Article

East Asian Trusts at the Crossroads

Ying-Chieh Wu *

ABSTRACT

The purpose of this work is to scrutinize the legal structure of trusts in Taiwan, Japan and South Korea. The so-called infrastructure of the private law of them is rooted in the Roman-Germanic basis, which adopts dichotomous system in respect of the private law dealing with property: the law of property and that of obligation. However, the adoption of the trust has caused some problems. Though controversial, the contract-based view seems to be the majority thesis in the East Asian civil jurisdictions, yet the property-based view dominates the common law world nowadays. However, being influenced by common law, the property-approach is also asserted in the aforementioned jurisdictions. It should be noted there has been another approach normally adopted by some civil jurisdictions and mixed jurisdictions, i.e. the doctrine of separate patrimony. The East Asian civil jurisdictions' approach is somehow at a crossroads. Being a legal system where nomenclature matters, the issue of taxonomic classification can hardly be ignored. We must find a way out from the crossroads, either perfect or not. It is to this task to which the present work is devoted.

Keywords: *Trust, Contract, Property, Separate Patrimony, Manifestation of Intent, Ownership, Dos, Peculium*

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* Assistant Professor (DPhil, Oxon), National Taiwan University, College of Law. Email: ycwu@ntu.edu.tw.

CONTENTS

I. INTRODUCTION

The purpose of this work is to scrutinize the legal structure of trusts in East Asia. Here, East Asian jurisdictions are used to encompass Taiwan, Japan and South Korea. The Civil Code and the Trust Act of each of these jurisdictions share remarkable resemblance owing to the regional history. For this reason, at least in terms of theoretical analysis, it would presumably be justified to put them together under the umbrella of East Asia.[1] The trust law of East Asian jurisdictions has experienced seemingly insurmountable doctrinal obstacles ever since the first importer, i.e. Japan introduced and promulgated it in 1922, followed by South Korea in 1961 and Taiwan in 1996. The main reason is possibly grounded on the fact that the so-called infrastructure of the private law of them is rooted in the Roman-Germanic basis, which adopts dichotomous system in respect of the private law dealing with property: the law of property and that of obligation. However, the adoption of the trust has caused an issue: which pigeon-hole should we wedge it into? We have two options: it is either contract or property. Though controversial, the former view seems to be the majority thesis in East Asia, yet the latter dominates the common law world nowadays. However, being influenced by common law, the property-approach is also asserted in East Asia. The truth is that there has been another approach normally adopted by some civil jurisdictions and mixed jurisdictions: the doctrine of separate patrimony. Unfortunately, there has been surprisingly little attention that has been given to it in East Asia.

Some may argue the debate does not hold any practical importance, thus we do not need to squeeze it into either category, for trusts are genetically impossible to be reconciled with the civilian tradition. The problem is that trusts are already transplanted on the East Asian civilian soil. Being a legal system where nomenclature matters, the issue of taxonomic classification can hardly be ignored. We must find a way out from this crossroads, either perfect or not. The rules embedded in the civil code and those mechanisms of trusts enshrined in the Trust Act will guide us to the path we need to consider in the future. In the following, we will examine whether trusts are contracts, followed by the possibility of property approach. Finally, we will explore the doctrine of separate patrimony.

1. For reasons of space and the present author's lack of knowledge over the trust law of other East Asian civil jurisdictions, the trust law of them will not be included in this work. Furthermore, the work fails to deal with all the issues given by the reviewers, for some of them need exploring in a separate work. However, the present author is very grateful for their comments, and, needless to say, I bear sole responsibility for the views presented in this work.

II. TRUSTS AS CONTRACTS

A. *Introduction*

'Trust Contract' is not an expression familiar to common law lawyers, yet the term is often used by Taiwanese, Korean, and Japanese lawyers. In common law jurisdictions, the law of contract and the law of trusts are two different subjects, treated as distinct species, and so the compound expression 'trust contract' is confusing. It seems hardly more comprehensible than 'cat dog' or 'bird fish'. However, in East Asian Jurisdictions , trust relationships have been recognised as a species of contractual relationship, and as a result, 'trust contract' denotes a regime of obligations between the parties to the contract, and is regarded as simply one more name on the list of types of contracts; alongside hire, transportation, mandate, sale and so on. So, the term 'trust contract' does not sound like 'cat dog' or 'bird fish'; instead, it sounds like a kind of dog or a kind of fish. The question that needs to be explored here is whether the law of trusts can be subsumed as a sub-category of the law of contract. If it is proved that it can, the term 'trust contract' can survive, *viz.*, the trust can continue to be regarded as a contractual relationship. If not, East Asian lawyers may have to divorce the two terms, adjust their usage of terminology, and reconsider the pure contractual approach to trusts. The key issue, accordingly, is to identify the source(s) of any discrepancy between a contractual relationship and an express trust relationship. In doing so, it is necessary to determine the indicia of each relationship. The indicia scrutinised in this chapter are the elements involved in the formation of contract and trust relationships, the obligations imposed by those relationships, and the remedies available to protect those relationships. When these indicia have been investigated, it ought to be clear whether trusts are contracts. We will begin with the inaugural step in each relationship, i.e., formation. This is followed by the remedial aspect, *viz.,* the remedies available should the promisor or trustee defaults on his duties. Fiduciary duties, which are often described as the hallmark of the trustee, are discussed when addressing the remedial aspect because, as will be seen below, fiduciary duties and the effects of breaches of such duties are closely connected; and because, more importantly, the extent to which fiduciary duties distinguish trust relationships from contractual relationships cannot be fully evaluated if they are to be explored separately.

B. *Trusts Are Contracts: A Doubtful Position*

In the trust law of Taiwan, South Korea and Japan, no formality is

required in establishing a valid express trust over personalty and realty unless an express trust is established by means of will or self-declaration.[2] This section proceeds on the assumption that these formal requirements are all satisfied, and enquires into the following more substantive questions: whether manifestation(s) of intention to create a trust (i.e., of the settlor's intention to create a trust and the trustee's acceptance of the trusteeship) can be the foundation of the contractual approach.

1. *Manifestation of Intention(s)*

(a) When settlor is not a trustee

Suppose S transfers a right to T and asks T to hold that right on trust for B, or for S himself. The central issue in such cases is as follows: can the legal relationship between S and T count as a contractual relationship? The answer in common law jurisdictions, where contract law is stringently differentiated from trusts law (being partly governed by a proprietary regime) is almost always negative, since it is S's intention to form a trust relationship, rather than a contractual relationship. But, if the question were posed in Taiwan, South Korea and Japan, it would be understood in terms of whether the relationship between S and T was a trust contract or another type of contract. This can be attributed to Taiwanese, Korean, and Japanese lawyers' perception of the consent manifested by settlor and trustee as a contractually binding agreement, i.e., a deal between them. Indeed, it can scarcely be denied that there must have been a negotiation between S and T, for we cannot forcibly vest a right in T and impose obligations upon him despite his opposition. As a result of this orthodoxy, the expression 'trust contract' is taken for granted in these jurisdictions. Thus, we need to discuss whether the existence of bilateral consent can justify a contractual approach to trusts.

It has just been said that there is no denying that the express trust established between S and T are hardly different from a contractual relationship in terms of the existence of bilateral intentions. However, we should question whether it is right to conclude from the existence of mutual agreement that an express trust is a contractual relationship. The work argues that the conclusion currently drawn by East Asian orthodoxy is inaccurate because mutual consent is equally significant in the acquisition of proprietary rights. Although sometimes proprietary rights (such as ownership, security interests, and so on) can be acquired by operation of law,

2. Shintakuho (信託法) [Trust Act] 2011, art. 3, no. 3 (Japan); Sintakbeop (신탁법률) [Trust Act], Act. no. 10924, 25 July, 2011, art. 3, para. 1, no. 3 (S. Kor.); Shen Tuo Fa (信託法) [Trust Act] 1996, art. 71, para. 1 (Taiwan).

mutual consent is in the majority of cases an element indispensible to the process of acquisition. For example, if a lender wants to secure the debt owed by his debtor by having a security interest attached to the borrower's title to the car, this can only be realized if the debtor agrees to his lender's request. Should we regard this sort of agreement as a contractual relationship just because of the existence of the bilateral intentions manifested by the lender and debtor in the process of establishing a security right over the debtor's title to the car? (Indeed, the lender's security interest over the debtor's title to the car would not have been successful were it not for the deal made between them.) The answer is 'No'. Deals can involve not only the grant of a contractual right but also the grant of a proprietary right, so it would be premature to conclude that express trusts, where settlor and trustee are not identical persons, are, therefore, a contract-based relationship. Other possibilities remain; we just cannot tell whether the relationship is a 'contractual' one simply from the existence of mutual agreement in the formation of the legal relationship. The key issues are: (1) what type of legal relationship the parties intend to establish; and (2) what effects the legal system imposes on the intended relationship.

As a result, if trusts always require that the settlor's rights be settled in another person, trusts and contracts are virtually indistinguishable at least as regards the existence of mutual consent. However, we have also seen that the need for mutual consent does not demand a contract-based analysis of trusts, even though the express trusts mentioned in this section are established by the bilateral intentions of S and T. The presence of mutual consent does not confirm which regime the express trusts considered in this section (i.e., where the settlor is not the trustee) fall within. It could be a contractual regime or a proprietary regime, or a third type of mechanism (e.g., an intention to create a separate fund). Furthermore, in cases in which a settlor intends to declare a trust by will, the trustee appointed in that testamentary trust would have no one to contract with, because a will only become effective after the testator/settlor deceases. If then nature of the trust is contract, it seems virtually impossible to explain the nature of the trust created by the settlor's will, for there has never been a contract whatsoever. Thus, the position currently held by the trust law of Taiwan, Japan, and Korea is doubtful.

(b) When settlor is a trustee

In the foregoing section, it was found that consensual agreement itself between settlor and trustee does not validate the view that express trusts are contractual relationships. The contractual approach is founded upon the premise that the settlor is not also the (or a) trustee. This premise meets a huge obstacle when we find that an express trust can also be set up by the settlor's unilateral intention to create a trust for others: i.e., by a

self-declaration of trust. The trust law of Japan, South Korea and Taiwan accepts the establishment of a trust by self-declaration of trust.[3] The reason this makes us hesitate to assimilate trusts with contracts lies in the impossibility of entering into a contract with oneself.[4] For example, consider the position if S declares himself a trustee of his car for B. According to the contractual approach, the deal should be concluded between settlor and trustee. However, in this case, S is both settlor and trustee, and it is hard to find a mutual agreement on establishing a trust, or consent between two parties to the establishment of a trust. In addition, while S can declare himself trustee of his car for himself and B, he cannot establish the same legal relationship under the contractual approach, for a person cannot conclude a contract with himself and make himself benefit from his own assets. Thus, the most basic elements of the contractual approach to trusts seem incapable of surviving in jurisdictions where trusts can be created by self-declaration.

(c) Trusts as a transcending device

If the trust can be established by virtue of contract, will, and self-declaration, it implies that there is a special quality embedded in the trust mechanism that transcends these three methods; for, if the trust was based on the contractual regime, it would be virtually impossible to set it up by the latter two methods, which do not involve any consensual agreement but only an unilateral intention to create a trust. This proves that the trust law of Taiwan, Japan and Korea impliedly or indirectly treats the express trust as being a different species from contract. Moreover, contract alone does not produce some of the remedies that will be discussed below. Thus, we cannot align contract with trust. It would be best to interpret the current language, 'trust contract' as denoting 'consensual trust' rather than 'contractual trust'.

2. *The Nature of Trustee's Liability in Breach of Trust*

Another problem that somehow makes us hesitate to fully regard trusts as contracts lies in the nature of the trustee's liability in breach of trust. In the above section, we have seen that trusts can be created by virtue of settlor's manifestation of intent, will and self-declaration. Let us suppose S

3. *Id.*

4. (フィデュシャリー「信認」の時代：信託と契約) Rye v. Rye A.C. 496 (1962). This issue had already been pointed out in Japan that the contractual approach should not overlook the explanation of self-declaration of trust, *see* HIGUCHI NORIO, FIDYUSHARI SHINNIN NO JIDAI: SINTAKU TO KEIYAKU (フィデュシャリー「信認」の時代：信託と契約) [FIDUCIARY RELATIONS–TRUSTS AND CONTRACT] 116 (1999). This issue has been pointed out in England by Professor Paul Mattews, *From Obligation to Property, and Back Again?*, *in* EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS 203 (David Hayton ed., 2002); this can also be applied in Japan, South Korea, and Taiwan.

has created a trust for B and the trustee is T; T then breaches of his duty of care and causes damage to the trust fund. If this trust is a contractual relationship, the nature of T's liability *must be contractual liability*. What if S has created the trust by means of will or self-declaration, and T breaches the same duty of care and some damage occurs to the trust fund. Since there is no contract in this case, it is so obvious that the nature of T's liability *cannot be regarded as contractual liability*. Both cases are concerned with the trust and the duty breached by the trustees is identical; there just seems lack of justification(s) that can support the above contradiction. If they fall within the cases of trust, then the nature of the trustee's liability in each scenario must be consistent, for like cases should be treated alike. As long as we don't give up the idea that trusts can be created by way of will and self-declaration, it seems that the contractual approach is the one that must be revisited.

3. *The Trustee's Fiduciary Obligations and Breach of Fiduciary Obligations*

Once the trust relationship is established, the trustee is burdened with fiduciary obligations to his beneficiary. This section considers whether the trustee's fiduciary duties can be recognised as one of the indicia distinguishing trusts from contracts. It is often argued in common law jurisdictions that the fiduciary nature of a trustee's obligations distinguishes them from contractual obligations; and hence that trusts are not contracts.[5] But, this traditional approach has attracted criticism from certain common law lawyers, who base their arguments on the default nature of fiduciary duties or the law and economics approach.[6] This kind of debate (i.e., whether fiduciary duties make the law of trusts different from contract law) has received surprisingly little academic or judicial attention in Taiwan, Japan, and Korea, as a corollary of this, fiduciary duties have seldom been used as a criterion for distinguishing express trust relationships from other contractual relationships.[7] So, this section will first discuss the contents of the fiduciary duties. Second, we will look into the remedies available against a trustee when he, in breach of fiduciary duty, procures certain profits when

5. Canson Enterprises Ltd. v. Broughton & Co. 85 D.L.R 129 at 154 (4th Can. B.C. 1991); Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209 (1995); MATTEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 214 (2010); Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595 (1997).

6. John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995); Frank E. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993); Henry Butler & Larry Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990); Robert Cooter & Bradly Friedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991).

7. NORIO, *supra* note 4, at 30.

carrying out trust business. The analysis may lead Taiwanese, Japanese, and Korean lawyers to revisit their current tendency to treat the fiduciary duties owed by trustees (and other fiduciaries) as a class of contractual obligations.

(a) Fiduciary obligations

A distinguished Canadian lawyer, Professor Lionel Smith, once said: "civil tradition lacks the historical foundations that underpin the fiduciary obligations known to the common law".[8] This is also true to Taiwan, Japan, and Korea. Thus, it merits exploration and two questions arise: (1) what is the content of the fiduciary duty, and (2) what normative behaviour could possibly demarcate fiduciary obligations from contractual obligations?

(i) The duty of loyalty

A fiduciary duty, though controversial, also expressed as a 'duty of loyalty',[9] is concerned with the 'undivided loyalty' of the person who stands in a fiduciary position.[10] The duty is considered as the defining obligation of a fiduciary.[11] Two rules can be identified here: The first is the no-conflict rule; the second, the no-profit rule.[12] The no-conflict rule denotes that "no one, having such (fiduciary) duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect".[13] The no-profit rule means that the trustee, as a fiduciary, is required not to procure or pursue any profit or interest of his own in performing his trust business.[14] These two rules are generally accepted as the core constituent elements of fiduciary obligations.[15]

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8. Lionel D. Smith, *The Motive, Not the Deed*, *in* RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOR OF EDWARD BURN 54 (Joshua Getzler ed., 2003).

9. A-G v. Blake, 1 A.C. 268 (H.L. 2001); Coulthard v. Disco Mix Club Ltd, 1 W.L.R. 707 (Eng. 2000); Peter Birks, *The Content of Fiduciary Obligation*, 34 ISRAEL L. REV. 3 (2000).

10. Boulting v. Association of Cinematograph Television and Allied Technician, 2 Q.B. 606 at 636 (Eng. 1963).

11. Bristol & West Building Society v. Mothew, Ch.118 (Eng. 1998).

12. Some authorities suggest that the no-profit rule is no more than an illustration of the no-conflict rule *e.g.*, New Zealand Netherlands Society 'Orange' Inc. v. Kuys, 1W.L.R. 1126 at 1129 (Eng. 1973); Conway v. Ratiu, EWCA (Civ 2005) 1302, [59], 1 All E.R. 571 (Eng. 2006). However, other authorities suggest that they are distinct rules (*e.g.*, Brown v. Inland Revenue Commissioners, A.C. 244 (H.L. 1965); Regal (Hastings) Ltd. v. Gulliver, 2 A.C. 134 (H.L. 1967).

13. Aberdeen Rly v. Blaikie Bros. 1 Macq. 461(H.L. 1854) 471 (Lord Cranworth L.C.) (U.K.).

14. Keech v. Sandford, EWHC (Ch) J76, [1558-1774] All E.R. Rep. 230 (Eng. 1726); Bray v. Ford, A.C. 44 (H.L. 1896) 51; the no-profit rule normally comes into play when a trustee secretly pursues his own profits with the trust funds, but in rare cases this is not so: for example, when someone who has ceased to be a trustee acquires some profits by using the information he procures while he was acting as a trustee, *see* William Swadling, *Property: General Principles*, *in* ENGLISH PRIVATE LAW 219, 298-99 (Andrew Burrows ed., 2d ed. 2008).

15. PAUL FINN, FIDUCIARY OBLIGATIONS 199-200 (1977); Leonard S. Sealy, *Some Principles of Fiduciary Obligation*, 21 CAMBRIDGE L.J. 119 (1963); RODERICK PITT MEAGHER, JOHN DYSON HEYDON & MARK JAMES LEEMING, MEAGHER, GUMMOW & LEHANE'S EQUITY DOCTRINES & REMEDIES 169 (4th ed., 2002); However, some commentator lists three distinct kinds of fiduciary duty: *e.g.*, duty of loyalty, duty of influence, and duty of confidence, *see* Peter Millett, *Equity's Place in the Law of Commerce*, 114 LAW Q. REV. 214, 219 (1998).

Both the no-conflict and the no-profit rules are provided for in the Trust Act of each of Taiwan, Japan and South Korea.[16] As in English law, they form the heart of the fiduciary duty of the trustee.[17] First, the no-conflict rule requires that the trustee shall perform the duty of loyalty when carrying out the trust business; in other words, the duty requires trustees to manage the trust rights solely for the interests of the beneficiary, not for themselves or for others: trustees must act in the interests of their beneficiaries if any conflict of interests should arise. Secondly, the no-profit rule, by compelling the trustee to disgorge the profits he procures from any breach of his duty of loyalty, imposes a negative duty on the trustee, requiring him not to seek personal profit when managing the trust rights.

(ii) Fiduciary and contractual obligations

In the preceding paragraphs, it was found that the duty of loyalty consists of no-conflict and no profit rules. The issue here is whether these fiduciary obligations owed by the trustee can be described as unique when compared to obligations arising from contractual relationships; if so, the former will be demonstrably incapable of falling within the ambit of the latter. A successful answer to this question can probably be reached by exploring the distinct normative behaviour of fiduciary obligations, by comparison to contractual obligations. Some may think that fiduciary and contractual obligations are not different in that both regimes are designed to require one party to a relationship personally to perform an action or inaction.[18] However, the point here is not to deny the obligational aspect of the trustee's fiduciary duty. It is rather to focus on the question whether it is correct to bring fiduciary obligations within the scope of 'contractual' obligations. To know the normative function of a legal regime is meaningful because it helps to distinguish one area from the other. Therefore, the question that should be stressed here is, what is the normative function of fiduciary obligations? And, does it differ from that of contractual obligations?

The trustee's fiduciary obligation is commonly regarded as peculiarly intense compared to other obligations.[19] This is partly due to the different

16. Shintakuho [Trust Act] 2006, arts. 31, 40 para. 3 (Japan); Sintagbeop [Trust Act], Act. no. 10924, 25 July, 2011, arts. 33, 34 (S. Kor.); Xintuofa [Trust Act] 1996, art. 35 (Taiwan).

17. ARAI MACOTO, SINTAKUHO (信託法) [THE LAW OF TRUST] 249 (3d ed. 2008).

18. While contractual relationships can involve personal duties of action or inaction, the no-conflict and no-profit rules are normally described in the form of "not-to-do-something", and so require the fiduciary's inaction. However, some academics stress the positive aspect of fiduciary duty, and argue that a fiduciary duty is a positive duty to advance the interests of the beneficiary, *see* Andrew Burrows, *We Do This at Common Law but that in Equity*, 22 OXFORD J. LEGAL STUD. 1, 8-9 (2002); the text that corresponds to this footnote includes the term 'action' so as not to exclude the positive aspect of fiduciary duty.

19. Austin Wakeman Scott, The Trustee's Duty of Loyalty, 49 HARV. L. REV. 521 (1936); TERAMOTO SHINTO, KAISETSU SHIN SHINTAKUHO (カイセツ シン シンタクホ) [COMMENTARIES

foundations of fiduciary obligation and contractual obligation. In other words, differently to a contractual regime, a trustee is required to put the interest of the person he owes fiduciary duties ahead of himself. This rather draconian rule was also emphasised by Chief Justice Cardozo as follows: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive is then the standard of behaviour."[20] From this common law judges' remarks, we can find a quite different normative behaviour of fiduciary obligations compared to contractual obligations: the former requires the trustee to act strictly in the best interests of the person (i.e., his beneficiary) to whom he owes the fiduciary obligations,[21] whilst the latter are normally concerned with people pursuing their own interests; a party to the contract is not required to implement his obligations solely for the benefit of other party. So for example, even if I have entered into a contract with B to sell my laptop to him, I can still profit by selling my laptop to someone who offers me a better price which is high enough to cover the compensation I will owe to B for breaching my contract with him. In this contractual relationship, I have pursued my own interest through the breach of contract; this is quite possible. However, as a trustee, my fiduciary obligations, applying the prophylactic no-conflict rule that requires me not to put oneself in a position where my interests conflict with those of my beneficiary, simply forbids me even to negotiate with others if the deal in question presupposes the advancement of my own interests.[22] And, moreover, if I breach my fiduciary duty and acquire personal benefits, the draconian remedy (i.e., the no profit rule) for this breach of fiduciary duty has me stripped of any benefits I have obtained.[23] In other words, trusts law, by imposing upon the trustee the prophylactic rule of fiduciary loyalty comprising no-conflict and no-profit rules,[24] promotes or secures the advancement of the interests of the

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ON THE NEW TRUSTS LAW] 68 (2007).

20. Meinhard v. Salmon 164 N.E. 545, 546 (1928).

21. This is also the attitude taken by American Restatement (second) of Trusts s. 170 (1) (1959) ("The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.").

22. In this respect, the present author agrees with Professor Lionel Smith who argues that "the heart of the fiduciary obligation lies in the justifiability of motive. Inaction, or action, may be a breach of fiduciary obligation, but not because there was a duty to act, or not to act; rather, because the inaction or action was improperly motivated", *see* Smith, *supra* note 8, at 53, 64.

23. The question of profit stripping is discussed in the following section.

24. However, it has been argued that "the overarching conflict principle, designed to foster loyalty by discouraging any preference for personal interest over duty, extends only to circumstances where a trustee has placed himself in the position of conflict; it does not apply where the trustee has been placed in that position, whether expressly or by necessary implication from the circumstances, by the settlor" *see* Edwin Simpson, *Conflicts*, *in* BREACH OF TRUST 75, 94 (Peter Birks & Arianna Pretto

beneficiary.[25] And this kind of normative behaviour (subjecting one party to the sole interest of another), which is embedded in the fiduciary duty of loyalty, can be said to be one of the distinct aspects of fiduciary obligations that does not form part of the normative basis of contractual relationships.[26]

Some academics (particularly, law and economics theorists) in common law jurisdictions consider fiduciary duties as default rules (i.e., implied contract terms) that function as a gap-filling device, which perfects an otherwise-incomplete contract; on this view, fiduciary duties save the cost which would otherwise be incurred were the parties to the fiduciary relationship required to negotiate over the terms of a duty of loyalty.[27] The central point of this approach is that fiduciary loyalty, being a default rule, can be contracted out of by the consent of settlor or beneficiary; and resembles in this respect other contractual relationships in which the parties are free to alter the terms of their contract. However, it has been argued that the fact that the trustee's fiduciary duties can be relaxed by agreement does not compel the conclusion that fiduciary obligations are identical to contractual obligations; the process of altering the terms of fiduciary and contractual obligations is dissimilar.[28] Indeed, both common law jurisdictions and the Trust Act of each of Taiwan, Japan, and Korea afford the possibility of a fiduciary opting out of his fiduciary duties, either by the trust instrument[29] or by the consent of the fiduciary's principal,[30] but the requirements are more stringent. For example, in common law jurisdictions, in order to avoid the liability that arises from a breach of fiduciary duty, the

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eds., 2002).

25. Burrows, *supra* note 18, at 1, 8-9.

26. It may be thought that contracts too can result in a relationship in which one party is subjected to another; provided only that the parties agreed to that kind of relationship. However, the issue here is slightly different. In every express trust, someone who accepts the office of trusteeship automatically owes duties of fiduciary loyalty (unless there is agreement to the contrary; but, as will soon be revealed, there are some limits to the possibility of excluding the trustee's fiduciary obligations); on the contrary, contractual relationships generally do not presuppose these draconian duties, which subjecting one party to the other.

27. Langbein, *supra* note 6, at 625, 655; Easterbrook & Fischel, *supra* note 6, at 425; Butler & Ribstein, *supra* note 6, at 1; Cooter & Friedman, *supra* note 6, at 1045; Anthony Duggan, *Is Equity Efficient?*, 113 L.Q. REV. 601, 624 (1997); Gillian Hadfield, *An Incomplete Contracting Perspective on Fiduciary Duty*, 28 CAN. BUS. L.J. 141-54 (1997).

28. Frankel, *supra* note 5, at 1209, 1211; CONAGLEN, *supra* note 5, at 219; Brudney, *supra* note 5, at 595, 597 (1997).

29. Sargeant v. National Westminster Bank plc., 61 P. & C.R. 518 (Eng. 1991); Sintakuho [Trust Act] 2006, art. 31, para. 2, no. 1 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 34, para. 2, no. 1 (S. Kor.); Xintuofa [Trust Act] 1996, art. 27 (Taiwan) prescribe that the trustee can put himself in a conflict of interest situation if the trust instrument so allows; Restatement (Second) of Trusts s. 170(1) comment.

30. Gibson v. Jeyes, 6 Ves 266, 270-77 (1801); Regal (Hastings) Ltd. v. Gulliver, 2 A.C. 134, 153 (1967); Quarter Master UK Ltd. v. Pyke EWHC (Ch) 1815, 1 B.C.L.C. 245 (Eng. 2004); Sintakuho [Trust Act] 2006, art. 31, para. 2, no. 2 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 34, para. 2, no. 2 (S. Kor.); Xintuofa [Trust Act] 1996, art. 35, para. 1, no. 1 (Taiwan) prescribes that the trustee can put himself in a conflict of interest situation if the beneficiary so authorises.

trustee's authorisation must be acquired on the basis that he has disclosed all material facts[31] that would otherwise affect the authorisation; and further, that authorisation must be supported by a clear evidence.[32] In other words, only by a fully-informed and evidenced authorisation could a fiduciary be immune to liability for a breach of fiduciary duty. The common-law of contract, by contrast, does not tend to impose such cumbersome conditions upon the parties to a contract.[33] Thus, the general rule is that "a person who is about to enter into a contract is under no duty to disclose material facts know to him but not to the other party[34]. . .if a general duty of disclosure did exist it would be very hard to say exactly what must be disclosed in any particular case."[35] Therefore, the non-disclosure of material facts may not, as a general rule, affect the validity of a contract;[36] yet, by contrast, it always endangers the validity of any authorisation given to a trustee. What Japanese trusts law on this question of authorisation issue shows is even more draconian than the position at common law. As mentioned in the preceding paragraph, the trustee's fiduciary duty can equally be exempted through approval given by the trust instrument or by the beneficiary. However, as at common law, this authorisation is taken to have been given on the condition that the fiduciary has informed the beneficiary of any material information.[37] On top of this fully-informed consent rule there is one further limitation directed at fiduciaries who are trust companies. The Trust Enterprise Act of Taiwan and the Trust Business Act of Japan both require that authorisation for such companies must be given in a written document;[38] and, some East Asian jurisdiction provides that, even if such authorisation is issued, it may not be effective if the transactions authorised could have a harmful impact on the beneficiary's interests.[39] Last but not least, while there is no provision to this effect, commentators tend to agree that any total or comprehensive elimination of fiduciary duties by means of

31. New Zealand Netherlands Society 'Orange' Inc. v. Kuys, 1 W.L.R. 1126 (P.C. 1973) 1132 (U.K.).

32. York & North-North-Midland Railway Co. v. Hudson, 51 E.R. 866 (1845); Coles v. Trecothick 32 E.R. 592 (1804).

33. MICHAEL FURMSTON, CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT 335 (15th ed., 2007); JACK BEATSON, ANSON'S LAW OF CONTRACT 236 (28th ed., 2002).

34. Norwich Union Life Ins. Co. Ltd. v. Qureshi, 2 All E.R. (Comm) 707, 717 (1999).

35. EDWIN PEEL, TREITEL'S LAW OF CONTRACT 424 (12th ed., 2007).

36. Norwich Union Life Ins. Co. Ltd. v. Qureshi, *supra* note 34; Agnew v. Länsförsäkringsbolagens AB, 1 A.C. 223, 265 (2001).

37. Sintakuho [Trust Act] 2006, art. 31, para. 2, no. 2 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 34, para. 2, no. 2 (S. Kor.); Xintuofa [Trust Act] 1996, art. 35, para. 1, no. 1 (Taiwan). Though the word "material information" is not expressed in the Xintuofa [Trust Act] 1996, art. 35, para. 1, no. 1 (Taiwan), the result must be the same, for consent is meaningless without any material information being informed of.

38. Xintuoyefa (信託業法) [Trust Enterprise Act] 2000, art. 27, art. 29, para. 2 (Taiwan).

39. Xintuoyefa (信託業法) [Trust Enterprise Act] 2000, art. 29, para. 2 (Taiwan).

the trust instrument or mutual agreement would make the trust void, on the basis that by taking out the core elements of the trust, the parties to the trust are to be deemed to have had no intention to establish any fiduciary relationships whatsoever.[40]

As has been explored, fiduciary duties have their distinct normative qualities in that trustees are from the beginning under demanding obligations to perform their duties solely in the best interests of their beneficiary, and that is not part of the general prerequisites to a contractual relationship. And while some endeavours have been made to justify the assertion that fiduciary obligations are identical to contractual obligations using the theory of the gap-filling default rule, the exacting process by which consent or authorisation to the exclusion of fiduciary duties must be procured clearly show the law's determination to give consent a different role from that which it has in contractual relationships. And this is what the default-rule advocates have so far overlooked. Therefore, fiduciary obligations (i.e., the duty of loyalty) should be regarded as qualitatively different obligations from contractual obligations.

(b) Breach of Fiduciary Duty: The Profit-Stripping Principle

If a trustee procures any profits by using or receiving trust funds in breach of his fiduciary duty of loyalty, common law jurisdictions tend to regard those profits as being held on constructive trust for the beneficiaries of the trust.[41] The approach adopted in East Asian Jurisdictions in this situation is to give the beneficiary a right to assert that the profits in the hands of his trustee form part of the trust funds, meaning that the beneficiary can order his trustee to put the unauthorised profits into the trust account, rather than leaving them in his personal account.[42] Though the beneficiary can also ratify the fiduciary's profit-acquiring transaction *ex post facto*,[43] profits obtained in breach of fiduciary obligations should in principle be returned even if they are not related to the trust funds or the principal's assets. So, we have seen that the trustee/fiduciary's profits acquired by virtue of a breach of fiduciary duty are generally liable to be returned. However, this powerful profit-stripping impulse in the case of breach of fiduciary obligations is fundamentally not the usual response to a breach of contractual obligations,[44] which is principally compensatory damage.[45、46] Thus,

40. SHINTO, *supra* note 19, at 118, 119 n. 3.

41. Guinness plc. v. Saunders, 2 A.C. 663 (1990); Neptune (Vehicle Washing Equipment) Ltd. v. Fitzgerald, Ch. 274 (1996); CMS Dolphin Ltd. v. Simonet, 2 B.C.L.C. 704 (2001).

42. MACOTO, *supra* note 17, at 269; Sintakuho [Trust Act] 2006, art. 40, para. 3 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 43, para. 3 (S. Kor.); Xintuofa [Trust Act] 1996, art. 35, para. 3 (Taiwan).

43. *Eg.* Sintakuho (信託法) [Trust Act] 2006, art. 32, para. 5 (Japan).

44. Minpo (民法) [Civil Code] 1898, art. 415 (Japan); Minbeop (민법) [Civil Code], Act. no. 471, 1 Jan., 1960, art. 390 (S. Kor.); Minfa (民法) [Civil Code] 1929, art. 226 (Taiwan) provide that

whether by analysis of the obligations that exist or the remedies that are given, any equation of contractual obligations with fiduciary obligations should be viewed with care unless and until the (many) doctrinal issues set out in this section can be satisfactorily dissolved.

4. *Effects against Non-Parties to the Trust*

Probably one of the most distinctive characteristics distinguishing trusts from contracts is the trust's effects against non-parties to the trust.[47] Included in the category of non-parties to the trust are third party transferees and the trustee's personal creditors. And it is admitted unequivocally that the protection of the trust fund against non-parties to the trust as the most important feature of the trust.[48]

As to the effect against third party transferees, the Trust Act of each of Taiwan, Japan, and South Korea awards the beneficiary a right to rescind the transaction concluded between the trustee and the third party transferee,[49] and by which can a beneficiary recover the dissipated trust fund. Unlike *Actio Pauliana* (fraud on creditors) prescribed in the civil code of Taiwan, Japan and South Korea,[50] the beneficiary's right of rescission does not require that the trustee should prejudice the beneficiaries, and, moreover, the assets recovered from the third party can only be used for the beneficiaries of the trust, rather than for the trustee's all creditors. Thus, the beneficiary's right of rescission prescribed in the law of trust is different from the one provided for in the civil code of Taiwan, Japan and South Korea.[51] It is quite

compensatory damages are the principal response to a breach of obligations.

45. Paul Finn, *Contract and the Fiduciary Principle*, 12 U. NEW S. WALES L.J. 76, 83 (1989); Thus, Professor Paul Matthews also argues that the "common law rules of remoteness of damage, and at least some of the rules relating to causation of loss, do not apply in breach of trust claims", *see* Mattews, *supra* note 4, at 203, 221.

46. An exception to the general principle in English law would be the case of Attorney-General v. Blake, 1 A.C. 268 (Eng. 2001), in which a profit-stripping remedy was awarded for a breach of contractual obligations. However, this remedy was said to be allowable "only in exceptional circumstances" (Attorney-General v. Blake, 1 A.C. 268, 285 (2001)).

47. This point is also raised and argued in some common law jurisdiction, *please see* Joshua Getzler, *Legislative Incursions into Modern Trusts Doctrine in England: The Trustee Act 2000 and the Contracts* (Rights of Third Parties) *Act 1999*, 2 GLOBAL JURIST TOPICS 1, 13 (2002).

48. MACOTO, *supra* note 17, at 103.

49. Sintakuho [Trust Act] 2006, art. 27 (Japan); Sintakbeop (신탁법) [Trust Act], Act. no. 10924, 25 July, 2011, art. 75 (S. Kor.); Xintuofa [Trust Act] 1996, art. 18 (Taiwan).

50. Minpo [Civil Code] 1898, art. 424, 425 (Japan); Minbeop [Civil Code], Act. no. 471, 1 Jan., 1960, art. 406 (S. Kor.); Minfa [Civil Code] 1929, art. 244 (Taiwan).

51. For more details on the beneficiary's right to rescind, *see* Chu Peh-Sung (朱柏松), *Lun Shoutojen Weifan Hsinto Penchieh Chufen Hsinto Tsaichan Chih Hsiaoli* (論受託人違反信託本旨處分信託財產之效力) [*The Effectiveness of Dispositions in Breach of Trust by Trustees*], 82 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 32 (2002); Wu Ying-Chieh, *Shintakbeopsang Suikjaeui Chwisokwon* (신탁법상 수익자의 취소권) [*The Beneficiary's Right of Rescission*], 38

hard to imagine a contractual mechanism could ever accord to one of the parties to it such a powerful right to recover the subject-matter of the contract. Trust allows the beneficiary to meddle with the transaction between his trustee and a third party with such generous requirements, which a contractual relationship cannot be expected to be capable of.

As to the effect against the trustee's personal creditors, the Trust Act of each of Taiwan, Japan, and South Korea provides that trust funds do not form part of the trustee's personal assets should he become bankrupt.[52] In other words, the beneficiary's position is preferred than those personal creditors of the trustee. If trust is a contract, beneficiaries should be treated equally, but they are preferred in the trustee's bankruptcy; the law impliedly prefers a trust to a contract, *viz.*, they are different.

To sum up, the third party-effect and the bankruptcy effect are not reconcilable with the contractual approach: trust can hardly be treated as a contract.

5. *Judicial Intervention*

Another distinctive feature of trusts compared to contracts would probably be the degree of judicial intervention. The Trust Act of each of Taiwan, Japan, and Korea does not have any articles dealing with the inherent jurisdiction of the court to give proper directions to the parties to a trust concerning the administration of a trust. However, it does provide that the beneficiary is entitled to make an application to the court to appoint an inspector to monitor the trustee's administration of the trust.[53] As regards the appointment or removal of the trustee, the courts do have jurisdiction to appoint a new trustee[54] if the settlor or beneficiary cannot decide whom to appoint after the trustee dies, loses his legal capacity, becomes bankrupt and so on. Furthermore, courts are also, following the application of the parties to the trust, empowered to remove a trustee who has breached one of his duties; and can remove a trustee for other significant reasons not involving a breach of the trustee's duties.[55]

This section has only touched on the point that judicial intervention is normally permitted, such that the courts occupy a comparatively important

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ANAMBEOPHAK (안암법학) [ANAM L. REV.] 199, 199-25 (2012).

52. Sintakuho [Trust Act] 2006, art. 23 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 24 (S. Kor.); Xintuofa [Trust Act] 1996, art. 11 (Taiwan).

53. Sintakuho [Trust Act] 2006, art. 46 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 67 (S. Kor.); Xintuofa [Trust Act] 1996, art. 52 (Taiwan).

54. Sintakuho [Trust Act] 2006, art. 62, para. 4 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 21, para. 2 (S. Kor.); Xintuofa [Trust Act] 1996, art. 36, para. 3 (Taiwan).

55. Sintakuho [Trust Act] 2006, art. 58, para. 4 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 16, para. 3 (S. Kor.); Xintuofa [Trust Act] 1996, art. 36, para. 2 (Taiwan).

role in facilitating the proper administration of trusts. Moreover, the functions performed by the courts in the appointment of trustees, administration of funds, and removal of trustees, are difficult to reconcile with the trust being a contractual relationship. Courts are generally not interested in whether there is an adequate counterparty to the contract; in removing a party from the contract; or in monitoring the performance of the counterparty to a privately-concluded contractual relationship. Thus, the role of judicial intervention should also indicate to us that private express trusts are qualitatively different from contracts.

C. *Conclusion*

Regarding a trust as a contract is similar to classifying a whale as a special fish. Whales do not produce their offspring in the form of eggs like other fish. Should we say that whales are a special species of fish and put them in the category of Pisces simply because of the similarity in their appearance? In the realm of analytical science, accurate nomenclature plays a vital role. What we should focus on are the decisive or core features demarcating one thing from another, not any superficial similarities. The facts that a trust can be created without mutual consent, that the beneficiary of a trust is capable of recovering his specific funds (as opposed to having a purely personal claim for money) from a recipient third party by exercising his right of rescission, and that judicial intervention is normally permitted, are sufficient to tell us that the mechanics of a trust are distinct from those of a contract: the proposition that trusts are contracts is probably founded on an unsound premise.

III. TRUST AS PROPERTY

A. *Introduction*

If we conclude that the contractual approach is not to be taken, the next candidate to be explored must be property regime. This is so because the private law dealing with property in Taiwan, Japan, and Korea is divided into obligation and property, and the dichotomy requires us to examine whether it can be wedged into the latter pigeon hole. An examination on the property regime is a good source of comparative analysis since trusts law in common law jurisdictions is normally considered part of the law of property, for it creates a property right (or right *in rem*) for the benefit of the beneficiary of a trust. The question is thus as follows: whether it is possible to argue that the beneficiary in Taiwan, Japan, and Korea can also be said to have a proprietary interest over the trust funds. Therefore, the central issue

that needs exploring in this section should be the 'the nature of the beneficiary's right over trust funds'. In the following discussion, we will briefly examine the approach taken in some common law jurisdictions, since it helps us properly understand the propositions of a property-based system for the trust; and it will be disclosed that they cannot be supported in Taiwan, Japan, and Korea.

B. *The Nature of the Beneficiary's Right in Common Law Jurisdictions*

1. *A Property-Based System*

It is true that many distinguished lawyers[56] and cases[57] have explained the nature of the right of the beneficiary on the right *in rem* approach. For example, Professor Gardner identifies the beneficiary's right as a kind of right in rem and says '. . . [T]rusts can be used to divide the ownership between two or more people.'[58] The grounds for saying this are that the beneficiary's right can be effective against a disponee[59] (third party transferee: the so-called 'third-party effect') and that his right can take priority over the trustee's ordinary creditors if the trustee becomes bankrupt (the so-called 'bankruptcy effect).[60] Suppose a settlor transfers a right to a trustee requiring him to hold it under a trust for the benefit of a beneficiary. If the trustee in breach of the trust transfers the trust fund to a third party and the latter is not a bona fide purchaser for value without notice of the breach, the third party disponee is bound by the beneficiary's right. This is so for the beneficiary's right is a property right. Moreover, when a right is held on trust, it allows the parties to the trust to partition off an insulated set of assets for separate treatment. As a result, when a trustee becomes insolvent, the trust rights do not vest in his or her trustee in bankruptcy (if the trustee is an individual) or company liquidator (if the trustee is a corporation). The consequence is that the trust funds cannot be used to satisfy the trustee's own debts.[61] This is provided for by the Insolvency Act 1986 (UK). Section 283(1)(a) says that 'all property belonging to or vested in the bankrupt at the

56. Austin Wakeman Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269 (1917); CHARLES ANDREW HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY 3, 87-154 (1915); JOHN WILLIAM SALMOND, JURISPRUDENCE 277-78, 284-89 (7th ed. 1924).

57. Baker v. Archer-Shee, A.C. 844 (1927); Archer-Shee v. Garland, A.C. 212 (1931); IRC v. Berrill, 1 All E.R. 867 (1982).

58. SIMON GARDNER, AN INTRODUCTION TO LAND LAW 13 (2007); note that it is axiomatic that there is no common law ownership in English law, although this statement gives the impression that it presupposes the existence of common law ownership.

59. SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 248 (2d ed., 2003).

60. *Id*. at 248-49.

61. On the other hand, if the beneficiary becomes insolvent or bankrupt, the beneficial interest *does* vest in the beneficiary's trustee in bankruptcy or liquidator.

commencement of the bankruptcy' comprises a bankrupt's estate; and section 283(3)(a) provides that section 283(1)(a) does not apply to 'property held by the bankrupt on trust for any other person'.[62] Article I (3)[63] of the 'Principles of European Trust Law' and article 11(b)[64] of the 'Hague Convention on the Law Applicable to Trusts and on their Recognition' also provide for this effect in insolvency. Consequently, since the trust rights are kept separate from those used to satisfy the trustee's personal debts, those rights are protected from the trustee's own creditors. This bears a resemblance to the effect of property right rather than that of personal right, in that the effect of the right reaches a party other than the trustee. Accordingly, the property-right approach relies on the following two effects: the effect in insolvency and the aforementioned effect of the beneficiary's right on third parties.

2. *The Falsity of the Concept of 'Division of Ownership'*

Though the beneficiary's right is generally regarded as a property right in its nature in common law jurisdictions, it must not be taken for granted that the beneficiary's right is a kind of ownership. It must be noted that that there are criticisms and counter arguments relating to the idea that trusts involve a division of ownership.[65] For instance, Professor Tony Honoré said: "while trust beneficiaries undoubtedly possess a beneficial interest in trust assets there is no compelling reason, it seems to me, to describe this as a form of ownership."[66] An approach according to which the beneficiary's property right is not 'carved out' of legal ownership, but 'engrafted onto' it, has already been spelled out by academics and judges in common law jurisdictions. For example, Professor William Swadling at Oxford writes: "it is a complete falsity to say that there is any division of ownership in the English law of trusts."[67] Moreover, over a half century ago, one of the greatest comparative lawyers, Professor F.H. Lawson, argued that the term 'equitable ownership' was not a correct term to use.[68] As these illustrations

62. It should be noted that there is no corresponding provision as regards corporate insolvency in the Insolvency Act 1986. However, it is commonly considered that the same principle applies to it, *see* GERARD MCCORMACK, PROPRIETARY CLAIMS AND INSOLVENCY 7 (1997).

63. The separate existence of the trust fund entails its immunity from claims by the trustee's spouse, heirs and personal creditors.

64. In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular, that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy.

65. Tony Honoré, *Trusts: The Inessentials*, *in* RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAY IN HONOR OF EDWARD BURN 7, 9 (Joshua Getzler ed., 2003).

66. Tony Honoré, *On Fitting Trusts into Civil Law Jurisdiction*, *in* 27 OXFORD LEGAL STUDIES RESEARCH PAPER 1 (2008), http://ssrn.com.abstract=1270179.

67. Swadling, *supra* note 14, at 219, 272-74.

68. FREDERICK H. LAWSON, A COMMON LAWYER LOOK AT THE COMMON LAW 203 (1955).

show, it is possible to say that the beneficiary's right could be a proprietary one,[69] but trusts do not include the division of ownership such as one at law and another in equity. Thus beneficiary's right should not be considered as ownership but as another kind of property rights. It must be remembered that not all property rights are ownership. The fact that equitable 'ownership' is a wrong term, and that it is not a universally accepted terminology are particularly important to lawyers in civilian jurisdictions.

C. *The Nature of the Beneficiary's Right*

1. *Personal Right Approach*

According to some lawyers in East Asia argue the beneficiary's right is a personal right; the he does not have any right over specific trust funds.[70] However, if this position is correct, it is logically impossible to accommodate the features of the beneficiary's right that have been imported from the common law model of trusts, such as the trust's effect in insolvency and its effect on third parties. These features are clearly provided for in the Trust Act of each of Taiwan, Japan and South Korea.

First, as regards the effect in insolvency, Article 2(3) of the Japanese Trust Act defines trust funds as follows:[71] "Trust funds under this Trust Act means all the assets which vest in the trustee and which need to be administered and disposed of subject to the trust terms"; and Article 2(8) defines the trustee's own assets as follows: "The private assets under the Trust Act means that the assets which vest in the trustee and which do not form part of the trust funds"; these two articles implies the principle that the trust funds, though held by a trustee, constitute a separate fund. Furthermore, Article 25 provides that "When the procedures for the trustee's bankruptcy commence, trust funds do not form part of the assets available to satisfy the trustee's personal debts";[72] and Article 23(1) further provides that "Except for the purpose of satisfying debts incurred by the trust, compulsory execution, provisional attachment . . . realization of security, auction and

69. Lionel D. Smith, *Unravelling Proprietary Restitution*, 40 CAN. BUS. L.J. 317 (2004); Lionel D. Smith, *Philosophical Foundations of Proprietary Remedies*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 281 (Robert Chambers, Charles Mitchell & James Penner eds., 2009).

70. MACOTO, *supra* note 17, at 40-43; CHE-UNG IM, SINTAKBEOP YEONKU (신탁법 연구) [STUDIES ON TRUSTS LAW] 3, 31 (2009).

71. Though the Taiwanese and South Korean Trust Acts do not contain a provision on the definition of trust fund, but the same conclusion could be extracted from art. 2 of the Taiwanese Trust Act and art. 1 of the South Korean Trust Act: both articles provides for the definition of trust.

72. This is also prescribed in the Taiwanese Trust Act, art. 11 and the South Korean Trust Act, art. 24.

interim injunction . . . against the trust fund are prohibited."[73] Article 23(1) is a logical consequence of Articles 2(3), 2(8), and 25: it is because the trust fund is separated from the trustee's private assets that it is immune to any enforcement procedures imposed on the trustee on account of his personal debts. To repeat: the trust funds will not form part of the assets available for distribution to the trustee's own creditors. Since the funds that the trustee holds as the subject matter of the trust rights are unavailable to the trustee's own creditors, the beneficiary's right under the trust is also preserved. Unfortunately, East Asian jurisprudence has not yet clearly explained the justification for shielding the trust funds from the trustee's own creditors.

Secondly, as regards the effect on third parties, as we have already seen, the Japanese Trust Act, in Articles 27(1)(ii) and 27(2)(ii), provides that the beneficiary is able to rescind certain transactions or dispositions made by the trustee.[74] What we can note about this provision is that it allows the beneficiary to meddle with dispositions that have been made between the breaching trustee and a third party transferee. Defenders of the orthodox position should be asked why the holder of a mere personal right is capable of affecting a third party. The standard response is that the beneficiary's right is a special personal right[75] justified by the policy of protecting beneficiaries. However, saying the beneficiary's right is exceptional and special cannot be the proper justifications, for what we are trying to verify is why it should be exceptional or special.

The explanation for the personal right approach is the propensity of Taiwanese, Japanese and Korean lawyers to conceptualise the trust as a species of contract; however, considering the existing provisions on the effect in insolvency and the effect on third parties, and all other reasons discussed in the previous section (i.e., Trust as Contract), trusts are hard to fall within the scope of the law of contract. The beneficiary's right over trust funds may be personal, but we need its legal grounds supporting its third party and insolvency effects. Can we say the beneficiary's right can amount to a property right even in Taiwan, Japan, and Korea?

2. *Property Right Approach*

This section, following the Roman-Germanic tradition that divides rights into property rights and personal rights, focuses on whether the beneficiary's right will fall within the former category. Indeed, some lawyers

73. The same rule is enshrined in the Taiwanese Trust Act, art. 12 and the South Korean Trust Act, art. 22.

74. Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 75 (S. Kor.); Xintuofa [Trust Act] 1996, art. 18 (Taiwan).

75. MACOTO, *supra* note 17, at 60.

in East Asia argue that the beneficiary holds a right *in rem* over trust funds.[76] However, it will be argued that any attempt to force it into this category will confront practical and theoretical obstacles due to the rigid principles of the local law of property (*Sachenrecht*). This section sets out a number of objections to considering the structure of the beneficiary's right to be a property right.

(a) Ownership

There is a barrier to Taiwanese, Japanese, and Korean law recognizing the beneficiary's right as ownership. The Civil Code of Taiwan, Japan and South Korea each provides that an owner, subject to the restrictions imposed by laws and ordinances, has the right freely to use (*usus*), profit from (*fructus*) and dispose of (*abusus*) the assets owned.[77] Furthermore, one of the 'general attributes of a property right' (i.e. a real right, a right *in rem*) is that, when the right is infringed, the right-holder has actions to vindicate his property in the hands of others or prevent their infringement of his right; the former is called *rei vindicatio*, the latter *actio negatoria*.[78] Now, whilst the Japanese Civil Code does not have any provision expressly giving the property-right-holder the *rei vindicatio* or *actio negatoria*, it is a prevailing view that, since they are general elements of all kinds of rights *in rem* (e.g. ownership, superficies, *servitude praedorium*, pledge, hypothec), the Civil Code presupposes that such actions are available to a person who has ownership. However the Taiwanese and Korean Civil Codes expressly provide for *rei vindicatio* or *actio negatoria*.[79] To sum up, the power to use (*usus*), the power to profit (*fructus*), the power to dispose (*abusus*), the availability of the *rei vindicatio,* and the availability of the *actio negatoria* are five main characteristics of ownership. And since theses jurisdictions adopts the concept of absolute ownership, ownership of trust fund can only vest in one legal entity in a trust relationship.

Now, in the case of trusts law in Taiwan, Japan, and South Korea, ownership of the trust fund vests in the trustee. Therefore, the trustee has all of the five aspects of ownership mentioned in the previous passage. It might be argued that the power to profit (*fructus*) does not belong to the trustee since the trustee cannot benefit from the trust fund.[80] However, this argument is not correct; it misses a step before the profit goes to the

76. CHOI DONG SIK, SINTAKBEOP [THE LAW OF TRUST] 328-29 (2006); SHIEH JER-SHENG, XINTUOFA (信託法), [THE LAW OF TRUSTS] 41-44 (2009).

77. Minpo [Civil Code] 1898, art. 206 (Japan); Minbeop [Civil Code], Act. no. 471, 1 Jan., 1960, art. 211 (S. Kor.); Minfa [Civil Code] 1929, art. 765 (Taiwan).

78. HIROSHI ODA, JAPANESE LAW 151 (2d ed. 1999); UCHIDA TAKASHI, MINPO I (民法I), [CIVIL LAW I] 367 (4th ed., 2000).

79. Minbeop [Civil Code], Act. no. 471, 1 Jan., 1960, arts. 213, 214 (S. Kor.); Minfa [Civil Code] 1929, art. 767 (Taiwan).

80. Pierre Lepaulle, *Trusts and the Civil Law*, 15 J. COMP. LEGIS. & INT'L L. 18, 20 (1933).

beneficiary's pocket. For example, suppose a trustee invests one million yen in real estate, and later it produces two million yen profits. No proceeds go directly to the beneficiary's pocket. It is the trustee to whom the money generated by the investment should be transferred, since his very role is to function as a conduit in passing the profits to the beneficiary. Thus, in normal transactions between the trustee and a third party, the benefit must come into the trustee's hands first. In this sense, we can say that the benefit of the trust fund belongs to the trustee. The allocation to the beneficiary of benefits arising from the trust is the next step, governed by the trust. Therefore, the trustee is equipped with all of the five elements of ownership. The beneficiary cannot use, profit or dispose of specific trust property directly; these powers belong solely to the trustee. In other words, the beneficiary cannot qualify as an owner of the trust fund, let alone as a co-owner.[81] East Asian law cannot help but come to the conclusion that the beneficiary's right is not an ownership. Thus, if it is a property right, it must be another type of property right attached to the assets held (owned) by the trustee. Since trust assets can comprise of various types of asset, we must explore whether it can be attached to each type of assets (for example, (i) land, (ii) goods, (iii) documentary intangibles: commercial paper; (iv) receivables (bank accounts); (v) investment securities: stocks, shares, and bonds; and (vi) money).

(b) Land

When a trustee holds a property right (i.e. ownership or hypothec) over a plot of land on trust for another, a question arises whether it is possible to argue that the beneficiary's right is a kind of property right attached to it. The short answer is that it cannot. In Taiwan, Japan, and Korea, in order to minimise disputes over titles to land, the law tries to ensure that property rights (freeholds, easements, mortgages and so on) have "universal exigibility". One of the means adopted is to require each kind of property right over land to be registered in the public register: this is called the 'principle of publicity'.[82] Once a property right over the land is registered, the right-holder's name will appear on the public register *as a recognized property right holder*, and a subsequent buyer of the land will be able to find out easily who has proprietary interests in respect of the land and what kinds of burdens are imposed on that land. As a result, the land cannot be disposed of to potential buyers free of existing property rights over that land; if a

81. As corollary of this, the concept of dual ownership can scarcely be accepted in Taiwan, Japan and South Korea, for more details, *see* Ying-Chieh Wu, *Trust Law in South Korea: Developments and Challenges*, *in* TRUST LAW IN ASIAN CIVIL JURISDICTIONS: A COMPARATIVE ANALYSIS 46, 57 (Lusina Ho & Rebecca Lee eds., 2013).

82. TAKASHI, *supra* note 78, at 437; WAGATSUMA SAKAE, BUKKENHO (物權法), [THE LAW OF RIGHT IN REM] 40 (1983).

buyer does purchase ownership of the land, he will not be able to assert his right against the registered holder of a property right, because the subsequent buyer should have known of the existence of registered property rights over that land. Registration functions as a means of deeming all the world to have known of the previous property right holder; in other words, it tells all the world who is entitled to assert his property rights over land against them (universal exigibility). Now, since registration tells people who can assert his property rights against all the world, the right must be *a recognized property right recorded on the register*. However, though it is possible to notify that the land transferred to the trustee is a trust asset, but it can hardly be said that the current legal regime of the three jurisdictions in question regards that the beneficiary of that trust has *a recognized property right recorded on the register*. The upshot is that the beneficiary cannot hold a property right that is attached to the land whose ownership is held by the trustee.

(c) Personalty

When the subject-matter of the trust rights that the trustee holds for the beneficiary is personalty, the same question arises: even if the beneficiary's right over the personalty cannot be ownership, can it be a kind of property right other than ownership? This section tries to find the answer. It uses five kinds of personalty as testing grounds: (i) goods; (ii) documentary intangibles: commercial paper; (iii) receivables (bank accounts); (iv) investment securities: stocks, shares, and bonds; and (v) money.

(i) Goods

In the case of goods, a delivery (transfer of possession) must be made in order to acquire a property right.[83] The reason the beneficiary is not qualified as a holder of property right when goods are the subject-matter of the trust assets is that the beneficiary never takes delivery (transfer of possession) of the goods, sometimes the beneficiary is even not aware of what goods constitutes the trust funds.

There are four types of delivery. The first is direct delivery, which requires one party to make a physical transfer of possession to the other. This usually happens in the cases of sale and pledge. In trusts, when the trustee buys something, it is obvious that it is the trustee who gets direct delivery from the seller. It may be possible for the beneficiary to take delivery. However, it must have been done with the agreement of the trustee since the contracting party (i.e. the buyer) is the trustee, not the beneficiary. The second type of delivery is delivery by agreement.[84] This is used when the trustee already has possession of the goods that he wants to buy from the

83. Minpo [Civil Code] 1898, art. 178 (Japan); Minbeop [Civil Code], Act. no. 471, 1 Jan., 1960, art. 188, para. 1 (S. Kor.); Minfa [Civil Code] 1929, art. 761, para. 1 (Taiwan).

84. Minpo [Civil Code] 1898, art. 182 (Japan); Minbeop [Civil Code], Act. no. 471, 1 Jan., 1960, art. 188, para. 2 (S. Kor.); Minfa [Civil Code] 1929, art. 761, para. 1 (Taiwan).

seller. Again, the parties to the agreement are the trustee and the seller, not the beneficiary; there is no transfer of possession to the beneficiary. The third type of delivery is constructive delivery.[85] This method of delivery is employed in the case of the typical real security right, the civilian counterpart of the mortgage found in common law jurisdictions. For example, suppose A (a mortgagor) wants to take a loan from T (a lender, mortgagee, and trustee for B), but A does not want to provide T with the possession of A's goods, since delivery of the possession of these goods to T would prevent A from carrying on his business. In this situation, A and T can make an agreement allowing A to keep the possession of the goods by treating the goods as though they have been delivered from A to T and then redelivered from T to A. Since the goods are deemed to have been once delivered to T (a mortagee of the titles to goods), the trustee acquires the titles to the goods, notwithstanding that A keeps possession of the goods. The example, it will be noted, also shows that the parties between whom the constructive delivery is made are A (the mortgagor) and T (the mortgagee); B is not one of these parties. The last form of delivery is delivery by transferring the right to the return of goods.[86] For instance, if A as an owner has a claim to the return of goods against B, A can sell his ownership to those goods to C before he recovers possession of the goods from B, simply by transferring the right to the return of the goods that A has against B to C; and A is required to inform B of the transfer. Now, if A wants to sell the titles to the goods to a C who is a trustee of another, it is the trustee (i.e. C) to whom A has to transfer the right to the return of the goods in order to effect delivery; again, not the beneficiary.

To conclude, since the beneficiary is in principle not a person to whom the delivery of goods is made, when the objects of the trust assets are goods, the beneficiary cannot be said to have property rights over those goods.

(ii) Documentary intangibles: commercial paper

In commercial transactions, 'commercial paper' is very often used between buyers and sellers. If the subject-matter of the trust funds that the trustee holds relate to some commercial paper, such as a negotiable instrument (i.e. a bill of exchange, promissory note, or cheque) or a document of title (i.e. a bill of lading), can we say that the beneficiary has property rights over the objects of those trust funds under current Taiwanese, Japanese, and Korean law? Let us begin by considering the nature of the rights that the trustee has. There is no doubt that the trustee's rights over the negotiable instruments or documents of titles cannot be said to be property

85. Minpo [Civil Code] 1898, art. 183 (Japan); Minbeop [Civil Code], Act. no. 471, 1 Jan., 1960, art. 189 (S. Kor.); Minfa [Civil Code] 1929, art. 761, para. 2 (Taiwan).

86. Minpo [Civil Code] 1898, art. 184 (Japan); Minbeop [Civil Code], Act. no. 471, 1 Jan., 1960, art. 190 (S. Kor.); Minfa [Civil Code] 1929, art. 761, para. 3 (Taiwan).

rights; the former relates to monetary *obligations* (i.e. rights to claim money) and the latter relates to delivery *obligations* (i.e. rights to claim delivery of goods). Though the trustee may have possession of the documents, what this means is that the trustee has a possession right over the note *itself*, not a property right over the obligations contained in the commercial paper. This does not change even if the delivery of possession is crucial to the exercise of the personal rights contained in the commercial paper. Thus, when the trust funds are concerned with negotiable instruments or documents of title, the trustee's rights are personal. That being so, there is no way of saying that the beneficiary has a property right over commercial paper, since an originally personal right cannot become property right in nature simply because it comes to be held on trust. There is nothing *in specie* over which the beneficiary could have a property right.

In conclusion: what is embedded in a documentary intangible, such as a negotiable instrument or a document of title, is a personal right to claim money (in the case of a negotiable instrument) or goods (in the case of a document of title), and this does not change even if the relevant commercial paper is held on trust. Therefore, where a trust fund is made up of commercial paper, it is hard to see the beneficiary as a holder of property right over it.

(iii) Receivables

If A owes B a debt, this means B is a creditor and A is a debtor. There is no doubt that B's credit is a type of personal right. Thus, we do not say that A (debtor) is subject to B's (creditor) property right; A is only personally bound to pay B a certain sum of money, *viz.*, B is only the holder of a personal right. So, if a debt owed by A (debtor) to B (creditor) is held by B (trustee/creditor) under a trust, it seems impossible to say that C, a beneficiary, has a property right over the debt; the trustee's right itself is only a personal claim against B.[87] This reflects the preceding discussion of documentary intangibles. Therefore, when trust rights are receivables, it cannot be said that the beneficiary has property rights over them; the creation of the trust cannot cause the subject-matter to mutate into property rights.

(iv) Investment securities

If a trustee's rights relate to investment securities such as shares and bonds, can we consider that the beneficiary has property rights over those funds? It may be helpful first to identify what manner of right the trustee has against those investment securities. In the case of bonds, what the trustee has is a personal right against, for example, the central government, a public authority, or some commercial entity, since the interests springing from the

87. *See* George L. Gretton, *Trusts without Equity*, 49 INT'L & COMP. L. Q. 599, 607 (2000).

bonds are the reward for the loan that either the settlor or trustee made to those bond issuers. Therefore, the same argument can be relied upon as was relied upon above: the beneficiary cannot have property rights over personal rights that the trustee has. The same conclusion is reached in cases where the subject-matter of the trustee's rights includes shares. It may be thought that a share-holder has a property right, reasoning from the premise that the shares represent a proportion of the net capital of the company (linked to the sum contributed on the share's issue) to the conclusion that the share-holders have property rights over the company's assets. However, this is not the case: the effect of purchasing or investing in shares is to gain the opportunity to receive dividends paid by the company business and to obtain powers such as the power to vote or take part in corporate governance. One important thing that should be noted is that the documents themselves (the certificates themselves) are becoming less and less important; dematerialisation of the certificate is spreading around the world in commercial transactions. Unlike the case of *documentary* intangibles such as the commercial papers mentioned above, where possession of the documents must be acquired in order for the rights they represent to be exercised, the paper involved in the issue of investment securities, which can be called *documented* intangibles, is merely *evidence* of entitlement to the securities; thus it is possible for all securities to be held in and handled by a computerised database, without documents. As a result, when a trustee holds shares, whether they are bought directly from the company or from intermediaries, the rights he has are personal ones to receive the benefits produced by the company. Therefore, the same conclusion must be reached as in the case of receivables, that the beneficiary's rights cannot be rights *in rem* when the trustee's rights are shares.

(v) Money

The most controversial potential subject-matter of a property right in Taiwan, Japan, and Korea, would undoubtedly be 'money'.[88] Money as currency is not only a tangible thing (when focusing on its physical constituents, such as metal or paper), but also a store of value used as a universal means of exchange. When considering the possibility of a property right (real right) on money, it seems that only the former feature (i.e. money as a tangible thing) gives rise to the possibility that money could be the object of a property right; the latter feature (money as a store of value used as a universal means of exchange) can be used as a ground for refusing to accept money as the subject-matter of a property right. To illustrate, when I have ten pounds in my pocket, there is no problem with regard to me

88. 'Money' in this section is used to denote 'physical money' such as coins and notes; thus, electronic money and bank money are excluded from the debate; those two kinds of money need special treatment which is out of the scope of this thesis.

excluding anyone who tries to pickpocket the ten pounds from me. My intention with regard to the pickpocket can be construed as this: "Do not touch my 'coins or notes'!"[89] Since the ten pounds possessed by me and kept in my pocket can be specifically identified by physical material (coins or notes), it is treated as a corporeal or 'tangible' thing (the first feature), and nobody is allowed to make physical contact with it without my permission. Accordingly, in the case where I have possession of money, I am capable of asserting a property right over it.

The story changes dramatically when the coins or notes are not possessed by me, e.g. because they are handed either to an agent for certain purposes, or to a bank as a deposit, or because they are stolen by someone else. Money in this case is deemed to be a store of value used as a 'universal means of exchange'. Since money is treated as a 'general' means of exchange, any coins or notes making up ten pounds will suffice to repay me the ten pounds owed to me by the agent or the bank. It does not need to be the particular coins or notes that I previously handed over. So, even if I did have property rights over coins or notes that I gave to the agent or the bank, or over coins or notes that were stolen, I would no longer have property rights over those coins or notes. All I would be entitled to do would be to ask for the return of coins or notes of the same value, ten pounds; I would have a personal claim to be paid ten pounds. In short, when money leaves my possession and mixed with other funds, my property rights over it would very much probably leave me as well.[90] This, though in slightly different wording, is expressed by the Supreme Court of Japan as follows: "Title to money rests with the possession of it."[91] In short, when the trustee's rights are titles to money, the beneficiary cannot be said to have property rights since the physical form of the money has never been in the beneficiary's possession.

3. *The Numerus Clausus Rule*

This part discusses the impact on the argument under consideration of the *numerus clausus*[92] rule in Taiwan, Japan, and South Korea. The Civil

89. Whilst I could equally say "Don't touch my 'ten pounds'!", my words in this case can be interpreted as "do not touch my 'note' with the value of ten pounds!"

90. Minfa [Civil Code] 1929, art. 813 (Taiwan); TZE-CHIAN WANG (王澤鑑), PUTANG TELI (不當得利) [UNJUST ENRICHMENT] 39 (2009).

91. Saiko Saibansho [Sup. Ct.] Jan. 24, 1965, Hanji 365-26 (Japan).

92. The *numerus clausus* rule in East Asian Civil Jurisdictions is imported from Germany. The *raison d'être* of the *numerus clausus* principle lies in the protection of commerce. Proprietary right-holders must make their proprietary rights public in order to assert his right against third parties, since third parties in commercial transactions should be able to spot these proprietary rights, and not suffer the unexpected misfortune of dealing with persons who do not actually have proprietary rights. 'Registration/recording' (in the case of land-related property rights, property rights over registrable

Code of each of those countries provides for the *numerus clausus* rule, i.e., no proprietary rights can be created except those provided for in this code or in other laws.[93] Since the possibility of new kinds of proprietary right is left open by the provision for 'other laws', proprietary rights can be newly produced when new legislation is promulgated. The question arises: do the Japanese Trust Acts come within the scope of these 'other laws' that might generate new types of proprietary right?[94] If so, the beneficiary's right can fit into the 'Proprietary' category.

As noted above, while the Japanese Trust Act does have an 'insolvency effect' and a 'third party effect', the beneficiary's right under Japanese law, as seen in the last section, does not meet the preconditions of being a property right, whether the trust funds comprise land or personalty. Therefore, it cannot easily be concluded that the beneficiary's right is a property right. Therefore, the Trust Act cannot be considered to fall within the reference to "other laws" in the article that provides for the *numerus clausus* rule.

4. *The Beneficiary's Right of Rescission*

The Trust Act of each of Taiwan, Japan, and Korea awards the beneficiary a right to rescind the transaction concluded between the trustee and the third party.[95] The question is whether we can regard this third-party effect as proof that the law considers the beneficiary's right as having proprietary nature. Some may argue that this is so. However, the fact the beneficiary is entitled to rescind the transaction entered into between the trustee and the third party cannot be used as evidence that the law indirectly accords to the beneficiary a property right, since the beneficiary would simply be able to *directly* assert his property right if his right is proprietary; he does *not need to borrow rescission in order to exercise his property right*.[96] Therefore, the existence of the right of rescission can hardly be used

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tangibles such as cars, and proprietary rights over registrable intangibles such as intellectual property) and 'possession' (in the case of movables such as books and clothes) are the two main methods of making property rights public. It can be said that the need (i.e. security of commerce) for real rights (i.e. property rights) to be made public justifies the *numerus clausus* rule: for more details about the other grounds that support the *numerous clasus* rule, *see* TZE-CHIAN WANG (王澤鑑), MINFA WUQUAN (民法物權) [THE LAW OF RIGHT IN REM] 42 (2011); TAKASHI, *supra* note 78, at 351; SAKAE, *supra* note 82, at 25-26.

93. Minpo [Civil Code] 1898, art. 175 (Japan); Minbeop [Civil Code], Act. no. 471, 1 Jan., 1960, art. 185 (S. Kor.); Minfa [Civil Code] 1929, art. 757 (Taiwan).

94. Some examples of such 'other laws' are Mining Law, Fishery Law, Law of Hypothec of Factories, Intellectual Property Law and so on.

95. Sintakuho [Trust Act] 2006, art. 27 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 75 (S. Kor.); Xintuofa [Trust Act] 1996, art. 18 (Taiwan).

96. KIA-LIN FAUNG (方嘉麟), TRUSTS LAW: PRINCIPLES AND PRACTICE 205 (2003); Wu, *supra* note 51, at 209, 210.

as a ground of arguing the beneficiary's right is a property right.

D. *Conclusion*

As has been explained above, the nature of the beneficiary's right over trust funds has been regarded as a property right in common law jurisdictions. However, the same approach cannot be accepted in Taiwan, Japan, and Korea. The stringent rules regarding the acquisition of property rights over land and personalty prevent the beneficiary's right over trust funds from being a property right. Moreover, the Trust Act of each of Taiwan, Japan, and Korea can scarcely be regarded as an act that produces property right for the beneficiary: it does not meet the *numerous clausus* rule.

If the beneficiary's right is not a property right, it must be a personal right (though not a contractual right as mentioned in the previous section) in its nature according to the Roman dichotomy. The problem is how to explain the third-party and insolvency effects if the beneficiary's right is only personal; and this is the issue to which we are now turning.

IV. TRUST AS SEPARATE PATRIMONY

A. *Introduction*

In the previous two parts, it has been found that both contract-based and property-based arguments are not immune to criticisms. If the trust can be squeezed into neither category, a third approach must be explored and some lawyers in other civilian and mixed jurisdictions explain the nature of trusts by using the concept of 'special' or 'separate' patrimony (i.e. contrasting personal patrimony and trust patrimony).[97] Since Taiwan, Japan, and South Korea are civilian jurisdictions, it is worth examining whether this view is also acceptable in the legal systems in question. In discussing this, two issues are indispensible: first, what is separate patrimony and whether the concept of 'separate' patrimony is familiar to Roman (or civilian) law tradition; and second, whether it fits the current trust law of Taiwan, Japan, and Korea. Therefore, this chapter looks for the Roman law origins of the "special" or "separate patrimony" analysis, and attempts to some legislative grounds supporting the separate-patrimony argument from the trust law of

97. TONY HONORÉ & EDWIN CAMERON, HONORÉ'S SOUTH AFRICAN LAW OF TRUSTS 493 (4th ed., 1992); Gretton, *supra* note 87; Kenneth Reid, *Patrimony not Equity: The Trust in Scotland*, 3 EUR. REV. PRIVATE L. 427 (2000); FRANS SONNEVELDT, THE TRUST: BRIDGE OR ABYSS BETWEEN COMMON AND CIVIL LAW JURISDICTIONS? 5 (K. L. M. van Mens & Harrie L. van Mens eds., 1992); NICOLAS MALUMIAN, TRUST IN LATIN AMERICA (2009).

Taiwan, Japan, and South Korea.

B. *Separate Patrimony and Roman Law*

This section examines the view that some institutions of Roman law could be interpreted as examples of the concept of special or separate patrimony; and the view that the concept of separate patrimony can be used to explain the nature of trusts. Before examining the civilian or Roman examples of separate patrimony, it may be helpful to explain the meaning of 'patrimony' first. The word patrimony broadly denotes the entirety of the rights (both the personal rights that form part of the law of obligations and the proprietary rights that form part of the law of property[98]) and liabilities of a legal person.[99] However, ever since Roman law periods, civilian jurisdictions have also embraced the possibility of having two patrimonies. The two major examples given by the proponents of this view are *dos*[100] and *peculium*[101].[102] For example, Professor George Gretton has argued that: "In general, the principle is: one person, one patrimony. Everyone has a patrimony, no one has more than one. But civilian tradition admitted qualifications to this principle. As well as his ordinary patrimony, a person could sometimes have a "special patrimony". (Such as *dos* or *peculium* in the Roman law)[103] In a similar vein, Professor Tony Honoré wrote that: "[t]he trust estate is a separate fund vested in the trustee . . . The conception of a separate fund is not confined to common law systems. Other systems of law admit or have admitted the idea: for example the *peculium* of Roman law . . . "[104]

We can find a couple of texts in the Digest of Justinian,[105] the Institutes

98. Here, 'property' is used as opposed to obligation; therefore, it does not include debt.

99. *See* Marius De Waal & Roderick Paisley, *Trusts*, *in* MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA 819, 839 (Reinhard Zimermann, Daniel Visser & Kenneth Reid eds., 2004); Lionel Smith, *Trust and Patrimony*, 28 ESTATES, TRUSTS AND PENSIONS J. 332, 335 (2009); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 235 (1975).

100. *Dos* was a gift given to a husband by his wife or another person on her behalf as her contribution towards the expenses that would be incurred during their married life, *see* NICHOLAS, *supra* note 99, at 88.

101. *Peculium* denoted the assets (for example, horses or money) given to a slave by his master, to be at the disposal of the slave, *see* WILLIAM WARWICK BUCKLAND, A TEXT-BOOK OF ROMAN LAW: FROM AUGUSTUS TO JUSTINIAN 65 (3rd. ed., 1963).

102. The *fideicommissum* in Roman law is sometimes compared to the trust in English law *see* DAVID JOHNSTON, THE ROMAN LAW OF TRUSTS (1988). Since the *fideicommissum* is not a concept used to explain the concept of separate patrimony, the comparison of the two institutions is not dealt with in this chapter.

103. Gretton, *supra* note 87, 609.

104. Tony Honoré, *Obstacles to the Reception of Trust Law? The Examples of South Africa and Scotland, in* AEQUITAS AND EQUITY: EQUITY IN CIVIL LAW AND MIXED JURISDICTIONS 793, 812 (Alfredo Mordechai Rabello ed., 1997).

105. DIG. 5. 3. 25; 10. 2. 38; 12. 6. 61; 23. 3. 1; 46. 6. 9.

of Justinian[106] and the Institutes of Gaius[107] where the word 'patrimony' is used. When a person dies, his/her patrimony devolves upon his/her successor; in other words, the contents of an inheritance are the rights contained in the predecessor's patrimony. As a result, all the predecessor's rights and liabilities are generally automatically transferred to his heir(s) from the moment of the predecessor's death. What the arguments for regarding the trust fund as a separate patrimony try to do is to make it possible for the trustee to have two patrimonies,[108] and they argue that examples of the usage of separate patrimony can be found from the Roman legal period onwards. There are two examples: *dos* and *peculium*. It will be disclosed that these Roman illustrations could be seen as cases in which some assets were managed separately, thus, for a separate patrimony.

1. *Dos (Dowry) as Separate Patrimony*[109]

Dos was a gift given to a husband by his wife or another person[110] on her behalf as her contribution towards the expenses that would be incurred during their married life.[111] *Dos* was not a legal duty imposed on the wife when getting married, but it functioned as evidence of the marriage when legal formality was absent.[112] Since *dos* was provided to the husband in order to alleviate the husband's economic burdens (*ad sustinenda onera matrimomii*) arising from the conjugal life, the assets contributed by the woman were not subject to the rules otherwise applying to *dos* if the marriage did not take place or was void.[113] Thus, it was offered conditionally on the marriage taking place. But once the marriage was established, the assets transferred to the husband as *dos* became wholly the assets of the husband;[114] in other words, the husband acquired the full rights to the assets involved in the *dos*. So, if the *dos* contained a piece of land or a chattel, the husband obtained the *dominium* (ownership right) of it; if it contained more limited real rights (*iura in re aliena*) such as *servitus*,

106. J. INST. 2. 1. pr.

107. G. INST. 2. 1.

108. For example, "Usually patrimony and personality coincide, so that a person has one patrimony only, comprising the totality of his assets and liability. In a trust, however, there are two patrimonies held by one person. A trustee, like everyone else, has his own private (or general patrimony. But in addition he has the trust patrimony", *see* Reid, *supra* note 97, at 427, 432.

109. For a full account of the rules on *dos*, *see The Digest of Justinian*, Books XXIII and XXIV; English translations are available from THE DIGEST OF JUSTINIAN Vol. 2 (Alan Watson ed., 2009).

110. The *dos* could be offered by the bride's father. When *dos* was provided by the bride's father, it was called *profecticia dos* (*See* DIG. 23. 3. 5).

111. *See* NICHOLAS, *supra* note 99, at 88; ROBERT WARDEN LEE, THE ELEMENTS OF ROMAN LAW 150 (4th ed., 1956).

112. BUCKLAND, *supra* note 101, at 107.

113. DIG. 23. 3. 3.

114. DIG. 23. 1. 1.

superficies, *ius emphyteuticum* or real security, the husband became the proprietary right holder of those interests. Likewise, if the *dos* contained the right that arises from a contract of a loan, that right in *personam* would be vested in the husband; even the right to release someone from his debt could be the subject matter of the *dos*[115] and the husband would be able to exercise that right of release. It is clear that both personal rights and proprietary rights were vested in the husband once the *dos* was given to him and the marriage had successfully taken place. But the husband, as the owner of the contributed assets, was required to administer them for the benefit of the marriage. So, *dos* appears quite like a trust fund, in that certain rights (whether personal or proprietary) are vested in the husband and he has to manage or use them for a specific purpose, i.e., to diminish the economic burdens stemming from married life. We soon notice that it involves the protection of the separate fund.

As mentioned above, some lawyers have argued that the trust fund is a separate patrimony and that we can find the concept of separate patrimony in Roman institutions such as *dos*. Now, let us have a close look at the means by which the *dos* was protected and see whether the concept of separate patrimony existed or functioned at all in the mechanisms of the Roman *dos*. The protection of *dos* developed in four stages. The first was the early Roman law period.[116] In this period, after the assets comprising the *dos* were provided to the husband by the wife's family, they became a contribution to the expenses of the household, and the rights (whether *in rem* or *in personam*) to those assets became wholly and irrevocably vested in the husband.[117] Therefore, the wife had no right at all against the transferred rights involved in the *dos*, and the husband was not burdened by any obligation to return them.[118] So, the husband was capable of using those rights for purposes having nothing to do with the marital life. However, the wife could stipulate for the return of the value of the *dos* if the marriage were to break-up through *cautio rei uxoriae*.[119] Indeed, it was only on the basis of the written memorandum of *cautio rei uxoriae* that the wife was able to pursue any interest in the value of the *dos* in early Roman law.

The second stage is the pre-classical period.[120] The protection of the wife's interests was much improved in this period as a reaction to the

115. DIG. 23. 3. 43 pr. and 1.

116. From the formation of the city-state of Rome to the middle of the third century BC.

117. NICHOLAS, *supra* note 99, at 88.

118. BUCKLAND, *supra* note 101, at 108-09.

119. *Cautio* is a memorandum of a transaction sealed by one or both parties, *see* BUCKLAND, *supra* note 101, at 461.

120. From the middle of the third century BC to the early first century AD. The second stage is especially linked to the period from the beginning of the second century BC to the late period of the first century BC; and this period is specifically called the Republic.

increase in the number of divorces.[121] The wife could initiate a legal suit developed in this period called the *actio rei uxoriae*, and require the return of the value of the rights that the wife's family had offered as *dos*. Differently to the early Roman law period, no expressly written stipulation was needed. Rather, the wife automatically acquired that right, and she could sue for the value of the *dos* once the marriage was terminated.

The third stage is the classical period.[122] The *actio rei uxoriae*, developed in the pre-classical period, survived into the classical period. However, in the time when Augustus was Emperor of Rome, he had furthered the protection of the wife's interests through the 'Julian Act on Adultery' (*Lex Julia de Adulteriis*). Under this Act, a husband could not alienate any Italic land[123] forming part of the *dos* even if the ownership of that land was vested in him.[124] If Italic land forming part of the *dos* was alienated in violation of the *Lex Julia de Adulteriis*, the alienation could be declared void.[125] Thus, even in the husband's insolvency, Italic land could not be sold to satisfy his debts. According to *the Institutes of Justinian*, the basis for the protection of the value of the land offered to the husband as *dos* was the prevention of the weakness of the female sex from being abused to the detriment of the fortunes that had been advanced to the husband by the wife's side.[126] In other words, this policy-motivated rule was rooted in the idea of paternalism.

The fourth period is the post-classical period, when Justinian became the Emperor of Eastern Rome.[127] In this period, the Emperor Justinian abolished the *actio rei uxoriae*. Instead, a better -systematized legal technique, the *actio ex stipulatu*, became the wife's general remedy.[128] The *actio ex stipulatu* was a legal action that could be used by a person who had a right *in personam* by the product of a verbal contract,[129] and in the time of Justinian[130] this verbal contract was implied by law once a marriage took place. Therefore, when the marriage ended, the wife could use the *actio ex stipulatu* to require the husband to return the rights transferred to him as *dos*. Again, land (but not other kinds of assets) was secure, since Justinian

121. NICHOLAS, *supra* note 99, at 88.

122. From the early first century AD to the middle of 3rd century AD.

123. *I.e.* the whole of Italy and the land of some privileged communities that was treated as if it were Italian, *see* NICHOLAS, *supra* note 99, at 105.

124. G. INST. 2. 63; *see* both Latin and English texts translated by WILLIAM GORDON & OLIVIA ROBINSON, THE INSTITUTION OF GAIUS 150-51 (1988).

125. BUCKLAND, *supra* note 101, at 110-11.

126. J. INST. 2. 8 pr.; *see* both Latin and English texts translated by THOMAS COLLETT SANDARS, THE INSTITUTES OF JUSTINIAN 153-54 (7th ed., 1941).

127. In the sixth century AD.

128. J. INST. 4. 6. 29; CODE JUST. 5. 13. 1; BUCKLAND, *supra* note 101, at 110.

129. For more information about the *actio ex stipulatu*, *see* BUCKLAND, *supra* note 101, at 434.

130. Inst. 4. 6. 29.

retained the rule prescribed in the *Lex Julia de Adulteriis* on the inalienability of Italic land comprising part of the *dos*; indeed, the rule was even expanded to cover non-Italic land. What then if the husband became insolvent? Justinian decided to protect the wife's interests in *dos* and give her a preferred position amongst the husband's creditors through an action called *vindicatio utilis*,[131] which protected wife' *dos* from other creditors of her husband. Thus, *dos* was indeed a separate patrimony, and civil tradition is familiar to this concept since Roman law periods.

2. *Peculium as Separate Patrimony*

In Roman times, slavery was an institution of the *jus gentium*,[132] whereby someone was made the subject of the ownership of another.[133] As a result, the slaves were in the power of their owners, and owners held the power of life and death over them and acquired whatever their slaves acquired.[134] It could be said that a slave, being *alieni iuris* (in the power of another) under Roman law, was like a human chattel or an animal capable of being owned[135] by his master. Though a slave was deemed as a thing in law, he was still a human being who needed some assets for his living, and the *peculium* served this purpose. *Peculium* denoted the assets (for example, horses or money) given to a slave by his master, to be at the disposal of the slave; thus, the *peculium* was used at the slave's discretion for his living expenses or business transactions.[136] In other words, *peculium* was asset whose title was held by the master for the benefit of his slave. The reason that *peculium* is said to be a case of separate patrimony is simply that the master held the legal rights relating to the *peculium* and they were treated separately from the master's other assets, since possession of the assets forming part of the *peculium* were in the hands of the slave. The master's rights over the *peculium* and all of his other rights were managed separately, since the slave *administered* the *peculium* possessed by him. The separate patrimony argument is reinforced by the fact that slaves could buy his freedom from his master using the *peculium* in his hands.[137] This clearly shows the fact that *peculium*, though held by the master, was actually used

131. SEUNG-JONG HYUN, SEUNG-JONG HYUN & KYU-CHANG CHO, ROMABEOP (로마법) [ROMAN LAW] 987 (1996); BUCKLAND, *supra* note 101, at 110.

132. The *Jus gentium* was the law applied to all the states of the Roman Empire (G. INST. 1. 1.).

133. DIG. 1. 5. 4. 1. This English translation is from Watson, *supra* note 109, at 15.

134. G. INST. 1. 52; slaves in Roman law were not necessarily persons in chains or imprisoned; certain slaves performed work nowadays done by clerks or servants, *see* BUCKLAND, *supra* note 101, at 62; NICHOLAS, *supra* note 99, at 65.

135. BUCKLAND, *supra* note 101, at 62; NICHOLAS, *supra* note 99, at 69.

136. BUCKLAND, *supra* note 101, at 65.

137. DIG. 40. 1. 4. 1, This English translation is from Watson, *supra* note 109, at 15.

for the benefit of his slave. Once again, we see an example of separate patrimony from Roman law; it is not a new idea to the civil tradition.

C. *Trust Fund as Separate Patrimony*

In the previous section, it was demonstrated that we can regard the Roman institutions of *dos* and *peculium* as examples of separate patrimony. In this section, We will scrutinize some legislative grounds that can possibly show us that trust fund functions as a separate patrimony.

1. *Legislative Grounds*

(a) Real subrogation

First is related to the application of real subrogation to trust funds. In the Trust Act of each of Taiwan, Japan, and South Korea provide that, beside the assets that, by the terms of the trust instrument, ought to be included in the trust fund, the proceeds the trustee acquires when the trust funds are disposed of, destroyed, damaged and so on should also form part of trust fund.[138] Thus, if the trustee obtains land using money from the trust fund, the land will stand in place of the money and form part of the trust fund; and if a building within the trust fund is destroyed and the trustee receives insurance money, the latter becomes part of the trust fund. In other words, what comes into the hands of the trustee at the expense of the trust fund is substituted for the original trust assets and becomes part of the new trust fund. It is this feature of real subrogation of the trust fund that shows it is an autonomous separate patrimony because what the trustee acquires as trustee becomes part of the trust fund and separated from other non-trust funds held by the trustee.

(b) Trustee's liability for damages, right to indemnity and duty of distribution

Following the argument based on real subrogation, we can rely on provisions of the Trust Act in Taiwan, Japan, and South Korea dealing with the trustee's liability for damages, right to indemnity and duty of distribution to show that even the Acts virtually treat the trust fund itself as a separate patrimony. The first Article to discuss is that which deals with the trustee's liability to compensate or restore the trust fund. The Trust Act of each jurisdiction provides that[139] if any of the following events happen due to the trustee's breach of his duty, the beneficiary can claim from the trustee either

138. Sintakuho [Trust Act] 2006, art. 16 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 27 (S. Kor.); Xintuofa [Trust Act] 1996, art. 9 (Taiwan).

139. Sintakuho [Trust Act] 2006, art. 40 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 43 (S. Kor.); Xintuofa [Trust Act] 1996, art. 23 (Taiwan).

(i) monetary compensation of the loss, if any, to the trust fund, or (ii) restoration of the trust fund." This Article presupposes the legal relationship that exits between the trustee and the trust fund. Otherwise, the trustee would not need to pay compensation for damage to the trust fund, since the relevant trust fund are all vested in himself. In other words, since the trust fund belonged neither to the settlor nor to the beneficiary, the trustee was required to compensate the loss suffered by the trust fund itself, as a separate patrimony comprising one or multiple assets. For example, suppose the trustee had ownership of land X and it was damaged by the trustee. if trustee was the sole entity with ownership of land X, there is no reason for him to be charged with a duty not to damage land X and to compensate for such damage or restore the value of the land should such damage occur; if he is obliged to pay compensation to make restoration of land X, this must be because land X itself forms a separate patrimony, and the trustee's liability must actually be towards the separate patrimony he administers.

Second, the separate patrimony argument is supported by the fact that the trustee has a right of indemnity for liabilities properly incurred[140] and a duty to pay for the debt arising from the trust affairs.[141] As to the former, i.e., the trustee's right to indemnity means that a trustee has the right to be indemnified out of the trust fund for his expenses, and the interest on those expenses thereafter, if the trustee pays expenses necessary for the management of the trust from his private assets. As to the latter, it denotes that in a trust where multiple trustees exist, each trustee is jointly and severally liable for any debt to a third party incurred by any of the trustees in the management of the trust. Thus, on the one hand, the law provides that the trustee is liable for any debts arising from the administration of the trust; on the other hand, the law entitles the trustee to recover the cost of expenses of the trust fund he has paid from his non-trust assets. And it can be easily be inferred that the reason the trustee can be reimbursed in this way is that the trust fund itself is liable for the trust debt; since the trustee has used his non-trust funds for the trust, the law establishes a repayment relationship between the trustee and the trust fund by permitting the former to recoup the cost out of a *segregated* trust fund. The key point here is that the trustee's right to indemnity must be against a separated patrimony, for it is impossible for a person to be reimbursed from something belonging to private patrimony.

The third issue in this section is the trustee's duty to distribute the benefit of the trust fund to the beneficiary only from the trust fund. For

140. Sintakuho [Trust Act] 2006, art. 48, para. 1 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 46 (S. Kor.); Xintuofa [Trust Act] 1996, art. 39 (Taiwan).

141. Sintakuho [Trust Act] 2006, art. 100 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 51 (S. Kor.); Xintuofa [Trust Act] 1996, art. 29 (Taiwan).

example, the East Asian jurisdictions all prescribe that, in relation to the implementation of the duty to distribute the benefit, the trustee is only obliged to perform that duty using the asset contained in the trust fund.[142] The reason why the trustee does not have to perform his duty to distribute from his private assets is that the trustee himself owes nothing personally to the beneficiary; only the trust patrimony itself is allowed to be used for the beneficiary. As a result, the trustee's right to indemnity for a liability properly incurred, and his duty to distribute the benefit of the trust fund to the beneficiary provides us with some persuasive evidence that the Trust Act of each of Taiwan, Japan, and Korea treat the trust fund as a distinct separate patrimony.

(c) Trust liability

The final legislative source that could function as proof that the law treats the trust fund as a separate patrimony is the article dealing with the devolution of trust liability. When a trustee retires or is removed and a fresh trustee appointed, the law provides that the latter succeeds to the rights and duties (or liabilities) of the former trustee.[143] The fact that the former trustee's liabilities are automatically taken over by the latter trustee proves that those liabilities are actually attached to the trust patrimony rather that the trustee himself, and that the trustee when in office is only dealing with the liabilities of the trust fund. Thus, it is possible to say that the trustee, though holding the trust fund, occupies *the office of the administrator* of trust patrimony.[144]

(d) The bankruptcy-effect and the third-party effect

The Trust Act of each of Taiwan, Japan, and Korea requires that trust fund be carved out of the trustee's personal assets should he become bankrupt (the bankruptcy effect).[145] This clearly shows that trust fund forms a separate patrimony, for otherwise it should be part of the trustee's bankruptcy assets and used to meet his own creditors' rights. Trust funds are vested in the trustee, yet they are protected and segregated from the trustee's personal assets if he goes insolvent: this demonstrates the law actually treats trust fund separately from the trustee's personal assets: trust fund is a separate patrimony which exists as opposed to trustee's personal patrimony.

We have seen that the beneficiary has the right to rescind the deal made between the trustee and the third party if it is concluded in breach of trust

142. Sintakuho [Trust Act] 2006, art. 100 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 38 (S. Kor.); Xintuofa [Trust Act] 1996, art. 30 (Taiwan).

143. Sintakuho [Trust Act] 2006, art. 75 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 53 (S. Kor.); Xintuofa [Trust Act] 1996, art. 48 (Taiwan).

144. Gretton, *supra* note 87, at 599, 618.

145. Sintakuho [Trust Act] 2006, art. 23 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 24 (S. Kor.); Xintuofa [Trust Act] 1996, art. 11 (Taiwan).

and the third party is not a *bona fide* purchaser (the third-party effect).[146] It has also been found that the beneficiary's right of rescission cannot be based on the property argument. The present work argues that it can properly be interpreted and supported by the separate patrimony approach. Since trust funds should be administered and distributed for certain purposes and treated separately from the trustee's own assets, if the trustee disposes of them in breach of trust, and the third party transferee is aware of the breach and that *the assets belonging to that separate patrimony*, the policy decision of the law makers prefers the beneficiary's interest, thus awards him a right of rescission to deny the transaction and recovers the dissipated fund back to the trust patrimony. It must be stressed that the beneficiary's right of rescission helps to recover the dissipated assets *back to trust patrimony*, not to the trustee's or beneficiary's own pocket: thus, the key player here is the concept of separate patrimony from which the two most important effects are drawn.

D. *Conclusion*

In this chapter, two themes were discussed: one was the likelihood that the concept of separate patrimony has a Roman origin; the other was the plausibility of regarding the trust fund as a separate patrimony. The argument for the concept of separate patrimony and the attempt to locate it in Roman law were both found sufficient. For example, separate patrimony can be found in the Roman concepts of *dos* and *peculium* since it was forming a segregated asset conferred on the wife and the slave that protected the *dos* and *peculium*, just as trust fund is separately protected. And the trust fund can be regarded as functioning as a separate patrimony, for both the provisions of the Trust Act in Taiwan, Japan, and South Korea provide us with the confidence to accord the character of separate patrimony to the trust fund. Since both the historical and the modern interpretations of the concept of separate patrimony are convincing; the concept of separate patrimony could be a third way that those civilian jurisdictions having trusts law can take. It must be emphasized that the doctrine of separate patrimony is widely taken in some mixed (Scotland,[147] Quebec,[148] South Africa[149]) or civilian jurisdictions (France[150] and almost all South American Countries[151]) having

146. Sintakuho [Trust Act] 2006, art. 27 (Japan); Sintakbeop [Trust Act], Act. no. 10924, 25 July, 2011, art. 75 (S. Kor.); Xintuofa [Trust Act] 1996, art. 18 (Taiwan).

147. Reid, *supra* note 97, at 427.

148. Civil Code of Quebec, art. 1261 (Can.); Smith, *supra* note 99, at 332, 334.

149. Waal & Paisley, *supra* note 99, at 819.

150. Paul Mattews, *The French Fiducie: And Now for Something Completely Different?*, 21 TRUST L. INT'L 17, 22 (2007).

151. MALUMIAN, *supra* note 97.

trusts law. It is surprising that little attention has been paid to these jurisdictions in Taiwan, Japan, and South Korea, yet they merit very much examination, not only because they have civilian elements in their legal system, but also because they have more experiences in resolving the doctrinal issues as concerned with the law of trust.[152]

Being unable to be wedged into either property or contract pigeon-hole, trust is best to be seen as a separate patrimony being segregated from the trustee's personal patrimony, and the trustee, having the office of the trust, is personally liable to the beneficiary in managing the trust. In conclusion, trust creates separate patrimony and personal rights for the beneficiary.

V. CONCLUSION

For the last couple of decades, the structure of trust has been an issue into which many distinguished lawyers in East Asia have delved. The work owes a great deal to them. In other words, the current work is no more than a try to add onto the signboard having already established by them, though with a different direction. The first direction we have explored was a contract-based approach. However, the facts that a trust can be created without mutual consent, that the beneficiary of a trust is capable of recovering his specific funds from a recipient third party by exercising his right of rescission, and that judicial intervention is normally permitted, are sufficient to tell us that the mechanics of trust are distinct from those of contract. The second direction we have looked at was a property-based approach. However, the stringent rules regarding the acquisition of property rights over land and personalty prevent the beneficiary's right over trust funds from being a property right. Moreover, the Trust Acts of each of Taiwan, Japan and South Korea does not meet the *numerous clausus* rule. The last direction we have probed was a separate-patrimony-based approach; and it was argued that the approach was worth considering for the aforementioned historical and legislative grounds addressed in Section III of the work. Especially, experiences of those mixed jurisdictions and some civil jurisdictions where trusts have been successfully administered would have profound significance for East Asia. This fact cannot be overlooked, for their legal system involves both common and civil law elements. They are jurisdictions which have endeavoured to solve the questions arising from the

152. It must be noted that a distinguished academic in Taiwan has long categorized trust fund as a case of separate (or special) patrimony, *see* TZE-CHIAN WAN (王澤鑑), MINFA ZONGTZE (民法總則) [GENERAL RULES OF CIVIL LAW] 258 (2014); the truth is that *sondervermögen* and *zweckvermögen* under German law, and bankruptcy assets and deceased's assets in the middle of the succession process can all be said to be good examples of separate patrimony, for they are assets belonging to someone, yet having to be administered and protected separately.

conflicts springing from having trust law along with civilian concepts (as briefly mentioned before, even French law adopted a trust based on the doctrine of separate patrimony). Their trust law merits our investigation,[153] for they have passed the cross road we are now wandering about. However, the present author admits whether the doctrine of separate patrimony can assist us to find a way out of this crossroads needs further examining and testing in the future.

153. The author plans to conduct a more extensive research on the trust law of France and mixed jurisdictions in another paper.

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處於十字路口的東亞信託法

吳 英 傑

摘 要

本文旨在分析檢討信託之結構，並以臺灣、日本，以及南韓之信託法為探討對象。臺灣、日本，以及南韓私法體系，係奠基於羅馬日耳曼（Roman Germanic）法律體系上。因此有關財產法體系，係採二足鼎立之架構，即債權法與物權法。然在此體系下引進信託法，卻有造成與既有私法體系及架構不容之結果。雖仍具爭議性，將信託視為契約之一種，就以前述東亞歐陸法區域而言，殆屬多數見解。反之，當今英美法體系之多數見解，將信託視為物權法之子領域。在前揭東亞歐陸法體系中，亦有學者受英美法之影響，主張信託具有物權法之性質。應注意者係，除此兩種看法之外，另有第三種態度；此態度視信託為一種特別財產的創設行為，而兼具歐陸法以及英美法成分的混合法體系地區之信託法，皆採納此結構。前述東亞歐陸法體系之信託法，可謂處於一個交叉的十字路口，蓋有關其正確態度，尚未有任何定論：處於「尚未定論」之一條路口上，觀看其他三條路口。歐陸私法體系重視為概念命名其性質，蓋此為法律分類學之實行基礎，故其重要性，絕不可小覷。吾人應自此十字路口走出，並邁向新的路口：撰寫本文之目的，亦在於此。

關鍵詞：信託、契約、物權、特別財產、意思表示、所有權、嫁妝（羅馬法）、奴隸財產（羅馬法）