

# 2019 NYSBA GLOBAL MEETING

Tokyo, Japan

November 7, 2019

## “A Century of Trust Law in Asia and North America”

Questions for the Panelists

### Panel Members

#### American jurisdictions

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#### Asian jurisdictions

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# PROLOGUE

What is a Trust?

Guidance from the Hague Connection on the Law Applicable to Trusts and their Recognition.

Definition: Trust refers to “the legal relationships created—*inter vivos* or on death - by a person, the Settlor, when assets have been placed under the control of a trustee for the benefit of the beneficiary or for a specified purpose.

# Defining Characteristics

What is a Trust?

1. The assets constitute a separate fund and are not part of the trustee's estate
2. Title to the trust assets stand in the name of the trustee or in the name of another person on behalf of the trustee.
3. The trustee has the power and duty in respect of which he is accountable, to manage, employ or dispose of assets in accordance with the terms of the Trust and the Special duties imposed on the Trustee by law.

# PROGRAM

## A. History of the Trust (10 mins)

### American Jurisdictions

1. When was the trust introduced into your legal system? What was the driving force behind the introduction of the trust into your legal system?  
BLUMENFELD and FOX

### Asian Jurisdictions

1. When was the trust introduced into your legal system, and by which law? What was the driving force behind the introduction of the trust into your legal system? ARAI / WANG / TANG

## American Jurisdictions

2. What, if any, role did the business uses of trusts serve in the development of trust law in your jurisdictions?

GALLIGAN

## Asian Jurisdictions

2. Can you explain why introducing the trust was considered to make your legal system more helpful for purposes of encouraging investment and promoting capital formation? ARAI

## American Jurisdictions

3. Why have trusts become such a common vehicle for wealth preservation and transmission?  
BLUMENFELD and FOX

## Asian Jurisdictions

3. How much did those who introduced the concept of the trust into your legal system take into account the potential use of trusts for wealth preservation and transmission? WANG

## B. Main Features of the Trust (15 mins + 10 mins Q&A)

1. Does your jurisdiction recognize the right of a third party beneficiary to enforce an agreement between the principal parties? Has the state of the law on third-party beneficiaries influenced the development of the trust concept in the law of your jurisdiction?  
ARAI / WANG / GALLIGAN

2. How strong in your jurisdiction are the protections of assets confided to a trustee against the liabilities of:
  - a. The trustee?
  - b. The settlor?
  - c. The beneficiaries? ARAI / WANG / GALLIGAN / BLUMENFELD



3. How is title to trust assets registered or otherwise conveyed? ARAI / WANG / FOX / BLUMENFELD
  - a. To the trustee acting as trustee?
  - b. To an entity denominated as a trust?
  - c. To the trustee in the trustee's own name with an obligation of asset segregation to be discharged by the trustee?

4. What types of investments and assets may a trust formed in your jurisdiction hold? WANG / TANG / TACHIBANA / FOX / BLUMENFELD
  - a. Real estate?
  - b. Tangible personal property?
  - c. Cultural objects?
  - d. Cash?
  - e. Indebtedness?
  - f. Stocks?
  - g. Hedge funds and private equity funds?
  - h. Business start-up?
  - i. Block chain and digital currencies?
  - j. Foreign currencies?

## Types of assets a trust may hold

Kazuya Tachibana SMBC Trust Bank in Japan

### Overview

“Trust property” includes all positive assets that can be given an approximate monetary value.

### Types of assets

	Types of assets	Acceptable as trust property	Note
a	Real estate	Yes	—
b	Tangible personal property	Yes	—
c	Cultural objects	Yes	—
d	Cash	Yes	—
e	Debt	Maybe	Impossible. However, substantially possible if the trustee assumes the debt covered by the Trust Property.

	Types of assets	Acceptable as trust property	Note
f	Stocks	Yes	—
g	Hedge funds and private equity funds	Yes	—
h	Business start-up	Maybe	Same comment as e for Debt.
i	Digital currencies	Maybe	Presumably possible if the digital currency is an assets that can be given a monetary value.
j	Foreign currencies	Yes	—

5. Does your jurisdiction impose on trustees a duty to diversify assets and to avoid concentration in any one type of asset or industry? Under what circumstances can a trustee hold a single asset (such as a significant equity position in a personally held company) without regard to its long-term economic outlook or prospects? ARAI / WANG / FOX / BLUMENFELD

6. What is the role of the settlor in the administration of a trust in your jurisdiction? Can the settlor obtain any asset protection benefits if the settlor retains any beneficial interest in the trust or some administrative role such as retaining the power to remove or replace a trustee?  
ARAI / WANG / GALLIGAN /  
BLUMENFELD

7. What are the roles of beneficiaries in the administration of a trust in your jurisdiction? ARAI / WANG / GALLIGAN / BLUMENFELD
  - a. Do the beneficiaries have a right to compel the trustee to disclose information about a trust?
  - b. Do the beneficiaries have a right to consent to or otherwise participate in decisions about the management and distribution of a trust?
  - c. Do the beneficiaries have a right to pursue remedies on behalf of a trustee?

8. What are the rights of beneficiaries to terminate a trust? Does it make a difference in the beneficiaries are also the settlors? ARAI / WANG / GALLIGAN / BLUMENFELD

9. What are the prerequisites for serving as a trustee in your jurisdiction? ARAI / WANG / GALLIGAN / BLUMENFELD
  - a. Can an individual ever serve as a trustee?
  - b. Must a trustee have special expertise in the management and investment of financial assets?
  - c. Must corporate trustees be organized separately from affiliates that manage or even produce financial products?



10. How strong is a trustee's duty of care in your jurisdiction? Does it exceed the normal duty of good faith and reasonable conduct expected of a party to a contract? ARAI / HO / GALLIGAN / BLUMENFELD
  
11. How strong is a trustee's duty of loyalty in your jurisdiction? Does the duty extend not only to the obligation of the trustee to administer the property in the best interests of the beneficiaries but also to pursue business opportunities on behalf of the beneficiaries in preference to the trustee's own financial interest? ARAI / HO / GALLIGAN / BLUMENFELD

12. What remedies are available, if at all, to disgorge unauthorized profits made by the trustee from the use of trust property or its position as trustee?  
ARAI / HO / GALLIGAN / BLUMENFELD
13. To what extent can beneficiaries in your jurisdiction enforce rights against third parties who receive unauthorized profits or traceable properties obtained from the unauthorised use of trust property or the trustee's position? ARAI / HO / FOX / BLUMENFELD

## C. Commercial Trusts (15 mins + 10 mins Q&A)

1. In your jurisdiction, what is the percentage of assets under management of commercial trusts? ARAI / WANG / TANG / GALLIGAN

2. Give one example of the most prominent use of the commercial trust in your jurisdiction. What are the advantages that the trust brings to the organization of capital investment and other business opportunities in your jurisdiction? ARAI / TANG / HO
  - b) Is the trust more advantageous than a corporation in your jurisdiction?
  - c) Is the trust more advantageous than a partnership?
  - d) Is the trust more advantageous than an agency relationship?
  - e) Does the trust provide greater security for an investment account than a brokerage or personal asset management account?

3. What are the main concerns and challenges of such a trust in your jurisdiction? ARAI / TANG / HO
4. How are these challenges addressed in your jurisdiction? By regulation or by adjudication in the courts? ARAI / TANG / HO
5. What investor protection measures have been introduced in your jurisdiction? ARAI / TANG / HO

## D. Family Trusts (20 mins + 10 mins Q&A)

1. In your jurisdiction, what is the percentage of assets under management of family trusts?  
ARAI / WANG / TANG
2. What types of trusts for families offered by trust companies in your jurisdictions are attracting the most interest? TACHIBANA / NAKADA/WANG  
(10 mins)



## D2. Types of Trusts for Families

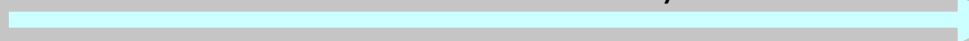
1. Only Trust Banks as Trustees (at least until 2004)
  - I. Trust banks offer both Banking Business (Deposits, Loan...) services, and Trust Business (Serve as Trustee for money, stocks) services.
2. Aging Society
  - I. 35.58 million people over 65 hold JPY 1,540 trillion (≈\$14.2 trillion USD) \* JPY1 trillion = \$9,223 million USD, as of October 18, 2019
  - II. To meet the demands of the elderly, trust banks offer **monetary trusts**, which ordinary banks cannot/do not offer, working as bank deposits with special services.

Settlor=1<sup>st</sup> Beneficiary



(Father)

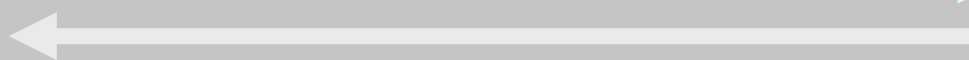
Transfers money



Trustee (Trust Bank)



Pays money upon request



Beneficiary's agent  
(eg: beneficiary's son)



Pays money upon request



## 2. Types of Trusts for Families

JAPAN



Monetary trusts are used for:

- Money management before/during mental or physical incapacity
  1. Money paid only when obtaining the consent of a person designated by a settlor
  2. Enables beneficiary's agent to withdraw money (Japan does not have joint accounts)
  3. Gives family members the opportunity to oversee the elderly 1<sup>st</sup> beneficiary's account activity by notifying the registered family members about a withdrawal request through a smartphone app and paying the money only after a certain revocable period.
- Will substitute
  4. Payment to the 2<sup>nd</sup> beneficiary upon 1st beneficiary's death (Japan does not have POD accounts)
- Provision of non-financial services
  5. Attaching/offering to monetary trust settlors non-financial services (such as housework and
    - I. nursing) at special discounted prices





3. Does your jurisdiction provide for the disposition of assets to trusts in Wills or other testamentary instruments?

**YES.** Japan's legal system allows the creation of living trusts and testamentary trusts under the Trust Law.

If your jurisdiction has a concept of forced heirship or “mandatory inheritance” can these requirements be satisfied by dispositions in trust for the benefit of the protected or reserve heirs?

**YES.** In Japan, a disposition in trust for the benefit of the protected or reserved heirs is deemed as a bequest to the person.



4. Does your jurisdiction adopt the doctrine of communal property during marriage? How does your jurisdiction tackle parties who transfer communal property into trusts without the consent or knowledge of their spouses? NAKADA / WANG

**No. Japan does not.**

**The default is *separate property*,  
in the absence of a prenuptial agreement to the contrary  
(which Japan almost never uses).**

3. Does your jurisdiction provide for the disposition of assets to trusts in Wills or other testamentary instruments? If your jurisdiction has a concept of forced heirship or “mandatory inheritance” can these requirements be satisfied by dispositions in trust for the benefit of the protected or reserve heirs? NAKADA / BLUMENFELD

4. Does your jurisdiction adopt the doctrine of communal property during marriage? How does your jurisdiction tackle parties who transfer communal property into trusts without the consent or knowledge of their spouses?

NAKADA / WANG

5. Do trusts in your jurisdiction play a role in the management of assets for the benefit of disabled or incapacitated person? ARAI / TANG / FOX / BLUMENFELD

6. Can you explain the income tax regime that applies to trusts in your jurisdiction? Are trusts taxed as:
- a) Separate taxable entities?
  - b) Pass-through vehicles?
  - c) Some combination of a) and b)? **WANG / GALLIGAN**

7. Do the answers to this question differ depending on whether a trust has a principal purpose to function as a business, a widely participated investment vehicle, or a vehicle for the preservation and transmission of family wealth? WANG / GALLIGAN
8. If your jurisdiction has an estate, inheritance or gift tax, how are dispositions in trust taxed under these rules? FOX / BLUMENFELD

9. Does your jurisdiction recognize the concept of a revocable trust? If the answer is “yes” can the settlor serve as the sole current trustee of the trust without “merging” the trust property with the settlor and negate the trust itself? ARAI / GALLIGAN / BLUMENFELD