

## Transformation of Trust Ideas in Japan : Drafting of the Trust Act 1922

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### Introduction

This paper traces the drafting process of the Japanese Trust Act 1922. Although the Act itself has been superseded by the new Trust Act 2006, it has left a definitive impact on how trusts are conceptualised, debated and put into practical use in Japan.

The conventional understanding is that under the Japanese trust legislation the beneficiary is entitled to claims *in personam*. The story is, however, more complicated than this statement suggests. Although the drafters of the Trust Act 1922 assumed throughout the drafting process that the beneficial right is to be characterised *in personam*, they did not necessarily view it as a precondition for the smooth transplanting of the trust idea into Japanese private law, which is largely based on Civil Law system. Nor did the drafters see it as a contradiction that the final Act contained a number of provisions that provide remedies of *in rem* nature. Rather, those provisions, inserted at different phases of drafting, reflect the drafters' pragmatic response to the shifting needs of the time, such as the need to prevent the creation of trusts for abusive purposes, to restrain the trustees from abusive practices, and to encourage and regulate trust businesses.

This paper aims to illustrate the pragmatism underlying the conception of trusts in Japan by examining the link between some of the major draft provisions and the various aspects of drafters' thinking at different drafting phases. It will begin by discussing at Part 1 the development prior to the drafting of comprehensive trust code. Part 2 contains the main discussion of the drafting process, which began in the 1910s and led up to the enactment of the Trust Act 1922. During this period, the initial draft was amended on a number of times to accommodate the shifting needs of the society. Finally, Part 3 examines how the final product, the Trust Act 1922, has shaped the theory and practice of Japanese trusts in the ensuing decades.

## 1. Receiving the Idea of Trusts: Early 20th Century

### (1) Early uses of trusts: bond issues in London

The early use of trusts in Japan occurred when the Japanese government was in dire need of funding to develop the infrastructure after the war with Russia (1904-05). In order to issue bonds in London, the government had to employ the trust structure to set aside certain assets for collateral. To facilitate such transaction, the Secured Bond Trust Act was passed in 1905. The fact that the trust was first employed in this commercial context, as opposed to the traditional context of managing family assets, left unique markings on the subsequent development of trusts in Japan. First, the government has a strong interest in how the trust legislation takes shape. Second, the use of trusts occurs predominantly in commercial settings. And lastly, as a reverse side of the second feature, there is no felt need for using trusts for succession purposes.

Shortly after the 1905 Act, the government initiated a drafting process towards more general legislation on trusts. Being specifically addressed to the need of introducing foreign capital, the 1905 Act contained no substantive definition of trusts. Article 1 of the Act defined the term 'trust company' as 'a company engaged in trust business connected with secured bonds'. Article 2 then provided that secured bonds must be issued in accordance with the 'trust contract concluded between the company issuing the bonds and the trust company'. However, the words 'trust', 'trust business' or 'trust contract' remained undefined in the Act.

There was another, and perhaps more pressing, reason for the government to proceed with the drafting of general trust legislation. Shortly after 1905, a number of businesses sprung up, presenting themselves as trust companies. In fact, not many of them were worthy of trusting, and some were in effect loan sharks and debt collectors. The government keenly felt the need to regulate them. At the same time, the Japanese economy was expanding, and the urbanised society had yet to locate a sound source of capital for small to mid-size businesses and consumers. There, the government saw a potential role for the trust companies to play as a financial institution. The situation

provided the government with sufficient impetus to draft legislation to regulate trust businesses.

In the early 1910s, the initiative of drafting trust legislation fell on the Treasury. It turned out that the draft was too much focused on regulatory concerns and lacked provisions with substantive component. Dissatisfied with the development, the Ministry of Justice obtained the Treasury's concession in 1917 to draft separate trust legislation. Thus, while drafting for the legislation for regulation of trust businesses was continued by the Treasury, ultimately leading to the passage of the Trust Business Act 1922, the drafting of the substantive legislation was carried out by the Ministry of Justice, leading to the Trust Act 1922. The main focus of this paper falls on the latter.

## (2) Doctrinal reception

A key figure, who provided the intellectual backbone throughout the process of introducing trusts to Japan, was Torajiro Ikeda (1879-1939). He graduated from Tokyo Imperial University and started working for the Ministry of Justice from 1903, where he was involved in the drafting of the Secured Bond Trust Act 1905. He then served various posts within the Ministry, as a judge for the Tokyo District Court, and a prosecutor for the Supreme Court of Judicature, and ultimately became the Chief Justice of the Supreme Court of Judicature.

In 1909, Ikeda published a book titled *On the Law of Trusts for Secured Bonds*. This proved highly influential on the subsequent drafting of the trust legislation. Most notably, he characterised the beneficial interests as being of *in personam* nature, an assumption that was never to be challenged seriously in the following drafting process. In his definition,

The trust is an institution where the trustee holds the basis-right for the beneficiary. Therefore, although the doctrinal explication of this nature has yet to settle in the Anglo-American scholarship, my explication is that the legal relationship between the trustee and the beneficiary is one of obligation. In other words, I believe that the nature in question best fits with the explanation that the trustee owes an obligation to hold the trust basis-right for the beneficiary and the beneficiary has the right to request it.<sup>1)</sup>

The word 'basis-right', which appears on the first quoted passage and forms the basis of Ikeda's definition of trust, does not belong to common usage either in English or Japanese terminology. The term can be found in an article 'Lectures on Equity' (1907), which was written in English by Henry T. Terry, an American law professor who taught at Tokyo Imperial University in 1877-84 and 1894-1912.<sup>2)</sup> The article appeared a year before Ikeda's book was published, and its influence on Ikeda's formulation of trusts is noticeable. In fact, Ikeda followed Terry in characterising trusts in *in personam* terms.

Nonetheless, Ikeda did not blindly follow Terry's teaching. Carefully noting, as we saw in the quoted passage, that the views on characterisation of trusts is divided among the Anglo-American scholarship, Ikeda examined both sides of argument. On the *in rem* camp, he listed Spence, J. Smith, Snell, Story, Ashburner, Thomson, Pomeroy, Indermour and Salmond, and on the *in personam* camp, he listed H. Smith, Adams, Perry, Erskine, Underhill, Terry, Lewin, Pollock and Ames. His conclusion was rather nuanced. In his view, the beneficiary's right necessarily depended on the categories of trusts. For passive trusts, the *in rem* theory was more appropriate, while for active trusts, *in personam* theory was more persuasive. From this observation, Ikeda concluded that the *in personam* theory was preferable because it was capable of providing a more comprehensive explanation than the *in rem* theory.

Apparently, Ikeda did not adopt the duty-based conception of trusts because that would relieve the theoretical tension with the Civil Code. In fact, in no part of his book, Ikeda discussed the inevitable conflict between the Common Law trusts and the Civil Law tradition. One possible reason for this is that he had no choice but to adopt English trust doctrine. He was developing the theory of trusts around the existing legislation, the Secured Bond Trust Act 1905, which was specifically enacted to facilitate bond issues in London. After all, he was not strictly an academic but a pragmatic practitioner. The trust legislation was not to form part of the Civil Code, and thus he would have had no qualm with

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1) Torajiro Ikeda, *On the Law of Trusts for Secured Bonds* (Shimizu Shoten, 1909), at 119. [池田寅二郎『担保附社債信託法論』（清水書店・明治40年）119頁]

2) Henry T. Terry, 'Lectures on Equity' (1907) 25(4) *Hogaku Kyokai Zasshi* 453, 460.

following the logic of *specialia generalibus derogant* (special things derogate from general ones).

### (3) The Exemplars of Codification: California (1872) and India (1882)

In addition to Terry's teaching and academic literature in England and the United States, Ikeda took advantage of two exemplars of trust codification.

One was the California Civil Code. Enacted in 1872, it is a comprehensive form of private law codification. The provisions on trusts are found in two separate parts of the Code, Articles 847 to 871, which are contained in Division II on Property, and Articles 2215-2289, which are located in Division III on Obligation. His admiration of the code is evident in his book: 'The language [of the California Civil Code] is concise, and the logic clear. English-style prolixity is not to be seen. It is valuable as a comprehensive code of trust law.'<sup>3)</sup>

The other exemplar was the Indian Trust Act, which came into force in 1882. Ikeda saw the Indian code as largely based on English law. Thus, he states in his book that 'English law in a written-down form can be found not in the main country but rather in India.'<sup>4)</sup>

Both codes had defined the beneficiary entitlement in *in personam* terms, giving Ikeda another reason to adopt the *in personam* definition. One irony in this phase of trust transplant, however, was that while the drafting efforts were underway in Japan, the trust practices in the U.S. and in India had begun to shift away from the *in personam* characterisation as expressed in those codes. In 1915, the U.S. Supreme Court held in *Browin v. Fletcher*<sup>5)</sup> that trusts were of *in rem* nature, though the case involved rather technical interpretation of jurisdictional statute, and not the familiar issue of the extent to which the beneficiary can assert certain rights. In 1917, A.W. Scott published an article advocating the proprietary theory. His treatise was very influential not least because it closely followed the structure of Restatement of Trusts, for which he was a reporter. Even in California, and in other states that passed similar

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3) Ikeda (n 1), at 111-12.

4) Ikeda (n 1), at 112-13.

5) 235 U. S. 589 (1915).

statute, the courts began to 'ignore' the statutory language.<sup>6)</sup>

In India, the shift is more nuanced, but, as Dr Tofaris notes, the Indian courts have continued to rely on the English law, Anglicising the trust doctrines within and outside the Indian Trust Act.<sup>7)</sup> These post-codification developments in the U.S. and in India remained largely unheeded during the Japanese codification process.<sup>8)</sup>

Overall, Ikeda referred even-handedly to both English and American writings.<sup>9)</sup> During the drafting process both the Indian and the Californian codes were cited. Given the early exposure to English trusts through bond issues in London, Ikeda may well have been more familiar with the English trust doctrine, which in many ways found its way to Indian Trust Code. At the same time, he was aware that trusts in the United States were put into more commercially oriented use. In particular, various 'trust corporations' had been established in the U.S. to offer trust services in exchange for remuneration.<sup>10)</sup> In essence, Ikeda was intent to introduce as far as possible the trust doctrines as they have developed in England, with possible modification to reflect the need to incorporate the commercial usage as observed in the U.S..

It may be figuratively said that Japan was the trust idea's final destination where both its west-bound and the east-bound voyages met. Nonetheless, the idea of trusts had to undergo further transformation before it struck root in the

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6) Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14 (1923); see also cases cited in George T. Bogert, *Trusts* (6th ed. Thompson 1987), at 136 n. 21.

7) Stelios Tofaris, 'The Indian Trusts Act 1882: A Historical and Theoretical Annotation' (2013) 88 *Rikkyo L Rev* 40(61), 31(70)-30(71).

8) In fact, the doctrinal development in the 1910s in the U.S. was noted at the final drafting phase of Japanese trust legislation, but it did not affect the course of debate. See *infra*, note 15, and the accompanying text.

9) In the listed bibliography at the end of the book, he refers to the following treatises, "Lewin—Law of Trust 10th Ed.; Pomeroy [sic]—Equity Jurisprudence 2nd Ed.; H. Smith—Principles of Equity 3rd Ed.; Story—Equity Jurisprudence 2nd Ed.; Ashburner—Principles of Equity".

10) In his bibliography, Ikeda referred to two American writings on trust company: Kirkbride & Sterrett—Modern Trust Company; George Cator (Johns Hopkins University Studies Series XV, Nos. 5-6.)—Trust Companies in the United States. He also quoted two English commercial law books: Palmer—Company precedent 9th Ed.; Simonson—Debenture and Debenture Stock 3rd Ed.

Japanese soil.

## 2. Drafting of the Trust Bill: 1910s and 1920s

As already noted, the Ministry of Justice initiated a drafting effort for substantive trust legislation in 1917. The world was then fighting the World War I (1914-18). The Japanese economy benefited from the War, but it suffered shortage of capital to support the growth of export industries. While Japan was entering a turbulent era, the drafting process can be conveniently divided into three phases.<sup>11)</sup> The drafters had to accommodate the shifting policy objectives in each phase.

### (1) The first phase: August to September, 1918

The government's policy since the early 1910s was to encourage the trust business to grow as a financial industry to meet the heavy demand for capital at the time. At the same time, they were keen to prevent the abusive practices that were frequently observed within the growing industry.

By September 1918, the draft had consisted of forty articles, including the definition of major concepts, the trustee's duty to follow the trust purposes, his duty of care, his duty to compensate for the loss that was unduly incurred, and his duty to segregate the trust assets from his own assets.

The draft at this stage reflected strong influence of Ikeda's academic thinking. He sought to incorporate the English law into the draft as much as possible. Although he characterised trusts in *in personam* terms, Ikeda did not hesitate to adopt those doctrines that might be seen as providing *in rem* remedy. For example, draft Article 25 (as of 19 September, 1918) closely follows the English doctrine of tracing, protection of a bona fide purchaser, and resulting trusts:

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11) This division follows Akira Tanaka's leading study on the drafting process of the trust legislation in 1922 and in his compilation of legislative materials on the trust laws. Akira Yamada, *On the Legislative Process of the Trust Laws* (Keiso-shobo, 1981) [山田昭『信託立法過程の研究』(勁草書房 1981)]; Akira Yamada, *Legislative Materials: Trust Law and Trust Business Law of 1922* (Shinzansha, 1991) [山田昭編『日本立法資料全集・信託法・信託業法: 大正 11 年』(信山社 1991)].

- (1) The beneficiary may assert his right against those who acquired the trust assets by a disposition contrary to the purpose of the trust. In such a situation, the person who acquired the trust assets shall administer the assets as a trustee until the appointment of a new trustee.
- (2) The preceding section is not applicable where the person who acquired the trust assets was not negligent in being unaware that the assets were disposed of in a way contrary to the purpose of the trust.

This provision was modified in the later course of re-drafting. In the final Article 31 of the Trust Act 1922, the aggrieved beneficiaries can 'claim rescission' against the third party of the disposition which he knew, or should have known in the absence of his negligence, was against the trust. In this context, the claim of rescission would sound less proprietary than the original language of 'assert his right'. Furthermore, if the relevant assets can be registered or recorded, this provision is applicable only where it is duly registered or recorded. The purpose of these modifications was to achieve consistency with the underlying civil law principle, but one can see that they related rather to the form, and were not intended to change the substantive entitlements or the practical administration of trusts.

Another draft provision at this phase that pointed to *in rem* characterisation was draft Article 10 (19 September, 1918). It sought to ensure the independence of the trust assets by insulating the trust assets from the reach of the trustee's creditors:

The trust assets are not subject to an enforcement proceeding or a compulsory auction except on the basis of a claim arising from the administration or disposition of the assets.

This was despite the provision of draft Article 3(2), according to which the trustee was entitled to exercise various rights against the third party as the complete owner of the trust assets. It was this draft Article 3 that eventually gave way. It was deleted during the second phase of drafting, while the essential component of draft Article 10 was retained in the final Article 16 of

the Trust Act 1922.

**(2) The second phase: September to November, 1918**

On 29 September, 1918, the government changed, and Takeshi Hara became the Prime Minister to lead the new Cabinet. For the first time in the Japanese history, the Prime Minister was a commoner and the Cabinet comprised of members of the political party that held majority of the House of Commons, the elected part of the Imperial Diet. This was a historic era called Taisho Democracy, filled with democratic fervour.

Under this political climate, trusts were seen as a device that favours the rich, similar to the privileged property regime that applied to aristocratic families. Thus, three major provisions were added during this phase to deal with the 'dark side' of the trusts. First, the draft Article 8 (1 November, 1918), which ultimately became Article 10 of the Trust Act, sought to prevent the creation of trusts for the purpose of evading the law:

A person who is precluded from enjoying a certain property right under the laws and regulations may not enjoy as a beneficiary the same benefit as that derived from holding such right.

The second such provision was draft Article 12, which allows the settlor's creditors to request avoidance of creation of trusts that was designed to defraud the creditors. This provision was drafted to parallel the Civil Code's general provision that entitles a creditor to request avoidance of his debtor's fraudulent juristic act.<sup>12)</sup> At the same time, it was broadly in line with the policy contained in the 1571 Statute of Elizabeth and the subsequent statutes to the same effect in England and the U.S.<sup>13)</sup>

The third provision dealing with the 'dark side' of trusts is rather unique.

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12) See Article 424(1) of the Civil Code. Under this provision, a creditor cannot request avoidance if the other party of the juristic act had acted in good faith, but in the trust context, the good faith of the trustee is no defence.

13) See in England, the Insolvency Act 1986, ss 423-425, 339-342.

Draft Article 11 prohibits the creation of trusts for the purpose of delegating the prosecution of lawsuit. The trust companies then undertook during the course of their 'trust business' an act equivalent to champerty and the government sought to provide specifically for this. No equivalent provision can be found in either the Indian or the California Code.

### (3) The third phase: June to August, 1919

On 11 November, 1918, the World War I was over. After half a year's post-war recession, the Japanese economy entered another boom. Together with high inflation, the economic boom encouraged speculation on lands and commodities. In the meanwhile, a number of large trust companies were established and began to operate on a much larger scale than in the early 1910s. In fact, they derived substantial income from stock brokerage, real estate transaction, and money lending, while acting as trustees in the conventional sense accounted for only a small part of their activities. The government was thus concerned with the trust companies' role within the bubble economy.

Among the provisions inserted at this phase were those that make sure that the trust companies concentrate on 'pure trust business'— safe-keeping and safe administration of assets. At that time, commercial banks had bitterly complained for excessive competition from the trust companies, and these provisions was meant to separate their trust businesses from financial activities such as loan and deposit. This was when the trustee's duty of loyalty was included in the bill for the first time.

One symbolic provision was draft Article 1, which defined the trust. Although the definition of the trust was contained in the draft of the first phase, it had been removed in the second phase. The new draft Article 1 revived the definitional provision, but it took an entirely different form.

Trust in this Act means an arrangement whereby one transfers or otherwise disposes of property to another and thereby entrusts upon the latter the administration or disposition of such property or the management of a businesses in accordance with some specified purposes.<sup>14)</sup>

On its face, the provision appears to imply that the trust is a concept whereby an obligation on the part of the trustee is created. The trust property is disposed of to the trustee, and there is no mention of any proprietary entitlement being conferred upon the beneficiary. However, at this phase, the drafter's emphasis lay elsewhere. Their preoccupation was on how to delineate the scope of trustee's duty. In fact, during the final process before presenting the bill to Imperial Diet, the range of the trustee's activities was further narrowed down by removing the words 'the management of businesses' from the draft provision.

Furthermore, a series of new draft provisions sought to ensure that the trust assets are administered separately from the trustee's assets. The new draft Article 17 specifically provided that upon the trustee's death the trust assets are not subject to inheritance. Under the draft Article 19, trustees are not allowed to set off the obligation that he owes with the claim that he has against the trust property.

The scope of subrogation was also expanded. In previous drafts, trust assets covered only those that were subject to the trust and those that were obtained as a consequence of administering or disposing of the trust assets. Under the new draft Article 16, the scope of trust assets was extended beyond those already covered to encompass those assets that the trustee received on the ground of the loss or damage of trust assets and other causes.

Another feature of the re-drafting during this phase was the strengthening of the power of settlors to control the trust assets. In the previous drafts, the beneficiaries were entitled to request compensation for or restitution of the loss that the trustee improperly caused or the trust assets that the trustee disposed of against the trust provisions. In the new draft Article 29 (9 December, 1919), the list of the persons who are entitled to make such requests were extended to include the settlor and his heirs and other trustees. The settlor and his heirs were also entitled, along with the beneficiaries and the trustees, to make an application to the court to vary the trust provisions on administration of trusts, when continuing to follow such provisions no longer suited the beneficiaries'

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14) Draft Article 1 (as of 9 December, 1919).

interest (draft Article 24). Furthermore, objection to the enforcement proceeding or compulsory auction against the trust assets can be made not only by the trustees and beneficiaries but also by the settlor and his heirs (draft Article 18).

Overall, the changes that took place during this phase gave the trust assets rather independent existence, weakening the control by the trustees as the owner. To ensure that the trust assets are securely administered by the trustees, an additional layer of protection was introduced by empowering the settlor to get involved, though drafters continued to refine those provisions that were designed to check the settlers' cynical use of trusts to insulate his assets from his creditors and others who have legitimate proprietary claims (draft Article 15).

#### (4) Legislative Process

In 1921, both the Trust Bill and the Trust Business Bill were sent to the Cabinet's Legislation Bureau. After some modification, they were then sent to the Sub-Committee on Trust Laws of the Ministry of Justice. It was at this stage in 1922 that a serious question was posed to the *in personam* characterisation of the trust beneficiary's right in the draft legislation. Kenzo Takayanagi, Professor of Law at Tokyo Imperial University and one of the few academics who followed the developments of American law at that time, noted that in the U.S., both the Supreme Court and the academics agree that the beneficiary right is proprietary in nature. Based on this observation, he expressed some reservation as to whether the Trust Bill should define trusts as a kind of an obligation.<sup>15)</sup> Nonetheless, his lone argument came too late and failed to overturn what had been presumed throughout the drafting process.

On 14 February, 1922, both the Trust Bill and the Trust Business Bill were presented to Imperial Diet. It was the Trust Business Bill, and not the Trust Bill, that attracted heated debate. By then the Trust Business Bill, consistently with the government's policy in the third drafting phase of the Trust Bill (as discussed in (3)), had sought to limit the scope of trust companies' activities. In

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15) Yamada, *On the Legislative Process* (n 11), at 218.

particular, the Trust Business Bill sought to confine the trust companies' business to the conventional role of the trustees, i. e. safe-keeping and conservative administration of the client's trust assets. Some members of the House of Commons were critical of the government's restrictive approach, and urged the government to view the financial role of the trust companies in a more positive light. In the end, their argument won several amendments. Whereas under the original Trust Business Bill the trust companies had no power to accept movables as trust assets, the amendment allowed them to accept certain categories of movables that are formally approved by the relevant Minister.<sup>16)</sup> The government was also sceptical about allowing the trust companies to invest their own assets in commodities and real properties, but after the amendment, they were allowed to purchase movables, lend money on movable charges, and purchase real property, subject to certain restrictions.<sup>17)</sup>

Similar dissatisfaction with the Trust Business Bill's restrictive approach was voiced in the House of Lords. The sentiment can be represented in a speech given by Lord Michitaka Sugawara, then the President of the Trust Companies' Association. In his view, the proposed legislation was too much in line with the English model, which is primarily concerned with traditional trusts. He argued that such approach would miss the demand of the era, given that the trust companies had already developed in the American model. He thus questioned the basis for the government's decision to narrow the trust companies' scope of business. However, his argument did not bring about any further amendment to the bill.

The Trust Bill, on the other hand, attracted very little debate and passed through both Houses without any amendment. Both trust bills became the law on 21 April, 1922, during the 45th Imperial Diet session. Akira Tanaka, the editor of the legislative material, has concluded that the trust bills proceeded through Diet without any serious debate as to how best to incorporate the Anglo-American doctrines into the Japanese legal system. The debate was

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16) Article 4 of the Trust Business Act 1922.

17) Article 11 of the Trust Business Act 1922.

eclipsed by the pressing issues of the day: the military disarmament and the universal suffrage.<sup>18)</sup>

It may well be, as Tanaka suggests, that the drafters and the members of the Diet were simply indifferent to the conceptual affinity of trust ideas to the Japanese legal system. However, the many rounds of re-drafting and the debates in both Houses reflect conscious policy decisions to put the trust ideas to the service of the shifting needs of the Japanese society. In particular, the strict definition of the trust and the adherence to the traditional English model, as opposed to the more commercially oriented American model, was a pragmatic decision to fit the trust law for the purpose of tight regulation of trust industries and separating them from various financial activities.

### 3. Subsequent History: Commercialisation of Trusts in the Globalised World

#### (1) Changes in the Japanese trust businesses

The history of the trust idea after 1922 contains, as do the many historical narratives of any kind, several ironies. Up until the end of the World War II, the trust companies operated in accordance with the 1922 Act's intention, administering assets entrusted by wealthy people. However, it was not long before the policy of trust business began to shift. After the War was over, the government yet again sought to use trusts as a vehicle of long-term financing to serve the rapidly expanding post-War economy.<sup>19)</sup> In 1943, the Concurrent Operation of Trust Business by Ordinary Banks Act was passed, allowing ordinary banks to conduct trust businesses. By 1948, all the trust companies had merged with banks to form 'trust banks' operating under the 1943 Act. In 1952, the Loan Trust Act was passed to encourage trust banks to provide loan trusts and investment trusts, opening up a large market for standardised

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18) Yamada, *On the Legislative Process* (n 11), at 267-68; Yamada, *Legislative Materials* (n 11), at 38.

19) For a concise history of the Japanese trust industry, see Makoto Arai 'Japan' in David Brownbill et al (ed), *Glasson's International Trust Laws* (loose-leaf ed), ch A21, at A21.29-A21.33; Makoto Arai, *The Law of Trust in Japan* (Yuhikaku, 3rd edn, 2008), 16-38 [新井誠『信託法』(有斐閣・第3版, 2008)].

money trusts.

During the 1980s, trusts began to serve more diverse purposes. Following the developments in the U.S., trust banks offered their trust services for real estate investment and securitization of debts. At this juncture, the restrictive aspects of the 1992 laws were perceived as an unacceptable burden on the creative use of trusts. Thus, the Trust Business Act was overhauled in 2004 to remove the restriction on the kind of assets to be accepted for trust businesses. It also sought to encourage non-financial institutions to enter the market of trust businesses. In 2006, the new Trust Act was passed to authorize more diverse use of trusts, such as enterprise trusts (enabled by Article 21 (1) (iii)), security trusts (enabled by Article 3), non-charitable purpose trusts (Articles 258-261), limited liability trusts (Articles 216-257), and securitization of beneficial rights (Articles 185-215). These innovations were said to follow closely the type of change that common law trust jurisdictions have recently considered, or soon will be considering.<sup>20)</sup> And yet, the use of traditional inter-generational trusts, though formally not prohibited, has been slow to take off.

## (2) Re-examination of the nature of trusts

Another irony in the history of Japanese trust is that soon after the 1922 laws were passed, the academics began to debate over the proper characterisation of trusts.

It was the civil law scholars who took seriously the conceptual place of trusts in the basic framework of private law in Japan. Early writings had followed the general assumption during the drafting stage and construed trusts as conferring an *in personam* right on the beneficiary. Nonetheless, they had difficulty reconciling their theory with the Trust Act 1922's provisions on subrogation (Article 14) and tracing (Article 31). To overcome these inconsistencies, Professor Kazuo Shinomiya, a civil law professor at the University of Tokyo, proposed to treat trust property as a kind of legal entity.

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20) Donovan Waters, 'Models of the Trust Ideas and Uses of those Models', in David Brownbill et al (ed), *Glasson's International Trust Laws* (loose-leaf ed) ch B13, at B13.89.

According to his model, the trustee holds a nominal right to the trust property, while the beneficiary has both *in personam* claims against the trust property (as a legal entity) and *in rem* claims to the assets that constitute trust property.<sup>21)</sup> However, this theory was not widely accepted, not least because legal entities can be established only by following a certain procedure as prescribed by law. More recently, Professor Hiroto Dogauchi put forward another formulation. In his view, the trust is ‘a legal concept which makes proprietary remedies available to those who have no rights *in rem*’.<sup>22)</sup> Despite the civil law scholars’ herculean efforts, one can perceive the sense of resignation that fitting the trust idea into a neat conceptual model is an unattainable task.

Commercial law scholars, on the other hand, have been more pragmatic and less troubled by theoretical niceties. And they were perhaps more influential. A group of commercial law scholars, working with the representatives of the major trust banks, published *A Study of Commercial Trust Law—A Draft Proposal for the Commercial Trust Act* (2001).<sup>23)</sup> It formed the backbone of the revision of the Trust Act 1922. In fact, the proposal had contained various draft provisions that ultimately became the key components of the 2006 Act.

The academic interest, which reached its height during the decade running up to the overhaul of the trust legislation in the 2000s, paralleled the globalisation and commercialisation of the trust practices. Professor Langbein’s re-discovery of ‘the contractarian basis’ of the American trust law attracted keen interests in Japan.<sup>24)</sup> The Japanese scholars were also sensitive to the

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21) Kazuo Shinomiya, *Trust Law* (revised ed. Yuhikaku 1989), at 65–81 [四宮和夫『信託法〔新版〕』（有斐閣 1989）].

22) Hiroto Dogauchi, *Principles of Trust Law and the System of Private Law* (Yuhikaku, 1996), at 223 [道垣内弘人『信託法理と私法体系』（有斐閣 1996）]. See also, Hiroto Dogauchi, ‘Overview of Trust Law in Japan’ available on-line at < <http://www.law.tohoku.ac.jp/kokusaiB2C/link/dogauchi.html> >.

23) The Commercial Trust Study Group, ‘*A Study of Commercial Trust Law—A Draft Proposal for the Commercial Trust Act*’ (Yuhikaku 2001) [商事信託研究会『商事信託法の研究——商事信託法要綱およびその説明』（有斐閣 2001）].

24) John H. Langbein, ‘The contractarian basis of the law of trusts’ (1995) 105 *Yale Law Journal* 625.

commercial development of the English trust practices, which led to the re-examination of 'the irreducible core content' of the English trusteeship as embodied in the scholarship of Professor (now Judge) Hayton and others.<sup>25)</sup> Langbein, Hayton and others were invited by Amakasu Charitable Trust, which was founded on the endowment from Mitsubishi Trust Bank, for a series of lectures in the 1990s. They were compiled and published as *Modern International Developments in Trust Law* (1999).<sup>26)</sup> Thus, by the turn of the century and onwards, the evolution of the Japanese trust ideas had begun to operate in the same currents that have affected the trusts ideas in the global context.

#### 4. Conclusion

Incorporating the idea of trusts into a legal system that is based on Civil Law is never easy, and Japan is no exception. When the drafters of the Trust Act 1922 weighed the English trust doctrine and the American model, they were clearly inspired by the examples of codification in India and California. Thus, while the final legislation proceeded on the basis of the *in personam* model of beneficiary interests, a number of provisions embodied principles that were more consistent with the *in rem* model. Additional layers of complexity were introduced when the drafters sought to make adjustment to meet the shifting needs of the society. Nonetheless, what Dr Tofaris has observed with regard to the Indian codification seems to apply to the Japanese trust legislation: although the Act defined the beneficiary's right as an obligation it gave them many rights which could easily be thought of as proprietary.<sup>27)</sup>

The developments after the passage of Trust Act 1922 also reflect the ever-changing socio-economic conditions to which the trust practices and industry must adjust themselves. The passage of the new Trust Act 2006 has even intensified the process, spurring innovation in both commercial and

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25) David J Hayton, 'Developing the obligation characteristic of the trust' (2001) 117 *Law Quarterly Review* 96.

26) David Hayton, (ed), *Modern International Developments in Trust Law* (Kluwer Law International, 1999).

27) Tofaris (n 7), at 28(73).

family trust practices. And yet, at present, there still remain some thorny problems at the interface between the Civil Code and the trust law, most notably in the area of inheritance. This is just one of the areas where the developments of trust ideas in India, along with mixed jurisdictions, European countries,<sup>28)</sup> as well as in Common Law and Commonwealth countries, can provide valuable sources of inspiration. The mutual understanding and learning among scholars and practitioners from those jurisdictions appears to promise rich fruits.<sup>29)</sup>

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28) Hague Convention on the Law Applicable to Trusts and on the Recognition (1985).

29) This paper is a modest attempt to test such a promise. For another such attempt made by the present author, see Masayuki Tamaruya, 'Mixed Legal System from the Perspective of Japanese Trust Law' (2012) 74 *Journal of the Japan Society of Comparative Law* [比較法研究] 237 (in English).