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OUTLINE OF LEGAL CONSTRUCTION OF THE JAPANESE SECURITIES INVESTMENT TRUST ACT (c. 198, 1951)

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[I] Enactment of Investment Trust Act in Japan.

The Trust Act and The Trust Business Act of Japan have been enacted already in 1922. But with regard to trust fund, trust companies then established, have, in applying these Act, only endeavoured to accept fund from customers as money trust (Kinsen-shintaku) by which trust companies receive money from investors in common to invest to any property such as securities, bond, land and tenements etc., and in termination of trust, convert such trust property to money and redeem to every customer in proportion to the amount of money received at the outset and there were no special purpose to invest to securities. In addition to these circumstances, as there were no enactment of special statute about to investment trust, there were no development of investment trust such as in England and America. But traders of securities, anxious to commence trust investment of Anglo-American type, being effected by introduction of Anglo-American trust idea, attempted such business of investment trust and secured some degree of success.

By the occurrence of the Second World War, these investment trust were greatly knocked down and there occurred suspension of it. But after the War, stock exchange were re-opened in May, 1949 and the market became very busy by effect of inflation, there appeared some tendency to re-open business of investment trust, and public opinion about enactment of special statute were greatly increased, the Department of Finance laid the Bill of investment trust before Diet at last and it passed and promulgated in June, 1951, called "Securities Investment Trust Act" (this Act was amended

twice, in 1952 and 1953). I will explain the basic legal construction of this Act in the following paragraph.

[II] Legal Construction of The Act

The Act defines "securities investment trust" as "it is a trust the object of which is to administer trust property as a investment to securities according to the directions of the settlor of trust" (§ 2). According to this definition, the investment trust must be carried on as a trust or so called "contractual type" contrasted to "corporation type", i.e. there must be settlor, trustee, cestuique trust and trust property. In ordinary trust relations, trustee has power of custody and disposition of trust property according to the object of trust, but in the investment trust carried on under this Act, the right and duty of administering trust property must be carried on by the directions of settlor, though the person by whom trust property actually administered is trustee, and this is one of the most important characteristics of the Act. The Act goes on "and it must contain the object by which many indefinite persons get equally subdivided right of cestui que trust." The Act also requires this equally subdivided right of cestui que trust to be represented by "beneficial certificates" (§ 5, I). The Act also requires that settlor must be settlor-company and trustee must be trust company or banking company which authorized to carry on trust business (§ 4, I).

I will explain more fully these elements by examining contents of this Act.

(1) Settlor Company

(A) Qualification of settlor-company

What is the qualification of settlor-company? The Act requires "it must be joint stock company the capital of which must exceeds ¥50,000,000. (§ 4, II) and the company which intend to carry on investment trust business must file a written application to Minister of Finance and get licence (§ 6, I). In order to give licence, Minister of Finance must ascertain the fact that, by examination of applicant's construction of personnel, experience and ability of investment to securities, conditions of market of se-

curities, the applicant has full adaptability to carry on the business as a settlor of investment trust (§ 7). By far, in practice, most company which were given licence by Minister of Finance were trader of securities registered in accordance with "Negotiation of Securities Act" (c. 25, 1948)

(B) Business of settlor-company.

Though the business of settlor-company is to create trust relation with trustee as to the investment trust, the Act does not provide with regard to the method of raising trust fund, it is submitted to the discretion of settlor company whether it transfer its own proper funds as trust funds and to sell subdivided interest of cestui que trust then bestowed to itself as outset beneficiary, or to transfer as trust fund to trustee in the name of settlor the money received as subscription for from general investors. In practice, however, latter method is prevailing, i.e. settlor-company usually decides total sum of fund of one investment trust, and levy from general investors subscription for subdivided investors subscription for subdivided interest of beneficiary until it amounts to total sum, and transfer the total sum to the trustee as trust fund in the name of settlor-company. By this method, the trust is created not when settlor-company received total sum of subscription, but when settlor company transferred it to the trustee company.

Trust instrument in which agreement between settlor company and trustee company concerning to the administration of trust fund, etc., is contained, should be approved by Minister of Finance (§ 12, I), and it must contain following items (§ 12, II):—

- 1) Name of settlor and trustee
- 2) Item concerning to business as settlor and trustee.
- 3) Item concerning to the capital sum of trust.
- 4) Item concerning to certificates of interest of cestui que trust.
- 5) Item concerning to custody and administration of capital and profit of trust.
- 6) Item concerning to redemption of capital and distribution of profit of trust property.
- 7) Item concerning to term of trust, its extension, dissolution of trust during term of trust.

- 8) Item concerning to method for calculating and payment of and time for payment of trust remuneration and other commission payable to trustee and settlor.
- 9) Item concerning to alternation of trust instrument.
- 10) Besides these, item concerning to matters which Minister of Finance decides for the protection of investors and for public policy.

Moreover, it is provided that Minister of Finance should reject application when the content of trust instrument seems to be contrary to laws and ordinances or not appropriate for public policy or protection of investors (§ 13, III).

Notwithstanding Act does not provide any class or species of securities to which settlor-company may invest, Minister of Finance is able to define it by applying above mentioned provision. In practice, the following species of securities are denoted in most approved trust instrument as proper securities to which settlor-company may direct investment:—

(a) national loan bond, (b) local government loan bond, (c) loan bond issued by any corporation established by special statute, (d) debenture, (e) contribution bond issued by any corporation established by special statute, (f) share-certificate, and it is also general practice that with regard to share-certificate, it is defined generally to such share-certificates as negotiable at stock-exchange.

Because the fact is that in ordinary trust relations, it is not the settlor but trustee who undertakes the custody and disposition of trust property, especially in Japan, idea of passive or simple trust is not acknowledged by current opinion, trustee has the power, so far as there is no special provision and statute, even in investment trust, to decide and carry on how or when to invest. But the Act provides that settlor-company shall have the power of direction to investment (§ 2).

As it is not permitted, however, that the settlor-company should have get any private profit by abusing this power, the Act contains one provision restricting the exercise of this power of settlor-company (§ 17), i.e. settlor-company should not make direction in such manner as;

- (1) To acquire securities which is owned by the name of settlor-company

itself, or by director or directors of settlor-company, or by principal shareholder or shareholders of settlor-company with trust property. (By "principal shareholder" meant any person who owns more than 10 percent of issued share-certificate of settlor-company).

(2) To sell or lent the securities which is held as trust property to aforesaid company or persons. Provided that it is permitted if directions were to do these through securities market (securities market defined by § 2 XII of the Negotiation of Securities Act (c. 25, 1948). Its raison d'être is that negotiation made through securities market usually were made by fair price. But negotiation made through securities market usually becomes as fair price is one thing, whether it is profitable for trust to acquire such securities is another thing.

To acquire securities with trust fund, notwithstanding there is no urgent necessities, may result damages to trust property, or overlook attempts of settlor company to make unjust enrichment by abusing its power as settlor. In Anglo-American principles of law of trust, it is severly prohibited to purchase trust property by the trustee individually, or sell trustee's individual property to himself as trustee (a) and it is also true even though the sale and purchase were held with fair prices. (b) The Court said that if trustee were permitted to do this "it would place before him the constant temptation to make the trust fund a dumping ground for his own unsatisfactory ventures. (c) In Japan, settlor company has a power to direct trustee concerning to investment, in addition to it, settlor companies are usually traders of securitie, temptation is perhaps greater than ordinary settlor at least. Legality of proviso of this section (§ 1) were attacked at Diet by one member of House of Representative. Department of Finance of Japan began to examine about qualification of settlor-company and reached to conclusion that settor company should not be trader of securities, therfore most trader of securities established another and independent company by which business of settlor company were carried on.

(2) Trustee-company.

(A) Qualification of trustee-company. In orner to accept office of investment trust, there is no need of getting license from Minister of Finance,

but trustee-company is required to be trust company or banking company which carries on trust business (§ 4, I), and to commence business of trust company or banking company, they should acquire licence from Minister of Finance. (§ 1, Trust Business Act. (c. 65, 1922), § 2, Banking Act (c. 21, 1927)).

(B) In carrying on business, trustee-company has only a limited power by which it administers or disposes trust property as settlor company directs. If the direction of settlor-company were beyond the scope of trust instrument, or contrary to public policy or provisions of law, should company reject that direction? It is a considerably difficult problem. If company could reject, settlor company's power of direction would become in vain, if company could not reject, interest of investors would not be protected. I am of opinion that on account of provision to the effect that sole power of direction is vested to settlor-company (§ 2), it is not the duty of trustee-company to decide legality of directions. In spite of that opinion, I agree to theory that trustee company would be held liable if trustee-company were fail to take reasonable care with regard to custody of trust property or funds which were in the hands of trustee-company.

(3) Cestui que trust.

(A) Who may be cestui que trust? The Act does not provide as to who may be cestui que trust. It only requires that interest of cestui que trust should be subdivided and should be acquired by indefinite and numerous persons. (§ 2) It is not legally impossible, therefore, to vest outset interest of cestui que trust to settlor-company. Indeed, under most trust instrument approved by Minister of Finance, it is provided that settlor-company is also outset beneficiary, and such subdivided interest of cestui que trust should be transferred to investors who made subscription of it.

(B) subdivision of interest of cestui que trust.

Outset interest of cestui que trust should be subdivided into equal parts. (§ 5) Every beneficiary who have subdivided beneficial interest have, with regard to redemption of principal and distribution of profit of trust fund, equal right in proportion of number of subdivided interest (§ 5, II)

(C) Beneficial certificates.

Beneficial certificates, as a general rule, are certificates to bearer, and may be converted to registered certificates by application of beneficiary. (§ 5, IV).

As to the publisher of beneficial certificates, the Act does not contain any provision. As beneficial certificate denotes right of beneficiary, it is natural that settlor-company who creates trust relations shoule publish beneficial certificates, but trustee-company's consent should be required as it is other party of the trust relations. In practice, beneficial certificates are publisooed by settlor-company with confirmation by trustee-company, following with this theory.

Beneficial certificates should be described with definite requirement. (§ 5, n. 6) These requirements are as follows :—(i) trade name of settlor and trustee.

(ii) Total sum of principal of trust fund and total number of subdivided beneficial interests at the outset of creation of trust.

(iii) Term of trust

(iv) Time and place for redemption of capital and distribution of profit of trust property.

(v) Method for culculating and payment of and time for payment of trust remuneration and other commission payable to trustee and settlor.

(D) transfer and exercise of subdivided beneficial interest.

With regard to certificate payable to bearer, transfer and exercise of beneficial interest, it should be accompanied with certificates (§ 5, I), while concerning to registered certificate, the Act does not provide anything, the method of which should be construed with similar to that of ordinary beneficial interest.

(4) Two types of investment trust recognized by the Act.—Open-end and Closed-end.

As described above, types of investment trust recognized by the Act are so called "contractual type" or "trust type" as contrasted to "Corporation type", and contractual type, has two different type, ane is "closed-end type" or "unit type", the other "open-end type". In unit type, addition

of trust fund invested by new investor or subscriber after the creation of trust is prohibited.

For example, a settlor company create a trust with the funds of ¥1,000,000,000, and transfer subdivided beneficial interest to subscribers, this fund constitute one unit, and settlor-company is prohibited to add it another sum of trust fund by leaving new subscriber. If settlor-company levies another ¥1,000,000,000 as trust fund, that constitutes another unit trust and could not be mingled with former trust fund. In unit trust, it is doubtful whether owner of subdivided beneficial interest may surrender his interest and could redeem principal of trust fund proportionate to his number of subdivided interest before termination of trust. The provisions of the Act on this point is ambiguous. But in practice, most trust instrument approved by Minister of Finance contains provisions on this point. It recognize sale of beneficial certificate by beneficiary to settlor not settlor himself, but as settlor. It is not bargain and sale of beneficial interest from beneficiary to settlor, though provision of trust instrument defines as "sale" of beneficial certificate to settlor, but special contract concerning to surrender of beneficial interest and redemption of proportionate trust fund between beneficiary and settlor. Trust instrument also provides as to reduction of redeemable price in proportion to duration between creation of trust and "sale" of beneficial certificate.

Until June 1942, unit type was only type of investment trust recognized by the Act. From June 1942, "open-end" type were recognized by the Act. By "open-end" type, it is meant the investment trust to which subsequent addition of trust funds were permitted. It is the same one investment trust in spite of addition of new principal trust fund. For instance, settlor-company levy subscription of ¥1,000,000,000, and afterwards it levy another subscription of ¥1,000,000,000 and add it to former trust fund, total sum of ¥2,000,000,000 constitute one investment trust fund. The Act provides that in this open-end type, limit of additionable sum of principal trust fund should be pre-estimated from the outset, and this pre-estimated sum should be indicated on beneficial certificate (§ 5 VII), and if beneficial certificate were that of added principal fund, total sum of principal fund and number

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of subdivided beneficial interest which were added until issuance of that beneficial certificate should be indicated on that certificate (§5, VII).

As to "sale" of beneficial certificate to settlor as settlor, it is the same with that of unit trust, except deduction of price. In "open-end" type, however, there is no deduction of price, but settlor may require commission for "sale" to settlor.

- (a) Scott, Law of of Trust, Vol. 2 pp. 857, 875, §22 of Japanes Trust Act (c. 62, 1922)
- (b) Scott, op. cit. pp. 857~860, 873, 878.
- (c) Cornet V. Cornet, 269 Mo, 298, 322, 190 S. W. 333, 341 (1916)