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**Conceptualising the Chinese Trust:  
Some Thoughts from Europe**

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## **Abstract**

Today it is common to find trusts in civil law jurisdictions, a recent and significant example being the Chinese trust, introduced in 2001. Yet civil law trusts are not the same as their common law counterparts, and the Chinese trust departs in some respects even from the model often found in the civil law. In particular, the Chinese trust allows for the possibility of title to trust assets being held, not by the trustee, but by the settlor. The paper examines this arrangement and concludes that, while it could be made to work and would justify the name of “trust”, the Chinese legislation fails to provide sufficient restraints on the power of the settlor. The paper then turns to consider the immunity of trust funds from the private creditors of the trustee. How can this immunity be explained? A traditional analysis is that, as the beneficiaries apparently “prevail” over the private creditors, so the explanation must be found in the nature of the beneficiaries’ rights, which are said to be real or quasi-real. But this overlooks the position of trust creditors. They too “prevail” over private creditors or, to state the position more accurately for civil law trusts, they have a direct right of recourse against trust assets. Any explanation of immunity must thus account for trust creditors as well as for beneficiaries, and there can be no doubt that the claims of the former are (usually) personal and not real. The solution is to be found in the idea of dual patrimony. In a civil law trust there is segregation not only of assets but of liabilities as well. A trustee has both a private and a trust patrimony. Private creditors may claim only from the former, trust creditors (including beneficiaries) only from the latter. Trust funds are thus immune from private creditors because they are held in a patrimony in respect of which the creditors have no rights.

## **Keywords**

Chinese law, trust, Chinese trust, civil law trust, beneficiary’s right, trust creditors, patrimony

# Conceptualising the Chinese Trust: Some Thoughts from Europe

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## A. INTRODUCTION

Why no trusts in the civil law? With this question Vera Bolgár launched a famous article in 1953.<sup>1</sup> But even back then, the question misrepresented the actual state of affairs for, as the author acknowledged, there already *were* trusts in the civil law. And the oldest of all, dating back to the seventeenth century, was the trust in Scotland—a mixed jurisdiction, admittedly, but one whose property law was resolutely civilian.<sup>2</sup> In the course of the nineteenth century the trust began to appear in other mixed jurisdictions, in South Africa, Québec and Sri Lanka. Louisiana followed in the 1920s and 1930s.<sup>3</sup> And by then the trust had already infected the civil law world. Most of the early development was in Latin America—in Columbia (1923), Panama (1925), Chile (1925), Mexico (1926), Bolivia (1928), Peru (1931), Costa Rica (1936), Venezuela (1940), Nicaragua (1940), Guatemala (1946), Ecuador (1948) and Honduras (1950).<sup>4</sup> In the civilian parts of Asia only Japan adopted the trust, in 1922, and the institution was largely ignored in Continental Europe with the exception of tiny Liechtenstein (1926). By 1953, therefore, trusts could often be found in the civil law.<sup>5</sup> But—and this was the point of Vera Bolgár’s article—there remained many civil law countries, including some of the most prominent, in which the trust was unknown.

In recent years the position has begun to change once again. Unexpectedly, Russia adopted the trust in 1993 and, just as unexpectedly, reconfigured it only two years later in the new Civil Code as a trust management contract.<sup>6</sup> Trusts were introduced to South Korea in 1961 and, much later, to Taiwan in 1996 and China in 2001.<sup>7</sup> Even Europe, traditionally hostile to the trust, has shown signs of succumbing to its charms. After a long period of gestation and controversy, France enacted legislation in 2007 to permit the *fiducie*, a trust or at least a trust-

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<sup>1</sup> Vera Bolgár, “Why No Trusts in the Civil Law?” *American Journal of Comparative Law* 2 (1953): 204.

<sup>2</sup> For the history of the Scottish trust, see George Gretton, “Trusts,” in *A History of Private Law in Scotland*, ed. Kenneth Reid and Reinhard Zimmermann (Oxford: Oxford University Press, 2000), vol. 1, 480.

<sup>3</sup> The history can be traced in the various contributions to *Trusts in Mixed Legal Systems*, ed. J. M. Milo and J. M. Smits (Nijmegen: Ars Aequi Cahiers, 2001), a number of the chapters from which are also published at *European Journal of Private Law* 8 (2000): 421 ff.). In Louisiana charitable trusts first became possible in 1882.

<sup>4</sup> For details, see Rodolfo Batiza, “The Evolution of the Fideicomiso (Trust) Concept under Mexican Law,” *Miami Law Quarterly* 11 (1956-7): 478 at 479. See also Nicolas Malumian, *Trusts in Latin America* (Oxford: Oxford University Press, 2009).

<sup>5</sup> For a review of the position at that time, see Joaquín Garrigues, “Law of Trusts,” *American Journal of Comparative Law* 2 (1953): 25.

<sup>6</sup> Elspeth Reid, “The Law of Trusts in Russia,” *Review of Central and East European Law* 24 (1998): 43; Andrey A Zhdanov, “Transplanting the Anglo-American Trust in Russian Soil,” *Review of Central and East European Law* 31 (2006): 179.

<sup>7</sup> For discussion see Lusina Ho, “The Reception of Trust in Asia: Emerging Asian Principles of Trust?” *Singapore Journal of Legal Studies* (2004): 287.

like institution albeit one which is subject to a number of limitations.<sup>8</sup> Previously, Luxembourg had introduced a fiduciary contract. And in other European countries, too, devices are in place which, while not full trusts, are at any rate trust-like in character.<sup>9</sup>

The reason for this new-found enthusiasm is not hard to discover. In China the trust was introduced to provide for the fiduciary management of assets in the context of, for example, pension funds and other collective investment schemes.<sup>10</sup> The motivation in other countries has been similarly commercial in orientation. In today's globalised economy the sheer flexibility of the trust has been seen as conferring a competitive advantage on those jurisdictions which are fortunate enough to have it. It is no wonder that their ranks are increasing. A further contributory factor, though much less important, was the Hague Trusts Convention of 1985, which both helped de-mystify the trust and also encouraged its introduction at least among those states which were considering the Convention's ratification. Thus far, however, only four civil law countries have chosen to ratify, all from Europe.<sup>11</sup>

Evidently, one motivation not much present was admiration for the common law. On the whole, those countries which have introduced the trust have sought to detach it from those common law features which a civilian system is likely to find troublesome, or at least to characterise these features in a different way. The civil law trust is thus a different creature from its common law counterpart. Indeed for some common lawyers it is not a trust at all, or at best is a trust only in the diluted sense allowed by the Hague Trusts Convention.<sup>12</sup> If that is a criticism, however, it seems misplaced. With careful engineering, the institution can perform most of the same functions, and often in much the same way, as a common law trust but without doing violence to the underlying civil law basis. The way in which this is done—

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<sup>8</sup> See e.g. Paul Matthews, "The French fiducie: and now for something completely different", *Trust Law International* (2007):17. As well as offering an insightful analysis the author has included his own translation of the legislation. For more recent developments, including legislative amendments, see Pierre Crocq, "National Report for France," in *Towards an EU Directive on Protected Funds*, ed. S. C. J. J. Kortmann et al. (Deventer: Kluwer Legal Publishers, 2009), 99-104.

<sup>9</sup> A convenient recent survey can be found in *Towards an EU Directive*, ed. Kortmann et al. The question of whether an institution is a trust or merely "trust-like" will, of course, depend on the definition of trust selected.

<sup>10</sup> Lusina Ho, *Trust Law in China* (Hong Kong: Sweet & Maxwell Asia, 2003), 3 ff. See also Charles Zhen Qu, "The Doctrinal Basis of the Trust Principles in China's Trust Law," *Real Property Probate and Trust Journal* 38 (2003-04): 345 at 348 ("China decided to introduce trusts into its legal system not out of intellectual curiosity but rather, as in other civil law countries that have embraced trusts, in order to cater to investment and commercial utilization of assets and to deal with the fiduciary transactions already in existence").

<sup>11</sup> They are Italy, Luxembourg, The Netherlands, and Switzerland.

<sup>12</sup> Matthews, "The French fiducie," 21.

the transplanting of a common law institution into a civil law setting—is one of the enduring fascinations of the civil law trust.

This paper attempts to explore this issue in the context of the Chinese trust. And it seeks to do so by reference to a series of even more recent developments which have taken place in Europe. The legislation in China—or so it seems to an outsider—is long on detail but short on explanation. It says what happens but without saying why. And although the necessary rules are usually present, the concepts that must underpin them are often absent. As Rebecca Lee has pointed out in a valuable article to which I will return, “the basis of the Chinese Trust is rarely conceptualized”.<sup>13</sup> The European experience is different. For a number of years now, Western scholars have been busy examining the nature of a civil law trust,<sup>14</sup> and some of the fruits of that scholarship can be seen in three significant documents which have appeared since 2006. None is legislative though all carry the possibility of legislation. Two are pan-European and signify an ambitious—many would say unrealistic—project to inaugurate a European trust. The third is a set of proposals by a government reform body, the Scottish Law Commission, in respect of the oldest civil law trust in the world, the trust in Scotland.<sup>15</sup> Scotland indeed forms something of a connecting thread, for not only have Scottish scholars been active in this area of the law but there was an influential Scottish presence in each of the European projects. These projects are the Draft Common Frame of Reference (“DCFR”)<sup>16</sup>

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<sup>13</sup> Rebecca Lee, “Conceptualizing the Chinese Trust,” *International and Comparative Law Quarterly* 58 (2009): 655 at 656.

<sup>14</sup> In this respect, Bolgár, “Why No Trusts?” broke new ground. Later contributions include: K. W. Ryan, “The Reception of the Trust,” *International and Comparative Law Quarterly* 10 (1961): 265; Donovan W. M. Waters, “The Institution of the Trust in Civil and Common Law,” *Recueil des Cours* 252 (1995):113; Tony Honoré, “Obstacles to the Reception of Trust Law? The Examples of Scotland and South Africa,” in *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions*, ed. A. M. Rabello (Jerusalem: Harry and Michael Sacher Institute for Legislative Research and Comparative Law, the Hebrew University of Jerusalem, 1997), 812; Tony Honoré, “On Fitting Trusts into Civil Law Jurisdictions”, accessed February 13, 2011, <http://users.ox.ac.uk/~alls0079/chinatrusts2.PDF>; Maurizio Lupoi, “The Civil Law Trust,” *Vanderbilt Journal of Transnational Law* 32 (1999): 967; Maurizio Lupoi, *Trusts: A Comparative Study*, trans. Simon Dix (Cambridge: Cambridge University Press, 1999), ch. 5; George L. Gretton, “Trusts without Equity” *International and Comparative Law Quarterly* 49 (2000): 599; *Trusts in Mixed Legal Systems*, ed. Milo and Smits.

<sup>15</sup> Scottish Law Commission, Discussion Paper on the *Nature and Constitution of Trusts*, Scot. Law Com. D.P. No. 133 (Edinburgh: The Stationery Office, 2006), accessed February 13, 2011, <http://www.scotlawcom.gov.uk>.

<sup>16</sup> *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Munich: Sellier, 2009). This is published both in an “outline” edition, edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke, accessed February 13, 2011, [http://ec.europa.eu/justice/policies/civil/docs/dcfr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf), which gives the DCFR text only, and also in a 6-volume “full” edition, edited by Christian von Bar and Eric Clive, which contains extensive commentary and comparative material. In relation to trusts, however, the commentary material (vol. 6, 5669-5742) is largely incomplete but will eventually be published as a separate volume.

and the draft EU Directive on Protected Funds<sup>17</sup>—the former a proto-civil code for Europe, produced by a private network of scholars but with EU finance and support, the latter an unofficial draft Directive which, if implemented, would make available a “protected fund”—a trust in all but name—for commercial purposes. The group which produced the draft Directive is a successor to, and contains some of the same personnel as, the authors of an earlier pan-European venture, the Principles of European Trust Law (1999),<sup>18</sup> and in many ways the draft Directive can be regarded as a developed version of the Principles.<sup>19</sup>

In writing this paper I am conscious that most of the literature on Chinese law is inaccessible to me and that even the legislation must be consulted in translation.<sup>20</sup> Yet the risk of misunderstandings seems outweighed by the importance of the subject. For there is much that can be said about the Chinese trust in the light of the developments in Europe just as there is much that Europe itself can learn from the Chinese experience. In this paper it will only be possible to cover two topics: the location of title to the trust assets, and the doctrinal explanation for the rule that trust assets have immunity from the private creditors of the trustee. The former is a question of technique, the latter one of attribution.

## B. LOCATION OF TITLE

### (1) Testing the options

Whether or not trusts are part of property law—a matter of controversy—they are at any rate *about* property, for it is of the very essence of a trust that assets are provided by one person (the settlor) to another person (the trustee) for the benefit of a third person (the beneficiary) or for purposes.<sup>21</sup> And it is also of the essence of a trust that, in respect of those assets, management and benefit are divided: the trustee manages and the beneficiary takes benefit. But what of ownership or, to use a term which can uncontroversially extend to intangibles,

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<sup>17</sup> *Towards an EU Directive*, ed. Kortmann et al.

<sup>18</sup> *Principles of European Trust Law*, ed. D. J. Hayton et al. (The Hague: Kluwer Law International, 1999).

<sup>19</sup> *Towards an EU Directive*, ed. Kortmann et al, xxi-xxiii.

<sup>20</sup> For an account of the literature, see Frances H. Foster, “American Trust Law in a Chinese Mirror,” *Minnesota Law Review* 94 (2009-10): 602 at 622-7.

<sup>21</sup> Although for convenience the trust actors are expressed in the singular, they very often exist in the plural. In particular there can be multiple beneficiaries and, at least where natural persons are involved, it is usual to have more than one trustee.



title?<sup>22</sup> To a lawyer trained in the civil law tradition, it is necessary to know about this before knowing about anything else, for from the location of title everything must then follow. Furthermore, that title cannot be divided. Common lawyers say that legal ownership is in the trustee and beneficial or equitable ownership in the trustee,<sup>23</sup> but this the civil law will not allow notwithstanding that *duplex dominium* was for hundreds of years a familiar notion in Continental Europe in the context of feudal land.<sup>24</sup> So, in looking for an owner of trust assets, the search is on for a single owner, for a person with full *dominium*.

A complicating factor is that, while eventually the beneficiary will take benefit, no one may be entitled to enjoy the property now. Postponed gratification is a common feature of the trust, for without it the settlor would usually give the property directly to the beneficiary. And if benefit is not, or not yet, in the beneficiary, it is emphatically not in the trustee, whose ownership is a thing devoid of joy. The trouble with joyless ownership, of course, is that it does not look much like ownership at all, especially to those schooled in the civilian idea of absolute *dominium*. The problem, however, should not be exaggerated. A person who grants a usufruct over property, or an extended lease at a peppercorn rent, has the form of ownership without much of the substance, and even if this is not quite the ownership without benefit that is found in a trust, it is much closer to it than to conventional ideas of the all-powerful owner.

Unease about conferring title on *any* of the parties to the trust can lead one in surprising directions. Article 1261 of the Québec Civil Code provides that “The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right”. And if none of the settlor, trustee or beneficiary has a real right, it must follow that the trust assets are not owned by anyone at all. The result feels uncomfortable and counter-intuitive, even if rules which might otherwise cause problems,

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<sup>22</sup> On this topic see Honoré, “Civil Law Jurisdictions,” 10-13; Ho, *Trust Law in China*, 37-42. On the question of whether intangibles can be “owned”, see George L. Gretton, “Ownership and its Objects,” 71 *Rebels Zeitschrift* 71 (2007): 802. The draft EU Directive on Protected Funds, art. 3.1 talks of the assets being “owned”.

<sup>23</sup> For the view that this equitable title is a “metaphor” and that there is no direct relationship between beneficiary and trust property, see Lionel D. Smith, “Trust and Patrimony,” *Estates, Trust and Pensions Journal* 28 (2009): 332 at 344. This is a “lightly revised” version of a paper which was originally published at *Revue générale de droit* 38 (2008): 379.

<sup>24</sup> See A. J. van der Walt and D. G. Kleyn, “*Duplex Dominium*: The History and Significance of the Concept of Divided Ownership,” in *Essays on the History of Law*, ed. D. P. Visser (Cape Town: Juta & Co Ltd., 1989), 213. In one jurisdiction which allows trusts, Scotland, the *duplex dominium* of feudalism remained in place until as recently as 2004.

such as those of *bona vacantia*, are disapplied. Are the alternatives really so unpalatable that it is necessary to take the property out of ownership altogether?

From locating the trust property in an ownerless patrimony it is a short step to treating the trust as a legal person in its own right. That very possibility was considered by the Scottish Law Commission as part of its recent reform exercise. Among its merits is a simple solution to the problem of title, for if the trust is a legal person, then it can own the trust property by itself. Nonetheless the idea was firmly rejected by the Scottish Commission, partly on grounds of complexity and partly from a reluctance to cut Scotland off from other jurisdictions. As the Commission explained:<sup>25</sup>

Trusts are used for a variety of purposes. The value of the current structure of the trust is its simplicity and therefore its adaptability for use in new economic and social environments. To introduce a separate juristic person, the trust, would complicate matters. The trust would have to exercise its active legal capacity through agents, presumably the trustees. Apart from issues of *vires*, the agency rules which would govern the relationships between the trust, the trustees and third parties would not be simple. It was accepted that even if a trust had separate juristic personality, trustees would continue to owe fiduciary obligations to the beneficiaries as well as to the trust: difficult conflicts of interest could be envisaged.

But if trust assets should not be ownerless and cannot be held by the trust itself, it is necessary to decide which of the trust actors should be given the property. It may be that the choice does not matter very much. In order for a trust to function only two things are indispensable. One is that the trustee has exclusive powers of management for the purposes of the trust including, if necessary, the power to alienate trust assets and perform other juridical acts in respect of them. The other is that the trust assets have immunity from the private creditors of whichever trust actor is selected as owner. Only the first of these is relevant for the choice of owner: immunity works in the same way regardless of location of title.<sup>26</sup>

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<sup>25</sup> Scottish Law Commission, *Nature and Constitution of Trusts*, para. 2.41.

<sup>26</sup> For discussion see C. below. The need for immunity is self-evident in the case of the settlor or trustee. But it is also likely to be needed for a beneficiary. Thus a beneficiary who owns trust assets holds both (i) the assets themselves and (ii) a right to make use of the assets at some point in the future. If the trust is to do its job, only the second should be capable of attachment by the beneficiary's private creditors.

In respect of powers of management, the default position is that these are held by whoever has title to the property. If, therefore, the trustee has title, nothing further need be done: powers of management follow as a matter of course. But if either the settlor or the beneficiary is owner, not only will management powers have to be conferred on the trustee, they will have to be taken away from the person who is owner. In that case ownership is stripped not only of benefit—usually unavoidable in a trust—but of management rights as well. Furthermore, a trustee who derives powers indirectly, from the ownership of others, will have the tiresome burden of proving these powers to the satisfaction of third parties. Even if there is no doctrinal reason for making the trustee the owner, therefore, there are powerful reasons of convenience. And there are other reasons too which argue against placing title in either the settlor or the beneficiary. There might be no current beneficiaries or too many. There might be a dispute as to whether a person is a beneficiary or not. The settlor or beneficiary might die or be dissolved. In short, there might be no one who can be owner. And unlike the position for trustees, it is hard to see how new settlors or beneficiaries might come to be appointed.

It is hardly a matter for surprise, therefore, that, almost always, the solution of the civil law trust, like its common law counterpart, is to make the trustee the owner.<sup>27</sup> On this topic the European draft instruments are at one. “In a protected fund”, the draft Directive runs, “assets are owned by an administrator<sup>28</sup> for the benefit of one or more beneficiaries”,<sup>29</sup> while the DCFR defines a trustee as “the person in whom the trust fund becomes or remains vested”.<sup>30</sup> The justification given in the DCFR is unreflectively dogmatic:<sup>31</sup>

An essential feature of a trust is that title to the trust fund is vested in the trustee. For the purposes of performing the trust the trustee is cloaked in the mantle of an outright owner. It is the ability of the trustee to dispose of the fund (derived from that title) which distinguishes a trust from other relationships in which assets are placed under the control of a non-owner—for example, the relationship arising from a contract for storage.

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<sup>27</sup> A rare exception is the *bewind* trust in South Africa (deriving from the Dutch institution of *bewind*) which gives ownership to the beneficiary.

<sup>28</sup> The “administrator” is the trustee.

<sup>29</sup> Draft EU Directive on Protected Funds, art. 3.1.

<sup>30</sup> DCFR, X.—1:203(2).

<sup>31</sup> DCFR, Full Edition, vol. 6, 5691.

In fact, vesting in the trustee is not “an essential feature of a trust”,<sup>32</sup> and the difficulties of doing otherwise are practical rather than doctrinal.

## (2) The position in China

Where does title lie in the Chinese trust? At least at first glance, the answer is far from clear. The difficulties begin with the definition of trust in article 2 of the Trust Law:<sup>33</sup>

For the purposes of this Law, trust refers to that the settlor, based on his faith in trustee, entrusts his property rights to the trustee and allows the trustee to, according to the will of the settlor and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purpose.

But although the trustee is thus to “administer or dispose of” the trust property in his own name, there is no unequivocal statement that he is the owner. On the contrary, the word “entrust” (*weituo*) is a standard term for agency where, of course, no transfer of title takes place.<sup>34</sup> Other provisions in the Law are suggestive but hardly conclusive. Article 14 talks of the property being “obtained” by the trustee, which might seem to imply a transfer of title,<sup>35</sup> but article 20, conferring rights to information on the settlor, talks of “his” trust property. It is probably a mistake to place too much weight on individual words which the Law happens to use: it certainly shakes one’s confidence to see the reference, in article 55, to trust assets “being transferred *to* the owner”. The truth is that the Law is consistent with title in either party, and it seems that this was deliberate.<sup>36</sup> Indeed it is not hard to see why. Assuming a contract between settlor and trustee, as is normal for *inter vivos* trusts in China, the rule is that the trust comes into existence as soon as the contract is signed.<sup>37</sup> Unless, therefore, a transfer is arranged so as to precede or accompany the contract, there will always be a period

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<sup>32</sup> Cf Lupoi, *Trusts*, 304: “The transfer of the right from the settlor to the fiduciary is a condition *sine qua non* if a civil-law concept is to approach the trust”.

<sup>33</sup> In this paper I use the English translation available at <http://www.asianlii.org/cn/legis/cen/laws/tl126/>, accessed February 13, 2011.

<sup>34</sup> Ho, *Trust Law in China*, 65.

<sup>35</sup> However, Lee, “Conceptualizing the Chinese Trust,” 660 points out that “acquired” (*qude*) is also used in the law of agency in relation to the requirement that the agent hand over property to the principal.

<sup>36</sup> Ho, *Trust Law in China*, 67.

<sup>37</sup> Trust Law, art. 8.

in which the trust property is held by the settlor. The more difficult question is what happens next.

Following the creation of a trust, there is nothing in the Trust Law to suggest either that the settlor is bound to transfer the trust property to the trustee or that he is prohibited from doing so.<sup>38</sup> Whether a transfer takes place, therefore, would seem to depend on the terms of the trust contract or, failing a relevant provision, on the decision of the settlor. In other words, the location of title is a matter of choice—an arrangement unparalleled, so far as I know, in any other country. In some trusts in China title will thus be with the settlor; in others it will be with the trustee. Both possibilities are provided for in the crucial articles which deal with immunity against creditors and heirs. Thus if the settlor dies or is dissolved, article 15 provides that “the trust property shall not be his legacy or liquidation property”. A virtually identical provision in respect of the trustee is found in article 16. Other provisions on creditor immunity are carefully neutral as to ownership of the trust property.<sup>39</sup>

While almost all Chinese trusts must begin with title in the settlor, I understand that the practice is then usually to transfer title to the trustee.<sup>40</sup> And even if the original assets remained with the settlor, any replacement assets acquired on behalf of the trust might be taken in the trustee’s name.<sup>41</sup> Nonetheless, ownership by the settlor is a significant occurrence in almost all trusts in China and a permanent arrangement in at least some. In international terms, this is highly unusual;<sup>42</sup> in the common law world it is altogether unknown except in the case—not apparently allowed under Chinese law<sup>43</sup>—where the settlor is also the sole trustee. That case indeed offers an instructive contrast. A settlor who is also trustee is subject to the fiduciary and other restrictions which affect all trustees. Ownership is trammelled by obligation. The Chinese settlor is not similarly restricted. The settlor is not a trustee. There is almost nothing in the Trust Law to control the use of the property.<sup>44</sup> And because the settlor is owner, the right to use and dispose of the property is, in principle, unfettered: “the owner of a realty or chattel”, says article 39 of the Property Law of 2007, “is

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<sup>38</sup> The view expressed in Qu, “Doctrinal Basis of the Trust Principles,” 360-1 that the settlor can be made to transfer is based on a combination of English law and wishful thinking.

<sup>39</sup> Arts. 17(2) and 37.

<sup>40</sup> Ho, *Trust Law in China*, 57.

<sup>41</sup> Article 14 provides that such assets are trust property but makes no stipulation as to where title lies.

<sup>42</sup> At one time this was thought to be the position in Mexico but that view was later rejected: see Ryan, “The Reception of the Trust,” 272-3.

<sup>43</sup> While the settlor may be a beneficiary (art. 43), there is no provision allowing him to be trustee.

<sup>44</sup> Other than an obligation, under art. 15, to differentiate it from the settlor’s other property.

entitled to possess, utilise, seek profits from and dispose of the realty or chattel in accordance with law”.<sup>45</sup> Doubtless the trust contract may often restrict the settlor’s acts, whether expressly or by necessary implication. But even where this is done, such restrictions operate only at the level of obligation and do not invalidate juridical acts.<sup>46</sup> Suppose for example that, in breach of a term of the trust contract, the settlor transfers trust property to a third party. If such a wrongful transfer had been carried out by the trustee, redress would be available under article 22 of the Trust Law which, with some qualifications, provides for the return of the property. There is no equivalent provision in respect of a transfer by the settlor.<sup>47</sup>

Leaving title with the settlor is unsatisfactory in another way as well. A trust is not terminated, article 52 provides, by the death or incapacity of the settlor or trustee. A trustee who dies can of course be replaced: the mechanisms are set out in article 40. But if a settlor dies, no provision is made for replacement. This hardly matters where the property is already with the trustee. But if the settlor still owns, it is not clear what is to happen to the property. It does not fall to the settlor’s heirs: article 15 so provides. Nor, apparently, is there any entitlement on the part of the trustee, or indeed any mechanism for effecting a transfer. The result seems to leave the trust assets in a sort of legal limbo.

Of course, it would be possible to amend the Trust Law in order to meet these points.<sup>48</sup> But allowing for title in the settlor is always likely to be just on the edge of what is possible for a trust and to require technical virtuosity if it is to succeed. Whether it is worth the effort, and the inevitable complexity, seems open to question. On the other hand, the result is at any rate a trust and not merely the contract of agency or mandate which it can sometimes seem to resemble.<sup>49</sup> In particular, no mere contract could explain the immunity from personal creditors. Opinion is, however, divided as to whether it is a trust within the Hague Trusts Convention.<sup>50</sup> The relevant definition, in article 2, requires that “title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee”. Can it be said that the settlor holds on behalf of the trustee? Intuitively, this feels the wrong way round:

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<sup>45</sup> I use the translation available at <http://www.asianlii.org/cn/legis/cen/laws/rrlotproc379/>, accessed February 13, 2011.

<sup>46</sup> Even the element of obligation may perhaps be questioned, because there is no equivalent for the settlor of the requirement in art. 25 that the “trustee shall abide by the provisions in the trust documents”.

<sup>47</sup> I am not qualified so say whether there might be a remedy against the third party under the general law.

<sup>48</sup> Some suggestions for amendment are made by Ho, *Trust Law in China*, 71-2.

<sup>49</sup> See Lee, “Conceptualizing the Chinese Trust,” 659-63 for a discussion of some of the issues.

<sup>50</sup> Ho, *Trust Law in China*, 41-2; Lee, “Conceptualizing the Chinese Trust,” 662.

at least when the trust is being set up, it is the trustee who holds for the settlor, and must do the settlor's bidding, and not the other way around. Yet once the trust is established the position may be different. While the settlor owns, it is the trustee who is entitled to administer or dispose of the property.<sup>51</sup> And it seems arguable that, for that purpose at least, the settlor can be said to hold on behalf of the trustee.

## C. IMMUNITY FROM PRIVATE CREDITORS

### (1) The nature of the problem

Article 34 of the Trust Law provides, uncontroversially enough, that: "The trustee shall have the obligation to pay the beneficiary benefits from the trust with the limits of the trust property". The beneficiary, however, is unlikely to be the trustee's only creditor. Not only do most trustees have private creditors, that is to say, creditors in respect of debts incurred in their private life, but a trustee may also incur liability while acting as such—for example, liability under a contract of purchase or in respect of services. What happens if all three types of creditor—beneficiaries, private creditors and trust creditors—lay claim to the trust property? Which claim is preferred? The answer is to be found in article 17. Compulsory measures against trust property—whether owned by the settlor or trustee—may only be taken in four narrow circumstances. Only the second is of importance: "where the creditors demand repayment of the debts incurred by the trustee in the course of handling trust business". Trust creditors, in other words, are entitled to be paid from the trust property. So too are trust beneficiaries, although their claim under article 34 is apparently postponed to that of the trust creditors.<sup>52</sup> Private creditors get nothing, or at least nothing from the trust property.<sup>53</sup> As a matter of legal policy, of course, the rule could hardly be otherwise, for if private creditors could attach trust property, no one would set up a trust. Without the rule, in other words, trusts would be pointless; yet with it they are barely explicable, at least to the civil lawyer. For if the trust property is owned by the trustee (or, as the case may be, by the settlor), and

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<sup>51</sup> Trust Law, art. 2.

<sup>52</sup> In the event of the trustee's failure to perform, a beneficiary is presumably also able to take compulsory measures against the trust property, although this is not explicitly stated. Perhaps this falls within the fourth case mentioned in art. 17 ("other circumstances prescribed by law").

<sup>53</sup> The position is of course the same in the event that the owner of the trust property becomes insolvent: see arts. 15 and 16.

owned in the full civilian sense,<sup>54</sup> why should it not be capable of attachment by that owner's creditors? The Trust Law gives the rule but not the reason. Yet reasons matter. Until we can explain creditor immunity we will know very little about the nature of the Chinese trust.

In this section I explore possible explanations for what remains the central mystery of the civil law trust.<sup>55</sup> For convenience of exposition, I will assume a trust in which the trustee is owner, but much the same considerations arise in cases where title remains with the settlor.

## **(2) Personal right**

A common way of expressing the issue—although not, as we will see, the only way<sup>56</sup>—is to ask why it is that the right of the beneficiary prevails over the right of private creditors. Why does the beneficiary get paid from the trust assets while the private creditors do not? The answer, it seems, must lie in the very nature of the beneficiary's right. In a civil law system, such as China's, patrimonial rights must usually be either personal or real, for the distinction between real and personal rights—between property and obligations<sup>57</sup>—is fundamental to the civil law. And from this it must follow that the right of a trust beneficiary is either personal or it is real. I begin with the former possibility.

Article 34 is suggestive of a personal right in the beneficiary, correlative to the trustee's obligation to pay for which the article provides. But if that is correct, it cannot, at least by itself,<sup>58</sup> explain the beneficiary's preference. For the private creditors, too, have personal rights against the trustee, and it is axiomatic that with unsecured creditors there is *paritas creditorum*, that all personal claims rank equally.

## **(3) Real right**

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<sup>54</sup> As opposed to the rather notional legal ownership of the common law trust, discussed at C.(4) below.

<sup>55</sup> By contrast, there is no particular mystery about the limited protection given to beneficiaries against third parties, effected in China by art. 22 of the Trust Law. Civil law systems have no difficulty in visiting on third parties responsibility for being complicit in the breach of personal rights. See e.g. DCFR, VIII.—2:301. This does not elevate the personal right into a right which is real or quasi-real.

<sup>56</sup> See D. below.

<sup>57</sup> Or between owning and owing as it is sometimes expressed.

<sup>58</sup> Later it will be explained why a personal right provides a sufficient explanation in conjunction with something else: see C.(4) below.



If the personal rights of private creditors cannot be defeated by another personal right, they can of course be defeated by a real right. Might the beneficiary's right be real? One commentator on the Chinese trust has suggested as much: "The beneficial interest of a beneficiary over the trust property is a right in rem, which can be asserted against the whole world".<sup>59</sup>

If the right is to be real, the first step is to consider what type of real right it might be. "The varieties and contents of real rights", says article 5 of the 2007 Property Law, "shall be prescribed by law", and of the real rights mentioned in the Property Law itself the most promising is right in security.<sup>60</sup> Alternatively, a real right *sui generis* might have been created by the Trust Law, if not expressly—for the Law is silent—then at least by necessary implication. Thus if a real right needs to be found, then no doubt this can be done, for there is nothing in the *numerus clausus* principle, expressed by article 5 of the Property Law, which prevents the creation of new real rights by legislation.

But there is a difficulty of a different kind. Far from being stable, the assets held in trust are likely to change over time as the trustee changes investments or buys and sells assets. And by article 14 of the Trust Law, incorporating the principle of real subrogation, "the property obtained by the trustee through administering, using or disposing of the trust property or by other means falls within trust assets". So if the trustee sells asset *x*, two things happen: first, asset *x* ceases to be trust property and, second, the proceeds of sale become trust property in its place. If the proceeds are then used to buy something else—asset *y*—then asset *y* becomes trust property in place of the proceeds of asset *x*. In the course of time most or all of the original assets may come to be replaced. This standard feature of trusts is incompatible with the idea of the beneficiary having a real right. For a real right is a right in a specific thing and not in a revolving fund: it is, as article 2 of the Property Law puts it, "the exclusive right of direct control over a specific *res*", and it continues to attach to that *res* regardless of change of ownership. If the beneficiary's right were real, it would attach to asset *x* and not to its replacement, asset *y*—it would, in other words, come to be a real right in the "wrong" asset. It follows that real right too must be rejected as an explanation of the beneficiary's preference.<sup>61</sup>

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<sup>59</sup> Qu, "Doctrinal Basis of the Trust Principles," 373.

<sup>60</sup> For which see part IV of the Property Law.

<sup>61</sup> For other objections to real right, see Gretton, "Trusts without Equity," 605-07.

#### (4) In-between right

The solution of the common law is to give the beneficiary a right which, while sometimes called “proprietary” or “*in rem*”, does not carry all the features of the civilian real right. In civilian terms it is thus a kind of in-between right, neither wholly real nor wholly personal. Importantly, and like other rights founded in equity, it prevails against creditors (although not against acquirers in good faith) and thus provides a neat doctrinal explanation for the immunity of trust property. One way of expressing the result is to say that the equitable right strips the trustee’s ownership of the beneficial quality which is needed if private creditors are to have rights of attachment.

This explanation, or something like it, is an obvious temptation for commentators on the Chinese trust. For Lusina Ho, for example, the beneficiary has “a *sui generis* right” which “has features of a real right, such as enforceability against the trustee’s creditors, successors and some transferees”.<sup>62</sup> Rebecca Lee goes further, offering a theory of her own invention.<sup>63</sup> In a trust, she says, the classical incidents of ownership, famously enumerated by Tony Honoré,<sup>64</sup> are not held by any single person, for if the trustee has the right of management, the beneficiary has the right of enjoyment. And that right of enjoyment is or at least includes the “exclusionary” right provided for by article 16 of the Trust Law, that is to say, the right to exclude trust property from the claims of private creditors. “Despite the fact that the beneficiary holds only one incident of ownership”, Professor Lee continues, “this does not prevent him from being recognized as the owner where appropriate”. “Thus”, she concludes, “it is not the patrimonial theory,<sup>65</sup> but this right of exclusion which explains the doctrinal requirement of keeping trust assets separate from the inherent property of the trustee so that they are immune from the claims of third parties, and which constitutes the beneficiary’s core proprietary rights under the trust”. The beneficiary’s “form of (property) ownership right”, however, is not a “right over the property in a trust” but an indirect right only, “a right in the right of the trustees in relation to the trust property”.

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<sup>62</sup> Ho, *Trust Law in China*, 177.

<sup>63</sup> Lee, “Conceptualizing the Chinese Trust,” 663-8.

<sup>64</sup> T Honoré, *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon, 1987), ch. 8.

<sup>65</sup> Discussed at D. below.

Professor Lee's analysis raises some intriguing questions. If a beneficiary is owner because he has a right of enjoyment, must the same not be true of someone who hires a car or borrows a book? Or again, is it possible to be "owner" and yet have no right "over the property"? And what is the nature of a right in a right, and does the law recognise other such rights?<sup>66</sup> Despite the fusillade of ideas, however, this analysis at bottom looks rather like the equitable right of English law. In any event it is profoundly uncivilian. To adopt it for the Chinese trust should be a last resort.

### **(5) Asking the wrong question**

There is also a more fundamental objection. Even if they were otherwise meritorious, all explanations considered so far would have to be discarded for one simple reason. By concentrating on the beneficiary they ask the wrong question. The point is easily demonstrated. In part the problem is that trusts can sometimes be without beneficiaries; yet, even where they are—as in a purpose trust—the trustee's private creditors are still denied the trust property. Any theory of trusts needs to be able to explain why. More importantly, the beneficiary is not the only creditor to be preferred to the private creditors of the trustee for, as previously mentioned,<sup>67</sup> the same is true of those who deal with the trustee in his capacity as such. Here the civil law parts company with the common law. In the common law a trust creditor cannot usually lay claim to the trust property. Instead the claim must be mediated through the trustee and, if necessary, through the trustee's private property. So far as the trust property is concerned a trust creditor is in much the same position as a private creditor.<sup>68</sup> But in many civil law trusts the trust property is directly available to the trust creditor. Like the beneficiary, therefore, the trust creditor is preferred to the private creditor.<sup>69</sup> So far as China is concerned, this is provided for by article 17 of the Trust Law. How is this preference to be explained? Does a plumber who fixes pipes in the trust premises have a real right in those premises, or perhaps an in-between right analogous to an equitable right? Of course not: he has a personal, contractual right and nothing more. The preference of trust creditors, and

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<sup>66</sup> The idea derives from Smith, "Trust and Patrimony," 344, where the context is the nature of the beneficiary's right in common law trusts.

<sup>67</sup> See C.(1) above.

<sup>68</sup> See e.g. Smith, "Trust and Patrimony," 338-42.

<sup>69</sup> Note that in certain circumstances the trustee is also a trust creditor, e.g. in respect of the right to reimbursement for paying other trust creditors conferred by art. 37 of the Trust Law.

therefore of beneficiaries too, must be explained in some other way. That way is the idea of the dual patrimony.

## D. THE DUAL PATRIMONY

### (1) From separation of assets to separation of liabilities

It is trite that in a trust there is a separation or segregation of assets. For example, the very first of the qualities required of a trust under article 2 of the Hague Trusts Convention is that “the assets constitute a separate fund and are not a part of the trustee's own estate”.<sup>70</sup> This description is one that any common lawyer would recognise and accept. But a civil lawyer, at least, must go further. The reason why some creditors can claim against the trust fund and some cannot is that there is a separation, not merely of assets, but of liabilities as well. There is, in other words, a separation of patrimonies.

### (2) Separation of patrimonies

The idea of patrimony is not a new idea but a very old one, traceable back to Roman law and a familiar presence in the civil law tradition.<sup>71</sup> That it might usefully be applied to trusts is, however, an idea of the 1930s and of the French jurist, Pierre Lepaulle.<sup>72</sup> A patrimony is the totality of a person's assets and liabilities and, in the ordinary case at least, a person has only a single patrimony. But there can also sometimes be special patrimonies, in which case a person holds both his own general or private patrimony and at the same time a special patrimony dedicated to some specific purpose. Lepaulle's insight was that, although patrimony was unknown to the common law, the trust could nonetheless be explained as a special patrimony, as a *patrimoine d'affectation*. As an explanation of the common law trust, Lepaulle's views have been found wanting,<sup>73</sup> for reasons which need not detain us here, but

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<sup>70</sup> See also art. 11 (“the trust property constitutes a separate fund”).

<sup>71</sup> Gretton, “Trusts without Equity,” 608-09.

<sup>72</sup> Pierre Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscale international* (Paris: Rousseau et Cie, 1932).

<sup>73</sup> Smith, “Trust and Patrimony,” 334 ff.

they have influenced the development of trusts in civil law jurisdictions in Latin America<sup>74</sup> and also in Québec where, according to the Civil Code (1991), the trust patrimony is an ownerless *patrimoine d'affectation*.<sup>75</sup> More recently, the idea of patrimony has been taken up again and further developed by a number of trusts scholars.<sup>76</sup> In its newly elaborated form the theory of special patrimony offers, perhaps for the first time, a thoroughly convincing explanation for creditor immunity and for much else besides.

Like many good theories it can be simply expounded. In the ordinary case there is unity of patrimony, the rule being one person one patrimony. But a person who is a trustee holds the trust assets and liabilities in a patrimony which is distinct from the person's own, private patrimony. In this way there is segregation not only of assets—a standard view, as already mentioned—but of liabilities as well. Each patrimony thus has its own creditors, for only private creditors may claim from the private patrimony and only trust creditors—who include beneficiaries—from the trust patrimony. So a person who lends money to the trust must seek recovery from the trust patrimony while a person who lends money to the trustee as a private individual must claim from the private patrimony. And beneficiaries defeat private creditors not because they have a right which is real or quasi-real but because they have a right in a different patrimony. The preference, however, is even-handed, for in the same way that private creditors have no claim in respect of the trust patrimony, so beneficiaries and other trust creditors have no claim in respect of the private patrimony.<sup>77</sup> Further, to talk of “preference” is misleading: it is not that the trust creditors are “preferred” to the private creditors in respect of the trust patrimony, it is that the private creditors have no claim on that patrimony at all.<sup>78</sup> If there is a surplus in the trust patrimony it is returned to the settlor, not used to pay the private bills of the trustee.<sup>79</sup> In other respects, too, the patrimonies operate independently from each. If, for example, an asset is sold or exchanged, the proceeds of sale or exchange are allocated to the patrimony from which the asset was taken. Or again, the bankruptcy of one patrimony has no effect on the solvency of the other.

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<sup>74</sup> Malumian, *Trusts in Latin America*, 20-22; Roberto Molina Pasquel, “The Mexican Fideicomiso: The Reception, Evolution and Present Status of the Common Law Trust in a Civil Law Country,” *Columbia Journal of Transnational Law* 8 (1969): 54 at 62-7.

<sup>75</sup> Québec Civil Code, art. 1261.

<sup>76</sup> Particularly in Scotland: see Gretton, “Trusts without Equity”; Kenneth G. C. Reid, “Patrimony Not Equity: the Trust in Scotland,” *European Review of Private Law* 8 (2000): 427 (= *Trusts in Mixed Legal Systems*, ed. Milo and Smits, 19).

<sup>77</sup> But the same person might be both a trust and a private creditor. In respect of different debts the point is obvious. But in some jurisdictions it can also be true in respect of the same debt. See D.(3) below.

<sup>78</sup> For China, see Trust Law, art. 16 (“the trust property shall not be deemed his legacy or liquidation property”).

<sup>79</sup> Trust Law, arts. 54 and 55.

In Europe the revised theory has been quickly taken up. Even as early as the Principles of European Law in 1999, patrimony was already a shadowy presence although the emphasis was mainly and conventionally on the separation of assets.<sup>80</sup> But by 2009, when the draft Directive on Protected Funds was produced by a successor group, it had become the central organising principle. Article 3 provides that:<sup>81</sup>

The assets of a protected fund form a patrimony separate from the private patrimony of the person who is administrator<sup>82</sup> and from the patrimony of any other protected fund held by that person.

Article 3 continues by explaining the consequences:<sup>83</sup>

Accordingly a creditor has no claim against –

- (a) the patrimony of a protected fund in respect of a private debt of its administrator;
- (b) the private patrimony of the administrator in respect of a debt of a protected fund.

The publication of the Draft Common Frame of Reference was so close to that of the draft Directive that it is improbable that there was mutual influence. Yet it too is based on the idea of dual patrimony, in language which is often close to that of the draft Directive. Thus the trust fund is said to be “a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee”, from which it follows that “the personal creditors of the trustee may not have recourse to the trust fund, whether by execution or by means of insolvency proceedings”.<sup>84</sup>

Finally, in a paper which appeared in 2006 the Scottish Law Commission, too, adopted the dual patrimony theory as a suggested basis for the reform of the law in Scotland. Hitherto the

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<sup>80</sup> Principles of European Trust Law, arts. I(1), (3) and III(3). A full account of the patrimony theory can be found in Kenneth G. C. Reid, “National Report for Scotland,” in *Principles of European Trust Law*, ed. Hayton et al., 68-9.

<sup>81</sup> Draft EU Directive on Protected Funds, art. 3.2.

<sup>82</sup> I.e. trustee.

<sup>83</sup> Draft EU Directive on Protected Funds, art. 3.3.

<sup>84</sup> DCFR, X.—1:202. For commentary including an example, see DCFR, Full Edition, vol. 6, 5686-8. Trust creditors have a right of direct recourse to the trust fund: see X.—10:202.

Scottish trust, like the Chinese, had been under-conceptualised. “There is little doubt”, the Law Commission wrote, “that the dual patrimony theory provides a convincing and satisfying explanation of the nature of a trust in Scots law”.<sup>85</sup> “However”, the Commission continued:<sup>86</sup>

there appears to be no direct judicial authority that the dual patrimony theory should be used to explain the nature of a trust in Scots law. And it may be many years before the courts have an opportunity to consider the issue. In these circumstances, it is our provisional view that the dual patrimony theory should be put into statutory form. It would then be clear that the principle underpins the trust in Scots law. This would bring a greater degree of coherence to the existing rules of trust law. It should also ensure that any future judicial or legislative developments should, in the first place at least, be consistent with the dual patrimony theory with the result that the law would evolve in a more rational way than in the past.

### **(3) Dual patrimony and the Chinese trust**

The dual patrimony theory has reached Chinese shores.<sup>87</sup> In a paper published in 2009 Rebecca Lee considers the theory at some length before rejecting it in the Chinese context.<sup>88</sup> Her views should not be allowed to go unchallenged. They are based on three main grounds. First, there is nothing in the Chinese Trust Law of 2001 to support the dual patrimony theory, whether expressly or by necessary implication. Secondly, “if the trust patrimony is owned by no one, it will, as a matter of law, fall to the State as *bona vacantia*, a consequence which does not seem to be contemplated by the Chinese Trust”. Thirdly, “Lepaulle’s theory has recently come under strong criticism by Professor Lionel Smith”.<sup>89</sup>

In relation to the first ground, it is certainly true that dual patrimony is nowhere mentioned in the Chinese Trust Law. If it were, all would be clear and the need for a conceptual inquiry could be abandoned right away. It is precisely because the Trust Law is so reticent as to its conceptual basis that further inquiry is needed.

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<sup>85</sup> Scottish Law Commission, *Nature and Constitution of Trusts*, para. 2.25.

<sup>86</sup> Para. 2.26.

<sup>87</sup> Patrimony makes a brief appearance in Ho, *Trust Law in China*, 179, which was published in 2003, before any of the European initiatives described above.

<sup>88</sup> Lee, “Conceptualizing the Chinese Trust,” 657-9.

<sup>89</sup> See Smith, “Trust and Patrimony”.

The second ground proceeds on a version of the theory which has been superseded by more recent scholarship. Only Québec has followed Lepaulle to the point of creating an ownerless trust patrimony. The modern European view is that the trustee owns both patrimonies.<sup>90</sup> And in a case where the trust property remains with the settlor—as will sometimes happen in China—it would be the settlor who had a dual patrimony.

The third ground is again based on Lepaulle's original theory. But in any event, Professor Smith's criticisms are of Lepaulle's theory as an explanation of the *common law* trust where, in Smith's view, dual patrimony is excluded by the fact that liabilities are not segregated. Far from being opposed to dual patrimony as an explanation of the *civil law* trust, Professor Smith expressly endorses it in the case of the civil law trust in Scotland and commends that solution to the attention of lawyers in Québec.<sup>91</sup>

Professor Lee concludes with three cases which, she says, the dual patrimony theory has difficulty in explaining. In fact, none seems at all difficult. The first—"where the trustee may incur personal liability for trust debts"—does not arise in China, at least where the trustee is acting within trust powers.<sup>92</sup> Article 37 is clear that "The charges paid and the debts owed to a third party by the trustee in the course of handling trust business shall be borne by the trust property". But even if it did arise, as it does in certain situations under both the draft Directive on Protected Funds and the DCFR,<sup>93</sup> the effect is simply to make the debt a private liability as well as a trust liability. Classification of liabilities is also the explanation for Professor Lee's second case: "where the beneficiary may hold the trustee personally liable for breach of trust". A trustee in breach of trust must pay out of the private patrimony and not the trust patrimony.<sup>94</sup> In other words, the obligation is a private debt and not a trust debt. That it should be payable out of one patrimony and not the other is an exemplification of dual patrimony rather than a denial of it. Professor Lee's final case—"where there is mixing of trust assets and assets of the trustees"—refers to the merely practical question of identifying assets and has no bearing on the existence or non-existence of separate patrimonies. In China a trustee who mixed assets would be in breach of articles 16 and 29.

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<sup>90</sup> That is shorthand: strictly what is owned is the content of the patrimonies.

<sup>91</sup> Smith, "Trust and Patrimony," 338, 350-4.

<sup>92</sup> Where the trustee acts beyond his powers, art. 37 imposes personal liability.

<sup>93</sup> Draft EU Directive on Protected Funds, art. 10.1; DCFR, X—10:201.

<sup>94</sup> See Trust Law, arts. 26-28.



I hope that scholars of the Chinese trust will consider this issue afresh in the light of the recent developments in Europe. Today the theory of dual patrimony is recognised as a powerful and convincing explanation of the personal and proprietary relationships which make up the civil law trust. It would be a pity if China were to be denied this conceptual awakening.