Comments

General Comments

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1. Introduction

My comment will focus on some general topics which would be of common interest among the participants of this symposium. First, I would like to discuss the meaning and importance of comparing the trust laws in Asia. Second, I will discuss several topics related to the creation of trust such as the requirement of trust property at the outset of trust creation and the reservation of power by the settlor to instruct the trustee.

2. The Meaning and Importance of Discussing Trust Laws in Asia

What is the meaning of comparing trust laws in Asia? Up until today we did not have occasion to discuss trust laws in Asia. We have in the past invited prominent trust law scholars such as Professor Donovan Waters from Canada and Professor David English from USA. But they were all from those countries from which we imported the trust law. It is obvious that we still have many things to learn from Anglo-American trust law. By the way, it happens that Professor English is here today. Later we may have some comments from him on today's symposium. As for trust laws in Asia we do not know very much. But Asia is a challenging field for a comparative study. We thought the time is ripe for all of us to discuss trust law in Asia. Thus we decided to invite trust law specialists from Asian countries and exchange our

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experiences of trust and trust law.

There are several reasons why we thought trust law in Asia is important today. First, the development in each Asian countries provides us with rich materials and interesting examples of how trust law and trust business have evolved over the years. Second, Asia is in itself interesting for its historical, cultural and societal diversity. The trust law in each jurisdiction based on these backgrounds must be also interesting to compare.

3. Trust Laws in Asia

The jurisdiction which each of our panelist represents has its own trust law and trust businesses. These jurisdictions can be divided in two groups. The first group consists of China, Korea and Japan, which have basically a civil law system. These countries have been and still are struggling to accommodate trust law in the civil law background. The second group consists of Hong Kong and Singapore, which have the common law system and the trust law is a part of its system.

But it seems that Hong Kong and Singapore are not simply following the English trust law. We have learned today from Professor HO and Professor TANG that their trust laws were built on the bases of English trust law, but they have also been influenced recently from the offshore trusts such as trust law of Cayman Islands and Guernsey. They are competing with the offshore trusts. In the offshore trusts there has been a departure from the traditional trust doctrine to attract the settlors and the beneficiaries.

This new trend has influenced the recent development of trust law in Singapore and Hong Kong. For example, the rule against perpetuity has been amended in Singapore to extend the perpetuity period to 100 years or abolished in Hong Kong. Also the reservation of the settlor's power to choose and instruct the trustee is a conspicuous character of offshore trusts and has influenced Singapore and Hong Kong as well. If

the settlor has the power to control the trustee the trust assets could be regarded as settlor's property which could be seized by the creditor of the settlor. The traditional trust law therefore preferred giving discretionary power to the trustee rather than giving power of instruction to the settlor to avoid this risk. But in Hong Kong and Singapore there seem to be a new movement to give more power to the settlor. This trend may have an impact on the trust law in UK and USA. I personally think this is an important topic which deserves more attention. Until now the academics and practitioners of trust in Japan have not paid much attention to the offshore trusts. But learning from the experiences of other Asian countries, Japan must realize that the competition with offshore trusts will become an important problem in the future.

4. Similarities and Differences among Asian Trust Laws

4.1 Differences

As mentioned above I have grouped the jurisdictions in Asia in two. One is the jurisdiction with a common law background and the other is the jurisdiction with a civil law background. Within these groups there are also differences.

The trust law in China, Korea and Japan was implanted into their civil law background. Therefore we all have the same problem of how to understand the beneficial interest in the trust structure avoiding the explanation of double ownership. But the trust law in each of these countries is also a product of their social and economic background. For example, the trust law in China was enacted at the time of reorganization and realignment of trust businesses and therefore had somewhat conservative or restrictive attitude toward trust businesses. The old Trust Act of 1922 in Japan was also restrictive, because the concern of the government at the time was to regulate trust companies. Thus for example, the provision of the Trust Act prohibited the trustee's conflict of interest absolutely even though the beneficiary gave consent to the self-dealing of the trustee. The new Trust Act of 2006 on the other

hand was to facilitate and promote trust businesses by giving more freedom to the parties. The trust law in Korea was influenced by the policy of promoting land development nationwide. This background also influenced the development of trust doctrine and case law in Korea. If we look at these different backgrounds surrounding the trust law, we will come to a more profound understanding of the trust law in each countries.

In the other group which consists of Singapore and Hong Kong the similarities of their trust law are obvious. But Singapore seems to be more active under the governmental policy to become the financial center in Asia and to bring back trusts from the offshore. Hong Kong is driven by the same interest as Singapore, but it seems that the initiative of financial institutions is the driving force rather the policy of the government.

4.2 Similarities

I may have emphasized too much the differences of trusts in Asia. But in fact we have more similarities than differences. Many of the problems we are facing today are the same in each jurisdiction. For example, the problem of the retained power of the settlor or the problem of the certainty of the trust property are all important issues in each jurisdiction. Only the way we approach to these problems and how we solve them are different.

5. Some Specific Issues

Now I would like to move on to the specific issues of trust law. As Professor Kanda will comment on the commercial trusts and Professor Arai will discuss the non-commercial private trusts, I will focus on some general problems related to the creation of trust.

5.1 The Meaning of Trust Property at the Stage of Creation of a Trust

5.1.1 The Relaxed Rule on Trust Property

What kind of property do we need to create a trust? As the formation of a contract is the threshold to the problem of contract, so is the creation of a trust an important problem for trust. The Trust Act 2006 of Japan has detailed and systematic provisions on the rights and duties of a trustee in contrast to the rather sparse provisions on the requirements of the creation of a trust.

As for the requirements of the trust creation the rule of the three certainties will be applied. Thus, as Professor TANG mentioned in his report, the certainty of object, of subject matter, and of beneficiary are necessary at the time of the creation of a trust. From the requirement of the certainty of subject matter it follows that a trust property is necessary at the outset. But Japanese trust law has a relaxed and liberal rule on the certainty of subject matter compared to other jurisdictions.

The present Japanese trust law does not require the existence of a trust property at the time of creation of a trust. Professor TANG said that the trust law in Singapore requires a certain property to exist at the moment of trust creation, therefore a future property which is uncertain at the time of trust creation cannot fulfill the requirement of the certainty of subject matter. As for this issue the present Trust Act in Japan clearly provides that trust property is not necessary. A trust inter vivos in Japan is nothing but a contract. Under the old Trust Act according to the majority of academics transfer of property to the trustee was necessary to create a trust. But even under this old Trust Act a prominent trust law scholar SHINOMIYA argued that a future property will fulfil the requirement of certainty of subject matter. Under the Japanese law future claims, such as future income or future rents can be transferred. It is not easy to understand why a future claim which has not yet come to existence can be transferred before its actual existence. But the case law and the majority of the academics acknowledge the

transferability of future claims. Based upon this idea, it would also be possible to create a trust by transferring future claims to the trustee to constitute a trust property.

A related problem in Japanese law is whether an aggregate of things or an aggregate of claims can be transferred to the trustee to create the trust asset. Under the Japanese law an aggregate of things is regarded as a single object which can be transferred to the trustee with a single act of transfer. An aggregate of things (universitas rerum) can be a trust property under the Japanese law. For example, "the whole merchandise of a certain warehouse" or "the whole potatoes in the specified certain storage room" can be a trust property. Usually there are some merchandise in the warehouse at the time of the creation of a trust. But it is possible that at the time of the creation of a trust the warehouse is empty. Still the trust will be created without any merchandise in the warehouse. If asked what the trust property is in this case, the answer would be as follows. The setting of a framework or a criteria of an aggregate of things is the original trust property. If at a later time any merchandise enters the warehouse or into this framework these merchandises will immediately constitute the trust property, Such a trust of aggregate things may be useful in a case where trust is used for the purpose of providing security for the creditor.

Whether universitas iuris such as an estate of a deceased person can be transferred to the trustee to create a trust was discussed in the Law Reform Committee for the revision of trust law. Some academics supported the idea, but the majority of the Committee rejected the transferability of universitas iuris. Especially when debts were included in the universitas iuris, transfer of debts requires the consent of the creditor and therefore it is difficult to transfer universitas iuris with a single act.

5.1.2 The Time of Transfer of the Trust Property

Another issue is the time of transfer of the trust property to the trustee from the settlor. The new Trust Act has taken the position that

transfer of the trust property does not have to occur at the creation of trust. It could be transferred after the trust has been created. A trust thus created is only an agreement between the settlor and the trustee in which the trustee promises to manage and dispose the trust property in a certain way agreed in the trust instrument. Though the trust property is not necessary to exist at the outset, there must be a trust property at a certain time after the trust is created. If the situation of the trust without any trust asset continues for a certain period of time, the trust will be terminated because of lack of trust property or impossibility of trust object.

In this context what Professor LOU mentioned in his report about the land trust in China was very interesting. He explained that in China land trust is at the moment difficult to create because of lack of the provisions for registration of trust in the Land Registration Act. Therefore what actually being done in China is a creation of a trust of future income from the land. Such a trust of future income will be economically almost the same as a trust of land itself. This example shows us that the problem of trust property can be solved in various ways. Some types of property cannot be transferred from various reasons. But the hindrances can be overcome by looking it from an entirely different angle, by recharacterising the trust property. What we need perhaps is the flexibility of our minds.

5.1.3 Seed Money Trust

In regard to the necessity of trust property new issues on trust property are discussed among the trust lawyers. Among such the so-called "seed money trust" is interesting. The settlor transfers a small amount of money as seed money to the trustee for a startup of a trust. After the trust has been created the trustee borrows money from investors. The trust fund thus enlarged in amount will be used for further investments buying stocks or other securities. The seed money which was used to create the trust could be returned to the settlor. Does this violate the nature of a trust that a trust is created by a property of

the settlor? If the seed money is returned to the settlor/the original beneficiary, what left after the retreat of the settlor with his money is the money from the third party investors. I do not have a firm opinion how to respond to this kind of trust. It may be an undermining of a typical model of a trust. It may be regarded as a progress of trusts. Trust lawyers in Japan are probably not so negative against this phenomenon. It comes from the tendency in the Japanese trust law that a trust is a contract and the property requirement is not rigid. We have heard from Professor HO and Professor TANG that it is not unusual in Hong Kong and Singapore that a trust is first created with a small amount of money and then increased afterwards. I would like to know what our guest speakers think about this.

5.2 Reservation of Powers by the Settlor

According to Professor HO's report, to bring back offshore trusts to onshore and to offer a more attractive trust to the settlors, Hong Kong has made it clear by legislation that the settlor's reservation of power to instruct the trustee does not make the trust voidable. Singapore is ahead of Hong Kong in this respect.

In a traditional Anglo-American trust the settlor does not reserve powers to instruct the trustee, because by the creation of a trust the settlor transfers the title of the property and therefore a typical type of trust is a discretionary trust in which the trustee has all the powers in regard to the trust property. If the settlor retains power over trust property there is a risk that the transfer of ownership to the trustee may be denied and the creditor of the settlor can reach the trust property. If the power of the settlor is so strong and the trustee is only a nominal existence, there may even be a risk that the trust itself could be void. What Professor HO mentioned about the power reserved to the settlor is that the reservation is not too extensive lest that the trust should be declared void. Only to the extent that the settlor has some power to influence the trustee would satisfy the needs of the settlors. Such a development of trust in Hong Kong and Singapore is evidently a

departure from the traditional Anglo-American trust.

A comment on this point from the Japanese side is that our trust law starts from a different starting point. The Japanese trust law gives the settlor a strong position to control the trustee. It was so under the old Trust Act of 1922. The idea behind this was that the settlor is the party who creates a trust with the trustee by agreement. Trust is basically a contract. Therefore the settlor has an interest to seek the performance of the trustee as agreed and if the trustee violates his obligations the settlor can enforce and sanction the trustee. The old Trust Act thus gave the settlor various powers to control the trustee. The new Trust Act of 2006 denied some of these powers, Most of these powers to control the trustee was given exclusively to the beneficiary. But still the basic idea of trust in Japan is that a trust inter vivos is a contract. The majority of the trust lawyers are of the opinion that a settlor can retain powers to control the trust and instruct the trustee. How much power can be reserved by the settlor is not fully discussed in Japan.

Among the powers reserved by the settlor are the power to decide the investment, the power to change and appoint the trustee, the power to change the beneficiary and the power to change the content of the beneficial interest. The Japanese trust law does not set any limit to the reservation of power by the settlor. In an investment trust the settlor-investment company has the power to instruct the trustee. Though the trustee in an investment trust is the owner of the trust property, it is only managing the trust property following the instruction of the settlor-investment company. The validity of such a trust has never been questioned.

Even though the trustee must follow the instructions of the settlor, a problem arises when the instruction was not appropriate and would harm the trust property and thus the beneficiaries. In principle the trustee must follow the instruction and if he did so there would be no liability of the trustee. But what if the instruction was obviously not appropriate or if the trustee knew that following the instruction will harm

the trust property? What happens if the trust property was therefore damaged? Can the beneficiaries claim damages against the trustee or against the investment company who gave the instruction? The instructor who has the discretionary power is evidently a fiduciary. But the Japanese law do not have the legal concept of fiduciary broad enough to include those people with discretionary powers.

If the settlor can reserve the power to instruct the trustee and if the instruction was inappropriate the same problem mentioned above will arise in other Asian countries as well. I am curious to know how these jurisdictions will solve this problem.

6. Conclusion

Through the comparison of Asian trust laws, we can learn the similarities and differences of the trust law in each jurisdiction. The similarity comes from the fact that an important issue in one jurisdiction is also an important issue in other jurisdictions. A difficult problem in one country is also a difficult problem in other countries. But the interesting part of the comparison is that we learn there are different approaches to the same problem. This will not only enhance our knowledge on trust but also gives us impetus to improve our legal system on trust.

The diversity of trust laws in Asia is full of excitement and future. I hope we can further our collaboration and step up to a more productive relation in the future.