Trusts in the World without Equity

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Introduction

As well known, Dr. SHINOMIYA, Kazuo's argument, "the trust system is quite characteristic of common law system, and therefore, when civil law jurisdictions introduce trust system, it is bound to be heterogeneous as if 'oil floating on water'"[1] has almost become a dogma (hereinafter referred to as "SHINOMIYA's Dogma") that has continuously spellbound many scholars and SHINOMIYA's Dogma has been repeatedly mentioned in their theses on law of trust[2] .

On the other hand, Professor Dogauchi challenges SHINOMIYA's Dogma by arguing that "As long as we consider law of trust as a sort of private law, we must not think that law of trust is something different from other legal system including contracts and legal persons based on civil law system[3].".

Without doubt, SHINOMIYA's Dogma has taken on a life of its own. We must rethink about whether a trust can really be explained only by common law system and if so, which features of trust are contradicted with private law system in civil law jurisdictions.

Of course, the awareness of this issue is shared by many civil law jurisdictions in the process of their struggles in order to introduce trust.

Law of trust was produced in common law system which distinguishes legal (common law) right from equitable right, and "though the English do not lay exclusive claim to having discovered God, they do claim to have invented the trust with two natures in one[4]".

Preamble of Hague Trust Convention stipulates:

"the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique institution"

1　SHINOMIYA, Kazuo, LAW OF TRUST (new ed.), Introduction (Yuhikaku, 1989)

2　For instance, KANSAKU, Hiroyuki "Principles of European Trust Law and Independence of Trust Property" BASIC RULES OF EUROPEAN TRUST LAW (ARAI, Makoto ed. Yuhikaku, 2003), p59.

3　DOGAUCHI, HIroto TRUST SYSTEM AND PRIVATE LAW SYSTEM (Yihikaku, 1996) p3.

4　T.B.Smith, International Encyclopedia of Comparative Law Vol.VI, chap.2, para.262.

In addition, the Priviy Council has said that "the distinction between the legal and the equitable estate is of the essence of the trust[5]."

In short, the argument that a trust can only be explained in the context of common law system which distinguishes legal (common law) right enjoyed by a trustee from equitable right owned by a beneficiary has long spellbound civil law jurisdictions as if a sort of religion.

I have become aware of this issue in comparative studies on Chinese trust law[6].

One of the most important features of Chinese trust law[7] is that it does not require any transfer of ownership of trust property (Article 2 "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 "(Emphasis is supplied by the author)).

However, both common law and civil law jurisdictions share the understanding that the transfer of property is an essential factor to create a trust. Not only England and the U.S. trust law but also Principles of European Trust Law take it for granted to transfer a trust property to a trustee. Chinese trust law is quite unique in this context.

Like Chinese trust law, trust law of Quebec does not require any transfer of ownership of trust property, either. This is considered as one of the mixture phenomena of French Civil Code and common law produced by the history of transfer from French territory to English territory in 1763[8]. In other words, the fact that although a property is transferred to a trustee, it does not constitute the trustee's patrimony cannot be well explained by civil law system that does not distinguish legal from equitable right like common law system. Therefore, Quebec trust law has established the principle that a property constitutes an independent patrimony that does not belong to anyone including the trustee, the settlor and the beneficiary.

Professor Nohmi calls such kind of trust including China and Quebec "Quebec –type Trust" and compares it with common law trust and Japanese trust, all of which require a property to be

5 Abdul Hameed Sitti Kadija v. De Saram [1946] 208 (Ceylon) at 217. (Privy Council, quoting with approval R. W. Lee, Introduction to Roman-Dutch Law (3rd ed, 1931), p372)

6 For details, please see SESE, Atsuko, "Comparative Studies on Chinese Trust Law – in Comparison with Japan, England and the U.S. Trust Law- " COMPARATIVE STUDIES ON PRIVATE LAWS IN CHINA –INTERNATIONAL IMPLICATIONS OF CONTRACTS, CORPORATSIONS, TRUST LAW and INVESTMENT LAW- (Koyo Shobo, 2010).

7 After the Promulgation of the first draft of the Committee for the Drafting Trust Law in 1994, approximately 7-year lengthy drafting Process was needed for the National People's Congress (NPC) Standing Committee to enact Trust Law of the PRC on the 28th of APril, 2001.

8 NOHMI, Yoshihisa "French Civil Code in Quebec" 200 YEARS OF FRENCH CIVIL CODE (KITAMURA, Ichiro ed. Yuhikaku, 2006) p93.

transferred to the trustee[9].

"Quebec –type Trust" reminds us of the fact that civil law jurisdictions have difficulties when they introduce trust system and each of those jurisdictions make some arrangement to solve the problems in different ways.

Therefore, in this thesis, I try to analyse how such civil law jurisdictions as China, Quebec, Japan , France, Germany and Scotland have made arrangement to adjust trust system with their civil law system.

First, I will solve the problem whether a trust really can be explained by common law system and be contradicted with civil law system without any special arrangement.

Second, which features of a trust is contradicted with civil law system must be clarified.

Third, whether common law system can consistently explain such features must be analysed.

Forth, how civil law jurisdictions have made arrangement to adapt trust to their own civil law systems must be explained.

I Why "Oil Floating on Water"

1. Roman Trust and Common Law Trust

First of all, SHINOMIYA's Dogma that suggests the exclusive origin of trust is common law system is not correct.

According to Professor Shichinohe[10], trust has been originated from two developmental lineages, which are "Salmann "of German law and "Fiducia" of Roman law. The former has developed into "Treuhand" in Germany on the one hand and others have been a trust in English law that is one of German laws through "use" after 15th century.

In addition, YAMADA[11] says, in comparison of Roman trust (Fiducie) with common law trust,

9 See the above note 8, p108. Although this book was published before the amendment to Japanese Trust Act, the amended Japanese Trust Act also requires a trust Property to be transferred to the trustee. As draft persons explain (TERAMOTO, Masahiro COMMENTARY FOR THE NEW TRUST CODE (Revised) (Shoji-Homu, 2008), p33) the reason why the amended Article 2 does not use the word "transfer" is to take into consideration of newly recognised declaration of trust. 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 trust contract. Japanese Trust Act is apparently different from China and Quebec law in terms of the necessity of transfer of Property.

10 SHICHINOHE, Katsuhiko "Trust in the Trust Code, or Trust-like Legal Relationship", *Hogaku Kenkyu* 82-1, (2009) p724.

11 YAMADA, Nozomi "Basic Structure of French Trust Law", *Hose-Ronshu* 227, (2008) pp600-601.

that (i)Although a trust itself is not used as a collateral, Fiducie can be used as a collateral[12]; (ii) Fiducie does not recognise declaration of trust; (iii)In Fiducie trust assets are comingled with the trustee's own assets.

According to Klingenberg[13], there are two types of trust in Roman law which are A: a trust contract executed with a friend: a transfer of property to a reliable person for the purpose stipulated in the trust contract[14]; B: a trust contract executed with creditor: a transfer of property as a collateral. In the case of B, the trustee becomes the owner of the property who can transfer that to the third party even before the due date. In such a case, the settlor has no claim based on right in rem, but has only action fiduciae.

In other words, features of Roman trust are (i)the ownership of the property is transferred to the trustee; (ii) trust assets are commingled with the trustees own assets; (iii)the beneficiary has merely right in personam against the breach of trust by the trustee.

On the other hand, common law trust shares the features of (i) with Roman trust, however, is different in accordance with (ii) and (iii). In relation with (ii), trust assets are independent from the trustee's own assets; (iii) the beneficiary has a stronger right that can be claimable to some extent of the third party (whether such a right can be called as real right will be explained later).

As SHINOMIYA's Dogma refers to common law trust, hereinafter, common law trust shall principally be analysed afterward.

2. Logical Foundation of Common Law Trust

(1) Explanation by Equity System

The features of common law trust are as follows:

α A trustee has ownership of trust assets.

β Trust assets are independent from the trustee's personal property.

γ A beneficiary's right is something more than right in personam.

SHINOMIYA's Dogma assumes that in civilian world without equity α is not compatible with β and α is not compatible with γ, either.

However, why in accordance with common law trust, is α compatible with and β, and are α and γ consistent?

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12 Even in so-called security trust, a trust is used in order to administer the other person (beneficiary)'s collateral and the trustee shall never be a sole beneficiary but shall merely a administrator.

13 Georg Klingenberg, Romanisches Sachenrecht (translated by TAKIZAWA, Eiji, Digaku-Kyoiku-Shuppan, 2007) pp102-103.

14 This type of trust can be explained by the fact that Fiducie was mentioned as ancient as in the adaptation of Greek tragedies in Roman era. (TANGE, Kazuhiko MEDITERRIAN SEA OF TRAVELS (Kyoto University Press, 2007) pp152-177.)

It is based on the historical background of England that equity system has been developed since middle age as a completely different legal system from common law system.

Personal trust law developed in England at the era of the Crusades, during the 12th and the 13th centuries. In that era, land ownership in England was based on the feudal system. When a landowner left England to participate in the Crusades, he needed someone to run his estate in his absence, often to pay and receive feudal dues. To achieve this, he would convey ownership of his lands to an acquaintance, on the understanding that the ownership would be conveyed back on his return. However, Crusaders would often return to find the legal owners' refusal to hand over the assets.

Unfortunately for the Crusader, English common law did not recognise his claim. As far as the King's courts were concerned, the land belonged to the trustee, who was under no obligation to return it. The Crusader had no legal claim. The disgruntled Crusader would then petition the King, who would refer the matter to his Lord Chancellor. The Lord Chancellor could do what was "just" and "equitable", and had the power to decide a case according to his conscience. At this time, the principle of equity was born.

The Lord Chancellor would consider it "unconscionable" that the legal owner could go back on his word and deny the claims of the Crusader (the "true" owner). Therefore, he would find in favor of the returning Crusader. Over time, it became known that the Lord Chancellor's court (the Court of Chancery) would continually recognise the claim of a returning Crusader. The legal owner would hold the land for the benefit of the original owner, and would be compelled to convey it back to him when requested. The Crusader was the "beneficiary" and the acquaintance was the "trustee". The term "use of land" was coined, and in time developed into what we now know as a trust.

In short, a party who had substantial rights on the questioned assets but without title brought a case to the Lord Chancellor who found the party to be equitable owner (beneficiary) and found the person with legal title to be a trustee. This is the very origin of trust system. Such kinds of cases have been accumulated into an equity law system which has been considered as important as common law (legal) system. Until the unification of two types of courts by Supreme Court of Judicature Acts 1873 and 1875 in the 19th century, court system had been separated into common law courts and equity courts.

Even after the unification, classification of common law and equity still exists. In terms of substantive law, the relationship between a trustee and a beneficiary[15], called as fiduciary relationship have been applied to many legal relationship including parents and fed children[16] or a

15 Thomson v. Eastwood [1877] 2 App. Cas. 215.

16 Bullock v. Lloyds Bank [1995] Ch. 317.

solicitor and her client.[17] In addition, the relationship between directors and shareholders has been considered as fiduciary relationship in Japanese corporate law even before the amendment of 2006 like the U.S. corporate law. Moreover, undue influence and unconscionability in the U.S. contract law are based on equity. In terms of procedural law, in the U.S. law, restitution and specific performance are considered as equitable remedies which are strictly distinguished from damage compensation as common law remedies. The former is an expletive remedy subordinated to the latter (though this rule has been modified by the amended UCC in 2003). For this reason, CISG Article 28 stipulates that "If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention"[18].

In traditional equity system, while the trustee has a common law (legal) ownership, the beneficiary has equitable ownership. In other words, the rights on trust assets separately belong to two different persons. The argument that such separation of ownership which is characteristic of common law system makes the above-mentioned compatibility of α with β, and α with γ legally consistent, therefore, civil law jurisdictions which has no equity system never be able to consistently explain α and β, and α and γ has been dominant.

(2) The Compatibility of α with γ - Legal Features of Beneficial right-

Can only the fact that beneficial right is an equitable right make α compatible with γ ?

HOSHINO[19] classifies arguments in England and the U.S. on legal features of beneficial rights as follows:

A: Dual Ownership Theory

This theory had been dominant until the 19th century in England. This is straightforward interpretation of familiarity of trust and common law system.

However, this theory emphasises the fact that trust is enforced by equity courts more than dual ownership.

B: Right in Personam Theory

F.W. Maitland explains that beneficial right has become closely resembling a real right proceeding in the following historical steps[20]:

At the initial stage, the beneficiary only has an in presonam remedy in equity against the trustee:

17 Wright v. Carter [1903] 1 Ch. 27

18 Please see the Chapter II of Note 6.

19 HOSHINO, Yutaka, THE ESTABLISHMENT AND APPLICATION OF TRUST LAW THEORIES (Shinzansha 2004) pp171-182.

20 F.W. Maitland, EQUITY: A COURSE OF LECTURES, REVISED BY BRUNYATE, J (Cambridge University Press, 1936), pp112-114.

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 assets 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 beneficial 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.

C: Right in Rem Theory (England)

A beneficial right is a substantial ownership. The trustee has merely a formal ownership and therefore, disposition of trust assets as a breach of trust is out of entrusted power and void. The beneficiary can make a claim against the transferee based on the substantial ownership. However, bona fide third party is protected because the trustee is a formal owner.

In other words, the rights of the beneficiary merely are reflections of the protection of the transferee.

D: Right in Rem Theory (the U.S.A.[21])

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

Concerning the issue (a), currently, the Right in Rem Theory that beneficial 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 beneficial right, or whether beneficial 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 beneficial right depend on what a trust assets is. In other words, in principle, if a trust assets is movable asset, beneficial right is personal assets whereas if a trust assets is real estate, beneficial right is real assets.

As above mentioned, the arguments on the legal features of beneficial rights are slightly different in England and the U.S. A. The way to explain the compatibility of α with γ is different. In addition, the separation of ownership on trust assets is merely one of the possible interpretations.

21 HIGUCHI, Norio, NOTES ON THE U.S. TRUST LAW (Kobundo, 2000) p138.

In conclusion, equity system alone cannot fully explain the relationship between α and γ. More persuasive foundation can be led by the legal features of beneficial rights that are not characteristic only of common law system but somehow similar to those of civil law jurisdiction as explained later.

(3) The Compatibility of α with β – the Independence of Trust Assets-

The separation of ownership on trust assets is not sufficiently persuasive regarding the compatibility of α with β, either. It can merely lead to the conclusion that while the trustee has both common law right and equitable right on her own assets, she has merely equitable right on trust assets, therefore, those properties must be independent from each other.

(4) Conclusion

Regarding the compatibility of α with γ, common law system can never be the exclusive explanation, and in terms of the compatibility of α with β, common law system is not sufficiently persuasive.

3. The Relationship with Private Law in Civil Law Jurisdictions

Which features or principles of private law in civil law jurisdictions are inconsistent with common law trust shall be talked here.

(1) The Compatibility of α with γ (Germany[22], China , Scotland and Japan)

・Absoluteness and indivisibility of ownership

・The principle that only statutory property rights can be recognised

・One thing one right theory

(2) The compatibility of α with β (France[23] and Quebec)

・Single patrimony theory

・Bankruptcy Remoteness

The details are explained as follows.

II Scotland

Against the SHINOMIYA's Dogma, Professor George Gretton argues that trust can exist in the worlds without equity in his famous thesis "Trusts without Equity[24]". He argues that instead of equity, the concept of patrimony can sufficiently explain trust. While the trustee originally has

22 NAKATA, Hideyuki, GERMAN TRUST LAW – IN COMPARISON WITH JAPANESE TRUST LAW, (Tohoku University Press, 2008)

23 MIZUNO, Noriko, Public Comment on the Draft for the Amendment to Trust Code (1 September 2005) http://www.law.tohoku.ac.jp/~parenoir/shintakuhou-kaisei.html

24 49I.C.L.Q.599 (2000)

general patrimony, the transferred trust assets shall constitute a special patrimony and the both of patrimonies are independent from each other.

Unique position of Scotland as one of the civil law jurisdictions at the same time as a part of the U.K. (under influence of common law) enables it to have such a unique system.

However, is his argument really correct? I will examine his argument in line with his above-mentioned thesis.

1. Can the Trust Be Explained in Terms of the Law of Obligations?

In common law jurisdictions, trust is not a contract. However, in many of civil law jurisdictions, inter-vivos trust is created by trust contract (or declaration of trust). Therefore, whether a trust can be explained in terms of law of obligations produced by contracts must be examined.

(1) Privity Theory

One objection to considering trusts as contracts is that the trust does not obey the dictates of privity theory. However, privity is nowadays hardly a universal truth and even in common law jurisdictions, it is not applied except for warranty context.

(2) Legal Features of Beneficial rights

Another possible objection to the attempt to understand the trust as a sort of contract is the fact that a beneficiary can in some circumstances hold liable a third party who acquires trust assets in bad faith. This fact is often held up as an illustration of the semi-real nature of the beneficial right. But nothing is more common than for legal systems to provide that if A breaks her contract with B as a result of collusion with C, C may have some liability to B. However, Professor Gretton argues that this conclusion must be that civil law systems are capable of protecting the trust beneficiary by the doctrine of notice to the same extent as does English law by its recourse to equitable interests in property[25].

However, this doctrine of notice is not a concept of civil law system but the one of common law system.

Article 27 Section 1 of Japanese Trust Act stipulates that “Where an act conducted by a trustee for the trust assets does not fall within the scope of the trustee's powers, a beneficiary may rescind such act, if all of the following conditions are met: (i) that the other party to the act knew, at the time of the act, that the act was conducted for trust assets ; and : (ii) that the other party to the act knew or grossly negligent in failing to know, at the time of the act, that the act did not fall within the scope of the trustee's powers.”

Professor Gretton also argues that all legal systems provide that gratuitous transfers are potentially reversible where the transferor is insolvent (it seems to me similar to Japanese Civil

25 Supra, note 24, p602.

Code Article 724)[26].

In conclusion, Professor Gretton argues that the biggest difficulty of contract theory is bankruptcy remoteness. If the trust is in its essence a contract, it will not defeat the rights of the owner's other creditors[27].

(3) Difference from Agency

Professor Gretton refers to "mandate without representation" and Dutch Bewind system and South African Roman-Dutch System. In these institutions, the beneficiary directly owns the trust assets. He argues that while those system can easily explain bankruptcy remoteness, the location of legal title is the reverse of the trust and therefore he cannot recognise them as trust[28].

(4) Right in Rem?

If beneficial right is real right, the problem whether ownership can be divided must be solved.

Professor Gretton remind us of the fact that the concept of "right in rem" itself is based on civil law system and the term "right in rem"as an English translation is not system-neutral language. Afterwards, he explains the reasons why he chooses right in personam theory as follows[29](my opposition shall be referred to as well.):

(i)A real right is presumptively valid erga omnes. By contract, a beneficial right is not.

(ii)If the right of the beneficiary is real, how is it that a person acquiring from the trustee can take free from the rights of the beneficiary? If the beneficiary's right is personal, the difficulty disappears: the third party is acquiring from the owner, and no other real rights affect the asset.

(iii)In international private law beneficial interests behave much more like personal rights than real rights.

(iv)In general, real rights in immovables can be, and usually must be, registered, whilst personal rights do not need to be, and in general cannot be, registered. In this respect beneficial rights follow personal rights.

→ In this point, I think the fact that in some civil law jurisdictions including Japan trust arrangement and beneficial rights on immovables can be registered must be mentioned.

(v)The rights of the beneficiary are transferable in the same manner as any personal rights, namely by assignment or cession, and not by the means used for the transfer of real rights.

→ Article 93 Section 1 of Japanese Trust Act stipulates that beneficial rights can be assignable unless the features of the rights do not allow. However, in Japanese Trust Act, each rights borne of beneficial rights are distinguished from beneficial rights themselves.

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26 Supra, note 24, p602.

27 Supra, note 24, p603.

28 Ibid.

29 Supra, note 24, pp605-607.

(vi) While real rights are subject to the "principle of specificity", beneficial rights are constantly shifting.

→ In Japan, floating chattel mortgage is recognised. "Constantly shifting" is not inconsistent with being real rights.

(vii) Beneficial rights are often indeterminable.

→ In England, Property Act 1925 abolished future interests unless established by trust. However, in the U.S. A., not only beneficial rights but also ownership may be indeterminable (in cases of future interests)[30].

(viii) The most important problem is to explain bankruptcy remoteness. If the beneficial rights are real, that would be an explanation. However, there exist at least some kinds of trust where it is senseless to attribute equitable ownership to the beneficiaries including charitable trusts and purpose trusts.

→ The second sentence seems not to deny the first sentence.

(ix)Real rights are defined primarily in terms of third party effect. However, the fact that in suing an intruder for trespass or registering a title, it is the trustee who is owner shows where ownership lies.

2. The Interpretation of Brussels Convention

The problem whether beneficial rights are right in rem or right in personam is not easily solved. However, the Court of Justice has been obliged to judge this problem in the context of Article 16 of the Brussels Convention. This provides that in an action concerning "**rights in rem** in immovable property[31]", jurisdiction belongs to the courts of the country where the property is situated. (Emphases are supplied by the author.)

In the case called Webb v. Webb[32] , a father bought property in France but arranged for the son to be registered as owner. Later they fell out and the father sued in the English court for a declaration that the son held the property for the father on trust. The English Court of Appeals referred the matter to the Court of Justice, which held that Article 16 did not apply, because the action did not concern **real rights** in French property. (Emphases are supplied by the author.)

This decision might be construed to consider beneficial rights to be a real rights in general.

Nevertheless, Professor Gretton argues that this decision is based on the difference between

30 Please see SESE, Atsuko, "The U.S. Business Law Vol. 24", *Journal of the Japanese Institute of International Business Law* 40-9 (The Japanese Institute of International Business Law, 2012), p1399.

31 Official English translation of English implementation law for this Convention =Civil Jurisdiction and Judgement Act 1982.

32 [1994]E.C.R.I-1717 (Court of Justice Case No. C-294/92)

translation of the Convention. While the official translation by England is **rights in rem,** Scots official translation is **real rights** that is close to the original French text "Drois reels immobiliers"[33]. (Emphases are Supplied by the author.)

He refers to the Professor Gutteridge's comment "It is almost impossible to convey to continental lawyers the exact sense in which an English lawyer uses the terms in rem and in personam[34]."

Professor Gretton argues that right in rem in common law system is a broader concept than real right in civil law system, therefore, beneficial right could be right in rem in common law system at the same time be personal right in civil law system.

3. Trust and Patrimony

Professor Gretton argues that patrimony is a perfect solution for the problems.

In order to explain French principle "one person, one patrimony"(Single Patrimony Theory), he says that a person could sometimes have a "special patrimony", including "matrimonial property" or "real subrogation".

Article 2 of Convention on the Law Applicable to Trusts and on Their Recognition provides for that:

For the purposes of this Convention, the term "trust" refers to the legal relationships created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics -

a) the assets constitute a separate fund and are not a part of the trustee's own estate;

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

In terms of these provisions, Professor Gretton argues that the provision do not refer to the division of ownership nor equity and the expression of "a separate fund" can be interpreted as "special patrimony", therefore, Scots trust law is more suitable to the definition of the Convention.

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33 Supra, note 24, p608.

34 H.C. Gutteridge, COMPARATIVE LAW (Cambridge Unibersity Press, 1946) p123.

4. The Latest Information Regarding Quebec Trust Law

According to Professor Gretton's presentation[35] in the International Conference "The Worlds of the Trust " held in 2010 by Quebec Research Centre of Private and Comparative Law, McGill University, Scots trust law is studied as a gravitational mid-point between three massive bodies, each with its own vis attractiva (Law of Property, Law of Obligations and Law of Persons).

(1) Legal Person

In 2005, the Scottish Law Commission consulted on the idea that all Scottish trusts should be legal persons[36] , however, it was rejected.

Professor Lionel Smith is anxious about such tendency saying that "if the trust becomes a legal person then it ceases to be a fundamental legal institution.[37]"

However, Professor Gretton also says that it is very difficult to differentiate a trust from a legal person and Quebec trust has gone even further than the common law trust has gone toward legal persons[38].

(2) Traditional Patrimony Theory

The traditional patrimony theory in France must be overcome.

In France, there are no statutory provisions to define a legal person; instead court decisions have recognised legal persons[39]. The principle of the unity of the patrimony (Single Patrimony Theory) is an important factor to recognise a legal person.

Aubry and Rau argue that patrimony has four important principles[40]:

(i) Everyone has own patrimony.

(ii) Everyone has only one patrimony.

(iii) All the patrimonies belong to persons.

(iv) Two or more than two persons cannot share one patrimony.

Scots trust law is inconsistent with (ii) because the trustee has both general patrimony and special patrimony. Cases which there are two or more co-trustees (these cases could exist in other jurisdictions including Japan) are contradicted with (iv).

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35 George Gretton "Up There in the Begriffshimmel?", paper presented at The Worlds of the Trust/La fiducie dans tous ses Etats conference, Montreal, 23-5 September 2010.

36 Scottish Law Commission, Discussion Paper on the Nature and the Constitution of Trusts (2006)

37 Lionel Smith "Trust and Patrimony" Estates, Trusts and Pensions Journal, Vol.28, pp332-354 (2009)

38 Supra, note 35, p6.

39 OMURA, Atsushi, CIVIL LAW AS ACADEMIC ACTIVITIES (The University of Tokyo Press, 2009) p273.

40 C. Aubry and F.C. Rau, COURS DE DROIS CIVIL FRANCAIS D'APRES LA METHODE DE ZACHARIAE, 4TH ED. (Paris: Marchal et Billard, 1873) vol. VI, bk. II, div.I, at para.573.

III France

1. Background of French Trust Law

France had refused to introduce trusts for a long time because of the above-mentioned principle of the unity of the patrimony (Single Patrimony Theory).

Finally, on the 19th of February 2007, the amendment to Civil Code was promulgated in order to introduce provisions on trusts. It took as long as 15 years since National Assembly rejected the draft in 1992.

Lepaulle's theory in 1920's that the distinction of common law rights and equitable rights is not an essential factor of trust was quite a revolution.

He argued that the existence of "patrimonie distinct" and the purpose is the essence of trust and trust assets are independent from any persons and are established for any purpose limited only by the law and public order. In short, he established purpose property theory in which trust assets do not belong to anyone including trustees or settlors.

According to Professor Nohmi[41], Single Patrimony Theory is classified into Subjective Theory and Objective Theory. The former (Aubry and Rau) which considers patrimony in connection with persons has been dominant. On the other hand, the latter which does not take it for granted to connect patrimony with persons allows the creation of patrimony by designation of purpose and enables foundation and trust to be well explained.

Recently, the usefulness of trusts has been witnessed in other countries and due to the competition that the common law trust was waging against the French legal system, French government became aware of urgent necessity to introduce trusts.

One year after the enactment of trust law, financial crisis triggered by the Lehman Shock in 2008 brought trusts once again to the fore. France began to be interested in Islamic finance the complex requirements of which can be satisfied by trust instrument[42].

2. The Contents of French Trust Law

The provisions on trusts are located as Title 14 "Trusts" (Articles 2011 to 2031) of Book III "Various Ways to Obtain Ownership"

(1) Transfer of Property

Article 2011 of the French Civil Code defines a trust as a contract by which the settlor transfers goods or rights to another person (the trustee) who holds these separate from her own property

41 NOHMI, supra note 8, p107.

42 Francois Barriere "The French fiducie, or the chaotic awakening of a sleeping beauty" RE-IMAGING THE TRUST –TRUSTS IN CIVIL LAW-(Cambridge University Press 2012 年) pp225-226.

with the remit to administer the property for the benefit of one or more beneficiaries.

Different from "Quebec-type Trust", French trust law requires property to be transferred to the trustee.

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 a 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 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 requires Requirement (b) (in reality, the separation of property from her own property) (*Re Rose*, *Rose v. I.R.C.* [1952][43]). However, currently in England this requirement is mitigated to some extent in the case of declaration of trust.[44]

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 Act stipulates that "to transfer or dispose of property" and most scholars interpreted that creation of trust is a contract in kind.[45] Japanese Former Trust Law did not recognise the declaration of trust.

As current Japanese Trust Act 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 the 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 trust contract.

Though Hague Convention on the Law Applicable to Trusts and on their Recognition does not

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43 Ch.499.

44 Pennington & Another v. Waine & Others [2002] 1 W. L.R. 2075.

45 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 TRUSTth ed.) (Kinzai, 2003) p41.

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 declaration of trust) as an essential factor.

In addition, by express recognition of the independence of trust property French trust system is thought to become similar to common law trust[46].

(2) Express Trust

A trust must comply with various requirements. In particular, Article 2012 stipulates that a trust can only be created by law or by contract and it must be expressly created. YAMADA argues that Article 2011 does not recognise statutory trusts including a constructive trust or a resulting trust.[47] However, the fact that the terms of "by law" were purposefully added to the original draft version which had provided for only "by contract" in order to exclude the possibility to create trusts by other means than contract[48] must be carefully considered.

The contract that sets it up must contain a certain amount of information and must be in writing (Article 2018) and must be registered with the registre national des fiducies (a purposely set up national registry) and the service des impôts (the French Inland Revenue), as failure to so register the fiducie renders it null and void (Article 2019).

(3) Duration

Originally, the duration of trust shall not exceed 33 years. In accordance with the amendment on the 4th of August 2008, the longest duration has become 99 years.

(4) Settlor

Originally, only legal persons can be a settlor, however, the amendment in 2008 has enabled natural persons to be settlors.

In accordance with Article 2025 Section2, when the creditors whose claims arise from the trustee (acting as trustee) have, in case of "insufficiency of the trust patrimony", recourse against the patrimony of the settlor.

In terms of common law trust, from the creation of trust onwards, the settlor drops from the scene and the beneficiary begins to have rights under the trust[49]. Nevertheless, as observed from the above, the fact that a settler remains responsibility even after the creation of trust is unique. Chinese trust law also gives a great power to settlors as explained later.

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46 YAMADA, supra note 11, p601.

47 Ibid.

48 KANEKO, Takaaki "Possibility of Trusts in Civil Law Jurisdictions? – Trusts in France-" TRUSTS AND ESTATE SUCCESSION IN AGING SOCIETY (ARAI, Makoto ed. Nihon Hyoronsha, 2006) p136.

49 Lusina Ho, TRUST LAW IN CHINA, (Hong Kong: Sweet & Maxwell, 203), p64

Moreover, the trustee's own property shall be free from trust creditors unless the trust contract so stipulates[50]. For this system, Professor Barriere writes as follows[51]:

It is fruitless to object that the personal assets of common law trustee is answerable for the debts which arise from the administration of the trust, because:

(i)The jurisdictions applying that the trustee has, by operation of law, the right to be reimbursed from the trust assets or the right to directly use the assets of the trust to repay to the creditors, so long as the trustee has acted within her powers.

(ii) The U.S. Uniform Trust Code presently sets out in its Article 1010 that the creditors whose claims arise in relation to a trust can only recover their claims from the assets of the trust. This constitutes recognition of the autonomy of the trust assets and liabilities. It can be seen that the French rule finds not equivalent within the logic of trust.

However, since Japanese Trust Act has also similar provisions to the U.S., I do not think that the difference is based on the civil law system itself.

(5) Trustee

Original Article 2015 stipulates that only banks, investment companies or insurance companies can be trustees. However, the amendment in 2008 enabled lawyers to be trustees. It is strange that notary publics did not lobby for this matter.

(6) Trusts for administration and trusts for security are treated as a single institution.

3. Adaptation

How French trust law that is somehow similar to common law trust is adapted to its own civil law system is an important issue. YAMADA emphasises that while common law trust is property right, French trust is a sort of contract[52]. However, this argument cannot explain the consistency with historical rigid refusal, taking into consideration of the fact that Article 2011 clearly recognises trusts created by operation of law.

According to Professor Barriere, at first, the legislator refused to characterise certain mechanisms as fiduciary alienations, preferring to use the term "mandate"[53]. However, this idea was turned down because the features of "mandate" of civil code are inconsistent with trusts.

He goes much further by saying that Title XIV of the Civil Code does note explicitly characterise it as a **patrimony by appropriation,** but there is no doubt that the trust patrimony is one (Emphases are supplied by the author.)[54]. **Patrimony by appropriation** is the term used in

50 Supra, note 42.
51 Ibid.
52 Supra, note 11, pp601-602.
53 Supra, note 42, p234.
54 Supra, note 42, pp38-241.

Article 1261 of Quebec Civil Code defining trusts as discussed later. (Emphases are supplied by the author.)

Furthermore, he argues that single patrimony principle is not really threatened by the trust patrimony: the trustee's personal patrimony will continue to be liable for his personal debts while the property put into the trust need not be available to the trustee's personal creditors. Even before the introduction of trust in 2007, securitisation organisations hold in "compartments" assets which are "only liable for the debts that are in relation to that compartment. In addition, there exist limited liability individual enterprises introduced by a law dated 15 June 2010.

More surprisingly, Professor Barriere writes that in any case, soon the trust patrimony may no longer be the sole exception to the principle of the unity of the patrimony: a November 2008 report, tabled by the National Assembly, proposed that patrimonies by appropriation be accepted as a matter of general law and that the government could prepare a bill allowing individuals carrying on a business, in particular skilled tradespeope, to choose a "patrimony by appropriation" as a structure for their business. If this project is executed, a company can freely separate a part of its assets to create an independent patrimony.

We must cautiously watch how far France will leave from the traditional principles which had made it most reluctant in civil law jurisdictions to introduce trust for a long time.

IV Chinese Trust Law

1. Property Is Not Transferred to the Trustee

Article 2 of Chinese Trust Act 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 "[55] (Emphases are 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.

As I discussed before, both common law and civil law jurisdictions share the understanding that the transfer of property is an essential factor to create a trust.

In accordance with Chinese Trust Act, Article 8 (1) requires creation of trust be in writing and

55 English Translation of Trust Law in this thesis is based on original text, Isinolaw (online database) and Professor Ho's book, supra, note 49.

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,[56] it is appropriate to interpret that inter vivos declaration of trust is not admitted because there is no laws or administrative regulations to recognise declaration of trust.[57] 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 Chinese Trust Act toward concerning factors of trust is extremely unique. Furthermore, it raises a serious problem that a trust cannot be distinguished from mandatory contract (Chinese Contract Act[58] arts. 396-413).[59]

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.[60]

There are two explanations for such confusion.[61]

- 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.[62]

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56 Ho, supra note 49, p54.

57 Dominant opinion. Ho, supra note 49, p78; NAKANO, Masatoshi and ZHANG, Jun Jian, TRUST LAW, (The PRC: China Fangzheng Publisher, 2004) p44.

58 Effectuated on the 1st of October 1999.

59 Ho, supra note 49, p57; Nakano, supra note 57, p61.

60 NAKANO, supra note 57 p63.

61 Ho, supra note 49 p67.

62 CHEN, Dagang, "Misunderstanding of the Features of the Law of Trust" 21-4 Rule of Law Journal (The PRC, 2006), p41.

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[63]; c) it is impossible for the trustee to manage trust property without receiving that property "in her name".[64]

Mr. ZHOU Xiao Ming of China Peoples University Trust and Foundation Research Centre and one of the members of the Drafting Committee, in his recent book[65], argues that Theory A is formal law provisions theory that requires transfer of property, and theory B is substantial law provisions theory that only requires intentions to create a trust. He chooses A because (i) mandate contracts must be distinguished from trusts; (ii)Article 15 cannot be enforced when trust assets belong to the settler. (I do not agree with him because asset segregation is required because the same party administers them.); (iii)Article 8 that provides for the creation of trust by wills is inconsistent with the argument that trust property remains with the settlor.; (iv)Article 2 that provides that "the trustee manages or disposes of such property **in her own name.**" (Emphases are supplied by the author.) is incompatible with the argument that the settlor retains trust property; (v) Article 55 provides for the procedures to change the title holder to the person who is authorised to hold it in accordance with Article 54; (vi) The practice has continuously been based on Theory A.

While the many scholars support the Theory A[66] including the Chairperson of the Drafting Committee and the President of China Trust Business Association, Mr. WANG, Lianzhou[67], 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."[68]

In fact, the provision of this Article 15 is clearly inconsistent with the Theory A and only the Theory B can explain this provision.[69]

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63 ZHANG, Tianmin, SHIQUDE XINTUO (LOSINGEQUITABLE TRUST), (The PRC: Zhongxin Publisher, 2004), p340; CHEN, supra note 62, p53.

64 Supra, note 57, p9.

65 XINTUO ZHIDU: FALI YU SHIWU (TRUST SYSTEM:LAW AND PRACTICE), (China Law Publishing, 2012)

66 Ho, supra note 49, p66.

67 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), p740.

68 Ho, supra note 49, p65.

69 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.

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 ChineseTrust Act. 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.[70] 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.

Moreover, Professor Ho, in her recent thesis[71], argues that there can be two kinds of trust in Chinese trust law: one that involves the transfer of the settler's rights in the underlying trust assets to the trustee, and the other that does not[72].

She explains that Article 15 is not superfluous because the reference to segregation still serves the purpose of clarifying that once a settlor's assets are placed under a trust, they are immune from the claims of the settlor's creditors[73].

She boasts that none of the provisions of the Chinese Trust Act is incompatible with granting full ownership of the trust property to the trustee[74].

However, legal institutions including bankruptcy remoteness which is the trust's most essential function should depend on trust property belongs to whom. If Professor Ho's Argument is correct, Trust Act should have separate provisions for each cases.

I argue that Chinese Trust Act provides for only non-transfer trusts.

I believe that unnatural term "entrustment" taking into consideration of ideology (discussed later) 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.

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70 Ho, supra note 49, p65.

71 Lusina Ho "Trust laws in China, History, ambiguity and beneficiary's rights" RE-IMAGING THE TRUST –TRUSTS IN CIVIL LAW-(Cambridge University Press 2012 年)pp183-221

72 Supra, note 71, p196.

73 Supra, note 71, p209.

74 Ibid.

2. Great Powers of Settlor

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)

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." (Emphases are supplied by the author.)

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

75 Ho, supra note 49, p64.

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.

(3) 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].

Such importance of settlor's position is to some extent shared with French Law as the above mentioned.

3. Analysis

The above mentioned Chinese trust's unique features must be attributed to the consideration of SHINOMIYA's Dogma?

76 Ho, supra note 49, p121.

I do not think so.

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 clarify 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 Act of 2007[77] 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[78], 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 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.

V Quebec

Quebec had been French territory until conceding to the U.K.in 1763, where Paris Customary Law had applied.

After the enactment of the former Civil Code in 1866 until the enforcement of amended Civil Code in 1994, the question regarding whether common law trust can be adapted to civil law institutions had repeatedly been raised and had been asked in many judicial decisions. Dominant opinion argued that a different legal structure than common law trust is required[79].

In Quebec trust law, trust property does not belong to anyone. Article 1261 of Civil Code stipulates that "The trust patrimony, consisting of the property transferred in trust, constitutes a

77 Effectuated on the 1st of October 2007.

78 Effectuated on the 1st of October, 1995.

79 NOHMI, supra note 8, pp97-98.

patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right." (Emphases are supplied by the author.)

Without doubt this is under a strong influence of Lepaulle's theory[80].

In addition, this legislation is based on the Objective Theory of the principle of the unity of the patrimony. (Single Patrimony Theory)

In accordance with Subjective Theory by Aubry and Lau, Quebec trusts are inconsistent with the third principle "every patrimony belongs to persons".

However, the system in which trust property belongs to no one is compatible with the absoluteness of ownership or the unity of ownership that are representative features of civil law system.

In conclusion, Quebec trust law too honestly sticks to the principle of the unity of the patrimony (Single Patrimony Theory) that France (the very birthplace of that Theory) has almost abandoned.

This ironical phenomenon is related to historical and political situation of Quebec, which recognises French as an exclusive official language, while official languages of all the other Provinces of Canada are both French and English[81]. People share allergic response toward English things and institution. For instance, during my stay for research in Quebec in August to September of 2012, Parti Qubcois whose policy objective is the independence from the U.K. won the election.

Such anti-U.K. feeling is reflected to the Preamble of Civil Code[82].

The original French Text provides , "Le code est constitué d'un ensemble de règles qui, en toutes matières auxquelles se rapportent la lettre, l'esprit ou l'objet de ses dispositions, établit, en termes exprès ou de façon implicite, **le droit commun**. En ces matières, il constitue le fondement des autres lois qui peuvent elles-mêmes ajouter au code ou y déroger." (Emphases are supplied by the author.)

The official English translation of the corresponding part is: " The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the ***jus commune***, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it." (Emphases are supplied by the author.)

Professor Smith told me that the ordinary English translation of the emphasised French term **le droit commun** should be "common law", however, Quebec legislators hate "common law"

80 Ibid, p115

81 Celine Dion, who has been grown up in Quebec, had not speak any English before her debut as a singer.

82 Based on the interview with Professor Lionel Smith, Director of the Quebec Research Centre of Private and Comparative Law, McGill University, on the 31st of August 2012 at his office in the Quebec Research Centre of Private and Comparative Law, McGill University in Montreal.

strongly enough to avoid using such words and instead they chose Latin term as ***jus commune.*** (Emphases are supplied by the author.)

2. Prehistory of Trusts

Like other civil law jurisdictions, the principles of crisp distinction between property and obligation, absoluteness of ownership, and "numerus clausus" (a clear and closed list of real rights) had been obstacles to the introduction of trusts[83].

However, Quebec had had trust-like institutions for a long time including Usufruct and Substitution which are similar to life estate and future interests of common law jurisdictions. In the former, the current owner A conveys her property to B for her life, for the crucial purpose to make C (B's child) own it. B shall administer and maintain the property until C owns it. The difference between the former and the latter is that the designation of C is not required in the latter.

The position of C looks like the one of beneficiary of trust.

3. Trusts in Civil Code

Provisions regarding trust (Articles1261-1370) are codified as a part of Civil Code as follows:

BOOK ONE THE PERSONS
BOOK TWO THE FAMILY
BOOK THREE SUCCESSION
BOOK FOUR PROPERTY
TITLE ONE KINDS OF PROPERTY AND ITS APPROPRIATION
TITLE TWO OWNERSHIP
TITLE THREE SPECIAL MODES OF OWNERSHIP
TITLE FOUR DISMEMBERMENTS OF THE RIGHT OF OWNERSHIP
TITLE FIVE RESTRICTIONS ON THE FREE DISPOSITION OF CERTAIN PROPERTY
TITLE SIX CERTAIN PATRIMONY BY APPROPRIATION
CHAPTER I THE FOUNDATION
CHAPTER II TRUST Articles1261-1298
DIVISION I NATURE O F THE TRUST
DIVISION II VARIOUS KINDS OF TRUSTS AND THEIR DURATION
DIVISION III ADMINISTRATION OF THE TRUST

83 Donovan W. M. Waters, Mark R. Gillen and Lionel D. Smith, WATERS' LAW OF TRUSTS IN CANADA (3rd. ed., 2005), p1341.

§ 1. — *Appointment and office of the trustee*

§ 2. — *The beneficiary and his rights*

§ 3. — *Measures of supervision and control*

DIVISION IV CHANGES TO THE TRUST AND TO THE PATRIMONY

DIVISION V TERMINATION OF THE TRUST

TITLE SEVEN ADMINISTRATION OF THE PROPERTY OF OTHERS Articles1299-1370

CHAPTER I GENERAL PROVISIONS

CHAPTER II KINDS OF ADMINISTRATION

DIVISION I SIMPLE ADMINISTRATION OF THE PROPERTY OF OTHERS

DIVISION II FULL ADMINISTRATION OF THE PROPERTY OF OTHERS

CHAPTER III RULES OF ADMINISTRATION

DIVISION I OBLIGATIONS OF THE ADMINISTRATOR TOWARDS THE BENEFICIARY

DIVISION II OBLIGATIONS OF THE ADMINISTRATOR AND THE BENEFICIARY TOWARDS THIRD PERSONS

DIVISION III INVENTORY, SECURITY AND INSURANCE

DIVISION IV JOINT ADMINISTRATION AND DELEGATION

DIVISION V PRESUMED SOUND INVESTMENTS

DIVISION VI APPORTIONMENT OF PROFIT AND EXPENDITURE

DIVISION VII ANNUAL ACCOUNT

CHAPTER IV TERMINATION OF ADMINISTRATION

First of all, Quebec defines trusts as real right by placing the related provisions in Book IV Property.

Provisions regarding trust extend through Title 6 and 7 of Book IV Property because a trustee of trust is one of the administrators of the property of others who are given full power of administration (in comparison with simple administration).

3. Quebec Trust Law in Civil Law Jurisdictions

Professor Smith argues that the common law trust is a strange hybrid of property and obligation; indeed, it is an obligational relationship with respect ro property that has been allowed to affect third parties and has in a most un-civilian way, given property-like characteristics to the obligational claims of the beneficiaries[84]. As repeatedly pointed out in this thesis, civil law system

84 Lionel Smith "The re-imagined trust" RE-IMAGING THE TRUST –TRUSTS IN CIVIL LAW-(Cambridge University Press 2012 年) pp258-261.

has many principals including crisp distinction between property and obligation, absoluteness of ownership, and "numerus clausus" (a clear and closed list of real rights) which have been obstacles to the introduction of trusts. In order to overcome those obstacles, Professor Smith argues that those jurisdictions have chosen two ways[85].

One is to stay faithful to post-codification civilian axioms by remaining essentially in the world of contract in Germany, Japan and Austria[86].

Another way is to personify the trust and it is one way to understand the implementation of the trust in Quebec Civil Code which keeps loyal to Lepaulle's Theory.

"Patrimony by appropriation" is a key term of Quebec trust law. Professor Smith argues that patrimony is a totally different concept from common law trust because while common law trust has only rights, patrimony holds both rights and obligations that look like an estate in common law system[87].

4. Problems of Quebec Trust Law

The most serious practical problem is that since patrimony is ownerless, who shall be a plaintiff or a defendant in the litigations regarding the trust is not certain.

There could be four sollutions[88]:

A: Patrimony is a legal person.

B: Patrimony is not a legal person, but a "sujet de droit" and can be bankrupt or parties of litigations[89]

C: Like Scots patrimony, patrimony assets are held by the trustee. Therefore, the trustee shall be a plaintiff or a defendant.

D:In accordance with Lepaulle's Theory, patrimony in the capacity of trustee shall be a plaintiff or a defendant.

D is the most literal interpretation of the related provision, however, is not substantially different from C in the practical context.

The obstacles to A and B are the provisions of Section 1 of respectively Articles 2 (natural persons) and 3 (legal persons): "Every person has patrimony". If patrimony had its own personality, patrimony would have dual personality system.

C is consistent with the provisions of Article 1278: "A trustee has the control and the exclusive

85 Ibid.

86 Ibid.

87 Supra, note 37, p22.

88 Supra, note 82.

89 M. Cantin Cumyn, "La fiducie, un noubeau sujet de droit" in Beaulne (ed.) MELANGES ERNEST CAPARROS (2002) p131.

administration of the trust patrimony, and **the titles** relating to the property of which it is composed **are drawn up in his name**; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation." (Emphases are supplied by the author.)

However, several decisions have held that a trust cannot itself be party to litigation[90].

Professor Smith argues that beneficial rights are merely "the rights held in the rights of his trustee" and the existence of trustee is very essence of trust[91].

However, it seems just a sophistry that although patrimony itself does not belong to anyone, the title of each assets held in the patrimony belongs to the trustee. Professor Smith also said that "Article 1278 is poorly drafted[92]."

According to Professor Smith, in many litigation cases, trustees play a role of plaintiff or defendant; however, there have been no Court of Appeal decisions yet. Therefore, the solution of this problem still remains uncertain.

We must also look at the provisions denying C: "Property belongs to persons or to the State or, in certain cases, **is appropriated to a purpose**."(Article 915 of Civil Code) (Emphases are supplied by the author.) The term "**is appropriated to a purpose**" means the case of trust. (Emphases are supplied by the author.)

In addition, Section 2 of Article 2 stipulates that "The patrimony may be **divided or appropriated to a purpose**, but to the extent provided by law." (Emphases are supplied by the author.) It implies that there is patrimony which is appropriated to a purpose as well as patrimony which is divided to a purpose[93].

What the latter means has been unclear for a long time, however, recently worth noting decisions regarding partnership came out.

First of all, in the case where former Civil Code applied, Ville de Quebec v. La Cie d'Immeubles Allrd Ltee (Allard)[94] held that partnership neither has legal personality nor is an independent patrimony.

However, in Ferme CGR enr., s.e.n.c. (Syndic de)[95], Court of Appeal held that although

90 Chateau Wilson Inc.v. Fiducie FamilialePezeyre-Lacroix(July 23, 2003), Doc.500-32-069887-026(Que. S.C.) "A trust is not any kind of legal equity; the application was dismissed due to the non-existence of the named respondent. Thecourt said that it is the trustees who must be named, in their quality as such.

91 Supra, note 37, p17.

92 Supra, note 82.

93 Ibid.

94 [1996]R.J.Q, 1566 (C.A.)

95 [2010]QCCA719

partnership has no legal personality, but is an independent patrimony; as a result, even if each partner has sufficient own assets, the partnership which is insolvent can be bankrupt.

Professor Smith explains that this is the very patrimony which is divided in line with Section 2 of Article 2 of the Civil Code[96]. Each partner holds a separate patrimony on partnership assets distinguished from her own patrimony when she established the partnership.

Such kind of phenomenon is similar to personalisation of trusts in France as I mentioned. Both jurisdictions seem to me to defend the principle of the unity of the patrimony (Single Patrimony Theory) to the death by making trust or patrimony close to legal person. I am afraid the cost or sacrifice is too big.

How Quebec trust law will be developed in the future makes us be confronted with the radical question of "what the essence of trust is" and we must watch it carefully.

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96 Supra, note 85.