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THE RECEPTION OF TRUST IN ASIA: EMERGING ASIAN PRINCIPLES OF TRUST?

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In common law jurisdictions, the trust is one of the most popular legal institutions for wealth management. Most civil law jurisdictions, however, have yet to embrace it. Debates continue as to the nature of the trust and its compatibility with indigenous legal concepts in civil law. The enactment of a domestic trust statute in China in 2001, and in major civil law jurisdictions in Asia (such as Japan, Taiwan and Korea) have demonstrated the practical importance of such debates in shaping trust legislation. Accordingly, this article seeks to take stock of the Asian approaches in receiving the trust, in the hope that insights can be drawn for the benefit of jurisdictions beyond Asia. The article first considers what the core features of the common law trust might be. Then, it looks at how these four jurisdictions adopt them, if at all, in their trust statutes and evaluates the advantages and disadvantages of the respective approaches.

I. INTRODUCTION

Though the trust has long been established in common law jurisdictions, it is much less prevalent in continental Europe. In these jurisdictions, doubts remain as to the compatibility of civil law concepts with trust principles, which involve dual ownership, equitable tracing, and hidden proprietary rights against third parties. In contrast, quite a few civil law jurisdictions in Asia, such as Japan,[1] South Korea,[2] Taiwan,[3] and, most recently, China[4] have adopted the trust. These Asian jurisdictions share the common objective of using the trust to enhance their financial infrastructure. There are also considerable similarities in the approaches, if not also the wording, of their trust statutes.

Accordingly, the aim of the present paper is to identify from these trust laws useful inspirations for Asian and European jurisdictions contemplating the adoption of the trust. The article comprises two parts. First, it looks at the core features of the common law trust and problems in fitting them into the civil law system. Second, it examines how these problems have been tackled, if at all, in civil law jurisdictions

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1 *Trust Act*, 1922, Law No. 512 of 1922 (with effect from January 1923) [*Japan Trust Act*].

2 *Trust Law*, 1961 (with effect from December 1962) [*SK Trust Law*].

3 *Trust Law*, 1996, Presidential Decree No. 8500017250 (with effect from January 1996) [*Taiwan Trust Law*].

4 *Trust Law*, 2001, Order No. 50 of the President of the People's Republic of China [*China Trust Law*]. In this article, references to China are to mainland China, excluding Hong Kong and Taiwan.

in Asia that have adopted the trust. In doing so, this article hopes to distill common (Asian) techniques for receiving the trust and pitfalls to be avoided.[5]

II. Common Features of the Trust

The usefulness of the trust as a legal mechanism has long been affirmed. One might recall the oft-cited praise by Sir Frederick W Maitland that the trust is "the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence".[6] In recent years, this English invention has been widely recognised or adopted outside the common law world, as a result of a flurry of efforts in Europe[7] and legislative activities in some Asian jurisdictions. This might be due, in great part, to the usefulness of the trust in effecting the entrustment of property in the hands of a party who, albeit having *prima facie* control or ownership over the property, is bound to use it for the benefit of designated purposes or persons. The main features of the trust have been subject to extensive analysis;[8] naturally, civil law jurisdictions are inclined to import only the core requirements of the trust, in order to minimize whatever adverse impacts it may have on their indigenous legal regimes.

From the academic commentaries relating to the nature of the common law trust, one might discern four main features: the vesting of legal ownership of the trust property with the trustee; the segregation of trust assets from other assets of the trustee; the imposition of fiduciary (and other) duties on the trustee; and the availability of (equitable) tracing, followed by the imposition of proprietary remedies on third party recipients who are not *bona fide* purchasers for value without notice. Needless to say, not all common features are necessarily core features, that is, those that are essential for the trust institution to be efficacious and effective. To identify the core features, a closer analysis of these common features is in order.

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5 Although such aspects as conflict of laws rules, anti-avoidance rules, and trust taxation are of considerable significance in receiving trusts, to keep the present article within a reasonable length, their examination will need to await another occasion.

6 F. W. Maitland, *Equity: A Course of Lectures*, 2 d ed. (Cambridge: Cambridge University Press, 1936) at 23.

7 Efforts have been made at the international level to devise some common principles, and have resulted in the Principles of European Trust Law; see David J. Hayton *et al.*, ed., *Principles of European Trust Law* (The Hague; London: Kluwer Law International, 1998) [*Principles of European Trust Law*]; David J. Hayton, "Trusts and their Commercial Counterparts in Continental Europe", Report for the Association of Corporate Trustees (January 2002) [unpublished, available from tact@cooden.fsbusiness.co.uk]; David Hayton, "The Trust in European Commercial Life", The Sir Roy Goode Commercial Law Lecture Series 2004-5 [on file with the author].

8 Some representative commentaries include: Henry Hansmann & Ugo Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis" (1998) 73 N.Y.U.L. Rev. 434; Henry Hansmann & Ugo Mattei, "Trust Law in the United States: A Basic Study of Its Special Contribution" (1998) 46 Am. J. Comp. L. 133; John H. Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale L.J. 625 at 640–643; G.L. Gretton, "Trust without Equity" (2000) 49 I.C.L.Q. 599; David J. Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 Law Q. Rev. 96; Lupoi, Maurizio, *Trust: A Comparative Study* (Cambridge: Cambridge University Press, 2000); Robert H. Sitkoff, "An Agency Costs Theory of Trust Law" (2004) 89 Cornell L. Rev. 621; and George G. Triantis, "Organizations as Internal Capital Markets: the Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises" (2004) 117 Harv. L. Rev. 1102.

A. *Vesting of Legal Title with Trustees*

It is a well established common law principle that, to establish a trust, the settlor must declare it, and do everything necessary to be done in his capacity to transfer legal title of the trust property to the trustee.[9] Of course, if he declares himself as trustee, the transfer of property could be dispensed with, the trust assets having already vested with him.

In a system that embraces dual ownership, this requirement is an extremely convenient method to split management and beneficial enjoyment over the trust assets: the trustee obtains *prima facie* ownership and management powers, whereas the beneficiaries obtain substantial (equitable) ownership and thus beneficial enjoyment of the assets. In this way, the trustee will be given the appropriate authority in virtue of his *prima facie* ownership to manage the trust property for designated purposes or persons.

However, civil law jurisdictions are unfamiliar with dual ownership, let alone the equitable jurisdiction. Accordingly, their common concern in receiving the trust is that, once (absolute) ownership is transferred to the trustee or beneficiary, there will not be any effective mechanism in the Codes of Obligation or Property to check the powers of the title holder.[10]

It is submitted that to divide management from beneficial enjoyment, a separate, equitable jurisdiction is not necessary. However, the trustee still needs to assume appropriate control over the trust assets in order to manage them effectively, and there need to be adequate checks on his powers to avoid abuses. Hence, even though the division is conveniently accommodated in common law jurisdictions through dual ownership, it can be achieved in civil law jurisdictions. One may transfer ownership to the trustee subject to restrictions,[11] transfer ownership to the beneficiary subject to the trustee's powers of management,[12] or transfer ownership to a separate patrimony not owned by any person, subject to the trustee's management powers and the beneficiary's correspondent rights of beneficiary enjoyment.[13]

These methods differ in their starting points as well as their respective advantages and disadvantages. Nonetheless, they show that to divide management and beneficial enjoyment over a piece of property, it is not necessary to transfer ownership to the

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9 See J. Mowbray Q.C. *et al.*, *Lewin on Trusts*, 17th ed. (London: Sweet & Maxwell, 2000) [*Lewin on Trusts*] at 38–55. American Law Institute, *Restatement (Second) of Trusts* (St. Paul: American Law Institute Publishers, 1959), §17 [*Restatement (Second) of Trusts*].

10 For a fuller discussion of this difficulty, see K. W. Ryan, "The Reception of the Trust" (1961) 10 I.C.L.Q. 265; Vera Bolgar, "Why No Trusts in the Civil Law?" (1953) 2 Am. J. Comp. L. 204; Dorcas White, "Some Problems of a Hybrid Legal System: A Case Study of St Lucia" (1981) 30 I.C.L.Q. 862; A. M. Honoré, "On Fitting Trusts into Civil Law Jurisdictions" [unpublished], online: Tony Honoré <http://users.ox.ac.uk/~alls0079/preview.htm>.

11 For non-Asian jurisdictions or international efforts that have adopted this approach, see *Principles of European Trust Law*, art. I(1), *supra* note 7; Scotland; Louisiana (*Louisiana Trust Code* (1994), §1731); and almost all civil law tax havens (such as Jersey, Guernsey, and Mauritius).

12 Such as the *bewind* in the Netherlands and South Africa. For problems of this approach, see Ugo Mattei, "Should Europe Codify Trust?" in Peter Birks & Adrianno Pretto, eds., *Themes in Comparative Law—In Honour of Bernard Rudden* (London: Oxford University Press, 2002) c. 16.

13 See the Québécoise trust, which treats trust property as falling within the *patrimoine d'affectation*, which is distinct from the trust parties and in which none of them has any real rights: Art. 1259 *Québec Civil Code* (1991).

trustee subject to another ownership right of the beneficiary over the same property. What matters most is to give the trustee appropriate powers of management subject to preventive mechanisms for abuses.

B. *Trustees' Duties*

In common law jurisdictions, the typical mechanism for preventing a trustee's abuse of his legal ownership is the imposition of stringent duties on him. These include: the duty to abide by the terms of the trust; the duty to account; the duty of good faith and honesty; the duty of care or reasonable prudence; and fiduciary duties of loyalty.[14] The granting of control over the trust property to the trustee subject to these duties creates a powerful check and balance that is crucial to the success of the trust. The former feature gives the trustee management powers and independence from the wishes of the beneficiaries; the latter ensures that the trustee is subject to effective monitoring and exercises those independent powers for the benefit of the beneficiaries.

Not all of the trustee's duties mentioned above are core obligations. For example, the fully-informed consent of beneficiaries and their subsequent ratification can justify *prima facie* breaches of fiduciary duties. Likewise, the duty of reasonable prudence can regularly be exempted. In the seminal decision of *Armitage v. Nurse*, Millett L.J. (as he then was) held that only duties of honesty and good faith are the core obligations of a trustee.[15] Though his Lordship did not mention the duty to account, it has been convincingly argued that this also belongs to the irreducible core of a trustee's duties.[16]

For a civil law jurisdiction contemplating the reception of a trust, there is little difficulty transplanting the core obligations of honesty, good faith, and the duty to account. Civil law lawyers are familiar with such duties. Of course, a trust that only subjects the trustee to these core obligations may not operate in the full rigour as would a common law trust that also imposes the fiduciary duties and the duty of reasonable prudence (the duty of care). It is therefore submitted that the best legislative approach is to also impose the duty of reasonable prudence and fiduciary duties on (civil law) trustees by way of default, but allow parties to contract out of them through exemption clauses. Here, there is no concern of incompatibility with indigenous legal concepts. The duty of reasonable prudence is no different from the well-established duty of care in civil law. Though fiduciary duties may be relatively less common in these jurisdictions, their introduction is unlikely to create any inconsistencies with indigenous laws of obligations.

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[14] See *Lewin on Trusts*, *supra* note 9, c. 20 & 34; *Restatement (Second) of Trusts*, §§ 170, 172, 173, 174, *supra* note 9 and *Uniform Trust Code*, §§ 802 and 804 (2000) (United States).

[15] [1998] Ch. 241 at 253. Note that the Law Commission of England and Wales recently recommended that professional trustees should not be able to rely on clauses which exclude their liability for breach of trust arising from negligence: see U.K., Law Commission of England and Wales, *Trustee Exemption Clauses* (Consultation Paper No. 171) (London: TSO, 2003).

[16] David J. Hayton, "The Irreducible Core Content of Trusteeship" in A. J. Oakley, ed., *Trends in Contemporary Trust Law* (Oxford: Clarendon Press, 1996) c. 3.

C. *Segregation of Trust Assets*

A feature of the common law trust that is crucial for its efficacy is the segregation of the trust assets from other assets of the trustees. This entails that the trust assets are free from the claims of the trustee's spouse, successors, or creditors (especially on his insolvency). In this way, even if the trust assets are transferred to the trustee for efficient management, they will not be vulnerable to claims unrelated to the trust and arising purely as a technical consequence of the transfer of ownership.

It is submitted that the segregation of the trust fund is a core feature of the trust. Without segregation, the trust will only be a type of contractual agreement that happens to involve the management of property, such as an agency or a civil law mandate.[17] It will lose its greatest attraction, since the risks of the unrelated claims mentioned above will outweigh the benefit of the trustee's service, which could have been obtained through an agency or mandate contract.[18]

Civil law jurisdictions that intend to introduce the trust should therefore strive to ensure that the trust assets are free from the claims of the trustee's spouse, successors, and creditors. In civil law terms, this involves treating them as falling outside the general patrimony of the trustee (and the settlor). It can be achieved by drawing analogy to recognised notions in civil law involving independent patrimonies, such as the patrimony of appropriation,[19] or the foundation.[20]

D. *The Tracing Process and Hidden Proprietary Rights*

A feature of the trust that is most likely considered heretical in the eyes of a civil law lawyer is the availability of the equitable tracing process to recover trust assets. Tracing is an evidentiary process that allows beneficiaries to identify current assets held in the hands of someone—including a third party—as representing the trust assets originally held in the hands of the trustee, even though the property has been exchanged into a new form, and passed through several hands.[21] These identification rules are

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[17] A mandate in Chinese law involves an agency arrangement whereby the mandator retains ownership of the relevant property, but engages the mandatory to act in his own name on behalf of the mandator. See further *Contract Law of the People's Republic of China*, Order No. 15 of the President of the People's Republic of China, 1999, c.21; Y. P. Du and L. Xuan, "Jiedu Xintuofa" [Understanding the Trust Law] (2002) 17 Law Journal of Shanghai Administrative Cadre Institute of Politics and Law, Issue No. 2, 36 at 39.

[18] See Henry Hansmann & Ugo Mattei, *supra* note 8. See, however, Patrick Parkinson, "Reconceptualising the Express Trust" [2002] Cambridge L. J. 657 at 667-669. The author argues that if there is a clear intention to create a trust, a valid trust will arise even though the trust fund is not held separately from the general assets of the trustee. Despite the generality of this statement, in elaboration, the author seems to have in mind a narrower principle, that it is not necessary to physically separate the trust fund, say, by putting it in a separate bank account (at 668-669).

[19] See *supra* note 13.

[20] Foundations are common legal devices for devoting property in perpetuity to non-profit making causes. See Nikolaus Biedermann, "Foundations vs. Trusts: Part I" and "Part 2" [1994] Private Client Business 283 and 352.

[21] For example, suppose a Ming vase that is settled on trust is sold by the trustee in return for US$100,000. Suppose further that the trustee used half of the proceeds to purchase a diamond necklace and gave it to his wife. Equitable tracing allows the beneficiaries to identify the necklace now owned by the wife as

extremely plaintiff-friendly, and often resolve evidential gaps by presumptions in favour of beneficiaries.[22] In addition, once properties in the hands of a third party are identified as traceable to the trust assets, the beneficiaries can assert proprietary claims (of a lien or constructive trust) against these properties. The third party will be treated as holding the bare legal title in favour of the beneficiaries; his heir and creditors will not be able to claim the trust properties. In effect, this replicates the trust arrangement in the third party, albeit not involving all of the duties of the express trustee. This provides very extensive proprietary protection for the beneficiaries.

While these equitable rules are long established in common law jurisdiction to protect the beneficiaries' proprietary rights, questions can still be raised as to whether their full length and breadth are needed for the trust to be efficacious. In other words, are all of them core to the trust concept? The extent of tracing and the consequential assertion of proprietary rights may be considered at three levels.

At the first, minimum level, if one accepts that a core feature of the trust is the existence and integrity of a segregated fund, one should also accept, as a corollary, that the trust fund is not limited to the initial settled sum, but includes the assets lawfully derived from it from time to time.[23] Otherwise, the notion of a segregated trust fund will be defeated once the initial sum is disposed of in exchange for other assets; yet such disposals and exchanges are crucial for the trust to be an efficacious instrument for wealth management. Accordingly, this limited extent of tracing should form the core part of an efficacious trust.[24]

The second level of tracing and assertion of proprietary rights is into assets still held by the trustees but obtained from his unlawful use of the trust fund. Such a feature has the twofold effect of requiring a trustee to account for unlawfully obtained profits, and treating him as having already done so.[25] The arguments for and against adopting this feature are finely balanced. On the one hand, it has the undesirable consequence of adversely affecting innocent creditors who has dealt with the trustee based on his apparent wealth.[26] A hidden proprietary right will be created. On the other hand, without this feature, the protection of the ring-fenced trust fund will be illusory, as it can easily be circumvented once the trustee used the trust assets in breach.[27] It is submitted that any civil law jurisdiction that intends to adopt this feature should proceed with caution. It is not necessary for the efficacious management of the trust assets by a law-abiding trustee. Its main justification is based on the need to provide a strong disincentive against trustees in breach; such a purpose can be achieved, perhaps more effectively, by criminal sanction or an *in personam* remedy of disgorgement of profits, without adverse proprietary consequences.

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property derived from the original Ming vase. For an excellent monograph on this subject, see Lionel D. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997).

22 See, for example, *Re Hallett's Estate*, (1879-80) L.R. 13 Ch. D. 696, and *Re Oatway*, [1903] 2 Ch. 356.

23 This is provided for in *Principles of European Trust Law*, art. III(1), *supra* note 7 at 15.

24 Of course, one would not be resorting to the plaintiff-friendly presumptions of *Re Hallett's Estate* and *Re Oatway*, *supra* note 22.

25 *Cf.* the reasoning adopted by Lord Templeman in *A.G. for Hong Kong v. Reid* [1994] 1 A.C. 324.

26 The spouses, heirs, and donees of the trustee will also be adversely affected, but the justification for protecting these individuals who have not provided consideration is much weaker.

27 David J. Hayton, "The Core of the Chinese Trust Law 2001" (Paper presented to the First International Trust Seminar, Beijing, 28 August 2004) at para. 4.3 [on file with the author].

The third and most extensive level is the assertion of proprietary rights against traceable assets held by third-party recipients. For the same, if not stronger reasons as those applicable to tracing into unlawful profits in the trustee's hands, it is doubtful if this feature must be adopted by civil law jurisdictions.

E. *The Core Minimum of a Trust*

To briefly sum up, the core features of a trust include the granting of appropriate management powers—whether through transferring legal ownership or otherwise—to the trustee, subject to checks to prevent abuses. Such checks on his powers must comprise the duty of honesty and to keep account; the imposition of fiduciary duties and the duty of reasonable prudence would be useful but they do not form the core obligations. The trust assets should form a segregated fund from the general assets of the trustee, and should accordingly be free from the claims of his spouse, heirs, and creditors. As a corollary, the trust assets should not be limited to the fund initially settled upon trust, but should at least comprise all properties in the trustees' hands that are lawfully derived from the initial trust fund.

III. Asian Approaches

Despite the hesitations of continental civil law jurisdictions about the trust, a majority of the more prosperous civil law jurisdictions in Asia have passed domestic trust statutes. They include Japan, South Korea, Taiwan, and China, all of which fall within the ten biggest economies in East Asia. This Part examines how these four jurisdictions incorporate the core features of the trust identified above.

A. *The Granting of Management Powers to the Trustee*

1. *Transfer or Entrustment?*

Except for China, the trust statutes of all the jurisdictions under examination are common in expressly stipulating that the settlor transfers or disposes of the assets. For example, article 1 of the *Trust Act* of Japan[28] defined the trust as the act to "*transfer or otherwise dispose of* a property right and cause another person to administer or dispose of the property in accordance with some specific purpose".[29] Read broadly, the definition seems to embrace the disposition of property rights to someone other than the trustee—it only requires a transfer or disposition of relevant property rights, and that the trustee be "caused to administer or dispose of" such rights. However, this broad interpretation has not been adopted. Rather, the Japanese trust has been analysed as involving two elements: the transfer or disposition of a property to the

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[28] *Supra* note 1.

[29] Arai Makoto, "The Law of Trusts and the Development of Trust Business in Japan", in David J. Hayton, ed., *Modern International Developments in Trust Law* (London: Kluwer Law International, 1999) c. 5 at 66 [translated by Arai Makato, emphasis added].

trustee and his management of it in accordance with some specific purposes.[30] The former element renders the trustee the title holder of the trust property, whereas the latter element both grants him administrative powers in relation to the trust property and obligates him to use such powers for the purposes specified by the settlor. The trust statutes of South Korea[31] and Taiwan adopt the same approach.[32] The definition of a trust in the Taiwanese *Trust Law* is drawn heavily from its forerunners in Japan and South Korea; the relevant explanatory note of article 1 of the 1992 (first) draft of the Taiwanese *Trust Law* refers specifically to the trust definitions in these two trust statutes.[33]

In contrast to these three trust laws, the *Trust Law* of China adopts a different—but problematic—definition of the trust.[34] Article 2 of the *Trust Law* defines the trust as a situation whereby: "the settlor … *entrusts* (*weituo*) the rights in his property to the trustee and the trustee manages or disposes of such property in his own name in accordance with the wishes of the settlor for the benefit of the beneficiary or for a specified objective". The main difference in the Chinese approach is in abandoning the term "transfer" (*zhuanyang*) in favour of "entrustment" (*weituo*). In Chinese law, "entrustment" is not a unique legal term for establishing a trust; it is typically used for creating an agency relationship[35] (or a mandate), which does not require any transfer of property to the agent.

2. *The Merits (or Demerits) of "Entrustment"*

The unique Chinese formulation, involving "entrustment" rather than "transfer" of property, has proven controversial both as to what it means and the desirability of its consequences. Notwithstanding the absence of express wording, it has been argued that ownership of the trust property is, in substance, vested with the trustee. This is said to be consistent with other provisions of the Trust that define trust property as property "obtained" by the trustee on the establishment of the trust,[36] require the trustee to "transfer" trust property to those entitled upon the termination of the

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30 *Ibid.* at 67.

31 *SK Trust Law*, art. 1(2), *supra* note 2.

32 *Taiwan Trust Law*, art. 1, *supra* note 3. For a comprehensive analysis of the *Taiwan Trust Law*, see Yvonne S. W. Fong, *Trust Law in Taiwan* [unpublished], online: Manivest <http://www.manivestasia.com/Library/Articles/ TAW0401.doc>. See also Wen-yu Wang, "Xintuofa yingruhe dinwei sanwei yiti zhi xintuofalu guanxi" [How Should the Trust Law Define the "Trinity" in Trust Relationship?] (2002) 53 The Law Monthly, Issue No. 12, 46; Zhao-lun Chang, "Liangan xintuo falu zhidu bijiao chutan" [A Preliminary Discussion of the Comparisons of the Trust Systems of China and Taiwan] (2003) 54 The Law Monthly, Issue No. 2, 67.

33 Ministry of Justice, Taiwan, First Draft of the *Trust Law*, July 1992 [on file with the author].

34 For reviews of the *Chinese Trust Law*, *supra* note 4, see W. Xin & W. Brown, "China's New Trust Law" *China Law Update* 4:7 (July 2001) 3; Walter Hutchens, "The PRC's First Trust Law: Trusts *Without* Chinese Characteristics?" *China Law and Practice* 15 (June 2001) 18; Tian Min Zhang, *Shiqu Hengpingfa De Xintuo* [A Trust Without Equity] (Beijing: CITIC Publishing House, 2003); Lusina Ho, *Trust Law in China* (Hong Kong: Sweet & Maxwell Asia, 2003); Li Hang Di, "Xintuo caichan yu zhongguo xintuofa" [Trust Property and the Chinese Trust Law] (2004) 22 Tribune of Political Science and Law, Issue No. 1, 94.

35 See *General Principles of Civil Law of China*, Order No. 37 of the President of the People's Republic of China, 1998, arts. 64 and 65.

36 *China Trust Law*, art. 14, *supra* note 4.

trust,[37] and mandate that the trust property be segregated from other properties of the trustee.[38]

According to this view, express reference to transferring ownership to the trustee would either give him absolute ownership that necessarily comprises the right of beneficial enjoyment,[39] or create a new ownership right that does not include the right of beneficial enjoyment.[40] The former conflicts with trust principles; the latter infringes the *numerous classus* principle enshrined in civil law systems, which prohibits the creation of new property rights. Hence, although the Law in effect gives ownership to the trustee, it does not say so expressly. Advocates of this view draw support from the official explanation for article 2, that is, to accommodate the lack of local acceptance in giving ownership to the trustee, and to better protect the interests of the beneficiaries *vis-à-vis* the trustee.[41]

However, if ownership is indeed vested with the trustee, article 15 of the Chinese *Trust Law*, which stipulates that the trust property must be kept separate from the settlor's property,[42] will be superfluous.[43] In any event, a drafting approach that does not stipulate expressly what it seeks to achieve in substance is at best a dubious example for other legislatures. The Law's lack of guidance to a judiciary that may not yet be familiar with the trust concept is also regrettable. For example, it is now unclear whether, in light of the inconsistencies between the provisions themselves, it is necessary for the settlor to transfer ownership of the relevant property to the trustee to set up a trust. If it is indeed possible for the settlor to retain ownership and simply enter into a "trust contract" (*xintuo hetong*) with the trustee to establish a trust, difficult practicalities will arise in these trusts.[44]

First, even if the settlor abides by the trust, the trustee has no *prima facie* ownership *vis-à-vis* the outside world to manage the trust assets, as ownership continues to vest with the settlor. Every time the trustee seeks to deal with the assets, he will have to

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37 *Ibid*. at art. 41.

38 *Ibid*. at art. 16.

39 Ben Xia, "Guifan caichan quanili zhidu de jibenfa" [The Foundation Law for Regulating Property Management Systems] [2001] China Finance, Issue No. 6, 14 at 15; Li Hang Di, *supra* note 34 at 102; De Xiang Guo, "On Special Regulations in the Trust Law of the People's Republic of China" [2003] Luoyang shifan xueyuan xuebao [Journal of Luoyang Teachers College] Issue No. 3, 27. See also Tian Min Zhang, *supra* note 34 at 340.

40 Xue Jun Sheng, "The Limitations of Chinese Trust Law and Its Weakening to Function of Trust" [2003] 25 Modern Law Science, Issue No. 6, 139 at 141.

41 See Prof. Jiang Ping's views in Ping Du, "Touzhi jijin di zhongyao falu yiju" [An Important Legal Foundation of Securities Investment Funds] *Shi Chang Bao* [*Market News*] (24 May 2001) 9, and the view of the drafters: Quanguo renda "Xintuofa" qicao gongzuo zu [Drafting Group of the Trust Law, National People's Congress] *Zhonghua Renmin Gongheguo xintuofa" tiaowen shiyi* [Annotation of the Provisions of the Trust Law of the P.R.C.] (Beijing: Publishing House of People's Court, 2001) at 20 *et seq.*

42 art. 15, *supra* note 4, reads as follows: "the trust property and other property of the settlor that is not part of the trust shall be kept separate". If the trust property has already been transferred away from the settlor, article 15 would not have been necessary.

43 See the contrary view that ownership is retained by the settlor, which is justified on the ground that it was vested with him before the trust is established, and has not been "transferred" to the trustee pursuant to any provision of the Law: Xin Qiu, "Xintuofa zi quehan jiqi guanyin" [The Inadequacies of the Chinese Trust Law and Their Reasons] [2003] 23 Sun Yatsen University Forum, Issue No. 6, 157 at 160; Chun Zhang, "Zhonghua renmin gongheguo xintuofa mianmianguan" [Several Views on the Trust Law of the People's Republic of China] [2002] Xuehai [Knowledge and Learning] Issue No. 1, 118 at 121.

44 For detailed criticisms, see Lusina Ho, *supra* note 34 at 67-72.

prove his authority to do so by producing the trust instrument and (perhaps also) the settlor's authorisation. This will be so cumbersome as to defeat the very purpose of the trust.

Second, if the settlor misappropriates the trust assets, and it is very easy for him as the owner to do so, there is very little the beneficiaries could do. As the property is not owned by the trustee, any action against him will face the difficulty of proving lack of prudence on his part in not pre-empting the conduct of the settlor, who is after all the legitimate owner of the trust assets. Besides, any direct action against the settlor will meet the even greater difficulties that the Chinese *Trust Law* does not subject him to any duties like a trustee is,[45] and that as the legitimate owner of the trust assets it is extremely doubtful if he is liable under the *General Principles of Civil Law*[46] for infringement of (another's) property rights.

In avoiding the theoretical debate on the reception of trust, the unique Chinese approach runs the risks of failing to provide effective management powers to the trustee and to maintain the integrity of the trust fund in some cases. The latter risk can be avoided by interpreting article 2 as saying that ownership can be retained (but possession will be given to the trustee) only in relation to tangible properties where ownership and possession are indivisible. However, the former risk, of posing practical hindrances to the trustee's management, still remains. Besides, the express wording of article 2 does not provide clear textual support for this reading.

B. *Checks on the Trustee's Powers*

As discussed above, the core minimum of checks on a trustee's powers comprises the duty of honesty and to keep account. Whereas fiduciary duties and the duty of reasonable prudence are useful, they are not core obligations. The imposition of these duties is to ensure that the trustee utilises his ownership (or any powers granted to him over the trust assets) to the benefit of the beneficiaries or the specified purposes. Furthermore, unlike common law jurisdictions where the settlor has no right *qua* settlor to enforce these obligations, all four statutes unanimously grant rights of enforcement to the settlor that are commensurate with those of the beneficiaries.[47] This suggests a conception of trust obligations as arising from the "contractual" undertaking by the trustee towards the settlor for the benefit of the beneficiary as a third party; under such a view, the trust is a tripartite relationship whereby the settlor as a contracting party has rights to enforce the trust contract.[48]

At the broadest level, all four trust statutes under consideration stipulate that the trustee manages or disposes of the trust assets for the benefit of specified purposes and persons,[49] rather than for his personal benefits. To give substance to this general

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[45] Such as the duty to segregate the trust assets from his own, the duty to keep and allow the inspection of accounts, the duty of reasonable prudence, and fiduciary duties.

[46] Order No. 37 of the President of the People's Republic of China, 12 April 1986.

[47] *Japan Trust Act*, arts. 27 & 40, *supra* note 1; *SK Trust Law*, arts. 34 & 38, *supra* note 2; *Taiwan Trust Law*, art. 34, *supra* note 3; *China Trust Law*, arts. 22, 23 & 49, *supra* note 4.

[48] See, for example, Wen-yu Wang, *supra* note 32 at 56–58; Xiaoming Zhou, *Xintuo zhidu bijiao fa yanjiu* [Trust Systems: Comparative Law Research] (Beijing: Law Press, 1996) at 36.

[49] *Japan Trust Act*, art. 4, *supra* note 1; *SK Trust Law*, art. 28, *supra* note 2; *Taiwan Trust Law*, arts. 1 & 22, *supra* note 3; *China Trust Law*, art. 1, *supra* note 4.

restriction, a series of duties are imposed on the trustee:

a. to manage the trust as an honest manager would;[50]
b. to separately manage the trust assets from his own or other assets,[51]
c. to keep account and complete records of all trust assets at the time he accepts the trust and thereafter annually,[52]
d. to allow interested parties to inspect such accounts and records as when requested, and the settlor, his heirs, and the beneficiaries to inspect all documents relating to the administration of trust affairs and to provide explanation.[53]

In particular, the trustee is prohibited from obtaining any benefit "in the name of whosoever" from the trust, save when he is a co-beneficiary.[54] He is therefore prohibited from obtaining remuneration for his service, unless when he assumes trusteeship in the course of business, or has been expressly authorised to receive remuneration.[55]

From this survey, it can be safely concluded that all four pieces of trust legislation successfully impose the core trust obligations on a trustee, in that the trustee is specifically required to keep trust accounts, to provide information relating to such accounts, and to manage the trust honestly. The statutes of South Korea and Taiwan closely resemble their Japanese predecessor.

Though the legislation in Japan, Taiwan, and South Korea do not expressly refer to the fiduciary duty, they do prohibit the trustee from enjoying the benefits of the trust, and emphasise that he could not do so "in the name of any person whosoever". Thus, at least the rudimentary form of the fiduciary duty has been put in place.[56] There is an adequate mechanism for creating the necessary tension between the trustee and beneficiaries, which is core to the common law trust. The Taiwanese and South Korean legislation further improve the provisions relating to fiduciary duties in terms of detail and sophistication. For example, both the rule and exceptions relating to

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50 *Japan Trust Act*, art. 20, *ibid.*; *SK Trust Law*, art. 28, *ibid.*; *Taiwan Trust Law*, art. 22, *ibid*.

51 *Japan Trust Act*, art. 28, *ibid*; *SK Trust Law*, arts. 30 & 31, *ibid*; *Taiwan Trust Law*, art. 24, *ibid*; *China Trust Law*, arts. 16 & 29, *supra* note 4 .

52 *Japan Trust Act*, art. 39, *ibid.*; *SK Trust Law*, art. 33, *ibid*; *Taiwan Trust Law*, art. 31, *ibid.*; *China Trust Law*, art. 33, *ibid*.

53 *Japan Trust Act*, art. 40, *ibid.*; *SK Trust Law*, art. 34, *ibid.*; *Taiwan Trust Law*, art. 32, *ibid.*; *China Trust Law*, arts. 20 (para. 2) and 49, *ibid*.

54 *Japan Trust Act*, art. 9, *ibid.*; *SK Trust Law*, art. 29, *ibid.*; *Taiwan Trust Law*, art. 34, *ibid.*; *China Trust Law*, art. 26, *ibid*.

55 *Japan Trust Act*, art. 35, *ibid*.; *SK Trust Law*, art. 41, *ibid.*; *Taiwan Trust Law*, art. 38, *ibid.*; *China Trust Law*, art. 35, *ibid.* The Chinese provision takes the most lenient approach in allowing remuneration.

56 See Arai Makoto, *supra* note 29 at 89-90. One cannot, of course, underestimate the difficulties of transplanting the fiduciary duty to civil law jurisdictions, on which there is considerable academic commentary: Katharina Pistor & Chenggang Xu, "Fiduciary Duty in Transitional Civil Law Jurisdictions—Lessons from the Incomplete Law Theory" in Curtis J. Milhaupt, ed., *Global Markets, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals* (New York: Columbia University Press, 2003), c. 3; Kon-Sik Kim and Joongi Kim, "Revamping Fiduciary Duties in Korea: Does Law Matter to Corporate Governance?", in Curtis J. Milhaupt, ed., *ibid.*, c. 11; Kideki Kanda and Curtis J. Milhaupt, "Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law" Columbia Law and Economics Working Paper No. 219 (24 March 2003), online: Social Science Research Network <http://ssrn.com/abstract=391821>.

the transfer of trust assets to the trustee's own assets—in common law terms, the self-dealing rule—are set out in considerable detail.[57]

As the most recent of the four Asian trust statutes under consideration, the Chinese *Trust Law* is the most elaborate in the provisions on trustees' duties. Apart from being an honest manager, the trustee should also discharge responsibilities scrupulously, prudently, efficiently, and in a trustworthy manner.[58] In addition, the Chinese *Trust Law* is most explicit in stating that the trustee should handle trust affairs in the best interest of the beneficiary.[59] This broad stipulation is echoed by numerous specific pockets of duties such as the self-dealing rule,[60] and the duty to keep confidence.[61] Any profits made by him from the unlawful use of the trust property will also be incorporated into the trust fund.[62] Admittedly, this formulation still falls short of the comprehensive plethora of duties established in common law jurisprudence. For example, it is unclear whether the duty also embraces the fair-dealing rule and the rule against unauthorized profits from the use of the trustee's position (as opposed to the trust property)—secret bribes and the *Keech v. Sanford* rule.[63] Nonetheless, the Chinese provisions are already the fullest as compared to its Asian counterparts.

C. *Segregation of Trust Assets*

1. *Asian Provisions on Segregation*

The importance of the segregation of the trust fund is recognised by all four jurisdictions under consideration. All four statutes impose a duty on the trustee to segregate the trust assets from those of his own,[64] and enshrine the principle that notwithstanding the trustee's *prima facie* ownership, the trust assets are separate from his own property. This is reinforced by the following provisions:

a. The trust assets do not fall within the *deceased trustee's* estate.[65]
b. The South Korean, Taiwanese and Chinese statutes provide that the trust assets do not fall within the *bankrupt trustee's* estate (or liquidation property).[66]
c. Though none of the statutes expressly protect the trust assets from claims by the *trustee's spouse*, this is arguably dealt with by the general prohibition

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57 See *Taiwan Trust Law*, art. 35, *supra* note 3 stipulating detailed exceptions such as: (i) the beneficiaries' written consent and in exchange for fair market value; (ii) if the assets were purchased in an open market; and (iii) in unavoidable circumstances, upon the Court's approval.

58 *Supra* note 4, art. 25.

59 *Ibid*.

60 *Supra* note 4, art. 27.

61 *Ibid*., art. 33 (para. 3).

62 *Ibid*., art. 26

63 (1726) Sel. Cas. Ch. 61. See also David J. Hayton, *supra* note 27, para. 4.6. See also Lusina Ho, *supra* note 34 at 99 *et seq*.

64 *Japan Trust Act*, art. 28, *supra* note 1, *SK Trust Law*, arts. 30 & 31, *supra* note 2, *Taiwan Trust Law*, art. 24, *supra* note 3, and *China Trust Law*, art. 29, *supra* note 4.

65 See *Japan Trust Act*, art. 15, *ibid.*; *SK Trust Law*, art. 25, *ibid.*; *Taiwan Trust Law*, art. 10, *ibid.*; and *China Trust Law*, art. 16, *ibid*.

66 *SK Trust Law*, art. 22, *ibid.*; *Taiwan Trust Law*, art. 11, *ibid.* and *China Trust Law*, art. 16, *ibid.* There is no such provision in the *Japan Trust Act*, *ibid.*, but this can be said to be dealt with by the general prohibition in art. 16 against enforcement measures.

from exercising enforcement measures against the trust property, save for rights accruing before the establishment of the trust, tax incidences or debts arising from trust administration.[67]

d. Claims arising from the management of the trust assets should not be used to set off debts arising from other property (of the trustee).[68] This is because even though such claims and debts are enforceable by and against the same person (the trustee), the trust assets and claims arising therefrom should be kept separate from the trustee's own assets.

e. The trust legislation of Japan, South Korea, and Taiwan stipulates that where the trust assets are rights other than ownership in a piece of property, such rights remain segregated even when the trustee happens to have acquired ownership of the property himself,[69] that is, even though ownership and those rights are vested in the same person. The Chinese *Trust Law* does not say so expressly, but this is implicit in the general principle that the trust fund is segregated from the trustee's own assets.[70]

All statutes under consideration stipulate that the trust assets not only include the initial settlement, but also assets obtained as a result of the management, use, disposal or other circumstances of the trust assets.[71] Thus, properties derived from the lawful use of the trust fund are clearly treated as part of it; in this way, the most limited aspect of tracing discussed above is allowed. Of course, such "tracing" does not involve invoking any presumptions to overcome evidentiary gaps, as is the case in common law jurisdictions.

As to properties derived from the unlawful use of the trust fund, only the Chinese *Trust Law* expressly states that if a trustee used the trust property for his own profits, such profits fall within the trust fund.[72] The trust statutes in Japan, South Korea, and Taiwan do not contain such an express provision. Nonetheless, the catch-all phrase referring to property obtained from "other circumstances" has been interpreted by Taiwanese commentators as embracing property obtained from unlawful dispositions of the trust assets.[73] To this limited extent, the Asian statutes have adopted the constructive trust that is well established in common law jurisdictions.

2. *Compatibility with Indigenous Principles on Property Law?*

What is worth considering is whether these Asian jurisdictions have adequately incorporated the core of the trust without contravening indigenous civil law principles.

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67 *Japan Trust Act*, art. 16, *ibid.*; *SK Trust Law*, art. 23, *ibid.*; *Taiwan Trust Law*, art. 12, *ibid.*; and *China Trust Law*, art. 17, *ibid*.

68 *Japan Trust Act*, art. 17, *ibid.*; *SK Trust Law*, art. 20, *ibid.*; *Taiwan Trust Law*, art. 13, *ibid.*; and *China Trust Law*, art. 18, *ibid*.

69 *Cf. Japan Trust Act*, art. 18, *ibid.*; *SK Trust Law*, art. 23, *ibid.*; *Taiwan Trust Law*, art. 14.

70 *China Trust Law*, art. 16, *ibid*.

71 See *Japan Trust Act*, art. 14, *supra* note 1, *SK Trust Law*, arts. 19, *supra* note 2, *Taiwan Trust Law*, art. 9, *supra* note 3, and *China Trust Law*, art. 14, *supra* note 4.
Note that the South Korean and Taiwanese statutes expressly refer to properties obtained from the destruction or damage of the trust assets.

72 *China Trust Law*, art. 26 (para. 2), *ibid.* Needless to say, the beneficiaries are also entitled to the remedies of nullification, compensation, and restoration mentioned above: arts. 22 & 27.

73 Zhao Lun Chang, *supra* note 32 at 71.

It is submitted that even though the scope of the segregated trust fund as recognised in Asia is much more limited than that in common law, the Asian statutes adequately incorporate the core of the trust discussed above. This is because as long as the trust assets are being lawfully managed, they and their exchange products form a segregated patrimony notwithstanding the ownership of the trustee. The trust fund is thus insulated from claims unrelated to dealings with the fund itself—such as those of the trustee's spouse, heirs and creditors—and arising only as a technical consequence of transferring ownership to the trustee's hands. This crucial protection enables a trustee to manage others' assets efficiently, as if he is the real owner, without subjecting the beneficiaries to any unnecessary risks of his bankruptcy.

It is true, though, that at least to this limited extent, the trust does not merely create personal obligations on the part of the trustee, but has proprietary, *in rem*, effect at least against his spouse, heirs, and creditors. Nonetheless, it is submitted that the creation of such a separate patrimony is not repugnant to civil law principles; in fact, it is analogous to well-recognised civil law concepts like the foundation. The trust only applies this conceptual framework to a wider scope.

It may then be considered whether the approach of automatically annexing unlawfully obtained properties still held by the trustee into the trust fund is repugnant to civil law principles. This principle can be analysed as comprising two main components: first, the imposition of an *in personam* right against the trustee to disgorge his profits; second, the deeming of such profits as having already been returned and falling within the segregated trust patrimony.

It is submitted that although the first component departs from the usual civilian remedies of nullification, compensation, and restoration, and involves granting an *in personam* remedy of disgorgement of profits against the trustee himself, there is no injustice.[74] After all, the trustee himself has acted wrongfully in breaching his obligations. In fact, such a remedy provides a strong disincentive to breach, though it also gives the trust fund a windfall of the profits made by the trustee.

The second component of annexing the unlawful profits into the trust fund, however, has adverse effects on the trustee's spouse, heirs, and creditors, and thus transgresses the fundamental civil law boundary between obligations and property. More importantly, this will indeed cause injustice on the part of these individuals, who, unlike the trustee himself, is innocent about the breach of trust.[75] They will be surprised by the hidden proprietary effect of the trust.

In response to this concern, it may be said that these individuals should not benefit from the trustee's wrongdoing, and so there is no injustice in extending the proprietary

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[74] This goes beyond the civilian scope for actions in unjust enrichment, whereby the plaintiff can only recover the relevant gains if he has suffered a corresponding loss (see, for example, art. 92 of the *General Principles of Civil Law*, China, 1988). This remedy has arguably been implicitly adopted in the trust provisions of Japan, South Korea, and Taiwan, which prohibit the trustee from making any personal profits from the trust property (see *Japan Trust Act*, art. 9, *supra* note 1; *SK Trust Law*, art. 29, *supra* note 2; *Taiwan Trust Law*, art. 34, *supra* note 3).

[75] In theory, there is no injustice in extending proprietary effects against the wrongdoing trustee himself, who cannot complain about being surprised by hidden proprietary rights. However, in practice, it is otiose to seek to enforce the proprietary effect against a wrongdoing trustee who is not bankrupt or who has not died, for an *in personam* remedy would have achieved the same result. Once he is bankrupt or has died, the proprietary effects are in effect enforced against his heirs or creditors, who may be innocent.

effect against them. While this might be true for the trustee's spouse and heirs who are voluntary recipients of the trustee's properties, there is a greater cause of concern for his creditors, who might have been misled by his appearance of wealth to refrain from taking security. As it would be extremely complicated for the trust legislation to distinguish between these different categories of individuals for this limited purpose, it would be more expedient to treat them equally. Whether this means extending the proprietary effect to all of them or containing it from them depends on how strong a jurisdiction seeks to maintain the line between obligations and property rights. As to this, the Chinese (and at least also the Taiwanese) Law has stepped beyond its traditional boundary.

D. *Proprietary Effects*

1. *Personal Remedies Against Third Parties*

None of the Asian jurisdictions under consideration goes so far as to impose a constructive trust on traceable assets now in the hands of third parties. The statutes of Japan, South Korea, and Taiwan only provide the remedy of nullification, subject to the following limits: first, where the trust properties need to be registered, the trust itself should be registered in order to be enforceable against third parties;[76] second, where the trust properties need not be registered, the remedy is enforceable only against parties who have knowledge of the wrongful disposal, or fail to acquire such knowledge as a result of their own gross negligence;[77] third, the remedy of nullification is subject to stringent time limits ranging from one month[78] to two years[79] from knowing the reason for nullification, subject to a cap of one[80] to five years[81] from the act of wrongful disposal. In substance, the main difference between the constructive trust and nullification is that the former treats the nullification remedy as having been executed and so the property as having already reverted back to the trust fund.[82] It gives fuller protection to the trust fund than the remedy of nullification, but it also has greater adverse effects on the trustee and third parties, such as the trustee's heirs, creditors, and transferees.

Unfortunately, the Chinese provisions on this important issue suffer from poor drafting. Both the details of the registration requirements and the effect of non-registration are unclear. Article 10 of the Chinese Trust Law provides that where the trust property needs to be registered, there needs to be "trust registration", presumably meaning that the trust itself must be registered. However, the same provision also allows the trust to be registered subsequently, without saying for how long registration

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76 *Japan Trust Act*, art. 3(1), *supra* note 1; *SK Trust Law*, art. 3(1), *supra* note 2 and *Taiwan Trust Law*, art. 4 (para. 1), *supra* note 3. The same principle applies to securities that are settled upon trust—the security documents should state that they are subject to trusts.

77 *Japan Trust Act*, art. 31, *ibid.*; *SK Trust Law*, art. 52, *ibid.*; and *Taiwan Trust Law*, art. 18, *ibid.*

78 *Japan Trust Act*, art. 33, *ibid.*; *SK Trust Law*, art. 54, *ibid.* For China, the limitation period is one year from the knowledge of the reason for nullification, with no upper time limit from the date of disposal, *China Trust Law*, art. 22, *supra* note 4.

79 *Taiwan Trust Law*, art. 35 (para. 4), *supra* note 3.

80 *Japan Trust Act*, art. 33, *supra* note 1; *SK Trust Law*, art. 54, *supra* note 2.

81 *Taiwan Trust Law*, art. 35 (para. 4), *supra* note 3.

82 See M. Lupoi, *supra* note 8 at 325.

can be delayed. The Law also fails to indicate which authority is responsible for administering the registration procedures. To date, no further guidance has been issued on these fronts. Yet the consequence of non-registration (whether at the time of establishment or subsequently) is quite serious, that is, the trust has no effect, whether as against the trust parties or third parties.[83] Even if the trust has been duly registered, it is only enforceable against a transferee of the trust property who is "well aware" (*mingzi*) that the transfer was wrongful. Furthermore, such a transferee is only subject to the remedies of compensation and restoration of the property to its original state.[84] The *Trust Law* does not make the remedy of nullification available against him.

As compared with the other three Asian trust statutes, the Chinese *Trust Law* involves the greatest uncertainty as to when a trust needs to be registered, and provides the least protection even if it is registered.[85] Notwithstanding registration, the remedy of nullification is still unavailable against any transferee, and the more limited remedies of compensation and restoration are only available against transferees with knowledge.

2. *Comparison with Common Law*

The civilian approaches discussed above broadly approximate the early stage of the development of the trust concept in English legal history. As described by Maitland, the trust obligation started as an *in personam* right of the beneficiary enforceable against the trustee only, and then expanded to be enforceable against his successors (who were treated as sustaining his *persona*), creditors,[86] donees, purchasers with notice, and so on until when the class of enforceable persons embraces the whole world except the bona fide purchaser without notice—equity's darling.[87]

At this final stage, even though equity only acts *in personam*, that is, it puts in jail a defendant who does not comply with equity's order, the trust in effect has proprietary characteristics in being so widely enforceable. Combined with the fact that common law jurisdictions do not require trusts to be registered, all transferees of property are vulnerable to this hidden proprietary right. Even though the law only imposes the constructive trust on volunteers or purchasers with notice, the replication of the trust arrangement on them means that their creditors, who are innocent and have paid consideration, will be adversely affected.

In light of these concerns, for civil law jurisdictions that are new to the trust, introducing the full breadth of this proprietary regime will create an extremely strong property right in contravention of the fundamental *numerus clausus* principle in civil law. It also necessitates the investigation of title and can be very disruptive to the smoothness of commercial transactions.

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83 *China Trust Law*, art. 10 (para. 2), *supra* note 4, though it is unclear whether this is the same as voidness (*wuxiao*).

84 *China Trust Law*, art. 22, *ibid*.

85 C. Q. Liao and Y. C. Li, "Qiantan xintuofa de jidian buzhu jiqi wanshan" [A Brief Discussion on the Inadequacies of the Trust Law and How to Perfect it] [2003] 37 Journal of Heilongjiang Administrative Cadre Institute of Politics and Law 26.

86 *Finch v. Earl of Winchilsea* (1715) 1 P. Wms. 277.

87 For details of this summarised account, see F. W. Maitland, *supra* note 6 at 112–114.

Accordingly, it is submitted that the Asian jurisdictions have rightly contained the proprietary effects of the trust by not imposing the (constructive) trust on third party transferees. Two crucial safeguards have been put in place to achieve this. First, the trust cannot be enforced against third parties unless trusts involving registrable property have been registered, or, for other trusts, the third party transferee has actual knowledge or is grossly negligent. This measure ensures that title investigation will not become considerably more cumbersome after the introduction of the trusts: those dealing with registrable property need to investigate title in any event and will easily discover the existence of the trust; those dealing with property not requiring registration will only be bound if they have actual knowledge or are grossly negligent. Second, even if a third party is bound due to registration or his own fault, only he himself is subject to the personal liabilities of nullification, compensation or restoration of property to its original state. This ensures that his spouse, heirs, and creditors, who are innocent and may also have provided consideration, are not adversely affected as those in common law jurisdictions. Of course, if such individuals themselves receive the trust property with the requisite degree of fault, they will be bound.

IV. Conclusion

In Europe, academic and international efforts have taken the lead to facilitate the reception of the trust. The *Hague Trust Convention*[88] enabled individual states to recognise overseas trusts, whereas the *Principles of European Trust Law*,[89] which are put forward by the International Working Group on European Trust Law, seek to define the core principles for domestic trusts. In contrast, the Asian governments have already introduced the domestic trust statutes before widespread academic impetus on receiving the trust.

This paper seeks to draw observations about the successes and failures of the trust laws in Asia, and hopes that these will be of use to other Asian jurisdictions (or European ones) contemplating the reception of the trust. The following propositions have been put forward:

1. The concept of the trust is to allow the manager (the trustee) to efficiently administer the trust assets vis-à-vis the outside world as if he is a real owner, but to do so for the benefit of the specified purposes or persons. The most effective and convenient mechanism to grant the trustee such powers of administration is to transfer ownership of the trust assets to him, whilst imposing duties on him to prevent his abuse of ownership.[90] Unless the settlor is subject to duties similar to those of the trustee, it is not advisable to allow the settlor to retain ownership of the trust assets after the establishment of the trust, or to leave this issue open-ended in the trust statutes.

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88 *Convention on the Law Applicable to Trusts and on their Recognition*, 1 July 1985, 1-VII-1985, online: Hague Conference on Private International Law <http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=59>.

89 The Principles are set forth in D. J. Hayton *et al.*, eds., *supra* note 7.

90 These duties could most conveniently be incorporated in the Obligations part of the Civil Code, and through written contracts or other written instruments.

2. To ensure that trust assets are not vulnerable to claims unrelated to dealings with the assets themselves, and arising only as a technical consequence of the trustee's ownership, the trust fund must be segregated from the personal and other assets of the manager, and free from the claims of his spouse, heirs and creditors.
3. Since the lawful operation of a trust necessarily involve dealings and exchanges with the trust assets, the trust fund should comprise both the initial settlement, and all properties lawfully derived from it. Beyond this, the imposition of proprietary liabilities in relation to properties unlawfully derived from the trust fund is not core to the trust, but is a very effective means to protect the segregated assets, albeit at the expense of creating hidden proprietary rights. However, if appropriate registration regimes or adequate protection for innocent recipients have been put in place, the imposition of personal liabilities (in compensation, restoration, or disgorgement) would both harness the civil law trust and be consistent with indigenous principles.[91]

[91] In relation to this aspect, it is submitted that the Taiwanese legislation has drawn the most satisfactory balance.