Comparative Studies on the Trust Law of the PRC: Taking into Consideration of the Enactment of the PRC Property Law and Amendment to Japanese Trust Law, English and the U.S. Trust Law

Atsuko SESE

I Introduction

After the promulgation of the first draft of the Committee for the Drafting Trust Law in 1994, approximately 7-year lengthy drafting process[1] was needed for the National People's Congress (NPC) Standing Committee to enact Trust Law of the PRC (hereinafter referred to as "Trust Law") on the 28th of April, 2001. Before the enactment, the second draft was rejected in 1996 and the third one was voted down in 2000. Trust Law came into effect on the 1st of October, 2001.

Originally, how law of trust, which was produced in common law system which distinguishes legal (common law) right from equitable right, is received in civil law jurisdictions is one of the most inspiring themes in comparative law. Trust Law is the 2nd one among socialist countries which belong to civil law jurisdictions, following the Trust Law of Russia[2] , and is the 4th one in Asian countries that belong to civil law jurisdictions, following the Law of Trust of Japan effectuated in 1923 (Amended Law came into effect on the 30th of September, 2007), the Law of Trust of Korea effectuated in 1962 and the Law of Trust of Taiwan effectuated in 1996. In this sense, Trust Law, comparatively newly enacted[3], is partially more advanced than Japanese former Trust Law (hereinafter referred to as "Japanese Former Trust Law") and adopted concepts that are unique in common law jurisdictions.

Trust law could put in place and important legal instrument for modernisation of financial system and "the Chinese experiment might be useful to civil law jurisdictions generally as an illustration of how thorny issues regarding the reception of the common law trust can be tackled."[4]

It is the objective of this thesis to overview the background of enactment of Trust Law and to analyse basic structure, concepts and rules of Trust Law in the comparison with Japanese Former

Trust Law, Japanese Trust Law as above mentioned effectuated in 2007 (hereinafter referred to as "Japanese Trust Law"), Trust Law of England (hereinafter referred to as "English Trust Law", and Trust Law of the U.S.A. (hereinafter referred to as "the U.S. Trust Law"). Furthermore, this thesis will focus only on private trust.

II The Background of the Enactment of Trust Law

The enactment of Trust Law was demanded to handle the problems that many investors sufferred from investment activities offered by rapidly increased trust and investment companies that were established without any substantive legal basis. In this sense, it was market-oriented legislation based on the necessity for legal control.

To start with, the first introduction of "trust" into China was triggered by the usage of trust for asset management by wealthy people newly grown under the administration of Chinese National Party[5]. This feature is similar to the Japan where trust system has been developed as financial vehicle. However, After the establishment of the PRC in 1949, trust system disappeared through confiscation by Peoples' Government of Central Trust Bureau, China Agricultural Bank, Bank of China, Communication Bank, Department of Trust attached to Central Cooperative Treasury all of which had been operated by Chinese National Party and through Peoples' Government's order to discontinue trust business rendered by private trust companies.[6]

Afterwards, based on the policy of reform and opening doors, trust system operated by trust and investment companies was revived in 1970's. The representative one was the China International Trust and Investment Company (CITIC) established in 1979. Furthermore, during the following 15 years, trust and investment companies were shot up to approximately 1,000 companies.[7]

Nevertheless, the legal bases for the above-mentioned companies were merely several relevant provisions of Provisional Regulations Concerning Bank Administration issued by State Council in 1986, Administration of Financial Trust and Investment Institutions Tentative Procedures[8] issued by the People's Bank of China (abolished by Administration of Trust and Investment Procedures in 2002), and Business Rules on Designed Trust Loans for Financial Trust and Investment Companies in 1993. Furthermore, these provisions lack even the definition of trust.

In addition, because trust business competes against business operated by banks, the People's Bank of China continuously restricted trust business. Therefore, trust and investment companies, which were supposed to operate business "in order to activate banking business" as "the second type of bank"[9], expanded their business including international trading, real estate development, leasing and even speculative investment. As a result, many trust and investment companies became insolvent and finally, Guangdong International Trust and Investment Company (GITIC)

was declared bankrupt which stunned the whole world by its historically biggest amount of debt at that time as an international bankruptcy case.

After the winding up of too many trust and investment banks was executed by the government in 1982, 1985, 1988 and 1992, the drafting of law of trust was commenced.[10] At that time, the main objective was to establish legal basis for trust and investment companies. However, as the execution of the fifth winding up in 1995 shows, this industry was still fluid. As a result, legislation of trust business law was put off.[11] The fifth winding up cut down the number of trust and investment companies in the PRC from 239 to approximately 60.

Furthermore, in January 2001, "Administration of Trust and Investment Companies Procedures" was effectuated (amended in June 2002) and "Administration of the Business of Holding Funds in Trust and Investment Companies Tentative Procedures" came into effective in July 2002. Adoption of minimum capital requirement by these promoted winding up and consolidation of the companies. Consequently, the number of trust and investment companies became as few as 37 in January 2003.[12]

In conclusion, the situation was serious enough to have to enact special industries' administrative regulations preceding the law of trust law, as a basic law.

As trust-related regulations, there are Administration of Securities Investment Funds Tentative Procedures (effectuated in 1997), Law of the PRC on Security Investment Funding (enacted in 2003) and Financial Funds Administration Company Regulations (effectuated in November 2000) that regulates Financial Funds Administration Company whose business is the securitisation of bad debts owned by PRC big four banks.

I will analyse Trust Law on which all of the above-mentioned regulations are based, as follows:

III Basic Structure of Trust Law

1. Part 1 General Principles (arts. 1-5)

The objectives of legislation, definition, and so on,

2. Part 2 Creation of Trust (arts. 6 – 13)

Creation of Trust and Effectuation of Trust and so on.

3. Part 3 Trust Property (arts. 14-18)

Independency of trust property and so on.

4. Part 4 Trust Parties (arts.19-49)

Section I Settlor (arts. 19-23)

Section II Trustee (arts.24-42)

Section III Beneficiary (arts.43-49)

5. Part 5 Change and Termination of Trust (arts.50-58)
6. Part 6 Charitable Trust (arst.59-73)
7. Part 7 Appendix (arts.74)

IV The Concept of Trust

1. What Trust Is

Article 2 of Trust Law stipulates:

"Trust in this Law means a situation whereby the settlor, based on her faith in the trustee, **entrusts** the rights in her property to the trustee and the trustee manages or disposes of such property in her own name in accordance with the wishes of the settlor for the benefit of the beneficiary or for a specified objective "[13] (emphasis was supplied by the author)

This provision involves many issues.

(1) Necessity of Transfer of Property

① The Issue

First of all, the word "entrustment" raises the most controversial problem.

That is because both common law and civil law jurisdictions share the understanding that the transfer of property is an essential factor to create a trust. This argument, "the transfer of property is necessary" does not mean that trust is created only after the transfer of property, in other words, this argument does not care about whether creation of trust is a contract in kind or not. Instead, the issue is whether in order to create a trust it is required for a settlor to commit to "transfer property at a certain point of time" or not.

In common law jurisdictions, in order to create a trust, the following two requirements must be satisfied:

(a) Announcement of creation of trust by a settlor

(b) A settlor executes all the activities that are necessary to transfer relevant property

Originally, even the declaration of trust, in which a settlor plays a role of trustee at the same time, theoretically demands Requirement (b) (in reality, the separation of property from her own property) (*Re Rose, Rose v. I.R.C.* [1952][14]). However, currently in England this requirement is mitigated to some extent in the case of declaration of trust.[15]

In the U.S.A., Requirement (b) means something more than an essential factor of creation of trust. Creation of trust is classified as a contract in kind in which trust is created only after the transfer of property. (the Second Restatement of the Law of Trust art. 26)

Article 1 of Japanese Former Trust Law stipulates "to transfer or dispose of property" and most scholars interpreted that creation of trust is a contract in kind.[16] Japanese Former Trust Law

did not recognise the declaration of trust.

As Japanese (new) Trust Law recognises the declaration of trust (art.3 (iii) and art.4(3)), the relevant provisions do not require the transfer of property, however, creation of trust except for a declaration of trust requires the transfer of property (art.3 (i) and (ii)). Nevertheless, to avoid being interpreted as a contract in kind, article 4 clearly stipulates that creation of trust is a consensual contract which is effectuated only by the execution of a trust contract.

Though Hague Convention on the Law Applicable to Trusts and on their Recognition does not require the transfer of property to the trustee, it still requires that the property be held under the control of the trustee. (arts. 1 and 2)

The above shows us that either in common law or in civil law jurisdictions, transfer of property (at a certain point of time) is required to create a trust (except for a declaration of trust) as an essential factor.

In accordance with Trust Law, article 8 (1) requires creation of trust be in writing and article 8 (2) provides that "in writing" includes contract, will or other document stipulated by laws or administrative regulations. Although what the 3rd category specifically means is not clear,[17] it is appropriate to interpret that an inter vivos declaration of trust is not admitted because there is no laws or administrative regulations to recognise declaration of trust.[18] In fact, inconsistency is observed that some articles of Trust Law collectively call these three categories provided by article 8(2) "trust activity" while other articles call them "trust deed". However, in this thesis, regardless of the original text, the collective definition is "trust activity".

As a consequence, the view of Trust Law on factors of trust is extremely unique. Furthermore, it raises a serious problem that a trust cannot be distinguished from mandatory contract (the PRC Contract Law[19] arts. 396-413).[20]

② Scholastic Opinions

There are two theories on this issue:

A: "Entrustment" shall be deemed as "Transfer".

B: Literary interpretation: For a trust to come into effect, it is not necessary that there be a transfer of property to the trustee.

From the beginning, the discussions on expression of this term had been backtracking during the drafting procedures. Though the first draft adopted the word "transfer", the second draft chose the word "entrustment". The fifth draft returned to "transfer", however, finally, the word "mandatory" was selected.[21]

There are two explanations for such confusion.[22]

- The psychological impediment in Chinese culture against relinquishing ownership over one's property to another person.

● Consideration in order to avoid the taxing question on fitting their dual ownership involved in trusts to civil law. This is because trust originated in common law jurisdictions splits ownership into two categories which are common law right and equitable right, and makes the former belong to a trustee and give the latter to a beneficiary.

In addition, some scholars are afraid that it might violate the Principle of One Object – One Title to transfer of title of the property to the trustee.[23]

The Theory A is justified because: a) because of the above-mentioned situation, it is substantially appropriate to consider "entrustment" as "transfer"; b)if transfer is not required, it is not proper in that trust cannot be distinguished from agency or mandatory[24]; c) it is impossible for the trustee to manage trust property without receiving that property "in her name".[25]

While the many scholars support the Theory A[26] including the Chairperson of the Drafting Committee and the President of China Trust Business Association, Mr. Wang Lianzhou[27], the Theory B is somehow persuasive.

Professor Ho of the University of Hong Kong argues that transfer is not required to create a trust mainly based on the provision of Article 15 of the Trust Law: "The trust property shall be segregated from the settlor's other property not under trust arrangement."[28]

In fact, the provision of this Article 15 is clearly inconsistent with the Theory A and only the Theory B can explain this provision.[29]

In my opinion, the Theory B is more natural because as discussed below, the idea that the settlor shall retain overwhelming power even after creating trust runs through Trust Law. In addition, while Japanese Former Trust Law Article 24 stipulates that co-trustees share trust property, Trust Law does not have such a provision. It also enhances the Theory B in that Trust Law does not recognise ownership of trust property by the trustees.

By the way, Professor Ho also argues that Article 8 "A trust comes into effect at the time when the parties execute a trust contract, or, where a document other than a trust contract is used, at the time of acceptance by the trustee" is also a basis for the Theory B, because this provision stipulates that a trust is created at the time of execution of contract, not requiring transfer of property.[30] However, as I discussed above, the issue whether or not it is required for a settlor to commit to transfer property to a trustee at a certain point must be distinguished from the problem whether or not a trust contract is a contract in kind or not. Accordingly, I do not agree with Professor Ho in this point.

In addition, I think that the true reason for the legislators to avoid using a word "transfer" is very political. In other words, ideological identity as a communist country made it difficult to expose the concept of private ownership. If a word "transfer" is used, the question of "what kind of right" over such property is transferred is closed up. Of course, in capitalist countries, what is

transferred is the ownership over that property. However, a word "private ownership" is a sensitive and dangerous term in fear of denying communism policy. At that time of the enactment of Trust Law in 2001, neither the amendment to the Constitutional Law to recognise private ownership system in 2004 nor the enactment of Property Law of 2007[31] had been realised.

The same ideological problems also disturbed the enactment of Property Law. While business demand realised the enactment of Security Law as early as in 1995[32], holding provisions concerning security real rights, i.e., mortgages and so on, the Property Law concerning highest concept of real rights was obliged to take a lengthy 6-year process since promulgation of the first draft. At the very last moment, an ideological campaign raised by certain political science scholars to oppose to the Property Law for its inconsistency with communism policy set back the enactment.

However, now that Property Law that recognises partial private ownership took in effect, I believe that the argument that transfer of property is an essential factor of creation of trust is freed from ideological constraints.

In principle, it is doubtful whether an arrangement without transfer of property can be called "trust" from comparative law perspective.

I believe that unnatural term "entrustment" taking into consideration of ideology must be amended into "transfer" as soon as possible and it will be politically allowed now. If so, of course the provision of Article 15 also must be amended accordingly.

(2) Faith

The expression of "based on her faith in the trustee" (art. 2) is explained to mean that the relationship between a settlor and a trustee is fiduciary relationship originated in common law.[33] However, the Chinese characters used in Article 2 means "faith" instead of "fiduciary"

Article 2 of the Second Restatement of the Law of Trust also clearly provides for "fiduciary relationship".

While Japanese Former Trust Law had no such a term, both Korean Trust Law (art.1(2)) and Indian Trust Law (art.3) have the same provision.[34]

(3) Disposition

Article 2 of Trust Law simply stipulates that "to entrust the rights in her property" and lacks the provision "to dispose of property including transferring or pledging as collateral" which Japanese Trust Law provides for.

As a result, the problem that utilisation real rights or security rights might not be an object of trust will rise. The conclusion to this problem is identical either based on the Theory A or based on the Theory B referred to in (1) above.

Professor Nakano argues that Article 6 of Indian Trust law which is as the same as Article 2 of

Trust Law is supposed to be interpreted in the same way as Article 1 of Japanese Former Trust Law ("to dispose of property including transferring"), therefore, Article 2 of Trust Law shall be interpreted in the same way.[35] However, I think that even this argument cannot recognise creation of trust by pledging as collateral. That is because the reason why the legislators intentionally add "pledging as collateral" at the time of amendment is to respond to the doubt that former relevant provisions might not recognise creation of trust by pledging as collateral.[36] As a result, Japanese Trust Law clearly recognises "security trust". It is appropriate that the addition of this term has created a new way to create a trust, not just confirmed something.

(4) Right in the Property

Article 2 refers to "to entrust the rights in property".

Japanese Former Trust Law also used the expression "the rights in property". However, Japanese Trust Law replaced those by "property" in order to clarify that object of trust could be anything that can be converted into cash.[37]

Accordingly, the interpretation of Article 2 of Trust Law is supposed to be the same as the one of Japanese Former Trust Law (not to recognise creation of trust by pledging as collateral).

2. Certainty

English Trust Law has the principle that for a trust to be valid the "three certainties" must be present- ① Certainty of Intention; ② Certainty of Subject Matter; ③ Certainty of Beneficiary.[38]

By the way, in the U.S. Trust Law, these requirements are important in order to recognise the intention to create a trust; however, they are never called "three certainty", the formal expression.[39]

Trust Law has the provisions supposed to consider this principle.

Concerning the subject matter, Article 7 stipulates that "In order to create a trust, there must be definite property under the trust." As not the intention to create a trust itself, but as the one closed to it, Article 6 stipulates that "Trusts shall be created for lawful trust purpose." Finally, concerning the beneficiary, Article 9(1)(iii) provides that to create a trust, beneficiaries or scope of beneficiaries of the trust shall be included in the written documents.

3. Formality Requirement

Every jurisdiction requires creation of trust by will to satisfy the formality of will. Therefore, here I concentrate on whether creation of inter vivos trust is a formal contract or not.

Formality requirement could be classified into in writing requirement and registration requirement.

(1) In Writing Requirement (Statute of Frauds)

As discussed above, Article 8 requires creation of trust to be in writing and Article 9 provides for what items shall be included.

Japanese Trust Law considers an inter vivos trust as a non-formal contract, by not requiring transfer of object to be effective (art. 4(1)) as well as by not requiring to be in writing. However, only in the case of declaration of trust (self trust), it is required for creation of trust to execute notarised deed (art. 4(3)) because it is necessary to clarify when a trust is created, otherwise a declaration of trust is difficult to objectively be judged when it is created (a settlor plays a role of a trustee at the same time).[40]

In English and the U.S. Trust Law, it depends on trust property.

In England, Article 53(1)(b) Law of Property Act 1925 stipulates that "A creation of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to create such a trust by her will." [41](*Grey v. I.R.C.*[1960][42] In England, Statute of Frauds requires contract in general (not only trust) regarding land or interest in land to be made in writing. Statute of Frauds was originally established by Article 7 of Statute of Fraud 1677 which was replaced by Law of Property Act 1925.

Article 39 of the Second Restatement of the Law of Trust stipulates that "A trust may be effectively created without writing unless otherwise stated in provisions of law." The exception here referred to is Article 7 of Statute of Frauds 1677, discussed above, which was received by many states of the U.S.A. Furthermore, even in the states which did not receive this provision, the situation is similar to that of England as follows: First, most of such states interpret that formality requirement for contract regarding real estate shall be applicable to the creation of trust. Second, even the states (i.e., State of Tennessee and State of North Carolina) which have no formality requirement for any contract, civil procedure code requires manifest and persuasive evidence for the creation of trust.[43]

(2) Registration Requirement

A more controversial issue is the registration requirement.

Article 2 of Trust Law stipulates that:

(1) When creating a trust, if the laws or administrative regulations stipulate that registration procedures for such trust property shall be completed, registration for trust shall be made in accordance with law.

(2)Anyone who fails to complete the registration procedures prescribed in the preceding paragraph, she must complete the necessary retroactive registration procedures[44] subsequently, and otherwise, such trust shall not be effective.

① Validity of Trust without Registration

(i) Problems of Contract Law

The PRC Contract Law has such provisions as "Where a contract may become effective only after the completion of approval and registration procedures in accordance with the provisions of laws or administrative regulations, such provisions shall govern." (art. 44 (2)) and "Where provisions of laws or administrative regulations require the modification of a contract to go through approval and registration procedures, such provisions shall govern." (art. 77(2). The similar provisions are Article 87, Article 96(2)).

Accordingly, the issue whether not completing registration procedures makes contract invalid or not is raised.

Article 9 of "Interpretation of the Supreme People's Court on the Application of Contract Law of the People's Republic of China (I) "(promulgated by the Supreme People's Court in December 1999. Hereinafter referred to as "Judicial Interpretation I") stipulates that "In accordance with Paragraph 2 of Article 44 of the Contract Law, if the laws or administrative regulations stipulate that contracts shall go through approval formalities or registration procedures shall take effect only after such formalities as approval and registration, but before the conclusion of debate of the first trial people's court the parties concerned have not yet gone through approval or registration formalities, the people's court shall determine the said contract as not having taken effect. If the laws or administrative regulations stipulate that contracts shall go through the required formalities but does not stipulate that the contract shall take effect only after the registration, then the validity of the contract does not depend on whether the parties concerned have gone through registration formalities, and the ownership of the subject matters of the contract and other property rights cannot be transferred. Change, transfer and cancellation of contracts as specified in Paragraph 2 Article 77, Article 87 and Paragraph 2 Article 96 of the Contract Law shall be handled in accordance with the aforesaid paragraph." (emphasis was supplied by the author)

In other words, this Judicial Interpretation I classifies the laws or administrative regulations that require registration procedures for contracts to be valid, into (a) "clearly providing that contracts which shall go through approval formalities or registration procedures shall take effect only after such formalities as approval and registration" and (b)"not clearly stating that shall take effect only after such formalities as approval and registration" The Supreme People's Court interprets that in cases (a), the validity of contract depends on the completion of required procedures, while in cases (b), not completing required procedures does not invalidate the contract itself, however, the real rights including ownership shall not be transferred without completing procedures.

Such kind of solution by the Judicial Interpretation, not amendment to the Contract Law left a very important problem unsolved.

For Example, Article 41 of the PRC Security Law stipulates that "Where a party mortgages

property provided for in Article 42 of this Law, she shall register the mortgaged property, and the mortgage contract shall become effective as of the date of registration." Since this provision falls into case (a) above, mortgage contract itself remains invalid prior to the completion of the registration procedures. It means that a creditor, who has executed mortgage contract and has already lent money to an obligor, has no legal (contractual) right to ask a obligor to cooperate with registration procedures.[45]

Article15 of"Reply of the Supreme People's Court to Several Questions Concerning the Handling of Cases of Administration of Real Estate Development Prior to the Effectuation of Real Estate Administration"[46] clearly stipulates that "Mortgage contract without the completion of registration procedures is deemed to be invalid." In addition, in many courts, sales of building contracts or mortgage contracts without registration were held to be invalid. Although Article 49 (1) of "Interpretation of Supreme People's Court on Some Issues of Applying the Security Law of the PRC" [47]stipulates that "If the mortgage is acted by properties whose ownership certificate has not been transacted, but the ownership certificate may be provided or the registration procedures may be completed before the conclusion of the debate of the first trial people's court, the mortgage may be regarded as the valid mortgage.", it cannot be a substantial solution.

(ii) Solution by the Enactment of Property Law

The serious problems above were finally resolved by the enactment of Property Law.

Article 15 (1) of Property Law provides that "Unless otherwise stated in the provisions of law or stipulated in the contract, a contract for the creation, alteration, assignment or elimination of property rights concluded between the parties concerned shall come into force at the time of conclusion; the effectiveness of the contact shall not be prejudiced despite of the failure of completing the registration procedures of the property rights." In addition, Article 187 stipulates that "Where mortgages are taken out on the properties as prescribed under items (a)-(c) of paragraph 1 of Article 180 of this Law or on the buildings under construction as prescribed under item (e) of paragraph 1 of Article 180 of this Law, the mortgage registration shall be completed accordingly. A mortgage shall be created at the time of registration." (emphasis was supplied by the author)

However, I do not think it is an appropriate solution.

First of all, provisions on security right in Property Law are wholly overlapped with those in Security Law. If so, the legislators should have merged them into either one and should have abolished the other one's relevant provisions. Nevertheless, the legislators, instead, left relevant provisions in Security Law unchanged and substantially replaced them with relevant provisions of Property Law. Article 178 of Property Law "If there is any discrepancy between the Security Law and the provisions of this Law, this Law shall prevail" makes such a strange arrangement possible. This provision considers Property Law as a special law whereas it treats Security Law as a general

law in relation to security rights. However, since security rights are part of property rights, it seems so weird to treat those two laws in such a way.

More strangely, Article 8 stipulates that "Where there are provisions in other laws governing the property rights, those laws shall be followed." In other words, Property Law is a special law in relation with Security Law, however, is a general law in relation with the other special laws!

Originally, this problem comes from Article 44 of Contract Law. Even with Article 9 of Judicial Interpretation I, problems stemming from laws or administrative regulations that provide for "a contract shall be effective as of the completion of approval or registration procedures" will be remained unsolved. Who can definitely say that there is no such law or administrative regulation other than Security Law? The legislators have resolved only the problem concerning Article 41 of Security Law in a very strange way which I call a stopgap measure, just because this provision was obviously proved to be problematic as it brought disasters to mortgage practice. Who can say that only Security Law has such a controversial expression?

I think that Article 44 of Contract Law must be amended as soon as possible, at least, Judicial Interpretation I must be re-considered.

(iii) Problems of Trust Law

Fortunately, Trust Law is not victim of Article 44 of Contract Law (art. 10).

However, different from Japan, where Real Estate Registration Law has had provisions concerning trust registration for a long time and every single case of land trust is registered accordingly, registration system for trust has not yet been made in the PRC. Moreover, even for ordinary real estate transactions, registration system is not perfect at all.

Trust registration system and relevant laws must be established as soon as possible.

② Time Limit for Retroactive Registration

Professor Ho argues that since a time limit for retroactive registration is unclear in accordance with Article 10(1), the problem rises that violation of registration requirement will never invalidate trust.[48] However, I think that as discussed in ①, the registration procedures may be completed before the conclusion of the debate of the first trial people's court.

③ Japan

In Japan, Former Trust Law requires registration procedures only for property "that is supposed to be registered" (art. 3(1)), and Article 14 of (new) Trust Law stipulates that "only property of which obtaining, losing and change in rights cannot be perfected without registration shall be registered." In addition, registration is not validity requirement but requirement for perfection of change in rights.

④ England

In England, land registration system was dramatically reformed by Land Registration Act

(LRA 2002).[49]

The fact of registration confers title rather than merely recording a title that has already been created.[50] In other words, no registration means no title.[51]

Of course, this rule also applies to the creation of trust. (LRA 2002 art.4)[52]

The problem is an interval between transfer and registration. Electronic application system helps to solve this problem.[53]

⑤ The U.S.A.

In the U.S.A., if trust property is land, registration is required to create a trust.

However, land registration system is different from England. Most of states adopt simple recording system where deeds are simply filed with local registration office. On the other hand, part of State of Hawaii, Massachusetts and several other states use "Torrens" system which was originated in Australia. In Torrens system, land court, as a specialised court, is involved with initial registration, therefore, registered information is supposed to be precise.[54]

4. Legal Features of Beneficiary Right

Some scholars say that traditional disputes whether beneficiary right is right in personam or right in rem is impractical.[55] It is because since the distinction of right in personam and right in rem is peculiar to civil law jurisdiction, beneficiary right cannot fit this classification. However, in fact, there have been disputes whether beneficiary right is right in personam or right in rem in common law jurisdictions for a long time, too.

(1) England

F.W. Maitland explains that beneficiary right has become closely resembling a right in rem proceeding in the following historical steps[56]:

At the initial stage, the beneficiary only has an in presonam remedy in equity against the trustee: equity acts in personam by putting in jail a trustee who does not comply with equity's order. Then, the trustee's successors are bound, as they are treated as sustaining the persona of the trustee, to be followed by her creditors, donees (and anyone who takes the property through the trustee without consideration), purchasers who have actual knowledge of the trust and so whose conscience is affected, as well as purchasers who are fixed with constructive notice. One might add that the successors, creditors, donees and (unless they buy without notice) purchasers of all these individuals are also bound by the same token. In the end, the beneficiary right, which is technically in personam, binds the whole world except equity's darlings. Moreover, these individuals are bound as if they were the trustees, through the imposition of a quasi- or constructive trust on them.

(2) The U.S.A.[57]

In the U.S.A. the legal issues concerning beneficiary right are classified into the one (a) whether beneficiary right is right in personam or right in rem; and the one (b)if beneficiary right is right in rem, whether it is a personal property or a real property.

Concerning the issue (a), currently, the Right in Rem Theory that beneficiary right is beneficial ownership has been established.

The issue (b) is particularly important in that the procedural requirements for jurisdiction, taxation rights and transfer of beneficiary right, or whether beneficiary right belongs to dower at succession depend on the conclusion. In accordance with Article 130 of The Second Restatement of the Law of Trust, legal features of beneficiary right depend on what a trust property is. In other words, in principle, if a trust property is a movable asset, beneficiary right is a personal property whereas if a trust property is a real estate, beneficiary right is a real property.

(3) Japan

In Japan, there have been many disputes. Opposing to the historically dominant Right in Personam Theory, Non Right in Personam Theory emerged. Currently, many scholars think that only such problems as cannot be solved by the provisions of Japanese Trust Law are practical because concerning only those problems, the legal features of beneficiary right determine the conclusion.[58]

Prior to the amendment to Japanese Former Trust Law, aforementioned problems were supposed to[59] ① perfection requirement of transfer of beneficiary right; ② statute of limitation of beneficiary right; and ③ Possibility of claim for the discontinuation of the disturbance based on beneficiary right.[60] However, the amendment solved the problem ① as follows: Article 93 of Japanese Trust Law provides for the principle of free transfer of beneficiary right and Article 94 stipulates that the assignment of a beneficiary right may not be asserted against the relevant trustee or any other third party, unless the assignor gives a notice thereof to the trustee or the trustee has acknowledged the same. As the contents of Article 94 is almost the same as Article 467 of Japanese Civil Code (Requirement for Assertion of Assignment of Nominative Claim against Third Parties) , Japanese Trust Law might be thought to be based on Right in Personam Theory.

In order to solve the problem ② , Japanese Trust Law has provisions for statute of limitation concerning nominative beneficiary claim(art. 102) that is distinguished from beneficiary right itself and claim to deliver of residual asset by reversioner (art. 193 (5)).

Consequently, only the problem ③ is now practical to dispute.

(4)The PRC

Although the situation of the PRC is explained to still remain in the initial stage analysed by Maitland,[61] there is a great controversy on legal features of beneficiary right as well.

There are Right in Rem Theory, Right in Personam Theory and Medium Theory. Right in Rem Theory is inconsistent with the principle that the types and contents of right in rem shall be

prescribed by laws (Property Law art. 5[62]), since newly enacted Property Law does not enumerate beneficiary right as rights in rem. On the other hand, Right in Personam Theory cannot fully explain the strong power of beneficiary.

Therefore, some scholars analyse beneficiary right as a "trust property right", which is an independent civil right similar to an intellectual property right or a right over share.[63]

V Classification of Trust

1. Statutory Trust

In common law jurisdictions, trust is classified as follows:

α Express Trust

β Non-Express Trust

β-1 Constructive Trust

β-2 Resulting Trust

In α, a trust is created through expression of intention. In common law jurisdictions, express trust is classified into inter vivos trust and trust by will. In accordance with Japanese Former Trust Law, a trust is created either by contract or by will. Japanese (new) Trust Law newly adds declaration of trust (art. 3 (iii)). In Japan, those contracts, wills and declaration or contents of expression or agreement are collectively called "trust act" (Japanese Former Trust Law art. 1 and 2; Japanese Trust Law art. 2(2) and 3). It is dominant opinion that Japanese Trust Law does not recognise constructive trust or resulting trust so far.

In (the PRC) Trust Law, Article 8(1) provides for formality (in writing) of trust and (2) stipulates that "Written documents shall include trust contracts, testaments, or other documents specified by laws and administrative regulations". What "other documents specified by laws and administrative regulations" refer to is unclear.[64]

Accordingly, Trust Law seems not to recognise at least constructive trust or resulting trust among statutory trusts.[65]

However, Article 55 stipulating "After the ownership of the trust property is determined according to the preceding Article, the trust shall be deemed to be subsisting before it is being transferred to the owner, and the owner shall be deemed the beneficiary" (emphasis was supplied by the author) deals with a kind of statutory trust.

Japanese Trust Law has a similar provision (art. 63), in which statutory trust ends at the time of completion of liquidation (art. 176).

2. Purpose Trust

(1) What Purpose Trust Is[66]

The above mentioned α express trust is further classified as follows:

α -1 Charitable Trust

α -2 Private Trust

α -2-1 Purpose Trust

α -2-2 Residual Trust.

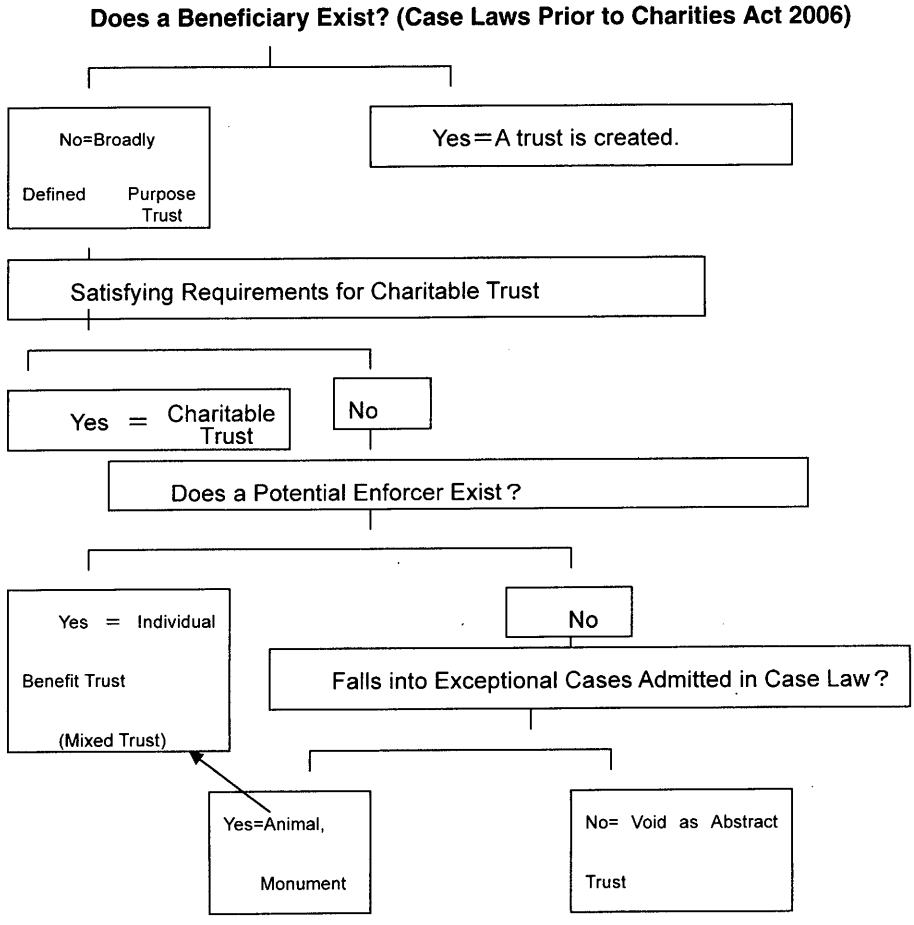
If classifying taking into consideration of Three Certainty Principle as mentioned above, express trust is divided as follows:

α -1 Trust with Beneficiary

α -2 Trust without Beneficiary=Broadly Defined Purpose Trust

α -2-1 Charitable Trust

α -2-2 Narrowly Defined Purpose Trust



First of all, in order to create a trust, the existence of a beneficiary is essential as one of the Three Certainty Principle in general.

Purpose trust is the one in which beneficiaries are not designated, instead, a trust is created for a certain purpose.

Purpose trust is in principle deemed void unless it satisfies requirements for charitable trust. In other words, trust lacking beneficiaries (broadly defined purpose trust) is void except for charitable trust as a general rule[67]. This is called "Beneficiary Principle".

This Beneficiary Principle is based on the "Enforceability Rule." The reason why the certainty of beneficiaries is required as one of the Three Certainty Principle is that there is no one to enforce trust but for a beneficiary and therefore it is not practical. In charitable trust there are enforcers, i.e., Charity Commissioners in England, Trust Administrator in Japan and Public Welfare Administration Authority in the PRC (art. 62 of Trust Law).

However, this Enforceability Rule ultimately leads to the arguments that as long as there is someone to enforce the trust, beneficiaries need not always exist.

Accordingly, English courts have exceptionally admitted validity of non charitable purpose trust in two kinds of cases as follows:

First exception is a case where potential enforcers exist. For example, in *Denley* [1969][68], The court upheld a trust of a corporate settlor's land to be maintained and used as and for the purposes of a recreation or sports ground primarily for the benefit of the employees of the company and secondarily for the benefit of such other persons (if any) as the trustees may allow to use the same. In this case, the employees are deemed as potential enforcers.

The other exception is a case where although neither beneficiaries nor potential enforcers exist, a trust is upheld for special purposes as concessions to human sentiment. There have been limited to two types, because they are the exceptions to the exceptions.

One is a trust for the maintenance of particular animals (*Re Dean* [1989][69]).

The other is a trust for the erection or maintenance of graves and sepulchral monuments (*Re Hooper* [1932][70]).

However, Charities Act 2006, effectuated on the 27th of February 2007 dramatically changed the situation by enlarging definition of charitable trust.

Historically, charitable purposes had been limited to the following four types based on the Preamble of Statute of Charitable Uses 1601: ① the relief of poverty; ② the advancement of education; ③ the advancement of religion; ④ other purposes beneficial to the community. Even after the Statute of Charitable Uses 1601 was replaced by the Mortmain and Charitable Uses Act 1888, the Preamble was expressly preserved. As Lord Macnaghten confirmed this classification, it is called Mcnaghten's Classification.

However, Section 2 of Charities Act 2006 enumerates 13 charitable purposes, historically the first definition stipulated as main provisions (not preamble), which includes (k) the advancement of animal welfare[71]. The above *Re Dean* case will be classified as a charitable trust, not individual benefit trust in accordance with Charities Act 2006. Accordingly, more charitable trusts will be upheld otherwise would fail.

Nevertheless, we must pay attention to the fact that even after Charities Act 2006, England firmly retains the policy that in principle non- charitable purpose trust is void. It has just saved certain cases by enlargement of definition of charitable trust, never has become more generous for non-charitable purpose.

(2) Japan

Although Japanese Former Trust did not recognise purpose trust, Article 258 of Japanese (new) Trust Law expressly provides for purpose trust. Its definition is precisely in line with the above mentioned classification. Furthermore, different from England, non-charitable trust is recognised without any restriction. In fear of interruption of circulation of resources, Article 259 of Japanese Trust Law stipulates that duration of purpose trust is limited up to 20 years[72]. This 20-year limitation is in line with Rule Against Perpetuity in common law jurisdictions.

(3) The PRC

Professor Ho argues that Trust Law does not prohibit purpose trust[73].

The reasons are that while Article 6 generally requires purposes for trust, trusts for unlawful purpose (art. 11(i)) or trusts for litigation or collection of debt (art. 11(iv)) are specifically considered void. This way of prescription implies that trusts for the purposes other than the ones to invalidate trust are valid.

However, I do not agree with this argument.

First, this argument is inconsistent with Article 11 (v) prescribing "A trust of which beneficiaries or the scope of beneficiaries cannot be determined shall be invalid". This is also contradicted with Article 9 (1)(iii) requiring for trust document to include beneficiaries or scope of beneficiaries. Professor Ho argues that these provisions should be abolished[74].

Second, as above mentioned, the reason why Article 6 provides for purpose of trust is not consideration into purpose trust, but consciousness of certainty of intention, one of the Three Certainty Principle.

VI Rights and Obligations of Parties of Trust

Rights ( ) is the number of the relevant Article	Only settlor	Settlor and beneficiary	Only beneficiary	Only trustee	others
Right to inspect(20)		PRC (joint execution)、Japan	England, USA		
Right to change the way to administer trust property(21)		PRC (joint execution)			Japan (all the parties)
Right to cancel trustee's act (22)		PRC (joint execution)	Japan		
Right to request the trustee to restore the property to its original state or to make compensation (22)		PRC (joint execution)	Japan		
Right to request to dismiss a trustee (23)		PRC(joint execution)、Japan	England, USA		
Right to consent to the resignation of a trustee (38)		PRC、Japan			
Right to appoint a new trustee when trust document has no relevant provisions (40)		Pre-emptively settlor, only if she does not exercise the right, beneficiary			Japan, England, USA (courts)
Right to change beneficiary (51)	PRC				Japan, England, USA (holder of power of appointment of beneficiary)

1. Settlor

(1) Great Power of Settlor

In general, from the creation of trust onwards, the settlor drops from the scene and the beneficiary begins to have rights under the trust[75]. Nevertheless, as observed from the above chart, the fact that a settlor is given a great power is unique to the PRC Trust Law.

① Rights Given not to Settlor but to Beneficiary in General

Article 22(1) stipulates that "If the trustee violates the purpose of the trust and disposes of the trust property, or handle the trust affairs improperly in violation of her administrative duty, thereby causing loss and damage to the trust property, the settlor of the trust has the right to apply to the people's court for setting aside such disposal, and has the right to request the trustee to restore the property to its original state or make compensation. If the transferee of the trust property knows of such violation but accepts the property, she shall return the property or make compensation." (emphasis was supplied by the author)

This kind of right is generally given only to beneficiary in Japan (Japanese Former Trust Law

art. 31; Japanese Trust Law art. 44)

② Rights Just to Request Courts not Directly to Trustee in General

Concerning the change of the way to administer trust property, for example, in Japan the settlor, the trustee or the beneficiary shall request the court to do so (Japanese Former Trust Law art. 23; Japanese Trust Law art. 150). However, this right is given to both the settlor (art. 21) and the beneficiary (art. 49) and they can request directly to the trustee.

(2) Right to Jointly Exercise with Beneficiary

Right to inspect (art. 20), Right to change the way to administer trust property (art. 21), Right to cancel trustee's act (art. 22), Right to request the trustee to restore the property to its original state or to make compensation (art. 22) and Right to request to dismiss a trustee (art. 23) are given to both the settlor and the beneficiary (art. 49). Initially, the rights of settlor are enumerated in Articles 20 -23 and later, Article 49 provides that Articles 20 -23 apply mutatis mutandis to a beneficiary.

Such a way to prescribe itself is somehow extraordinary.

In Japanese Trust Law, the rights of beneficiary are prescribed (arts. 88-92) and the provisions regarding corresponding obligations of trustee are given (arts. 29-33). Afterwards, the relevant provisions are applied mutatis mutandis to the settlor (art. 145). That is because who enjoys the interests of trust is basically a beneficiary. From this point of view, the way adopted by the PRC is unusual.

It seems to me that a settlor is much more important than a beneficiary in the PRC. This is one of the reasons why I am reluctant to consider the word "entrustment" stipulated in Article 2 of Trust Law as "transfer".

In addition, the rights given to a settlor or a beneficiary can be exercised independently in Japan. However, the rights given to a beneficiary (arts. 20-23, 49) must be exercised together with a settlor. Moreover, the relationship between a settlor and a beneficiary is never equal. Article 49 (1) stipulates that "If the opinion of the settlor is different from the one of the beneficiary, the latter may request the court for award." It seems that it is principle for a beneficiary to get consent by a settlor to exercise the relevant rights. This is nothing but "the tail wagging the dog." There is possibility for a settlor to abuse this right to consent[76].

2. Trustee

(1) Due Care of a Prudent Manager, Duty of Loyalty

Article 25 of Trust Law stipulates as follows:

(1)The trustee shall abide by the provisions in the trust document, and administer the trust affairs for the best interests of the beneficiary.

(2) The trustee shall perform his duties zealously as well as the obligations with honesty, good faith, care and efficiency.

Section (1) provides for duty of loyalty and (2) refers to due care of a prudent manager.

Duty of loyalty is obviously the most important equitable duty in trusts of common law jurisdictions. Both The Second Restatement of the Law of Trust (art. 170) and Uniform Trust Code adopted in 2000 (art. 802) clearly provide for this duty.

However, Japanese Former Trust Law had provisions for duty of care (art. 20), but it was interpreted as a default provision[77]. Furthermore, it had no provisions for duty of loyalty. Therefore, (the PRC) Trust Law is advanced compared to Japanese Former Trust Law in this point.

By the way, Japanese (new) Trust Law provides for both duty of care (art. 29) and duty of loyalty (art. 30).

Uniform Trust Code (act. 803) provides for duty of impartiality as well. Japanese Trust Law also has provisions for duty of impartiality (art. 33). Nevertheless, (the PRC) Trust Law has no such provisions.

(2) Prohibition to Enjoy Trust Interests

Article 26 stipulates that "(1) Except for obtaining remuneration in accordance with this Law, the trustee shall not seek for interests for her by using the trust property. (2)If the trustee violates the preceding Paragraph and seeks for interests for her by using the trust property, the interests gained therefrom shall be integrated into the trust property."

While Japanese Former Trust Law had provision (art. 9) similar to (1) above, it had no provision equivalent to (2) above. Therefore, the effects of transactions violating the duty of loyalty were not clear.

Japanese (new) Trust Law provides for duty of loyalty (art. 30) and prohibition of conflict of interest (art. 31), (4) of which stipulates that interests gained from transactions generating conflict of interest shall belong to the trust property. As a result, Article 9 of Japanese Former Trust Law was abolished.

(3) Prohibition to Convert Trust Property into Trustee's Own Property

Article 27 of Trust Law prohibits conversion of the trust property into the trustee's own property, and stipulates that if the trustee converts the trust property into her own property, she must restore the trust property to its original state; and indemnify the trust in case of damage thereto.

Japanese Former Trust Law (art. 22) in principle prohibited such transactions, whereas only in the cases of circumstances beyond the party's control, and with the court's authorisation, such a transaction was exceptionally permitted. While as discussed above, Japanese Former Trust Law

had no provisions for duty of loyalty, the argument that this provision is the one for duty of loyalty was somehow influential[78].

Article 31(1) (i) of Japanese Trust Law defines conversion of trust property into trustee's own property as one of the conflict of interest transactions and enumerates more detailed exceptional cases (art. 31 (2)).

(4) Prohibition of Conflicts of Interest

Article 28 of Trust Law prohibits ① transactions between trustee's own property and the trust property and ② transactions between trust properties of different settlors, subject to the exceptions of (a) cases where otherwise stipulated in the trust document; and (b) cases where the settlor or the beneficiary consents and the transaction is at fair and open market price.

Although Article 22 of Japanese Former Trust Law did not refer to the above ① or ② transactions, transactions ① or ② were interpreted to be prohibited from the purpose of Article 22[79].

Transactions ① or ② are enumerated in Article 31 (1) of Japanese Trust Law as conflict of interest transactions and more detailed exceptional cases are also provided (art. 31(2)).

(5) Duty of Segregation

Article 29 of Trust Law stipulates that "The trustee shall administer the trust property separately from her own property, and keep separate accounting books, and also do so for the trust properties of different settlors of trusts."

Both Japanese Former and new Trust Law have the similar provisions. (Former: art. 28; new: art. 34)

Of course, in common law jurisdictions, duty of segregation is one of the duties to maintain the trust property[80].

(6) Duty not to Delegate

Article 30 of Trust Law stipulates that "(1) The trustee shall handle trust affairs herself, but may entrust others to handle such affairs if the trust document provides otherwise or has to so for reasons beyond her control. (2)If the trustee entrusts a third party to handle the trust affairs, she shall bear liabilities for the acts by the entrustee.

While Japanese Former Trust Law had the similar provisions (art. 26), the trustee had to bear liabilities only for appointment and oversight of the third party.

Such arrangement as to only allow very narrowly limited exceptions is no longer realistic in the modern society where division and specialisation of labour has become highly developed[81]. Therefore, Japanese (new) Trust Law dramatically rationalises outsourcing by trustees as follows (art. 28):

Outsourcing of trust affairs by the trustee is permitted in the following cases:

① if the trust act has relevant provisions;

② even if the trust act has no such provisions, it is appropriate for the purpose of trust to outsource;

③ even if the trust act prohibits outsourcing, the circumstances are beyond the trustee's control.

In England, from very early era, outsourcing has been permitted in the cases where the circumstances are beyond the trustee's control or outsourcing is in accordance with the ordinary customs[82].

In the U.S.A., prohibition of outsourcing has been more strictly interpreted than England. However, the outsourcing of ministerial duties is permitted[83].

The most controversial problem of (the PRC) Trust Law is that the trustee shall bear full liabilities for the acts by the third party.

In Japanese Trust Law (art. 35) the trustee shall bear liabilities only for appointment and oversight of the third party. England (Trustees Act 2000, art. 23(1)) and the U.S.A. (The Second Restatement of the Law of Trust art. 171) are the same. Accordingly, the situation of the PRC is unusual from comparative law perspective[84].

(7) Co-Trustees

① Article 31 Duty to Act Jointly

Article 31 of Trust Law stipulates that "Where there are two or more trustees in the same trust, they are co-trustees. The co-trustees shall handle trust affairs jointly. However, if the trust document stipulates that the trustee may jointly and severally handle certain specified affairs, such stipulations shall prevail. If the co-trustees have different opinions on handling the trust affairs the trust document shall be followed; if the document is silent on this, the settlor of a trust, beneficiary or the persons interested shall decide."

Equivalent provision of Japanese Former Trust Law (art. 24) additionally provided that co-trustees shall jointly and severally share the trust property. However, (the PRC) Trust Law has no such provision. It is consistent with the argument that "entrustment" referred to in Article 2 cannot be deemed as "transfer".

The most controversial provision is that if the co-trustees have different opinions on handling the trust affairs, the trust document shall be followed; if the document is silent on this, the settlor of a trust, beneficiary or the persons interested shall decide.

The beneficiary might make a decision in favour of herself.[85] In addition, non-existence of the provision regarding whose opinion has priority might trigger disputes.

② Joint and Several Liability

Article 32 of Trust Law stipulates that "the co-trustees who incur (a) obligation to a third

party in the course of administration of the trust affairs shall bear joint and several liability for repayment. The manifestation of intention made by the third party to one of the co-trustees shall be effective to the other co-trustees. If one of the co-trustees violates the purpose of the trust and disposes of the trust property, or handles trust affairs improperly in violation of his administration duty, thereby causing (b) loss and damage to the trust property, the other co-trustees shall bear joint and several liabilities for indemnity."

Although Japanese Former Trust Law provided only for (a) (art. 25), Japanese (new) Trust Law provides for both (a) (art. 83) and (b)(art. 85).

(8) Duty to Keep Account and Duty of Secrecy

Article 33 of Trust Law provides for ① duty to keep account; ② duty to report; and ③ duty of secrecy.

Although Japanese Former Trust Law had provisions only for ① (art. 39), Japanese (new) Trust Law provides for both ① (art. 36) and ② (art. 37).

Trust in common law jurisdiction also considers these duties essential (the Second Restatement of the Law of Trust art. 172).

(9) Duty to Deliver

Article 34 of Trust Law stipulates that "The trustee has the obligation to pay the beneficiary benefits from the trust limited to the trust property".

This provision is somehow strange because trust benefits are in principle based on the merit system and trust interests cannot be bigger than the value of trust property.

If we could deem the word "trust benefits" as "obligation incurred in the course of trust administration", it is the same as "limited liability trust" referred to in Article 2 (12) of Japanese Trust Law, however, such interpretation is impossible.

(10) Right for Fee

Article 35 of Trust Law stipulates that ① the trustee has the right to obtain remuneration if so written in the trust document; ② if the document is silent on this, with consent of the parties concerned, supplementary agreement may be made; if neither agreement in advance nor supplementary agreement has been made, the trustee shall not ask for any remuneration; ③ The agreed remuneration may be changed with the consent of the parties concerned.

Japanese Former (art. 35) and (new) Trust Law (art. 54) provide for ① above. It means that ② and ③ above can be done only by amendment.

In addition, Article 36 of (the PRC) Trust Law stipulates that "if the trustee violates the purpose of the trust and disposes of the trust property, or handles trust affairs improperly in violation of his administration duty, thereby causing loss and damage to the trust property, she shall not ask to be paid before she restores the property to its original state or makes

compensation." Article 54 (4) of Japanese Trust Law is the same.

(11) Right for Compensation

Article 37 of Trust Law stipulates that ① The charges paid and debts owing to a third party by the trustee due to the administration of the trust affairs shall be borne by the trust property; ② If the trustee has advanced such payment with her own existing property, she shall have the prior right to be reimbursed from the trusted property; ③ The debts owing to a third party or the loss or damage suffered by her due to the trustee's violation of administration duty or improper administration of the trust affairs shall be borne by her own existing property.

In this provision, the reimbursement of advanced payment and debt owed by trust property is treated in the same way, however, they are basically different in that while the former is the reimbursement from the trust property (or the beneficiary) to the trustee, the latter is the debt owed by the trustee to the creditor.

Concerning the former, Japanese Former Trust Law stipulated that the trustee may request for reimbursement from both the trust property and the beneficiary (art. 36). However, Japanese (new) Trust Law (art. 48) provides that only if the trustee and the beneficiary specifically agree, the trustee may request the beneficiary for the reimbursement.

Regarding the latter, while in principle trustee shall be liable to repay the debt owing to a third party beyond the value of the trust property, Japanese Trust Law establishes optional arrangement for limited liability trust in which liability of the trustee is limited to the value of the trust property (arts. 2(12), 21(2)(iv)). Yet, in order to protect creditors, many relevant provisions are adopted (arts. 216-247).

However, (the PRC) Trust Law makes limited liability trust a default arrangement, which is not appropriate.

In addition, regarding ② above, in accordance with Japanese Trust Law, the right to reimbursement will become general credit but for the beneficiary's consent(arts. 48 and 49).

(12) Resignation

Article 39 of Trust Law provides that the trustee may resign with consent of both the settlor and the beneficiary.

Japanese Former (art. 43) and (new) Trust Law (art. 57) have the same provisions.

(13) Termination of Appointment

Article 39 of Trust Law stipulates that "Under one of the following circumstances, the trustee's, appointment shall be terminated: ① She dies or is declared dead in accordance with law; ② She is declared to be a person with no or qualified capacity; ③ Her appointment is cancelled or she is declared bankrupt; ④ Her trusteeship is dissolved or her legal qualification is lost; ⑤ She resigns or is removed or dismissed; or ⑥ Other circumstances stipulated in laws or administrative

regulations.

When the trustee's appointment is terminated, her successor, or personal representative, guardian, or liquidator shall keep the trust property properly, and help the new trustee take over the trust affairs."

Japanese Former Trust Law had the same provisions (for ①②③, art. 42; for ④, art. 44; for ⑤, arts. 45, 46 and 47). Japanese (new) Trust Law has the same provisions.

(14) Appointment of New Trustee

Article 40 stipulates that "If the trustee's appointment is terminated, a new trustee shall be appointed in accordance with the trust document; if it is silent on it, the settlor of a trust shall make the appointment; if she does not make the appointment or is incapable of appointing the trustee, the beneficiary shall appoint; if the beneficiary is the person with no or qualified capacity, her guardian shall make appointment. The new trustee shall take up the rights and obligations of the former trustee in the administration of the trust affairs."

Again, these provisions show the overwhelming power of a settlor. In common law jurisdictions as well as Japan (Former Law art. 49, new Law art. 62), it is provided that the court shall appoint a new trustee upon request by interested persons.

3. Beneficiary

(1) Spendthrift Trust

Article 47 of Trust Law stipulates that "If the beneficiary becomes insolvent[86], her beneficiary right may be used to repay the debts, except limited by laws, administrative regulations or trust documents."

Professor Ho argues that this provision implies that it is possible in the PRC to create a kind of trust that is similar to the U.S. spendthrift trust or English protective trust[87]. However, she finally concludes that Article 15 will deny such an interpretation[88]. It is because Article 15 stipulates that "After a trust is established, if the settlor of a trust dies or is dissolved, cancelled in accordance with laws, or declared bankrupt, the settlor of a trust is the sole beneficiary, the trust shall be terminated, and the trust property shall be her estate of inheritance or liquidated property."

By the way, Article 58 of Japanese Former Trust Law stipulated that in the case where the settlor is the sole beneficiary, if the settlor would become insolvent unless she uses the trust property for repayment, the court may make a decision to cancel the trust. It meant that only the circumstances of the beneficiary with which the other interested persons including the trustee cannot be involved may terminate the trust. This was called "art. 58 risk[89]" and Art. 58 was abolished by the recent amendment.

(2) Co-Beneficiaries

Japanese Trust Law adds the detailed provisions (arts. 105-122) concerning the decision making procedures by co-beneficiaries that did not exist in the Former Trust Law.

(The PRC) Trust Law is advanced than Japanese Former Trust law in that it has provisions concerning co- beneficiaries (arts. 94 and 95).

(3) Assignment of Beneficiary Right

Article 48 of Trust Law in principle recognises assignment and succession of beneficiary rights.

Japanese Trust Law has the same provision (art. 93) as well as the provision concerning requirement for perfection (arts. 94 and 95). (The PRC) Trust Law lacks the latter. It must be legislated.

VII Change and Termination of Trust

1. Settlor's Right to Change Beneficiary

Article 51 of Trust Law allows only the settlor to appoint beneficiary in certain cases.

Japanese Trust Law establishes "power of appointment of beneficiary" (art. 89) for the first time so that a settlor, a trustee or others may be given power of appointment of beneficiary in accordance with trust act.

In common law jurisdictions, a trustee may often be given power of appointment of beneficiary among a certain class of people[90].

(The PRC) Trust Law is somehow extraordinary in that only settlor is given such a power.

2. Cancellation

Article 50 of Trust Law stipulates that "If the settlor of a trust is the sole beneficiary, she or her successor may revoke the trust, unless the trust document otherwise provides."

Although Japanese Former Trust Law had the same provision (art. 57), the provision to restrict the settlor from cancellation at the timing that harms the trustee was supplemented. Japanese (new) Trust Law is the same as above (art. 164. In the cases where the settlor is not a sole beneficiary, the agreement between the settlor and the beneficially enables it).

In common law jurisdiction, inter vivos trust is classified into a revocable trust and a revocable trust, the former of which can be revoked.

3. Continuation of Trust until Transfer of the Rights

Article 55 of Trust Law stipulates that after the ownership of the trust property is determined

in accordance with the preceding article, the trust shall be deemed to be subsisting while it is being transferred to the owner, and the owner shall be deemed the beneficiary.

As mentioned above, it can be called a kind of statutory trusts.

Japanese Former Trust Law had the same provision (art. 63). However, Japanese (new) Trust Law provides that after the termination of trust, the trust shall be deemed to be subsisting until completion of liquidation, by doing so it extends the duration of statutory trust.

(The PRC) Trust Law does not refer to the trust liquidation procedures. These must be legislated because trust liquidation will of course be rendered after the termination of trust.

VIII Conclusion

As analysed above, although the PRC Trust Law is one of the well drafted laws among the PRC private laws, it has many problems.

Particularly, the fact that a settlor is given such an overwhelming power as might destroy essential feature of trust must be reconsidered. In addition, the definition of trust not requiring the transfer of property triggers the radical issue what a trust is from comparative law perspective.

While the PRC Trust Law is more advanced than Japanese Former Law in several points, its deficits have become obvious by the amendment to Japanese Trust Law in 2007. Japanese Trust Law has many suggestions in reconsidering the relevant provisions of PRC Trust Law.

NOTES

1 At least the 6th draft was made during 7 years. Nakano, Masatoshi, "The Trust Law of China" (2003) 28 *Study of the Law of Trust* p61.
2 Enacted on the 24thof October, 1993. The number of articles is less than Trust Law of China.
3 However, the Japanese Amended Trust Law is the newest one in Asia now.
4 Ho, Lusina, *Trust Law in China*, (Hong Kong: Sweet & Maxwell, 2003), p2.
5 Ibid. p3.
6 Jiang, Ping and Zhou, Xiao Ming, "Framework Related to the Enactment of the Law of Trust in the PRC (1)" 47-7 Horitsu no Hiroba (Law Square) (Gyosei,1994), p54.
7 Nagaoka, Ikuya, "Trend of Trust System in the PRC", *Possibility of Study of Asian Law*, (Asian Law Society, 2006), p54.
8 Jiang and Zhou, supra n.6, p48.
9 Kang, Shi and Ishimoto, Shigehiko, "Enactment of Law of Trust in the PRC(1)", 29-6 Journal of the Japanese Institute of International Business Law (The Japanese Institute of International Business Law, 2001), p739.
10 Nakano, supra n.1, p61.

11 Kang and Ishimoto, supra n.9, p736.
12 Ho, supra n.4, p7.
13 English Translation of Trust Law in this thesis is based on original text, Isinolaw (online database) and Pr. Ho's book, supra n.4.
14 Ch.499.
15 *Pennington & Another v. Waine & Others* [2002] 1 W. L.R. 2075.
16 Teramoto, Muramatsu, Tomizawa, Suzuki and Mikihara, "Explanation of New Law of Trust – Principally Focusing on Parts Related to Financial Business – (2)" (hereinafter, this series of articles is referred to as "Explanation by the Legislators") 1794 *Banking Law Journal* (Kinzai, 2007) p24; Nohmi, Yoshihisa, *Modern Law of Trust* (Yuhikaku, 2004) p19; Mitsubishi Trust Bank Trust Law Study Group, *Law and Practice of Trust* (4th ed.) (Kinzai, 2003) p41.
17 Ho, supra n.4, p54.
18 Dominant opinion. Ho, supra n.4, p78; Nakano, Masatoshi and Zhang Jun Jian, Trust Law, (The PRC: China Fangzheng Publisher, 2004) p44.
19 Effectuated on the 1st of October 1999.
20 Ho, supra n.4,p57; Nakano, supra n.1, p61.
21 Nakano, supra n.1 p63.
22 Ho, supra n.4, p67.
23 Chen, Dagang, "Misunderstanding of the Features of the Law of Trust" 21-4 Rule of Law Journal (The PRC, 2006),p41.
24 Zhang, Tianmin, *Shiqu Hengpingfa De Xintuo (Losing Equitable Trust)*, (The PRC: Zhongxin Publisher, 2004), p340; Chen, supra n.23, p53.
25 Nakano and Zhang, supra n.18, p9.
26 Ho, supra n.4, p66.
27 Kang and Ishimoto, supra n.9, p740.
28 Ho, supra n.4, p65.
29 Professor Nakano, Masatoshi states that it is a very strange provision. "Trust Law of China -Provisions and Comments- (I)", 36-2 *Asia University Law Review* (Asia University, 2002), p37.
30 Ho, supra n.4, p65.
31 Effectuated on the 1st of October 2007.
32 Effectuated on the 1st of October, 1995.
33 Xu, Mengzhou, *Trust Law*, (The PRC: Law Publisher, 2006), p3.
34 Nakano, supra n.29, p24.
35 Ibid.
36 "Explanation by the Legislators"(1), supra n.16, 1793 *Banking Law Journal* (Kinzai, 2007) p12.
37 Ibid. (2) 1794 *Banking Law Journal* (Kinzai, 2007) p22.
38 *Knight v. Knight*[1840], 3 Beav 148, p173.
39 Higuchi, Norio, *Notes on the U.S. Trust Law I*, (Kobundo, 2000), p25.
40 "Explanation by the Legislators" (2), supra n. 16, p23.
41 David Hayton & Charles Marshall, *Commentary and Cases on The Law of Trusts and Equitable Remedies*, (12th ed.) (UK: Sweet & Maxwell, 2005), p71
42 A.C. 1
43 Higuchi, supra n.39, p190
44 Some of publicly disclosed English translations simply use a word "registration", original term is retroactive registration.
45 Sese, Atsuko, "Comparative Studies on the PRC Contract Law – Comparison with Contract Laws of

Japan, Germany and France (5)" 28-2 Journal of the Japanese Institute of International Business Law (The Japanese Institute of International Business Law, 2005), p219.

46 Promulgated and effectuated on the 17th of December, 1995.

47 Effectuated on the 13th of December 2000.

48 Ho, supra n.4, p80.

49 Effectuated on the 13th of October 2003.

50 Charles Harpum & Janet Bignell, *Registered Land–Law and Practice under the Land Registration Act 2002-*, (UK: Jordans, 2004), p2.

51 Martin Dixon, *Modern Land Law*, 5th ed. (UK: Cavendish, 2005), p89.

52 Article 4 of LRA 2002 stipulates that "The following transfers of 'a qualifying estate' are required to be registered. (1) ……(2) A transfer by way of gift. A gift expressly includes the following situations: (a)where land is transferred by the owner to trustees in order to constitute a trust, except where that trust is a bare trust for the benefit of that owner; (b) where a transfer of land is made to a beneficiary under a trust who is absolutely entitled to the land. It will not, however, be a gift if the beneficiary in question is the original settlor and the land is held on a bare trust for him.

53 Harpum and Bignell, supra n. 50, p350.

54 For details, please see Sese, Atsuko, "Report on the Watch of Legal System and Law School and Registration System", 32-7 Journal of the Japanese Institute of International Business Law (The Japanese Institute of International Business Law, 2004), pp887-894.

55 Kinoshita, Tsuyoshi, *Anglo-American Private Law*, (Yuhikaku, 1988), p.280.

56 F.W. Maitland, *Equity: A Course of Lectures, revised edition by Brunyate, J* (UK: Cambridge University Press, 1936), pp112-114.

57 Higuchi, supra n.39, p138.

58 Nohmi, supra n.16, p180.

59 Ibid.

60 In accordance with Japanese Civil Law, such claims can be exercised only based on right in rem.

61 Ho, supra n. 4, p178.

62 Japanese Civil Code also has similar provision (art. 175).

63 Ho, supra n. 4, p176.

64 Ibid. p54

65 Ibid. p82.

66 For details, please refer to Sese, Atsuko, "How Property Belongs to an Entity and Cy-pres Theory in England", 179 Trust (Trust Companies Association of Japan, 1994), pp28-43.

67 *Re Endacott* [1960] CH.232 at 246.

68 1 Ch. 373; 34 Conv.77, 37 Conv.420.

69 41 Ch. D 552.

70 CH. 38.

71 Section 2 Meaning of "charitable purpose"

(1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—

(a) falls within subsection (2), and

(b) is for the public benefit (see section 3).

(2) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

(a) the prevention or relief of poverty;

(b) the advancement of education;

(c) the advancement of religion;

(d) the advancement of health or the saving of lives;
(e) the advancement of citizenship or community development;
(f) the advancement of the arts, culture, heritage or science;
(g) the advancement of amateur sport;
(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
(i) the advancement of environmental protection or improvement;
(j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
(k) the advancement of animal welfare;
(l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;
(m) any other purposes within subsection (4).

72 "Explanation by the Legislators" (5) ,supra. n.16, 1797 *Banking Law Journal* (Kinzai, 2007) p45.
73 Ho, supra n.4, p86.
74 Ibid. p87.
75 Ibid. p64.
76 Ibid. p121.
77 "Explanation by the Legislators" (3) supra n. 16, 1795 *Banking Law Journal* (Kinzai, 2007) p40.
78 Shinomiya, Kazuo, *Trust Law (new version)* (Yuhikaku, 1989), p232.
79 Nohmi, supra n. 16, p85.
80 Higuchi, Norio, *Notes on the U.S. Trust Law II*, (Kobundo, 2000), p22.
81 "Explanation by the Legislators"(3) supra n.16, 17935*Banking Law Journal* (Kinzai, 2007) p39.
82 *Speight v. Gaunt* [1883] 9 App. Cas 1.
83 Second Restatement of the Law of Trust art. 171; Higuchi, supra n. 80, p108.
84 Ho, supra n.4, p108.
85 Ibid. p110.
86 In some translations, this word "insolvent" is translated as "unable to repay her debts on their due dates". However, the word used in the original Chinese text is "qingchang" which means to repay all the debt and this expression is used in Law on Bankruptcy (effectuated on the 1st of June, 2007) art. 2 (definition of bankruptcy) and in Civil Procedure Law art. 199. Therefore, the correct translation is supposed to be "insolvent".
87 Ho, supra n.4, p117.
88 Ibid. p120.
89 "Explanation by the Legislators" supra n.16, (4), 1796 *Banking Law Journal* (Kinzai, 2007) p34.
90 Nohmi, supra n. 16, 248; Higuchi, supra n. 39, p106; Hayton and Marshall, supra n. 41, p193.

(Received October 1, 2009)
(Associate Professor, Department of Public Policy, Faculty of Public Policy,
Attorney at Law (The State of New York))