trustee, it becomes necessary to prescribe explicitly the relation between the trust property and the private property of the trustee, so there are the provisions concerning the

out the necessary actions for the transfer of trust affairs.

⑤ In the case referred to in the preceding paragraph, if the bankruptcy trustee attempts to dispose of property that belongs to the trust property, a beneficiary may demand that the bankruptcy trustee cease to dispose of the property; provided, however, that this shall not apply after a new trustee, etc. becomes able to administer trust affairs.

⑥ The former trustee's heir, etc. or the bankruptcy trustee may demand reimbursement, from the new trustee, etc. or from the incorporated trust property administrator, of expenses paid for carrying out the actions under the provisions of paragraph ①, paragraph ② or paragraph ④, and for interest thereon accruing from the date of payment.

⑦ The provisions of Article 49, paragraph ⑥ and paragraph ⑦ shall apply *mutatis mutandis* to the right that the former trustee's heir, etc. or the bankruptcy trustee has pursuant to the provisions of the preceding paragraph.

independence of trust property. As for the beneficiary, since trust property belongs to the beneficiary in substance, it is theoretically consistent that the current statute has no provisions prescribing the independence of trust property in relation to the beneficiary.

As we have just seen, the interpretation of the provisions may be qualitatively different depending on the base trust theory, especially concerning in relation to whom the “independence of trust property” has its meaning. In fact, even on the significance of the provisions concerning the independence of trust property in the current statute, each trust theory gives considerably different interpretation one another. Taking these facts into consideration, we would say, the provisions concerning “the independence of trust property” in the current statute have been somewhat carelessly inherited from the former statute which based on the jus-in-personam theory. In this meaning, it is questionable for those provisions to be able to give any practical interpretational policy for solving concrete problems in trust business.

Anyway, since the current statute bases not solely on the jus-in-personam theory, the meaning of “the independence of trust property” should be interpreted broader than under the former statute. In this meaning, it would be appropriate, whether from the viewpoint of a theoretical consideration or of a practical interpretational policy, to consider that trust property is the property to be distinguished substantially not only from the private property of the trustee as explicitly prescribed in the current statute, but also from each private property of the settlor or of the beneficiary even though there is no provision concerning them.

Chapter 3

The Parties of Trust

A trust can be settled with arbitrary purpose unless it is prohibited by law or the other decrees. However, in order to settle validly a trust and to attain the trust purpose, certain qualifications and an ability at certain level are to be required of the trust parties. In this chapter, we will give an overview over the qualifications and abilities required of trust parties, so that we will see arguments on the fundamental structure of trust from another side.

3.1 Trustee

(1) The Qualifications for a Trustee

A trustee has the administrative power on the trust property and has the power and duty to perform the trust works so as to attain the trust purpose, whether any trust theory is followed. In ordinary trust relationship, the trustee holds the nominal title of the trust property and has the outward appearance as the property right holder of that property.

Viewing from those facts, we could enumerate as the necessary conditions to be a trustee, firstly, the legal formal capacity to act as the holder of the administrating power on a trust property and, in addition, certain real ability for property management which is sufficient to administer the trust property so as to attain the trust purpose. Therefore, a dead person, a bankrupt or a outwardly legal parson that lost the legal personality cannot be a trustee as well as an adult ward, a person under curatorship and a minor. So, if the trustee fell under one of those categories after the settlement of the trust, the duty of the trustee as the trustee will terminate¹.

¹(Grounds for Termination of a Trustee's Duty as Trustee)

Article 56 ① A trustee's duty as trustee shall terminate on the following grounds, in addition to the completion of the liquidation of the trust; provided, however, that in the case of the termination on

Although those regulations or restrictions on the power of property administration of those persons prescribed in the other acts than Trust Act are principally targeting at the self management of its own property, since higher reasonable property management ability would be required in a trust relationship than in a self property management, a person who may lack an enough ability reasonably to manage its own property is, in general, considered naturally to lack the actual ability for a property management as the trustee. In addition, since a “person” should have the possibility to become a subject to hold property rights, namely, the capacity to hold rights in order to become even the nominal title holder or the outward property right holder of a trust property, a dead person or a corporation that lost the legal personality cannot be a trustee also from this respect.

the grounds set forth in item 3, if the terms of trust otherwise provides, such provisions shall prevail:

1. the death of the individual who is the trustee;
2. a ruling for commencement of guardianship or commencement of curatorship against the individual who is the trustee;
3. an order for the commencement of bankruptcy proceedings against the trustee (excluding cases of dissolution by an order for the commencement of bankruptcy proceedings);
4. the dissolution of the juridical person who is the trustee for reasons other than a merger;
5. the resignation of the trustee under the provisions of the following Article;
6. the dismissal of the trustee under the provisions of Article 58; or
7. any grounds specified by the terms of trust.

② Where the juridical person who is the trustee has effected a merger, the juridical person that survives the merger or judicial person that is incorporated through the merger shall take over the trustee’s duty. Where the judicial person who is the trustee has effected a company split, the same shall apply to the juridical person that succeeds to the rights and duties of the trustee as a result of the company split.

③ Notwithstanding the provisions of the preceding paragraph, if the terms of trust otherwise provides for, such provisions shall prevail.

④ Where the grounds set forth in paragraph ①, item 3 occur, if the trustee’s duty as trustee does not terminate pursuant to the provisions of the proviso to said paragraph, the bankrupt shall perform the duties of the trustee.

⑤ A trustee’s duty as trustee shall not terminate on the grounds that the trustee has been handed an order for the commencement of rehabilitation proceedings; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

⑥ In the case prescribed in the main clause of the preceding paragraph, when there is a rehabilitation trustee, the right of the trustee to perform the trustee’s duties and administer and dispose of property that belongs to the trust property shall be vested exclusively in the rehabilitation trustee. The same shall apply where there is a provisional administrator in charge of rehabilitation proceedings.

⑦ The provisions of the preceding two paragraphs shall apply *mutatis mutandis* where the trustee is given an order for the commencement of reorganization proceedings. In this case, the phrase “there is a rehabilitation trustee” in the preceding paragraph shall be deemed to be replaced with “there is a reorganization trustee (excluding the period set forth in Article 74, paragraph ② of the Corporate Reorganization Act (including cases where applied *mutatis mutandis* pursuant to Article 47 and Article 213 of the Act on Special Rules, etc. for Reorganization Proceedings for Financial Institutions, etc.).”

Theoretical arguments of qualifications for a trustee mostly concentrate on those points described above. But since there are, in reality, various regulations on the property management power or on a juridical subjectivity and it is practically difficult to evaluate the actual ability for property management of a concrete person, it is not rare for the qualification of a trustee to be disputed in practical business.

For example, when there are some regulations or legal restrictions on the legal subject or the way of trading of a certain kind of properties, the judgement on the qualification of a trustee as the trustee may delicately change depending on what kind of properties the trust property includes. There may be various opinions also on whether such regulations on the legal subject or administration of certain kind of properties should affect on the beneficial right that intends to get benefit from such properties. If one gives an affirmative answer to that, rather complicated problem may occur like whether, when the trust property of trust *B* includes a beneficial right of trust *A* whose trust property includes a property on which there are regulations or legal restrictions concerning the holder or the way of trading, the qualifications for the trustee of the trust *B* should be affected by those regulations or restrictions. There are many instances of such regulations or restrictions in the areas of real property rights, stock holding concerning certain kinds of corporation and also certain medical supplies in many countries. Those regulations naturally vary in the methods and ranges from country to country, so it is one of the problems for which enough attention should be paid especially when settling an international trust relationship.

Moreover, especially when the trustee is an association, the effect of regulations or legal restrictions on trading may become problematic in relation to the subject of administration of trust property in settling the trust or in executing the trust works, for the meaning of the property management ability of such an association would be affected by whether it has the legal personality or whether having certain kind of power to manage the property is suitable to the objectives of the association. For example, as for an association without the legal personality, since it has not formal legal personality, the property held by such an association is generally thought to be entrusted to its representative, while the actual property management activities would be done in many cases as if it had the formal legal personality. Under the current law, an association without the legal personality cannot be appointed as a trustee as a general rule. However, if we infer from the thought that the property of such an association belongs to the representative in person by entrusting, it may be possible even under the current law that, with making the representative the nominal title holder of concrete properties, an association without the legal personality functions as the substantial trustee. Such a separation between the nominal trustee and the substantial trustee may be abused in order to avoid the effects of regulations or legal restrictions since restrictions on the capacity to hold a property or to act concerning an association will not affect the actions of a member in person of the association.

(2) Joint Trusteeship

“Joint trusteeship” means the case in which there are two or more trustees in one trust relationship. Under the former statute, so to speak, *Gesammthand* acts (meaning, nearly, joint acts) were required to all the joint trustees, so that it was necessary for the trustees always to act unitedly². The essential merit of having plural trustees would be that the most suitable way of the execution of the trust works to the trust purpose can be expected through the deliberations among the trustees. So, except for the case in which all of the plural trustees could act based on one same opinion, it would be appropriate to determine in advance some policy of the actions as the trustee according to some rational criterions in the situations in which the opinions may contradict among the trustees.

Taking those facts into consideration, the current statute, while the attribution co-ownership is still held in which³, has introduced the principle of the decision by majority in the determination of the will of the joint trustees and, in addition, allows to prescribe a way for flexible distributions of the powers of the administration in the terms of trust so that rational execution of trust works by joint trustees are expected⁴. On the other hand, the liability of the trustee is, as a general rule, the

²Article 24 of the former statute ① When there are plural trustees in a trust, the trust property is seemed to be held under co-ownership.

② In the case of the last paragraph, unless some special rules are provided in the trust arrangement, the handling of the trust affairs should be done unitedly by all the trustees. Provided that a manifestation of intension to one of the trustees has the effect also to the other trustees.

³(Trust Property in Co-ownership Without Share Subject to Certain Restrictions on the Disposition of Shares)

Article 79 In the case of a trust with two or more trustees, the trust property shall be deemed to be held under co-ownership without share, subject to certain restrictions on the disposition of their shares.

⁴(Method of Trust administration)

Article 80 ① In the case of a trust with two or more trustees, decisions on the trust administration shall be made by the majority of the trustees.

② Notwithstanding the provisions of the preceding paragraph, decisions on an act of preservation may be made by each trustee independently.

③ Where a decision is made on the trust administration pursuant to the provisions of the preceding two paragraphs, each trustee may execute trust affairs based on such decision.

④ Notwithstanding the provisions of the preceding three paragraphs, where terms of trust contains provisions concerning the division of duties among the trustees, each trustee shall make decisions on the trust administration and execute those affairs pursuant to such provisions.

⑤ With regard to an act to be conducted in the interests of the trust property based on a decision on the trust administration made under the provisions of the preceding two paragraphs, each trustee shall have the authority to represent the other trustee(s).

⑥ Notwithstanding the provisions of the preceding paragraphs, if the terms of trust otherwise provides for, such provisions shall prevail.

⑦ In the case of a trust with two or more trustees, it shall be sufficient for a third party to make a manifestation of intention to any one of them; provided, however, that if the terms of trust otherwise

joint liability over all the trustees in relation to the beneficiary or a third party. For the determined policy for the trustees' actions should unitedly regulate the behaviors of all the trustees even when the decision making process provided in the term of the trust is flexible⁵.

However, in the present trust business, there have been kinds of substantial "joint trusteeship" which rigidly don't fall under the joint trusteeship in the statute. This fact leads to interpretational problems in various respects.

First, consider the case in which a trustee A has gotten entrusted all the trust property by itself at first and, then, appoints B and C as the property administrators and makes them administer a part of the trust property as the agents of A. In such a case, it is only A who is the trustee in relation to the beneficiary and B and C are mere agents of A, so, considerably different legal effects would be led to compared with the legitimate joint trusteeship case.

Second, consider the case in which a trustee A by itself is entrusted with the trust property at first, then entrusts B and C again with parts of the trust property so that

provides for manifestation of intention by a beneficiary, such provisions shall prevail.

(Standing to Sue or to Be Sued of Trustees with Segregated Duties)

Article 81 In the case prescribed in paragraph ④ of the preceding Article, each trustee shall stand as a plaintiff or defendant with respect to duties of the said trustee in any action against the trust property on behalf of the other trustee(s).

(Delegation to Other Trustees to Make Decisions on the Trust administration)

Article 82 In the case of a trust with two or more trustees, no trustee may delegate the other trustee(s) to make decisions on the trust administration (excluding those falling within the scope of the ordinary business), except where terms of trust otherwise provides for or there is a compelling reason to do so.

⁵Article 25 of the former statute When there are plural trustees in a trust, the debt through the act of the trust to the beneficiary shall be borne jointly by the trustees. The same shall be applied to the debt in in the course of administering trust affairs.

(Assumption of Obligations in Administering Trust Affairs)

Article 83 ① In the case of a trust with two or more trustees, where each trustee has assumed an obligation to a third party in the course of administering trust affairs, these trustees shall be joint and several obligors.

② Notwithstanding the provisions of the preceding paragraph, where terms of trust contain a provision concerning the division of duties among the trustees, when either of these trustees has assumed an obligation to a third party in the course of administering trust affairs pursuant to such provisions, the other trustees shall be liable only by using property that belongs to the trust property to perform the obligation; provided, however, that where the third party knew, at the time of the act causing the assumption of the obligation, that said act was conducted in the course of administering trust affairs and that there were two or more trustees for the trust, and did not know and was not negligent in failing to know that the terms of trust contained provisions concerning the division of duties among the trustees, the other trustee(s) may not duly assert such provisions on the division of duties against the third party.

B and C administer respective trust properties according to their own judgements. In such a case, the beneficiary of the first trust doesn't have beneficial rights in the sequential trusts administered by B and C, so that the beneficiary's supervising power doesn't reach the administrative actions of B and C. In this meaning, the legal effect in that case is quite different from that in the case in which B and C are the "joint trustees" of Trust Act with A.

However, even in those cases described above, essentially same legal effect as when A, B and C are appointed as joint trustees in Trust Act could be deduced in relation to the beneficiary of the first trust through some reasonable interpretation of the legal relationships among the trustee A and the property administrators B and C.

For instance, if we interpret the legal statuses of the property administrators B and C as agents of the trustee A, if we can admit the direct legal relationship between the agents and the beneficiary with taking the agent theory into consideration, we could think the supervising power of the beneficiary has the direct effect over B and C. By the way, it is possible to prescribe in the trust terms in advance the criterion concerning what range of the trust property would be allowed to be entrusted to the agents of the trustee. Then the judgement on whether some concrete property is entrusted to an agent is an instance of the trust property administration actions of the trustee. So, when some failure of B or C causes to any damage to the trust property, the beneficiary can ask directly B and C for the responsibility of the failure, as well as A for the responsibility for the administration on whole the trust property. In such a case, the responsibility of A, B and C would be interpreted as a joint responsibility for the one same damage, so that the legal effect would be same as in the case of formal joint trusteeship.

On the other hand, when the trustee A entrusted parts of the trust property again to B and C, as far as stratified trust relationships is validly established, the beneficiary of the lower trust is not in the direct legal relationship with B and C. In addition, since the profits from the properties administered by B and C belong only indirectly to the beneficiary through those beneficial rights of the higher trusts that are included in the trust property of the lower trust, if one thinks it would be better to allow the beneficiary to ask for the responsibility against B or C, the almost only way to do so would be to argue that the higher trust relationship essentially forms a part of the lower trust relationship. For instance, if B and C are substantially under the supervision by A in their property administrations, the higher trust relationships could be interpreted as principal-agent relationships in the essence, the same legal effect as described in the last paragraph could be deduced by considering B and C as agents of the trustee A in their legal substances. Besides, if one adopts concerning the fundamental structure of trust the doctrine that the beneficiary is the substantial owner of the trust property, it would be possible to conclude that the effect of the substantial ownership of the beneficiary is extended over the sequential trust relationships, by considering the higher trust relationships as being substantially united

with the lower trust relationships even if the trust relationships are stratified, unless one of those trusts is operated in the form of “combined administration” with still another trust.

As a conclusion from what we have considered above, it is not necessarily impossible as an interpretation of the current statute to provide some theoretical stand point from which essentially same legal effect can be deduced irrespective of what legal construction is adopted to appoint the “joint trustees” whether formal or not formal but substantial ones. But the more difficult problem is in that such an interpretational policy may not necessarily be the best for the interest of the beneficiary so that the evaluation of the effect may depend on the concrete situations. For, the fact that the supervising power of the beneficiary reaches the administration actions of B or C may, in turn, be taken as the cause of the responsibility of the beneficiary her/himself to a person other than those trust parties (see Chapter 5 Section 3). So, viewing from the fact that the beneficiary in the case like above mostly doesn’t have the actual chance to control the concrete administration actions in the trust relationships, to expand the supervising power of the beneficiary through an interpretation may result to impose the beneficiary a burden exceeding the merit that the beneficiary can have more alternatives for claiming the restoration of the loss of trust property.

In addition, the merits for which some trust parties try to create such forms of property administration as deviate from the formal statutory one are completely neglected if the legal effect is always essentially same as in the case of formal joint trusteeship. Then, from the stand point of trust parties, it would become useless to provide special clauses for the way of administration in the trust terms. Instead, such an argument would be rather persuasive as insists that the legal effect the trust parties actually intended could be deduced only through flexible but logical interpretations on the formal legal construction the parties intentionally prescribed in the trust terms with enough regards for each actual situation. So, as for the beneficiary or a third party who is not involved against its intention like a victim of torts but enters by its own intension into the legal relationship, the trust terms agreed by the parties after the considerations and mutual adjustments should be out into the center of the legal interpretation, which would be appropriate also from the viewpoint of the fact that a trust relationship can be created by the free will of the trust parties to attain the trust purpose.

After considering all the factors described above, we would conclude that what is attached the greatest importance to in interpretation of the “joint trusteeship” including informal but substantial one is how to interpret the “agreement” between trust parties, typically the trust terms determined to regulate the legal relationship among the parties. While such an interpretational policy is theoretically consistent with the supposition that a trust relationship can be freely settled by the trust parties, since actually possible situations under which some legal dispute may occur have an infinite variety, the trouble, cost and risk to estimate the effects of concrete trust

terms in future possible conflicts would become considerably high if not only each wording but also all the possible combinations of the words or sentences in the trust terms should be taken into consideration at the time of the settlement of the trust terms in order to infer their future effects. Moreover, if such trust relationships are set among plural parties in a complicated form, the content of the trust terms for each individual trust may contradict the conclusion of an interpretation of the terms from the viewpoint of the common purpose to all the trust parties. So, we should note, all that the policy of the interpretation can give may be only an unclear clue in the phase of the application to concrete cases.

(3) Executor of the Power of Trustee on behalf of the Trustee

It is, of course, the trustee that the power and duty on the execution of the trust affairs are attributed to. But as for the range of the actual works that should be handled by the trustee her/himself, there may be various way of thinking. If the confidence on a trustee in person is emphasized in the settlement of a trust relationship, one would think the trustee in the trust relationship was appointed as the very person who should perform the trust administration, so that the trust administration should not be delegated to another person unless there is some exceptional ground for it. Instead, if one emphasizes that the fundamental ground of the creation of a trust is to attain the trust purpose, one would think that the reason why the trustee was installed to the status is because the settlor etc. thought the trustee her/himself is appropriate to be appointed for the attainment of the trust purpose. Then, when there is another person who is suitable to do the trust administration for the attainment of the trust purpose, the trustee should willingly appoint such a person as the vicarious actor of the trustee and the trustee her/himself should do the backing operations for the trust works by the actor on behalf of the trustee.

Under the former statute, partly because the *jus-in-personam* theory was adopted there, the power of the trustee should be exercised by the trustee in person, as a general rule⁶. The current statute, while the concrete standard to allow the substitutive performer itself has not changed from the former statute, has reconstructed the wording of the provision presupposing that the substitutive performer can be appointed in certain situations⁷. The general rule there is that the delegation condition can be

⁶Article 26 of the former statute [excerpt] ① The trustee may delegate the trust administration to another person only if there is some ground to make it unavoidable unless otherwise prescribed in the trust terms.

...
⁷(Delegation of Trust administration to a Third Party)

Article 28 In the following cases, a trustee may delegate the trust administration to a third party:

1. where it is provided by the terms of trust that the trust administration is to be or may be delegated to a third party;

determined freely in the terms of the trust including the supervising power of the trustee over the delegate⁸.

As for the responsibility of the delegate of the trustee to the beneficiary, on the other hand, the direct responsibility to the beneficiary was explicitly prescribed in the former statute⁹. In contrast, there is no provision concerning this problem in the current statute. However, the legal relationship between the trustee and its delegate could be considered as a commission relation in Civil Code except for the case in which the appointment of a delegate is forced by some legal provision. So, we can conclude the delegate should take the direct responsibility to the beneficiary within the delegated works by analogical application of the provision concerning the direct responsibility of the sub-agent in Article 107 paragraph ② of Civil Code. In fact, when the appointment of the delegate of the trustee is allowed in the terms of trust, it is one of the main duties for the trustee to select a suitable delegate who can perform the appropriate property administration for the attainment of the trust purpose. Since the duty of the assigned delegate is to perform the concrete trust affairs to attain the trust purpose, it would be effective and efficient from the viewpoint of the supervising over the trust administration that the delegate takes the direct responsibility to the

2. where the terms of trust does not contain any provisions concerning the delegation of the trust administration to a third party, but delegating the trust administration to a third party is considered to be appropriate in light of the purpose of the trust; and

3. where it is provided by the terms of trust that the trust administration shall not be delegated to a third party, but delegating the trust administration to a third party is considered to be unavoidable in light of the purpose of the trust.

⁸(Duty to Appoint and Supervise a Third Party when Delegating the Trust administration)

Article 35 ① When delegating the trust administration to a third party pursuant to the provisions of Article 28, the trustee shall delegate said administration to a suitable person in light of the purpose of the trust.

② A trustee, when the trustee has delegated the trust administration to a third party pursuant to the provisions of Article 28, shall conduct the necessary and appropriate supervision of the third party in order to achieve the purpose of the trust.

③ When a trustee has delegated the trust administration to any of the following third parties, the provisions of the preceding two paragraphs shall not apply; provided, however, that when the trustee becomes aware that the third party is unsuitable or unfaithful or that the administration of affairs by the third party is inappropriate, the trustee shall give notice to the beneficiary to that effect, cancel the delegation to the third party, or take other necessary measures:

1. a third party designated by the terms of trust; or

2. in cases where it is provided by the terms of trust that the trust administration shall be delegated to a third party designated by the settlor or the beneficiary, the third party designated pursuant to such provisions.

④ Notwithstanding the provisions of the proviso to the preceding paragraph, if the terms of trust otherwise provides for, such provisions shall prevail.

⁹Article 26 of the former statute [excerpt]

...

③ A person who performs the trust affairs on behalf of the trustee shall take the responsibility equal to the trustee.

beneficiary or the trust property within the performance of the concrete trust affairs while the trustee takes the responsibility for the appointment and supervision.

Now we have seen whole the general theory on the delegate of trustee. But a practically more important problem is whether the legal relationship of the trustee with a concrete substitutional actor to administer the trust property could be interpreted as the relationship with “a delegate of the trustee’s power”. For instance, imagine the case that certain part of the trust property is entrusted to a third party by the trustee so that the third party administers that part of the trust property as the trustee. There is no direct legal relationship between the beneficiary of the first trust and the trustee of the second trust, so that the only person to whom the trustee of the second trust is in duty is the beneficiary of the second trust, namely, the first trust property which the trustee of the first trust administers.

However, in such a case, the trust property of the first trust includes the beneficial right of the second trust relationship in exchange for the re-entrusted part of the trust property, so that the trustee of the first trust is administering the beneficial right of the second trust as a part of the trust property. Viewing from the fact, it looks simply logical for the beneficiary of the first trust not to have a direct legal relationship with the trustee of the second trust. Moreover, in a case like above, the effect of legal dispositions of the concrete trust properties in the second trust would affect on the first trust relationship only through the profits from the beneficial right of the second trust, so one may think that the beneficiary of the first trust shouldn’t have the direct controlling power over the property administration in the second trust and that it is enough for the beneficiary to be able to secure the profits from the beneficial right of the second trust that constitutes a part of the first trust property. So, this interpretation problem would become rather complicated.

On the other hand, in spite of the formal creation of the re-trust relationship, depending on the contents of the trust agreement concerning concrete property administration actions or the actual conditions of the administration of the trust property, there may be the cases in which the direct duty and responsibility of the administrator to the beneficiary of the first trust should be affirmed by interpreting the legal status of the administrator as a substitutive performer for the trustee in substance. In fact, if one adopts concerning the fundamental structure of trust the standpoint that the beneficiary is the substantial owner of the trust property, it would be reasonable to admit the direct legal relationship between the administrator who actually perform the property administration and the beneficiary who is the substantial owner of the property whether the outward legal status of the administrator is a substitutive performer or the trustee of the second trust. However, we should note that the logically effective range of such an interpretation is not restricted to the case of the execution of the administrative power of the beneficiary of the first trust relationship over the trustee of the second trust relationship. For example, it would have some effect also on the case in which those duty and responsibility to a third party which occurred

along the property administration in the second trust is claimed against the beneficiary of the first trust as the substantial owner. So, it is worth being noted that such a way of interpretation doesn't always lead to some advantageous conclusion to the beneficiary of the first trust.

(4) Succession of the Status of the Trustee

A trustee should have an enough property management ability to perform trust affairs, while the status is fundamentally based on the confidence from other trust parties. So, a trustee should resign the post when she/he loses the confidence from the persons concerned or the required ability of property management. However, a trust relationship itself doesn't terminate merely by the termination of the duties of the trustee or by the resignation of the trustee from the post unless the trust requires that certain person to be the trustee for the attainment of the trust purpose. It keeps the existence with the same purpose by assigning a new trustee.

Succession of the status of trustee means the change of the subjects to whom the trust property belongs under the *jus-in-personam* theory the former statute adopted. However, under any trust theory, the transfer of the administrating power on the trust property and the distribution of the duties and responsibilities between the old and new trustees are important matters both theoretically and practically. So, special provisions for succession of the position of the trustee were provided by the former status¹⁰, and there are rather detailed provisions provided by the current statute, too¹¹. However, as the current statute generally admits wide range of freedom of the

¹⁰Article 50 of the former statute [excerpt] ① When a change of the trustees occurred, the trust property shall be considered to be transferred to the new trustee at the time of when the former trustee's duties have been terminated.

Articla 52 of the former statute [excerpt] ① When a change of the trustees occurred, the new trustee shall take over the obligations to the beneficiary the former trustee has borne by the act of trust.

¹¹(Succession, etc. to Rights and Duties Concerning the Trust)

Article 75 ① Where a trustee's duty as trustee has been terminated on any of the grounds listed in the items of Article 56, paragraph ①, when a new trustee has assumed the duty, it shall be deemed that the new trustee has succeeded to, at the time of the termination of the former trustee's duty, the former trustee's rights and duties concerning the trust existing as of that time.

② Notwithstanding the provisions of the preceding paragraph, where a trustee's duty as trustee has been terminated on the grounds listed in the items of Article 56, paragraph ①, item 5 (limited to the case under the provision of Article 57, paragraph ①; excluding the case referred to in the proviso to Article 59, paragraph ④), it shall be deemed that the new trustee has succeeded to, at the time of assumption of the office by a new trustee, etc., the former trustee's rights and duties concerning the trust existing as of that time.

③ The provisions of the preceding two paragraphs shall not preclude the effect of any act carried out by the former trustee, a trust property administrator, or an incorporated trust property administrator within the scope of their powers before the new trustee assumes the office as the new trustee.

agreement by the trust parties in the trust act, the concrete rules for the succession

④ The provisions of Article 27 shall apply *mutatis mutandis* where the former trustee has carried out any act that does not fall within the scope of the powers of the former trustee before the new trustee, etc. assumes the office as a trustee.

⑤ Where the former trustee (including the trustee's heir; hereinafter the same shall apply in this Article) has incurred liability under the provision of Article 40, or where a director, executive officer, or any other person equivalent thereto (hereinafter referred to as a "director, etc." in this paragraph) of the former trustee who is a juridical person has incurred liability under the provision of Article 41, the new trustee, etc. or incorporated trust property administrator may make a claim against the former trustee or its director, etc. under the provisions of Article 40 or Article 41.

⑥ Where the former trustee may receive reimbursement of expenses, etc. or compensation for damages, or where the former trustee may receive trust fees from the trust property, the former trustee may make a demand of the new trustee, etc. or incorporated trust property administrator for reimbursement of expenses, etc., compensation for damages, or payment of trust fees; provided, however, that the new trustee, etc. or incorporated trust property administrator shall only be liable for using property that belongs to the trust property to perform this obligation.

⑦ The provisions of Article 48, paragraph ④ and Article 49, paragraph ⑥ and paragraph ⑦ shall apply *mutatis mutandis* to the right that the former trustee has under the provisions of the preceding paragraph.

⑧ Execution, execution of a provisional seizure or provisional disposition, procedures for the exercise of a security interest, or an auction which has already been commenced against property that belongs to the trust property before a new trustee assumes the office of trustee, may be continued against the new trustee.

⑨ The former trustee may retain property that belongs to the trust property until the former trustee receives satisfaction of the claim pertaining to the demand under the provisions of paragraph ⑥.

(Liabilities of the Former Trustee and the New Trustee for Obligations Succeeded To)

Article 76 ① Even where obligations pertaining to trust claims are succeeded to by the new trustee pursuant to the provisions of paragraph ① or paragraph ② of the preceding Article, the former trustee shall be liable to perform the obligations thus succeeded to using the former trustee's own property; provided, however, that this shall not apply if the former trustee is only liable for using property that belongs to the trust property to perform such obligations.

② Where the new trustee has succeeded to the obligations prescribed in the main clause of the preceding paragraph, the new trustee shall only be liable for using property that belongs to the trust property to perform those obligations.

(Transfer, etc. of Trust Affairs from the Former Trustee to the New Trustee, etc.)

Article 77 ① Where the new trustee, etc. assumes the office of trustee, the former trustee shall, without delay, settle the accounts on trust affairs and request approval for the settlement of accounts from a beneficiary (if there are two or more beneficiaries at the time in question, from all of them; if there is a trust caretaker at the time in question, from the trust caretaker), and shall transfer trust affairs as required in order for the new trustee, etc. to administer them.

② Where a beneficiary (if there is a trust caretaker at the time in question, the trust caretaker; the same shall apply in the following paragraph) has approved the settlement of accounts set forth in the preceding paragraph, the former trustee shall be deemed to have been released from the liability to the beneficiary to transfer trust affairs under the provisions of said paragraph; provided, however, that this shall not apply if the former trustee has committed misconduct in the course of the duties.

③ Where a beneficiary has not made any objection within one month from the time when the

of the status of the trustee would be determined by the agreement in practice. In this meaning, the dismissal of a trustee by a court for the reason of the loss of the confidential relationship between trust parties also would be done depending, in essence, on the manifestation of the will to dismiss the trustee by the settlor or the beneficiary¹².

It is concerning a way of distribution of the duties and responsibilities rather than of the powers that practical problems tend to happen in the succession of the status of trustee. If there happens some trouble on the distribution of the power of the trustee, it would be in the case where already resigned trustee concludes a trading contract or the like on the trust property with a third party, then the third party claims the obligation on the trust property applying the apparent agency institute, or in similar cases. But to such cases the arguments for the institute of the apparent agency without authority could be applied without modification, so the fact that it happens concerning a trust relationship would add nothing to the complication of the problem. In contrast to that, as for the duties and responsibilities of the trustee, the causes have occurred before the resignation of the former trustee but the effects

beneficiary was requested by the former trustee to give an approval for the settlement of accounts set forth in paragraph ①, the beneficiary shall be deemed to have approved the settlement of accounts set forth in said paragraph.

(Transfer, etc. of Trust Affairs from the Former Trustee's Heir, etc. or the Bankruptcy Trustee to the New Trustee, etc.)

Article 78 The provisions of the preceding Article shall apply to the former trustee's heir, etc. in cases where the trustee's duty as trustee has been terminated on the grounds set forth in Article 56, paragraph ①, item 1 or item 2, and to the bankruptcy trustee in cases where the trustee's duty as trustee has been terminated on the grounds set forth in Article 56, paragraph ①, item 3.

¹²(Dismissal of the Trustee)

Article 58 ① The settlor and the beneficiary may, based on an agreement between them, dismiss the trustee at any time.

② When the settlor and the beneficiary have dismissed a trustee at a time that is detrimental to the trustee, the settlor and the beneficiary shall compensate the trustee for any damages; provided, however, that this shall not apply if there was a compelling reason for such dismissal.

③ Notwithstanding the provisions of the preceding two paragraphs, if the terms of trust otherwise provides, such provisions shall prevail.

④ When the trustee has caused a substantial detriment to the trust property through a breach of the duties or where there are other material grounds, the court may, upon the petition of a settlor or a beneficiary, dismiss the trustee.

⑤ Before dismissing the trustee pursuant to the provisions of the preceding paragraph, the court shall hear a statement from the trustee.

⑥ The judicial decision on the petition for permission set forth in paragraph ④ shall include the reasons for said decision.

⑦ A settlor, trustee or beneficiary may file an immediate appeal against a judicial decision of dismissal under the provisions of paragraph ④.

⑧ The provisions of paragraph ① and paragraph ② shall not apply where there is no settlor at the time in question.

appeared after the succession in most cases. It sometimes happens that the acts of both the former trustee and the new trustee convolutedly contribute to the effects. So, the distribution of the responsibilities between the former and new trustees are to be disputed.

The most clear-cut interpretation of this problem would be like following. The responsibility of trustee is that of each trustee in person, rather than of the status. So, if the liability is the effect of the behavior of the former trustee, the former trustee should take it even after the resignation from the post of the trustee, and the new trustee takes no responsibility for that. This thought theoretically supposes that the trustee in person is the object of the confidence in the trust relations and that the legal liability of the trustee comes from the personal judgement of the trustee. However, under this way of thinking, the beneficiary should estimate at the time of the succession of the status of trustee the probability of the occurrence of any damage caused by the acts already done by the former trustee before the succession. Besides, the beneficiary must always take the risk for the claim against the former trustee to become difficult to be collected or even practically worthless by the death or bankruptcy of the former trustee. Moreover, some of beneficiaries may have not the beneficiary yet at the time of succession in some cases. Therefore, careful considerations would be necessary on whether we can suppose the beneficiary could watch and control over the process of the succession of the status of trustee, except for such a case as the former trustee is dismissed by the application of the beneficiary. However, according to the thought, when the acts of the former and new trustees concurrently generated some harmful results, the former and new trustee should jointly take the responsibility. When there is some interval between the causing action and the occurrence of the harmful effect, the new trustee would also have some part in the trust works that led to the damage, so, in most cases, the beneficiary could call for the compensation of the damage against the new trustee as one of the joint obligors. Then one could expect that the probability for the beneficiary to lose the chance to get the compensation of the damage will be actually not so high.

On the other hand, if one considers the responsibility of trustee, not as that of the concrete trustee in person, but as that associated with the legal status of trustee, the trustee should claim the compensation of the damage against the trustee at the time of the occurrence of the effect. This conclusion is still a clear-cut one, although in opposite direction to the thought described above. However, this way of thinking would lead to an unexpected result from the stand point of the new trustee, for the new trustee might be claimed the compensation of the damage whose cause was wholly the action of the former trustee before the succession of the status. So, the to-be trustee must scrutinize very carefully the conditions of the trust in succession of the status of trustee. In addition, from this opinion's point of view, the legitimacy of the legal status of trustee would be grounded not only on the confidence from the other trust parties but also on the enough funds or some abstract financial reliability of the

trustee, so there may happen some contradictions to the theoretical construction of the fundamental structure of trust.

3.2 Beneficiary

(1) The qualifications for Beneficiary

A beneficiary is a person who is to get the benefit from the administration of the trust property. But a beneficiary has no authority to administer the trust property unless she/he is also the trustee at the same time. Therefore, a beneficiary, as a general rule, doesn't bear the duty or responsibility of the failure in administration of the trust property or the damage from the failure of the trust property. As for the benefits a beneficiary could get, there is no need for the beneficiary to have the ownership or the other property right on the benefits and it is enough for the profits to be legitimately held or consumed by the beneficiary, so a beneficiary doesn't need to have even the capacity to hold rights in some cases. Viewing from those facts, as for the qualifications for beneficiary, the ability to administer property or the capacity for liability is not required, in contrast to the case of trustee, so that the capacity or situation to make the benefits from a property administration available for the beneficiary is enough.

In addition, it is a part of the judgements for the trust property administration when a beneficiary could get what benefit from the trust property. Therefore, as far as the trustee are performing appropriately the duties, there is no problem even if the profits from the administration was not paid at once to the beneficiary. It would be enough that the actual payment is done in the course of the trust administration later when it has become possible according to the calculation. The argument above would be unaffected even if some concrete prescriptions are provided in the terms of trust or the other agreements.

So, it is not necessary that the person/s to be the beneficiary/beneficiaries is/are defined and actually ready to get the benefits from the trust at the establishment time. In fact, under both the former and current statutes, the provision only prescribes that the person determined to be the beneficiary in the terms of trust can by operation of law acquire the benefits from the trust and there is no provision concerning the qualifications for beneficiary¹³. Moreover, both statutes doesn't contain

¹³Article 7 of the former statute A person designated by the provisions of terms of trust as one who is to be a beneficiary shall acquire a beneficial interest by operation of law, provided, however, that if the terms of trust otherwise provides, such provisions shall prevail.

(Acquisition of Beneficial Interest)

Article 88 ① A person designated by the provisions of terms of trust as one who is to be a beneficiary (including a person designated as an initial beneficiary or as a new beneficiary after a change as a

any provision to require the actual definite existence of the beneficiary at the time of the establishment of the trust. Therefore, we could conclude, as the interpretation of the current statute, that the definite existence of the beneficiary is not necessary at the time of the establishment of trust and that a person, a corporation or even an association without legal personality could be a beneficiary as far as it is suitable to the trust purpose.

Since the legal theoretical precondition of the inference described above is only the fact that a beneficiary doesn't need the power to administer the property, the conclusion would be same under any theoretical construction concerning the fundamental structure of trust. However, from the viewpoint of the doctrine that the beneficiary is the substantial owner of the trust property, the lack of the existence or definiteness of the beneficiary who should be the actual center of the trust relationship may cause some instability of the establishment of the trust at first glance. But since the trustee who is both the administrator and the nominee of the trust property exists, as far as a system to make the profit readily available after the beneficiary is specified is prepared, the non-existence or indefiniteness of the beneficiary itself doesn't affect the validity of the trust relationship.

However, that the beneficiary is not specified in spite of the establishment of the trust brings about the situation that the profits which belong to none continue to exist until the beneficiary is specified. So, in such a case that a conflict of interests among the parties concerned occurred on the specification of the beneficiary, or under the legal system where the taxation is solely based on the actual income of the beneficiary so that there is no incentive to hasten the specifying of the beneficiary, the beneficiary may be kept unspecified for considerably long time.

However, as for the conflict of interests among the parties concerned, a speedy specification of the beneficiary would not resolve the problem. Rather important concern is to protect the profits from some unjustified consumption by the other persons. From this point of view, it might be rather desirable to have the trustee administer the profits in the established trust relationship. As for the taxation system problem, since the determination of the concrete form of the enjoyment of the benefits by the beneficiary is entrusted to the terms of trust or the other agreement based on the free wills of the trust parties, it would be difficult to repress completely some strategic operation by the parties concerned with the terms of trust in order to lighten the tax in some degree. An only possible way may be legislate a taxation institution

result of the exercise of the right to designate or change beneficiaries as prescribed in paragraph ① of the following Article) shall acquire a beneficial interest by operation of law; provided, however, that if the terms of trust otherwise provides, such provisions shall prevail.

② If a person designated as one who is to be a beneficiary as prescribed in the preceding paragraph does not know that the person has acquired a beneficial interest pursuant to the provisions of said paragraph, the trustee shall notify such person to that effect without delay; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

to impose a tax on the trustee or the trust property itself in the trust relationship whose the beneficiary is non-existent or indefinite¹⁴.

Therefore, even though the concrete determination of the beneficiary takes some time and costs, the establishment of the trust doesn't need to be delayed until the specification of the beneficiary, and even if the some long time has passed in the state of the absence or indefiniteness of the beneficiary, the trust cannot be taken as invalid only by the fact, at least in theory. Rather, in such a trust relationship in which the state of the absence or indefiniteness of the beneficiary continues for a long time, the probability of the attainment of the purpose of the trust would be considered as quite low, which may well be picked up in the legal interpretation as the cause of the termination of the trust.

By the way, the arguments described above are, as mentioned at the beginning of this section, theoretically based on the supposition that a beneficiary has not administration power on the trust property. However, as for the possible responsibility of beneficiary to a third party, one could ground it on the very fact that the beneficiary is to get benefits from the trust property, whether the beneficiary has the administration power on the trust property. As for the detail of this argument, we will discuss it in Chapter 5 Section 3.

(2) Co-Beneficiaries · Sequentially Ordered Beneficiaries

When there are plural beneficiaries in one same trust relationship, those beneficiaries are called “co-beneficiaries”. If it is determined in terms of trust that the termination of the enjoying the benefit for one of the co-beneficiaries causes the beginning of the enjoyment of the benefits for another of the co-beneficiaries, these beneficiaries are called “sequentially ordered beneficiaries”. From the viewpoint of those definitions, “co-beneficiaries” would be the upper concept of “sequentially ordered beneficiaries”. But in practical business, “co-beneficiaries” case means exclusively the situation in which plural beneficiaries in one trust relationship are enjoying at the same time the benefit from the trust property and is mostly laterally distinguished from the sequentially ordered beneficiaries case. Following explanations will follow the practical convention.

¹⁴(Special provisions for the trust etc. without the beneficiary etc.)[excerpt]
Article 9-4 of Inheritance Tax Act ① When the trust lacking the beneficiary etc. takes effect, if a person to be the beneficiary etc. of that trust falls under those determined as the relatives of the trustee of that trust by a governmental order (called “relatives” thereafter in this and the next articles) (in the case in which a person to be the beneficiary in the trust is not clear, if the relatives of the trustee are to get the transfer of the trust property when the trust terminates), the trustee of that trust is considered to get the right concerning the trust from the settlor by gifts (if the trust is to be effectuated by the death of the settlor, by testamentary gifts) at the time of the effectuation of the trust.

It is when there are some conflict of interests among the plural beneficiaries that legal trouble occurs on the trust relationship, whether it is the case of co-beneficiaries or of sequentially ordered beneficiaries. The current Trust Act prescribes that, in the case of a trust with plural beneficiaries, the trustee should perform the duties “equitably” for those beneficiaries.¹⁵ But since there is no prescription on the definition of the “equitably”, it is impossible to draw some concrete standard for resolutions of the conflict only from this provision.

Generally speaking, the profits a trust property can yield are limited, so, since there are plural beneficiaries in a trust relationship, conflicts of interest among those beneficiaries necessarily occurs. Especially in a co-beneficiaries case in which plural beneficiaries get the benefits at the same time from the trust property, some direct collision of interests among the beneficiaries tend to happen concerning the concrete sharing of the profits. In a sequentially ordered beneficiaries case, the timings of the enjoyments of the benefits are shifted, so that the conflict of interests would not easily come to the surface. But considering in some long period, one could usually realize that there is some clear conflict of interests among the beneficiaries also in a sequentially ordered beneficiaries case.

Anyway, since the concrete form of the enjoyment of the benefits from the trust property by the beneficiaries is based on the agreement between the trust parties, the policy of the resolution of the conflict of interests among the beneficiaries should be also on the interpretation of the agreement between the trust parties with putting the trust purpose on the theoretical center. Therefore, in both cases of co-beneficiaries and of sequentially ordered beneficiaries, the points to be in mind for the conflict of interests among beneficiaries are: Firstly, if there is some explicit provision in the terms of trust or any other clear agreement between the trust parties concerning that problem, it should be obeyed first. Secondly, if there is no explicit provision in the terms of trust or the like, one should interpret the terms of trust suitably to the trust purpose. Thirdly, if any clear conclusion could not be drawn by the first and second interpretational policies above, each beneficiary should share the benefits or interests in equal ratio.

The argument concerning a co-beneficiaries or sequentially ordered beneficiaries case described above supposes “one same trust relationship” in which the plural beneficiaries enjoy the benefits at the same time or sequentially. But the practical problem in actual cases is whether the beneficiaries in mutually legally different trusts can be treated essentially same as those among whom there is legally a “co-beneficiaries” relationship, when those trusts are actually performed in unification. A similar problem would happen also for the “sequentially ordered beneficiaries” relationship when the

¹⁵(Duty of Equity)

Article 33 In the case of a trust with two or more beneficiaries, the trustee shall perform duties of the trustee equitably on behalf of these beneficiaries.

timings of the enjoyments of the benefits are shifted sequentially among the plural beneficiaries in plural trusts administered in unification.

There is no established doctrine for the interpretation of the legal relations among plural trust properties administered in combination. There are various possible ways of interpretation. For example, one could interpret it simply as mutually independent plural trust relationships. Or, one could consider the trust properties in combined administration as substantially one unified trust property and try to deduce some unified conclusion wholly on the combined trust property. Or, one could think that there is established a stratified trust relationship among the properties in the plural trusts or between the combined trust and each individual trust, so that, while keeping formal distinction between the each trust property and the combined property, the legal effects from all the individual trust properties should be substantially related with each other through the beneficial rights. However, after all, since the grounds that necessitate the combine administration of trust properties or the purposes of the individual trusts would have very rich variety, an interpretation cannot help sticking to the agreement in each trust relationship.

Similarly, the cause of the practical necessity to create substantial but informal co-beneficiary or sequentially ordered beneficiary through an actually unified administration of the properties of mutually different individual trusts would be various as well as the purposes of individual trusts. Therefore, any way of thinking has a reason in some degree whether the importance is put on the formal legal individuality of each trust or on the actual united administration of all the trust properties. So, there is practically no need to decide definitely whether that trust should be taken as a co-beneficiaries case or a sequentially ordered beneficiaries case or neither. However, viewing from this stand point, if the purposes or terms of the individual trusts are not congruent with each other, the interpretation of the trust relationships as a whole may become so complicated that it would be difficult for the parties concerned to anticipate the resolution of some conflict of interests. But, since the purpose or terms of trust is concluded being based on the intentions and acceptance of the trust parties, it cannot be helped that the trust parties must shoulder certain actual disadvantages from the complication of the interpretation at the time of the dispute.

(3) Candidate for Beneficiary

As we referred to in describing the qualifications for a beneficiary, it is not required for all of the beneficiaries to be specified and exist at the time of settling of the trust. Under the situation that the trust relationship has been continued for some time, there may appear someone who is not the beneficiary yet but may possibly satisfy the conditions for being the beneficiary in some future. Whether such a not yet but to be beneficiary, namely, a candidate for the beneficiary should be treated as a kind of beneficiary is a rather complicated problem. By the way, the candidate for beneficiary

here means the one who has the possibility never to satisfy the condition to be the beneficiary. So, the candidate for beneficiary has theoretically quite different property from the “beneficiary in future” who is not a beneficiary at present but planned to be a beneficiary in future, or the “sequent beneficiary” or the “following beneficiary” who is planned to become a beneficiary after the termination of benefitting of the former beneficiary. For the beneficiary in future or sequent or following beneficiary already satisfies the condition to be the beneficiary in the trust relationship but merely the beginning of the enjoyment of the benefits is postponed to the future time.

As a general legal principle not restricted to the trust institute, it is after the establishment of the legal relationship and the legal positions between the parties that the right and duty relationship between them are validly effectuated. Therefore, even when a candidate for beneficiary considerably is expected to be the beneficiary in near future with considerably high probability, as far as the legal status is uncertain, the creation of the right and duty as a beneficiary for the person is only after the assumption of the status of the beneficiary by the person. Therefore, a mere expected interest, whether legally, as “a candidate for beneficiary” cannot be the ground for the execution by the candidate for beneficiary of the supervising power as the beneficiary over the concrete actions for the trust administration, but only for not being unfairly or illegally treated concerning the judgement of the qualifications of the person for the beneficiary.

The problem here is whether a candidate for beneficiary has some legitimate interest to ask for the continuing of the trust relationship until the candidate is ready to be judged to satisfy the condition to be the beneficiary. In fact, there may be certain conflict of interests between a candidate for beneficiary and the present beneficiary who has already enjoyed the benefits, in some respects. One can imagine a situation that the present beneficiary agrees that the trust should terminate, so that the expected interests of the candidate for beneficiary to enjoy the benefits in a future are spoiled. For example, in the case of a trust relationship whose purpose is to supply the pensions to the retired employees of an organization, if the installments paid by the employees who are candidates for the beneficiary serve partly the costs to administer the funds as the trust property, the situation that the trust is terminated according to the agreements only by the present beneficiaries, namely, the retired employees and the liquidation of the trust property is processed would lead to the result that the payments of the pensions for the retired employees are secured at the cost of the present employees. This appears unfair.

The reason why it appears unfair would be because it is natural for the candidates for beneficiary to suppose their payments of the installments would be the funds for their future rights to enjoy the benefits as the beneficiary of the trust, even if there is almost no economically substantial link between those payments and benefits. This supposition is consistent also from the viewpoint of a principle that an individual person will act for the self-interests in its private legal behavior and it would be

congruent with the substantial intent of a candidate for beneficiary in entering into the trust relationship with the purpose of supplying pensions, for she/he are willing to pay the installment because it would be profitable to her/himself.

However, since the payments of installments by candidates for beneficiary should be done in advance to become the true beneficiary by the very structure of the contract, the risk of insolvency of the funds is inevitable in theory. So, unless the employees are actually forced to enter the pension trust or there is almost no explanation of the rights and duties of the pension contracts to the employees, it is, at least within the present legal frame, difficult to allow the candidates for beneficiary some substantially equivalent rights and powers to the true beneficiary only by the fact that the termination of the trust relationship at certain time causes a damage to the substantial interests of the candidates for beneficiary who were expecting to take the post of the beneficiary.

Therefore, if the expectation of a candidate for beneficiary to get the benefits from the trust property after taking the post of the beneficiary in a future should be protected, there should be some institutional machinery that would protect such expectations so as to secure the confidence on such a trust relationship from the parties concerned. Concretely, a plan to select a trust manager as the representative of the interests of the candidates for beneficiary and to make clear the entrustment relation with the candidates for beneficiary would be appropriate viewing from the general theory of trusts or the efficiency of the practical works for the administration of the trust property.

(4) Holder of a Vested Right

“Holder of a vested right” means a person to whom the rest of the trust property belongs after the liquidation process by the termination of the trust is completed. The holder of a vested right is a status to get the benefits from the trust property, though after the termination of the trust, so, in this meaning, we could say it is actually the “last” beneficiary of the trust. If one thinks like above, the holder of a vested right has the interest as actual “beneficiary” on the plan to determine when the trust terminates and how the liquidation of the trust property is processed. Instead, if one thinks that the right and power of the “beneficiary” of a trust continue to exist only as far as the trust relationship exists and that the holder of a vested right is a repository of the rest of the trust property selected from the parties concerned in order to avoid the no-owner situation of the rest of the trust property after the liquidation, then the right of a vested right holder to get a part of the trust property in future is only an interest in expectation, so that even when some action which is disadvantageous to the person to be the vested right holder is done in the course of the liquidation of the trust property, the to be vested right holder has no means to lodge an objection against the action. The current Trust Act prescribes that a holder of a vested right

is deemed to be a beneficiary during the liquidation of the trust¹⁶, so two ways of thought described above are mixed in the statute.

Who will become the holder of a vested right is determined according to the provision of the terms of trust, if any. Otherwise, the settlor or the successor(s) will become the holder of a vested right. When the holder cannot be specified in spite of all above, the trustee who executed the liquidation of the trust property will be the holder of a vested right¹⁷. According to the common opinion under the former statute, the reason why the settlor or the successor becomes the holder of a vested right when there is no special provision in the terms of trust is because the trust was originally settled by the intension of the settlor so that it would be a natural intension to revert to the situation as similar as possible to that before the settlement of trust, namely, to make the rest of the trust property belong to the settlor or the successor unless a special intension to make the rest of the trust property belong to another person is expressed in the terms of trust. However, that theory is supposing that a trust relationship is settled by the intentions of the settlor and the effect of the will should reach even to the termination time of the trust. It may be consistent when one puts an importance on the intension of the settlor and the acceptance of the trustee at the time of the settlement of the trust in interpreting the trust relationship. But when one thinks what is important in a trust relationship is a confidential relationship between the trustee and the beneficiary, the settlor would not take part in the trust relationship except for the settlement, so that the former common opinion loses its ground. On the other hand, the current statute prescribes that if the terms of trust contains no special provision concerning the designation of a beneficiary for residual assets, it is deemed to be provided in the terms of trust that the settlor or the

¹⁶(Holder of a Vested Right)[excerpt]
Article 183 ...

⑥ A holder of a vested right shall be deemed to be a beneficiary during the liquidation of the trust.

¹⁷(Vesting of Residual Assets)

Article 182 ① Residual assets shall vest in the following persons:

1. the person designated by the terms of trust as the person who is to be the beneficiary in relation to distribution claim as a beneficiary involving the distribution of residual assets (referred to as the “beneficiary for residual assets” in the following paragraph); and

2. the person designated by the terms of trust as a person in whom residual assets should be vested (hereinafter referred to as the “holder of a vested right” in this Section).

② Where the terms of trust contains no provisions concerning the designation of a beneficiary for residual assets or holder of a vested right (hereinafter collectively referred to as a “beneficiary etc. for residual assets.” in this paragraph) or where all persons designated by the provisions of the terms of trust as beneficiaries for residual assets, etc. have waived their rights, it shall be deemed as having been provided by the terms of trust that the settlor or settlor’s heir or other universal successor is to be designated as the holder of a vested right.

③ When the vesting of residual assets is not determined pursuant to the provisions of the preceding two paragraphs, residual assets shall vest in a liquidation trustee.

successor is to be designated as the holder of a vested right¹⁸. In effect, the current statute is trying to ground the result that the settlor or the successor becomes the holder of a vested right on the fictional designation in the terms of trust. However, the supposition that the settlor has such an intent is inconsistent with the way of treatment of settlor in the other provisions of the current Trust Act, so that it is difficult to give a clear cut explanation for this problem.

(5) Beneficiary after the Extinction of the Beneficial Right

A typical problem concerning the relation between plural beneficiaries in one trust relationship is how to treat in the trust relationship the beneficiary for whom the benefits or especially economic profits intended in the terms of trust is extinct. On the other hand, the theoretical explanations for it are rather clear. In the end, the orientation of the interpretation is determined by how to think of the nature of the beneficiary right the beneficiary has in the trust relationship.

If one thinks that the nature of the beneficial right is the enjoyment of the concrete economic benefits from the trust property or especially to get the share of the profits from the property management with the trust property as the funds, then, since the beneficiary has gotten all the profits she/he could get after the extinction of the “enjoyment of benefit”, the most natural thought would be that the beneficiary loses the meaning to stay the post after the extinction of the enjoyment of the benefit so that she/he would break away from the trust relationship. So the ex-beneficiary now has no legal relation to the trust relationship, she/he would not have any interest on the loss or damage to the trust property after the breaking away, so that no adjustment including her/him would be necessary unless the benefits she/he got in the past was illegal. On the other hand, that ex-beneficiary has lost also the rights and powers on the trust property after the breaking away, so there is no room for the ex-beneficiary to complain any unfair treatment with the other beneficiaries after the breaking away. A typical case for such a situation is that after a beneficiary left from the trust relationship by the extinction of the beneficial right, a part of the terms of trust or the administration policy of the trust property is changed by an agreement between the trustee and the rest of the beneficiaries.

Instead, if one thinks that the nature of beneficial right is the substantial own-

¹⁸(Vesting of Residual Assets)[excerpt]
Article 182 ...

② Where the terms of trust contains no provisions concerning the designation of a beneficiary for residual assets or holder of a vested right (hereinafter collectively referred to as a “beneficiary etc. for residual assets.” in this paragraph) or where all persons designated by the provisions of the terms of trust as beneficiaries for residual assets, etc. have waived their rights, it shall be deemed as having been provided by the terms of trust that the settlor or settlor’s heir or other universal successor is to be designated as the holder of a vested right.

ership of the trust property or that the supervising power of beneficiary should be executable over the individual actions by the trustee for the administration of the trust property, then, even after the right for a beneficiary to enjoy the benefits from the trust property extinguished, the nature of the beneficial right is unaffected, so there is no reason to deprive the beneficiary of the status of a beneficiary unless there is some agreement to do that and beneficiary shouldn't be thought to break away from the trust relationship. In this case, since the beneficiary after the extinction of the benefit is still a beneficiary of the trust equitable treatments of the beneficiaries including one who still enjoy the benefits would be naturally required in all cases. So, the beneficiary whose right to enjoy the benefits was extinguished may exercise its supervising power over the administration actions of the trust property. On the other hand, as far as the beneficiary after extinction of the benefits is still one of the beneficiaries, that beneficiary may have to bear the responsibility as a trust parties when the liability as the trust party is claimed, for instance, when the past enjoyment of the benefit by the beneficiary illegally harmed a third party or when the beneficiary got unfairly much benefits in the past at the expense of the other beneficiaries. In such cases, the return of the benefits that beneficiary got in the past and/or the compensation of the damage would be claimed against that beneficiary.

As we just have seen, the interpretation on the status of the beneficiary after extinction of the enjoyment of the benefits changes depending on the way of thinking on the nature of beneficial right. In addition, as for the conclusions on concrete problems, any one of them is not always advantageous to that beneficiary. In the end, we should consider the purpose of that trust and the interpretation of the nature of the beneficial right in the terms of that trust in detail. But, even if we put an importance on the interpretation of the concrete trust terms, there is still left a problem. For in the trust relationship in which the equitable treatments of the ex-beneficiary and the current beneficiary is concerned, there are two different types of beneficiaries, so that a congruent "nature" of the beneficial right may not be deducible for all the beneficiaries. Then, we would confront with a very difficult problem, namely, on what standard we should judge the "equitableness" in dispute among the beneficiaries who have the beneficial rights of mutually different natures. From the stand point described above, there is no way but to deduce the conclusion from the interpretation of the purpose of the trust even in such cases. But such a stand point may make it difficult to anticipate what interpretational policy will be taken in a future dispute. So, practically, it would be needed to provide explicit provisions in the terms of trust to settle the policy of the interpretation in case of conflict.

(6) Assignee of Beneficial Right

Since a beneficial right is a kind of property right whose content is to enjoy the various benefits from the administration of the trust property, it can be assigned to another

person like the other property rights unless the assignment is prohibited by law or the other orders. A possible problem in the assignment of the beneficial right is what is the content of the right or power the assignee has gotten.

In principle, the content of the right or power the assignee of the beneficial right would get is same as that of the beneficial right the assignor had unless the terms of trust provide some provisions which prescribes some changes of the content of the right by assignment. It is naturally consistent with a major principle that none can assign the right or power one doesn't hold to the assignee.

Then, a practical problem is whether the assignee should be bound with the terms of trust when there are various restrictions on assigned beneficial right in the terms of trust. For instance, imagine the case that in order to create a trust relationship with a third party as the beneficiary, a self-benefit trust with the trustee as the beneficiary is settled at first but with various restrictions on the beneficial right, then the beneficial right is assigned to the third party. A practical interpretation problem in such a case is whether the latter trust relationship is valid as if it were a trust relationship with the third party as the beneficiary from the beginning.

The background thought of this problem is that allowable extents of the restriction on the content of the beneficial right would be different between a self-benefit trust and a non-self-benefit trust. The reason of the thought is like follows. On the one hand, in the case of a self-benefit trust, the beneficiary is the settlor in person, so, however the beneficial right is set or what restrictions are imposed on the beneficial right in the terms of trust, the inconvenience or damage from those are to be borne by the settlor her/himself. Therefore, any restrictions could be taken as valid in a self-benefit trust. On the other hand, in the case of the non-self-benefit trust, it is a third party who enjoy the benefits from the trust property, and placing restrictions on the contents of the beneficial right in the terms of trust may create a kind of "sanctuary" within the trust property in the meaning that any execution of the right or the power by anyone cannot interfere in that area. So, in a non-self-benefit trust, the allowable extent of the restrictions on the contents of the beneficial right would require the more careful considerations (see Chapter 2 Section 1).

The thought like above is supposing that the contents of the beneficial right in a non-self-benefit trust should be, in principle, same as those of the ownership or any other legally defined property right without any trust relationship. However, it is not rare to place various restrictions on the beneficial right in the terms of trust in order to realize the legal effect which would not be attainable through any other property right or legal construction than a beneficial right of the trust, although, surely, the beneficial rights of many trusts have essentially same contents as some ordinary property right. A typical example is to restrict or to prohibit the assignment of the beneficial right in order to prevent the trust property from being scattered, which is valid in trust law unless the purpose could be seen as violating public order or standards of decency. Therefore, it is rather natural in the trust relationship in which it is put

on the center for all the parties concerned to be bound with the result of the trust property administration according to the purpose of the trust, that the contents of a beneficial right is restrictive compared with the ownership or the other property right in relation to the trust property. The fact that the content of the beneficial right can be freely determined in the terms of trust including its restrictions is also one of the fundamental characteristics of trust. In addition, if that thought described above is intending to imply that creating so called legal “sanctuary” in a non-self-benefit trust leads to some social injustice, a self-benefit trust also should have the same problem. So there should be no reason to differentiate a non-self-benefit trust from a self-benefit one concerning the restrictions on the content of the beneficial right. Therefore, we conclude that there is no reason to give different interpretational conclusions on the case in which a self-benefit trust is settled first and then the beneficial right is assigned to a third party, on the one hand, and on the case in which a non-self-benefit trust is settled from the beginning, on the other hand.

Generally, when a beneficial right is assigned, the assignee should be assigned the beneficial right with knowing all the restrictions on that right prescribed in the terms of trust. Then, even if there are some restrictions etc. which are inconvenient for the assignee, such inconveniences should be reflected in the price the assignee is to pay for the beneficial right to the assignor. This argument is surely supposing the case in which the assignment of the beneficial right is based on the contractual agreement between the assignor and the assignee. But even when a beneficial right is transferred through an execution procedure or the like, since the content of the right or power the beneficiary had is not beyond that which is restricted by the terms of trust, there is no reason for the purchaser who has got the beneficial right to be able to have more right or power than as it is, unless those restrictions on the beneficial right in the terms of trust constitute any obstruction of the execution procedure. Moreover, also in a case in which a beneficial right is transferred by inheritance, since a presumed heir cannot exercise any concrete right or power over the content of the property right to be inherited by the presumed heir, when the decedent settled a trust and put some restrictions on the beneficial right in the terms of trust, the presumed heir cannot stop it. So the content of the beneficial right the heir inherits should be congruent with that restricted by the terms of trust.

So, our conclusion is like follows. Any restrictions on the content of the beneficial right in the terms of trust should be valid whether the trust is self-benefit or non-self-benefit unless such terms of the trust themselves are deemed to be invalid because of the violation of public order or standards of decency. And as far as a beneficial right becomes an object of transference, such restrictions on the content of the beneficial right should be unchanged before and after the transference unless that content is susceptible to the character or property of the individual beneficiary.

3.3 Settlor

(1) Qualifications for Settlor

A settlor is a person who settles a trust to create a trust relationship and transfers its own property to the trustee, or who makes its own property to be the trust property in a self trust. From this point of view, the qualifications for a settlor will be, at minimum, to own the property to be the trust property and to have the ability to set the purpose of a trust and the power to transfer its own property to the trustee or to change that to be the trust property. In addition, if one puts an importance on the fact that the settlor sets the trust purpose, so that one thinks the settlor should have the power to supervise or to decide the fundamental administration policy in the trust relationship, then the settlor should possess the ability to exercise appropriately the supervising power over the administration actions by the trustee. Moreover, If one takes into consideration also the possibility that the settlor or the successors may become the holder of a vested right when there is no provisions concerning it in the terms of trust, then the qualifications for a settlor would include those for a beneficiary.

Under the former statute, a settlor was the person to settle the trust and, at the same time, had the supervising power equal to that of the beneficiary and the status of the holder of a vested right after the termination of the trust¹⁹. By contrast, the current statute takes the status of the settlor to be a mere settlor of the trust

¹⁹Article 16 of the former statute [excerpt] ...

② A settlor or the successor, beneficiary or trustee may assert an objection to the execution, provisional seizure, provisional disposition or exercise of a security interest, or auction that is being commenced in violation of the provision of the last paragraph.

Article 23 of the former statute [excerpt] ① When, due to the special circumstances that were unforeseeable at the time of an act of trust, the method of trust administration no longer conforms to the interests of the beneficiary, the settlor or the successor, the beneficiary or the trustee can file a petition of a modification of the trust to the court.

Article 27 of the former statute When any loss to the trust property occurred by an inappropriate administration action by the trustee or when the trustee disposed of the trust property in violation of the terms of trust, the settlor or the successor, the beneficiary or the other trustee may claim the compensation of the loss or the retraction of the trust property against that trustee.

Article 40 of the former statute [excerpt] ...

② The settlor or the successor or the beneficiary may make the requests to inspect the documents concerning the trust administration and ask the questions on the actions for the trust administration to a trustee.

Article 62 of the former statute [excerpt] At the termination of the trust, where there is no holder of a vested right defined in the terms of trust, the trust property shall belong to the settlor or the successor.

relationship and emphasizes by an explicit provision that the right or power of the settlor could be restricted or deprived of by the terms of trust²⁰, so that the current statute very strongly restrains the status of the settlor as a supervisor or a holder of a vested right. If one supposes, like the current statute, that the settlor should participate in the trust relationship only at the settling phase, it would be enough that the qualifications for a settlor is satisfied at the time of the settlement, so that, even if the settlor has lost the qualification after the settlement, it would have no effect to the trust relationship.

In relation to the legal positioning of the status of the settlor in a trust relationship, we should discuss how the intensions of the trust parties are related with the attainment of the purpose of the trust. Surely, if the settlor exercises a strong supervising power over the administration of the trust property, the significance of the settlement of the trust may be almost lost in some case, for then there would be substantially no difference from the situation that the trust property owned by the settlor. However, the will of the beneficiary who is enjoying the benefits from the trust property isn't always congruent with the attainment of the purpose of the trust. In this meaning, it is not necessarily unreasonable measures for the attainment of the purpose of the trust to give a supervising power over the actions of the trustee to the settlor who has no personal interest in the condition of the administration of the trust. Viewing from the wording of the current provision, it merely prescribes that the terms of trust may provide for a settlor not to have all or part of the rights or powers, so the existence of right or power of the settlor itself is not wholly negated. First of all, the settlor would participate as the party in the setting of the terms of trust which contains provisions to restrict or deprive of the rights or powers of the settlor. Taking those factors into consideration, as the meaning of the current provision, what should be emphasized is the fact that the trust parties have been given a choice of the distribution of the rights and powers to attain the purpose of the trust. So, we should not interpret the current provision as adopting one theoretical doctrine for the status or qualifications of the settlor.

(2) Succession of the Status of the Settlor

In the cases of the succession of the status of the settlor, a succession of the status as the person who settled the trust relationship sometimes provides a practical problem when the settlement process contains some failures or when the liability of the settlor is claimed in relation to the settlement act of the trust. On the other hand, after a trust relationship has been validly established, a succession of the status of the settlor, in principle, doesn't cause any legal problem. Presumed heirs of the settlor

²⁰(Settlors' Rights, etc.) [excerpt]

Article 145 ① Terms of trust may provide for a settlor not to have all or part of the rights under the provisions of this Act.

also have fundamentally no legal relation to the trust relationship except that they may become the holders of a vested right at the time of the termination of the trust.

However, if one thinks that the settlor should have the supervising power over the administration of the trust property or if the supervising power of the settlor is actually admitted in the terms of trust, the problem of the succession of the status of the settlor may come to the surface both theoretically and practically. As referred to above concerning the status and qualifications of the settlor, the possible ground of the legitimacy for the supervising power of the settlor over the administration of trust would be that the intension of the settlor should be respected in determining the policy of the administration of the trust property. If so, since a heir of the settlor doesn't inherit the intension itself of the settlor, it becomes theoretically questionable for such an heir to succeed to the supervising power of the settlor over the administration of the trust property and to exercise it quite equal to the late settlor. In fact, an heir of the settlor has the status of a person to whom the trust property might have belonged if there had not been the settling of the trust by the settlor. In addition, where the holder of the rest of the trust property after the liquidation is not specified in the terms of trust, an heir of the settlor may get the rest of the trust property as the holder of a vested right. Taking those facts into consideration, an heir of the settlor may think it more advantageous for her/himself to terminate the trust relationship so as to execute the right as the holder of a vested right than to let the trust property be administered according to the purpose of the trust. Then, it will be surely questionable whether a person having such a partial interest is appropriate for the supervisor over the administration of the trust property.

As a conclusion, as far as the attainment of the trust purpose is thought to be important, we should be careful in allowing the heirs of the settlor to succeed the supervising power which the settlor had over the administration actions on the trust purpose.

3.4 The Other Parties

(1) Trust Caretakers

A "trust caretaker" is a person who has the supervising power over the administration of the trust property to protect the interests of the present or future beneficiaries where there exists no beneficiaries in the trust relationship at present or where there is a possibility to occur some conflict of interests among the beneficiaries. A trust caretaker stands on the status of the agent or representative of the beneficiaries in that she/he performs the supervising power on the trustee on behalf of the beneficiaries. But seeing from another side, since the trust caretaker never enjoys the benefits from the trust but exercises its supervising power on behalf of all the beneficiaries, the

status is rather similar to that of the trustee. Therefore, it would be inappropriate for the qualifications for the trust caretaker to be thought as conforming to those for the beneficiary. Rather, what is important on the qualifications for the trust caretaker will be an ability to properly exercise the supervising power over the administration of the trust property.

However, the current statute prescribes a “beneficiaries meeting” in which a resolution of the general will through the discussion among the beneficiaries and the decision by the majority will be realized when there are many beneficiaries in a trust²¹. While, the provision concerning the trust caretaker gives only the case of the absence of the beneficiary as the example, so there is no provision which prescribes a set up of the trust caretaker in the case that there are many beneficiaries²². However, what

²¹ Article 105 ① In the case of a trust with two or more beneficiaries, the beneficiaries’ decisions (excluding decisions on the exercise of the rights listed in the items of Article 92) shall be made with the unanimous consent of all beneficiaries; provided, however, that if the terms of trust otherwise provides, such provisions shall prevail.

② In the case referred to in the proviso to the preceding paragraph, if it is provided in the terms of trust that beneficiaries’ decisions shall be made by majority vote at a beneficiaries meeting, the provisions of the following Subsection shall apply; provided, however, that if the terms of trust otherwise provides, such provisions shall prevail.

③ Notwithstanding the provisions of the proviso to paragraph ① or the preceding paragraph, provisions of the terms of trust on the method of making decisions on release from liability under the provisions of Article 42 shall be effective only if they are provisions to the effect that such decisions are to be made by majority vote at a beneficiaries meeting as provided for in the following Subsection.

④ The provisions of the proviso to paragraph ① and the preceding two paragraphs shall not apply to exemptions from liability listed as follows:

1. a total exemption from liability under the provisions of Article 42;
2. a partial exemption from liability under the provisions of Article 42, item 1 (limited to liability arising in cases where the trustee was willful or grossly negligent in the performance of the duties); and
3. a partial exemption from liability under the provisions of Article 42, item 2.

²²(Appointment of a Trust Caretaker)

Article 123 ① Provisions may be established in terms of trust to designate a person who is to be the trust caretaker in cases where there is no beneficiary at the time in question.

② If the terms of trust contains provisions designating a particular person to be the trust caretaker, any interested party may specify a reasonable period of time and call on the person designated as the one who is to be the trust caretaker to give a definite answer within that period of time with regard to whether the person will accept the office; provided, however, that if the terms of trust designates a condition precedent or a time of commencement to said provisions, this may only be done after the condition precedent is fulfilled or after the time of commencement arrives.

③ Where a call for an answer is made under the provisions of the preceding paragraph, if the person designated as the one who is to be the trust caretaker fails to give a definite answer to the settlor (if there is no settlor at the time in question, to the trustee) within the period set forth in said paragraph, it shall be deemed that the person does not accept the office.

④ Where there is no beneficiary at the time in question, if the terms of trust contains no provisions concerning a trust caretaker or if the person designated by the provisions of the terms of trust as

will form the base of the decision of the beneficiaries in a beneficiaries meeting is an accumulation of the individual wills of the beneficiaries, so that such an individual will inevitably contains a pursuit for the private interest, not only for the interest of the trust relationship on the whole. In this respect, the decision making by the majority of the beneficiaries in the beneficiaries meeting has quite different legal nature from the setting of the trust caretaker who exercises the supervising power over the administration of the trust property on behalf of the future and present beneficiaries from a third party's stand point. In addition, the beneficiaries who can attend the beneficiaries meeting are restricted to the present beneficiaries, so in order to protect the interests of the future possible beneficiaries there is no way but to assign a third party to the representative or agent and to send her/him to the meeting. By the way, the "beneficiary's agent" prescribed in the current Trust Act²³ is in effect an agent of the "present beneficiary", so, such an agent cannot be thought as representing also the candidates of beneficiary who are not yet the beneficiaries.

Viewing from the considerations described above, it should be allowed that a trust caretaker is freely set up by the act of trust wherever it is difficult for all the beneficiaries to get to an agreement and, on the other hand, it is inappropriate to interpret the provision of the current statute as prohibiting the setting up of the trust

the one who is to be the trust caretaker does not accept or is unable to accept the office, the court may appoint a trust caretaker at the petition of an interested party.

⑤ When a judicial decision on the appointment of a trust caretaker has been made under the provisions of the preceding paragraph, it shall be deemed that the provisions set forth in paragraph ① were established in the terms of trust with regard to the appointed trust caretaker.

⑥ The judicial decision on the petition set forth in paragraph ④ shall include the reasons for said decision.

⑦ The settlor or the trustee, or the trust caretaker at the time in question, may file an immediate appeal against a judicial decision on the appointment of a trust caretaker under the provisions of paragraph ④.

⑧ The immediate appeal set forth in the preceding paragraph shall have the effect of a stay of execution.

²³(Appointment of a Beneficiary's Agent)

Article 138 ① Provisions may be established in the terms of trust to designate a person who is to be the beneficiary's agent, while specifying the beneficiary or beneficiaries whom the person is to represent.

② If an terms of trust contains provisions designating a particular person to be the beneficiary's agent, any interested party may specify a reasonable period of time and call on the person designated as the one who is to be the beneficiary's agent to give a definite answer within that period of time with regard to whether the person will accept the office; provided, however, that if the terms of trust designates a condition precedent or a time of commencement to the provisions, this may only be done after the condition precedent is fulfilled or after the time of commencement arrives.

③ Where a call for an answer is made under the provisions of the preceding paragraph, if the person designated as the one who is to be the beneficiary's agent fails to give a definite answer to the settlor (if there is no settlor at the time in question, to the trustee) within the period set forth in said paragraph, it shall be deemed that the person does not accept the office.

caretaker for the case that there are many beneficiaries.

(2) Mediator of Trading

As typical in the investment trust (collective investment scheme) the purpose of which is capital investment, it is not rare in practical business that a professional mediator intermediates the trading between the parties in the course of the settlement or termination of the trust or of the administration of the trust property so that she/he performs necessary clerical works or transfers the investments or the prices. It is not an easily solvable problem how to position theoretically the status of such a mediator of trading in relation to the trust parties.

To whom of the trust parties could such a mediator be seen substantially equal? Is she/he an agent of the settlor? Or an agent of the trustee? Or an agent of the beneficiary? Or, rather, not an agent of any trust party at all but an independent legal subject? The answer may depend on the stand point or condition of the disputant. Moreover, the intermediation actions by such a mediator has begun with the invitation of the investors before the settlement of the trust and lasts up to the transfer of the rest of the property after the completion of the liquidation at the termination of the trust. That means, the legal relations among the parties concerned which one need to consider include not only those during the trust relationship is being validly maintained but also those before the settlement and those after the termination of the trust. So the argument will be still more complicated. If the legal status of the mediator is prescribed in the terms of trust, surely it may be useful for resolving concrete problems in that trust relationship. But even then, since such terms of trust cannot fix the general position of the mediator theoretically in the legal structure of trust, such a resolution may be not the definitive one but only a superficial one.

However, in the contrary, we could doubt the necessity of such a general theory for the status of the mediator which is uniformly applicable to all possible cases, for the roles of the mediators and the concrete contents of the contracts in actual trading have really great variety. Moreover, where the mediator can be essentially identified with one of the trust parties, the significance of the general legal status of the mediator would be discounted so that what in turn comes to the surface are concrete problems involving the conditions of the legal relations coming from the past trading, the interlocking relation with capital or other various factors.

Taking those above into consideration, we may conclude that practically more appropriate resolution could be expected by allowing terms of trust or the other agreement between the trust parties to define freely the status of the mediator in each trust relationship than by a general theory. If one still sticks to the general theory for the mediator, one should interpret the status of the mediator consistently with the purpose of that trust.

Chapter 4

Supervision and Administration of Trust

In this chapter we give an overview on the rights and duties relations among the trust parties in the course of the administration of trust property. If one thinks it better to secure the variety of the forms of legal relationships or the purposes of trusts, regulations by trust law on trust relationships should be restrained as far as the trust property is satisfactorily administered and the purpose of the trust is properly pursued, for too rigid regulations may lead to the prohibition of the trust parties' creativity concerning certain type of legal relationship. On the other hand, since the conflict of interests among trust parties may be always possible to occur, it may not always lead to a satisfactory result that all the affairs of the trust are left entrusted to the free agreements by the trust parties. So, what to be discussed is how and what extent the regulations by trust law should be forced on the actual concrete trust relationships.

4.1 The Power of Trustee

(1) The Theoretical Grounds for the Power of Trustee

A trustee has the power to administer the trust property according to the purpose of the trust¹. However, the explanations on the theoretical grounds for the trustee to have such a power will considerably differ depending on the way of the theoretical construction of the fundamental structure of trust.

¹(Scope of the Trustee's Powers)

Article 26 A trustee shall have the power to administer or dispose of property that belongs to the trust property and to conduct any other acts that are necessary to achieve the purpose of the trust; provided, however, that this shall not preclude such power from being restricted by the terms of trust.

If one thinks that the trustee is the owner of the trust property and the beneficiary has a claim to the trustee to have the beneficiary enjoy the benefits from the trust suitably to the purpose of the trust, then the legitimacy of the power of the trustee is deduced naturally from the ownership of the trustee on the trust property. In this case, even if there are some restrictions on the power of the trustee, such restrictions are a kind of obligations on the trustee, so the nature of the trustee as the owner of the trust property will be fundamentally unaffected by the restrictions. Therefore, as we will discuss later, even if the trustee deviated the power given in the terms of trust, since the trustee keeps the status as the owner of the trust property, such a deviation is a mere nonfulfillment of the duty which has been imposed on the trustee through the act of trust, so, in the course of the argument in this theory, it will be premised that the act of the trustee is generally valid even in such a deviation case.

Instead, if one thinks that the beneficiary is the substantial owner of the trust property, since the trustee administers the trust property entrusted from the beneficiary, the substantial owner of the property, the ground of the legitimacy of the trustee's power is some proof of that entrustment of the power of the beneficiary to the trustee. A typical example of such a proof is the terms of trust, but any other special agreement between the beneficiary and the trustee will be enough, too. In addition, when the entrusting of the original administration power of the beneficiary to the trustee is based on the other legal provisions, for instance, in the case in which on behalf of a minor the beneficiary a person with parental authority assumes the trustee, such legal relationship on the other provisions would be the proof. In such a case, the content of the power the trustee has will be determined by the provisions prescribed in the terms of trust. But where there is no explicit provision in the terms of the trust, the content will be determined by the special agreement between the beneficiary and the trustee, if any. And if there is no such agreement, the content of the power will be determined within a reasonable extent to which the beneficiary would entrust the power to the trustee in relation to the purpose of the trust. In the case in which there is another legal relationship between the trustee and the beneficiary and the relationship is the foundation of that trust relationship, the scope of the power of the trustee will be decided within a reasonable extent inferred from the interpretation of such another legal relationship. So, if the trustee deviates the scope of the power defined in the terms of trust or inferred from a reasonable interpretation on the purpose of the trust, since there is no ground for the legitimacy of such an act by the trustee, the argument in that theory would assume that the deviating act by the trustee is generally invalid.

Instead, if one thinks that a trust property is an independent entity, so that the trustee has the power to administer the trust property according to the purpose of the trust, then the ground of the legitimacy of the power is a proof that shows the existence of the independent trust property and grants the power to the trustee. The only factor that satisfies both conditions will be the act of trust. In this case, the

content of the power of the trustee will be determined by the provisions in the terms of trust, if any. Otherwise, the scope of the power will be within a reasonable extent inferred from an interpretation of the purpose of the trust. Under this thought, the right of the beneficiary to enjoy the benefits from the trust property is a kind of claim in relation to the trust property. So, when the beneficiary and the trustee personally agree on the scope and contents of the power of the trustee, the effect of that agreement is interpreted as a kind of personal obligation between the beneficiary and trustee unless the agreement constitutes a part of the act of trust. Therefore, in this theory, when the trustee acted in violation of that personal agreement with the beneficiary, that act by the trustee is generally valid as far as it is within the limit of the power determined in the terms of trust.

(2) Delegation of the Trustee's Power to a Third Party

As for the question whether the trustee can delegate its administration power over the trust property to a third party, the principle has been completely changed between the former and the current statutes. Under the former statute, since the trustee was a person on whom the beneficiary or the settlor put a personal confidence, the trustee had the duty to administer the trust property in person, as a general rule, and a delegation of the administering power to a third party was allowable only where there was some reason by which it was unavoidable². By contrast, the current statute lists three reasons where the trustee is allowed to delegate the administration power to a third party, namely, where the terms of trust allows it, where it is suitable to the purpose of the trust and where there is some reason that makes it unavoidable, so that the delegation of the administering power is allowed in the principle for the attainment of the trust purpose³. However, even under the former statute, to delegate a part of the power of the trustee by the act of trust is allowed through interpretational theory. So, the legislation of the current statute may have made no big difference practically to the standard of the conflict resolutions compared with

²Article 26 of the former statute [excerpt]

① The trustee may delegate the trust administration to another person only if there is some ground to make it unavoidable unless otherwise prescribed in the trust terms.

³(Delegation of Trust administration to a Third Party)

Article 28 In the following cases, a trustee may delegate the trust administration to a third party:

1. where it is provided by the terms of trust that the trust administration is to be or may be delegated to a third party;
2. where the terms of trust does not contain any provisions concerning the delegation of the trust administration to a third party, but delegating the trust administration to a third party is considered to be appropriate in light of the purpose of the trust; and
3. where it is provided by the terms of trust that the trust administration shall not be delegated to a third party, but delegating the trust administration to a third party is considered to be unavoidable in light of the purpose of the trust.

the situation under the former statute.

But as for the theoretical positioning of this problem, the orientation of the argument will be quite different between the current and the former statutes. For, while the former statute took the problem as that of whether the trustee will be charged with a liability, the current statute interprets the problem of a delegation of the trustee's power to a third party as a kind of the execution of the trustee's power in itself. Under the current law, since a trustee can delegate a part of her/his power to a third party as far as it is within the power, a trustee should consider in the course of the administration whether each concrete action would be done by her/himself or delegated to a third party. When there occurred some loss on the trust property as the result that a trustee did not appropriately delegate the execution of power to third party, the trustee may be charged with the liability of the violation of the duty of care as a bona fide administrator because of the inappropriate execution of the power. In this meaning, while outwardly the provisions of the current statute is positioning the problem of a delegation of a trustee's administration power to a third party to a part of the execution of the trustee's power, the current law substantially imposes on the trustee the obligation to appropriately delegate a part of the power to a third party as a part of the duty of a bona fide administrator of the trustee. In sum, the two sides principle of the power is recognizable also in this respect. That is, the fact that an additional power is given to the trustee augments the concrete factors the trustee should take into consideration in executing the power, so that the probability of the occurrence of the liability of the trustee may be heightened.

As for the legal status of the third party who is delegated a power by the trustee, various ways of legal construction are possible. But the plainest one among them will be to consider the delegation of the power by the trustee to a third party as a mandatary or agency relationship between the trustee and the third party. By this thought, the third party will take the duties and responsibilities from the trust relationship as an agent of the trustee within the power delegated. By the way, the former statute provided that the third party who got the delegation of the power by the trustee should take responsibility directly to the beneficiary⁴. But even if there were no such provisions, a similar conclusion could be deduced by an application of a mandatary or agency relationship prescribed in the civil code (see Paragraph ② Article 107 of Civil Code). As for the trustee's responsibility in the case of the delegation of the power to a third party, the common opinion thinks the responsibility will be "limited" on the choice of and the supervision over that third party⁵. If one sticks

⁴Article 26 of the former statute [excerpt]

...

③ A person who performs the trust affairs on behalf of the trustee shall take the responsibility equal to the trustee.

⁵Article 26 of the former statute [excerpt]

...

to the thought that such a third party is an agent or mandatary of the trustee, it is difficult to judge that the trustee may avoid the responsibility as “the principal”. But when the third party violated the limit of the delegated power, the responsibility of the trustee to choose or to supervise that third party will be asked in accordance with the general principle of the employer’s liability. However, since the ability to perform concrete acts for the administration of trust property and the ability to select an appropriate third party and to supervise the actions in the case of the delegation of the trustee’s power are mutually qualitatively different things in practice, the expression that the responsibility of the trustee is “lightened” or “limited” to the choice of or the supervision over the third party is quite misleading. Rather, we would say, the trustee takes a qualitatively different duties and responsibilities concerning the choice and supervision in the case of the delegation of the trustee’s power.

On the other hand, as for the status of the third party who is delegated the trustee’s power, the theoretical construction like following could be possible. That is, the trustee re-entrusts a part of the property to a third party, then the third party administers that trust property as the trustee of the following trust. By this way of thought, the execution of the power by the third party is based on the third party’s own power that was given to the third party as the trustee in the following trust, so that the trustee of the original trust stands substantially as a representative of the beneficiary of the original trust. So, the scope of the supervising power of the trustee over the third party’s execution of the power will be considerably reduced compared with the case that the third party is taken as the agent or mandatary of the trustee. Then, the liabilities of the trustee of the original trust will be reduced to those from the inappropriate settlement of the following trust and the inappropriate (non-)execution of the supervising power as the beneficiary of the following trust. In this meaning, the responsibility of the trustee would be “limited” within “the choice and supervision”, or rather, change its nature.

(3) Right of Reimbursement of Expenses

If a trustee has paid necessary expenses for the trust administration or has got damage without the trustee’s negligence in the course of the trust administration, the trustee can receive the reimbursement for such expenses or the compensation of the damages from the trust property⁶. A trustee, on the one hand, administers the trust property,

^② In the case prescribed in the last paragraph, the trustee shall take the responsibility only on the choice and supervision of that another person.

⁶(Reimbursement of Expenses, etc. from the Trust Property)

Article 48 ① Where a trustee has paid, from the trustee’s own property, expenses that are considered to be necessary for the trust administration, the trustee may receive reimbursement for such expenses and interest thereon accruing from the date of payment (hereinafter referred to as “expenses, etc.”) from the trust property; provided, however, that if the terms of trust otherwise provides for, such

provisions shall prevail.

② When a trustee needs expenses for the trust administration, the trustee may receive advance payment thereof from the trust property; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

③ In order to receive advance payment of expenses from the trust property pursuant to the provisions of the main clause of the preceding paragraph, a trustee shall give notice to a beneficiary of the amount of advance payment to be received and the basis for the calculation of such amount; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

④ Notwithstanding the provisions of paragraph ① or paragraph ②, where a trustee has incurred liability under the provisions of Article 40, the trustee may not receive reimbursement for expenses, etc. or advance payment of expenses until after the trustee performs such liability; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

⑤ In the case referred to in paragraph ① or paragraph ②, a trustee shall not be precluded from receiving reimbursement for expenses, etc. or advance payment of expenses from a beneficiary based on an agreement between the trustee and the beneficiary. (Method of Reimbursement, etc. for Expenses, etc.)

Article 49 ① Where a trustee may receive reimbursement for expenses, etc. or advance payment of expenses from the trust property pursuant to the provisions of paragraph ① or paragraph ② of the preceding Article, said trustee may transfer monies that belong to the trust property to the coffers of trustee's own property, up to the amount receivable.

② In the case prescribed in the preceding paragraph, when necessary, a trustee may dispose of property that belongs to the trust property (excluding such property whose disposal would make it impossible to achieve the purpose of the trust); provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

③ In the case prescribed in paragraph ①, if any of the items of Article 31, paragraph ② apply, a trustee may transfer property that belongs to the trust property other than monies, to the coffers of trustee's own property, instead of exercising the right under the provisions of paragraph ①; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

④ When proceedings are commenced for execution against or for the exercise of a security interest in property that belongs to the trust property, the right that a trustee has pursuant to the provisions of paragraph ① shall be deemed to be a monetary claim in relation to such proceedings.

⑤ In the case referred to in the preceding paragraph, a trustee who has proved that the trustee has the right prescribed in said paragraph by means of a document certifying the existence of said right may also demand a distribution under the proceedings for execution or for the exercise of a security interest set forth in said paragraph.

⑥ The right that a trustee has pursuant to the provisions of paragraph ① with regard to expenses, etc. for the preservation, liquidation, or distribution of property that belongs to the trust property, which has been conducted in the common interest of creditors (limited to creditors who hold claims pertaining to the obligation covered by the trust property; hereinafter the same shall apply in this paragraph and the following paragraph) shall, in the proceedings for execution or for the exercise of a security interest set forth in paragraph ④, prevail over the rights of other creditors (in cases where such expenses, etc. were not beneficial to all creditors, those who did not benefit from such expenses, etc. shall be excluded). In this case, said right has the same rank in the order of priority as a statutory lien prescribed in Article 307, paragraph ① of the Civil Code.

⑦ The right that a trustee has pursuant to the provisions of paragraph ① with regard to the expenses, etc. which fall under the following items shall, in the proceedings for execution against or for the exercise of a security interest in the property set forth in the respective items, as set forth

but, on the other hand, legally gets no profit from the trust administration itself, so, it

in paragraph ④, prevail over the rights of other creditors for the amount specified in the respective items:

1. the amount of expenses paid for the preservation of property that belongs to the trust property or any other amount that is considered to be necessary for maintaining the value of such property: such amount; and

2. the amount of expenses paid for the improvement of property that belongs to the trust property or any other amount that is considered to be conducive to increasing the value of such property: such amount or the amount of the increase in value at the time in question, whichever is smaller.

(Subrogation of a Trustee through Performance of Obligations Covered by the Trust Property)

Article 50 ① Where a trustee has performed an obligation covered by the trust property by using trustee's own property, when the trustee acquires the right under the provisions of paragraph ① of the preceding Article through such performance, the trustee shall be subrogated to the creditor who holds the claim pertaining to said obligation covered by the trust property. In this case, the right that the trustee has pursuant to the provisions of said paragraph shall be deemed to be a monetary claim in relation to such subrogation.

② When a trustee is subrogated to the creditor set forth in the preceding paragraph pursuant to the provisions of said paragraph, the trustee shall give notice to the creditor, without delay, to the effect that the claim held by the creditor is a claim pertaining to an obligation covered by the trust property and that the trustee has performed said obligation by using the trustee's own property.

(Reimbursement of Expenses, etc. and Simultaneous Performance)

Article 51 A trustee may, before the right that the trustee has pursuant to the provisions of Article 49, paragraph ① is extinguished, refuse to perform the obligation of distribution involving the trust property to a beneficiary or a holder of a vested right prescribed in Article 182, paragraph ①, item 2 ; provided, however, that if the terms of trust otherwise provides, such provisions shall prevail.

(Measures for Trust Property that Is Insufficient for the Reimbursement of Expenses, etc.)

Article 52 ① Where a trustee wishes to receive reimbursement for expenses, etc. or advance payment of expenses from the trust property pursuant to the provisions of Article 48, paragraph ① or paragraph ② but the trust property (excluding any property that may not be disposed of pursuant to the provisions of Article 49, paragraph ②; the same shall apply in item 1 and paragraph ④) is insufficient to provide such reimbursement or advance payment, the trustee may terminate the trust if the trustee has given notice of the following matters to the settlor and the beneficiary but has not received reimbursement of expenses, etc. or advance payment of expenses from the settlor or the beneficiary even when a reasonable period of time set forth in item 2 has elapsed:

1. a statement to the effect that the trustee is unable to receive reimbursement of expenses, etc. or advance payment of expenses due to the insufficient trust property; and

2. a statement to the effect that the trustee will terminate the trust if the trustee is unable to receive reimbursement of expenses, etc. or advance payment of expenses from the settlor or the beneficiary within a reasonable period of time specified by the trustee.

② For the purpose of the application of the provisions of the preceding paragraph in cases where there is no settlor at the time in question, the phrase "the settlor and the beneficiary" and "the settlor or the beneficiary" in said paragraph shall be deemed to be replaced with "the beneficiary."

③ For the purpose of the application of the provisions of paragraph ① in cases where there is no beneficiary at the time in question, the phrase "the settlor and the beneficiary" and "the settlor or the beneficiary" in said paragraph shall be deemed to be replaced with "the settlor."

is natural from the viewpoint of equity that the trustee who paid the expenses as the administrator or got some damage without the negligence can get the compensation. However, as for the theoretical construction to explain the legal effect, there are various possibility depending on the theory to be adopted concerning the fundamental structure of trust. In addition, we should note that the conclusion on the question, from whom the trustee would get the compensation, may vary even in the principle corresponding to the way of thought concerning fundamental structure of trust.

First, if one thinks that the trustee owns the trust property, the expenses or damage caused by the trust administration will be generally charged to the trustee as the owner at first. However, since the trustee does not get the benefits from the property administration, it may be inequitable that the trustee bears only the expenses of the damage. So the trustee is allowed, according to her/his own judgement and discretion, to get the reimbursement of those expenses or damage from the trust property of the beneficiary who get the benefits from the trust administration by the trustee. The the provision concerning the right for the reimbursement in Trust Act embodies that principle of equity.

In contrast, if one thinks that the beneficiary substantially owns the trust property, the expenses or losses generally should be paid from the beneficiary as the substantial owner of the trust property, so, the trustee should not be left charged with those expenses. Therefore, the expenses or damage the trustee has paid should be able to be restored at the beneficiary's cost. However, it will be practically convenient for the expenses or damage to be compensated for from the trust property. The the provision concerning the right for the reimbursement in Trust Act provides the concrete process to adjust the expenses of damage which the trustee once has gotten but should finally result in the charge of the beneficiary.

On the other hand, if one thinks that the trust property is an entity substantially

④ Where the trust property is insufficient to provide for reimbursement of expenses, etc. or advance payment of expenses pursuant to the provisions of Article 48, paragraph ① or paragraph ②, or if there is neither a settlor nor a beneficiary at the time in question, the trustee may terminate the trust.

(Compensation for Damages Out of the Trust Property)

Article 53 ① In the cases listed in the following items, a trustee may receive compensation from the trust property for the amount of damages specified in the respective items; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail:

1. where the trustee has suffered any damages in the course of administering trust affairs, in the absence of trustee's own negligence: the amount of such damages; and
2. where the trustee has suffered any damages in the course of administering trust affairs due to an international or negligent act of a third party (excluding the case set forth in the preceding item): the amount of compensation that may be demanded from such third party.

② The provisions of Article 48, paragraph ④ and paragraph ⑤, Article 49 (excluding paragraph ⑥ and paragraph ⑦), and the preceding two Articles shall apply mutatis mutandis to the compensation for damages from the trust property under the provisions of the preceding paragraph.

independent of the trust parties, the trust property itself should be generally charged with the expenses or damages caused from the trust administration. So, there is no reason for the trustee who is the administrator of the property, as well as the beneficiary who gets the benefits from the trust property, to be charged with the expenses and damage without its own failure. Therefore, the trustee who has paid the expenses and damages can generally claim the reimbursement against the trust property, but not against the beneficiary directly. The the provision concerning the right for the reimbursement in Trust Act simply embodies this principle, in which the trustee can get the reimbursement of the expenses or the compensation of the damage from the trust property.

As we have seen, the difference of the way of thinking on the fundamental structure of trust affects the basic conclusion on the question, who should be generally charged with the expenses or damages caused from the trust administration, so who should, in principle, become the other party of the claim of the reimbursement of the compensation by the trustee. But since there is an explicit provision in Trust Act, the claim of the reimbursement or compensation can be satisfied from the trust property, anyway. However, since, as described above, the theoretical ground of the claim of the reimbursement etc. by the trustee is different, the legal nature of the claim is interpreted differently, so that, for instance, as for the question whether a creditor of the trustee can be subrogated to the reimbursement claim of the trustee and directly claim the payment of the credit to the trust property, or the question such a creditor can apply the seizure of the reimbursement claim and the exaction of the credit on the trust property, there may be left some disputable points. In this type of problem, the conclusion differs depending on the answer of the question whether the trustee can give up the reimbursement right by her/his own discretion. If one thinks it is in principle the trustee that should be charged with the expenses etc., the answer will be negative, while, if one thinks instead it is the beneficiary or the trust property that the expenses etc. should finally fall on, the answer will be positive, so that the execution of the right by the creditor of the trustee against the trust property will be affirmed.

By the way, under the former statute, since the trustee could claim the reimbursement of the expenses also against the beneficiary⁷, some complicated considerations

⁷Article 36 of the former statute ① A trustee may, for the reimbursement of taxes and other public charges or the other expenses that the trustee has paid concerning the trust property or the compensation for any damages that the trustee has suffered in the course of administration the trust affairs in the absence of the trustee's own negligence, sell a trust property so as to collect the claim in advance of the other right holders on the trust property.

② The trustee may require the beneficiary, as for the expenses or damages in the last paragraph, to pay the value or to provide an appropriate security unless the beneficiary is still unspecified or not exist yet.

③ Where the trustee has renounced the right in the last paragraph, the provision of the last paragraph shall not apply.

and arguments were necessary in order to explain theoretically that provision and to determine the concrete range of the beneficiaries who may get claimed the reimbursement etc.. But the current provisions restricts the range of the target of the claim to the trust property and newly prescribes the termination of the trust to liquidate the trust property in case that the trust property is insufficient to cover the value of the reimbursement⁸. Concerning those provisions, from the stand point that the beneficiary is the substantial owner of the trust property, some explanation may be necessary for the restriction of the target of the reimbursement claim to the trust property. On the other hand, from the stand point that the trustee will adjust the sharing of the cost in the course of the trust administration, one could value the fact that those provisions have made practical dispositions simpler.

(4) The Effect of the Execution of the Power of Trustee

It is a matter of course that the effect of the execution of the trustee's power reaches to the trust property. But as for the theoretical construction for that, the way of the explanation varies according to the thought concerning the fundamental structure of trust.

If one thinks that the trustee is the owner of the trust property, since a legitimate execution of the power by the trustee is one by the owner of the trust property, it is natural for the effect to reach throughout the trust property, in addition, it would affect the legal condition of the trustee in person. Therefore, the right and duty relationships created in the course of the administration of the trust property would

⁸(Measures for Trust Property that Is Insufficient for the Reimbursement of Expenses, etc.) [excerpt]

Article 52 ① Where a trustee wishes to receive reimbursement for expenses, etc. or advance payment of expenses from the trust property pursuant to the provisions of Article 48, paragraph ① or paragraph ② but the trust property (excluding any property that may not be disposed of pursuant to the provisions of Article 49, paragraph ②; the same shall apply in item 1 and paragraph ④) is insufficient to provide such reimbursement or advance payment, the trustee may terminate the trust if the trustee has given notice of the following matters to the settlor and the beneficiary but has not received reimbursement of expenses, etc. or advance payment of expenses from the settlor or the beneficiary even when a reasonable period of time set forth in item 2 has elapsed:

...

(4) Where the trust property is insufficient to provide for reimbursement of expenses, etc. or advance payment of expenses pursuant to the provisions of Article 48, paragraph ① or paragraph ②, or if there is neither a settlor nor a beneficiary at the time in question, the trustee may terminate the trust.

(Compensation for Damages Out of the Trust Property) [excerpt]

Article 53 ① In the cases listed in the following items, a trustee may receive compensation from the trust property for the amount of damages specified in the respective items; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail:

be established nominally as those between the trustee and the other parties, although economically substantially between the trust property and the other parties. So, it may become necessary to adjust the effects of the legal relationships in order to avoid a too much complication of the legal relationships or to prevent any unfair gains by the trustee.

Instead, if one thinks that the beneficiary is the substantial owner of the trust property, since an execution of the power by the trustee is one as the administrator, not as the owner of the trust property, the effect of the juristic act by the trustee reaches only the beneficiary as the substantial owner of the trust property, so that the legal condition of the trustee in person would not be affected by the act. therefore, the right and duty relationships created in the course of the trust administration are established between the beneficiary and the other parties both nominally and substantially, but nit between the trustee and those the other parties. So, where any of the other parties expected to create the legal relationship with the trustee who was the outward title holder of the trust property, some means for the protection of the interest of the other party may become necessary.

On the other hand, if one thinks that the trust property is an entity independent of the trust parties, since the trustee exercises the power as the administrator of the trust property but not as the trustee in person, the effect of the juristic act by the trustee affects only the trust property, but not the trustee in person. Moreover, from this way of thinking, since the trust property is independent also of the legal status of the beneficiary, the legal effect of the administration act will not reach the beneficiary. Therefore, the juristic act by the trustee as an execution of the power of the trustee has the effect only between the trust property and the other party of the act, and it will not establish any legal relationship between the trustee or the beneficiary and the other party. So, where that the other party didn't know the existence of the trust relationship, or where the trust property was insufficient to be charged with the obligation, some measures to protect the interest of the other party may become necessary.

As we have seen, although the juristic act as the execution of the power of the trustee has no doubt the legal effect on the trust property, it may be controversial depending on the theoretical construction whether the act may establish a legal relationship with the trustee who is the legal title holder of the trust property or with the beneficiary who is the economically substantial owner of the trust property or with neither.

Among them, a possibly practical problem is the interest adjustment between the other party of the trading act of the trustee and the beneficiary. For, where the beneficiary has drawn the substantial economic profits from the trust property, that the other party may expect to be able to claim some against the beneficiary. For example, where the trust property fell into the lack of the funds because of the enjoyment of the benefits by the beneficiary and where the trustee also didn't have

sufficient means to fulfill the obligation to the other party, the possibility to allow that the other party to claim the fulfillment of the obligation directly against the beneficiary will be practically paid much attention to from the viewpoint of economic substantial equity. Seeing from general legal principle, since the execution of the power of the trustee was done with the existence of the trust relationship and the content of the power of the trustee expressed, no legal relationship will be created between the beneficiary and the other party of the trading act of the trustee unless one sticks to the doctrine that the beneficiary is the substantial owner of the trust property. But this thought itself stands only when one can judge that the fundamental legal relationship between the parties is nothing but a “trust”. In fact, as we will see later in Chapter 5 Section 3 in detail in relation to the responsibility of the beneficiary, the cases in which the legal relationship between formal trust parties is interpreted as not a trust relationship in reality or as some complex of a trust and agency relationships will be never rare in practice depending on the concrete legal situations around the trustee and beneficiary. Theoretical consideration in the discussions of trust are always supposing that the object relationship is definitely a “trust” one. But how a legal relationships between certain parties is interpreted in the practical world may be largely uncertain.

(5) The Effect of the Violation of the Act of Trust

How one should think of the legal effect of an administrative act by the trustee where a trustee performs the administrative act in violation of the terms of trust will depend on the ground for the power of the trustee. As we have seen in (1) of this section, what one thinks is the ground of the power of the trustee depends on its way of thinking on the fundamental structure of trust. Therefore, the explanation of the effect of the violative administration act by the trustee will depend on the way of thinking on the fundamental structure of trust.

If one thinks that the trustee is the owner of the trust property, the power of the trustee is based on the legal status of the trustee as the owner of the trust property, so that the concrete prescriptions on the scope of the power in the terms of trust or various restrictions or prohibitions on the execution of the power are all taken as a kind of obligations of the trustee in person. Therefore, even when the trustee performed the trust administration in violation of the terms of trust, since the trustee has the legal status of the owner of the trust property, such a violative act is valid, as a general rule. However, since such a violative act constitutes a violation of the obligation on the trust act by the trustee, where a third party who is the partner of the juristic act by the trustee can be seen as essentially unified with the trustee in their legal statuses, for example, if the third party has known the fact of the violation of the trust or if such a third party is a successor of the trustee, then some pursuit of the liability may be possible to the third party. In sum, under this way of thinking,

the ground for the effect for the property which once left the trust property by the trustee's violative act to be restored to the trust property or for the damages to the trust property by the trustee's violative act to be compensated cannot be the invalidness of the administrative act by the trustee. So, one must argue that the violative act is surely a mere breach of the obligation by the trustee but the trustee and the third party who is the other party of the violative act can be essentially identified with each other.

Instead, if one thinks that the beneficiary is the substantial owner of the trust property, the trustee can exercise the power only within the limit set by the beneficiary as the substantial owner, so the trustee's act that deviates from the scope of the power will be invalid as the act without the authority. However, if one sees the situation from the stand point of the third party who was the other party of the violative act by the trustee, the third party may have had a good reason to believe that the execution of the power by the trustee fell within the legitimate power of the trustee, then the expect and interest of the third party should be protected. Therefore, if there is some legitimate reason to protect the third party, for example, where the third party was in good faith without negligence at the time of the violative act of the trustee, the invalidness of the violative act cannot be insisted in relation to such third party. By the way, in this case, since the protection of the interest of the third party is based on the legitimate reason of the third party to believe the outward validity of the violative act by the trustee, so a possible negligence on the side of the beneficiary as the substantial owner of the trust property would not be taken into consideration. In sum, under this way of thinking, an act in breach of trust is invalid in principle. By that reason, it should be possible to take back the property that has left the trust property by the violative act. But where there is a good reason to protect the expect and interest of the third party who was the partner of the violative act, the invalidness of the act cannot be insisted to the third party. In addition, as for that good reason to protect the third party, the situations only on the side of the third party will be taken into consideration. And as the effect of the interest adjustment, the result may be either that the third party gets the right on the property as if there were no breach of trust and the beneficiary is charged with the damage or that the third party gets the damage by the invalidness of the act by the trustee.

On the other hand, if one thinks that the trust property is an entity independent of the trust parties, since the power of the trustee is determined solely by the terms of trust, the act by the trustee deviating the given power is invalid as an act without authority. There may be surely some cases in which the expect and interest of the third party should be protected because there is a good reason for the third party to believe in the legitimacy of the trustee's execution of the power. But, under this way of thinking, the beneficiary also has the interest to enjoy the benefits from the trust property, and that interest is a kind of the right in person to but not the substantial ownership of the trust property. So, as for the property that has outwardly left from

the trust property by the violative act, the beneficiary still keeps the right on that property since the violative act was invalid. Moreover that right of the beneficiary is logically compatible with the existence of the right of the third party on that property. Therefore, under this way of thinking, in the case in which the trustee performed an act in breach of trust, the right of the third party who was the partner of the violative act and the right of the beneficiary are concurrent on the property which has outwardly left from the trust property by the violative act of the trustee, so that the situations on the both sides should be comprehensively taken into consideration in the interest adjustment between the beneficiary and the third party. In sum, under this way of thinking, while the ground of the claim of return of the property having left from the trust property by an act in breach of trust by the trustee will be the invalidness of that violative act, since there occurs the concurrence of the rights of the third party who was the partner of the violative act and of the beneficiary on that property, the interest adjustment between them should be performed by taking comprehensively the situations on the both sides, namely, not only those on the third party but also those on the beneficiary into consideration. By the way, as for the effect of the interest adjustment from this theory's stand point, not only either all or nothing conclusion for the one party but also some distributive adjustments may be admissible in theory, for instance, to set the order of priority between the beneficiary and the third party or to divide the value of the contents of the rights between the beneficiary and the third party. This is because the interest adjustment between the beneficiary and the third party has the meaning not only of the judgement on the validity of an act in breach of trust but also of the adjustment between the concurrent claims. In this meaning, this theory may allow certain arbitrarative conclusion based on a comprehensive consideration of the concrete situations.

However, the current statute prescribes that where the other party to the act knew or was grossly negligent in failing to know, at the time of the act, that the act did not fall within the scope of the trustee's powers, a beneficiary may rescind such act⁹. The interest adjustment between the beneficiary and the third party deduced

⁹(Rescission of Acts Conducted by Trustee Beyond the Powers) [excerpt]

Article 27 ① Where an act conducted by a trustee for the trust property does not fall within the scope of the trustee's powers, a beneficiary may rescind such act, if all of the following conditions are met:

1. that the other party to the act knew, at the time of the act, that the act was conducted for the trust property; and
2. that the other party to the act knew or was grossly negligent in failing to know, at the time of the act, that the act did not fall within the scope of the trustee's powers.

② Notwithstanding the provisions of the preceding paragraph, where an act conducted by a trustee to establish or transfer a right for property that belongs to the trust property (limited to such property for which a trust registration as set forth in Article 14 may be made) does not fall within the scope of trustee's powers, a beneficiary may rescind such act, if all of the following conditions are met:

from that provision can be interpreted as giving the standard for identifying the statuses of the trustee and the third party, as prescribing the situations for the third party to be protected and as giving the standard for the comprehensive interest adjustment between the beneficiary and the third party, all alike. So, any stand point on the fundamental structure of trust will not be theoretically inconsistent with the provision. We can see there the reinforced neutral position of the current statute to the trust theories.

4.2 The Duties of the Trustee

(1) The Nature of the Duties of Trustee

Most of the trustee's duties are explicitly prescribed in Trust Act. But the relation between the logical structure of those provisions and their practical meaning is rather complicated.

For instance, while the fiduciary duty of trustee should generally regulate the cases of the conflict of interest between the beneficiary or trust property and the trustee so uniformly that there should be no special exemption from the duty according to the concrete result of an act in violation of the fiduciary duty, in practice, where the concrete result is profitable for the beneficiary or the trust property, since no damage is caused by the violation of the fiduciary duty, the trustee will be exempted from the responsibility from the violation of the duty. On the other hand, as is typical in the case of the duty of care of a good manager of the trustee, whether there is a violation of a duty depends on the degree of the care paid by the trustee at the time of the questioned action, so, even if some damages occur on the beneficiary or the trust property in the course of the actual disposition of the trust property, the occurrence of the damage itself would never be a cause of the violation of the duty from the logical point of view. However, in practical world, one tends to think that, since there have occurred some damages on the trust property, there must be some breach of the duty by the trustee. As the result, the damage may be easily attributed to some violation of the duty.

On the other hand, the duties of the trustee are usually prescribed in the form of prohibitions of some types of act to the trustee so as to prevent the trustee from unfairly benefiting her/himself. Based on that, even if the beneficiary asked the trustee for doing some type of act for the self interest, where such an act constitutes an violation of the trustee's duty, the trustee should reject to perform that act.

1. that at the time of the act, the trust registration as set forth in Article 14 existed with regard to the property that belongs to the trust property; and

2. that the other party to the act knew or was grossly negligent in failing to know, at the time of the act, that the act did not fall within the scope of the trustee's powers.

Viewing this fact from another side, restrictions on the action of the trustee by the duty of the trustee are also protecting the trustee against the excessive demand by the beneficiary to act for the maximum profits for the beneficiary at the cost of the burdens or damages of the trustee so as to make the trustee possible to avoid unnecessary damages.

Largely, the duties of trustee is generally interpreted as to prevent the trustee from seeking the self interest so as to secure systematically that the trustee performs the actions suitable to the attainment of the trust purpose, by prohibiting in advance the trustee from certain types of act. But, in the practical world, the results of the acts of the trustee are tend to be taken as quite important, and there are actually some cases in which the interest of the beneficiary are substantially prevailing against the statutory prohibitions or restrictions on the actions of the trustee. Therefore, when one confronts the question to what degree the duties of the trustee may be “lightened” by the act of trust, one should note that the answer may be a character of a double-edged blade in that the wider the scope of the discretionary power becomes, the weaker is the protection of the trustee from unnecessary damages or burdens in effect.

(2) The Fiduciary Duty of Trustee (Duty of Loyalty)

“The fiduciary duty of trustee” is, literally interpreted, to require the trustee as the duty, not only to obey the purpose of the trust in the administration of the trust property but also to be faithful to the benefit of the beneficiary (the duty of loyalty). Actually, the provision of the current statute is adopting such an expression¹⁰. However, what does it that a trustee acts “faithfully” on behalf of the beneficiary? or, conversely, what may actions of the trustee constitute a violation of the fiduciary duty? or what does the “behalf of” the beneficiary mean at all on which the trustee should act “faithfully”? Those questions are never answerable only from the words of the provision.

Under the former statute, there was no explicit provision on the duty of loyalty. The common opinion enumerated as the possible types of the violation of the duty of loyalty, firstly, an act in a situation of the conflict of interest between the trustee and the beneficiary or the trust property, secondly, an act of the trustee to pursue also the self interest in the administration of the trust property and, thirdly, an act of the trustee to benefit a third party in the administration of the trust property. And the common opinion thought that, as for these three types of the act, those acts are generally prohibited whether some damages occur by the act or not, in order to prevent such damages in advance. they thought it was pursued by that

¹⁰(Duty of Loyalty)

Article 30 A trustee shall administer trust affairs and conduct any other acts faithfully on behalf of the beneficiary.

for the appropriateness of the administrative actions of the trust property to be institutionally secured.

However, the common opinion concerning the duty of loyalty under the former statute didn't put an importance on the concrete result of the act by the trustee, and, in addition, didn't admit the possibility of the immunity of the trustee from the duty of loyalty by the approval of the beneficiary or by the permission by a court. So, where, for instance, the biggest benefit can be brought about to the beneficiary by an act in a conflict of interests situation by the trustee, since that type of act is generally prohibited because of the duty of loyalty of the trustee, the apparent opportunity of the "benefit" for the beneficiary was lost at the same time by the duty of loyalty of the trustee. In this respect, the common opinion under the former statute concerning the violation of the duty of loyalty must be judged that it could not provide any persuasive argument in the appropriateness of the conclusions for the practical business, except for the theoretical consistency.

The current statute, in contrast to the former statute, provides the existence of the duty of loyalty in an explicit provisions, as we has seen. And following that provision, the current statute prohibits generally a trustee to act in conflict of interest with the beneficiary or the trust property¹¹and to perform an act that may be in a part of the

¹¹(Restriction on Acts that Create Conflicts of Interest)

Article 31 ① A trustee shall not carry out the following acts:

1. causing property that belongs to the trust property (including any right for such property) to be included in the trustee's own property, or causing property that belongs to the trustee's own property (including any right for such property) to be included in the trust property;
2. causing property that belongs to the trust property (including any right for such property) to be included in the trust property of another trust;
3. carrying out an act for the trust property with a third party while serving as the third party's agent; and
4. establishing a security interest on property that belongs to the trust property in order to secure a claim pertaining to an obligation that the trustee is liable to perform only by using property that belongs to the trustee's own property, or carrying out any other act with a third party for the trust property which would create a conflict of interest between the trustee or an interested party thereof and the beneficiary.

② Notwithstanding the provisions of the preceding paragraph, in any of the following cases, a trustee may carry out the acts listed in the items of said paragraph; provided, however, that this shall not apply in the case set forth in item 2 if it is provided for by the terms of trust that the trustee may not carry out said acts even in the case set forth in said item: 1. where it is provided by the terms of trust that the trustee is allowed to carry out said acts;

2. where the trustee has disclosed the material facts and obtained approval from the beneficiary for carrying out said acts;
3. where any right to property that belongs to the trust property has been included in the trustee's own property by reason of inheritance or any other universal succession; or
4. where, in order to achieve the purpose of the trust, it is considered reasonably necessary for the trustee to carry out said acts, and it is clear that said acts conducted by the trustee will not harm the interests of the beneficiary, or where there are justifiable grounds for the trustee to carry

trust administration on the account of the trustee's own property or of an interested party of it¹². The types of the acts prohibited in those provisions are essentially equal to those having been enumerated as the illustrative types of the violative action to

out said acts in light of the impact of said acts on the trust property, the purpose and manner of the acts, the status of a substantial relationship between the trustee and the beneficiary which makes the trustee an interested party, and other relevant circumstances.

③ A trustee shall, when the trustee has carried out any of the acts listed in the items of paragraph ①, give notice of the material facts concerning said act to a beneficiary; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

④ Where the act set forth in paragraph ①, item 1 or item 2 is carried out in violation of the provisions of paragraph ① or paragraph ②, such act shall be void.

⑤ The act set forth in the preceding paragraph shall become effective retroactively as of the time of the act, if it is ratified by the beneficiary.

⑥ In the case prescribed in paragraph ④, when a trustee has disposed of or carried out any other act regarding the property set forth in paragraph ①, item 1 or item 2 with a third party, a beneficiary may rescind the disposition or other act only if the third party knew or was grossly negligent in failing to know that the act set forth in paragraph ①, item 1 or item 2 was carried out in violation of the provisions of paragraph ① or paragraph ②. In this case, the provisions of Article 27, paragraph ③ and paragraph ④ shall apply *mutatis mutandis*.

⑦ Where an act set forth in paragraph ①, item 3 or item 4 has been carried out in violation of the provisions of paragraph ① and paragraph ②, a beneficiary may rescind the act only if the third party knew or was grossly negligent in failing to know that such act was conducted in violation of these provisions. In this case, the provisions of Article 27, paragraph ③ and paragraph ④ shall apply *mutatis mutandis*.

¹²Article 32 ① With regard to an act that a trustee may carry out in the course of administering trust affairs based on the trustee's powers as a trustee, if the trustee's failure to carry out such an act would be contrary to the interests of a beneficiary, the trustee may not conduct such act on the account of the trustee's own property or on the account of an interested party thereof.

② Notwithstanding the provisions of the preceding paragraph, in any of the following cases, a trustee may carry out the act prescribed in said paragraph on the account of the trustee's own property or on the account of the interested party thereof; provided, however, that this shall not apply in the case set forth in item 2 if it is provided by the terms of trust that the trustee may not carry out said act on the account of the trustee's own property or on the account of an interested party thereof even in the case set forth in said item:

1. where it is provided by the terms of trust that the trustee is allowed to carry out said act on the account of the trustee's own property or on the account of an interested party thereof; or
2. where the trustee has disclosed the material facts and obtained approval from the beneficiary for carrying out said act on the account of the trustee's own property or on the account of an interested party thereof.

③ A trustee shall, when the trustee has carried out the act prescribed in paragraph ① on the account of the trustee's own property or on the account of an interested party thereof, give notice to the beneficiary of the material facts concerning the act; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

④ Where a trustee has carried out an act prescribed in paragraph ① in violation of the provisions of paragraph ① and paragraph ②, the beneficiary may deem that said act has been conducted in the interests of the trust property; provided, however, that this may not harm rights of any third party.

⑤ The rights under the provisions of the preceding paragraph shall be extinguished when one year has elapsed from the time of the act.

the duty of loyalty in the former statute era. So, those provisions can be interpreted as explicit prohibition provisions of the representative types of the violation of the duty of loyalty.

Parallel to those, the current statute explicitly prescribes that an act by trustee which falls under any of the types prescribed will not constitute the violation of the duty of loyalty where it is provided by the terms of trust that the trustee is allowed to do an act of such types or where the trustee has disclosed the material facts and obtained approval from the beneficiary to do so. These provisions have been legislated in response to the criticism against the “inflexibility” of the duty of loyalty so as to establish an appropriate standard for conflict resolutions¹³. The foundational thought of these provisions takes the phrase “faithfully on behalf of the beneficiary” in the article 30 as meaning “for the interest of the beneficiary in person” and is conforming to a sense of equity which is typical in the case of the certain type of commercial trust relationship, according to which what is a benefit for a beneficiary should be left to the beneficiary’s own judgement.

In addition, the article 31 prescribes that an action of the type listed as a violative one may not constitute a violation of the duty of loyalty when the legal relationship has belonged to the trustee by an inheritance or when the action to create conflict of interest is reasonably necessary to achieve the purpose of the trust and it is clear that the act will not harm the beneficiary’s interests or when there are some justifiable

¹³(Restriction on Acts that Create Conflicts of Interest) [excerpt]
Article 31

...

② Notwithstanding the provisions of the preceding paragraph, in any of the following cases, a trustee may carry out the acts listed in the items of said paragraph; provided, however, that this shall not apply in the case set forth in item 2 if it is provided for by the terms of trust that the trustee may not carry out said acts even in the case set forth in said item: 1. where it is provided by the terms of trust that the trustee is allowed to carry out said acts;

2. where the trustee has disclosed the material facts and obtained approval from the beneficiary for carrying out said acts;

Article 32 [excerpt]

...

② Notwithstanding the provisions of the preceding paragraph, in any of the following cases, a trustee may carry out the act prescribed in said paragraph on the account of the trustee’s own property or on the account of the interested party thereof; provided, however, that this shall not apply in the case set forth in item 2 if it is provided by the terms of trust that the trustee may not carry out said act on the account of the trustee’s own property or on the account of an interested party thereof even in the case set forth in said item:

1. where it is provided by the terms of trust that the trustee is allowed to carry out said act on the account of the trustee’s own property or on the account of an interested party thereof; or

2. where the trustee has disclosed the material facts and obtained approval from the beneficiary for carrying out said act on the account of the trustee’s own property or on the account of an interested party thereof.

grounds for the trustee to perform such an act evaluated from the synthetic point of view¹⁴. This provision, in contrast to what we described above, permits a immunity from the duty of loyalty from the viewpoint of a reasonable action as the trustee. It leaves a room for the trustee to escape the liability even when the approval to the act by the beneficiary could not be obtained so as to have a function also to prevent the beneficiary from some excessive insistence on the liability to the trustee on the ground of the violation of the duty of loyalty.

The current provisions on the duty of loyalty is intended to respond to the criticisms to the duty of loyalty under the former statute and to solve the problems concerning the duty of loyalty in various respects so as to give a practically appropriate conclusions. The intention of the legislation in itself can be also theoretically supportable when one considers the equity between trust parties and the principle that a trust relationship exists for the accomplishment of the trust purpose.

However, even the current statute still contains some uncertainty in the prescription of the condition for the trustee to escape from the duty of loyalty, which may cause some trouble in the interpretation. For instance, based on what facts one can say “the material facts are disclosed”? In addition, the condition “the act which is considered reasonably necessary for the trustee to carry out” also doesn’t make the concrete conditions clear in advance of the act. In these meaning, if one takes also such a fact into consideration as that the situation in which the violation of the duty of loyalty is disputed is usually some “marginal” one in which the confidential relationship between the trustee and then beneficiary has been completely broken, the possibility of the immunity of the trustee from the liability by the violation of the duty of loyalty through the provisions for it in the current statute contains, we must say, considerable amount of uncertainties.

¹⁴(Restriction on Acts that Create Conflicts of Interest) [excerpt]
Article 31

...

② Notwithstanding the provisions of the preceding paragraph, in any of the following cases, a trustee may carry out the acts listed in the items of said paragraph; provided, however, that this shall not apply in the case set forth in item 2 if it is provided for by the terms of trust that the trustee may not carry out said acts even in the case set forth in said item:

...

3. where any right to property that belongs to the trust property has been included in the trustee’s own property by reason of inheritance or any other universal succession; or

4. where, in order to achieve the purpose of the trust, it is considered reasonably necessary for the trustee to carry out said acts, and it is clear that said acts conducted by the trustee will not harm the interests of the beneficiary, or where there are justifiable grounds for the trustee to carry out said acts in light of the impact of said acts on the trust property, the purpose and manner of the acts, the status of a substantial relationship between the trustee and the beneficiary which makes the trustee an interested party, and other relevant circumstances.

(3) The Duty of the Care of a prudent Manager of Trustee

“The duty of the care of a prudent manager of trustee” (abbreviated as “DCPM” following in this section) requires for a trustee to pay that care as a prudent manager in administration of the trust property which is required in administrating another person’s property as the manager. While some theoretical stand point on the fundamental structure of trust thinks a trustee is the owner of the trust property, even under that thought a trustee is obligated to obey the purpose and the terms of the trust in the administration of the trust property, and a trustee in person never gets the benefits directly from the administration of the trust property. Therefore, the administration of the trust property by a trustee is essentially equal to manage another person’s property irrespective of the way of thinking on the fundamental structure of trust. So it is natural for a trustee to be borne DCPM. What is practically important is the concrete contents of DCPM.

Although both the current and former statutes have the provisions to prescribe the duty of care of a prudent manager¹⁵, the concrete contents are not prescribed in the provisions, so that the judgement on whether a certain action of a trustee violates DCPM must be left to the casuistic in each individual case. Since the same type of action may or may not constitute a violation of DCPM depending on the concrete situations, it is impossible to decide definitely in advance whether a concrete action constitutes such a violation. But we may be able to say, as a minimum explanation of the general principle, something like following.

First, the acts which are interpreted as not congruent with the purpose of trust or those which are violating the prohibitions or restrictions prescribed in the terms of trust will be deemed with high provability as violating DCPM. For example, so is the case in which an investment for commercial products with so high risk as in congruent to the purpose of the trust is done in a investment trust relationship with the trust property as the fund. Second, the change of social or economic environments may convert an action of the type which was not a violation of DCPM into a violative action of DCPM. Taking a judgement on an investment as the example, such a behavior will be judged with high probability as a violation of DCPM as to continue the investments mechanically based on a long fixed standard without any revisions corresponding to the changes of the investing environment. Reversely, there may be a case in which the de facto change of the purpose of a trust makes an action

¹⁵Article 20 of the former statute A trustee shall administer trust affairs in line with the purpose of the trust with the due care of a prudent manager.

(The Trustee’s Duty of Care)

Article 29 ① A trustee shall administer trust affairs in line with the purpose of the trust.

② A trustee shall administer trust affairs with the due care of a prudent manager; provided, however, that if terms of trust otherwise provide, the trustee shall administer trust affairs with such care as provided for by the terms of trust.

that was previously incongruent with the purpose of the trust not violative to DCPM, or moreover, not to do such an action violative to DCPM. For example, whether the judgements on the investment actions should be entrusted to a third party expert may be included in such problems. Third, in contrast to the duty of loyalty explained above, individual approvals by the beneficiary to the each concrete action of the trustee will not always give an immunity from DCPM. This is because it is the trustee, not the beneficiary in the basic legal structure of trust that has the final decision authority in the administration of the trust property. However, for instance, in a commercial trust for investment activities, if the beneficiary gives some direction for a concrete investment action, it will not necessarily unreasonable to allow the trustee an immunity from the liability by the violation of DCPM based on the direction of approval by the beneficiary, from the viewpoint of a general principle that losses from a failure of an investment activity should belong to the person who actually decides that investment action.

As we have just seen, as for DCPM of the trustee, one same action may be judged sometimes violative and sometimes not violative to DCPM depending on the situations about the trustee. So, there is no absolute standard for the trustee to avoid being claimed a liability of the violation of DCPM in advance. the usual situation where a trustee is actually claimed the liability of the violation of DCPM is that the planed profits could not be attained or even some losses on the trust property has occurred through the administration activity of the trust property. Then the practically important problem is to what extent the facts of such losses or shortage of profits should (not) affect the concrete interpretational problems of the violation of DCPM by the trustee.

From the theoretical point of view, DCPM presents only the level of the care the trustee is required to pay at the time of the administrative action. So, as far as the act by the trustee was done with a care at the required level, even if some losses or shortage of profits occurred on the trust property as a result of that act, the trustee should not be claimed a liability of the violation of DCPM. However, in the practical world, it cannot be avoidable for the claimant's side to come to a thought of, so to speak, the reverse inference, namely, the thought that as far as the losses of shortage of the profits actually occurred, there should have been some breach of DCPM by the trustee. If the trustee's side, against the thought above, tries to show that DCPM was fulfilled, that one must show not only that the act by the trustee was reasonably compliant to the purpose or the terms of the trust, but also that the losses etc. on the trust property have occurred in spite of the trustee's fulfillment of DCPM or that such losses etc. would have occurred on any trust property administered by any trustee in a similar situation. But such a proof would be quite difficult in most cases.

Although DCPM of the trustee is theoretically deemed as the standard of actions in the administration of trust property, the possibility that the liability of a trustee is claimed merely based on the loss or shortage of the profits cannot be actually denied.

So, in order for a trustee to guard her/his own legitimate interest, it is desirable that there is some criterion to judge in advance whether a certain act violates DCPM. The possibility of immunity from the liability of the violation of DPCM on an approval or direction by the beneficiary should be worth to be considered further in depth.

(4) The Duty of Disclosure of Trustee

“The duty of disclosure of trustee” means the duty by which a trustee should disclose the information concerning the trust property to the trust parties, typically to the beneficiary, in the administration of the trust property. The current statute prescribes, at first, the general duty of trustee to report on the processing status of trust administration, then provides very detailed provisions that prescribe the range of the information to be disclosed, the procedure for the disclosure and the conditions for the immunity of the trustee¹⁶. This duty of disclosure plays a very important

¹⁶(Duty to Report on the Processing Status Trust administration)

Article 36 A settlor or beneficiary may request that a trustee to report on the processing status of trust administration as well as the status of property that belongs to the trust property and the obligation covered by the trust property.

(Duty to Prepare, Report On, and Preserve Books, etc.)

Article 37 ① A trustee shall prepare books and other documents or electromagnetic records relating to the trust property, as provided for by Ordinance of the Ministry of Justice, in order to clarify the accounts on trust affairs as well as the status of property that belongs to the trust property and the obligation covered by the trust property.

② A trustee shall prepare a balance sheet, profit and loss statement, and any other documents or electromagnetic records specified by Ordinance of the Ministry of Justice, once each year, at a certain time, as provided for by Ordinance of the Ministry of Justice. ③ When a trustee has prepared the documents or electromagnetic records set forth in the preceding paragraph, the trustee shall report to a beneficiary (if there is a trust caretaker at the time in question, to the trust caretaker) on the content thereof; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

④ Where a trustee has prepared the documents or electromagnetic records set forth in paragraph ①, the trustee shall preserve said documents (if electromagnetic records are prepared in lieu of said documents by the method specified by Ordinance of the Ministry of Justice, such electromagnetic records) or said electromagnetic records (if documents are prepared in lieu of said electromagnetic records, such documents) for ten years from the date of their preparation (or until the date of the completion of the liquidation of the trust if this occurs within said ten-year period; the same shall apply in the following paragraph); provided, however, that this shall not apply where the trustee has delivered said documents or copies thereof to the beneficiary (if there are two or more beneficiaries at the time in question, to all beneficiaries; if there is a trust caretaker at the time in question, to the trust caretaker; the same shall apply in the proviso to paragraph ⑥), or has provided the beneficiary with information on the matters recorded in said electromagnetic records by the method specified by Ordinance of the Ministry of Justice.

⑤ Where a trustee has prepared or acquired a written contract relating to the disposition of property that belongs to the trust property or any other documents or electromagnetic records concerning the trust administration, the trustee shall preserve said documents (if electromagnetic

records are prepared in lieu of said documents by the method specified by Ordinance of the Ministry of Justice, such electromagnetic records) or said electromagnetic records (if documents are prepared in lieu of said electromagnetic records, such documents) for ten years from the date of the preparation or acquisition. In this case, the provisions of the proviso to the preceding paragraph shall apply *mutatis mutandis*.

⑥ Where a trustee has prepared the documents or electromagnetic records set forth in paragraph ②, the trustee shall preserve said documents (if electromagnetic records are prepared in lieu of said documents by the method specified by Ordinance of the Ministry of Justice, such electromagnetic records) or said electromagnetic records (if documents are prepared in lieu of said electromagnetic records, such documents) until the date of the completion of the liquidation of the trust; provided, however that this shall not apply where the trustee has, after ten years have elapsed from the date of their preparation, delivered said documents or copies thereof to the beneficiary, or has provided the beneficiary with information on the matters recorded in said electromagnetic records by the method specified by Ordinance of the Ministry of Justice.

(Request to Inspect, etc. of the Books, etc.)

Article 38 ① A beneficiary may make the following requests to a trustee. In this case, in making such a request, the reasons therefor shall be specified:

1. a request to inspect or copy the documents set forth in paragraph ① or paragraph ⑤ of the preceding Article; and
2. a request to inspect or copy any object which shows the matters recorded in the electromagnetic records set forth in paragraph ① or paragraph ⑤ of the preceding Article by a method specified by Ordinance of the Ministry of Justice.

② The trustee may not refuse a request set forth in the preceding paragraph when such a request has been received, except where it is found to fall under any of the following cases:

1. where the person making such request (hereinafter referred to as the “requester” in this paragraph) has made the request for purposes other than an investigation related to the securement or exercise of the requester’s rights;
2. where the requester has made the request at an inappropriate time;
3. where the requester has made the request for the purpose of disturbing the trust administration or harming the common interests of the beneficiaries;
4. where the requester operates or engages in a business which is effectively in competition with business pertaining to the trust;
5. where the requester has made the request in order to inform a third party, for profit, of any fact that the requester may learn by way of inspecting or copying documents or any other object under the provisions of the preceding paragraph; or
6. where the requester has informed a third party, for profit, of any fact that the requester has learned by way of inspecting or copying documents or any other object under the provisions of the preceding paragraph within the past two years.

③ The provisions of the preceding paragraph (excluding item 1 and item 2) shall not apply when there are two or more beneficiaries of a trust and the request set forth in paragraph ① is made by all beneficiaries, or when there is only one beneficiary of the trust and the request set forth in said paragraph is made by such beneficiary.

④ Where it is provided by the terms of trust that a request to inspect or copy documents or any other object under the provisions of paragraph ① is to be restricted with regard to any information other than the those listed below if a beneficiary gives consent for such restriction, the beneficiary who has given such consent (including the beneficiary’s successor; hereinafter the same shall apply in this Article) may not revoke the consent:

roll to maintain the appropriateness of the trust administration and the confidential relationship among the trust parties through the disclosure by the trustee to the trust parties the facts that the administration of the trust property is being performed in accordance with the property of the trust and on behalf of the beneficiary.

On the other hand, some cases in which the disclosure of the information is requested by a beneficiary may have some aspects whose nature is qualitatively different from that of the duty of disclosure. As we have seen concerning the duty of loyalty of trustee, the current statute prescribes that a trustee can escape from the liability of

1. information that is indispensable for preparing the documents or electromagnetic records set forth in paragraph ② of the preceding Article or any other material information concerning the trust; and

2. information that is unlikely to harm the interests of any person other than said beneficiary.

⑤ Upon receiving a request to inspect or copy documents or any other object under the provisions of paragraph ① from a beneficiary who has given the consent as set forth in the preceding paragraph, a trustee may refuse such a request, except for the part that falls under the information listed in the items of the preceding paragraph.

⑥ An interested party may make the following requests to a trustee:

1. a request to inspect or copy the documents set forth in paragraph ② of the preceding Article; and

2. a request to inspect or copy any object which shows the matters recorded in the electromagnetic records set forth in paragraph ② of the preceding Article by a method specified by Ordinance of the Ministry of Justice.

(Request for the Disclosure of Names, etc. of Other Beneficiaries)

Article 39 ① In the case of a trust with two or more beneficiaries, each beneficiary may request that trustee disclose the following matters by an appropriate method. In this case, in making such a request, the reasons therefor shall be specified: 1. the names and addresses of the other beneficiaries; and

2. the content of the beneficial interest held by other beneficiaries. ② A trustee may not refuse a request set forth in the preceding paragraph when such a request has been received, except where it is found to fall under any of the following cases:

1. where the person making such request (hereinafter referred to as the “requester” in this paragraph) has made the request for purposes other than an investigation related to the securement or exercise of the requester’s rights;

2. where the requester has made the request at an inappropriate time;

3. where the requester has made the request for the purpose of disturbing the trust administration or harming the common interests of the beneficiaries;

4. where the requester operates or engages in business which is effectively in competition with business pertaining to the trust;

5. where the requester has made the request in order to inform a third party, for profit, of any fact that the requester may learn by way of the disclosure under the provisions of the preceding paragraph; or

6. where the requester has informed a third party, for profit, of any fact that the requester learned by way of the disclosure under the provisions of the preceding paragraph within the past two years.

③ Notwithstanding the provisions of the preceding two paragraphs, if the terms of trust otherwise provides, such provisions shall prevail.

the violation of the duty of loyalty in a suspicious act where the trustee has disclosed the material facts and obtained approval from the beneficiary for the carrying out that act¹⁷. Then, the problem here is how we should interpret the relation between “an immunity of a trustee from the liability of the violation of the duty on the ground of the information disclosure” and “the duty of the trustee to disclose the information”.

Some opinion thinks those two aspects mixed into one with almost no care for the difference between them, so that it concludes the trustee is in the duty to disclose the important facts concerning the duty of loyalty. That opinion bases on the supposition that the range of the information to be disclosed and the timing when the disclosure action is required are both quite similar in those two aspects. However, we should not neglect the great difference of the purposes of those two information disclosures, that as the duty of the trustee and that in order for the trustee to avoid the blame for the violation of the duty in another act. In fact, if the liability of a trustee should be affirmed in the violation of the duty of loyalty while the information disclosure concerning that has not appropriately done, that liability of the trustee is grounded on the violation of the duty of loyalty itself. The trustee should be responsible for the claim of the violation of the duty of loyalty not because the information disclosure has not properly done.

We should note in addition that the range of the information to be disclosed or the condition for the release from the duty of disclosure in relation to the other duties is actually quite different between the disclosure as the trustee’s duty and that for the trustee’s immunity from the liability.

On the one hand, the ground of the information disclosure as the fulfillment of duty of the trustee is the existence of the terms of trust or the provisions of the Trust Act that prescribe the duty of the information disclosure. So, the range of the information to be disclosed is defined by what is reasonably required to be disclosed by the terms of trust or the legal provisions. More concretely, the range of the information to be disclosed is limited within the affairs concerning the trust property in the trust relationship as usual in the duty of the trustee. So, it is not allowed to request as the carrying out of the duty of disclosure in a trust relationship the disclosure of the information on the property belonging to another trust. In addition, the duty of the information disclosure of trustee tends to conflict with the duty to protect privileged

¹⁷(Restriction on Acts that Create Conflicts of Interest)[excerpt]
Article 31

...

② Notwithstanding the provisions of the preceding paragraph, in any of the following cases, a trustee may carry out the acts listed in the items of said paragraph; provided, however, that this shall not apply in the case set forth in item (ii) if it is provided for by the terms of trust that the trustee may not carry out said acts even in the case set forth in said item:

...

2. where the trustee has disclosed the material facts and obtained approval from the beneficiary for carrying out said acts;

information which a trustee may be imposed toward the beneficiary in the course of the administration of the trust property. Since the duties of trustee should not impose a trustee something impossible to perform, in the case of the conflict between the duties of the disclosure and of the protection of the privileged information, the trustee should be released from one of the duties or, at least, one of the duty should be relaxed for the trustee.

On the other hand, the ground of the information disclosure for the exemption of a trustee from the duty of loyalty is not the terms of trust or the legal provisions ordering to do so but the fact that it is necessary as the counterevidence to the suspicion of the violation of the duty of loyalty. Therefore, the range of the information to be disclosed for the exemption from the duty of loyalty is not restricted on the general matters prescribed in the terms of trust or the provisions of the Trust Act but it should include enough facts to convince the beneficiary of the appropriateness of the administrative actions by the trustee. In this meaning, the information to be disclosed will not be restricted to the affairs on the relevant trust property. For instance, when a trustee wants to prove her/himself not to intend to profit a third person, the trustee may have to disclose the information on other trust property. As for the relation with the duty to protect privileged information, since the information to be disclosed for the exemption from the duty of loyalty is not a legal duty by itself, the conflict between duties in relation to that to protect privileged information will not occur. So, if some information is protected as privileged, that information should not be disclosed for the exemption of a trustee from the duty of loyalty.

So, we should keep it in mind that although both are called commonly as the disclosure of the information by the trustee, there are great differences between the information disclosure as the fulfillment of the duty of the trustee and that to be done for the immunity from the liability caused from the duty of loyalty not only in the legal theoretical nature but also in their practical treatments. Although it may be a bit extreme opinion, it may be possible to think that the trustee has the power to choose not to disclose an information to the beneficiary in exchange of the liability from the violation of the duty of loyalty. In fact, even though a trustee will be claimed a liability to compensate the damage caused from the violation of the duty of loyalty, if more serious damage could be avoided by not disclosing some relevant important information, the decision not to disclose such information could find certain supports in practice.

(5) Duty of Trustee to administer Properties in Segregation

“The duty of trustee to administer properties in segregation” is the duty according to which a trustee should segregate property that belongs to the trust property from property that belongs to the trustee’s own property or from that which belongs to the trust property of other trusts in the trust administration. This duty of the segregated

administration is prescribed for the proper execution of the supervising power by the beneficiary or the like by making clear distinctions among individual trust properties. For the confusion of the properties between the private property of the trustee and the trust property or between trust properties of mutually different trusts tends to lead to the trustee's personal benefit from the trust property or the generation of the hotbed for the unfair trading between trust properties. The former statute also had the provision for the duty of the segregated administration¹⁸. The current statute prescribes concrete methods for the segregated management of the properties according to the types of the trust properties so that it aims further thoroughgoing and clarification of the segregation of the properties in the administration¹⁹.

However, this duty of segregated administration requires, though the border of the trust property will be made clear, a little complex practical treatment of the affairs in the case of the combined administration of the properties in plural trusts. In addition, there may be, though depending on the nature of the constituent properties of the trust, actually not a few cases in which it makes more flexible responses to the changes of the value of the trust properties of certain types possible that the segregation of the properties is left unclear and only the ratio of the shares among the trust relationships on whole the assets is clearly maintained. Moreover, since the disputes in practice on the loose segregation of properties happen usually under the

¹⁸Article 28 of the former statute A trustee shall administer the trust property in segregating property that belongs to the trust property from property that belongs to the trustee's own property or from the trust property that belongs to other trusts in the trust administration. Provided, as for the money as the trust property, it is enough to make it clear in the account.

¹⁹(Duty to Segregate Property)

Article 34 ① A trustee shall segregate property that belongs to the trust property from property that belongs to the trustee's own property and that which belongs to the trust property of other trusts by the method specified in each of the following items for the categories of property listed in the respective items; provided, however, that if the terms of trust otherwise provides for the method of segregation, such provisions shall prevail:

1. property for which a trust registration set forth in Article 14 may be made (excluding the property set forth in item 3): by said trust registration;
2. property for which a trust registration set forth in Article 14 may not be made (excluding the property set forth in the following item): either of the methods specified in (a) or (b) below for the categories of property listed in (a) or (b), respectively:
 - (a) movables (excluding monies): by retaining property that belongs to the trust property separately from property that belongs to the trustee's own property and the trust property of other trusts in the manner whereby they can be distinguished from each other on sight; or
 - (b) monies and any property other than those set forth in (a): by clarifying the accounting thereof; or
3. property specified by Ordinance of the Ministry of Justice: by a method specified by Ordinance of the Ministry of Justice for the appropriate segregation of the property.

② Notwithstanding the provisions of the proviso to the preceding paragraph, a trustee shall not be exempted from the duty for trust registration set forth in Article 14 for the property set forth in item 1 of said paragraph.

situation that it has turned out there is no property to be specified as corresponding to each right of each trust party, there may be no need to prohibit or restrict such a loose administration as far as the beneficiary or other trust parties require the trustee the more efficient way of administration with knowing such a risks as the situation like described above.

If so, there may be some cases in which it is more rational from the viewpoint of the purpose of the trust to allow special provisions in the terms of trust to define freely the content of the duty of segregated administration. Especially where massive trades are done concentratedly in short time on the property of which the registration is required on transfer, to require the trustee to complete the actual registration at each time of the trade may cause some inflexibility of the administration of the trust property, and spoil the chance for saving the cost of the registrations. However, the current statute provides rather restraint provisions by which the duty for trust registration cannot be exempted from while free agreements on the concrete way of segregated administration in terms of trust are allowed²⁰.

By the way, we should keep it in mind the “appropriateness” of the execution of the supervising power by the beneficiary has some quite different meaning in practice from what we have implicitly supposed up to there, which is based on the traditional way of understanding. Namely, that the supervising power of beneficiary etc. is appropriately exercised traditionally means for the beneficiary etc. to do the necessary and sufficient watch over the acts of the trustee so as to avoid the risk of unfair administration by the trustee. But practically, the meaning of the “appropriateness” has the restrictive side, namely, to restrict the scope of the trust property over which the beneficiary has the supervising power so as to prevent the beneficiary from drawing information on the trust property belonging to other trusts or the private property of the trustee.

In sum, the existence of the duty of segregated administration has the function to make clear for a beneficiary the scope of the trust property over which a beneficiary has the supervising power, as well as the function on behalf of a trustee to guard the private property of the trustee or the trust property in other trust relationships from an abuse of the supervising power by a beneficiary. So, it is overhasty to conclude that the prescription of the duty of segregated administration as the duty of trustee

²⁰(Duty to Segregate Property)[excerpt]

Article 34 ① A trustee shall segregate property that belongs to the trust property from property that belongs to the trustee’s own property and that which belongs to the trust property of other trusts by the method specified in each of the following items for the categories of property listed in the respective items; provided, however, that if the terms of trust otherwise provides for the method of segregation, such provisions shall prevail:

...

② Notwithstanding the provisions of the proviso to the preceding paragraph, a trustee shall not be exempted from the duty for trust registration set forth in Article 14 for the property set forth in item 1 of said paragraph.

means simply a restriction on the methods of the administration which may conflict with an efficient handling of the work. If one takes the conditions described above of the beneficiary or a third person into consideration, the provisions of the current statute which restricts the freedom of the terms of trust on certain matters may be seen as reasonable in some degree.

On the other hand, to make clear the scope of the trust property in a trust relationship by the segregated administration may lead to the result that, seeing from the other side, it will become observable from the outside of the trust relationship whether some property is belonging to the trust property. Then, a thought may naturally occur by which even if not all of other legal requirements for public notices are satisfied, where the segregated administration is properly done, it is enough for the public notice of the trust relationship concerning the property segregated in the administration. In fact, in a period under the former statute, responding to the criticism from the practical business that the provisions for the public notice of a trust relationship are somewhat inflexible, such a thought has been legislated as to take the trust administration in segregating the trust property from the trustee's private property as the substitute for the registration of properties for the public notice²¹.

However, that legislation itself was done without enough theoretical considerations and had no practical base to promote an appropriate execution of the supervising power, so that it has been almost neglected at present. But the provision had some theoretical meaning in that it made clear the various aspects the duty of segregated administration of the trust property may have. So, we will discuss this issue later in the section dedicated for the explanation of the institution for the public notice of trust (Chapter 4 Section 6).

(6) The Duty of the Co-Trustees

Where trust property is administered by plural trustees, namely, in the co-trustees case, the duty of the co-trustees can be explained simply in theory. Under the former statute, the general rule was the joint action of all the co-trustees²², and the liability

²¹Trust Business Act amendment in Heisei 10 (1998) Article 10 [excerpt]

① As for the securities a trust corporation holds as the trust property, notwithstanding the provision of Article 3 paragraph ② of the Trust Act, when those securities have been administered in segregation from the securities the trust company holds as the private property, the trust relationship on the former securities may be asserted against a third party.

²²Article 24 of the former statute ① Where there are plural trustees, the trust property is jointly owned by the trustees.

② In the case set forth in the preceding paragraph, unless there is no special provision prescribing otherwise, the performance of the trust affairs shall be done jointly by the co-trustees. Provided, a juristic act done toward one of the co-trustee shall have the effect also over the other co-trustees.

as the result of the action was the joint and several liability of all the co-trustees²³. By contrast, the current statute has adopted the principle of the decision by majority as the standard to determine the act in a co-trustees case and prescribed explicitly the possibility of the division of the duties among individual trustees²⁴. As the result, under the current statute, in the case in which the division of the duties among trustees is prescribed in the terms of trust as well as the case in which an act is determined as of all the trustees by the decision by the majority, it has become necessary to taking the behavior of each trustee into consideration in determining the internal share or range of the joint and several liability on the trustees, so that the rather complicated relations between the obligation covered the trustee's own property and that covered only by the trust property are provided in the current Trust Act²⁵. However, whether under the former statute or the current statute, it is rare at least in commercial trusts that plural trustees jointly administer the trust

²³Article 25 of the former statute When there are plural trustees, an obligation which is taken in the course of the trust administration to the beneficiary shall be borne jointly and severally by the trustees. The same shall be applied to an obligation concerning the disposition of the trust affairs.

²⁴(Method of Trust administration)[excerpt]

Article 80 ① In the case of a trust with two or more trustees, decisions on the trust administration shall be made by the majority of the trustees.

② Notwithstanding the provisions of the preceding paragraph, decisions on an act of preservation may be made by each trustee independently.

③ Where a decision is made on the trust administration pursuant to the provisions of the preceding two paragraphs, each trustee may execute trust affairs based on such decision.

④ Notwithstanding the provisions of the preceding three paragraphs, where terms of trust contains provisions concerning the division of duties among the trustees, each trustee shall make decisions on the trust administration and execute those affairs pursuant to such provisions.

...

²⁵(Assumption of Obligations in Administering Trust Affairs)

Article 83 ① In the case of a trust with two or more trustees, where each trustee has assumed an obligation to a third party in the course of administering trust affairs, these trustees shall be joint and several obligors.

② Notwithstanding the provisions of the preceding paragraph, where terms of trust contain a provision concerning the division of duties among the trustees, when either of these trustees has assumed an obligation to a third party in the course of administering trust affairs pursuant to such provisions, the other trustees shall be liable only by using property that belongs to the trust property to perform the obligation; provided, however, that where the third party knew, at the time of the act causing the assumption of the obligation, that said act was conducted in the course of administering trust affairs and that there were two or more trustees for the trust, and did not know and was not negligent in failing to know that the terms of trust contained provisions concerning the division of duties among the trustees, the other trustee(s) may not duly assert such provisions on the division of duties against the third party.

(Special Rules for Trustee Liability, etc.)

Article 85 ① In the case of a trust with two or more trustees, where two or more trustees have incurred liability under the provisions of Article 40 for an act that they have committed in breach of their duties, these trustees who have committed such an act shall be joint and several obligors.

property. Actually, the duties of trustee are rather finely divided into individual trustees and, in addition, the division of the duties may be periodically revised in the trust with a certain type of trust property. So, it is practically reasonable in some degree that the current provisions prescribes the principle of the decision by majority in contrast to the joint action principle of the former statute.

However, as we mentioned concerning Co-trustees case (Chapter 3 Section 1), there are left some unclear parts even under the current statute concerning whether a concrete trust relationship in which the trust property is managed by plural trustees will be qualified as a “co-trustees” case in the Trust Act. In fact, it is only to the case which is judged as a co-trustees one that the provisions concerning the duties and responsibilities of the co-trustees in the current statute will be applied. So, practically, it is reasonable to take also the possibility of the unintended interpretation by a court into consideration in advance.

For instance, in the case in which the mutual relationship among the “trustees” in a trust is interpreted as being equal to that between “the trustee” and “the actual property administrator(s) who was(were) entrusted the management by the trustee”, there is only one trustee, so the provisions for the co-trustees case are not be applied. In such a case, the trustee is assuming, as a general rule, whole the duty and responsibility from the trust relationship in relation to the beneficiary, while other actual trust property administrators may get charged with the liability claimed directly by the beneficiary depending on the content of the division of the duties and responsibilities of trustee provided in the terms of trust. Since the trust property in such a case is, even though it is practically managed in division, jointly managed in theory, the scope of the information disclosure claim by the beneficiary will be stretched all over the trust property.

On the other hand, in the case in which the trust relationship is interpreted as that a part of the trust property is re-trusted, so the relationship among the plural trustees is interpreted as being equal to that between “the trustee of the original trust” and “the beneficiary of the re-trust”, the sharing of the duties and responsibilities among

② For the purpose of the application of the provisions of Article 40, paragraph ① and Article 41 in the case of a trust with two or more trustees, the term “beneficiary” in these provisions shall be deemed to be replaced with “beneficiary or the other trustee(s).”

③ In the case of a trust with two or more trustees, if any of these trustees is released from liability under the provisions of Article 40 or Article 41 pursuant to the provisions of Article 42, no other trustee may file a claim to hold the person who would have incurred liability under the provisions of Article 40 or Article 41 liable; provided, however, that if the terms of trust otherwise provides, such provisions shall prevail.

④ For the purpose of the application of the provisions of Article 44 in the case of a trust with two or more trustees, the term “beneficiary” in paragraph ① of said Article shall be deemed to be replaced with “beneficiary or the other trustee(s)” and the term “those beneficiaries” shall be deemed to be replaced with “those beneficiaries or the other trustee(s).”

the trustees will become still more complicated. For instance, “the beneficiary” in such a case is exactly “the beneficiary of the original trust relationship” and not “the beneficiary of the re-trust relationship”. “The beneficiary of the re-trust relationship” is “the trust property of the original trust relationship” or “the trustee of the original trust relationship” as the administrator of that property. Therefore, “the beneficiary of the original trust relationship” has no direct trust relationship with “the trustee of the re-trust relationship”, so that the beneficiary cannot exercise the supervising power over “the trustee of the re-trust relationship”. For the subject of the supervising power over “the trustee of the re-trust relationship” is “the beneficiary of the re-trust relationship”, namely, “the trustee of the original trust relationship”. However, “the beneficiary of the original trust relationship” can claim the liability of “the trustee of the original trust relationship” where there has been some failure by “the trustee of the original trust relationship” concerning the way of the settlement of the re-trust relationship or the supervision over the administration in the re-trust relationship. In addition, as for the information disclosure claim, it is on “the trust property of the original trust relationship” but not on “the trust property of the re-trust relationship” that “the beneficiary of the original trust relationship” has the claim as a beneficiary. So, the beneficiary of the original trust relationship cannot request “the trustee of the re-trust relationship” a disclosure of “the information concerning the trust property of the re-trust relationship”. She/He can request “the trustee of the original trust relationship” only “the information about the trust property in the original trust relationship”, which may include the information concerning the losses or gains on the original trust property as the results of the benefits from the re-trust relationship.

Such being the case, as for the contents of the duties and responsibilities of co-trustees, like many other respects in Trust Law, the most part must be left to the interpretation of the concrete terms of trust since the ways of constitution or the purposes of actual trust relationships are various. Therefore, it cannot be avoided that rather complicated considerations may be required in the practical resolution of a dispute in the case in which plural trustees are adopted.

(7) The Effect of the Violation of the Duty of Trustee

As for the effect of the violation of the duty of trustee prescribed in Trust Act or terms of trust, problems may occur practically or theoretically in some respects.

The first question is whether the act which violated the duty of trustee prescribed in Trust Act or terms of trust should be invalid or valid on the face but avoidable. This problem can be fixed by the terms of the provision, but the interpretation of the general principle may vary depending on the ways of thinking concerning the fundamental structure of trust. If one thinks a trustee is the owner of the trust property, since a trustee is a holder of the absolute right on the trust property, a violative act by the trustee against the trust relationship constitutes only a violation

of the obligation of the trustee in relation to the beneficiary, so that the act by the trustee is generally valid in itself unless explicitly prescribed otherwise by Trust Act. Contrary to that, If one thinks that a beneficiary is the substantial owner of the trust property or that trust property is an entity independent of the trust parties, then, since a trustee has been given the power only for doing actions necessary for the administration of the trust property, an act which violated the duty of trustee is invalid as an action out of the authority.

However, this argument is only for theoretical purpose and the discussion reaches only the general rule. Some more complicated arguments will be required for appropriate resolutions of practical problems like in the case where interest of some third party is involved in the violative administration of the trust property or the beneficiary gains some from the violative act, for in which to treat that violative act as simply invalid is not necessarily advantageous for the trust property or the beneficiary. In fact, the provisions concerning the effect of the violative act by the trustee in the current statute prescribes in the case of the violation of the duty of loyalty, for instance, that an act creating conflict of interests is generally void but can be made retroactively valid by an approval of the beneficiary²⁶, and, on the other hand, that the act for the interest of the trustee or a third party can be considered as conducted in the interest of the trust property²⁷. As we can see from those provisions, the act in violation of a duty of trustee is not prescribed as simply void. We should note that, among the various problems concerning the effect of the act in violation of a duty of trustee, especially in the problem of the validness of that act, concrete results of the act are taken together into consideration to some degree, so that the solution is not simply deduced from the application of a general theory.

The second problem is how to restore or compensate the loss or the damages on the trust property where the trust property or the beneficiary got damaged or the trust property suffered a loss by an act of the trustee in violation of a duty of trustee. It means what exceptional means the Trust Act explicitly provides to the principle of the monetary compensation for damages in Civil Code (see Civil Code Article 417 and Article 772 paragraph 2).

²⁶(Restriction on Acts that Create Conflicts of Interest)[excerpt]
Article 31

...

④ Where the act set forth in paragraph ①, item 1 or item 2 is carried out in violation of the provisions of paragraph ① or paragraph ②, such act shall be void.

⑤ The act set forth in the preceding paragraph shall become effective retroactively as of the time of the act, if it is ratified by the beneficiary.

²⁷Article 32 [excerpt]

...

④ Where a trustee has carried out an act prescribed in paragraph ① in violation of the provisions of paragraph ① and paragraph ②, the beneficiary may deem that said act has been conducted in the interests of the trust property; provided, however, that this may not harm rights of any third party.

The aim that Civil Code provides the monetary compensation principle for damages is to simplify the method for claiming a liability and to make use of the universal currency of money in modern economic society. That general principle will be applied to a trust relationship, too, since a trust relationship is one of juristic relationship. So, where the trust property or the beneficiary got damaged or the trust property partly or wholly suffered a loss by an act of the trustee in violation of a duty of trustee, the amount of the damages or losses should be evaluated in terms of money so as to have the trustee compensate for it in principle.

However, the most important ground of a trust relationship is not in the pursuit of personal interests of the trust parties but in the accomplishment of the purpose of the trust. So, if a trust relationship has been settled for pursuing commercial profits, to evaluate all the damages or losses in terms of money will not inconsistent with the purpose. But the existence and maintenance of a certain trust property is indispensable for the attainment of the purpose of the trust in many cases, in which the lack of the certain trust property leads immediately to the termination of the trust relationship because of the impossibility of the accomplishment of the purpose of the trust. If one stands on the position that a trust relationship which has been established once should be maintained as far as possible, where the lack of some trust property causes the termination of the trust relationship, it is clearly more reasonable to claim for the restoration of the property than to demand the compensation with money. In addition, when there is some method to injunct the act in violation of the duty by the trustee in advance so as to avoid the termination of a trust relationship because of the lack of a certain trust property, to make use of such a method will be surely useful for the continuation of the trust relationship, namely, for an attainment of the purpose of the trust.

Trust Act, both in the former and the current statutes, has the provision which explicitly prescribes that a demand for the restoration of the state of the trust property from the trustee is allowed where some loss or some change to the trust property occurred²⁸. In addition, as for an injunction claim in the situation in which there is

²⁸Article 27 of the formal statute When a trustee caused any loss to the trust property due to any failure of the administration, or when a trustee disposed of a trust property against the purpose of the trust, the settlor or the successor, the beneficiary or other trustee(s) may demand the compensation of the damages or the restoration of the trust property from the trustee.

(Trustee Liability to Compensate for Losses, etc.)[excerpt]

Article 40 ① When any of the cases listed in the following items has occurred due to the trustee's breach of the duties, the beneficiary may demand that the trustee take the measures specified in the respective items; provided, however, that this shall not apply to the measures specified in item 2, if it is extremely difficult to restore the trust property, if the restoration would require excessive expenses, or if there are other special circumstances where it is inappropriate to have the trustee restore the trust property:

1. where any loss to the trust property has occurred: compensation for such loss; and

a fear for the trustee to do an act in breach of the duty while there was no explicit provision for that in the former statute, the current statute has the provisions in which such an injunction is explicitly admitted as the right of the beneficiary²⁹. The existence of those provisions means that the basic policy of Trust Act concerning the restoration from the damages due to the act in breach of a duty by trustee is not only to make up for the economic loss but also to maintain a trust relationship for the attainment of the purpose of the trust. Therefore, although those methods are prescribed as “rights of the beneficiary” in the statute, we should note that those rights should not be exercised, in principle, only for the beneficiary’s personal interests.

4.3 Right of Beneficiary

(1) The Nature of the Right of Beneficiary

A beneficiary has the right to enjoy the benefits from the administration of the trust property. That right is called the “beneficial right”. The theoretical construction concerning the fundamental structure of trust has been historically argued around the problem, how to understand the nature of the beneficial right. So, the way of thinking of the nature of the beneficial right varies depending on the thought concerning the fundamental structure of trust.

If one thinks that the trustee is the owner of the trust property, the beneficiary is never the owner of the trust property but has a claim to demand the trustee for the suitable trust administration to the purpose of the trust so as to enjoy the benefits from the administration of the trust property. So, this thought is usually called the “jus-in-personam theory”. Under the jus-in-personam theory, the beneficial right is a claim against the trustee in person and the ground of the beneficial right is the agreement between the trust parties in which the trustee has assumed that obligation in relation to the settlor or the beneficiary. The jus-in-personam theory was adopted explicitly by the former statute. In addition, the theory is suitable to the appearance of trust relationship in that a trustee holds the title of the trust property and performs

2. where any change to the trust property has occurred: restoration of the trust property.

...

²⁹(Cessation of a Trustee’s Acts At the Demand of the Beneficiary)

Article 44 ① Where a trustee has acted or is likely to act in violation of laws and regulations or the provisions of the terms of trust, if said action is likely to cause substantial harm to the trust property, the beneficiary may demand that the trustee cease said action.

② Where a trustee has acted or is likely to act in violation of the provisions of Article 33, if said action is likely to cause substantial harm to some of the beneficiaries, those beneficiaries may demand that the trustee cease said action.

the most of the powers as the owner of the property in relation to third parties. So, the theory still finds the supporters up to present.

On the other hand, if one thinks that a beneficiary is the substantial owner of the trust property, the beneficial right a beneficiary has is nothing but the substantial ownership on the trust property. So, this thought is usually called the “jus-in-rem theory” since it takes a beneficiary right as a right in rem. But, in order to express the nature of beneficial right clearer, it may be better to call it the “beneficiary-as-the-substantial-owner” theory. Under the beneficiary-as-the-substantial-owner theory, a beneficial right is the entity into which all the rights concerning the trust property are accumulated and the ground of a beneficial right is the existence of the trust relationship itself, which practically means the contract and other juristic acts for the settlement of the trust. The beneficiary-as-the-substantial-owner theory is a theoretical construction which shows straightforwardly the fact that the beneficiary should be able to enjoy the benefits from the administration of the trust property. In addition, this theory can give the fact that the beneficiary has the supervising power over the trustee a clear ground, namely, the substantial ownership of the beneficiary on the trust property. Due to these reasons, considerable numbers of supports can be found for this theory under the current statute as well as under the former statute.

Instead, if one thinks that a trust property is an entity independent of the trust parties, since a trust property never belongs to anyone of the trust parties as its own property, a beneficial right is not the ownership but a right to demand the enjoyment of the benefits coming from the trust property. However, on the other hand, under this theory, the trustee also is never the owner of the trust property, in contrast to the case of the jus-in-personam theory, so the counter party of the demand for the enjoyment of the benefit is the trust property itself as a substantially independent entity. As we can see from the explanation, this theory is constructed by putting on the center not the nature of beneficial right but the independency or the substantial legal subjectivity of the trust property in the meaning that the trust property never belongs to anyone of the trust parties. So, the theory is called the “trust-property-as-a-substantial-legal-subject theory”. Under the trust-property-as-a-substantial-legal-subject theory, no “ownership” exists on the trust property, different from any usual property, but many different rights and duties of the trust parties including the beneficial right have been set by the act of trust. So, the ground of the beneficial right is same as the ground of the existence of the trust relationship, concretely, the act of trust. The trust-property-as-a-substantial-legal-subject theory had some peculiarities under the former statute in that, for instance, it insisted definitions of concepts or the interpretational conclusion which were clearly discrepant from the verbal meanings of the statutory provisions. Moreover, for example, the insistence that there is no ownership on the trust property clearly contradicts the general principle of Civil Code, so this theory was criticized as hard to understand. However, the way of thought that the trust property is not owned by a particular person of the trust parties but

substantially independent existence is in itself suitable to the sense of practical trust business in administering trust properties, so that some deep-rooted supports can be found in the world of practical trust business.

As we have pointed out in many places up to here, the current Trust Act prescribes the definition of trust by abstracting common parts of all the theories concerning the fundamental structure of trust, so that, also as for the various aspects of the problem concerning the rights and duties relations in a trust relationship, it does not stand on any one of the theories. So, in contrast to the former statute which adopted the *jus-in-personam* theory, the current statute will not cause any serious contradiction in provisions with any theoretical stand point concerning the nature of beneficial right. Viewing from the actual practices of trust, there exist all kinds of trust relationships corresponding to the intensions and demands by various trust parties, so that the most suitable interpretation of the nature of beneficial right necessarily varies depending on the purpose of each trust relationship. While to admit various natures of beneficial right may be convenient for the attainments of various trust purposes, it may lead, at the same time, to frequent occurrences of practical interpretational problems concerning the nature of beneficial right.

In sum, although the current statute stands on the neutral position for theoretical definitions of the nature of beneficial right, To take such a position never gets rid of the meaning of the discussion on the nature of beneficial right. Rather, it would augment the significance of the argument on the nature of beneficial right both in theory and practice, for it leads to the co-existence of various kinds of beneficial rights.

(2) Establishment of Beneficial Right

Although the nature of beneficial right can admit, as we mentioned above, of various interpretations, the right is established theoretically as a matter of course associated with that of the trust relationship. The mutual relation between the establishments of a trust relationship and of the beneficial right is explained under the *jus-in-personam* theory that the acceptance of the trust relationship by the trustee establishes the claim of the beneficiary against the trustee, namely, the beneficial right. On the other hand, under the *beneficiary-as-the-substantial-owner* and the *trust-property-as-a-substantial-legal-subject* theories, an establishment of a trust relationship itself modifies the whole ownership structure on the trust property, so that the beneficial right is established as the substantial ownership on the trust property or the right to demand the benefit from the trust property, respectively.

By the way, under the current statute, it is possible to establish a trust relationship without any provisions on the beneficiary by the will of the settler. But a trust relationship of this type is restricted in the period for establishment. In addition, it is required to assign a trust caretaker when created by the method of a will. Moreover, the power of the settlor over the trust property cannot be restricted by the terms of

trust when created by the method of a contract³⁰. Consequently, a trust relationship

³⁰(Requirements for a Trust With No Provisions on the Beneficiary)

Article 258 ① A trust with no provisions on the beneficiary (including provisions on the method for specifying a beneficiary; the same shall apply hereinafter) may be created by the method set forth in Article 3, item 1 or item 2.

② In the case of a trust with no provisions on the beneficiary, provisions on the beneficiary may be established by making a modification to the trust.

③ In the case of a trust with provisions on the beneficiary, such provisions on the beneficiary may not be abolished by making a modification to the trust.

④ When a trust with no provisions on the beneficiary is to be created by the method set forth in Article 3, item 2, provisions to designate a trust caretaker shall be established. In this case, no provisions may be established to restrict the trust caretaker's power to exercise the rights listed in the items of Article 145, paragraph ② (excluding item 6).

⑤ In the case of a trust with no provisions on the beneficiary which was created by the method set forth in Article 3, item 2 and for which there are no provisions for designating a trust caretaker, if there are provisions on the executor, the executor shall appoint a trust caretaker. In this case, when the executor has appointed a trust caretaker, it shall be deemed that the provisions set forth in the first sentence of the preceding paragraph were established in the terms of trust with regard to the appointed trust caretaker.

⑥ In the case of a trust with no provisions on the beneficiary which was created by the method set forth in Article 3, item 2 and for which there are no provisions designating a trust caretaker, if there are no provisions on the executor or if the person designated as the one who is to be the executor does not appoint or is unable to appoint a trust caretaker, the court may appoint a trust caretaker at the petition of an interested party. In this case, when a judicial decision on the appointment of a trust caretaker has been made, it shall be deemed that the provisions set forth in the first sentence of paragraph ④ were established in the terms of trust with regard to the appointed trust caretaker.

⑦ The provisions of Article 123, paragraph ⑥ to paragraph ⑧ shall apply mutatis mutandis to a judicial decision on the petition set forth in the preceding paragraph.

⑧ In the case of a trust with no provisions on the beneficiary which was created by the method set forth in Article 3, item 2, the trust shall terminate where there is a vacancy in the position of trust caretaker and the position has not been filled with a new trust caretaker for one year.

(Duration of a Trust with No Provisions on the Beneficiary)

Article 259 The duration of a trust with no provisions on the beneficiary may not exceed 20 years.

(Settlor's Rights in a Trust with No Provisions on the Beneficiary)

Article 260 ① In the case of a trust with no provisions on the beneficiary which was created by the method set forth in Article 3, item 1, it shall be deemed as having been provided that the settlor (if there are two or more settlors, all settlors) shall have the rights listed in the items of Article 145, paragraph ② (excluding item 6) and that the trustee shall have the duties listed in the items of paragraph ④ of said Article. In this case, such provisions may not be changed by making a modification to the trust.

② In the case of a trust with no provisions on the beneficiary which was created by the method set forth in Article 3, item 2, if it is deemed, pursuant to the provisions of the second sentence of Article 258, paragraph ⑤ or the second sentence of paragraph ⑥ of said Article, that the provisions set forth in the first sentence of paragraph ④ of said Article have been established, it is not allowable to restrict the trust caretaker's power to exercise the rights listed in the items of Article 145, paragraph ② (excluding item 6) by making a modification to the trust.

without any provisions on the beneficiary means practically that in which there is temporarily no person who has the right to enjoy the benefit from the trust property just after the establishment of the trust relationship, so that the supervising power over the administration of the trust property is exercised by the person other than the beneficiary, namely, the trust caretaker or the settlor on behalf of a future beneficiary. Therefore, we can suppose it is still a general rule under the current statute that a beneficial right becomes executable at the same time as the establishment of the trust.

However, as we explained concerning the establishment of a trust, the existence of the trust property is not required at the establishment time of the trust relationship and the actual execution of the beneficial right becomes possible only after the time when an actual beneficiary is specified or selected and a concrete beneficial right belongs to the beneficiary. A beneficiary candidate who is not still assigned as a beneficiary or a person who doesn't satisfy some qualification for a beneficiary shouldn't be allowed to exercise the beneficial right since any person is not a beneficiary until she/he has certainly gotten the status of a beneficiary, even if that person is sure to get the beneficial right in near future (See Chapter 3 Section 2 (3)).

By the way, should a provisional remedy be allowed in order for a to-be beneficiary to secure a beneficial right to be acquired in near future? The answer may depend on the degree of certainty that the to-be beneficiary actually gets the beneficial right. But, seeing from the balance with general expectation interests which associate with a legal position, we conclude that it will be generally not allowed for a person to petition a provisional remedy to secure the benefits which the person expects to enjoy through the beneficial right before the person gets the status of a beneficiary. However, where the trustee or a third party intentionally gives damages to the trust property in order to harm the future benefits, even if the status of the future beneficiary is not a beneficiary yet at the time of the wrongdoing, there seems to be enough room to consider an establishment of torts against the future beneficiary and the claim for compensation of the damages against the trustee or the third party.

The current statute prescribes that where a person has acquired the status of a beneficiary by the establishment of the trust relationship or by satisfying the conditions for being beneficiary prescribed in the terms of trust, the person acquires a beneficial right by operation of law without the need of the manifestation of the will to accept the status by the person³¹. Therefore, a trustee will bear the duties

³¹(Acquisition of Beneficial Interest)

Article 88 ① A person designated by the provisions of terms of trust as one who is to be a beneficiary (including a person designated as an initial beneficiary or as a new beneficiary after a change as a result of the exercise of the right to designate or change beneficiaries as prescribed in paragraph ① of the following Article) shall acquire a beneficial interest by operation of law; provided, however, that if the terms of trust otherwise provides, such provisions shall prevail.

② If a person designated as one who is to be a beneficiary as prescribed in the preceding paragraph does not know that the person has acquired a beneficial interest pursuant to the provisions of said

and responsibilities in the trust relationship to the beneficiary from the time of the establishment of the beneficial right on. However, since the trustee may not know the fact that someone has acquired the status of a beneficiary just at the acquisition time, the liability from the act by the trustee which, in effect, damaged the benefit for the beneficiary should be reasonably restricted where the trustee didn't know the existence of the beneficiary, therefore, of the beneficial right at the time of that act. By the way, the risk of an actual hindrance of the administration actions because the trustee cannot know the existence of the beneficiary or the establishment of the beneficial right will be augmented in the case in which the trust act has provisions not on the beneficiary but on the person who has right to designate beneficiaries. Therefore, the current statute provides the provisions which make the necessary information concerning the procedure for the designation of beneficiaries concentrate on the trustee, so as to repress superfluous disputes on that point³².

The fact that a beneficial right is established by operation of law at the same time as the establishment of the trust relationship has theoretically no relation to the contents of the beneficial right. The concrete contents of individual beneficial rights are determined corresponding to the individual purposes of the trusts, so the powers of the beneficiaries may, of course, vary depending on the purposes of the trusts even if a beneficiary acquires it by operation of law. The concrete content of a beneficial right can be freely defined in the act of trust taking the purpose of the trust into consideration, as a general rule. By the way, the current statute prescribes that certain types of the beneficiary's right cannot be restricted or negated by the terms of trust³³. Most of those types of the right of beneficiary fall under the supervising

paragraph, the trustee shall notify such person to that effect without delay; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

³²(Right to Designate or Change Beneficiaries)

Article 89 ① In the case of a trust with provisions on the persons who have the right to designate or change beneficiaries, the right to designate or change a beneficiary shall be exercised by manifestation of intention to do so to the trustee.

② Notwithstanding the provisions of the preceding paragraph, the right to designate or change a beneficiary may be exercised through a will.

③ Where the right to designate or change beneficiaries is exercised through a will pursuant to the provisions of the preceding paragraph, if the trustee does not know of such exercise, the acquisition of the status of a beneficiary through the exercise of said right may not be duly asserted against such trustee.

④ When the person who was a beneficiary has lost beneficial interest as a result of the exercise of the right to change beneficiaries, the trustee shall notify such person to that effect without delay; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

⑤ The right to designate or change beneficiaries shall not be succeeded to through inheritance; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

⑥ For the purpose of the application of the provisions of paragraph ① in cases where the person who has the right to designate or change beneficiaries is a trustee, the term "trustee" in said paragraph shall be deemed to be replaced with "person who is to be a beneficiary."

³³(Prohibition by Provisions in the Terms of Trust of a Beneficiary's Exercise of Rights)

power of beneficiary over the administration of the trust property, on which we will explain again later.

Article 92 No restrictions may be imposed by the provisions of the terms of trust on the beneficiary's exercise of the following rights:

1. the right to file a petition with the court under the provisions of this Act;
2. the right to call for a definite answer under the provisions of Article 5, paragraph ①;
3. the right to assert an objection under the provisions of Article 23, paragraph ⑤ or paragraph ⑥;
4. the right to demand payment under the provisions of Article 24, paragraph ①;
5. the right to rescind under the provisions of Article 27, paragraph ① or paragraph ② (including cases where these provisions are applied mutatis mutandis pursuant to Article 75, paragraph ④);
6. the right to rescind under the provisions of Article 31, paragraph ⑥ or paragraph ⑦;
7. the right to request a report under the provisions of Article 36;
8. the right to request to inspect or copy materials under the provisions of Article 38, paragraph ① or paragraph ⑥;
9. the right to demand compensation for a loss or restoration of the trust property under the provisions of Article 40;
10. the right to demand compensation for a loss or restoration of the trust property under the provisions of Article 41;
11. the right to demand a cessation under the provisions of Article 44;
12. the right to demand payment under the provisions of Article 45, paragraph ①;
13. the right to demand a cessation under the provisions of Article 59, paragraph ⑤;
14. the right to demand a cessation under the provisions of Article 60, paragraph ③ or paragraph ⑤;
15. the right to demand payment under the provisions of Article 61, paragraph ①;
16. the right to call for a definite answer under the provisions of Article 62, paragraph ②;
17. the right to waive a beneficial interest under the provisions of Article 99, paragraph ①;
18. the beneficiary's right to demand that the trustee acquire the beneficial interest under the provisions of Article 103, paragraph ① or paragraph ②;
19. the right to call for a definite answer under the provisions of Article 131, paragraph ②;
20. the right to call for a definite answer under the provisions of Article 138, paragraph ②;
21. the right to request the delivery of documents or provision of records under the provisions of Article 187, paragraph ①;
22. the right to request to inspect or copy materials under the provision of Article 190, paragraph ②;
23. the right to request that a matter be stated or recorded in the registry under the provisions of Article 198, paragraph ①
24. the right to demand compensation or payment of monies under the provisions of Article 226, paragraph ①;
25. the right to demand compensation or payment of monies under the provisions of Article 228, paragraph ①; and
26. the right to demand compensation for a loss under the provisions of Article 254, paragraph ①.

(3) The Supervising Power of Beneficiary

The right of the beneficiary can be roughly divided into two categories. The one is the concrete interest to enjoy the benefit from the administration of the trust property, which undoubtedly belongs to the beneficiary in person and is generally a property of the beneficiary. Another is the right for the beneficiary's supervision of the administration of the trust property. That "right" of the beneficiary is to be called rather "the power". The supervising power of beneficiary is, seeing from the aim of the trust institution, a juristic means which the Trust law gives a beneficiary in order to have the trustee keep the administration of the trust property suitable to the purpose of the trust, although it has also an intimate relation with the personal interest of the beneficiary concerning the enjoyment of the benefit through the beneficial right. Under the former statute, a settlor as well as beneficiary held its own supervising power, as a general rule. So, there was a room, also theoretically, to interpret that the beneficiary's supervising power could be exercised for the personal interest of the beneficiary, in contrast to that of the settlor. On the other hand, as we will discuss later concerning settlor in Section 4, the current Trust Act cuts off the functionality of settlor from the other trust parties in effect, so that it sets forth as the legislative policy the effect that the power of settlor is greatly reduced. Therefore, the functionality of the supervising power to orient the trust administration to the attainment of the trust purpose, which the former statute intended by giving the power to a settlor, must be generally entrusted to a beneficiary.

As the result, concerning the supervising power of beneficiary over the trustee under the current statute, some new problems which did not exist under the former statute may occur. Should it be allowed for a beneficiary to make use of the supervising power for pursuing her/his own interest? Or should we think that a beneficiary should assume a *de facto* "duty" to exercise the supervising power appropriately for the accomplishment of the purpose of the trust? Further, where the attainment of the purpose of the trust became difficult or impossible or some damages occurred on other beneficiaries or on a third party because of the lack of the appropriate use of the supervising power by a beneficiary, may a beneficiary, jointly with or independently of the trustee, assume a liability of the compensation of the damages to the other beneficiaries or third party?

If one tries to interpret the provisions of the current statute verbally, one will realize that the supervising power of beneficiary is prescribed as a "right" of beneficiary concerning the "duty" of trustee in each relevant provision. Therefore, as far as we view the problem from the fundamental principle concerning "right", a holder of a right should be able to make use of the right for her/his own interest or to refrain from the execution of the right based on her/his own judgement. As for the question whether a right holder may assume a "duty" to make use of her/his own "right", simply to hold the "right" is not enough as the ground of the "duty" to make use of

the “right”, so some further reason will be necessary to ground such a “duty”. If a “duty” of a right holder to make use of the “right” is not admitted, the general rule is that any “liability” will not happen where there is no “duty”. Viewing from these general principles, a beneficiary should be allowed to make use of the right for the sake of her/his own interest and, since the supervising power is a “right” a beneficiary holds, the execution of the power is not a “duty” of the beneficiary, so that even if for the beneficiary not to exercise appropriately the power causes some damages to other beneficiaries or third parties, the beneficiary shouldn’t need to assume the liability to compensate for the damages.

However, the argument above are sticking to the provisional wording that a beneficiary has the “right” to the trustee and supposing that a trust relationship will be created aiming only at the personal interest of the beneficiary. In addition, “the interest of the beneficiary” in this meaning represents only actual profits which will be generated by the administration of the trust property and which the beneficiary can get from the trust activity. So, this argument places the part of the enjoyment of the actual profits from the trust property on the center of beneficial right in the trust relationship, so that the supervising power of a beneficiary is looked as a subsidiary right for the security of the actual profits from the trust property.

However, if one is going further in that direction, the one will meet the problem how to explain the provision of the current statute which prohibits the act of trust from restricting the supervising power part of beneficial right. As we have seen above, what kind of the benefits a beneficiary can enjoy with the beneficial right is freely determined in the terms of trust with taking the purpose of the trust into consideration, as a general rule. So, a supervising power which is only a subsidiary means for that should be, of course, able to be determined freely by an agreement between trust parties with considering the relation to concrete contents of the benefits a beneficiary could enjoy. But then, why the statutory provisions restricts the freedom of the terms of trust to determine the content of the supervising power of beneficiary which is merely a subsidiary means while a free agreement between the parties is allowed on the essential body of beneficial right, namely, the content of the benefit a beneficiary can enjoy? To give a reasonable explanation for that, we should admit that the supervising power of beneficiary is intended to protect something which shouldn’t be changed by an agreement between the trust parties. So, a thought that the supervising power of beneficiary is a subsidiary means for the enjoyment of the benefit by a beneficiary because a trust relationship exists for the personal interest of the beneficiary comes up against a difficult problem to explain the statutory provisions in relation to the supposition that a beneficiary should be able to freely dispose of its own interest.

Instead, if one thinks that the reason of the existence of a trust relationship is in the administration of the trust property being bound with the purpose, which is the fundamental thought of this book, it is relatively easy to give a reasonable explanation

for the supervising power of beneficiary. The supervising power of beneficiary has theoretically a quite different nature from that of the benefitting part of a beneficial right. It is the actual means for a beneficiary to keep the administration of the trust property appropriate in accordance with the purpose of the trust, so that it is a means not for the personal interest of a beneficiary but for the accomplishment of the purpose of the trust. As we have seen, since the current statute, in contrast to the former statute, has diluted the significance of the existence of a settlor who had held the supervising power over the trustee without enjoying the benefit from the trust property, it is none but a beneficiary that the current statute expected to exercise the supervising power over the trustee's actions in order to attain the purpose of the trust.

Therefore, a beneficiary should make use of the supervising power not as the "right" to seek for the personal interests but, in effect, as a kind of "duty" for the attainment of the purpose of the trust. Viewing from this stand point, where the purpose of a trust became difficult or impossible to attain because the beneficiary didn't exercise appropriately the supervising power, the beneficiary should assume the "liability" to the result since the beneficiary neglected the "duty" to make use of the supervising power appropriately. Moreover, where such a negligence by a beneficiary causes damages to other beneficiaries, the trust property or third parties, the beneficiary should compensate for the damages. According to this thought, while the benefitting part of a beneficial right which intends to the personal interest of the beneficiary can be freely changed by an agreement as a property of the beneficiary, the supervising power over the trustee cannot be changed by the act of trust since it is a "duty" of the beneficiary for the attainment of the purpose of the trust. So, the intention of the provision of the current statute can be now clearly explained. In addition, we expect that it can give some reasonable standard to resolve problems concerning how to exercise the supervising power where there are plural beneficiaries in a trust relationship, which is difficult to resolve from the stand point which sees the beneficial right as an accumulation of the personal interest of each beneficiary.

(4) Assignment of Right of Beneficiary

A beneficial right is a property that belongs to a beneficiary, so that it can be, as a general rule, freely transferred unless the transfer is prohibited or restricted by the terms of trust. By the way, among the contents of a beneficial right, the supervising power over the trustee is not for the private interest of the beneficiary but is should be taken as a kind of "duty" for the attainment of the trust purpose, as we discussed above. However, the problems of the nature of supervising power and of the transferability of a beneficiary right are logically independent with each other, so, where a beneficial right is transferred, not only the part of the beneficial right which gives the beneficiary the actual profits from the trust property but also

the part which gives the beneficiary the power to supervise the actions of the trustee will be transferred to the transferee, and the transferor has lost all the interests and the power and left from the trust relationship. As for the procedure of the transfer of beneficial right, since the substantive and procedural principles in Civil Code differs between a right in person and a right in rem, the interpretation varies depending on the thought concerning the fundamental structure of trust.

If one thinks like the *jus-in-personam* or the *trust-property-as-a-substantial-legal-subject* theory that a beneficial right is a kind of right in person, the transfer of a beneficial right should obey the procedure for the assignment of a claim and the transfer can be validly done only by the agreement between the transferor and transferee. However, in order to be able to assert the assignment against a third party or the obligator, the requirement for the assertion equal to that of a claim prescribed in Civil Code must be satisfied. If one interprets that the obligator stands for the trustee in the case of trust, a notice to or an acknowledgement by the trustee is required as the requirement for the assertion. If one interprets that the obligator stands for the trust property as an entity, the requirement for the assertion will be still a notice to or an acknowledgement by the trustee, but in this time, as the administrator of the trust property. By the way, under these two theories, the trust property and the beneficial right are mutually independent properties, so to satisfy the requirement of the public notice or the registration of the trust itself on the trust property, on the one hand, and to satisfy the requirement for the assertion of the assignment of the right to other trust parties or third parties, on the other hand, are mutually completely different matters. However, a public notice of the change of beneficiaries by way of the modification of the terms of trust at the opportunity of the registration for the public notice of the trust relationship may satisfy also the requirement for the assertion of the assignment of the beneficial right since it also has the functionality to give a notice of the change of beneficiaries to the trust parties or third parties.

Instead, If one thinks like the *beneficiary-as-the-substantial-owner* theory that a beneficial right is the substantial ownership or some right in rem on the trust property, the transfer of a beneficial right takes effect by the manifestation of the intention of the transferor to transfer the right in rem, as a general rule. Under this thought, the public notice of the fact that a property belongs to a trust property and that of the beneficial right which is the substantial ownership or, anyway, a property right on the trust property are essentially unified to express that right to the trust parties or third parties. So, as the requirement for the assertion of the assignment of a beneficial right, it is necessary to express clearly the change of the beneficiary in the public notice of the trust relationship and which will be enough. Actually, if the trust property concerning the transfer of the beneficial right is a property to be registered, the terms of trust which should be attached to the file for the registration should be replaced so as to express the assignment of the beneficial right. When there is no registration system for the trust property, the existence of the ownership or the

property right should be confirmed in the position of the trustee who administers that trust property, namely, the notification to or the acknowledgement by the trustee as the administrator of the trust property will be required for the assertion of the change of the beneficiary.

Under the former statute, there was no provision concerning transfer of a beneficial right. Theoretically, since a beneficial right is a kind of a property right in the broad sense, the common opinion thought that the transfer of a beneficial right itself was possible unless it was prohibited or restricted by the terms of trust etc. However, there were not detailed discussions on the concrete procedure for the transfer. As we described above, the actual procedure or the requirement for assertion may be thought differently depending on the theory concerning the fundamental structure of trust. But, in practice under the former statute, the terms of trust usually had provisions which prescribed that the procedure of the transfer of a beneficial right follows that for the assignment of claim and the trustee's approval is generally required for a transfer of a beneficiary right. For the former statute adopted the jus-in-personam theory and it was necessary to concentrate the information concerning the trust property at the trustee.

By contrast, the current statute explicitly prescribes that a beneficial right is generally assignable to another person³⁴ and that the requirement for assertion of the assignment of a beneficial right is the notification to or the acknowledgement of the trustee³⁵. These provisions are basically following the method of the assignment of the nominative claim. So, since the trustee's acknowledgement of the assignment of a beneficial right is a mere condition for assertion of the assignment of the beneficial right³⁶, the assignment of a beneficial right would be validly established only by the agreement between the assigner and assignee without the trustee's acknowledgement.

By the way, the current statute provides detailed provisions for the pledge of a

³⁴(Assignability of Beneficial Interest)

Article 93 ① A beneficiary may assign a beneficial interest to another; provided, however, that this shall not apply if the nature thereof does not permit assignment.

② The provisions of the preceding paragraph shall not apply if the terms of trust otherwise provide; provided, however, that such provisions of the terms of trust may not be duly asserted against a third party who has no knowledge of such provisions.

³⁵(Requirements for Perfection of the Assignment of Beneficial Interest)

Article 94 ① The assignment of a beneficial interest may not be duly asserted against a trustee or any other third party unless the assignor gives notice of the assignment to the trustee or the trustee acknowledges the same.

② The notice and acknowledgement set forth in the preceding paragraph may not be duly asserted against a third party other than a trustee unless they are made by means of an instrument bearing a certified date.

³⁶(Trustee's Defense Upon the Assignment of a Beneficial Interest)

Article 95 A trustee may duly assert as a defense against the assignor any grounds that have arisen in relation to the assignor before the notice or acknowledgment set forth in paragraph ① of the preceding Article is made.

beneficial right and its effects³⁷. But, since a beneficial right is generally transferable, it may be also an object of a mortgage, so that it may take in some different effects from a pledge which is prescribed in the Trust Act, which we should note, too.

(5) Right of Co-Beneficiary

Also in the case in which there are plural beneficiaries, all described above concerning the nature of beneficial right should be valid as they are. The basic content of beneficial right is defined in the terms of trust in relation to the purpose of the trust. And the interpretation of the nature of beneficial right varies considerably depending on the way of thought concerning the fundamental structure of trust. In addition, a beneficial right contains the supervising power over the trustee as well as the interest to benefit from the trust property. The supervising power should be made use of not for the personal interest of the beneficiary but for the attainment of the purpose of the trust. A beneficial right can be transferred as a general rule.

³⁷(Pledges of Beneficial Interest)

Article 96 ① A beneficiary may create a pledge on a beneficial interest; provided, however, that this shall not apply if the nature thereof does not permit such a pledge.

② The provisions of the preceding paragraph shall not apply if the terms of trust otherwise provides for; provided, however, that such provisions of the terms of trust may not be duly asserted against a third party who has no knowledge of such provisions.

(Effect of Pledges of Beneficial Interest)

Article 97 A pledge on a beneficial interest shall exist against the following monies, etc. (meaning monies or other property; hereinafter the same shall apply in this Article and the following Article):

1. monies, etc. that the beneficiary who holds the pledged beneficial interest has received from the trustee as distribution involving the trust property;
2. monies, etc. that the beneficiary who holds the pledged beneficial interest receives by demanding that the trustee acquire the beneficial interest as prescribed in Article 103, paragraph ⑥;
3. monies, etc. that the beneficiary who holds the pledged beneficial interest receives through the consolidation of beneficial interests or splitting of a beneficial interest as a result of a modification of the trust;
4. monies, etc. that the beneficiary who holds the pledged beneficial interest receives through the consolidation or split of trust(s) (meaning consolidation of a trust or split of a trust, the same applies hereinafter); and
5. in addition to what is listed in the preceding items, monies, etc. that the beneficiary who holds the pledged beneficial interest receives in lieu of such beneficial interest.

Article 98 ① A person who has created a pledge on a beneficial interest may receive monies, etc. set forth in the preceding Article (limited to monies) and appropriate them for payment of a claim of the person prior to other creditors.

② Before the claim set forth in the preceding paragraph becomes due, the person who has created the pledge on a beneficial interest may have the trustee deposit an amount equivalent to the monies, etc. prescribed in said paragraph. In this case, a pledge shall exist on such deposited monies.

However, where there are plural beneficiaries, some peculiar problems may also occur. The first problem is how to distribute the benefits from the administration of trust among the beneficiaries. In such a case, we should consider the possibility of the conflict of interests among the beneficiaries as well as between the trustee and the beneficiaries. The second problem is how for the beneficiaries to make use of the supervising power. This problem is more serious in relation to the personal interest of each beneficiary where there are plural beneficiaries since the conflict of interest among beneficiaries may occur.

As for the first problem, since the general rule is that the basic content of a beneficial right is determined in the terms of trust, the content of a beneficial right in the case in which there are plural beneficiaries should still be determined by following the terms of trust. Therefore, for instance, the act of trust may set the priority order among the beneficiaries in the distribution of the gains or losses or prescribe some fixed ratio to divide the gains or losses among the beneficiaries. Then, the problem will be how to do where no standard for the beneficial right is provided in the terms of trust. As a general rule, we should consider all the beneficial rights as equal, so that the gains or the losses should be distributed equally to all the beneficiaries. This conclusion will be supportable whether the nature of a beneficial right is thought as a right in person or as the substantial ownership on the trust property.

On the other hand, as for the second problem, if it is allowed for all the beneficiaries to make use of the supervising powers for the individual personal interests, it is clear that the administration of the trust property may be disordered. Therefore, the principle for execution of the supervising power, which we described above, will be still more appropriate for the case. That is, each co-beneficiary should make use of the supervising power reasonably for the sake of the attainment of the purpose of the trust. Also the provisions concerning the decision of the will of the co-beneficiaries in the current statute³⁸ could be interpreted as based on that principle.

³⁸Article 105 ① In the case of a trust with two or more beneficiaries, the beneficiaries' decisions (excluding decisions on the exercise of the rights listed in the items of Article 92) shall be made with the unanimous consent of all beneficiaries; provided, however, that if the terms of trust otherwise provides, such provisions shall prevail.

② In the case referred to in the proviso to the preceding paragraph, if it is provided in the terms of trust that beneficiaries' decisions shall be made by majority vote at a beneficiaries meeting, the provisions of the following Subsection shall apply; provided, however, that if the terms of trust otherwise provides, such provisions shall prevail.

③ Notwithstanding the provisions of the proviso to paragraph ① or the preceding paragraph, provisions of the terms of trust on the method of making decisions on release from liability under the provisions of Article 42 shall be effective only if they are provisions to the effect that such decisions are to be made by majority vote at a beneficiaries meeting as provided for in the following Subsection.

④ The provisions of the proviso to paragraph ① and the preceding two paragraphs shall not apply to exemptions from liability listed as follows:

1. a total exemption from liability under the provisions of Article 42;

(6) Right of Sequentially Ordered Beneficiaries

In contrast to ordinary co-beneficiaries case in which several beneficiaries enjoy the benefit from the trust property at the same time, in the case of the sequentially ordered beneficiaries, the subsequent beneficiary cannot exercise the right unless the preceding beneficiary's right terminates or lapses. In this case, the problem is from what time on the interest of the subsequent beneficiary will be protected as the right of a "beneficiary". The answer may vary depending on the interpretations of "sequentially ordered beneficiaries".

Suppose that a trust relationship with "sequentially ordered beneficiaries" is intended to be continued for considerably long term and the reason of the sequential ordering of the beneficiaries is because the concrete conditions concerning the benefiting process from the trust property doesn't allow to give plural beneficiaries the benefits at the same time, so that the sequential ordering should be set on the actual benefiting. Where such an interpretation is appropriate, each beneficiary may be restricted on the content of the right to enjoy the benefit from the trust property in actual benefitting phase in order that the enjoyments of the benefits by subsequent beneficiaries are secured to the certain degree. It may fall under an abuse of the beneficial right, for instance, that a beneficiary destroys the trust property with knowing the existence of the subsequent beneficiaries so as to make the subsequent benefitting impossible or that a beneficiary easily gives the approval to the trustee's violative act so as to have the trust property damaged. Such an abuse of the beneficial right may constitute a tort to the subsequent beneficiaries.

Instead, suppose that a trust relationship seems to have sequentially ordered beneficiaries but the ordering is a mere accidental result of the individual trust acts on individual beneficiaries. In such a case, the subsequent beneficiaries could enjoy the benefit from the trust property on the condition that there is left the rest of the trust property after the termination or lapse of the right of the preceding beneficiary. Then, the preceding beneficiary may make use of the beneficial right exclusively for the sake of her/his own interest. Even if the trust relationship has ended up to be terminated due to the execution of the beneficial right by a beneficiary, that beneficiary doesn't need to assume the liability to subsequent beneficiaries. Few provisions concerning sequentially ordered beneficiaries in the current statute seem to be supposing, although not properly, the case of the latter type³⁹.

2. a partial exemption from liability under the provisions of Article 42, item 1 (limited to liability arising in cases where the trustee was willful or grossly negligent in the performance of the duties); and

3. a partial exemption from liability under the provisions of Article 42, item 2.

³⁹(Special Rules for a Trust with Provisions on the Acquisition of Beneficial Interest Upon the Settlor's Death, etc.)

Article 90 ① In the case of the trusts set forth in each of the following items, the settlor under those items shall have the right to change the beneficiaries; provided, however, that if the terms of trust

Of which type an actual trust relationship is will be determined, in effect, through the interpretation of the trust purpose and the terms of trust. Therefore, the principle concerning the right of sequentially ordered beneficiaries will become inevitably indefinable both theoretically and practically. Above all, we should pay a special attention to the risk of the conflict of interests among the trust parties, especially among the beneficiaries.

(7) Right of Future Beneficiary and Holder of Vested Right

“A future beneficiary” has no right to enjoy the benefit from the trust property at present but has the expectative right to enjoy the benefit in the future. This “expectative right to enjoy the benefit in the future” is a present right. Therefore, in the case of the future beneficiary, in contrast to the case of the subsequent beneficiaries described above, the beneficial right has been already established, so the problem left is how actually to protect the interest.

Theoretically the most clear cut resolution will be the thought that a future beneficiary is only restricted on the part of the enjoying the benefit from the trust property, so can already make use of the supervising power over the trustee. However, under this thought, the ground for a future beneficiary to be able to exercise the supervising power over the trustee at the present time will be to promote the accomplishment of the purpose of the trust including the beneficiary’s own benefit in the future but not to protect the personal interest of the beneficiary to enjoy the benefit from the trust property in the future.

On the other hand, a vested right holder, surely, stands on the status on which the enjoyment of some benefit in the future is expected, but the situation is quite different

otherwise provides for, such provisions shall prevail:

1. a trust with provisions that a person designated as one who is to be a beneficiary is to acquire a beneficial interest at the time of the settlor’s death; and

2. a trust with provisions that a beneficiary is to receive distribution involving the trust property at the time of the settlor’s death or thereafter.

② The beneficiary set forth in item 2 of the preceding paragraph shall not have rights as a beneficiary until the settlor under said item dies; provided, however, that if the terms of trust otherwise provides for, such provisions shall prevail.

(Special Rules for Trusts with Provisions on the Acquisition of New Beneficial Interest by Another Party Upon the Beneficiary’s Death)

Article 91 A trust with provisions that upon the beneficiary’s death, the beneficial interest held by said beneficiary shall be extinguished and another person shall acquire a new beneficial interest (including provisions that upon the death of the predecessor beneficiary, another person shall acquire a beneficial interest as the successor beneficiary) shall be effective, in cases where any beneficiary who is alive when 30 years have elapsed since the creation of the trust acquires a beneficial interest pursuant to said provisions, until such beneficiary dies or until the beneficial interest of such beneficiary is extinguished.

from that of a future beneficiary. The content of the right a vested right holder has is “to enjoy the benefit” from the rest, if any, of the trust property after the liquidation process including creditors or other parties concerned on the trust property caused by the termination of the trust. So, there is no relation between this right to enjoy the benefit from the trust property in the future and the accomplishment of the purpose of the trust. Therefore, since a vested right holder never has the status of “beneficiary” in the trust relationship, it could not be allowed for a vested right holder to make use of the supervising power to secure her/his own right to get the benefit in the future from the rest of the trust property after the liquidation.

(8) Right of the Assigner of the Beneficial Right

A beneficial right is generally transferable, as described above, and the content of the right will not be changed before and after the transfer. This conclusion can be naturally deduced from the fact that a beneficial right is assignable as a kind of property of the assigner. However, if one thinks that there may occur some change in the content of a beneficial right before and after the assignment, one should discuss the reason including the right of what content the assignee could get.

Such a thought of the possibility of the change is supposing such a case as the assignee of the beneficial right cannot exercise the right freely enough because of the restrictions on the conditions of the benefit or the supervising power in the terms of trust. Concretely, the ground of the argument is the fact that the range of the contents of the beneficial right which can be restricted in the terms of trust may be different between a self interest trust and a non-self interest trust (See Chapter 2 Section 1). So, the question is how to treat various restrictions on a beneficial right which were prescribed in the terms of trust supposing the self interest trust relationship after the transfer of the beneficial right to a third party. Should the beneficial right assigned to the third party be still kept to be restricted when the trust relationship has become a non self interest one?

However, where the existence of the restrictions on the beneficial right was explained to the assignee by the assigner and the assignee was accepted the conditions, there would be no room for an objection theoretically or practically against the conclusion that the content of the beneficial right will not change before and after the assignment. In addition, even if the assigner didn't explain the restrictions on the beneficial right to the assignee, what the assignee can dispute is only the validity of the assignment. If one insists that the content of the assigned beneficial right should be changed, one should give other ground for it than the insufficient explanation by the assigner.

Therefore, as an explanation for the case in which the content of a beneficial right practically looks like changed before and after the assignment, the content of the beneficial right is actually not changed by the assignment, but only the scope of the

beneficial right that the assignee in person can actually exercise is changed. That is, the assigner of the beneficial right should have assumed some personal restrictions on the scope of the beneficial right that the assigner could exercise through some special agreement with the trustee or trust property. In such a case, the assignee of the beneficial right would not be bound by the assigner's personal restrictions, so that the content of the beneficial right looks broadened by the assignment. Such a way of the explanation would be appropriate from the viewpoint of the stability of the interpretation on the content of a beneficial right.

(9) Right of Beneficiary after the Termination of the Distribution

In a trust relationship whose purpose is to distribute the profits from the administration of the trust property to the beneficiary, it may be a problem what content the a beneficial right has which doesn't include the claim of the repayment from the fund after the completion of all the distributions. In this type of trust, it is not rare that there are great many beneficiaries, and, in addition, the change of the scope of the power of beneficiaries or the policy of the administration of the trust property, which have been determined in the terms of trust with some flexibility in advance, may become actually necessary corresponding to the market condition in rather high probability. So some questions may occur concerning what range of the parties concerned should be treated as "the beneficiaries".

One possible way of thinking of this problem is that since the distribution which has been the purpose of the trust relationship has been terminated, the beneficial right should lapse by the extinction of the object and the beneficiary would leave the trust relationship. This thought takes "the purpose of trust" in the trust relationship restrictively as to provide the beneficiary with the distribution and treat the beneficial right as being terminated by the attainment of the object in relation to the trust relationship since the distribution for the beneficial right, which was the original purpose, is completed. This thought is largely congruent with the common sense in the practical trust business. By the way, a beneficiary who has left the trust relationship loses the power to supervise the administration of the trust property or to give an approve the change of the terms of trust but, on the other hand, is generally released from the responsibility accompanied with the enjoyment of the benefit from the trust property since she/he has been already unrelated to the trust relationship. In this respect, this thought is suitable to the theory which takes a beneficial right as "a right in person" to the trustee or the trust property.

Instead, there is another thought according to which the supervising power part of a beneficial right over the trustee should not lapse only by the fact of the completion of the distribution, so that the beneficiary isn't be left from the trust relationship yet.

This thought takes “the purpose of trust” as concerning whole the administration of the trust property in the trust relationship and insists that a beneficiary for whom the distribution from the trust property was completed should still play the role in order to attain the purpose of the trust. It is a very clear cut argument theoretically from the viewpoint of the proper function of the supervising power a beneficiary has. In addition, under this thought, while the beneficiary for whom the distribution of the profits was completed can still exercise the supervising power over the trustee, the beneficiary may have to assume the responsibility concerning the past benefitting from the trust property or the exercise of the supervising power. In this respect, this thought is suitable to the theory according to which a beneficial right is the substantial ownership on the trust property.

Practically, to prescribe in advance in the terms of trust the status of a beneficiary after the completion of the distribution will be one of effective measures against this problem. But we should note still that the interpretation of “the purpose of the trust” may be various depending on the viewpoint of the interpreter.

4.4 Power of Settlor

(1) Power of Settlor in the Trust Relationship

How to think of the status of the settlor in the trust relationship is, although there is almost no provision concerning that in the current Trust Act, an important problem both theoretically and practically.

There are two representative opinions concerning the status of settlor. The one positions settlor on the status which is the establisher of the trust relationship and forms the purpose of the trust by itself so that it plays the key role for the attainment of the trust purpose. Another positions admits settlor only the status of the establisher of the trust relationship as one of the trust parties and thinks that the attainment of the trust purpose after the establishment of the trust relationship is performed exclusively by the trustee and beneficiary, so that the settlor substantially leaves the trust relationship.

The argument concerning the status of settlor discusses, in sum, the role of a settlor in relation to the accomplishment of the trust purpose after the establishment of the trust relationship, that is concretely, of what range the settlor could exercise the supervising power over the trustee. However one thinks of the nature of beneficial right, since the possibility of the additional exercise of the supervising power by the settlor is another problem than that of the beneficiary, one should consider this problem independently of the beneficial right irrelevant to the theory concerning the fundamental structure of trust to be adopted.

If one takes also the relation between the attainment of trust purpose and the will

of the settlor into consideration, it will become still more complicated to determine the resolution policy. A trust purpose is surely determined by the settlor at the settlement time of the trust relationship, but “the will of the settlor” in the case in which the settlor exercises the supervising power over the trustee after the establishment of the trust relationship and “the purpose of the trust” in the trust relationship are not necessarily congruent even in theory. Moreover, even if one could suppose that it is the settlor who naturally attached the highest importance to the purpose of the trust, “the purpose of the trust” there may be “the purpose of the trust” at the settlement time, so, that may not be able to respond flexibly to the changes of the conditions after the settlement.

Therefore, we should note that even if one thinks that the supervising power over the trustee should be made use of for the sake of the accomplishment of the purpose of the trust, one cannot always easily reach to the conclusion for the question, which of the settlor and the beneficiary is more suitable to exercise that supervising power.

(2) The Status of Settlor in Trust Act

As described above, concerning the status of settlor, the opinions splits depending on the answer to the question, who is suitable for exercising the supervising power in order to attain the trust purpose. So, also in the legislation, the contents of the provisions may greatly vary depending on the fundamental stance of the legislation.

The former Trust Act was giving a settlor rather wide ranged supervising power even after the establishment of the trust⁴⁰ and positioned the settlor a suitable super-

⁴⁰Article 16 of the former statute [excerpt] ...

② A settlor or the successor, beneficiary or trustee may assert an objection to the execution, provisional seizure, provisional disposition or exercise of a security interest, or auction that is being commenced in violation of the provision of the last paragraph.

Article 23 of the former statute [excerpt] ① When, due to the special circumstances that were unforeseeable at the time of an act of trust, the method of trust administration no longer conforms to the interests of the beneficiary, the settlor or the successor, the beneficiary or the trustee can file a petition of a modification of the trust to the court.

Article 27 of the former statute When any loss to the trust property occurred by an inappropriate administration action by the trustee or when the trustee disposed of the trust property in violation of the terms of trust, the settlor or the successor, the beneficiary or the other trustee may claim the compensation of the loss or the restoration of the trust property against that trustee.

Article 40 of the former statute [excerpt] ...

② The settlor or the successor or the beneficiary may make the requests to inspect the documents concerning the trust administration and ask the questions on the actions for the trust administration to a trustee.

Article 47 of the former statute When a trustee violated the duty or performed other serious wrong

vising power holder equal, or, in some cases, superior to the beneficiary. The reason could be explained as follows. The definition of trust relationship in the former put an importance on the assignment of certain property by the settlor to the trustee⁴¹. Since the definition put the focus on the action of the settlor to set up the trust purpose and to settle the trust relationship, it would be theoretically most consistent to make the settlor play the part to act for the sake of the attainment of the purpose of the trust. Additionally, a settlor never gets the benefit from the trust property as far as the trust relationship continues to exist unless the settlor is the beneficiary at the same time. So, a settlor is readily thought to be a suitable supervising power holder in order to attain the trust purpose compared with the beneficiary whose exercise of the supervising power always arouses a suspicion of the pursuit of the personal interest. In fact, if one places the supervising power of settlor like above, it becomes possible to allow a beneficiary to make use of the supervising power for her/his own personal interest. To allow a beneficiary such a way of exercise of the supervising power would lead to the reinforcement of the thought that a beneficial right is the beneficiary's own right or property.

Contrary to that, the current statute has adopted the thought that the status of settlor is only a party to settle a trust relationship, so that it has provisions by which the terms of trust can exclude the settlor from the trust parties after the establishment of that trust relationship⁴². The ground of these provisions can be interpreted

doings, a court may dismiss the trustee at the request of the settlor or the successors or the beneficiary.

⁴¹Article 1 of the former statute Trust in this statute means to do transfer or the other disposition of certain property rights so as to have the other person administer or dispose of the property in accordance with a certain purpose.

⁴²(Settlors' Rights, etc.)

Article 145 ① Terms of trust may provide for a settlor not to have all or part of the rights under the provisions of this Act.

② Terms of trust may provide for the settlor also to have all or part of the following rights:

1. the right to assert an objection under the provisions of Article 23, paragraph ⑤ or paragraph ⑥;
2. the right to rescind under the provisions of Article 27, paragraph ① or paragraph ② (including cases where these provisions are applied mutatis mutandis pursuant to Article 75, paragraph ④);
3. the right to rescind under the provisions of Article 31, paragraph ⑥ or paragraph ⑦;
4. the right under the provisions of Article 32, paragraph ④;
5. the right to request to inspect or copy materials under the provisions of Article 38, paragraph ①;
6. the right to request the disclosure under the provisions of Article 39, paragraph ①;
7. the right to demand compensation for a loss or restoration of the trust property under the provisions of Article 40;
8. the right to demand compensation for a loss or restoration of the trust property under the provisions of Article 41;
9. the right to demand a cessation under the provisions of Article 44;
10. the right to file a petition for the appointment of an inspector under the provisions of Article

as following. The definition of trust in the current statute put an importance on the property administration after the establishment of trust, according to which the trustee assumes the duty to administer the trust property obeying the purpose of trust for the beneficiary⁴³. Inferring practically reasonably from that standpoint, the trust parties who are to play the key part in order to accomplish the trust purpose will be the trustee who actually performs the administration of the trust property and the beneficiary who enjoys the benefit from the administration. However, under this thought, as we have already seen, it is inevitable that the theoretical characteristic of the supervising power of beneficiary becomes considerably complicated. So, we cannot easily judge which is better of the former and current statutes concerning the positioning of the status of settlor.

46, paragraph ①;

11. the right to demand a cessation under the provisions of Article 59, paragraph ⑤;
12. the right to demand a cessation under the provisions of Article 60, paragraph ③ or paragraph ⑤;
13. the right to demand compensation or payment of monies under the provisions of Article 226, paragraph ①;
14. the right to demand compensation or payment of monies under the provisions of Article 228, paragraph ①; and
15. the right to demand compensation for a loss under the provisions of Article 254, paragraph ①.

③ For the purpose of the application of the provisions of Article 24, Article 45 (including cases where applied *mutatis mutandis* pursuant to Article 226, paragraph ⑥, Article 228, paragraph ⑥, and Article 254, paragraph ③), or Article 61 in cases where the provisions of an terms of trust are established as set forth in the preceding paragraph with regard to the rights listed in item 1, item 7 to item 9, or item 11 to item 15 of said paragraph, the term “beneficiary” shall be deemed to be replaced with “settlor or beneficiary.”

④ Terms of trust may provide for a trustee to have the following duties:

1. the duty to notify the settlor of the matters of which the trustee should notify the beneficiary (if there is a trust caretaker at the time in question, the matters of which the trustee should notify the trust caretaker; the same shall apply in the following item) pursuant to the provisions of this Act;
2. the duty to report to the settlor the matters which the trustee should report to the beneficiary pursuant to the provisions of this Act; and
3. the duty to request that the settlor give an approval for the settlement of accounts for which the trustee is to give approval pursuant to the provisions of Article 77, paragraph ① or Article 184, paragraph ①.

⑤ For the purpose of the application of the provisions of paragraph ①, paragraph ② and the preceding paragraph in the case of a trust with two or more settlors, the term “settlor” in these provisions shall be deemed to be replaced with “all or some of the settlors.”

⁴³(Definitions) [excerpt]

Article 2 ① The term “trust” as used in this Act means an arrangement in which a specific person, by employing any of the methods listed in the items of the following Article, administers or disposes of property in accordance with a certain purpose (excluding the purpose of exclusively promoting the person’s own interests; the same shall apply in said Article) and conducts any other acts that are necessary to achieve such purpose.

4.5 Powers of Supervising Authorities

(1) Supervising Power of Courts

The legal position of a court concerning the supervising power over trust relationships has been considerably shifted between the former and the current statutes.

Under the former statute, a court had non only the general supervising power over administration of trust property by a trustee⁴⁴, but also, in some cases, the authority to give a trustee an exemption from the liability from the breach of the duty of loyalty etc., as the substitution of the approval by the beneficiary⁴⁵. In sum, the court had the authority to intercept administration activities of the trust property by the trustee based on its own judgement concerning the concrete situations of the interests on the beneficiary in each trust relationship as the representative on behalf of the beneficiary, as well as the general supervising power over the administration actions by the trustee.

However, typical examples that had been thought as the situation in which a trustee may get the permission of the court as the substitution of the beneficiary's approval were the case non-existence or the lack of the capacity to give the approval of the beneficiary and the case in which the beneficiary unreasonably rejected to give the approval and insists unfairly the liability of the trustee. Viewing from such examples, the role of the court there was rather to help the trustee for securing the legitimate administration in concrete cases so as to protect the trustee's legitimate interest. So, although the court represent the interest of the beneficiary, what essential the court does is nothing but to seek for the best alternative for the attainment of the trust purpose from the stand point of the public interest. In this meaning, the court is not an agent of an of the trust parties but a third party who stands on the public interest view point.

By the way, the supervising power of court exercised from the public interest view point can be seen in may other places like that of family court over the administration of family property or other various family management areas. However, that respect of the role of court has actually not been studied enough. The development of the study in this area is sincerely desired.

By contrast, the current statute dropped the provisions concerning the general supervising power of court over the administration of the trust property by a trustee,

⁴⁴Article 41 of the former statute ① Trust affairs shall be supervised by a court unless the trust relationship is accepted as the commercial business of the trustee.

② The court may, based on the request by parties concerned or on its own authority, inspect the disposition process of the trust affairs, assign the inspector or do the other necessary dispositions.

⁴⁵Article 22 of the former statute [excerpt] ① A trustee shall not, in any name, make a trust property its own property or get some right on a trust property. Provided, where there was some reason which make it inevitable to do the act set forth above, the provision set forth shall not apply to that act by the trustee with the permission of the court to do so.

instead, put the provisions on each problems in which the judgement by a subject other than the trustee may be required, to allow the court, based on the request from the parties concerned, to appoint or dismiss an property administrator or a supervisor over the property administration restrictively to the concrete problem area. The cases in which the current statute allows the court to exercise a direct supervising power concerning the continuation of a trust relationship are really exceptional⁴⁶.

⁴⁶(Appointment of a Trustee by the Court in the Case of a Testamentary Trust) [excerpt]

Article 6 ① Where a trust is created by the method set forth in Article 3, item 2, if the will contains no provision concerning the designation of a trustee or if the person designated as the one who is to be the trustee does not undertake or is unable to undertake the trust, the court may appoint a trustee on the petition of an interested party.

...

(Appointment of an Inspector) [excerpt]

Article 46 ① When there are sufficient grounds to suspect misconduct or material facts in violation of laws and regulations or the provisions of the terms of trust in connection with the trust administration by a trustee, the beneficiary may file a petition with the court for the appointment of an inspector in order to have the inspector investigate the status of the trust administration as well as the status of property that belongs to the trust property and the obligation covered by the trust property.

...

(Resignation of the Trustee) [excerpt]

Article 57 ...

② The trustee may resign from the office as trustee with the permission of the court when there is a compelling reason.

...

(Dismissal of the Trustee) [excerpt]

Article 58 ...

④ When the trustee has caused a substantial detriment to the trust property through a breach of the duties or where there are other material grounds, the court may, upon the petition of a settlor or a beneficiary, dismiss the trustee.

...

Article 62 [excerpt] ① Where a trustee's duty as trustee has been terminated on any of the grounds listed in the items of Article 56, paragraph 1, if the terms of trust contains no provisions concerning a new trustee, or where the person designated by the provisions of the terms of trust as a person who is to be the new trustee does not undertake or is unable to undertake the trust, the settlor and the beneficiary may, based on an agreement between them, appoint a new trustee.

...

④ In the case referred to in paragraph ①, the court may, at the petition of an interested party, appoint a new trustee when it finds it necessary in light of the status of discussions pertaining to the agreement set forth in said paragraph and any other circumstances. ...

(Trust Property Administration Orders) [excerpt]

Article 63 ① Where a trustee's duty as trustee has been terminated on any of the grounds listed in the items of Article 56, paragraph (1), at the petition of an interested party, the court may,

when a new trustee has not yet been appointed and when it finds it to be necessary, make a disposition ordering administration by a trust property administrator (hereinafter referred to as a “trust property administration order” in this Subsection) until a new trustee is appointed.

...

(Appointment of Trust Property Administrators, etc.) [excerpt]

Article 64 ① When the court issues a trust property administration order, it shall appoint a trust property administrator therein.

...

(Trust Property Administrator’s Powers) [excerpt]

Article 66

...

② When there are two or more trust property administrators, they shall act within the scope of their power jointly; provided, however, that with the permission of the court, they may perform their duties severally or divide their duties among themselves.

...

(Ownership, etc. of Trust Property Upon Termination of Trustee’s Duty as Trustee Due to Death of the Trustee) [excerpt]

Article 74 ① When a trustee’ duty as trustee has been terminated on the grounds set forth in Article 56, paragraph ①, item 1, the trust property shall be incorporated as a juridical person.

② In the case prescribed in the preceding paragraph, at the petition of an interested party, the court may, when it finds it to be necessary, make a disposition ordering administration of the trust by an incorporated trust property administrator (hereinafter referred to as an “incorporated trust property administration order” in paragraph ⑥).

...

(Determination of the Price of a Beneficial Interest, etc.) [excerpt]

Article 104 ...

② If no agreement is reached on the determination of the price of the beneficial interest within 30 days from the date of the beneficiary’s demand that the trustee acquire the beneficial interest, the trustee or the beneficiary may file a petition with the court for the determination of the price within 30 days after said 30-day period has elapsed.

...

(Appointment of a Trust Caretaker) [excerpt]

Article 123 ...

④ Where there is no beneficiary at the time in question, if the terms of trust contains no provisions concerning a trust caretaker or if the person designated by the provisions of the terms of trust as the one who is to be the trust caretaker does not accept or is unable to accept the office, the court may appoint a trust caretaker at the petition of an interested party.

...

(Appointment of a Trust Supervisor) [excerpt]

Article 131 ...

④ When there are special circumstances wherein a beneficiary is unable to supervise a trustee appropriately, if the terms of trust contains no provisions concerning a trust supervisor or if the person designated by provisions of the terms of trust as the one who is to be the trust supervisor

does not accept or is unable to accept the office, the court may appoint a trust supervisor at the petition of an interested party.

...

(Judicial Decision Ordering the Modification of a Trust Due to Special Circumstances) [excerpt]
Article 150 ① When, due to the special circumstances that were unforeseeable at the time of an act of trust, the provisions of the terms of trust concerning the method of trust administration no longer conforms to the interests of the beneficiary in light of the purpose of the trust, the status of the trust property, and any other relevant circumstances, the court may order a modification of the trust at the petition of the settlor, the trustee or the beneficiary.

...

(Judicial Decisions Ordering the Termination of a Trust Due to Special Circumstances) [excerpt]
Article 165 ① When it has become clear that, due to the special circumstances that were unforeseeable at the time of the terms of trust, the termination of a trust has come to be in the best interest of the beneficiary in light of the purpose of the trust, the status of the trust property, and any other relevant circumstances, the court may, at the petition of the settlor, the trustee, or the beneficiary, order the termination of the trust.

...

(Judicial Decisions Ordering the Termination of a Trust to Ensure the Public Interest) [excerpt]
Article 166 ① In the following cases, when the court finds the existence of a trust to be unallowable from the perspective of ensuring the public interest, it may, at the petition of the Minister of Justice, the settlor, the beneficiary, a trust creditor, or any other interested party, order the termination of the trust:

1. where the trust was created for an unlawful purpose; or
2. where the trustee has committed an act that goes beyond or abuses the trustee's power as prescribed by laws and regulations or the terms of trust or has committed an act in violation of criminal laws and regulations, and where the trustee continuously or repeatedly commits said act despite having received a written warning from the Minister of Justice.

...

(Temporary Restraining Order on Trust Property) [excerpt]
Article 169 ① Where a petition set forth in Article 166, paragraph ① has been filed, the court may, at the petition of the Minister of Justice, the settlor, the beneficiary, a trust creditor, or any other interested party or on its own authority, render a disposition ordering administration by an administrator (referred to as an "administration order" in the following Article) or may issue any other temporary restraining order that is necessary with regard to the trust property.

...

Article 170 [excerpt] ① When the court issues an administration order, it shall appoint an administrator therein.

② The administrator set forth in the preceding paragraph shall be supervised by the court.

③ The court may order the administrator set forth in paragraph ① to make a report on the status of property that belongs to the trust property and the obligation covered by the trust property, and to settle the administrative accounting thereof.

...

(Appointment of a New Trustee) [excerpt]

In sum, the current statute stands on the negative position in having a court who is not necessarily an expert of property administration judge the problems directly concerning the administration of the trust property by its own responsibility so as to avoid possible perplexities in practical business caused by interceptions of a court.

However, as described above, to give a court the supervising power aimed at promoting the attainment of the trust purpose from the viewpoint of the public interest by making use of the intervention of the judgement by a court as a third party standing on the neutral standpoint. So, this does not necessarily cause a disadvantage to the trust administration in the trust relationship. Moreover, as also described above, in the case in which the administration of family property becomes necessary, although the actual results have been accumulated through the case by case efforts of courts, there are not still enough studies and considerations on the meaning of the supervising power of the court in the respect. We should study the very nature of the role and function of the court in this respect more. By the way, the public interest or the neutral standpoint on which a court exercises the supervising power has the peculiar meaning compared with a governmental supervision over trust relationships, which will be, as we will discuss later, performed from the viewpoint of a governmental policy concerning whole the trading relationships making use of some form of a trust administration or of a trust relationship. Where there is no explicit provision in Trust Act to allow a court to supervise generally over the trustee or to authorize a court to give the permission to an act of the trustee as the substitution for the beneficiary's approval, it is very difficult to insist as an interpretation of the statute that a court should have such authorities.

Such being the case, the supervising power of court which had a certain significance practically and theoretically under the former statute has been made defunct by the

Article 173 ① Where the court has ordered the termination of a trust pursuant to the provisions of Article 166, paragraph ①, it may, at the petition of the Minister of Justice, the settlor, the beneficiary, a trust creditor, or any other interested party or on its own authority, appoint a new trustee for the liquidation of the trust.

...

(Performance of Obligations Pertaining to Conditional Claims, etc.) [excerpt]

Article 180 ① The liquidation trustee may perform obligations pertaining to conditional claims, claims with indefinite durations, or any other unliquidated claims. In this case, the liquidation trustee shall file a petition with the court for the appointment of an appraiser in order to have these claims appraised.

...

(Special Rules on the Duty to Prepare, Report on, and Preserve Books, etc.) [excerpt]

Article 222 ① Notwithstanding the provisions of Article 37 and Article 38, the preparation of books and other documents or electromagnetic records pertaining to a limited liability trust, reporting on their content, and preservation of these materials, as well as the inspection and copying of the same shall be governed by the provisions of the following paragraph to paragraph ③.

provisions in the current Trust Act. It is hard to evaluate such a way of legislation solely positively. Although it is difficult to base the supervising power of court on the provisions of the current Trust Act, serious reconsiderations of the role of courts will become necessary in the future from the viewpoint of the public interest concerning the supervising power over general property administrations including not only trust law but also civil code cases.

(2) Supervising Power of Governmental Authorities

Since the introduction of the concept of Trust into Japanese law, what has been kept at the center of the trust business especially after the enforcement of the former statute is, so called, “commercial trust” in which a financial institution, especially a trust bank assumes the position of trustee and administers the trust property so as to pursue the profits. By that reason, the supervising power of governmental authorities over trustees has the nature of the business regulation on trust in relation to other financial commodities with economically similar purpose to that of commercial trust as a part of financial policy over the various financial organizations in Japan.

There may be theoretically various possible ways of thinking on how the supervising power of governmental entities with such a nature as the national financial policy should be exercised.

If one thinks that the regulations or interventions by governmental authorities to the actions of trustees should be minimal, the supervising power of governmental authorities should be restricted to the really necessary range explicitly prescribed in statutes, such as issuing of the ministerial ordinances, giving permissions or approvals of the business entity or issuing a business improvement order to the business entity who violated some rule or regulation concerning the property administration. Therefore, a governmental authority shouldn't intervene the interpretation or promote certain type of interpretation of concrete trust acts, whose interpretation should be left entrusted to the trust business entity.

Instead, if one evaluate positively the maximum regulations or interventions of governmental authorities into the trust business, a governmental authority should control the interpretational policy of the terms of trust in a trust relationship in which a trust bank administers the trust property by making effective use of the power of the permissions and approvals to the concrete business acts, especially to the production of the new financial commodity, so that the interpretation of the statutory provisions and of the actual rights and duties in trust relationships will be unified through all the trust business carried out by trust banks. On the other hand, under this way of thinking, a legal relationship other than a trust relationship will be treated strictly differently from a trust relationship when the business category of the agency is different from a trust bank even if the economic purpose of that legal relationship is quite similar to that of a commercial trust relationship.

The mode of the exercises of the supervising power of governmental authorities naturally reflects the general tendency of the financial policy of the country. In Japan, the regulations and interventions of the governmental authorities to the trust business had been massive up to recent. But, at present, the tendency is changed toward the direction that the interpretation of the terms of trust or the statutory provisions are basically entrusted to the voluntary judgement of the business entities. This tendency means, on the one hand, that the possibility of creative activities based on the voluntary judgement is secured for the trust banks or other trust business entities and, on the other hand, that the responsibilities associated with voluntary judgements may be held by the trust business entities when some dispute about the property administration has occurred. So, the times are flowing toward the direction in which the “true ability” as a business entity is tried in various meanings.

4.6 Public Notice of Trust Relationship

(1) Theoretical Significance of Public Notice of a Trust Relationship

A “public notice of a trust relationship” means to indicate the fact that certain property belongs to a trust property, by a method with which the trust parties or a third party can objectively recognize the fact. A public notice of a trust relationship can be theoretically divided into two parts, the one which obeys the general principle of the public notice of the right and duty relation on a property and the other which indicates the contents peculiar to trust relationships. Of which, what provides more interpretational problems is, of course, the latter, trust proper part. However, those two parts are often closely related, so we need to be conscious of the dividing point up to which the scope of the general principle of the notice concerning a property right reaches and from which the scope of the trust peculiar problem concerning public notice begins.

By the way, even if we concentrate our attention to the trust peculiar problematic, various ways of thinking are possible based on by what reason one thinks the public notice of a trust relationship is required.

First, one may explain that a public notice of a trust relationship is an institution to notify the distinction between the trust property and the private property of the trustee to a third party like the other party of the trading with the trust property. Since trust property is administered in the name of the trustee, the trustee looks outwardly the owner of the trust property. But, since the trustee assumes the duty to administer the trust property according to the purpose of the trust on behalf of the beneficiary, so that the trustee doesn’t manage the trust property as her/his own property, the economic gains or losses on the trust property belongs to the differ-

ent subject from the outward appearance. Such being the case, viewing from the standpoint of a third party who will enter into the trading relationship with the trust property, some unexpected result may happen because even the range of the responsibility to be caused by the trading may be quite different from the range expected from the outward appearance if the object property of the trading belongs to the trust property. Therefore, as for the trust property, it should be made distinguishable from the private property of the trustee by publicly notifying the fact of the existence of the trust relationship on it.

However, according to this thought, where a third party can recognize from the outward appearance that a property belongs to trust property, the public notice of the trust relationship on it is not necessary. So, for example, where there is some method to indicate explicitly that the property belongs to trust property, even if there are other methods for the public notice like the registration of the trust relationship on the property, it is not always required to register the trust relationship one by one on the trust property. Also as for the content to be publicly notified, if it is publicly recognizable at least that the property is a trust property, since a third party can investigate what contents the trust relationship has, the detailed contents of the terms of trust are theoretically not required to be publicly notified.

Secondly, one may think that the purpose of the public notice of a trust relationship is to let the beneficiary clearly know the range of the trust property to enjoy the benefit from, so as to make the benefitting the trust property and the exercising of the supervising power over the trustee effective. As we have discussed concerning the right or power of beneficiary, the limit of the property on which a beneficiary has the beneficial right and the supervising power is within the trust property. And since the title of the trust property is held by the trustee and the trust property administered by the trustee in the trust relationship, in order for the beneficiary to make use of the beneficial right effectively, it is not enough that the range of the trust property is clear only in relation to the trustee, so the existence of the trust relationship, namely, the existence of the beneficial right on the trust property should be clear to a third party who may enter into trade with the trust property.

According to this thought, a public notice of a trust relationship means nothing but to notify publicly the existence of the beneficial right. So it will be required not only to notify the fact that the property belongs to the trust property, but also to attach the materials with the file of the registration from which the existence and the content of the beneficial right prescribed in the terms of trust could be inferred. Moreover, under this thought, since it is enough as the public notice of the trust relationship for the existence and content of the beneficial right to be notified to general third parties, even if, for instance, the very fact that a trust property belongs to the trust property was not made clear in the public notice, where the beneficiary is indicated as the title holder of the property right and the content of the indication is congruent to that of the beneficial right, it may be possibly considered valid as the

public notice of the trust relationship. However, it is another problem that “a trust relationship” itself can be admitted by interpretation on the property with such an anomalous way of the public notice.

Thirdly, one may think that a public notice of a trust relationship explicitly indicates the scope of the power of the trustee publicly including third parties so as to express internally and externally the legitimate effectuation of the trust relationship. Although a trustee is generally vested the power to administer the trust property, it is not allowed for a trustee to administer the property for her/his own interest, and a trustee should assume the heavy liability including an obligation to restore the original state of the trust property at the failure in the administration. In addition, the act by the trustee which deviates the power may be avoidable by the beneficiary. However, since the contents of the trustee’s power in a trust relationship can be freely prescribed in the terms of the trust, the actual contents of the trustee’s power may become rather complicated. Therefore, not only a trustee but also a third party who is going to trade with the trustee should always pay attention to whether the juristic act is within the power of the trustee so as to secure the transfer of the property right. The institution of public notice of a trust relationship is contributing to the reliability of such a trading relationship.

By the way, under this thought, since a public notice of a trust relationship means, in effect, the public notice concerning the scope of the trustee’s power, it will required not only to publicly notify the fact that the property belongs to the trust property but also to attach the materials including the terms of trust with the file of the registration from which the range of the power given to the trustee could be inferred. In addition, according to this thought, compared with the second thought described above, it is not important to indicate who is the beneficiary in the public notice of the trust relationship, so the contents of the materials to be attached with the file of the registration are different.

The answers for the question, who will be get what convenience from the public notice of a trust are mutually different among these three thoughts described above. But any one of them does not logically contradict with the other two. Therefore, the practically sound institution for the public notice of trust relationships should be planed to satisfy the demands from all the three thoughts. So, what a public notice of a trust relationship should do will be to make clear the range of the trust property, the existence of the beneficial right and its content and the scope of the trustee’s power through the materials attached to the file of the registration from which parties concerned including third parties could make appropriate judgements. The most suitable materials for such an attachment will be, needless to say, the terms of the trust.

By the way, the discussions above are supposing that the trust parties or a third party who is going to be the other party of trading with the trust property can appropriately defend its own interest thanks to the public notice of the trust relationship.

However, there actually exists the case in which some economic profits can be secured substantially more when the existence of the trust relationship is not made publicly clear than when it is made clear, in some special state of interests of the parties. Trust parties have a choice of to do or not to do the public notice of the trust relationship. But the general principles in doing such a choice should be that the trust parties must take also the possible disadvantage by not doing the public notice of the trust relationship together into consideration and accept that. We might say, unfortunately, the methods for public notice concerning the segregated administration of the trust property, which we discuss next, have been legislated without sufficient considerations on that general principle.

(2) Segregated Administration of Trust Property and Public Notice of Trust Relationship

The provision of the former statute required the registration of trust relationship where the trust property was of the type equipped with the registration system or the description of the trust relationship on the the face where the trust property was security⁴⁷. But this provision was strongly criticized from the practical business that it hindered the efficient trading in practice. The practical needs under such a situation led to the occurrence of the opinion that the segregated administration of the trust property may be admitted as the substitute for the public notice.

As we have discussed concerning the trustee's duty of the segregated administration, it should be possible to distinguish a trust property from the trustee's private property or the other trust properties where the trust property is administered in segregation from the other properties. So, among the three thoughts concerning the meaning of the public notice of a trust relationship, at least to the thought that emphasizes the foreseeability of the legal effect by a third party, the segregated administration of the trust property might be thought enough as the public notice in the meaning that the fact that the property belongs to the trust property and the range of the trust property by which the scope of the trustee's power is delimited are made clear. However, as we will discuss in detail below, the opinion at the era of the former statute that the segregated administration could be a substitution for the public notice of the trust relationship which is required by the statutory provision involved too much theoretical and practical difficulties. For, first of all, it did not

⁴⁷Article 3 of the former statute [excerpt]

...

② A trust relationship shall not be duly asserted against third parties unless, as for securities, pursuant to the Cabinet Order, it is described on the face that the security belongs to the trust property, or unless, as for share certificates or bonds, it is annotated on the shareholder registry or on the bond registry respectively that the share certificates or the bonds belong to the trust property.

sufficiently consider the costs and risks of not completing the public notice of a trust relationship which is the requirement for the assertion of the trust relationship on the property. Moreover, it neglected the general principle of the requirement for the assertion of property right which it had been already long since its establishment in Japanese legal system. In addition, it insisted without giving any theoretical ground that the trust relationship should be able to be asserted against a third party irrespective of the good faith or bad faith of the third party with the existence of the trust relationship.

In practical trust business under the former statute, it is usual that the terms of trust excluded the requirement of the inscription of the trust relationship on the face of the security. So it was quite rare that the inscription of the trust relationship was actually done. As the result, there had been actually no detailed investigation into how much it took the cost to register actually the trust relationship on the face of the securities or, on the other hand, to what extent the damages by not completing the statutory required public notice of a trust relationship may spread and, still less, the comparative consideration of the economic advantages and disadvantages of the public notice of a trust relationship. So, the opinion mentioned above was presented without any realistic calculation of the cost of the procedure to inscribe a trust relationship and the foreseeable damages caused by saving the public notice, and simply insisted on the exception of the established principle of the public notice as the requirement for assertion, so as to relief the actual practice that didn't carry out the inscription of a trust relationship on the face of securities etc.. That is, that opinion was dubious from the outset.

Since the Trust Act itself prescribed that the inscription on the face was the requirement for assertion of a trust relationship, the result of not completing the required procedure should have been clear. That is, the existence of the trust relationship on the trust property cannot be duly asserted against third parties whether the third party is in good faith or in bad faith with the trust relationship. The choice to complete or not to complete the procedure for the public notice of the trust relationship is entrusted to the judgement of trust parties. Since the almost only reason in practice for not completing the public notice procedure was "it takes the cost", it should have been a matter of course from the general principle of the requirement for assertion that the trust relationship on the trust property on which the procedure for the public notice of the trust relationship wasn't carried out couldn't be asserted against any third parties.

Although from the side of the opinion that the segregated administration can be a substitution for the public notice some refutations to the quite natural criticism described above were provided, it cannot present any definitive ground for its own insistence. The main refutations were that trust property was a kind of special property which should be qualitatively distinguished from the private property of the trustee so that it from the nature should not belong to the property to support the

trustee's liability, that it should be publicly known that trust banks as professional trustees hold many trust properties, or that, analogically applying the general rule of the supreme court judgement Showa 43 (1968) July 11 MH vol.22 no.7 1462 page in which the take back claim from a consigner was approved on the bankruptcy of the factor, the beneficiary could take back the trust property from the bankruptcy assets of the trustee.

However, if one insists that the trust property is substantially independent from the private property of the trustee, the very fact of the independence should be the ground for the requirement of the public notice of the existence of the trust relationship on the property. Even if it is clear that a trust bank holds considerable amount of trust properties, since such a trust bank holds also considerable amount of the private properties, it is simply illogical to deduce from only the fact that the party is a trust bank that the public notice of the trust relationship on the trust property is unnecessary to distinguish the trust property from the private property of the trust bank, unless the trust bank accepts not holding any private properties. Further, in the the case of the Showa 43 (1968) the supreme court judgement in which the take back claim from a consigner was approved on the bankruptcy of the factor, for the type of the properties consigned it was actually quite difficult to notify publicly the fact of their consignment and, moreover, both parties of the litigation admitted that the properties were consigned from the consigner. Viewing from those facts, the precedent of the supreme court judgement should be deemed as limited to rather special case, so, even though the judgement approved the claim of the taking back of the consigned property by the consigner, one can never reason from the precedent that the established general principle of the public notice of a trust relationship as the requirement for assertion may be opportunistically avoided.

Such being the case, the opinion that the segregated administration of the trust property can be a substitution for the explicit indication of the trust relationship contained serious problems both in the practical motivations and the theoretical ground. In spite of all those, Amendment of Trust Business Act Heisei 10 (1998) provided that the segregated administration by the trustee of the trust property from the private property should have the effect of the explicit indication of the trust relationship under the former Trust Act⁴⁸, although without any effective response to the criticisms from the view point of the general principle of the requirement for assertion described above. Should we say the problem has been solved by the legislation?

However, this amendment of Trust Business Act only required the segregation

⁴⁸Amendment of Trust Business Act Trust Business Act amendment in Heisei 10 (1998) Article 10 [excerpt]

① As for the securities a trust corporation holds as the trust property, notwithstanding the provision of Article 3 paragraph ② of the Trust Act, when those securities have been administered in segregation from the securities the trust company holds as the private property, the trust relationship on the former securities may be asserted against a third party.

between the trust property and the trustee's private property but didn't mention to the segregation among trust properties. Moreover, the provisions didn't any care for the fact that in order for a beneficiary to execute the right of segregation of the trust property from the bankruptcy procedure the beneficiary must prove that the property belongs to the trust property. As the result, those provisions, in effect, might be essentially no use for protecting the interest of the beneficiary but, on the other hand, might help the trustee who neglected the formal procedure to indicate explicitly the trust relationship on the trust property to avoid the duty or the liability caused from the failure of the public notice. Such a result would be really inappropriate from the view point of the equity among the parties concerned and from the view point of the protection of the interest of the beneficiary in case of the bankruptcy of the trustee. Fortunately, under those provisions, there had occurred no case in which a trustee went into bankruptcy and the beneficiary needed to claim the taking back of the trust property from the bankruptcy assets of the trustee based on the provision. So, while the provisions were problematic in themselves, the problems had been left out of considerations.

The opinion that the segregated administration of the trust property lacked any basic consideration on the theoretical ground for the public notice of a trust relationship. For example, to make inferable the existence of a trust relationship from outward, to make the scope of the beneficial right clear or to indicate the legitimacy of the act of the trustee, all these require to make the content of the trust relationship publicly noticeable, as well as the existence itself of the trust relationship. However, in a segregated administration of trust property, the information concerning the trust property is structurally concentrated on the trustee. So, if one intends to make a segregated administration have the functionality of the public notice of the trust relationship, the "information disclosure" to quite wide range including third parties would become necessary. But it will require the change of the principle of the information disclosure concerning trust property according to which the information concerning the trust property is shared only within the trust parties. In this meaning, that opinion had difficulties not only practically but also theoretically as a policy for administration of trust property.

Under the current statute, the provision concerning the public notice of a trust relationship prescribes only that with regard to the property equipped with the registration system for the public notice of the rights on it, the trust relationship on it cannot be duly asserted against a third party unless the trust relationship is registered⁴⁹. As for the other types of property including securities etc., there is no special

⁴⁹(Requirements for Perfection Concerning Property that Belongs to Trust Property)

Article 14 With regard to any property for which the acquisition, loss, and modification of any right may not be duly asserted against a third party unless it is registered, the fact that such property belongs to the trust property may not be duly asserted against a third party unless the fact that the property is under the trust is registered.

provision provided. So, the same opinion we have refuted above will not be insisted anymore. But we should remember that affair as a food of reflection, which symbolically represents the tendency of the trust law area to lack theoretical contemplations.

4.7 Tax on Trust

(1) Tax on Trust Viewed from the Fundamental Structure of Trust

Taxation on a trust relationship is generally based on the substantive legal relation like usual taxations on other legal relationships. But, since the legal theoretical constructions of trust relationship are variously insisted, the interpretational problems may occur in the taxation.

First, when certain property is transferred from the settlor to the trustee at the settlement of a trust relationship or when the settlor declares to make certain property the trust property in the case of the declaration of trust, the income tax by transfer, the consumption tax or other taxations based on a “transfer of a property” may become relevant. The problem is, in effect, whether the settlement of a trust relationship will fall under “the transfer” of the property. The arguments around this problem will be involved including the problems of the fundamental structure of trust, the purpose of trust and the species of the properties actually converted to the trust property.

Second, after the establishment of a trust relationship, the problem is when and to whom belong or are assigned the profits from the administration of the trust property according to the trust purpose. This is a typical and traditional problem of the taxation on the trust relationship. The main issue for interpretation is the relation between the questions, to what degree the trust relationship is independent of the trust parties and whether the taxation on the trust property could be allowed separately from the taxations on the trust parties.

Third, it may become a problem how the nature of the beneficiary as the legal subject should be taken into account in a taxation on the benefits the beneficiary enjoys from the administration of the trust property. This problem is quite difficult to establish some clear standard to solve it. For it includes various complicated and subtle issues like the balance of taxations on one beneficiary between the incomes from the trust administration and the other legal relationship, the balance of taxations on beneficiaries between trust relationships with mutually equal or similar purposes, the possible discrepancy of the interpretational policies between those balance considerations above, whether the beneficiary holds the legal personality, whether it is domestic or foreign etc.,

However, the deepest source of those problems is the fact that there is no uni-

fied theoretical construction of the fundamental structure of trust and actual trust relationships with similar or equal purposes can be created on the supposition of any legal theoretical construction. Then, practically desirable taxation system on a trust relationship should have the consistent standard for various types of trust relationship as well as take the taxation balances among trust relationships with similar purposes or between trust relationships and other profitable legal relationships into consideration. There may be various ways of thinking concerning the taxation system on trust relationships. We will put the possible thoughts in order from the theoretical view point concerning fundamental structure of trust in following.

First of all, if one thinks that a trustee is the owner of the trust property, the taxation on a trust relationship should be calculated on the basis of the attributions of the trustee. So, the profit from the administration of the trust property should be taken generally as the income of the trustee and the tax should be imposed on the trustee. However, since the benefits the beneficiary has gotten according to the terms of trust have been transferred from the trustee to the beneficiary, the income tax with respect to the transferred value will be imposed on the beneficiary and the value will be subtracted from the basis of income tax on the trustee. As for the taxation on the trustee, since it belongs to the cost of the administration of the trust property to the trustee, the trustee can claim the value against the trust property as the reimbursement of the expense for the trust administration, so that the value will be charged to the trust property in the end. The advantage of this way of thought is that since the trustee is the title holder of the trust property, the taxpayer can be clearly fixed. While a beneficiary is liable to pay the tax within the actual benefits the beneficiary has got from the trust administration, the trustee is liable to the tax on the profits which is still reserved in the trust property. In this meaning, the correspondence between the person who actually has the profit under control and the person who should pay the tax on the profit is quite exact in this theory.

However, since this theory takes, first of all, the trustee as the taxpayer, if a trust relationship select as the trustee an entity who could not be a taxpayer, it could made the taxation on the trust administration impossible. Such an entity would not have, in most cases, the capacity or ability to manage the trust property so that it lacks the qualification for the trustee, in effect. But where a person who is not a taxpayer is actually assigned as the trustee formally according to the terms of the trust and the actual administration activities are performed by some other person but not the trustee, then, since the person who actually administer the trust property and the trustee is not a taxpayer, the taxation at the stage of the trust administration loses the target viewing from the stand point of this theory. Then, the taxation on the trust relationship must be concentrated at the stage of the enjoyment of the benefit by the beneficiary. But since a beneficiary can adjust the timing of the exercise of the beneficial right if it is allowed in the terms of trust, a beneficiary may be able to manipulate the timing to set off the benefits against some loss from the

other account so as to substantially avoid the taxation on the income from the trust administration. Anyway, this theory has the apparent weak point in that it cannot prevent the trust parties from so manipulating the terms of trust as to entrust the administrative activity to other party and to allow the adjustment of the timing of the actual benefitting in order to obstruct the taxation at the appropriate timing.

Instead, if one thinks that a beneficiary is the substantial owner of the trust property, as for the profits generated from the administration of the trust property, all are considered to belong to the beneficiary who is the substantial owner of the trust property, so that the tax is imposed on the beneficiary but not on the trustee. In addition, under this theory, the acquisition of the beneficial right by the beneficiary is identified with the acquisition of the additional trust property in the taxation, so that the time of the occurrence of the cause of the taxation is when the beneficial right was acquired. This theory focuses on the point that the economic profits from the trust relationship finally belong to the beneficiary. This thought fundamentally conforms to the sense of equity for the taxation from the economic point of view. Additionally, under this way of thinking, the manipulations of the positioning of the administration power or the timing of the exercise of the beneficial right through the terms of the trust are not effective for avoiding the taxation. In this meaning, the conclusion of this theory has the advantage in the equitability of the taxation in connected with other legal relationships.

However, under this theory, the tax is imposed on the beneficiary at the stage in which the income of the beneficiary is not still realized but abstractly attributed to the administration of the trust property. Then, this theory must be able to explain the effect that the tax is imposed on the beneficiary in advance based on the profits the beneficiary doesn't control or grasp yet. Moreover, where a trust relationship provides the beneficial rights of various types and constitutions so that the legal relationships among beneficiaries are complexed, rather complicated problems may occur under this theory, for instance, which beneficiary would be the actual taxpayer or what part of the profits would be the source of the taxation, etc.. One possible practical solution in such a case may be to impose the tax on each beneficiary according to the ratio in the whole profit from the trust administration which could be categorized and calculated from the concrete contents of individual beneficial rights as the sources of the taxation. However, although depending on the actual contents of the beneficial rights, the total sum of the contents of the beneficial rights may not be equal to "the substantial ownership" of the trust property. To reconstruct the mutually qualitatively different contents of the beneficial rights so as to reduce those to the simple ratio may be quite difficult in some cases. In sum, the problem this theory has is that certain difficulties or confusions may be inevitable where the contents of the beneficial rights are very complexed.

On the other hand, if one thinks that trust property is an independent entity of the trust parties, the taxation with respect to the profits from the administration of

the trust property is imposed on the trust property itself and the trustee in person or the beneficiary has no relation to that taxation. Since the enjoyment of the benefit from the trust property through a beneficial right is an income independent from the profits by the trust administration, the tax with respect to the enjoyment of the benefit as the income of the beneficiary is separately imposed on the beneficiary. The value transferred to the beneficiary through the beneficial right is discounted from the source of the tax on the trust property since the trust property pays it as a necessary cost. This theory separates the profits from the trust administration from the trust parties themselves and the taxation on the beneficiary is based on the actual income of the beneficiary through the beneficial right. In this respect, under this theory, the taxation corresponds to the actual situation of the controls or grasps of the profits, so the conclusion of this theory has the advantage in the equitability of the taxation.

However, since to specify the scope of the trust property which should be the source of taxation is the most important subject for this theory, the very specification may be difficult in some cases. For the scope of the trust property can be freely determined in the terms of trust and the contents or the locations of the properties are also involved in the judgement on the taxability. For example, consider the case in which a part of the trust property is located in a foreign country but the administration action of whole the trust property and the benefitting through the beneficial right are done domestically. It may be certain to be able to impose the tax with respect to the benefitting on the beneficiary. But it may require some complicated considerations to judge in relation to the taxation power in the location country of the trust property whether the taxation with respect to the profits directly from the administration of the trust property may be possible. Even if whole the trust property and all the trust parties are domestically located, where the scope of the trust property is complicatedly determined in the terms of trust, or where the administrative powers and beneficial rights in plural trust relationships are complicatedly intertwined, the distribution relation of the profits from the trust administration may be complicated and the sources of the incomes which should be the tax base may be so dispersed as for the calculation of the tax amount to be difficult. In sum, the problem this theory has is that the adjustment of the scope or the contents of the trust property in terms of trust may cause confusions in the interpretation of the tax base so that some heavy extra works may fall on the shoulders of the tax practitioners.

As we have seen, some kind of interpretational difficulty is always accompanied with taxation on the trust relationship whether one adopts any theory for that. The difficulties in planning the tax system on the trust relationship would be augmented by the requirement of the equitability in relation to the other legal relationship with similar economic purpose to that of trust.

(2) How Should Be the Tax System with Respect to a Trust Relationship at Present and in the Future

The current Japanese tax system on the trust relationship considers a beneficiary as the owner of the trust property and all the gains and losses from the administration of the trust property as the gains and losses of the beneficiary⁵⁰. Therefore, under the current tax system, there is surely no risk of avoiding the taxation by manipulating the content of the power of the trustee or the timing of the exercise of the benefitting right in the terms of trust. But where the terms of trust define the contents of the beneficial right very intricately or where the timings of the payment from the profits through the beneficial right are determined in detail in the terms of trust, how to interpret the provisions in relation to taxation should cause entanglement to the taxation practice.

However, compared with general interpretational problems in Trust law, the taxation problem on a trust relationship has a little different characteristic. In general interpretation problem of the terms of trust, the principle is that the interpretation of the terms should be in accordance with to the expression of the intentions of the trust parties concerning the rights and duties relations since the terms of trust is determined by the free will of the trust parties. While, in the interpretation of terms of trust on the occasion of taxation on the trust relationship, the taxation authority doesn't necessarily strictly bound with the expression of the rights and duties relations the trust parties have settled in the act of trust viewing from the fact that a taxation should be planed from the stand point of the public interest, so that the authority could impose a tax based on the interpretation of the terms of trust corresponding to the economically substantial distribution of the profits.

Anyway, the tax system on the trust relationship should be oriented to the taxation plan to minimize the confusions of the interpretations for the trust parties or for the taxation authority. However, as we have discuss up to here, the clearer the standard or

⁵⁰(Attribution of Assets and Liabilities in Trust Property and Profit and Expenses to Be Attributed to Trust Property) [excerpt]

Article 13 of Income Tax Act ① Beneficiaries of a trust (limited to the beneficiaries who actually have the beneficial right) shall be considered to hold the properties and debts belonging to the trust property of that trust and the profits and costs to be attributed to the trust property shall be considered as the beneficiaries' profits and costs respectively so as to apply the provisions of this Act.

(Attribution of Assets and Liabilities in Trust Property and Profit and Expenses to Be Attributed to Trust Property) [excerpt]

Article 12 of Corporation Tax Act ① Beneficiaries of a trust (limited to the beneficiaries who actually have the beneficial right) shall be considered to hold the properties and debts belonging to the trust property of that trust and the profits and costs to be attributed to the trust property shall be considered as the beneficiaries' profits and costs respectively so as to apply the provisions of this Act.

criteria for the taxation becomes, the easier it becomes to manipulate the contents of the act of trust so that the inequitable taxation tends to occur compared with the other legal relationship with similar economic purpose to that of trust.

However, such a complication of the taxation might be the fate of a trust relationship. For a trust relationship could be seen historically to be developed as a kind of a method of tax evasion. Anyway, taking the inherent difficulties of the taxation on trust relationships into consideration, the current tax system is not bad. While it supposes that the beneficiary basically owns the trust property, it also provides a special treatment for the case in which the actual content of the beneficial right is limited to getting a share of the profits⁵¹. In addition, the current provision considers a future beneficiary who has the power to change the terms of trust as the beneficiary in taxation⁵², and, moreover, treats a certain type of the trust relationship equally

⁵¹(Attribution of Assets and Liabilities in Trust Property and Profit and Expenses to Be Attributed to Trust Property) [excerpt]

Article 13 of Income Tax Act ① Beneficiaries of a trust (limited to the beneficiaries who actually have the beneficial right) shall be considered to hold the assets and debts belonging to the trust property of that trust and the profits and costs to be attributed to the trust property shall be considered as the beneficiaries' profits and costs respectively so as to apply the provisions of this Act. Provided, however, that this shall not apply to the assets and debts or the profits and costs which belong to or are attributed to the trust property of a group investment trust, a retirement pension trust or a trust subject to corporation taxation.

(Attribution of Assets and Liabilities in Trust Property and Profit and Expenses to Be Attributed to Trust Property) [excerpt]

Article 12 of Corporation Tax Act ① Beneficiaries of a trust (limited to the beneficiaries who actually have the beneficial right) shall be considered to hold the assets and debts belonging to the trust property of that trust and the profits and costs to be attributed to the trust property shall be considered as the beneficiaries' profits and costs respectively so as to apply the provisions of this Act. Provided, however, that this shall not apply to the assets and debts or the profits and costs which belong to or are attributed to the trust property of a group investment trust, a retirement pension trust, a trust for specified public interest etc. or a trust subject to corporation taxation.

⁵²(Attribution of Assets and Liabilities in Trust Property and Profit and Expenses to Be Attributed to Trust Property) [excerpt]

Article 13 of Income Tax Act ...

② A person who is actually given the power to change the trust (except for the power to make a trivial change to be prescribed in a Cabinet Order) and prescribed to get the benefit from the trust property (except for a beneficiary) shall be deemed as the beneficiary set forth in the previous paragraph so that the provision of the previous paragraph shall be applied.

(Attribution of Assets and Liabilities in Trust Property and Profit and Expenses to Be Attributed to Trust Property) [excerpt]

Article 12 of Corporate Tax Act ...

② A person who is actually given the power to change the trust (except for the power to make a trivial change to be prescribed in a Cabinet Order) and prescribed to get the benefit from the trust property (except for a beneficiary) shall be deemed as the beneficiary set forth in the previous paragraph so that the provision of the previous paragraph shall be applied.

to a corporation so as to impose the tax on the trustee⁵³. Those provisions can be

⁵³(Definitions)[excerpt]

Article 2 of Income Tax Act ① In this Act, the meanings of the terms listed in following items shall be defined by the provisions of respective items.

...

8-3. Trust subject to corporation taxation A trust for corporate taxation prescribed in Corporate Tax Act (Showa 40 (1965) Act No.34) Article 2 item 29-2 (Definitions)

...

(Application of this Act to Beneficiary of a Trust Subject to Corporation Taxation)

Article 6-2 ① The provisions of this Act (except for the previous Chapter (Tax Liability), Chapter 5 (The Place for Tax Payment) and the Part 6 (Penal Provisions). The same shall be applied to the next Article) shall apply to a trustee of a trust subject to corporate taxation with regarding the persons as deferent persons by trust property, etc. (meaning assets and debts belonging to trust property and profits and costs attributable to such trust property; hereinafter the same applies in this Chapter) of each corporate taxation trust and personal asset, etc. (meaning assets and debts and profits and costs other than trust asset, etc. of a trust subject to corporate taxation; hereinafter the same applies in the next paragraph).

② In the case referred to in the preceding paragraph, the trust assets and the personal assets of each trust subject to corporate taxation shall be deemed to belong to each person regarded different in the previous paragraph.

(Definitions)[excerpt]

Article 2 of Corporate Tax Act In this Act, the meanings of the terms listed in following items shall be defined by the provisions of respective items.

...

29-2. Trust subject to corporate taxation Trust listed in following (except for group investment trust, retirement pension trust prescribed in Article 12 paragraph ④ item 1 (Attribution of asset and debt belonging to trust property and profit and cost to be attributed to trust property) and a trust for specified public interest prescribed in the item 2 of the same paragraph);

(a) A trust with a provision which prescribes the issue of a certificate of beneficial right.

(b) A trust without beneficiary prescribed in Article 12 paragraph ① (including a person to be regarded as the beneficiary prescribed in the paragraph ① pursuant to paragraph ② of the same Article).

(c) A trust (except a trust which is entrusted the assets belonging to a trust property) whose settlor is a corporation (except for a public corporation and a public interest corporation) and which fall under at least one of the following conditions;

(1) All or important part of the business (limited to the matter on which a resolution of the shareholders' meeting of that corporation prescribed in Companies Act (Heisei 17 (2005) Act No. 86) Article 467 paragraph ① (limited to the part concerning the items 1 and 2) (Approvals of Assignment of Business) is required concerning the assignment) of that corporation is entrusted and it was estimated at the time of the effectuation of the trust that the ratio of the share in the beneficial right which the shareholders etc. would get would fall under the case prescribed in Cabinet Order as exceeding fifty hundredths (except the case prescribed in Cabinet Order as that the species of the assets except for money belonging to the trust property are generally equal).

(2) At the time of the effectuation of the trust or when the prescription of the duration (meaning the duration provided in the act of trust. The same shall apply in (2)) has been effectuated (referred to as "the effectuation time etc." in (2)), the corporation or a person prescribed by Cabinet

interpreted as seeking for the theoretical clearness and the practical appropriateness at the same time by setting the theoretically mixed standard. This basic policy can be evaluated positively. If there occur in the future such tax evasions as to be socially evaluated as abusing of trust relationships, some flexible change or new establishment of the tax system should be supported from the stand point of the public interest. However, anyway, struggles in “creativity” between the tax system planners and trust parties will continue, in effect, for ever.

Order as having special relationship with the corporation is the trustee and at the effectuation time etc., the duration period was prescribed to exceed twenty years after the effectuation time etc. (including the case in which neither the corporation nor a person having special relationship with the corporation had been the trustee but after that the corporation or a person having special relationship with the corporation was assigned as the trustee and at the time of the assignment the duration period was to exceed twenty years after the time, but except the case in which it is prescribed by Cabinet Order to need long time for managing or disposing of the trust property because of the nature of the trust property).

(3) At the time of the effectuation of the trust, the corporation or a person having special relationship with the corporation was the trustee and a person having special relationship with the corporation was the beneficiary and it falls under the case which Cabinet Order prescribes is the case in which at that time the ratio of the share of that person having special relationship with the corporation in the benefit could be changed.

(d) An investment trust prescribed in Article 2 paragraph ③ of Act on Investment Trusts and Investment Corporations

(e) A specific purpose trust prescribed in Article 2 paragraph ⑬ (Definition) of Act on Securitization of Assets (Heisei 10 (1998) Act no.105)

(Application of this Act concerning trustee of corporate taxation trust)

Article 4-6 ① The provisions of this Act (except Article 2 item 29-2 (Definitions), Article 4 (Taxpayer) and Article 12 (Assets and debts belonging to trust property and profit and cost attributable to trust property) and Chapter 6 (The place for tax payment) and Book 5 (Penal provisions; hereinafter the same shall apply in this Chapter)) shall apply to a trustee of corporate taxation trust with regarding the persons as deferent persons by trust property, etc. (meaning assets and debts belonging to trust property and profit and cost attributable to such trust property; hereinafter the same applies in this Chapter) of each corporate taxation trust and personal asset, etc. (meaning assets and debts and profits and costs other than trust asset, etc. of a trust subject to corporate taxation; hereinafter the same shall apply in the next paragraph).

② In the case referred to in the previous paragraph, trust asset, etc. and personal asset, etc. of each corporate taxation trust shall belong respectively to each person regarded different in that paragraph.

Chapter 5

Relation between Trust and Third Parties

The administration activities of trust property are rarely completed within the trust parties and usually involve third parties. Therefore, the possibility of some conflict of interests between one of trust parties, especially a beneficiary, and a third party is inevitable and the interpretational problems in such a case of conflict of interests occupy the important part of the trust law problems. In this chapter, at first, we discuss generally the structure of the conflict of interests between trust parties and third parties. Then, we pick up, as typical situations in which such a conflict of interests tends to be serious, the case in which the interests crashes between a beneficiary and a third party because of a disposition of the trust property in breach of trust by the trustee and the case in which a third party claims the liability of the trustee concerning the administration action of the trust property. In the course of the discussion, we will see how the way of the argument is influenced by the theoretical construction concerning the fundamental structure of trust and by the thought on the nature of beneficial right.

5.1 The Status of a Third Party against Trust Relationship

(1) Relationships between Trust Parties and Third Parties

A trustee generally holds the power of administration of the trust property. A settlor or a beneficiary doesn't take part directly in the administration activity of the trust property unless some special provision to allow it is provided in the terms of trust. Therefore, viewing from the stand point of a third party who entered into a trading relationship with a trust property, the other party of the dealing is the trustee and the

beneficiary is behind the scene as one of the trust parties. As far as the administration of the trust property is normally performed, the beneficiary will not stand in any legal relationship with the third party. So, if a legal relation between the beneficiary and a third party is mentioned, it indicates some unusual happening in the administration of the trust property.

As such an unusual happening, two situations can be imagined. The first situation is that the act of disposition of trust property by the trustee violates the trust purpose or exceeds the administration power of the trustee, through which a property that is indispensable for the attainment of the purpose of the trust is assigned to a third party. In such a case, the admissibility of the claim against third party from the beneficiary is the problem. The second situation is that in the course of the trust administration some damages are caused to a third party but the trust property is insufficient to fulfill the claim of the compensation of the damages of the third party. In such a case, the damaged third party may also claim the compensation against the beneficiary who has enjoyed the benefit from the trust property. The problem is whether such a claim by the third party against the beneficiary could be affirmed.

Of those two, as for the first situation, Trust Act provides a standard for interest adjustment of the rights between the beneficiary and the third party. But the interpretation may greatly vary depending on the theoretical construction concerning the fundamental structure of trust or the way of understanding of the nature of the beneficial right. If one theoretically analyzes the standard for interest adjustment between a beneficiary and a third party tracing back to the historical origin of trust institute, one will see the fact that the changes or differences of the conceptual structures of the right or the property, and, moreover, the difference of the role in the legal system in the ages have had subtle influences over the actual content of the standard for the interest adjustment at respective ages. Therefore, it will be unsatisfactory as an investigation only to trace the verbal face of the provisions concerning the standard for the interest adjustment provided in Trust Act. We need further to consider how the interest adjustment standard provided in Trust Act would be theoretically positioned in relation to the various theoretical constructions concerning the fundamental structure of trust.

On the other hand, as for the second situation, there is an opinion insisting that the third party cannot pursue the liability directly against the beneficiary since there is no provision to allow such a claim provided in Trust Act. In fact, since a beneficiary and a third party would not enter into a legal relationship as far as the management of the trust property is appropriately performed, if a third party can duly claim directly against a beneficiary without any provision to allow it, it should be theoretically explainable from the fundamental legal structure of trust. However, as we have discussed in many respects, there are several possible theoretical constructions concerning the fundamental structure of trust, and the provisions in the current statute are designed to avoid any serious inconsistency with any theories. As the result, the

5.1. THE STATUS OF A THIRD PARTY AGAINST TRUST RELATIONSHIP¹⁷⁷

foundational theory to be adopted has, in effect, a great influence on the orientation of the argument concerning the liability of a beneficiary to a third party.

In the interpretation of legal relation between trust parties and third parties, especially concerning the interest adjustment between the beneficiary and a third party, the difference in the theoretical construction concerning the fundamental structure of trust may lead to a significant difference in the conclusion. What is important in order to secure the theoretical legitimacy and practical appropriateness of the standard for that interest adjustment is to be able clearly to explain why a third party who did not take part in the agreement to create the trust relationship should be bound by the trust relationship which stands on the agreement between the trust party.

(2) Clarification of Trust Relationship and Its Relation to Third Party

Another factor which may cause a trouble in the interest adjustment between trust parties and third parties is the situation that the existence of the trust relationship is not clear viewing from the side of third parties. In such a case a third party would believe at first that the other party of the juristic act of the third party is the trustee in person but later she/he realizes the existence of the trust relationship. The problem is how such a change of the recognition of the third party may affect the interest adjustment between that third party and the trust parties, especially, the beneficiary. By the way, where a beneficiary pursues the liability of a third party on the ground of the breach of trust, as referred to above, or where a third party pursues the liability of a beneficiary, the third party usually have a recognition of, if not the fact of the breach, the existence itself of the trust relationship, then the foreseeability of the claim from the side of third parties becomes an important issue.

One opinion takes the subjective foreseeability of the legal relationship from the side of the third party as the fundamental criterion to judge the allowability of the pursuit of the liability. Another takes the objective state of the legal relationship around the parties as the fundamental ground.

If one takes the subjective foreseeability of the legal relationship from the side of the third party as the fundamental criterion to judge the allowability of the pursuit of the liability, then, at the stage where the existence of the trust relationship is unknown by the third party, the third party recognize only the trustee in person as the other party of the dealing, so she/he should also recognize her/his right is secured, after all, only within the trustee's own asset. If so, even if the third party found later that the trust relationship had been established and the beneficiary might be involved in the legal relationship between the trustee and the third party, it may give the third party the security of the claim which exceeds the third party's own expectation that the third party is allowed to pursue the liability of the beneficiary directly. So one

may think it should be inappropriate, as a general rule. Since this way of thinking puts an importance of the actual recognitions of the parties concerned, where, to the contrary, the third party recognized, or believed with reasonable ground in the existence of the trust relationship, one tends to think the insistence of the right by the third party should be affirmed along the recognition of the third party, even if the trust relationship is actually void.

Instead, If one takes the objective state of the legal relationship among the parties, even if a third party did not recognize a part of the her/his own right, since the right itself actually existed, there should be no reason for the wrong recognition of the third party to affect the content of the right. So, since now the third party has gotten to the correct recognition, there should be no problem for the third party to execute its own right, so it should be, of course, allowed for the third party to pursue the liability of any of the trust parties. This thought attaches greater importance to the objective legal relationship than to the recognition of the state by the parties, so where the trust relationship which the third party believed in did, however, not actually exist, on would thought the third party's claim which doesn't follow the actual legal relation should not be allowed, unless it is evaluated violating the good faith rule for the side of the supposed trust parties to insist non-existence of the trust relationship, for example, where the believe of the third party was based on the words of the supposed trust parties.

On the other hand, where such a legal state is not clear for a third party, one may treat the problem as that of the requirement for assertion. Especially where the trust parties are intentionally making the existence of the trust relationship unclear by, for example, not explicitly indicating the trust relationship in administrating the trust property, the trust parties cannot duly assert the trust relationship against a third party who is the other party of the act for the trust administration, and the third party, in turn, can insist the right supposing the existence or non-existence of the trust relationship at the third party's choice. Such a conclusion may be understandable at first sight. However, the requirements for assertion of a trust property the provisions of the current statute explicitly prescribe are concerning only the case where the trust property falls under the type requiring the registration for the assignment of the right on it. So, since there is provided no special requirement for assertion for the trust property of the other type, the case in which the trust relation on the property "cannot be asserted" against third parties should be essentially restricted to the case in which the registration of a trust relationship is not done on a real estate belonging to trust property.

Viewing from the stand point of the court which retrospectively judges on the dispute between parties, it is desirable for a legal relationship generally to be made explicit and clear, of course, not only for a trust relationship. In this meaning, such an opinion makes sense that a court should give a negative evaluation to the behavior of the party who intentionally didn't the true legal relationship explicit. However, the

state of interests among the parties of a legal relationship is not necessarily simple. As for a trust relationship, whether the existence of the trust relationship is made explicit in a juristic action may subtly and complicatedly affect the state of interests between the parties. So, it may be inevitable that there are the cases in which the existence of the trust relationship is not made explicit in the trust administration. Therefore, how to “protect” the interest of third parties as the other parties of the act for trust administration will continue still to be an important problem under any legal system.

5.2 Breach of Trust and Responsibility of a Third Party

(1) Relation between Breach of Trust and a Third Party

Where a trustee acted deviating the power given by the terms of trust or assigned a trust property in breach of trust, there are several possible situations in which the third party may stand who was the other party of the violative act by the trustee. Firstly, it may be the case that the third party didn't know the existence of the trust relationship and was taking the property as the trustee's own property in entering the trading relation which breached the trust. Secondly, it may be the case that the third party knew the existence itself of the trust relationship but entered into a trading relationship with the trust property without realizing that the act by the trustee was in breach of the trust. Thirdly, it may be the case that the third party knew the existence of the trust relationship and the fact that the act by the trustee is in breach of the trust but entered into the trading relationship with the trust property. In addition, it may be an actual problem which category the case where the third party didn't know by gross or any negligence the existence of the trust relationship or the fact of the breach of trust of the act would fall under.

In the first case referred to above, that is, the case in which the third party didn't know the existence itself of the trust relationship, the third party would have been recognized the trustee as the owner of the trust property and believed trading with the trustee in person. Therefore, the first problem concerning the interest adjustment between the beneficiary and the third party in this case will be whether it is possible to force the existence and the effect of the trust relationship on the third party in spite of the content of the recognition of the third party. This problem is close to that of the possibility of a due assertion of the trust property against the third party.

As we have already discussed concerning the public notice of a trust relationship, under the current statute, since the registration of the trust relationship is the requirement for the assertion against third parties, the allowability of the assertion of a trust relationship against a third party is judged by the registration of the trust

relationship whether the third party knew the existence of the trust relationship. On the other hand, concerning properties with no registration system, there is no provision prescribing the requirement for assertion in the current Trust Act. So, the trust relationship may be forceable on a third party only where the third party knew the existence of the trust relationship or where the third party didn't know the trust relationship without any reasonable ground, that is, by light or gross negligence. By the way, in explaining the standard for the interest adjustment, whether one supposes the principle is the general assertibility over everyone of a trust relationship but the case where the third party didn't know the existence of the trust relationship without any negligence is the exception, or one thinks the assertibility of the trust relationship is affirmed against only the third party who knew or didn't know by negligence the existence of the trust relationship will depend on the theory the one adopts concerning the fundamental structure of trust.

In the second case referred to above, that is, the case in which a third party didn't know the fact of the breach of the trust, the issue will be the evaluation of the fact that the third party believed the act by the trustee was within the power of the trustee, namely, whether the third party believed the legitimacy of the act by the trustee by some legitimate reason. However, in the judgement on the legitimacy of the belief of the third party, in contrast to the case of the recognition of the trust relationship itself, since the third party had realized the existence of the trust relationship, the third party could have researched the content of the trustee's power given in the trust relationship. So, where the third party didn't do a sufficient research so that the third party couldn't realize the breach of trust, the third party will be evaluated to have behaved with light or gross negligence. While the third party may be required to investigate the content of the power of the trustee when the existence of the trust property had become clear for the third party, the trustee, in turn, should respond to the question from the third party when the third party required the trustee to confirm the act for trading is within the power of the trustee or compliant to the purpose of the trust.

In the third case referred to above, that is, the case in which a third party knew the fact of the breach of trust of the act by the trustee as well as the existence of the trust relationship, there is no doubt both practically and theoretically in that the effect of the existence of the trust relationship can be forced on the third party. However, in this case, what content of the remedy should be given to the third party based on what theoretical construction may vary in the basic principle depending on the way of thinking concerning the fundamental structure of trust.

As we have explained up to here, the evaluation of the legal position of a third party who was the other party of the trading act in breach of trust by the trustee would vary depending on how is the content of the recognition of the third party concerning the trust relationship and to what degree the third party could and should investigate the existence of the trust property itself, the content of the power of the trustee or the

purpose of the trust. We should consider, further more, the theoretical constructions to give a conclusion to this problem and the content of the remedy the third party could make use of in relation to the thoughts concerning the fundamental structure of trust.

(2) The Fundamental Structure of Trust and Resale Right of Beneficiary

In the interest adjustment between a beneficiary and a third party in the case of the breach of trust by the trustee, a generally appropriate standard may be acquired basically from the judgement on the third party's knowing/not-knowing of the existence of the trust relationship or the fact of the breach of trust by the trustee. Then, the next problem is the theoretical construction for the standard of the interest adjustment. This problem is closely related to the theories of the fundamental structure of trust.

If one thinks that the trustee is the owner of the trust property and that the beneficial right is a right in person against the trustee, since the beneficial right is a right in person but not on the trust property, the person on whom the beneficial right can be forced is, as a general rule, restricted to the trustee. However, the third party who knew the existence of the trust relationship and the fact of the breach of trust of the act by the trustee can be seen as the partner of the trustee in the breach of trust, so that the third party can be legally identified with the trustee. So, the effect of the beneficial right could be extended to the third party.

Under this theory, the remedy for the beneficiary against the breach of trust is basically that the the effect of the beneficial right which is generally limited to the trustee is extended over the third party, so that the third party should assume the duties and responsibilities equal to the trustee concerning the transferred trust property. In sum, under this theory, a third party who knew the fact of the breach of trust by the trustee would enter into a constructive trust relationship with the beneficiary.

However, the duties and responsibilities in this constructive trust relationship are created to correct the effect that a part of trust property was assigned to the third party through the act in breach of trust by the trustee. So the contents of the duty and responsibility of the third party would be not quite the same as that of the trustee since "the purpose of the trust" related with the third party is different from that of the original trust. Therefore, the third party doesn't have, for example, the power to administer the assigned trust property in pursuit of the profit and, on the other hand, does assume the obligation or liability to return the assigned property to the trust property in response to the claim by the beneficiary.

Instead, if one thinks that the beneficiary is the substantial owner of the trust

property so that the beneficial right is the substantial ownership of the trust property, then the effect of a beneficial right as the substantial ownership should affect, as a general rule, the third party who was the other party of the act in breach of trust by the trustee. However, where the third party was confident of the legitimate appearance of the trading act by the trustee and there was a reasonable ground for the third party's not knowing of the trust relationship or the breach of the trust by the trustee, the third party's interest should be protected so that the third party can avoid the effect of the beneficial right. In sum, the standard for the interest adjustment between the beneficiary and the third party under this theory tends to protect the confidence of the third party in the legitimate appearance of trade based on the general effect of the fact that the beneficial right is the substantial ownership of the trust property.

Therefore, under this theory, in the interest adjustment the circumstances around the trustee in acting in breach of trust are not generally taken into consideration and only the situation on the side of the third party is considered to judge whether there was a reasonable ground for the third party to confide in the legitimate appearance of the trade. And, since the question is whether the effect of the beneficial right as the substantial ownership of the trust property is extended to the property assigned to the third party, which is decided by whether the confidence of the third party is worth to be protected, the result of the interest adjustment between the beneficiary and the third party is either that the effect of the beneficial right is affirmed so that the third party loses the ownership of the assigned property or that the interest of the third party is protected so that the effect of the beneficial right was cut off from the property assigned to the third party.

As the actual content of the beneficial right the beneficiary can exercise against the third party, the claim to return the assigned property to the trust property should be generally allowed since the assigned property was judged to be still within the scope of the beneficial right. As the theoretical construction for this case, one may think that the juristic act in breach of trust is rescinded by the beneficiary or that the third party assumes the status of the trustee of the constructive trust the purpose of which is to return the assigned property to the original trust property.

Instead, if one thinks that trust property is a substantial entity independent of the trust parties and that the beneficial right is a right in person against the trust property, the effect of the beneficial right should reach the property assigned to a third party through an act in breach of trust by the trustee since the act in breach of trust violates the scope of the power of the trustee. In addition, the third party also has got the title on the assigned property since the third party was assigned it from the outwardly legitimate title holder of the property. So, the interest adjustment between the beneficiary and the third party is done by weighing the right of the beneficiary against that of the third party so as to judge which should be given the priority to another. The generally acceptable standard for the interest adjustment would be

that the third party's right should be given the priority to the right of the beneficiary where the third party didn't know the existence of the trust relationship and/or the fact of the breach of trust in the act by the trustee and there is some reasonable ground for the third party's not knowing. Otherwise, namely, where the third party knew the existence of the trust relationship and the fact of the breach of trust by the trustee or where third party didn't know them without any legitimate reason, the right of the beneficiary should be given the priority to the right of the third party. In sum, under this theory, in the case in which a trust property was assigned to a third party through an act in breach of trust by the trustee, the third party and the beneficiary acquire the rights on the property at the same time, then the priority relation between those rights would be judged by weighing one right against another.

Therefore, according to this way of thinking, since all the circumstances should be considered in weighing the beneficial right against the third party's right, not only the circumstances on the side of the third party but also those on the side of the beneficiary should be taken into consideration in the interest adjustment between the beneficiary and the third party. An practical result of the interest adjustment may be, not restricted to the conclusion that either the beneficiary or the third party is admitted the whole content of the right, various moderate conclusions, such that a priority relation is set between the rights of the beneficiary and the third party, or that the beneficiary is made assume the obligation to pay some compensation to the third party in exchange for the return of the assigned property to the trust property by the third party, etc.. In sum, this theory supposes as the fundamental view, unlike the other theories described above, not the thought that a "person" like the trust parties or third parties governs a "thing" like trust property but the thought that so and so person has the right against the "property" independent of the parties concerned. In addition, this theory doesn't put the ownership on the center of the argument on the rights of the parties concerning the trust property. As the effect, it can consider some results which would be impossible to deduce from the other theories.

By the way, in this theory, in the case in which the effect of the beneficial right should reach the third party, that is, where the right of the beneficiary should be given the priority to the right of the third party, since the assigned property still belongs to the trust property, the general rule as the solution is to return that property to the trust property. However, as the result of the fine interest adjustment between the beneficiary and the third party, it may become necessary to make the third party administer the assigned property as the trustee of the constructive trust and to make the beneficiary enjoy the benefit from the administration by the third party through the beneficial right. By the way, the constructive trust relationship in this last case is, unlike in the other cases of constructive trust, not necessarily limited for the purpose of the return of the property to the trust property but also for the realization of the priority relation of the rights between the beneficiary and the third party. Therefore, the actual content of the administration power given to the third party as the trustee

of the constructive trust in this case may include the administration of the assigned property for pursuing the profits. There may be the case where the third party is requested to administer the property to gain profits by the beneficiary. As another way of the resolution, it may be practically reasonable in some cases to adjust the priority relation between the rights by taking also the right assigned to the third party as a kind of beneficial right.

(3) Historical Background for the Arguments Concerning the Resale Right of Beneficiary

As we have discussed, the theoretical construction of the fundamental structure of trust and the arguments concerning the standard for the interest adjustment between a beneficiary and a third party in the case of the breach of trust are closely related with each other. Although the results of the interest adjustment are not largely different among the theories, since the ways of the theoretical construction are qualitatively different, we need to understand also the historical background to generates those arguments concerning the standard for interest adjustment between a beneficiary and a third party in order to have some clear view on this problem¹.

The legal system we have been supposing up to here is, including Japanese legal system, what stands on a basically coherent judgement of the values. So, we have not taken into consideration a legal system in which several “justices” in several dimensions socially or even legal theoretically rival each other. Besides, it is true that there is still left an unclear part concerning what is the essence of a “trust relationship”, but there is no theoretical dispute concerning many of the basic concepts like “trust property”, “breach of trust” or “beneficial right” which will constitute the foundation for interpretational arguments. So, although some preparations from the practical view point may be needed to discuss what type of trust relationship should be taken as the most fundamental, historical arguments or theoretical reconsiderations on the fundamental conceptual presuppositions may be not necessarily required in all cases.

However, the state in which interpretational doctrinal discussions are developed without any radical consideration of the presuppositions for the arguments is a quite typical phenomenon for whole the area of Trust Law Studies in Japan including the arguments on the theoretical construction for the fundamental structure of trust as well as the discussions around the standard of the interest adjustment between a beneficiary and a third party in the case of the breach of trust by the trustee. In fact, compared with Trust Laws of England and the Unites States which is the mother law of the Trust Act of Japan, the development of Trust law in Japan is peculiar and ahistorical. For in England the trust institute has historically developed as a case law fundamentally based on the high authority of Equity court but at the age

¹For details of the following discussion, see Hoshino “Theories of Trust”.

of the judicial reform in the nineteenth century the reconstruction and legitimization of the institutes were required, then the theoretical construction including the *jus-in-personam* theory as the representative was proposed. On the other hand, in the United States of America, the fundamental concepts “property” or “right” began to be transformed at the beginning of the twentieth century so that the new theoretical possibilities of the trust theory were pursued, which had, in effect, deviated from that of England. However, in Japan, the arguments concerning the fundamental structure of trust has been, since the import of the concept of trust up to the present, performed over the problem of the consistent positioning of trust into the already-existing contract institute presupposing in essence the uniformity of the Japanese legal system.

Therefore, we can say that the arguments concerning the fundamentals structure of trust in Japan has been targeting on the theoretical construction not to cause theoretical contradiction with the other existing legal institutions, in other words, to make it possible to get to a conclusion which keeps practically appropriate relation with the other legal institutions. Since there has been a fundamental accordance on the theoretical ground for the basic concepts in Japanese trust law and there is no doctrinal opposition concerning the concept of legal “justice”, it may have been suitable to the state of practice in Japan to pursuit practical appropriateness of the resolutions of concrete problems based on the basic concepts or the sense of justice so as to investigate the theoretical construction to give the clearest explanation for the conclusions setting fundamental considerations of the conceptual consistency of the trust theory aside.

However, to consider various theoretical constructions in order to find socially as well as legally appropriate resolutions for actual concrete disputes is one problem, but it is another problem to investigate the theoretical foundation of trust institute up to the reconsiderations of the basic concepts or the structure of the legal system which should constitute the common assumption for all the legal arguments. “Trust” in Japan has been developed from the view point of how to make use of that property administration technology as the main concern of the practical business of trust since its import up to the present. As the result, discussions concerning trust law have been attaching great importance to the concrete conclusions more than in the other areas of legal studies. Still worse, recently to derive a conclusion from theoretical interpretation tends to be slighted, so that there is even an opinion that newly appeared problems could be wholly solved by new legislation, which is becoming influential in Japan. If all of us simply followed this tendency, the theoretical foundation of the interpretation would be blurred so that the interpretation itself might lose its meaning.

To take trust institute as a legal technology for property administration will be reasonable in itself from the view point of the purpose of business enterprises. And it is natural to attach an importance to the concrete conclusion for the question in

practical business. But the use and effect of such a stand point should be carefully examined.

(4) Resale Right of Beneficiary in Trust Act

Trust Act provides, as the resale right of beneficiary, the rescission right of a beneficiary against the juristic act in breach of trust by the trustee². As for the rescission right of beneficiary, there were provisions also in the former statute³. But the current statute have new provisions concerning matters not prescribed in the former statute. That is, the current statute clearly distinguishes as the provisional conditions the

²(Rescission of Acts Conducted by Trustee Beyond the Powers)

Article 27 ① Where an act conducted by a trustee for the trust property does not fall within the scope of the trustee's powers, a beneficiary may rescind such act, if all of the following conditions are met:

1. that the other party to the act knew, at the time of the act, that the act was conducted for the trust property; and

2. that the other party to the act knew or was grossly negligent in failing to know, at the time of the act, that the act did not fall within the scope of the trustee's powers.

② Notwithstanding the provisions of the preceding paragraph, where an act conducted by a trustee to establish or transfer a right for property that belongs to the trust property (limited to such property for which a trust registration as set forth in Article 14 may be made) does not fall within the scope of trustee's powers, a beneficiary may rescind such act, if all of the following conditions are met:

1. that at the time of the act, the trust registration as set forth in Article 14 existed with regard to the property that belongs to the trust property; and

2. that the other party to the act knew or was grossly negligent in failing to know, at the time of the act, that the act did not fall within the scope of the trustee's powers.

③ When any one of the two or more beneficiaries has exercised the right to rescind under the provisions of the preceding two paragraphs, the rescission shall also be effective for other beneficiaries.

④ The right to rescind under the provisions of paragraph ① or paragraph ② shall be extinguished by prescription if it is not exercised within three months from the time when the beneficiary (if there is a trust caretaker at the time in question, the trust caretaker) became aware of the existence of the grounds for rescission. The same shall apply when one year has elapsed from the time of the act.

³Article 31 of the former statute When a trustee disposed of a trust property in breach of trust, a beneficiary may rescind the disposition against the other party of the disposition or the next assignee. Provided that the provision set forth shall apply only when the registration of the trust has been completed or, as for the property on which the registration of trust isn't possible, when the other party of the disposition or the next assignee knew the fact that the disposition violated the purpose of the trust or didn't know that fact by gross negligence.

Article 32 of the former statute Where there are several beneficiaries, a rescission one of them exercised shall have the effect on behalf of the other beneficiaries.

Article 33 of the former statute A rescission right prescribed in Article 31 shall be extinguished by the operation of the prescription if it is not executed within one month from the time when the beneficiary or the trust caretaker realized the existence of the cause of the rescission. The same shall be applied when one year has elapsed from the time of the disposition.

knowing/not-knowing of the existence of the trust relationship from that of the fact of the breach of trust by a third party so as to adjust interests between a beneficiary and a third party.

Where a disposition in breach of trust was rescinded by the beneficiary, the disposition is deemed void *ad initio*, so that the third party whose act was rescinded assumes the liability to return the assigned property to the trust property. By the way, The rescission by the beneficiary of the disposition in breach of trust is interpreted to be done for the correction of the effect of the violative disposition so as to promote the attainment of the trust purpose rather than for the pursuing the personal interest. So, the beneficiary who exercises the rescission right stands on the status substantially to exercise a part of that administration power over the trust property which the trustee originally has in the trust relationship. Therefore, the beneficiary who exercised the rescission right can demand the third party to return the assigned property directly to the beneficiary in person, not necessarily limited to demanding to return it to the trustee.

However, contrary to the obligee's right to demand the rescission in Civil Code, in which the obligee who exercised the rescission right can demand to return the relevant property to the obligee in person, since the beneficiary who are exercising the rescission right is standing on the status equal to the trustee in the trust relationship, the beneficiary should assume also the substantial "duty" to deliver the property returned from the third party to the trust property. So, the beneficiary who exercised the rescission right should not be allowed to enjoy the benefit from the property through the beneficial right actually prior to the other beneficiaries, if any, or to set off the beneficial right against the liability to deliver the property returned from the third party to the trust property.

As we have seen, the current Trust Act provides rather clear provisions concerning the interest adjustment between a beneficiary and a third party in the case of the breach of trust by the trustee. The next problem is in what relation the standard for the interest adjustment prescribed in the current statute and that to be derived from the theoretical construction concerning the fundamental structure of trust are.

First, if one thinks that a trustee is the owner of the trust property, the interest adjustment between a beneficiary and a third party would be based on the judgement whether that third party can be substantially identified with the trustee. The remedy given to the beneficiary would be to admit the constructive trust relationship with the third party so as to have the third party assume the duty as the trustee of the constructive trust to return the assigned property to the trust property. Seeing from this point of view, the rescission right of the beneficiary prescribed in the current statute would make the disposition in breach of trust void so that the third party cannot hold the property any more on behalf of her/himself. The exercise of the rescission right demands the third party to return the assigned property to the trust assets but the legal construction to make the third party administer the assigned

property as the trustee of a constructive trust is not adopted in the current statute. So, the current statute would be interpreted to prescribe the right to rescind the disposition in breach of trust explicitly as one of the theoretically possible remedies.

Second, if one thinks that a beneficiary is the substantial owner of the trust property, in the interest adjustment between a beneficiary and a third party, it is supposed that the disposition in breach of trust is void as the deviation of the power of the trustee and the conclusion is determined by taking the confidence of the third party on the legitimate appearance of the dealing into consideration. The remedy for the beneficiary is, in principle, to demand the third party to return the assigned property based on the substantial ownership of the beneficiary. Seeing from this point of view, the rescission right of the beneficiary prescribed in the current statute would make sure to the parties concerned the invalidness of the disposition so as to indicate the legitimacy of the demand by the beneficiary to return the assigned property. On the other hand, the legal construction to make the third party to administer that property as the trustee of a constructive trust is not adopted in the current statute. So, the current Trust Act would be interpreted to prescribe explicitly only one of theoretically possible remedies, namely, the rescission right of the beneficiary from the stand point of this theory, too.

Third, if one thinks trust property is an independent property from the trust parties, the interest adjustment between a beneficiary and a third party would be done by weighing the rights one against another which the beneficiary and the third party respectively have on the trust property with taking comprehensive circumstances synthetically into consideration so as to determine the priority relation between the rights. Viewing from this perspective, the remedy to be given to the beneficiary would, although it may vary depending on the nature of the third party's right, as a general rule, include all the possible methods to make it possible to restore the enjoyment of the benefit on the property through the beneficial right. So it may include to rescind the disposition so as to demand the third party to return the assigned property to the trust asset, to make the third party administer the assigned property as the trustee of a constructive trust or to demand the third party to compensate for the damages with taking the change of the value of the assigned property into account. Then, the rescission right of the beneficiary prescribed in the current statute is surely one of the allowable remedies for the beneficiary, but how to do with the other remedies which should be naturally given to the beneficiary? However those remedies are difficult to be derived directly from the provisions of the current statute. Therefore, in the end, also under this theory the current Trust Act would be interpreted to prescribe explicitly only one of theoretically possible remedies, namely, the rescission right of the beneficiary.

As being clear from what we saw above, as for the standard for the interest adjustment between a beneficiary and a third party and the remedies for the beneficiary against the disposition in breach of trust, every theory of the fundamental structure

of trust can give several theoretical possibilities, while the current Trust Act explicitly prescribes only one of those several possible remedies, namely, the right to rescind the disposition in breach of trust, but has no explicit provision concerning the other remedies. The provision in the current Trust Act concerning the interest adjustment between a beneficiary and a third party and the remedy given to the beneficiary against the disposition in breach of trust by the trustee would surely not cause a contradiction with any of the theories concerning the fundamental structure of trust but, at the same time, is not completely compliant to any one of the theories. In this meaning, the provisions in the current statute can be said to be keeping the neutral stand point to the theoretical disputes concerning the fundamental structure of trust also in this issue as well as in the issue of the definition of trust we referred to above. Such a theoretically neutral nature of the current statute rejects to give an advantage to any of those theoretical constructions, although this issue over the standard for the interest adjustment between a beneficiary and a third party in the case of the disposition of the trust property in breach of trust is expected to be the critical point of the theoretical conflict among the theories of the fundamental structure of trust. Seeing from this situation, the oppositions among the theoretical constructions concerning the fundamental structure of trust could be, at least as far as the interest adjustment between a beneficiary and a third party on the disposition in breach of trust is concerned, reduced to a mere “difference of explanations”. As the result, it may be natural for some opinions to consider the oppositions among those theoretical constructions as not worth discussing.

However, as we have seen in various respects, the oppositions among the theoretical constructions concerning the fundamental structure of trust actually lead to the difference of the conclusions among those theories. The typical case in which such a difference appears most vividly is the argument on the liability of a beneficiary to a third party, on which we will discuss in the next section.

5.3 Liability of Beneficiary to Third Parties

(1) Right of a Third Party Toward Beneficiary

The problem whether a beneficiary may be made to assume some liability to a third party concerning the legal relationship created in the course of the administration of the trust property had not been recognized as a problem up to recent. It may be because, firstly, the trustee had been practically ready to assume the first order liability to a third party so that there had not occurred practical needs for a third party to pursue directly the liability of a beneficiary very much and because, secondly, trust banks that assume the status of trustee as their own business have advertised, as the “merit” or “characteristic” of the investment activities using trust institute,

the fact that a beneficiary doesn't stand in any legal relation with third parties by the theoretical principle of trust relationship so that the existence of a trust relationship functions as, so to speak, "barrier" against liabilities of a beneficiary.

"The characteristic of trust relationship" referred to here means, in sum, that a person who performs the investment activity as a beneficiary will take the responsibility for the result of the investment only within the trust property in relation to a third party who is substantially the other party of the investment activity. Such a way of thinking is problematic from the view point of the balance between risks and returns in investment activities. However, the very principle that a beneficiary doesn't stand in a legal relationship with third parties could be, on behalf of the attainment of the trust purpose, theoretically derived from the effect of the actual legal relationship which has been formed among the trust parties. In addition, the existence of such a legal relationship could be recognized by a third party who is going to be the other party of a trade with the trust property. Therefore, one could argue persuasively, although such a case is another problem as the third party has become the other party of trade without knowing the existence of the trust relationship, where the third party accepted the trading relation with knowing the existence of the trust relationship, the third party should have realized that there is no legal relationship between the beneficiary and the third party so that the third party cannot generally pursue the liability to the beneficiary.

However, in order to allow a third party to pursue the liability of a beneficiary, some the theoretical constructions seems to be possible. For example, based on the fact that the beneficiary has got the benefit from the trust property, one may insist that the gain the beneficiary has got was unjust enrichment at the cost of the damages the third party got. Or, one may insist that the failure of the investment according to the direction by the beneficiary constitutes a tort against the third party who was the other party of the trade. Or, one may insist that the gain of the beneficiary constitutes a fraudulent act against the third party as the obligee on the trust property. But it is uncertain whether a court would accept any of them.

Such being the case, it is not easy to change the general principle of trust relationship only on the ground of the requirement of the balance between the risks and returns in investment activity. So, as far as a beneficiary is taken to be a mere "beneficiary" of "a trust relationship", the probability for the beneficiary to assume a liability to a third party would be estimated rather low.

However, such an estimation stands as far as it is supposed that the legal relationship the parties created is interpreted to be a "trust relationship" by a court or the like. Therefore, even if the parties recognized the legal relationship they formed as a trust relationship or described it as a trust relationship, if it is interpreted as some other legal relationship that trust, for instance, as "an agency relationship" by interpreting "beneficiary" as "principal" and "trustee" as "agent", a liability of the "beneficiary" to a third party could be quite easily affirmed as the liability of

“the owner” of the trust property or the liability of “the principal” of the agency relationship.

Moreover, even when the legal relationship the parties formed is interpreted as a “trust relationship”, such an interpretation is always possibility that an agency relationship has been created at the same time between the parties. Then, the “beneficiary” is interpreted as the “beneficiary and principal” and the “trustee” as the “trustee and agent” so that both the trust and agency institutes may be applied to the case⁴. According to the ordinary common opinion, since the person to whom the ownership the property disposed of is attribute is different between a trust, in which it is the trustee, and an agency, in which it is the principal, a trust relationship and an agency relationship could never coexist in one legal relationship. However, in Business Trust in which to pursue the profits as a business is set to be the purpose and Illinois Land Trust in which the administration power of the real estate is essentially held by the beneficiary in the trust institute in the United States of America, if the beneficiary exercises the direction power over the trustee so that the beneficiary is considered to have the “control” by her/his own judgement, the coexistence of an “agency relationship” with the “trust relationship” is affirmed. There is actually such a case in which a court affirmed a liability of the beneficiary to a third party by applying the agency institute to the relation of the beneficiary with the third party. From the considerations on the judgement which affirmed the liability of the beneficiary to the third party, the general rule the case has established could be interpreted that, as a principle of trust relationship in general, where the beneficiary has the control over the trustee based on it’s own judgement in the administration of the trust property, the beneficiary could be deemed to be the principal of an agency relationship with the trustee so that the liability of the beneficiary to third parties could be generally admitted, rather than that the liability of the beneficiary to the third party could be affirmed only in the case of Business Trust or Illinois Land Trust.

Generally, whether a legal relationship can be interpreted as a trust relationship should be judged from the view point of the essential nature of trust relationship, and what is the most important nature of trust relationship is, as we have discussed above, the effect that the trust parties or the trust administration is bound with “the trust purpose”. Seeing from this view point, if one thinks that the essential nature of agency relationship is to make the legal effect of the agent’s action attributed to the principal, since such a nature of agency relationship would not contradict to that of trust relationship, it may be theoretically allowable for legal relationships of trust and agency to coexist in one legal relationship.

By the way, as for the theoretical construction to admit the liability of a beneficiary to a third party, in addition to the coexistence of an agency relationship with the

⁴As for details concerning such a case, see Yutaka Hoshino “Liabilities of a ‘beneficiary’ in ‘trust relationship’ (1)–(3・完)” NBL no.673-675 (1999).

trust relationship as referred to above, a theory like following may be thinkable. That is, a beneficiary who has exercised the direction power over the trustee so as to reflect her/his own will to the administration of the trust property could be deemed as a part of the trustee so that the “liability of beneficiary” may be affirmed by an analogy of that of the trustee. This way of thinking can be completed within the general theory of trust and the scope of the liability of a beneficiary can be relatively easily determined in practice since it is determined through an analogy with the liability of the trustee. However, this way of thinking may run up against the difficulty in the case in which several beneficiaries are independently giving the directions so that the beneficiary to assume the liability can not be identified in a simple way, especially when the third party determines against whom to file the suit. By contrast, whether the “beneficiary” is a “beneficiary and principal” and the “trustee” a “trustee and agent” could be determined in principle only by the nature of the relationship between the specified beneficiary and trustee, independently of the interpretation of the relations with the other beneficiaries, so that the resolution of a dispute could be completed within the parties in a lawsuit. Taking those factors into consideration, the theoretical construction of the coexistence of agency and trust relationships has an advantage from the view point of the easiness of the judgement in a lawsuit.

Anyway, the necessity of the deepening of the arguments for a flexible method of interpretation of actual legal relationships as described above will grow more and more.

(2) The Fundamental Structure of Trust and Liability of Beneficiary

The argument concerning the liability of a beneficiary to a third party described above are based on the consideration of the balance between the risks and returns in investment activities presupposing that the purpose of the trust is in the pursuit of economic profits. In this meaning, the argument above is being developed based on a certain interpretation of the purpose of the trust. As the result, while that argument would be appropriate whether one stands on any theoretical construction concerning the fundamental structure of trust as far as the purpose of the trust relationship is the pursuit for the economic profits by the investment activity, where the purpose of the trust is other than the pursuit for economic profits, one must reconsider the rationality and appropriateness to impose the liability to a third party on the beneficiary in relation to each concrete trust purpose.

On the other hand, when one views the problem from the side of the theoretical construction concerning the fundamental structure of trust, it can be concluded from the theoretical considerations in some cases that the liability of the beneficiary to a

third party should be affirmed irrespective of the purpose of the trust.

If one thinks that the beneficial right is the substantial ownership of the trust property, although the obligations or liabilities generated in the course of the administration of the trust property would be charged with by the trust property at first, when the trust property is insufficient for the fulfillment of all the obligations and liabilities, a third party may be able to insist that the beneficiary as the substantial owner of the trust property should finally assume the obligations and liabilities directly to the third party. Besides, when the trust property must be liquidated among the parties concerned including the creditors and the trust parties because of, for example, the termination of the trust property, as far as the beneficial right is thought to be the substantial ownership of the trust property, the right of the owner at the time of the liquidation can be exercised only after the obligations and liabilities are fully paid for the creditors. So the beneficial right should be posterior to the claims of ordinary creditors in the share.

Instead, if one thinks the beneficial right is a claim against the trustee in person, since the beneficiary stands on the status of the obligee in relation to the trust property, the beneficiary and the creditors on the trust property should be treated equally as a general rule. So, it is only when so prescribes some special agreement or a statutory provision that the one should have the priority the others. By the way, if one thinks that trust property is a property independent of the trust parties, the beneficial right is not a mere right in person but a kind of real right on the trust property. However, the case in which a beneficial right can be exercised toward a third party is only where the supervising power of the beneficiary is exercised in order to attain the trust purpose like in the case of interest adjustment between the beneficiary and the third party concerning the trade in breach of trust by the trustee. So, as far as one considers only the part to enjoy the benefit from the beneficial right, it is difficult to give a beneficial right any superior status as a right on the trust property to other ordinary credits. Therefore, whether one takes a beneficial right as a claim against the trustee in person or as a claim against the trust property, the status of a beneficiary is an ordinary obligee in principle, although corresponding to the content or the timing of the exercise of the beneficial right the evaluation of the right at the time of the liquidation may fluctuate in practice. Generally speaking, the case in which a liability or a responsibility problem brings about between co-obligees is only where an obligee has acquired some unlawful profit by some fraudulent act to other obligees. Then, the case in which a beneficiary should assume a liability or obligation to a third party would not happen, as a general rule, unless the exercise of the beneficial right by the beneficiary unlawfully harmed some third party.

As we have just seen, corresponding to whether one thinks that the beneficial right is the substantial ownership of the trust property or that the beneficial right is a claim against the trustee or the trust property, the principle for the problem whether a liability of a beneficiary to a third party should be affirmed would change

irrespective of the purpose of the trust relationship in the case. This argument also requires some radical reconsideration on the practical nature of the status and the right of a beneficiary in a trust relationship. For, in traditional arguments, it has been implicitly presupposed that the total sum of all the rights on a property is the absolute title, namely, the ownership on the property, so that they have thought that it is necessary and desirable to consider the nature of a right to be as close to the ownership as possible in order to secure the right. In fact, as the background of the rise of the opinion which insisted that a beneficial right is the substantial ownership of the trust property under the former statute in which the *jus-in-personam* theory was explicitly adopted, there has generally prevailed the conviction that the right of a beneficiary could be more strongly protected when the beneficial right is thought to be the substantial ownership of the trust property than when it is thought to be a right in person. However, as it should be clear from our argument above, in some states of interests of a beneficiary and a third party, even if one doesn't treat the beneficial right as the substantial ownership of the trust property, it is actually possible to protect the beneficial right equally and, conversely, viewing from the fact that if the beneficial right is considered as the substantial ownership of the trust property, a liability to a third party may be charged to the beneficiary as the substantial owner. If one takes these facts into consideration, the necessity of the reconsideration of the theoretical substance of the phrase "the protection of the interest of beneficiary" should be said to be urgent.

By the way, since the former statute had no explicit provision concerning the priority order between the beneficiary and third parties, the argument concerning the nature of beneficial right and the argument concerning the admissibility of an obligation or a liability of a beneficiary to a third party might have a great influence in theory and practice so that the handling of words "creditor" and "beneficiary" might become subtle in an interpretation of the terms of trust. By contrast, the current statute prescribes concerning the general treatment of the claims against the trust property that the claim by a beneficiary based on the beneficial right should be subordinated to claims by ordinary creditors⁵. So, at least as for the actual conclusion on the practical problem, no great difference would be caused by the difference in the way of thinking concerning the fundamental structure of trust.

However, at the same time, we should note the provisions in the current statute will not contradict to any theoretical standpoint concerning the fundamental structure of trust.

The provision cited above only prescribes the effect that a beneficial right would be subordinated to the rights of ordinary creditors but doesn't refer to the nature of the beneficial right. If one emphasizes the phrase "claim as a beneficiary", one may

⁵(Relationship between Distribution claim as a beneficiary and Trust Claims)
Article 101 Distribution claim as a beneficiary shall be subordinated to trust claims.

interpret that the provision supposes the right of a beneficiary, that is, the beneficial right is a kind of claim which may concur with the claims by ordinary creditors. Conversely, viewing from the effect of the provision that the claim of a beneficiary is subordinated to the claims of the ordinary creditors, the conclusion itself is congruent with that from the theory that a beneficial right is the substantial ownership of the trust property. But even if one thinks a beneficial right is a right in person against the trustee or the trust property, one may take the provision as specially prescribing the priority order, so there causes no contradiction with the provision. Moreover, it is not clear whether the provision prohibits any special agreement among the interested persons. Anyway, that provision is logically never excluding the thought that a beneficial right is a kind of a right in person. So, it is not unreasonable to interpret that to make a beneficial right subordinated to ordinary credit rights is a part of the interest adjustment between a beneficiary and a third party. It should be fruitful both theoretically and practically to consider the scope of the provision referred to above with taking into consideration the consistency with the standard, on which we discussed in Section 2, for the interest adjustment between a beneficiary and a third party in the case of a trade in breach of trust by the trustee.

In sum, the provisions in the current Trust Act keeps on the neutral position also in this problem area. So, the interpretation would be required to be flexible by taking the theoretical considerations on the fundamental structure of trust into account. Practically, it may be useful to create special agreement concerning the priority order among the beneficiary and other creditors corresponding the situations and the purpose of the trust.

(3) Exemption of Trustee from the Liability and Responsibility of Beneficiary

As an actual situation in which a liability of a beneficiary to a third party becomes the issue, we can provide the case in which a third party directly pursues the liability of the beneficiary where the terms of trust or some special agreement of the trust parties prescribes that the liability or obligation the trustee assumed to a third party could be claimed from the trustee against the beneficiary as the right to reimbursement.

The time order up to the acquirement of the right against a beneficiary will be, in theory, like follows. At first, the third party acquires a right in the course of the administration of the trust property to the trustee who has the power to administer the trust property. Then, the trustee fulfills the obligation in relation to the third party. After that, the trustee claims the reimbursement against the beneficiary insisting the effect of the exemption prescribed in the terms of trust or in a special agreement. Since, whether it is in the terms of trust or a special agreement, who should be directly bound with the effect of the provision are only the trust parties,

so that a third party should be generally not bounded to the effect of the agreement between the trust parties, even if the trust parties agreed in the exemption of the trustee from the liability, a third party could claim its own right directly against the trustee according to the general principle of the attribution of the obligations and liabilities in a trust relationship.

However, in reality, there is a case in which, while the trustee or the trust property is insufficient to fulfill the obligation to the third party, the beneficiary holds sufficient assets to pay the debt. In such a case, for the third party it would be better to pursue the claim directly to the beneficiary than to the trustee or the trust property for the certain and secure satisfaction of the claim right. However, the ground to allow such a direct claim of a third party to the beneficiary is various depending on the theoretical construction concerning the fundamental structure of trust.

If one thinks that the trustee is the owner of the trust property, the obligations or liabilities in the course of the administration of the trust property are all generally assumed by the trustee. Then, the beneficiary is a kind of obligee to the trustee, so it is difficult to give a sound ground to allow a direct claim of a third party against the beneficiary from this fundamental structure of trust. However, under this theory, the fact that the trustee is exempted from the obligations or liabilities generated in the course of the administration of the trust property in relation to the beneficiary would mean that the beneficiary has exclusively assumed all the obligations and liabilities which the trustee should be generally assumed. If so, a third party may pursue the liability directly against the beneficiary base on the exclusive assumption by the beneficiary. On the other hand, however, the behavior of the third party to pursue the liability directly to the beneficiary could be interpreted as admitting the exemption of the trustee from the liability, so that the third party could not pursue the liability of the trustee at the same time with claiming the payment of the debt against the beneficiary.

Instead, if one thinks that a beneficiary is the substantial owner of the trust property, the theoretical ground for the direct claim from a third party against the beneficiary would be derived from the fundamental structure of trust itself, that is, the very fact that the beneficiary is the substantial owner of the trust property, so, the fact that the trustee is exempted from the obligations and liabilities in relation to the third party would be theoretically irrelevant to the allowability of the direct claim of the third party against the beneficiary.

On the other hand, if one thinks that trust property is a property independent the trust parties, a little complicated argument would be required in order to affirm the direct claim of a trustee against the beneficiary. Since a trustee is a mere administrator of the trust property under this theory so that a trustee originally need not to assume the final liability brought about in the course of the administration of the trust property, even if the beneficiary agreed the exemption of the trustee, one cannot easily conclude that such an agreement means the assumption by the beneficiary of

the direct liability or obligation. Moreover, since the beneficiary is a kind of an obligee on the trust property under this theory, whether it is possible for the third party as an obligee to pursue the liability to another co-obligee would depend on the approval by the third party of the exemption of the trustee given by the beneficiary. In this respect, the argument for the direct claim against the beneficiary in this case has a theoretically different nature from that for the claim against the substantial owner of the trust property.

As we have seen up to here, if one makes the “ownership” of trust property belong to one of the trust parties, a direct pursuit of the liability to the trust party from a third party would become easily admissible in theory. So, we should carefully consider the effect or appropriateness of making the nature of beneficial right closer to the “ownership” in each concrete aspect of a problem.

Chapter 6

Modification and Termination of Trust

In this chapter we discuss the case in which the circumstances around a trust relationship are changed by a modification of the purpose or the terms of the trust or by the termination of the trust relationship. By the termination of a trust relationship, the legal relationships which has been formed around the trust relationship are all extinguished and the trust property enters into the liquidation. On the other hand, by the modification of trust, since the existing trust relationship is theoretically not terminated, the legal relationships around the trust relationship are not extinguished, and the liquidation of the trust property isn't commenced as a rule. If one takes the trust purpose as the essential nature of a trust relationship, the modification and the termination of the trust relationship both cause a theoretically equal change in that the already existing trust purpose has lapsed. However, depending on the theoretical construction to be adopted, some different effects may be brought about concerning the state of the legal relationships including those with third parties or the necessity of liquidation of the trust property.

6.1 Modification of Trust

(1) Modification of Terms of Trust

The provisional terms provided in the act of trust, in short, the terms of trust prescribe the basic matters concerning the administration of the trust property. Since the creation of a trust relationship is based on the agreement between the trust parties by the contract as its typical example, the terms of trust can be changed including the

part of the trust purpose by the agreement among the trust related parties¹. It would be trivially clear that the “the trust related parties” referred to above include the trustee and the beneficiary, who will get legally influenced directly by the modification. The settlor who has projected her/his own intention into the trust relationship

¹(Agreement, etc. among the Relevant Parties)

Article 149 ① A trust may be modified at the agreement of the settlor, the trustee, and the beneficiary. In this case, in making such a modification, the contents of the terms of trust after modification shall be specified.

② Notwithstanding the provisions of the preceding paragraph, in the cases listed in the following items, a trust may be modified by the methods specified in the respective items. In this case, the trustee shall, without delay, give notice of the contents of the terms of trust after modification, to the settlor in the case set forth in item 1, or to the settlor and the beneficiary in the case set forth in item 2:

1. where it is clear that the modification is not contrary to the purpose of the trust: an agreement between the trustee and the beneficiary; or

2. where it is clear that the modification is not contrary to the purpose of the trust and that it conforms to the interests of the beneficiary: the trustee’s manifestation of such intent in a document or electromagnetic record.

③ Notwithstanding the provisions of the preceding two paragraphs, in the cases listed in the following items, a trust may be modified by the persons specified in the respective items manifesting their intent to do so to the trustee. In this case, in the case set forth in item 2, the trustee shall, without delay, notify the settlor of the contents of the terms of trust after modification:

1. where it is clear that the modification will not harm the interests of the trustee: the settlor and the beneficiary; or

2. where it is clear that the modification is not contrary to the purpose of the trust and that it will not harm the interests of the trustee: the beneficiary.

④ Notwithstanding the provisions of the preceding three paragraphs, if the terms of trust otherwise provides for, such provisions shall prevail.

⑤ Where there is no settlor at the time in question, the provisions of paragraph ① and paragraph ③, item 1 shall not apply, and the phrase “to the settlor in the case set forth in item 1, or to the settlor and the beneficiary in the case set forth in item 2” in paragraph ② shall be deemed to be replaced with “to the beneficiary in the case set forth in item 2.”

(Judicial Decision Ordering the Modification of a Trust Due to Special Circumstances)

Article 150 ① When, due to the special circumstances that were unforeseeable at the time of an act of trust, the provisions of the terms of trust concerning the method of trust administration no longer conforms to the interests of the beneficiary in light of the purpose of the trust, the status of the trust property, and any other relevant circumstances, the court may order a modification of the trust at the petition of the settlor, the trustee or the beneficiary.

② In filing the petition set forth in the preceding paragraph, the provisions of the terms of trust after modification to which the petition pertains shall be specified.

③ Before the court makes a judicial decision on the petition set forth in paragraph ①, it shall hear the statement of the trustee. ④ A judicial decision on the petition set forth in paragraph ① shall include a summary of the reasons for said decision.

⑤ The settlor, the trustee, or the beneficiary may file an immediate appeal against the judicial decision on the petition set forth in paragraph ①.

⑥ The immediate appeal set forth in the preceding paragraph shall have the effect of a stay of execution.

may be able to be the party of the agreement of the modification unless the terms of trust exclude the settlor from the qualified persons for the agreement for modification.

By the way, there is no doubt for that the beneficiary in this case includes a beneficiary who is actually enjoying the benefits and a future beneficiary who is planned to enjoy the benefits in the future. But the questions that provide practically serious problems are: whether a beneficiary candidate who may possibly become the beneficiary should be included in the beneficiary, whether a past beneficiary whose right to enjoy the benefit was lapsed should be included in the beneficiary and whether the holder of a vested right should be included in the beneficiary. In principle, as for a beneficiary candidate, since a beneficiary candidate is not yet a beneficiary at the time of the agreement, a beneficiary candidate cannot become one of the party of the agreement for a modification of the terms of trust. As for a past beneficiary, the conclusion may depend on what one thinks is the essential part of the beneficial right, that is, whether one thinks that the part to enjoy the benefit from the trust property is essential or that the part of the supervising power over the administration of the trust property is essential. On the other hand, a holder of a vested right enters into the interested party concerning the trust property only after the termination of the trust relationship. Since the institute of the modification of the terms of trust isn't taking the terminated trust into account, we could say a holder of a vested right cannot become one of the party of the agreement.

However, since a beneficiary candidate cannot be a party of the agreement to modify the terms of trust as a general rule, it may be possible for the current beneficiary and the trustee to agree on the modification of the terms of trust so as to harm the beneficiary candidate in the future. However, on the other hand, it may be difficult to legitimize to give a protection for the expectation of the beneficiary candidate to become a proper beneficiary in the future at the equal level to the interest which the current beneficiary has. In fact, if one considers how to treat the effect of that agreement to modify the terms of trust which involved a beneficiary candidate as a party while, however, the beneficiary candidate has not been assigned as a beneficiary in the end, one would feel negative to allow a beneficiary candidate to participate in the agreement to modify the terms of trust. However, for example, in the case of a trust relationship whose purpose is to pay the retirement pension, when there exist the employees who can expect to become the beneficiary to receive the pension with high probability in the future, for example, those close to their retirement period, if the terms of trust is modified actually with the intention to harm those beneficiary candidates, that may constitute a tort to harm the expectational interests of the beneficiary candidates. Therefore, even though a beneficiary candidate in person cannot take part in the agreement of the modification of the terms of trust, it would be desirable in practice to protect the interests of beneficiary candidates substantially by appointing a trust caretaker who represents the beneficiary candidates' interests.

Viewing from the stand point that being bound with the trust purpose is the

essential nature of a trust relationship, the fact that the terms of trust including the purpose of the trust can be modified by the agreement among the trust related parties would cause a fear that the trust purpose might be made unstable. However, even if the purpose of the trust was modified by the agreement between the trust related parties, there has been no change in the situation that the trust administration or the trust parties are bound with the, although new, purpose of the trust. Since the very first purpose of the trust was formed by the wills of the trust parties at the settlement of the trust, it is theoretically a matter of course that a purpose of trust can be freely changed by the agreement among all the trust related parties. By the way, as a method to keep the purpose or the terms of the trust fixed for certain period in practice, the terms of trust can in itself restrict the range of the parties who can modify the terms of trust with the agreement or exclude certain trust parties from the parties of the agreement to modify the terms of trust. So, the fear described above would be only theoretical one and it would not happen in practice for a trust relationship to become particularly unstable by the free modification of the terms of trust through the agreement among the trust parties.

(2) Consolidation of Trusts

“A modification of trust” has two theoretical meanings. The first is to administer the trust property with the scope of the trust property maintained but according to a different way of thinking from the previous one through modification of the purpose of the terms of the trust prescribed in the act of trust. By contrast, the second is to consolidate properties in several trust relationships into one trust property or to split one trust property into several trust relationships so as to administer the trust properties according to a different way of thinking from the previous one with corresponding adjustments of the purposes and the terms of the trusts. Those two “modifications of trust” have theoretically different dimensions one another but there are many similar points between the two in the problem of the modifications or adjustments of the terms of trust including the purpose or in the state of the changes of the legal states including the legal status of a third party. So, we should keep paying the attention to the differences and similarities between the two in following discussion.

“A consolidation of trusts” means to modify a trust relationship by consolidating properties in several trust relationships into one trust property. The former statute had no explicit provision concerning consolidation of trusts, the common opinion at that time took the consolidation, including the split we will describe below, of trusts as a process to terminate the trust relationship once and then to settle a new trust with consolidation or split of the properties. Under this way of thinking, the requirements for the consolidation or split of trusts are virtually same as those of the termination of the trusts and, as for a trust relationship after the consolidation or split, since it

is simply a newly settled trust relationship, there is no room to conflict with already existing provisions. In the end, the view for the consolidation or split of trusts under the former statute was theoretically very clear.

However, that thought had practical problems. When the existing trust relationship once terminates, the trust property was required to be liquidated. In the liquidation process, the gains or losses in the trust property must have been made explicit, which was sometimes undesirable for the interest of the beneficiary. In addition, the fact that the trust relationship must be once terminated by the liquidation process was disadvantageous also for the obligees on the trust property. So, in order to avoid the liquidation process, which might be undesirable both for the beneficiaries and the obligees to the trust, a procedure of “consolidation of trusts” which doesn’t include the termination of the trust were theoretically sought for. There were following three methods considered for that.

The first method is to administer the properties in several trust relationships in parallel according to one administration policy without the legal consolidation of those trust relationships. By sharing the gains or losses from such a unified administration in some pre-fixed ratio, essentially same effects as a consolidation of those trusts will be expectable. By this method there is legally no “consolidation of trusts”, so problems associated with the consolidation process will not occur naturally. As far as there happens no change in the inter-trust legal relationship among existing trust relationships, there is no need to modify or adjust the terms of those trusts. However, since each trust property will be administered according to the new administration policy after the de facto “consolidation”, where the new administration policy is greatly different from one of the past administration policies of those trusts or where the new way of administration includes the act prohibited or restricted in one of the exiting trust relationships, certain modifications of the terms of trust would be required individually. Besides, under this method, the actual administration process is practically quite similar to a combined administration of those several trusts. Where the combined administration itself is unsuitable to the terms of trust in one of those trust relationships or where one of those trust relationships is unsuitable to the combined administration, the operation of that “consolidation” or “combined administration” itself may constitute a violation of the fiducial duty or the duty of care of a good manager of the trustee. By the way, under this method, since existing legal relationships concerning the administration of the trust property within each trust relationship are not affected, there is no need to liquidate each trust relationship.

The second method is to exchange trust properties in several trust relationships with beneficial rights on the trust properties so as to concentrate those trust properties into one trust property in one of those trust relationships. The trust properties in all trust relationships except one are only the beneficial rights in the exceptional one trust relationship at which all material trust properties are concentrated. The gains and losses in the course of the administration of the trust property are shared to the

other trust relationships through the beneficial rights, so that essentially equal effect to a consolidation of those trusts can be expected. Under this method, when the existing trust properties are exchanged with beneficial rights on one trust property the concrete value of each property is determined by some internal agreement, so, the gain or loss in each trust administration up to the exchange time is not necessarily made explicit. Besides, since the all except one trust relationships are not changed except that the trust property is changed to be a beneficial right, modifications of the terms of trust in each trust relationship would not be necessary in a usual case. However, since the acquirements of the beneficial rights in one trust relationship by the other trust relationships are essentially “investments” to the trust property from the other trust properties, such a “investment” action may be evaluated to be unsuitable in relation to the propose of one of the trusts which acquire the beneficial rights in exchange of the investments. If that “investment” action generates some losses on the trust property, the liability of the trustee may be pursued because of the violation of the duty of care of a good manager. Since this method doesn't cause any change of the legal relationships around each trust relationship, any adjustment with the creditors to the trust or the liquidation process would usually not become necessary. But viewing from the side of the creditors of the trust which acquired a beneficial right in exchange of the material trust property, whole the material trust property is swapped with an abstract right, namely, a beneficial right in another trust relationship. If such an exchange is evaluated to diminish the value of the trust property, the obligee's rescission right may be executed against the exchange.

The third method is to settle a new trust relationship so as to transfer all the trust properties of the existing trusts to the new trust. All existing trust relationships acquire the beneficial rights in the new trust relationship in exchange of the transfer of the trust properties. The gains and losses in the course of the administration of the trust property in the new trust relationship are shared to each existing trust relationship through the beneficial right so that essentially equal effect to a consolidation of those existing trusts could be expected. Since this method settles a new trust relationship independent of existing trust relationships so that the new trust accepts all material trust properties of the preexisting trust relationships and the preexisting trusts acquire the beneficial rights of the new trust relationship in exchange, there is no need to adjust the terms of trust between the new trust relationship which holds all material trust properties and the preexisting trust relationships. In addition, a modification of the terms of trust in each preexisting trust in accordance with the new trust relationship would not be necessary unless the terms of trust of the preexisting trust prohibit the investment of the trust property in the new trust relationship. Besides, since the legal relationships associated with the preexisting trust relationships will be basically not changed, the interest adjustments or the liquidation of the trust property in relation to the creditors of the trusts may not be required unless the transfer of the trust property from the preexisting trust in exchange of the beneficial

right in the new trust relationship is rescinded by a creditor of any of the preexisting trust as a fraudulent transfer.

Although, in the second and third methods, even the continuity of the existence of the preexisting trust relationships may be theoretically questioned. For, since duplicated trust relationships would be formed after the “consolidation” of trusts, where one same person is the trustee in all the existing trust relationships in the second method or where one same person is the trustee in all the preexisting and the newly created trust relationships, all the beneficiaries and trustees in the duplicated trust relationships concerning the preexisting trust relationships are reduced to only one person. In addition, under the situation in which duplicated trust relationships are established, the supervising power of a beneficiary in an original trust relationship would be limited to the administration of the trust property in the trust relationship, that is, the management of a beneficial right in the re-trust relationship. If so, the details of the state of the administration in the new trust relationship may be excluded from the object of the disclosure request by a beneficiary in an original trust relationship. Then, besides the problem of the duplicated trust relationships above, where one trust relationship accepts all the material trust properties of the other trust relationships in exchange of the beneficial right, as for the re-trust relationship on the one hand, the beneficiary can request the disclosure of the information concerning the individual administrations of all the trust property and for the creditors the asset capable of attachment would be incremented but, as for the original trust relationships on the other hand, the state of the administration of the trust property in the re-trust relationship may not be the object of the disclosure request from the beneficiary and for the creditors the only asset capable of attachment is the beneficial right in the re-trust relationship. Viewing from these facts, a great gap would be generated between the re-trust relationship and the original trust relationships by these second and third methods.

The current statute prescribes the definition of consolidation of trusts as the consolidation of the trust properties of several trusts into the trust property of a single new trust² so as to make it explicit that a consolidation of trusts can be done by the agreement among the trust related parties³. And, corresponding to the defini-

²(Definitions) [excerpt]
Article 2 ...

⑩ The term “consolidation of trusts” as used in this Act means the consolidation of the whole of the trust properties of two or more trusts that have the same trustee into the trust property of a single new trust.

³(Agreement, etc. among the Relevant Parties)
Article 151 ① Trusts may be consolidated by the agreement of the settlors, trustees, and beneficiaries of the former trusts. In this case, in effecting such a consolidation, the following matters shall be specified:

1. the contents of the terms of trust after consolidation of the trusts;
2. if there is any change in the contents of the beneficial interest provided for by the terms of

tion provision, the current provision is prescribed that when a consolidation of trusts is done, the existing trust relationships should terminate⁴. Moreover, the current statute explicitly prescribes the relation of a consolidation of trusts with the creditors to the trusts. That is, a creditor to the trust to be consolidated who may be harmed by the consolidation can state the objection to the consolidation⁵, and obligations

trust, such contents and the reasons for the change;

3. if monies or any other property is delivered to a beneficiary upon the consolidation of the trusts, the content and value of such property;

4. the day on which the consolidation of the trusts becomes effective; and

5. other matters specified by Ordinance of the Ministry of Justice.

② Notwithstanding the provisions of the preceding paragraph, in the cases listed in the following items, trusts may be consolidated by the methods specified in the respective items. In this case, the trustee shall, without delay, give notice of the matters listed in the items of said paragraph, to the settlor in the case set forth in item 1, or to the settlor and the beneficiary in the case set forth in item 2:

1. where it is clear that the consolidation is not contrary to the purpose of the trust: an agreement between the trustee and the beneficiary; or

2. where it is clear that the consolidation is not contrary to the purpose of the trust and that it conforms to the interests of the beneficiary: the trustee's manifestation of such intent in a document or electromagnetic record.

③ Notwithstanding the provisions of the preceding two paragraphs, if each terms of trust otherwise provides for, such provisions shall prevail.

④ Where there is no settlor at the time in question, the provisions of paragraph ① shall not apply, and the phrase "to the settlor in the case set forth in item 1, or to the settlor and the beneficiary in the case set forth in item 2" in paragraph ② shall be deemed to be replaced with "to the beneficiary in the case set forth in item 2."

⁴(Grounds for Termination of a Trust) [excerpt]

Article 163 In addition to cases under the provisions of the following Article, a trust shall terminate in the following cases:

...

5. where the trust is consolidated with another trust;

⁵(Objections by the Creditors)

Article 152 ① Where trusts are to be consolidated, creditors who hold claims pertaining to obligations covered by the trust properties of the former trusts may state their objections to the trustees with regard to the consolidation of the trusts; provided, however, that this shall not apply if there is no risk of such creditors being harmed by the consolidation of the trusts.

② Where all or some of the creditors set forth in the preceding paragraph may state their objections pursuant to the provisions of said paragraph, the trustee shall give public notice of the following matters in the official gazette, and shall give notice of the same separately to each of the known creditors as set forth in said paragraph; provided, however, that the period set forth in item 2 may not be less than one month:

1. a statement to the effect that the trusts are to be consolidated;

2. a statement to the effect that the creditors set forth in the preceding paragraph may state their objections within a certain period of time; and

3. other matters specified by Ordinance of the Ministry of Justice.

③ Notwithstanding the provisions of the preceding paragraph, a trustee who is a juridical person may substitute public notice (limited to public notice given by the following methods) for the separate

which have been existing to the former trust relations before the consolidation should be succeeded by the trust after the consolidation⁶.

In sum, the current statute makes clear that a consolidation of trusts can be done by the agreement among the trust related parties and adopts the way of thinking to terminate the preexisting trust relationships once. So, the practical problems to be associated with that way of thinking, for example, the inconvenience from the fact that the gain or loss in preexisting trust relationships must be made clear at the consolidation, would occur also under the current Trust Act, except for explicitly prescribed problems like the legal relationship of a consolidation with the creditors to the trusts. If a practitioner want to avoid those problems, the practitioner would be obliged to make use of the other, non-statutory methods described above. Therefore, we must say the the theoretical and practical problems we described above concerning the methods to realize de facto consolidation of trusts under the former statute would still continue to exist even under the current statute. However, as for the problem that the state of duplicated trust relationships as a result of a consolidation may fall under the cause of the termination of the trust relationship, it will not be a problem under the current Trust Act. For, since who becomes the beneficiary in the new trust relationship is thought to be either the trust property itself of the preexisting

notice to each creditor under the provisions of said paragraph:

1. publication in a major daily newspaper which publishes matters on current events; or
2. electronic public notice (meaning, among methods of public notice, a method wherein measures are taken to make the information that should be given in a public notice available to many and unspecified persons by electromagnetic means (meaning an electromagnetic means prescribed in Article 2, item (xxxiv) of the Companies Act (Act No. 86 of 2005), which is prescribed in said item; the same shall apply in the following Section)).

④ If any creditors set forth in paragraph ① do not state any objections within the period set forth in paragraph ②, item 2, such creditors shall be deemed to have accepted the consolidation of the trusts.

⑤ When any creditors set forth in paragraph ① state their objections within the period set forth in paragraph ②, item 2, the trustee shall make payment or provide reasonable security to such creditors, or shall entrust adequate property to a trust company, etc. (meaning a trust company or a financial institution engaging in the trust business (meaning a financial institution authorized under Article 1, paragraph ① of the Act on the Concurrent Undertaking of Trust Business by Financial Institutions (Act No. 43 of 1943)); the same shall apply in the following Section) for the purpose of having such creditors receive payment; provided, however, that this shall not apply if there is no risk of such creditors being harmed by the consolidation of the trusts.

⁶(Scope of Obligations Covered by Trust Property After Consolidation of Trusts)

Article 153 Where trusts are consolidated, the obligations covered by the trust properties of the former trusts shall become obligations covered by trust property after the consolidation.

Article 154 Where trusts are consolidated, the obligations covered only by the trust property (meaning obligation covered by the trust property which may be paid only out of property belonging to the trust property, hereinafter the same shall apply in this Chapter) among obligations covered by the trust property with regard to the previous trusts referred to in the preceding Article, shall be obligations covered only by the trust property after consolidation of trusts.

trust relationship or its trustee as the administrator, the beneficial right in the new trust relationship is held clearly as the trust property of the preexisting trust. It is true that the current statute still prescribes the case in which the beneficiary and the trustee are reduced to one same person as a cause of the termination of the trust relationship, but the content of the case is prescribed as where the trustee holds all the beneficial rights as the trustee's own property⁷. Therefore, the state of duplicated trust relationships to be generated by a de facto consolidation will not fall under the cause of the termination of a trust, at least under the provision of the current statute, so that the trust relationship will validly continue to exist even after the de facto consolidation.

(3) Split of Trust

A "split of trust" means to split one trust relationship into several trust relationships so as to administer those trust properties under mutually different thoughts. Also in a split of trust, like in a consolidation of trusts we have discussed above, the adjustment or modification of the terms of trust or the interest adjustment with creditors would have to be considered. But among them, what is specially worth discussing concerning the split of trust is the problem of interest adjustment with creditors.

In contrast to a consolidation of trusts, in a split of trust, since each trust property after the split is originally a part of trust property of one trust and doesn't have been administered in several different trust relationships, an adjustment or a modification of the terms of trust would be almost unnecessary unless the nature of the trust property has been so changed by the split that the administration of the trust property cannot follow the former administration policy. However, as for an interest adjustment with creditors, a split of trust, in contrast to a consolidation of trusts, always causes the decrease of the material part of the trust property, so that a both practically and theoretically important problem is in what legal relationship with the trust the creditor would stand across the split of the trust or what claim or power the creditor can exercise over the split of trust.

The former statute had no provision concerning a split of trust, too. So, like in the case of a consolidation of trusts, an ordinary opinion insists that to split a trust the trust should be terminated once and new trust relationships should be settled after a split of the trust property. As practical problems under this method, one

⁷(Grounds for Termination of a Trust) [excerpt]

Article 163 In addition to cases under the provisions of the following Article, a trust shall terminate in the following cases:

...

2. where the trustee has continuously held all beneficial interests in the form of the trustee's own property for one year;

...

pointed out that the gain or loss in the trust relationship must be made clear at the termination of the trust, which may be undesirable for the beneficiary and that the liquidation procedure in relation to the creditors must be actually operated, which may be undesirable for the beneficiary and/or the creditors. There are three methods designed to split a trust without the termination of trust. The legal constructions of those are quite parallel to the methods for consolidation of trusts. But the potential problems in those methods have a little different nature from the case of consolidation, so we will describe them one by one in following.

The first method is to administer the trust property in being split under different administration policies with each other in one trust relationship without terminating the trust relationship so that essentially equal effect to a split of the trust could be expected. Since this method legally doesn't split the trust, the difficulties to be associated with a split of a trust will never occur. But one may question whether it is legally possible to administer a part of one trust property independently under the different administration policy for that part. Under this method, the trust property is, even if it is virtually split, legally one property, so that the scope of a disclosure request will cover all the trust property and that the gains or losses from the split administrations, apart from the inner trusts distribution, may be inevitably added up as a whole in relation to the creditors. Moreover, in relation to the creditors, one cannot help accepting that the responsibility to the creditors should be covered by whole the trust property before the split administration. If one want to exempt some parts of the trust property from the liability of the claim of certain creditors so as to get the substantial effect of the internal split of the trust, one must obtain individually the approval of the creditors. Even when such approvals of the creditors are obtained, since the trustee must keep the property and the debts clearly distinguished according to which debt is covered by which part of the trust property, the burden of the official works on the trustee may be bloated.

The second method is to "re-trust" a part of trust property so as to create stratified trust relationships. The original trust gets the beneficial right in the re-trust relationship in exchange but actually doesn't exercise or even does waive the beneficial right so that the essentially equal effect to a split of the trust could be expected. This method avoids the interpretation that a part of the trust relationship "terminated" by way of settling re-trust relationships while the actual split between the preexisting trust and the newly settled re-trust relationships is intended by restraint on the exercise or waiving of the beneficial right in the re-trust relationship. Under this method, since the re-trust relationship is newly settled, the adjustment of the terms of trust between those of the preexisting trust would be already done, but only when the creation of the re-trust relationship is prohibited in the terms of any of the preexisting trusts, the modification of the term of the preexisting trust would be required. However, under this method, rather complicated considerations may be required on the relations with the creditors. For it may be allowable only within the

trust related parties that although a beneficial right is acquired to the newly settled re-trust, its exercise is restrained or given up so as to get the effect of a split of the trust. Viewing from the creditor's stand point, since a part of the preexisting trust property is reduced by the settlement of the re-trust relationship, the beneficial right acquired in exchange of the part of the trust property should be incorporated into the trust property as the complement of the transferred part of the trust property. Then, the acquired beneficial right is the important part of the trust property and if so, to restrain or waive such a beneficial right is nothing but a fraudulent action against the creditors. Therefore, it is quite probable for a creditor to exercise the obligee's subrogate right on the beneficial right in the re-trust relationship or to rescind the waiver of the beneficial right as a fraudulent act. By the way, it may be possible to admit the preexisting creditors of the original trusts to exercise the claim on also the re-trusted trust property in order to protect the expected interests of those preexisting creditors. In such a case, the newly settled trust by the re-trusting would assume the obligations doubly with the original trust. But then, since the preexisting creditor can exercise the claim against both the preexisting trust and the newly settled trust, it would cause a next problem, that is, how to adjust the interests with new creditors of the newly settled trust. In fact, in such a case, the preexisting creditor could execute the claim both on the trust property and the beneficial right in the re-trust relationship. It is difficult to derive a clear-cut conclusion on how to consider the relation between the trust property and the beneficial right.

The third method is to create several re-trust relationships so as to get the beneficial right in each trust relationship then to waive those beneficial rights so that the essentially equal effect to a split of trust could be attained. This method is a radicalization of the second method described above. The terms of the newly settled re-trusts would be freely determined independently of the preexisting trust relationship. However, as for the relations with the creditors, the same problems as described above concerning the second method would occur in more serious forms. So, it may be practically difficult to completely avoid the risk of the exercise of the obligee's subrogation right on a beneficial right or the claim of the rescission of the re-trust as a fraudulent act from a creditor.

As we have seen up to here, in a split of trust, while adjustments or modifications of the terms of trust will not be required in contrast to the case of a consolidation of trusts, it is unavoidable to happen some difficult problem in the interest adjustment with the creditors of the trusts. Therefore, from the practical point of view, it may be necessary in order to split a trust to liquidate the trust property once in relation to all the creditors or to acquire the individual agreements from all the creditors on the scope of the assets to cover each obligation.

The current statute divides split of trust into two categories, "absorb-type trust split" and "creation-type trust split" according to the form of the trust relationship

after the split⁸ and explicitly prescribes on each type of split that it can be effected by the agreement among the trust related parties as a general rule⁹. In addition, as for

⁸(Definitions) [excerpt]

Article 2 ...

① As used in this Act: the term “absorption-type trust split” means the transfer of a part of a trust’s trust property into the trust property of another trust that has the same trustee; the term “creation-type trust split” means the transfer of a part of a trust’s trust property into the trust property of a new trust that has the same trustee; and the term “split of trust” means an absorption-type trust split or creation-type trust split.

⁹(Agreement, etc. among the Relevant Parties)

Article 155 ① An absorption-type trust split may be effected at the agreement of the settlor, the trustee, and the beneficiary of a trust. In this case, in effecting such a split, the following matters shall be specified:

1. the contents of the terms of trust after the absorption-type trust split;
2. if there is a change in the contents of the beneficial interest provided for by the terms of trust, such contents and the reasons for the change;
3. if monies or any other property is delivered to a beneficiary in the absorption-type trust split, the contents and value of such property;
4. the day on which the absorption-type trust split becomes effective;
5. the contents of any property to be transferred;
6. if there is any obligation which will, as a result of the absorption-type trust split, cease to be an obligation covered by the trust property of a trust that transfers a part of its trust property to another trust (hereinafter referred to as the “split trust” in this Subsection), and will become an obligation covered by the trust property of the other trust to which said part of the trust property is transferred (hereinafter referred to as the “succeeding trust”), the matters concerning such obligation; and
7. other matters specified by Ordinance of the Ministry of Justice.

② Notwithstanding the provisions of the preceding paragraph, in the cases listed in the following items, an absorption-type trust split may be effected by the methods specified in the respective items. In this case, the trustee shall, without delay, give notice of the matters listed in the items of said paragraph, to the settlor in the case set forth in item 1, or to the settlor and the beneficiary in the case set forth in item 2:

1. where it is clear that the split is not contrary to the purpose of the trust: an agreement between the trustee and the beneficiary; or
2. where it is clear that the split is not contrary to the purpose of the trust and that it conforms to the interests of the beneficiary: the trustee’s manifestation of such intent in a document or electromagnetic record.

③ Notwithstanding the provisions of the preceding two paragraphs, if each terms of trust otherwise provides for, such provisions shall prevail.

④ Where there is no settlor at the time in question, the provisions of paragraph ① shall not apply, and the phrase “to the settlor in the case set forth in item 1, or to the settlor and the beneficiary in the case set forth in item 2” in paragraph ② shall be deemed to be replaced with “to the beneficiary in the case set forth in item 2.”

(Agreement, etc. among the Relevant Parties)

Article 159 ① A creation-type trust split may be effected at the agreement of the settlor, the trustee, and the beneficiary of a trust. In this case, in effecting such a split, the following matters shall be specified:

1. the contents of the terms of trust after the creation-type trust split;

the interest adjustment with the creditors, the current statute admits an objection right of a creditor against a split of trust¹⁰, and prescribes the object and the scope

-
2. if there is a change in the contents of the beneficial interest provided for by the terms of trust, such contents and the reasons for the change;
 3. if monies or any other property is delivered to the beneficiary in the creation-type trust split, the contents and value of such property;
 4. the day on which the creation-type trust split becomes effective;
 5. the contents of any property to be transferred;
 6. if there is any obligation which will, as a result of the creation-type trust split, cease to be an obligation covered by the trust property of the former trust and become an obligation covered by the trust property of the new trust, matters concerning such obligation; and
 7. other matters specified by Ordinance of the Ministry of Justice.

② Notwithstanding the provisions of the preceding paragraph, in the cases listed in the following items, a creation-type trust split may be effected by the methods specified in the respective items. In this case, the trustee shall, without delay, give notice of the matters listed in the items of said paragraph, to the settlor in the case set forth in item 1, or to the settlor and the beneficiary in the case set forth in item 2:

1. where it is clear that the split is not contrary to the purpose of the trust: an agreement between the trustee and the beneficiary; or
2. where it is clear that the split is not contrary to the purpose of the trust and that it conforms to the interests of the beneficiary: the trustee's manifestation of intention in a document or electromagnetic record.

③ Notwithstanding the provisions of the preceding two paragraphs, if each terms of trust otherwise provides for, such provisions shall prevail.

④ Where there is no settlor at the time in question, the provision of paragraph ① shall not apply, and the phrase "to the settlor in the case set forth in item 1, or to the settlor and the beneficiary in the case set forth in item 2" in paragraph ② shall be deemed to be replaced with "to the beneficiary in the case set forth in item 2."

¹⁰(Objections by the Creditors)

Article 156 ① Where an absorption-type trust split is effected, creditors who hold claims pertaining to obligations covered by the trust property of the split trust or the succeeding trust may state their objections to the trustee with regard to the absorption-type trust split; provided, however, that this shall not apply if there is no risk of such creditors being harmed by the absorption-type trust split.

② Where all or some of the creditors set forth in the preceding paragraph may state their objections pursuant to the provisions of said paragraph, the trustee shall give public notice of the following matters in the official gazette, and shall give notice of the same separately to each of the known creditors set forth in said paragraph; provided, however, that the period set forth in item 2 may not be less than one month:

1. a statement to the effect that the absorption-type trust split is to be effected;
2. a statement to the effect that the creditors set forth in the preceding paragraph may state their objections within a certain period of time; and
3. other matters specified by Ordinance of the Ministry of Justice.

③ Notwithstanding the provisions of the preceding paragraph, a trustee who is a juridical person may substitute public notice (limited to public notice given by the following methods) for the separate notice to each creditor under the provisions of said paragraph:

1. publication in a major daily newspaper which publishes matters on current events; or
2. electronic public notice.

④ If no creditors set forth in paragraph ① state any objections within the period set forth in

of the assets to cover obligations to the creditors in several types¹¹. However, those

paragraph ②, item 2, such creditors shall be deemed to have accepted the absorption-type trust split.

⑤ When any creditors set forth in paragraph ① state their objections within the period set forth in paragraph ②, item 2, the trustee shall make payment or provide reasonable security to such creditors, or shall entrust adequate property to a trust company, etc. for the purpose of having such creditors receive payment; provided, however, that this shall not apply if there is no risk of such creditors being harmed by the absorption-type trust split.

(Objections by the Creditors)

Article 160 ① Where a creation-type trust split is to be effected, creditors who hold claims pertaining to obligations covered by the trust property of the former trust may state their objections to the creation-type trust split to the trustee; provided, however, that this shall not apply if there is no risk of such creditors being harmed by the creation-type trust split.

② Where all or some of the creditors set forth in the preceding paragraph may state their objections pursuant to the provisions of said paragraph, the trustee shall give public notice of the following matters in an official gazette, and shall give notice of the same separately to each of the known creditors set forth in said paragraph; provided, however, that the period set forth in item 2 may not be less than one month:

1. a statement to the effect that the creation-type trust split is to be effected;
2. a statement to the effect that the creditors set forth in the preceding paragraph may state their objections within a certain period of time; and
3. other matters specified by Ordinance of the Ministry of Justice.

③ Notwithstanding the provisions of the preceding paragraph, a trustee who is a juridical person may substitute public notice (limited to public notice given by the following methods) for the separate notice to each creditor under the provisions of said paragraph:

1. publication in a major daily newspaper which publishes matters on current events; or
2. electronic public notice.

④ If creditors set forth in paragraph ① do not state any objections within the period set forth in paragraph ②, item 2, such creditors shall be deemed to have accepted the creation-type trust split.

⑤ When creditors set forth in paragraph ① state their objections within the period set forth in paragraph ②, item 2, the trustee shall make payment or provide reasonable security to such creditors, or shall entrust adequate property to a trust company, etc. for the purpose of having such creditors receive payment; provided, however, that this shall not apply if there is no risk of such creditors being harmed by the creation-type trust split.

¹¹(Scope of Obligations Covered by the Trust Property of a Split Trust and That of a Succeeding Trust After an Absorption-Type Trust Split)

Article 157 Where an absorption-type trust split is effected, the obligation set forth in Article 155, paragraph ①, item 6 shall cease to be an obligation covered by the trust property of the split trust after the absorption-type trust split, and shall become an obligation covered by the trust property of the succeeding trust after the absorption-type trust split. In this case, any obligation which was an obligation covered only by the trust property of the split trust shall become an obligation covered only by the trust property of the succeeding trust.

Article 158 Where a creditor who may state objections pursuant to the provisions of Article 156, paragraph ① (limited to creditors to whom separate notice should be given pursuant to the provisions of paragraph ② of said Article) has not been given notice as set forth in paragraph ② of said Article, the creditor may also demand, based on the claim which the creditor has held since prior

provisions in the current statute have been directly adopting a common opinion on the split of trust under the former statute. So, the problems associated with that legal construction are still unavoidable as in the era of the former statute. In addition to that, we should still consider the theoretical and practical problems caused by the very fact that there exist the methods to realize the essentially equal effect to a split of trust with avoiding a formal split procedure.

to the absorption-type trust split and which falls under any of the following items, that the trustee perform the obligation pertaining to said claim by using the property specified in the respective items; provided, however, that such performance shall be limited, in the case of the property set forth in item 1, to the value of the property to be transferred to the succeeding trust as of the day on which the absorption-type trust split becomes effective, and in the case of the property set forth in item 2, to the value of the trust property of the split trust as of said day:

1. a claim pertaining to an obligation covered by the trust property of the split trust (excluding claims pertaining to the obligation set forth in Article 155, paragraph ①, item 4): property that belongs to the trust property of the succeeding trust after the absorption-type trust split; or
2. a claim pertaining to an obligation covered by the trust property of the succeeding trust (limited to claims pertaining to the obligation set forth in Article 155, paragraph ①, item 6): property that belongs to the trust property of the split trust after the absorption-type trust split.

(Scope of Obligations Covered by the Trust Property of the Former Trust and That of the New Trust After a Creation-Type Trust Split)

Article 161 Where a creation-type trust split is effected, the obligation set forth in Article 159, paragraph ①, item 6 shall cease to be an obligation covered by the trust property of the former trust after the creation-type trust split, and shall become an obligation covered by the trust property of the new trust after the creation-type trust split. In this case, any obligation which was an obligation covered only by the trust property of the former trust shall be an obligation covered only by the trust property of the new trust.

Article 162 Where a creditor who may state an objection pursuant to the provisions of Article 160, paragraph ① (limited to such a creditor to whom a separate notice should be given pursuant to the provisions of paragraph ② of said Article) has not been given notice as set forth in paragraph ② of said Article, the creditor may also demand, based on a claim which the creditor has held since before the creation-type trust split which falls under any of the following items, that the trustee perform the obligation pertaining to said claim by using the property specified in the respective items; provided, however, that such performance shall be limited, in the case of the property set forth in item 1, to the value of the trust property of the new trust as of the day on which the creation-type trust split becomes effective, and in the case of the property set forth in item 2, to the value of the trust property of the former trust as of said day:

1. a claim pertaining to an obligation covered by the trust property of the former trust (excluding a claim pertaining to the obligation set forth in Article 159, paragraph ①, item 4): property that belongs to the trust property of the new trust after the creation-type trust split; or
2. a claim which has become a claim pertaining to an obligation covered by the trust property of the new trust (limited to a claim pertaining to the obligation set forth in Article 159, paragraph ①, item 4): property that belongs to the trust property of the former trust after the creation-type trust split.

6.2 Termination and Continuation of Trust

(1) Termination of Trust

A “termination of a trust” means that the trust parties and the trust property are released from the binding power of the purpose of the trust. What are provided as causes of termination of a trust are the case in which the trust related parties agreed with the termination of the trust¹², the case in which the cause of termination prescribed in the act of trust occurred, the case in which the purpose of the trust has been accomplished or its accomplishment turned out to be impossible, the case in which the trust disappeared by a consolidation of trusts, the case in which the trust fell into the bankruptcy¹³ and the case in which some other special circumstance or

¹²(Termination of a Trust by Agreement Between the Settlor and the Beneficiary)

Article 164 ① A settlor and a beneficiary may terminate a trust at any time by an agreement between them.

② When a settlor and a beneficiary have terminated a trust at a time that is detrimental to the trustee, the settlor and the beneficiary shall compensate the trustee for any damages; provided, however, that this shall not apply if there was a compelling reason for the trust to be terminated at that time.

③ Notwithstanding the provisions of the preceding two paragraphs, if the terms of trust otherwise provides for, such provisions shall prevail.

④ The provisions of paragraph ① and paragraph ② shall not apply where there is no settlor at the time in question.

¹³(Grounds for Termination of a Trust)

Article 163 In addition to cases under the provisions of the following Article, a trust shall terminate in the following cases:

1. where the purpose of the trust has been achieved or where it has become impossible to achieve the purpose of the trust;
2. where the trustee has continuously held all beneficial interests in the form of the trustee’s own property for one year;
3. where the trust lacks a trustee and the office has not been filled with a new trustee for one year;
4. where the trustee has terminated the trust pursuant to the provisions of Article 52 (including cases where applied mutatis mutandis pursuant to Article 53, paragraph ② and Article 54, paragraph ④);
5. where the trust is consolidated with another trust;
6. where a judicial decision ordering the termination of the trust has been rendered pursuant to the provisions of Article 165 or Article 166;
7. where an order for the commencement of bankruptcy proceedings has been entered against the trust property;
8. where the settlor is given an order for the commencement of bankruptcy proceedings, an order for the commencement of rehabilitation proceedings, or an order for the commencement of reorganization proceedings, and the trust agreement is cancelled under the provisions of Article 53, paragraph ① of the Bankruptcy Act, Article 49, paragraph ① of the Civil Rehabilitation Act or Article 61, paragraph ① of the Corporate Reorganization Act (including cases where applied mutatis mutandis pursuant to Article 41, paragraph ① and Article 206, paragraph ① of the Act on Special

some public interest requires the trust to terminate¹⁴. However, the ground to justify the termination of a trust is different in every case.

For example, the ground of a termination based on the cause prescribed in the act

Rules, etc. for Reorganization Proceedings for Financial Institutions, etc.); or

9. where any grounds specified by the terms of trust occur.

¹⁴(Judicial Decisions Ordering the Termination of a Trust Due to Special Circumstances)

Article 165 ① When it has become clear that, due to the special circumstances that were unforeseeable at the time of the terms of trust, the termination of a trust has come to be in the best interest of the beneficiary in light of the purpose of the trust, the status of the trust property, and any other relevant circumstances, the court may, at the petition of the settlor, the trustee, or the beneficiary, order the termination of the trust.

② Before the court makes a judicial decision on the petition set forth in the preceding paragraph, it shall hear the statement of the trustee.

③ The judicial decision on the petition set forth in paragraph ① shall include the reasons for said decision.

④ The settlor, the trustee, or the beneficiary may file an immediate appeal against a judicial decision on the petition set forth in paragraph ①.

⑤ The immediate appeal set forth in the preceding paragraph shall have the effect of a stay of execution.

(Judicial Decisions Ordering the Termination of a Trust to Ensure the Public Interest)

Article 166 ① In the following cases, when the court finds the existence of a trust to be unallowable from the perspective of ensuring the public interest, it may, at the petition of the Minister of Justice, the settlor, the beneficiary, a trust creditor, or any other interested party, order the termination of the trust:

1. where the trust was created for an unlawful purpose; or

2. where the trustee has committed an act that goes beyond or abuses the trustee's power as prescribed by laws and regulations or the terms of trust or has committed an act in violation of criminal laws and regulations, and where the trustee continuously or repeatedly commits said act despite having received a written warning from the Minister of Justice.

② Before the court makes a judicial decision on the petition set forth in the preceding paragraph, it shall hear the statement of the trustee.

③ The judicial decision on the petition set forth in paragraph ① shall include the reasons for said decision.

④ The person who has filed the petition set forth in paragraph ① or the settlor, the trustee, or the beneficiary may file an immediate appeal against the judicial decision on the petition set forth in said paragraph.

⑤ The immediate appeal set forth in the preceding paragraph shall have the effect of a stay of execution.

⑥ When the settlor, the beneficiary, a trust creditor, or any other interested party has filed a petition set forth in paragraph ①, the court may, at the petition of the trustee, order the person who has filed the petition set forth in said paragraph to provide reasonable security.

⑦ When filing a petition under the provisions of the preceding paragraph, the trustee shall make a prima facie showing of the fact that the petition set forth in paragraph ① was filed in bad faith.

⑧ The provisions of Article 75, paragraph ⑤ and paragraph ⑦ and Article 76 to Article 80 of the Code of Civil Procedure (Act No. 109 of 1996) shall apply mutatis mutandis to the security to be provided upon the filing of a petition set forth in paragraph ① pursuant to the provisions of paragraph ⑥.

of trust or on the agreement of the trust parties is, of course, the respect of the wills of the trust parties. The termination by the accomplishment or the impossibility of the accomplishment of the purpose would be logically derived from the fact that the essential nature of trust relationship is to be bound with the trust purpose. On the other hand, the termination of a preexisting trust at the consolidation could be interpreted as a political concern to avoid unnecessary complications of trust relationships by a consolidation of trusts. But it may be seen also as a simple adoption of the common opinion for the legal construction of a consolidation in the former statute era. Further, a termination of a trust by the bankruptcy of the trust would be a socio-political decision to secure the economic and social confidence for general trust relationships and the trust institute.

Thus the ground of the legitimacy for the cause of termination of a trust is not necessarily uniform, so also for the interpretation of the timing of each termination some cause-wise interpretation may be required. For example, the termination based on the termination reason prescribed in the terms of trust or by the agreement among the trust related parties will be effectuated, as a rule, at the time determined in the act of trust or the agreement respectively but where there is no explicit determination of the termination time, the termination time will be decided by an interpretation of the agreement among the trust parties. In the case of the termination by the consolidation or the bankruptcy of the trust, the termination time would be the effectuation time of the consolidation or the commencement time of the bankruptcy proceeding, respectively. In the case of termination by a decision of a court, the period of the termination would be recorded in the decision. In contrast to those above, in the case of the termination caused by the accomplishment or the impossibility of the accomplishment of the purpose of the trust, an interpretation of the purpose would be indispensable and, in addition, the possibility of continuity of the trust relationship with some similar purpose through a modification of the purpose would be considered so as to get to the individually appropriate conclusion. So, we should note that interpretations of the termination condition of a trust in this case may be tangled.

(2) Liquidation of Trust

When a trust relationship terminates, the trust property is released from the purpose of the trust and the legal relationships involving the trust related parties are all liquidated including those with third parties. In this case the practically most important problem is how to distribute the “rest of the property” among the trust related parties. This problem is the core of the problem of the “liquidation of trust property”.

On the general standard of the judgement in the case of liquidation of a trust, in contrast to the case of the running trust relationship, the interpretation cannot

put the purpose of the trust on the center. Rather, the only purpose in the liquidation of a trust is the reasonable and appropriate distribution of the rest or the trust property after the redemption of the principal among the parties concerned. Then, the power and duty of the trustee also can be understood to be maintained only for that purpose. Further, the supervising power of the beneficiary should be exercised not for the attainment of the trust purpose before the liquidation but for supervising the trustee's exercise of the power in order for the liquidation process to be performed reasonably and appropriately. Then the status of the beneficiary would become essentially same as that of the third parties concerned. From this view point, it would be theoretically more appropriate to think that a trust relationship is once dissolved at the "termination of the trust" but resurrect as a new trust relationship with the purpose of "the liquidation of the trust" and then completely vanished with the completion of the liquidation than to think that a trust relationship is "ended" only after the completion of liquidation. Both the former and current statute use a fiction that a trust relationship after the termination will continue to exist for the purpose of the liquidation¹⁵. This could be interpreted as essentially following the idea described just above.

The basic order of the liquidation process of a trust is, if there are some obligations with priority, those obligations are fulfilled first, then ordinary obligations are fulfilled. After then, if there is left some of the trust property, the rest of the trust property is transferred to the holder of a vested right. The theoretically most important problem in this respect is how to treat the beneficiary. How to think of the status of beneficiary varies depending on how to think of the fundamental structure of trust. If one thinks that a beneficiary is the substantial owner of the trust, the transfer of the rest of the trust property becomes possible naturally only after the completion of the payments for the creditors. From this stand point, a holder of a vested right can get only such a part of the rest of the trust property that the substantial ownership of the beneficiary doesn't reach. By contrast, if one thinks that a beneficial right is a right in person to the trustee or the trust property, a beneficiary is theoretically one of the creditors. So, as a general rule, a beneficiary could get the distribution at the equal status to that of the ordinary creditors. There was no provision which explicitly prescribes this problem in the former statute. However, the current statute has a provision which prescribes that a beneficiary should be subordinated to the ordinary creditors¹⁶. So,

¹⁵Article 63 of the former statute Where a trust has terminated, such trust shall be deemed to continue to exist until the rest of the trust property has been transferred to the holder of a vested rights.

(Constructive Existence of a Trust)

Article 176 Even where a trust has terminated, such trust shall be deemed to continue to exist until the liquidation is completed.

¹⁶(Relationship between Distribution claim as a beneficiary and Trust Claims)

Article 101 Distribution claim as a beneficiary shall be subordinated to trust claims.

the priority order of a beneficial right will not change in practice whether one takes the beneficial right as a substantial ownership or as a right in person.

Another practically important problem concerning a liquidation of a trust is at what time the payment or the transfer of property based on the liquidation process is considered to be done where there are some intermediators other than the trust parties in the dealing for the liquidation. This problem has the decisive influence to determining the time of the finish of a liquidation process in relation to each person concerned, that is, to the answer for the question, up to what time the liquidation trustee has been charged with the duty and responsibility to the person concerned with the liquidation.

The criterion for the interpretation on this problem is relatively clear in theory, which is, in sum, that the liquidation process is finished in relation to a person at the time when the payment of the obligation or the transfer of the property is done to the person her/himself or the agent of that person so that the property has reached within the control area of the person. Therefore, while where there is a special agreement or contract with the person concerned, the agreement or contract should prevail, where there is no special agreement or contract concerning this problem, the time would be determined by considering the status of the intermedator etc. through the interpretation of the concrete legal relationship between the intermedator and the person concerned with the liquidation. However, the nature of actual intermedator as an entrepreneur or the roll to be played by the intermedator in the liquidation process of the trust may be so various that it is not necessarily clear of whom the intermedator is an “agent” or “related person”. Then some disputes among the trust related persons may occur over the interpretation of the status of the intermedator. In fact, even if an intermedator or the like who has a capital relationship with the trustee is defined as the agent of one of the beneficiaries in the act of the trust, it will be problematic simply to accept that the “trustee” trades with the intermedator as “the agent of a beneficiary” based on the literal interpretation of the act of the trust concerning the status of the intermedator. More careful interpretation would be required in such a case.

As for the problem whether a beneficiary should assume direct liabilities to the creditors of the trust where it turned out in the course of the liquidation that the trust property is not enough to pay all the debts to the creditors, we already discussed above in relation to the liability of a beneficiary (Chapter 5 Section 3). Further, we already discussed also the legal status of the holder of a vested right (Chapter 3 Section 2 (4)). However, what we need to interpret carefully in the provisions of the current statute is that the current statute prescribes that the trustee can get the rest of the trust property where a holder of a vested right cannot be determined according to the provisions for the liquidation of a trust¹⁷. The theoretical principle in the

¹⁷(Vesting of Residual Assets)

case in which a trust property has fallen into *bona vacantia* is that it belongs to the National Treasury where it is a real property or it belongs to the possessor (Article 239 of Civil Code) otherwise. Since the possessor of the rest of the trust property in the liquidation is usually the trustee, the disposition of the current Trust Act would have the appropriateness to some degree also as the practical convention. However, this provision explicitly admits that the trustee can own the trust property, although after the completion of the liquidation process, so one should watch the activity of the trustee in the course of the liquidation not for the trustee to manipulate unfairly the decisions of the distribution of the trust property in the liquidation process for the trustee's own interest.

(3) Continuation of Trust

In the case of the termination of a trust by the reason of the accomplishment of the purpose or the impossibility of the accomplishment of the purpose, an interpretation of the purpose would be required. In this interpretation, in what degree of abstraction the purpose of the trust is interpreted would have a great influence to the conclusion on the question whether the purpose of the trust has been accomplished or whether the purpose of the trust has turned out to be impossible to be accomplished. Further, even if the purpose of the trust can be considered to have been accomplished, according to a careful interpretation of the purpose of the trust and the intension of the settlor of the trust relationship, there may be some case in which to retain the trust relationship with the purpose similar to the previous one is better and socially useful than to terminate the trust relationship so as to liquidate the trust property. This is a problem area concerning "continuation of a trust", which often brings about in practice concerning a public interest trust.

In a trust relationship for public interest, it is presupposed that even if a concrete purpose is defined in the terms of each trust, the major purpose which would common

Article 182 ① Residual assets shall vest in the following persons:

1. the person designated by the terms of trust as the person who is to be the beneficiary in relation to distribution claim as a beneficiary involving the distribution of residual assets (referred to as the "beneficiary for residual assets" in the following paragraph); and

2. the person designated by the terms of trust as a person in whom residual assets should be vested (hereinafter referred to as the "holder of a vested right" in this Section).

② Where the terms of trust contains no provisions concerning the designation of a beneficiary for residual assets or holder of a vested right (hereinafter collectively referred to as a "beneficiary etc. for residual assets." in this paragraph) or where all persons designated by the provisions of the terms of trust as beneficiaries for residual assets, etc. have waived their rights, it shall be deemed as having been provided by the terms of trust that the settlor or settlor's heir or other universal successor is to be designated as the holder of a vested right.

③ When the vesting of residual assets is not determined pursuant to the provisions of the preceding two paragraphs, residual assets shall vest in a liquidation trustee.

in such trust relationships is “the attainment of the public interest”. So, even if the concrete purpose determined in the act of a trust has been accomplished or has become impossible to be accomplished, there may be the case in which to make the trust relationship continue to exist with some similar purpose would be suitable for “the attainment of the public interest” as the major purpose than to make it terminate. Further, as the intension of the settlor, it is may be rather few that a settlor who settle a trust for public interest intended to attain only that concrete purpose of the trust relationship. Instead, it is more reasonable and natural to think that such a settlor created the concrete trust as a means to attain the realization of some more general public interest. In fact, if the trust relationship terminates, the liquidation of the trust relationship is performed, so that the rest of the trust property after the liquidation belongs to either the holder of a vested right or the trustee in person. Then, it will not be probable that a trust relation is settled again with the rest of the property as the trust property. Considering those facts, the opinion that such a trust relationship should not be easily terminated would have some actual legitimacy.

However, the argument above may look like a circular reasoning beginning with the presupposition that a trust relationship should be retained as far as possible. Viewing in other perspective, since a trust relationship is bound with the trust purpose, where the purpose is accomplished or becomes impossible to accomplish, the termination of the trust relationship should be the logical consequence and to settle a new trust relationship with a similar purpose can not be derived at least directly from the pursuit for the purpose of the preexisting trust relationship. Therefore, it would be difficult to deduce the ground of the rationality or the legitimacy of continuation of a trust from the theory of the nature of trust relationship. Besides, consider also the termination by other reason than the accomplishment or impossibility of accomplishment of the trust purpose. As for, for example, a termination of a trust by a cause which is prescribed as the reason of the termination in the terms of the trust, to make the trust relationship continue irrespective of the prescription in the act of trust couldn't be evaluated to be appropriate or rational at least from the view of the traditional principle concerning trust relationship and if one still needs to do so, one must use a fiction to suppose “the agreement” among the trust parties for the retainment of the trust relationship but with a new trust purpose. Still less, in the case of the bankruptcy of the trust or in the case in which a court issues a termination order to the trust relationship from the view of public interest, since there is no rational reason to retain the trust relationship, it is practically impossible to argue the continuation of the trust relationship.

In sum, the rationality and appropriateness of continuation of a trust mean the rationality and appropriateness to create a new trust relationship with a similar purpose to that of a preexisting trust relationship to be terminated. Under the current private law system in which it is the major principle that a private property right can be freely exercised within the right of the title holder, it is difficult to legitimate

continuation of a trust relationship against the will of the parties of the preexisting trust or the terms of the trust which is an embodiment of the will. Therefore, unless one supposes that the trust parties share the common major purpose “the public interest”, or unless the supervising authority over that public interest trust executes the discretion power to retain the trust relationship, one couldn’t theoretically give a persuasive explanation of the fact that the continuation is preferred to the termination of the trust.

Other thinkable major purpose than public interest will be the “pursuit for an economic interest”, as a means for which some concrete investment instruments or objects for the investment are specified in “the trust purpose”. However, in such a case, since up to when the action of the pursuit for an economic interest would be continued should be determined by the agreement among the parties, it couldn’t be said to be desirable to make the trust relationship continue by the judgement of the other person than the trust parties even against the termination reason of the trust relationship determined in the agreement among the trust parties or defined in the terms of trust. If the trust parties want the continuation of the trust relationship, the rational and appropriate way would be to settle a new trust relationship with a new purpose again.

Chapter 7

Characteristics of Applied Trusts

In this chapter, we give overviews over, as examples of applied trusts, four types of trusts, Public Interest Trust, Commercial Trust, International Trust and Intellectual Property Trust and consider characteristics of them respectively with keeping what we have discussed concerning the general characteristics and problems of trust up to here in the mind. Those applied trust relationships are all very important in both theory and practice, so that formally each one would require a full-scale investigation. But according to the policy of this book, namely, to consider the characteristics of the general theory of trust and the practical problems, we will restrict our discussion to the minimal description of the characteristics and problems concerning those types of trusts.

7.1 Public Interest Trust

(1) Meaning of Public Interest and Power of the Competent Government Agency

Public interest trust is a trust relationship whose purpose is a realization of some public interest. But the “public interest” here is far from univocal. Act on Public Interest Trusts (Public Interest Trust Act Taisho 11 (1922) Act no.62), which is the special statute for public interest trust, provides the definition of public interest trust as a trust with no provision on the beneficiary prescribed in Article 258 of the current Trust Act the purpose of which belongs to science, arts, charity, ritual, religion or other public interests and that has acquired the permission of the competent government agency¹. This provision concretely lists the purpose of trust which would be

¹Article 1 of Act on Public Interest Trusts Of trust with no provision of the beneficiary prescribed in Article 258 of Trust Act (Act no. 108 of 2006 (Heisei 18)), a trust the purpose of which falls under science, arts, charity, ritual, religion or other public interests and which has acquired the permission

admitted as a public interest trust. But if one consider the items more rigidly, while “science, arts and charity” are concrete actions to attain respective public interests, “ritual and religion” are listed because of their historical and social rolls to support various activities to promote public interests including science etc.. So, we should note that from this theoretical point of view the subjects the provision lists belong to mutually different spheres.

The current Trust Act doesn’t have a provision which directly prescribes public interest trust but, instead, the Act on Public Interest Trusts referred to above exists as a special law for public interest trusts. However, this Act on Public Interest Trusts consists of the provisions that originally constituted the part for public interest trust in the former Trust Act. At the opportunity of the legislation of the current Trust Act, that part was excerpted, given some provisions for minimal adjustments and legislated as an independent statute with the new name “Act on Public Interest Trust”. So, the contents of the provisions of the Public Interest Trust Act is essentially same as the Public Interest Trust part of the former Trust Act. Therefore, we should note that the interpretation of public interest trusts is basically unchanged since the former Trust Act until the Public Interest Trust Act will have been amended in the future.

Compared with an ordinary trust relationship, namely, a private interest trust, the characteristic of a public interest trust is, in addition to the restriction on the trust purpose to a realization of some public interest, that a trust relationship is established only after the acquirement of permission from the competent government agency². Further, as the power of the competent government agency, the general supervising power over public interest trusts³ as well as the permission of a modification of a trust⁴,

set forth in the next article (hereinafter referred to as Public Interest Trust) shall be governed by the provisions of this Act.

²Article 2 of Public Interest Trust Act ① Of trust with no provision of the beneficiary prescribed in Article 258 of Trust Act, a trust the purpose of which falls under science, arts, charity, ritual, religion or other public interests shall not be effected unless the trustee has acquired the permission of the competent government agency.

② As for the duration of a public interest trust, Article 258 of Trust Act shall not apply.

³Article 3 of Public Interest Trust Act A public interest trust shall subordinate to the supervision of the competent government agency.

Article 4 of Public Interest Trust Act ① The competent government agency may at any time investigate in the state of administration of a public interest trust or order a deposit of a property or other necessary dispositions.

② A trustee of a public interest trust shall perform a public notice on the state of the trust administration and trust property one a year at a determined period.

⁴Article 5 of Public Interest Trust Act ① When there occurred on a public interest trust some special circumstance which was not able to be foreseen at the time of the settlement time, the competent government agency may order the modification of the trust unless the modification violates the main aim.

② The provisions of Article 150 of Trust Act shall not apply to a public interest trusts.

consolidation or split of trusts⁵ and resignation of a trustee⁶ are prescribed respectively. In addition, the powers of a court prescribed in Trust Act generally belong to the power of the competent government agency for a public interest trust⁷. Still one more characteristic of a public interest trust is that even after the termination of a public interest trust, where there is no determination of a person to hold the vested right or the vested right holder waived the right, the trust relationship can be retained with the rest of the trust property as the trust property for the similar purpose based on the judgement by the competent government agency according to the main aim of trust⁸. The income of a public interest trust is generally exempted from the tax⁹, which is an apparent difference with a private interest trust.

In sum, in public interest trusts the supervising power of the competent government agency is quite strong, so that the administration of a public interest trust is performed virtually under the direction and supervision of the competent government agency. In this meaning, in a public interest trust, by what means the “public interest” will be realized is not necessarily entrusted on the free creativity of the trust parties. In addition, in settling a public interest trust, which government agency is competent in that public interest as the trust purpose must be clear in practice. Seeing from this point of view, the fact that the provision of Public Interest Trust Act is enumerating concrete public interest areas for a trust purpose as a public interest trust may be interpreted as considering the convenience to determine the competent

⁵Article 6 of Public Interest Trust Act The permission of the competent government agency shall be required in order to modify (except the modification prescribed in the previous Article) or to consolidate or split public interest trusts.

⁶Article 7 of Public Interest Trust Act A trustee of a public interest trust may resign the trustee only when there is a compelling reason, provided the permission the competent government agency shall be required.

⁷Article 8 of Public Interest Trust Act [excerpt] ① As for a public interest trust, the power of a court prescribed in Trust Act concerning a trust with no provision of the beneficiary prescribed in paragraph ① of Article 258 of that Act shall belong to the competent government agency.

⁸Article 9 of Public Interest Trust Act Where a public interest trust terminates, when there is no provision to determine the holder of a vested right or when the holder of a vested right waived the right, the competent government agency may make the trust relationship continue for the similar purpose to the previous one according to the main aim of trust.

⁹(Immunity concerning Public Corporations and Public Interest Trusts etc.) [excerpt]
Article 11 of Income Tax Act

...
② As for the income which occurred on the trust property of a public interest trust prescribed in Article 1 (Public Interest Trust) of Act on Public Interest Trust (Act no.62 of 1922) or of a beneficiary protection trust prescribed in Article 2 paragraph ① (Definitions) of Act on Exchange of Company Bonds and Shares etc. (provided, however, as for the interest etc. of public corporation bonds etc., restricted to the part which is calculated according to Cabinet Order as the value of the part corresponding to the period during which those public corporation bonds etc. belong to the trust property of the public interest trust or of the beneficiary protection trust) The income tax shall not be imposed.

government agency for the trust. Further a room of discretion of the trust parties is narrow in determining the actual administration policy of the trust property, the concrete contents of beneficial right or the selection of a person to be beneficiary from beneficiary candidates. In this meaning, an opinion that a public interest trust should be argued separately from an ordinary trust would have some reason.

However, since a public interest trust is still a kind of a trust relationship, even if a trust relationship failed to be settled as a public interest trust, it would be established as a private interest trust, so that the current Trust Act would be applied to it. Trust parties have the choice on whether the trust relationship would be established as a “public interest trust” or not. In sum, we should think that the difference between a private interest trust and a public interest trust is based not on the theoretical nature of the trust relationship but on the practical considerations, especially, on a governmental policy. Therefore, also in public interest trusts the essential nature of trust relationship is that the trust property and the trust parties are bound with the purpose of the trust, like in a private interest trust. The paying the respect for that nature should be put on the center of a legal interpretation also in exercising the power of the competent government agency.

(2) The Nature of Beneficial Right in a Public Interest Trust

As we have described above, as the “realization of a public interest” is set to be the major objective in a public interest trust relationship, there are some differences also in the nature of a beneficiary or beneficial right from those in an ordinary trust relationship. since to give maximum benefits to a certain beneficiary is not a purpose in a public interest trust so that a predetermined benefit from the trust property is given to a “beneficiary” who is selected according to a predetermined criterion in order to realize effectively the public interest, a beneficiary in a public interest trust is usually not concretely specified at the beginning time of the settlement. Although we have already explained above, it is supposed that the supervising power over a public interest trust is exercised mainly by the competent government agency, so that the exercise of the supervising power of the beneficiary would be redundant. So, in contrast to the case of a public interest trust, the beneficiary’s exercise of the supervising power will not be the center of the institution of the public interest trust.

Therefore, the nature of beneficial right in public interest trusts is in that the content of a beneficial right for the beneficiary is concentrated at the enjoyment of the benefit from the trust property according to the act of trust so that the exercise of the supervising power over the administration of the trust property is entrusted to the competent government agency. Thus, a beneficial right in a public interest trust cannot be said to be the substantial ownership of the trust property and, since the trust relationship cannot be said to be based on the confidential relationship with the trustee, it cannot be interpreted as a claim right to the trustee in person. In the end,

as for a public interest trust, it would be most reasonable to think that a beneficial right is a right in person against the trust property as an independent property for the realization of the public interest. If one considers the nature of a beneficial right in a public interest trust intimately associated with the main aim of the institution, as for the right of a beneficiary candidate who is not yet a beneficiary, it would be more consistent to expect an appropriate exercise of the supervising power by the competent government agency than to interpret the right of a beneficiary candidate who is not yet a beneficiary as an independent right of the beneficiary candidate.

However, the argument like above clearly presupposes the reliability of the institution according to which the supervising power is always appropriately exercised by the competent government agency for the purpose of the realization of the public interest. Then, the next problem will be how to secure the reliability of the institution or how to correct the effect of the inappropriate exercise of the power where some inappropriate exercise of the power by the trustee or by the competent government agency harmed the reliability. In such a case, although some complicated legal relationships may be inevitably generated, it should be better to allow also a beneficiary or a beneficiary candidate in a public interest trust relationship to exercise the supervising power from a little different view point than the competent government agency in order to keep the appropriateness of the operation of the institution through an analogy with the supervising power of a beneficiary or a beneficiary candidate in private interest trust relationships.

(3) Modern Applications of Public Interest Trusts

According to the traditional common opinion, while Public Interest Trust and Incorporate Foundation are essentially same property administration institutions with the realization of some public interest as the purpose, an incorporated foundation has its independent legal personality but, on the other hand, a public interest trust doesn't. Such being the case, the choice between those institutions has been determined virtually according to the scale of the assets. Seeing from the similarity between them, the "accomplishment of public interest" in the purpose of a public interest trust is supposing the duration of the trust relationship for some time like in an incorporated foundation and the arguments over the continuation of a trust described above can be seen to have some connection with such circumstances. Further, candidates of a person who can get the benefit from a public interest trust may range over rather wide area like in the case of incorporated foundation and the objectivity and fairness in some social meaning would be required in the selection of a beneficiary taking the purpose, "the accomplishment of public interest", into consideration. Under such a traditional common opinion, what is not so much different from the case of a incorporated foundation would be required to settle a public interest trust in the scale of the asset or in the legally required procedure for the settling.

However, under the traditional common opinion like above, it will be actually difficult within the property disposable by an individual to settle a public interest trust with a concrete purpose which should be useful to realize the ultimate public interest. Let's imagine a public interest trust for supporting revival from disaster of great earthquake. Suppose, for example, that someone is intending to settle a public interest trust by providing its private property to support economically the residents of the area which has been suffered by a great earthquake and the enterprises doing businesses in such an area. Since, even if only within the private property only for persons residing in a limited area, for an individual to do some supporting activities would be useful not only for the support of that disaster area but, ultimately, also for the promotion of the revival of whole the society, so that it can be said clearly to lead to "a realization of a public interest". It is true that, since the scale of the property which an individual can provide as the trust property is naturally not very huge, it would be impossible to support all the residents and enterprises in all damaged areas, so that the residents and enterprises actually supportable by that asset would be regionally and personally limited to the range which the individual actually has known of.

Such, so to speak, "an individual type public interest trust" has in reality some incompatible characteristic with the presuppositions of the traditional view concerning public interest trust. So, according to the traditional opinion, it may be difficult in some degree to acquire the permission for such a trust relationship as a public interest trust. However, if the will of individual which clearly leads to the realization of the public interest doesn't fall under the category for a public interest trust, it will be theoretically and practically a failure of the institution. In fact, the greater was the damages by an earthquake, the more cost and time it takes to grasp all the details of the state of the damages. So, if one must wait for the activities of the public interest groups or public agencies whose objects to support are all the damaged residents and enterprises in all the disaster areas, swift and flexible supporting activities would not be expectable, for such a group or organization would be required to act objectively and impartially. Therefore, as a general policy for activities for the public interest for the purpose of supporting the damaged areas, it will be necessary and useful to prepare some complex system, with which, while some part of the support activities is entrusted to the accumulation of the activities of "individual type public interest trusts" which target at support within the range personally known to those active persons, orthodox public interest groups or public agencies complement the support activities with the comprehensive perspective, for instance, by supporting the areas where the supporting activities or funds are insufficient. By the way, a method to make the private property of an individual donate to a public interest group does not make a swift support action possible. Moreover, since the usage of the donated asset is administered generally based on the judgement by the donee organization, the actual will of the donator is not necessarily reflected on the usage of the asset,

which is a serious failure of this method.

Such being the case, it is not appropriate both in theory and practice to interpret the main aim of the institution of public interest trust close to that of incorporated foundation. Rather, the public interest trust institution in the future should have more flexibility in the operation so as to allow an individual to settle a public interest trust for “the realization of the public interest” as far as possible within the asset that individual can disposed of. Rational exercises of the discretion power by the competent government agency in each relevant field and the preparation of the rational provisions for the public interest trust institution are waited for.

7.2 Commercial Trust

(1) Definition and Characteristic of Commercial Trust

Of the definitions of commercial trust there are two qualitatively different ones. The first is that a “commercial trust” is a trust relationship in which the trustee is a merchant, who is a profit-making businessman¹⁰. The second is that a “commercial trust” is a trust relationship the purpose of which is a pursuit for profits on a regular basis. The latter definition is commonly accepted in present arguments concerning the commercial trust.

However, the trustee of a trust relationship the purpose of which is a pursuit for profits on a regular basis is in most cases a merchant. Moreover, in reality, whether the purpose of a trust relationship is “a pursuit for profits on the regular basis” is difficult to judge based on the appearance in many cases, so that whether the trustee is a merchant is, in effect, the practical criterion to judge from the outward appearance whether a trust relationship is a commercial trust.

Since the legislation of the former Trust Act up to the present, there is no Act named “Commercial Trust Act” in Japan. the arguments on Civil Trusts and on Commercial Trusts have been performed side by side based on the same provisions of Trust Act. The overwhelming majority of the actual trust relationships has been commercial trusts in which the trustees are trust banks. Therefore, a “trust” in Japan means a “commercial trust” at the core, so that the distinction between a civil and commercial trusts has not be thought to be necessary very much. By the way, the amendment of the former Trust Act and the legislation of the current Trust Act was motivated by the strong criticism from the trust business that the former Trust Act lacked the practical rationality. But, needless to say, this “practical rationality” meant in reality a “practical rationality as the commercial trust institution”.

¹⁰Article 6 of the former Trust Act An assumption of a trust relationship is deemed to be a commercial transaction where it is performed as a business.

Therefore, we should note that the arguments concerning practical or theoretical problems on the current Trust Act should be interpreted as actually supposing a commercial trust relationship, on which the discussion in this book is not the exception.

Theoretically, how to think about the characteristic of “the commercial trust” compared with “the civil trust” is a quite important problem but it is difficult to give a clear-cut conclusion. This problem is, in the end, reduced to the problem to abstract the theoretical view point to distinguish between “commercial” and “civil” in general trades not limited to trust relationships. But on this problem, since the modern Japanese legal system was established, in spite of the long history of the disciplinal discussions, the most persuasive conclusion concerning the difference between “civil” and “commercial” transactions is from the commercial legal study merely that a commercial transaction is a transaction an enterprise performs for the purpose of profits on a regular basis.

Such being the case, if one considers the theoretical nature of a commercial trust based on the traditional argument concerning the characteristics of general trades, the one must rely, in the end, on the attribution of the trustee who actually administer the trust property. However, while we acknowledge insufficiency of our argument, if we dare to try to argue the characteristic of the commercial trust from the side of the trust purpose, the argument will be as follows.

First, if one supposes that there is the major aim “a pursuit for profits” in commercial trusts, the concrete trust purpose of a concrete commercial trust relationship would be positioned as a concrete measure to attain the major aim. Therefore, in interpreting the consistency of the administration of the trust property with the trust purpose, not only the consistency with the concrete purpose in that trust relationship but also whether the administration action is reasonable from the view of “the pursuit for profits” would be taken into consideration. Such a way of thinking will affect the interpretations concerning the evaluation of the exercise of the power by the trustee, the duties and responsibilities of the trustee or even the evaluation of the exercise of the supervising power by the beneficiary.

Second, in a commercial trust, although the conception of its theoretical characteristic may be controversial, the trust property is understood as consisting of an accumulation of economic values rather than of concrete physical properties. It is true that the existences of the concrete properties are sometimes indispensable in order to attain the purpose of the trust, for example, to secure the control power over a certain enterprise. But even in such a case its rationality will be explained by the nature as a concrete measure for some efficient incrementation of the economic value in the end. Thus, the way of thinking that the trust property is grasped as an accumulation of economic values in commercial trust relationships would have a great influence on the judgement on the rationality of the administration action on a concrete trust property or the interpretation of the action’s suitability to the trust purpose.

The argument above is, surely, no better than an essay. In addition the conclusion may look mediocre. But the deepening the argument on this problem in the future is clearly necessary and useful.

(2) Commercial Trust and the Current Trust Act

As described above, the current Trust Act is an amendment of the former statute from the view point of the practical rationality as commercial trusts. So, the provisions of the current statute are basically suitable to the characteristic of commercial trusts.

By comparing the provisions of the current statute with those of the former statute, the general characteristics of the current Trust Act are, firstly, that a trust relationship is constructed by putting the agreement of the trust parties on the center, so that the concrete contents can be determined freely by the trust parties, and secondly, that an importance is not necessarily put on the status of the settlor but rather on the confidential relationship between the trustee and the beneficiary after the establishment of the trust relationship, and thirdly, that the duty and responsibility of the trustee is reasonably limited, so some flexible adjustment with the interest of the beneficiary is intended. All of those characteristics have the rationality and appropriateness in relation to the pursuit for profits in a commercial trust.

In addition to the general characteristics above, the provisions for the securitization of beneficial rights and the provisions for the limitation of the liability of the trustee could be enumerated as the characteristic provisions in the current Trust Act. We could say that all those provisions are designed from the angle of the rationality of the administration in a commercial trust for the purpose of the pursuit for profits rather than from the consideration on all over the trust relationships.

(a) Securitization of Beneficial Right

As for the method to securitize a beneficial right so as to put it on the circulation in the financial market, there was no provision in the former statute. But the current Trust Act explicitly provides the settlement of a “trust with certificates of beneficial interests”¹¹. As a general argument, where beneficial rights are securitized, the legal relationship among the trust parties may be changed as follows.

¹¹(Provisions of The Terms of trust on the Issuance of Certificate of Beneficial Interest)
Article 185 ① The terms of trust may provide for a certificate(s) indicating one, two, or more beneficial interests (hereinafter referred to as a “certificate of beneficial interest”) to be issued as provided for in this Chapter.

② The provisions of the preceding paragraph shall not preclude the terms of trust from providing that no certificate of beneficial interest shall be issued for a beneficial interest of specific content.

③ In the case of a trust with provisions as set forth in paragraph ① (hereinafter referred to as a “trust with certificate of beneficial interest”), the provisions set forth in the preceding two paragraphs may not be changed by making modifications to the trust.

First, since the status of a beneficiary can be easily transferred with the certificate, it may be more difficult for the trustee to grasp who is the beneficiary, than before the securitization. It means that, for example, the possibility of the act in conflict of interests for the trustee becomes difficult to be realized, so such circumstances may have some effects on the interpretation of the violation against the duty of loyalty by the trustee.

Second, where the assignment of the status of a beneficiary becomes relatively easy, since concrete beneficiaries may possibly be changed at any time, the effect of the agreement between the trustee and a concrete beneficiary would be questioned. An agreement between the trustee and the beneficiary at a certain time is usually done on behalf of that beneficiary in person and it would be rare that an agreement is made exclusively for the sake of the future beneficiary who may acquire the certificate of the beneficial interest. So, if it is allowed to modify the terms of trust by the agreement between the present trustee and beneficiary, such a modification may harm a future beneficiary. Therefore, in a trust relationship in which the beneficial interest is securitized, the effect of the agreement between the trustee and the beneficiary should be basically restrained and, as an institution design, it would be better for the stability of the circulation of the beneficial rights to prohibit the modification of the terms of trust by an agreement between the trustee and the beneficiary.

Concerning the first problem described above, the current Trust Act requires the preparation of the beneficial interest registry¹² and the trustee can treat as a beneficiary the person who is registered as a beneficiary in the registry at a certain date¹³. In a trust with certificate of beneficial interest, the beneficial right is not

④ In the case of a trust with no provisions as set forth in paragraph ①, the provisions set forth in said paragraph or paragraph ② may not be established by making modifications to the trust.

¹²Article 186 A trustee of a trust with certificate of beneficial interest shall, without delay, prepare a beneficial interest registry, and state or record therein the following matters (hereinafter referred to as the “matters to be stated in the beneficial interest registry” in this Chapter):

1. the content of the distribution claim as a beneficiary pertaining to each beneficial interest and other matters specified by Ordinance of the Ministry of Justice as matters that specify the content of the beneficial interest;
2. the serial number of the certificate of beneficial interest pertaining to each beneficial interest, the date of issue, whether each certificate of beneficial interest is a registered certificate or bearer certificate, and the number of bearer beneficial interests;
3. the name and address of the beneficiary pertaining to each beneficial interest (excluding beneficiaries of bearer beneficial interests);
4. the day on which the beneficiary set forth in the preceding item acquired each beneficial interest; and
5. in addition to what is listed in the preceding items, the matters specified by Ordinance of the Ministry of Justice.

¹³(Record Date)

Article 189 ① The trustee of trust with certificate of beneficial interest may specify a certain date (hereinafter referred to as the “record date” in this Article), and designate the beneficiaries who

effectuated unless the certificate is delivered¹⁴ and the assignee of the certificate of beneficial interest cannot duly assert the status of the beneficiary against the trustee unless the assignee's required information is recorded in the registry¹⁵. In sum, the current statute is making the information on the beneficiary and beneficial right as well as the issuance of the certificate of beneficial interest concentrated at the trustee. Therefore, the trustee can systematically grasp who is the beneficiary so that the trustee can easily recognize the scope of the duty and responsibility to the beneficiary.

Next, as for the second problem above, in issuing the certificate of beneficial interest the current statute prohibits lightening the duty of a good manager of the trustee or modifying the duty of the notification, through the terms of trust¹⁶. On the

have been stated or recorded in the beneficial interest registry as of the record date (hereinafter referred to as the "beneficiaries as of the record date" in this Article) as the persons who are entitled to exercise their rights.

② The provisions of the preceding paragraph shall not apply to any beneficiaries of bearer beneficial interests.

③ When designating the record date, the trustee of a trust with certificate of beneficial interest shall specify the content of the rights that the beneficiaries as of the record date are entitled to exercise (limited to such rights to be exercised within three months from the record date).

④ When the trustee of a trust with certificate of beneficial interest has designated the record date, the trustee shall give public notice in an official gazette, no later than two weeks prior to the record date, with regard to the record date and the matters specified pursuant to the provisions of the preceding paragraph; provided, however, that this shall not apply if the terms of trust contains provisions on the record date and the content of the rights that the beneficiaries as of the record date are entitled to exercise.

⑤ Notwithstanding the provisions of paragraph ①, paragraph ③, and the main clause of the preceding paragraph, if the terms of trust otherwise provides, such provisions shall prevail.

¹⁴(Assignment of a Beneficial Interest for Which a Certificate of Beneficial Interest Has Been Issued)

Article 194 The assignment of a beneficial interest in a trust with certificate of beneficial interest (excluding a beneficial interest subject to the provisions set forth in Article 185, paragraph ②) shall not be effective unless the certificate of beneficial interest pertaining to such assigned beneficial interest is delivered.

¹⁵(Requirements for the Perfection of an Assignment of a Beneficial Interest in a Trust With Certificate of Beneficial Interest)

Article 195 ① The assignment of a beneficial interest in a trust with certificate of beneficial interest may not be duly asserted against the trustee of the trust with certificate of beneficial interest unless the name and address of the person who has acquired the beneficial interest has been stated or recorded in the beneficial interest registry.

② For the purpose of the application of the provisions of the preceding paragraph with regard to a beneficial interest subject to the provisions set forth in Article 185, paragraph ②, the phrase "trustee" of the same paragraph shall be deemed to be replaced with "trustee or any third party."

③ The provisions of paragraph ① shall not apply to bearer beneficial interests.

¹⁶(Special Rules on the Duties of the Trustee of a Trust With Certificates of Beneficial Interests)
Article 212 ① In the case of a trust with certificates of beneficial interest, notwithstanding the provisions of the proviso to Article 29, paragraph ②, no provision of the terms of trust may mitigate

other hand, the current statute allows the terms of trust to prescribe that a certain range of the beneficiary's power including the rescission right against the act in breach of trust can be exercised by only the beneficiary whose share over the whole beneficial right exceeds a certain ratio¹⁷. Those provisions are intending, in sum, to make the administration policy of the trust property stable so as to prevent, to some degree, the confusion by the discrepancies of individual judgements among the beneficiaries. However, viewing from a general principle, since the beneficiary may change relatively easily in a trust with a certification of beneficial interest, some modification of the

the duty set forth in the main clause of said paragraph.

② The provisions of Article 35, paragraph ④ shall not apply to a trust with certificate of beneficial interests.

¹⁷(Special Rules on The Terms of trust Providing for Restrictions on the Exercise of Rights by a Beneficiary)

Article 213 ① In the case of a trust with beneficiary certificates, notwithstanding the provisions of Article 92, item 1, item 5, item 6, and item 8, provisions may be established in the terms of trust to the effect that, with regard to all or part of the following rights, such rights may be exercised only by a beneficiary who holds a beneficial interest which represents not less than three-hundredths of the voting rights of all beneficiaries (or any smaller proportion provided for by the terms of trust; hereinafter the same shall apply in this paragraph) or a beneficiary who holds beneficial interest which represents not less than three-hundredths of the total number of existing beneficial interests:

1. the right to rescind under the provisions of Article 27, paragraph ① or paragraph ② (including cases where these provisions are applied mutatis mutandis pursuant to Article 75, paragraph ④);
2. the right to rescind under the provisions of Article 31, paragraph (6) or paragraph (7);
3. the right to request to inspect or copy materials under the provisions of Article 38, paragraph ①; and
4. the right to file a petition for the appointment of an inspector under the provisions of Article 46, paragraph ①.

② In the case of a trust with certificate of beneficial interests, notwithstanding the provisions of Article 92, item 1, provisions may be established in the terms of trust to the effect that, with regard to all or part of the following rights, such rights may be exercised only by a beneficiary who holds a beneficial interest which represents not less than one-tenth of the voting rights of all beneficiaries (or any smaller proportion provided for by the terms of trust; hereinafter the same shall apply in this paragraph) or a beneficiary who holds a beneficial interest which represents not less than one-tenth of the total number of existing beneficial interests:

1. the right to file a petition for a judicial decision to order the modification of the trust under the provisions of Article 150, paragraph ①; and
2. the right to file a petition for a judicial decision to order the termination of the trust under the provisions of Article 165, paragraph ①.

③ The provisions of the preceding two paragraphs shall not apply to a trust with certificate of beneficial interests if disclosure under the provisions of Article 39, paragraph ① is restricted by the provisions of the terms of trust as set forth in paragraph ③ of said Article.

④ In the case of a trust with beneficiary certificates, notwithstanding the provisions of Article 92, item 11, provisions may be established in the terms of trust to the effect that the right to demand a cessation under the provisions of Article 44, paragraph ① may be exercised only by a beneficiary who has continually held a beneficial interest during the preceding six months (or any shorter period provided for by the terms of trust).

administration policy of the trust property would be inevitable. As a institution, it would be better for all the circumstances including such a condition to be left on the judgement by the investors for determining the investment.

To what degree trusts with certificates of beneficial interests will prosper in the future trust business will largely depend on the judgement in the market on whether certificates of beneficial interests are worth investing in. Seeing from theoretical view point, this institute may greatly change the present state of trust relationships. But, in spite of its experimental nature, this institutionalization could be positively evaluated.

(b) Limitation of Liability of Trustee

According to the traditional common opinion, since a trustee has the power to administer the trust property, a trustee should assume, at least at first, all the obligations or liabilities generated in the course of the administration. However, if one thinks that the risk of the loss in the investment activity should be taken by the person who can acquire the possible gain, then, since trust property as an independent property performs an investment activity, it would be questionable that the conclusion that the trustee should take all the risk with the trustee's own property is harmonious with such a sense of equity in investment activities. In fact, there is an opinion that actually casts strong doubt on the conclusion. Seeing from the stand point of a third party who entered into a trade relationship with the trust property, especially in a trust relationship the purpose of which is certain investment activity, concerning the right which the third party has acquired in the course of the investment, it may be more reasonable for the third party to grope for a way of a direct claim against the beneficiary who would have got the benefit from the investment activity, rather than having the trustee assume all the responsibility and liability for the loss. Under the thought to limit the responsibility or liability of the trustee to the range covered by the trust property, there is a presupposition that it is the beneficiary and the trust property but not the trustee who is performing the investment activity, which may be the common feeling of the trustee and third parties.

The current Trust Act has explicit provisions which admit a "limited liability trust" in which the terms of trust sets the limit on the range of the liability of the trustee¹⁸. Where the terms of trust prescribes the liability of the trustee to be

¹⁸(Requirements for a Limited Liability Trust)

Article 216 ① A limited liability trust shall become effective as a limited liability trust when it is provided by the terms of trust that the trustee is liable to perform all obligation covered by the trust property only by using property that belongs to the trust property, and when a registration of such provisions is made as provided for in Article 232.

② The terms of trust set forth in the preceding paragraph shall provide for the following matters:

1. the purpose of the limited liability trust;
2. the name of the limited liability trust;

limited, if the fact that it is a limited liability trust is registered¹⁹ and clearly indicated to the other party of the trade²⁰, then the liability of the trustee concerning the administration of the trust property is limited within the trust property and, except for the case of the liability caused by the trustee's intention or gross negligence²¹, the execution of the claim will not be enforced on the trustee's private property²². By

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3. the names and addresses of the settlor(s) and the trustee(s);
 4. the place where the principal trust affairs for the limited liability trust are to be administered (referred to as the "place for the administration of affairs" in Section 3);
 5. the method of administration or disposition of property that belongs to the trust property;
- and
6. other matters specified by Ordinance of the Ministry of Justice.

¹⁹(Registration of the Provisions on Limited Liability Trust Status)

Article 232 When the terms of trust has provided as set forth in Article 216, paragraph ① the terms of trust, a registration of its provisions on the limited liability trust status shall be made within two weeks, by registering the following matters:

1. the purpose of the limited liability trust;
2. the name of the limited liability trust;
3. the name and address of the trustee;
4. the place of administration of affairs of the limited liability trust;
5. if a trust property administrator or incorporated trust property administrator has been appointed under the provisions of Article 64, paragraph ① (including cases where applied *mutatis mutandis* pursuant to Article 74, paragraph ⑥), the name and address thereof;
6. if the terms of trust contains provisions on the termination of the trust under the provisions of Article 163, item 9, such provisions; and
7. if the trust is a trust with accounting auditors (meaning a trust with accounting auditors as prescribed in Article 248, paragraph ③; the same shall apply in Article 240, item 3), a statement to that effect and the names of the accounting auditors.

²⁰(Duty of Clear Indication to the Counterparty)

Article 219 A trustee may not, in conducting a transaction as the trustee of a limited liability trust, duly assert against the other party to the transaction as such unless the trustee has clearly indicated to that effect to the other party.

²¹(Trustee Liability to Third Parties)

Article 224 ① In the case of a limited liability trust, if the trustee was willful or grossly negligent in the course of administering trust affairs, the trustee shall be liable to compensate for any damages suffered by a third party arising therefrom.

② The provisions of the preceding paragraph shall also apply when a trustee of a limited liability trust has committed the following acts; provided, however, that this shall not apply if the trustee proves that the trustee did not fail to exercise due care in committing said act:

1. making false statements or records on the matters that should be stated or recorded in the balance sheet, etc.;
2. making a false registration; or
3. giving false public notice.

③ In the cases referred to in the preceding two paragraphs, when there is another trustee who is also liable to compensate for damages in addition to the trustee set forth in those paragraphs, these trustees shall be joint and several obligors.

²²(Restrictions on Execution, etc. Against Property That Belongs to Trustee's Own Property)

Article 217 ① In the case of a limited liability trust, no performance may be compelled nor may

the way, in a limited liability trust, also the distribution to the beneficiary will be limited within a certain amount²³.

Since a trade with trust property should be able to be done through the free agreement with a third party, where the third party admitted the limitation of the trustee's liability based on the registration and indication, the effect should, of course, bind the third party. But, for example, where the liabilities by a tort and a contract concurred on the trustee, since the limitation of the trustee's liability is clearly based on the contractual agreement, we can't easily give a conclusion on the question whether the limitation of the liability has the effect also on the liability by a tort. Then, it is still unclear whether this institution for the limitation of the trustee's liability can perfectly "protect" the trustee.

(3) The Present State of Commercial Trust Institution

As we described above, since the establishment of the former Trust Act up to the present, special legislations concerning commercial trusts have been only for specific species of the commercial trust relationships, so that the general interpretational theory for commercial trust relationships has been developed together with that for civil trust relationships wholly based on the Trust Act. This state is basically unchanged under the current Trust Act and the Trust Act is applied to both civil and commercial trusts.

The opinions may differ on the question whether "Commercial Trust Act" should be legislated as a statute independent of Trust Act under the present situation. Actually, in the course of the amendment of the former Trust Act and the legislation of the current Trust Act, such an opinion had been strongly insisted that the applica-

provisional seizure, provisional disposition, exercise of a security interest, auction, or proceedings for collection of delinquent national taxes be carried out against property that belongs to the trustee's own property, based on a claim pertaining to any obligations covered by trust property (excluding obligations pertaining to the right set forth in Article 21, paragraph ①, item 8).

② The trustee may assert an objection to performance that was compelled or to, provisional seizure, provisional disposition, exercise of a security interest, or an auction that was carried out in violation of the provisions of the preceding paragraph. In this case, the provisions of Article 38 of the Civil Execution Act and the provisions of Article 45 of the Civil Provisional Remedies Act shall apply *mutatis mutandis*.

③ The trustee may assert an objection to proceedings for collection of delinquent national taxes that were carried out in violation of the provision of paragraph ①. In this case, the assertion of the objection shall be made by entering an appeal against the proceedings for collection of delinquent national taxes.

²³(Restriction on Distribution of Trust Property to the Beneficiary)

Article 225 In the case of a limited liability trust, no distribution of trust property may be made to the beneficiary beyond the maximum distributable amount (meaning the maximum amount that may be distributed to the beneficiary, as calculated by the method specified by Ordinance of the Ministry of Justice within the amount of net assets; hereinafter the same shall apply in this Section).

tion of the provisions concerning commercial trust relationship in the former Trust Act caused various problems on the practical business by trust banks. Taking into account the fact that the study on the legal institute of commercial trusts had been rather developed at that time, not only to amend the former Trust Act but also to legislate a Commercial Trust Act separately should have been one of the alternatives in theory at that time.

However, the current Trust Act which was legislated as the result of the amendment of the former Trust Act has many provisions which are rather congruent with the present mind of trust banks in practice. So the current Trust Act can be said to possess the characteristics of "Commercial Trust Act". As we have already discussed above, it is quite difficult to point out what theoretical characteristic the "commercial trust" has compared with the "civil trust" although the difference on the fundamental philosophy concerning the trust purpose and the administration of the trust property may be recognized at first sight. On the other hand, although the current Trust Act has been legislated supposing the application to commercial trust relationships, such a provision that may immediately cause a trouble when applied to a civil trust relationship has never been recognized. Rather, also as for the theoretical construction concerning the fundamental structure of trust, the current Trust Act sticks to the neutral position to all the theories. Seeing from the stand point which supports the diversification and flexibility of trust, the current Trust Act will be evaluated to have the sufficient rationality and appropriateness also in the application to civil trust relationships.

Thus, the needs to legislate another Commercial Trust Act than the current Trust Act would be very small in the present circumstances. However, although the provisions of the current Trust Act basically respect the agreement among trust parties and tend to restrain the exercise of the supervising power by a court, since the role of a family court is highly expected both legally and socially in the case of the family property administration which is a typical example of civil trust, when we consider the application of the provisions of Trust Act in this field, some adjustment on the discussion would become necessary, for example, by analogical interpretation of the provisions of Civil Code which prescribe the supervising power of a court.

7.3 International Trust

(1) Characteristic of International Trust

"International Trust" means a trust relationship a part of which is located in a foreign country. Concretely, the case in which a part of the trust property is administered abroad, the case in which directions to the administration of the trust property are given from abroad or, further, the case in which the nationality of the trust parties

is of a foreign country would be included in international trust, for instance. So, the instances of international trust have rich variety.

Where one considers the reason why an international trust is created, one should clearly distinguish two cases, namely, the case in which a trust relationship is made use of for international property administration and the case in which a part of a trust relationship which could be domestic is intentionally located abroad.

In the case in which a trust relationship is used for an international property administration, the trust parties usually try to give flexibilities to the transfer of assets or the acquirement of profits in the international property administration so that the effectiveness at the equal level of a domestic trust relationship is aimed at. The reason why a trust relationship of this form is created is in many cases that it is intended to convert qualitatively various, internationally sporadically existing properties into the one unified fund for a beneficial right so as to secure the common traits through the property. Therefore, the most important problem in the interpretation of an international trust relationship of this type is the economic evaluation of the trust property or the adjustment of the economic profits. As for these evaluation and adjustment, since a trust relationship is created by the agreement among the trust parties, the agreement among the trust parties concerning the evaluation and adjustment should be respected in principle. But where the interpretations differ among the trust parties, or where the trust parties agreed with making some unfair profits, from the view point of the justice and equity it would be inevitable to reinterpret the agreement among the trust parties. Then, the interpreter would come up against the difficult problem not restricted within the trust law area but existing all over the legal studies, namely, how to estimate the economic value of a legal property.

On the other hand, in the case in which a part of trust property is intentionally located abroad, the trust parties don't fear that the legal relationships may be complicated. Rather, such trust parties are usually intending to complicate the legal relationships so as to draw from which some economic profits. The "profits" here include not only the profits from the administration of the trust property but also the saving of the tax by making use of the country-wise different tax systems. In this case, since the parties themselves intends to form a complicated legal relationship, the most important problem in interpretation is up to where the interpretation should follow the legal relationships the trust parties intentionally formed or to what degree the interpretation should follow the reasonable consideration based on the actual transfer of economical profits in spite of the outward legal relationships. It is true that this problem can occur in the case of a domestic trust relationship. But in the case of an international trust relationship, since the legal relationships may be internationally extended, the contents of the "substantial interpretation" may be country-wise different so that the discrepancies of the substantial interpretations may make the legal relationships still more complicated. However, it is inevitable that the interpretation of an international trust relationship would become more complicated

than of a domestically completed trust relationship since legal systems are formed country-wise. Should we pursue for the internationally harmonious legal interpretation by excluding the each country-peculiar substantial interpretation? Or, should we think that the interpretation should be performed on the ideas of justice and equity of each country's because the legal order in each county should be protected by each respective country since to create the unified theory of all the countries' interpretations is actually impossible. Which should be adopted as a way of thinking within a legal system of one country, opinions may differ.

As we have seen, there are many problems left unresolved, or some of them even impossible to completely resolve concerning international trusts. But we should note that most of these problems are not limited to the case of international trusts but concerning general legal interpretation. In the case of international trusts, applicable legal provisions extend over several legal systems in several countries, as we will see below concerning the conflict of laws, so that a domestic legal provision which is expected to function as the standard of the justice and equity in an ordinary case is made relative, thus one cannot derive a clear-cut conclusion from it in most cases. However, the thought that sees the current provisions in the domestic legal system as the absolute standard of the justice and equity would be in itself questionable in the appropriateness and, moreover, the ideal that all the basic concepts are unambiguously made clear is far from being realizable in the discipline on the trust law as we have seen again and again up to here. Therefore, there is no need to emphasize the theoretical difference between international trusts and ordinary domestic trusts. Also in the legal interpretation for international trusts, to interpret flexibly the content of the agreement among the trust related parties with putting one the center the thought that a trust relationship is a legal relationship bound with the trust purpose would lead to the rational and appropriate resolution of concrete disputes.

(2) Choice of Applicable Law to Trust

The most symbolic problem to represent the complexity of international trust relationships will be the problem of the choice of applicable law. In the case in which a trust relationship extends over plural countries, the law in each country would be applicable to the trust relationship. Moreover, some party mat insist that laws in several countries should be applied to the trust relationship at once. As the result, the range of laws applicable to the trust relationship may grow endless. On this problem, Act on General Rules for Application of Laws (Heisei 18 (2006) Act No. 78) in Japan provides the general rules in every legal construction. But such a law for conflict of laws itself is legislated independently in each country, so one must consider the problem to select the applicable law among laws for application of laws. Thus, it is clearly difficult to find a decisive resolution of a problem in an international trust relationship.

Since the current Trust Act is a domestic law, it implicitly supposes that a trust relationship is completed in the home country, so that there is no concrete provision provided especially for an international trust relationship. Besides, we should pay attention to the fact that the basic legal concepts like “a right in person”, “a right in rem”, “a property right”, “a right” or “an interest” which are basic components of the legal relationships among the trust related parties or the legal relationship between the trust parties and third parties, are differently understood in every country. Further, as we have seen up to here, as for a trust relationship, there are various theories concerning even the nature of beneficial right. As the result, for example, the applicable law would be different depending on whether one thinks that a beneficial right is the substantial ownership of the trust property or that a beneficial right is a right in person.

So, we should admit that any definitive theoretical conclusion on the problem in what range the Japanese Trust Act is applicable could not be found in the case of an international trust. Even if one derives a conclusion by the application of the Japanese Trust Act, the “rationality” or the “appropriateness” may be questionable in the case of an international trust relationship. However, on the other hand, it is clearly problematic if one thinks that all the provisions and all the arguments of Japanese trust law should be excluded from the applicable laws to a trust relationship merely because the trust relationship is an international trust and a part of the trust relationship is located abroad.

Then, also in the interpretation of the choice of the applicable law in the case of an international trust, we should, in the end, begin the argument with the presupposition that the essential nature of a trust relationship is for the trust parties and the trust property to be bound with the purpose of the trust. This stand point would respect the outward appearance of the legal relationship which the trust parties created and, at the same time, search for the most suitable law to be applied to the trust relationship in relation to the purpose of the trust. This way of thinking could be rather highly expected to get to a both theoretically and practically appropriate conclusion in many cases although it is difficult to specify the applicable law in all cases uniformly by that.

7.4 Intellectual Property Trust

(1) Characteristic of Intellectual Property Trust

An “intellectual property trust” means a trust relationship the trust property of which is an intellectual property. The intension of an intellectual property trust is, in sum, to make use of a trust relationship for the administration of the intellectual property, which can be said one of the most attractive methods for the modern use of a trust

relationship. However, setting such a practical characteristic aside, it is considerably difficult problem to grasp clearly what theoretical characteristic intellectual property trusts have. In considering such a theoretical problem, the fundamental policy of the interpretation is directed by what characteristic the intellectual property which constitutes the trust property has as a property.

For example, if one takes the characteristic of the intellectual property as an immaterial property right, an intellectual property trust could be interpreted similarly to other trust relationship the trust property of which isn't material, that may be, for instance, a trust relationship of the credits as the typical case. In fact, the office works for the administration of intellectual property should have many common features with those for the administration in a credit trust relationship caused from the common characteristic that the property is immaterial. Further, a typical intellectual property that has high value as a property would be associated with the claim for the royalty in exchange of setting the right of the use, so the some continuity between an intellectual property trust and a credit trust cannot be negated. However, while a credit is a claim relation between plural parties and the typical cause, a contract, is in principle freely concluded between the parties, an intellectual property is defined as a fruit of some intellectual efforts by each holder of the intellectual property, so that it requires no "the other party" in the creation of the right and there still needs careful considerations to judge whether freedom of the will of the parties at the same level as in the case of a credit to agree with and to decide the content of the intellectual property could be affirmed.

Instead, if one takes the characteristic of intellectual property as the fact it is a fruit of the intellectual efforts of the title holder, intellectual property interest is an institution to administer the result of the intellectual efforts of the title holder according to the purpose of the trust, so that it would be understood rather differently from other trusts. In an ordinary trust relationship which we have considered above, the trust property is a "thing" or an "economic value", so that it becomes naturally an object of administration. By contrast, an intellectual property is not necessarily crystallized as a "thing" and doesn't always represent any economic value, so, one must reconsider the meaning of the administration of the fruit of intellectual efforts. In fact, if one thinks that an intellectual property should include not only concrete results of the intellectual efforts and the methods or means as the results but also the intellectual efforts themselves, one should radically reconsider the problem whether such an intellectual activity itself can be actually "bound with the purpose of the trust".

At present, the practically attractive sphere of intellectual property trusts is to make use of a trust relationship in order to administrate reasonably and intensively a typical intellectual property which is clearly institutionalized in the statutes like a patent right or a copy right. Since such a trust relationship will always fall under the category of intellectual property trust however one considers the nature of intellec-

tual property trusts in theory, the importance to make the theoretical characteristic of intellectual property trusts clear is not realized in practice. However, when the examples of intellectual property trust is augmented in the future, the number of the cases in which some subtle interpretation is required would necessarily increase. Then, we couldn't avoid answering the problem what is the theoretical characteristic of intellectual property trusts. This problem is still unresolved at present and even the future direction for the resolution is still uncertain. But it is surely necessary to consider the theoretical characteristics of the intellectual property trust or the intellectual property itself further. In considering that problem, it should be useful, above all, to delve into the sphere of the intellectual property as the fruits of the title holder's intellectual efforts as we referred to above.

(2) International Intellectual Property Trust

What is attracting the trust business most of all types of intellectual property trusts at present is to make use of an international intellectual property trust relationship as a method to manage the intellectual properties which have been created in several countries in the course of the international activities of an international enterprise or groups.

The traditional method for the management of international intellectual property is to concentrate the intellectual properties which have been given or acquired in various countries at the central office which is located in the place where the main business activities are performed, so that the central office manages the intellectual properties and distributes the power of the operation of the right to the other offices in various countries. However, in this method, since the rights etc. based on the intellectual properties created in various countries all belong to the central office in the place for the main business activity, the other business offices can enjoy only a part of the benefit from the right. Therefore, if the intellectual properties which has been created individually in various offices in various countries are all incorporated into a unified management, the rights based on those intellectual properties all belong to one central office in one country, so that each office which individually create the intellectual property in each country may feel negative to make the fruits subject to the unified management.

On the other hand, another method is also rather widely used at present, which is for all the relevant offices to share the intellectual property rights which are given or acquired in various countries. In this method, contrary to the method described above in which the central office in the country for the main business activity manages all the intellectual properties in unification, each office holds the rights concerning the relevant intellectual properties as its own rights, so as to prevent the actual management of the intellectual properties from being one-way management in relation to the central office at the main business place. However, in this method, since one

same legal relationship may belong to several offices in several countries, if the number of the relevant countries is increased, the legal relationships may be so complicated that, in case of some dispute, the cost of the efforts for the resolution may become enormous.

Taking such situations of the practical business into consideration, the method to settle a trust relationship for the administration of international intellectual properties may be able to provide the solutions to the problems of the ordinary methods for international intellectual property management described above. Concerning a unified management of intellectual properties, trust property would be administered in unification based on the trust purpose, so that it is not permitted for a particular party arbitrarily to administer the property. Further, as for the legal relationships among the parties, if the contents of the beneficial rights have been flexibly adjusted in the act of the trust, the trust relationship would cope with the peculiar state of the practices and regulations in each country through the agreement among the relevant parties. Moreover, in an intellectual property trust relationship, all the trust related parties stand on the equal statuses under the trust purpose, so that legal or factual priority order among the parties concerned should disappear. By this effect, the risk of the occurrence of the mental oppositions among the offices would be largely got rid of, which may be considerable merit for the enterprises engaged in international business.

We have seen the practical usefulness and promise of international intellectual property trusts. But if one considers the theoretical characteristics, the one will crash the difficult problem: the feature of international trust relationship and the feature of intellectual property trust relationship, both features should be taken into consideration in order to grasp the theoretical characteristic of international intellectual property trust. Even if we restrict ourselves to concrete interpretational problems, piles of difficult problems with various aspects are left unsolved in the area of international intellectual property trusts, for example: ① the fundamental structure of legal relationships among the trust related parties; ② legal problems in conversion of an intellectual property right into a beneficial right; ③ an interpretational policy for choice of applicable law to the trust relationship; ④ an interpretational policy on the performance of the tax system and trust affairs; and so on.

As we have seen in discussions in various disciplines on trust relationship, if one bases the interpretational argument on the “being bound with the trust purpose” as the essential nature of trust, it should be expectable to a high degree that one can perform a theoretically consistent and practically reasonable interpretation. However, as for the conclusions on the left problems in various areas, typically in the area of international intellectual property trusts, we should deepen the arguments further. The necessity of the considerations on trust from the theoretical view point will not be ceased by any legislation. I sincerely hope that discussions in this book contribute to further development of the study of trust law.

(End)