



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

A developed understanding of the beneficiary's interest in commercial trusts through a comparative study of Chinese law

Citation for published version:

Zhang, R 2020, 'A developed understanding of the beneficiary's interest in commercial trusts through a comparative study of Chinese law', *Maastricht Journal of European and Comparative Law*, vol. 27, no. 3, pp. 343-357. <https://doi.org/10.1177/1023263X20924508>

Digital Object Identifier (DOI):

[10.1177/1023263X20924508](https://doi.org/10.1177/1023263X20924508)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Maastricht Journal of European and Comparative Law

Publisher Rights Statement:

The final version of this paper has been published in the Maastricht Journal of European and Comparative Law, by SAGE Publications Ltd, All rights reserved. © Ruiqiao Zhang, 2020. It is available at: <https://journals.sagepub.com/doi/10.1177/1023263X20924508>

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



**A Developed Understanding of the Beneficiary's Interest in Commercial Trusts
through a Comparative Study of Chinese Law**

Ruiqiao Zhang*

ABSTRACT

Trusts have existed for centuries, while societies and economies have developed in the intervening years. This requires renovations, or new judicial interpretations, of the trust in order to adapt it to modern circumstances. Based a comparative study of Chinese trust law and a discussion about the theoretical basis for the research – the new role of trusts in a commercial context and the essence of the trust – the author provides a developed understanding of the beneficiary's interest to adjust the traditional trust notions to meet the demands of commercial practices. She argues that a beneficiary's right can be explained as a special personal claim consisting of three parts: the main claim (personal claims), appurtenant rights (rights of supervision), and security rights (rights of revocation). The theory of beneficiary's special personal claim provides a more unified and comprehensive understanding of the nature of the beneficiary's interest, in particularly in newly developed commercial trusts.

Keywords: trust law, comparative law, the nature of a beneficiary's interest, law and finance, rule of law

* DCL, LLMs, LLB & BSc, Lecturer, School of Law, University of Edinburgh. I would like to thank Professor Lionel Smith, Professor David Fox, and journal reviewers for their invaluable comments.

INTRODUCTION

The trust, originally used in common law to protect family landholdings over generations, has developed into a vehicle that is not only adopted as a guardian of family property, but also for entrepreneurial and commercial uses. The new role that the trust plays in financial markets has also spurred the introduction of trusts into civilian jurisdictions, including China. This evolved role of trusts invites scholars to rethink some fundamental concepts and theories of the traditional common law trust, such as the ownership of trust property, the essence of the trust, and the nature of the beneficiary's right.

This article seeks to provide a developed understanding of the beneficiary's interest through a comparative study of Chinese law. In particular, this helps to respond to the evolved role of trusts for commercial use and the consequence of the introduction of trusts in civil law. As one of the world trade centres, and one of the first socialist and civil law jurisdictions to introduce a domestic law of trusts, China's legislation and practice of trusts has important research significance. Because of the trust's advantages in investment, banking, and financing, China took the bold step of introducing its own domestic trust law in 2001. The Chinese trust is mainly in the form of commercial trust.

To provide a developed understanding of the beneficiary's interests, particularly in a commercial setting, and to explain how or where the case study of Chinese law sheds light on the re-examination of traditional theories of trust, this article is divided into three parts and makes comparisons between the Chinese trust and the common law trust mainly as found in England and Wales. The first part examines the new role of trusts in the commercial context, which is also the context in which the trust is mainly applied in China. Part two critically analyses the essence of the trust, i.e. which aspects of trust law relating to property and obligations are essential to the trust. After discussing these issues as the theoretical basis for

the research, the final part provides a developed understanding of the beneficiary's interest – a special personal claim. The author employs interdisciplinary, theoretical, comparative, and reformist methodologies.

A NEW ROLE FOR TRUSTS TO PLAY IN THE COMMERCIAL CONTEXT
— AN EXAMPLE OF THE NOTION OF THE TRUST IN CHINA

The origin of trusts can be traced back to the thirteenth century, when it was used to protect family assets. The trust was essentially a conveyancing device for the holding of land to avoid financial liability and restrictions on the inheritance of property.¹ In the modern world however, it has also developed into and is more often used as a valuable device for commercial business in various forms, including investment vehicles, pensions trusts, securitization trusts and many others.² The trust is of particular use in the international financial markets. It permits the legal relationship between persons and assets to remain secure and flexible at the same time, with property or priority rights relating to a changing pool of assets being enjoyed by a changing class of persons and being subject to concurrent interests and/or enforcement restrictions.³ In financial terms, the most important role a trust plays in today's world is related to the holding of incorporeal wealth.⁴

¹ See S. F. C. Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 2nd ed, 1981) ch 9; J. H. Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press, 2002) ch 14.

² See R. Zhang, "The new role trusts play in modern financial markets: the evolution of trusts from guardian to entrepreneur and the reasons for the evolution" (2017) 23:4 *Trusts & Trustees* 453 at 456-458.

³ D. Hayton, H. Pigott, and J. Benjamin, "The Use of Trusts In International Financial Transactions" (2002) 1 *JIBFL* 23 at 29.

⁴ M. Graziadei, U. Mattei and L. Smith, eds. *Commercial Trusts in European Private Law*, (Cambridge: Cambridge University Press, 2005) at 27, n 74: See R. H. Sitkoff, 'An Agency Costs Theory of Trust Law', 89

The use of trusts in commercial applications⁵ has promoted the introduction of trusts into civilian jurisdictions. With the development of international trade, the civilian jurisdictions, whether pure or mixed, were anxious to improve their opportunity to collaborate with or even compete with common law jurisdictions. Trusts no longer exist only in common law systems.⁶ In fact, both the United Nations⁷ and the Hague Conference on Private International Law (HCCH)⁸ have attempted to introduce the trust to civilian jurisdictions and respond to the evolution of trusts in the commercial context. This international trend makes the case study of Chinese trusts – an example of trusts in civil law and for commercial uses – of great comparison interest in analysing what are the differences between traditional trusts and commercial trusts, and how can the traditional trust notion be adjusted to meet the demands of commercial practice.

The notion of trust in China has evolved differently from traditional common law's conception of trust. It has mainly been used for commercial applications. The traditional trust

Cornell L. Rev. (2004).

⁵ The trust, in this evolved form, is described as a 'commercial trust' in this article, referring to express trusts engaging in commercial activity. It is not a legal term of art or a category of trust in the traditional taxonomy.

⁶ P. Panico, *International Trust Laws* (Oxford: Oxford University Press, 2nd ed, 2017) 1.

⁷ See Unidroit, International Institute for the Unification of Private Law, UPL 1957, Paper XL, Trust – Document 1, 'Report on Possible Uses of Certain Principles of the Trust in Civil Law Countries'; UPL 1958, Paper XL, Trust – Document 2, 'Memorandum Concerning the Introduction of Some Principles of Trust into the Civil Law Legislations'.

⁸ In 1984, the delegates of some twenty-six member countries of the Hague Conference met in their fifteenth session and discussed the fashioning of a Convention to recognise the trust. As a product of the conference, the implementation of the Hague Convention on the Law Applicable to Trusts and on their Recognition (concluded 1 July 1985, entered into force 1 January 1992) was published.

that used to manage inter-generational property never took root in feudal dynastic China. Inheritance was predominantly regulated by customary law, and there was little room for testamentary disposition by individuals. The history of trusts in China only started from 1911, when dynastic rule ended and the Chinese Nationalist Party took control of the country. Trusts were set up as trust administration departments within banks, governmental trust institutions, and trust companies – a type of trust was broadly adopted at that time and still exists as a major use of trust in China.⁹

With the growth of private wealth in China, from 1979 to 1988, the number of trust and investment companies rose up to more than one thousand.¹⁰ This period also saw the introduction of a new form of commercial trust, the collective capital trust, only operable by trust companies.¹¹ However, due to the lack of legal requirements for the segregation of investor and trustee funds, whatever profits or losses accrued went to the trust and investment companies rather than to the customers.¹² To correct the inappropriate promotion of trust companies and to regulate trust business, the Chinese government implemented a series of ‘rectifications’ between 1988 and 1998 in which trust institutions were separated from banks.¹³

⁹ The trust came to a halt after the Communist takeover in 1949, and obtained a new lease of life in 1979 when China adopted an open-door policy for foreign trade and investment.

¹⁰ J. Tang and R. Chao, *Financial Trust and Financial Market* (Tianjin: Tianjin science and Technic Press, 1990) 29 [translated by author].

¹¹ L. Ho, R. Lee and J. Jin, ‘Trust Law in China: a critical evaluation of its conceptual foundation’ in L. Ho and R. Lee (eds), *Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis* (Cambridge: Cambridge University Press, 2013) 80, 80.

¹² L. Ho, ‘Trust laws in China: History, ambiguity and beneficiary’s rights’ in L. Smith (ed), *Re-imagining the Trust: Trusts in Civil Law* (Cambridge: Cambridge University Press, 2012) 183, 188-189.

¹³ D. Su, ‘Trusts and Taxes’ (2006) 11 *Times Finance* 7, 7 [translated by author].

A further culling of companies with payment difficulties, insufficient assets, or poor management, reduced the number of trust and investment companies to fifty-eight.¹⁴

The experience of those rectifications became one of the primary reasons for drafting the Trust Law of People's Republic of China¹⁵ (Trust Law of China), which makes China one of the first socialist, civil law jurisdictions to have introduced a domestic law of trusts. This Trust Law has attracted much attention, both in China and overseas.¹⁶

When the *Trust Law of China* was drafted, it mainly provided for commercial trusts, and thus contains some unique regulations compared with its common law counterpart. Professor Jiang Ping, the *Trust Law of China*'s main drafter, considered it an innovation of the Chinese law to leave open the issue of the location of ownership.¹⁷ Instead of adopting the term of 'transfer', the Chinese law chooses the expression of 'entrusting' (委托) the property to describe the relationship between a settlor and a trustee. Article 2 of the Trust Law of China

¹⁴ J. Guan, *Trust Law & Practice in China* (Beijing: Law Press China, 2008) 11-12 [translated by author].

¹⁵ Trust Law of the People's Republic of China (adopted at the Twenty-First Session of the Ninth National People's Congress, promulgated by Order No. 50 of the President of the People's Republic of China on 28 April 2001, and effective as of 1 October 2001). Before the Trust Law of China, the Chinese trust was regulated by the Provisional Regulations on the Management of Financial Trust Investment Institutions promulgated in April 1986 and the Provisional Regulations on the Capital Management of Financial Trust Investment Institutions promulgated in December 1986.

¹⁶ See L. Ho, *Trust Law in China* (Hong Kong: Sweet & Maxwell Asia, 2003) 2. 'First, there is much hope in China that the Law will put in place an important legal instrument for the professional management of assets and, ultimately, for modernising China's financial infrastructure. Second, the Chinese experiment might be useful to civil law jurisdictions generally as an illustration of how thorny issues regarding the reception of the common law trust can be tackled...'.

¹⁷ See P. Jiang, *Several Ideas of China's Trust Law* (Beijing: China Legal Publishing House, 2000) [translated by author].

provides that: ‘the settlor, based on his faith in the trustee, entrusts his property rights to the trustee and allows the trustee to, according to the will of the settlor and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purposes.’¹⁸ In the drafters’ perspective, the choice of the term ‘entrust’, as opposed to ‘transfer’, was not an oversight. The Trust Law of China only needed to provide that a trustee is authorised to manage and administer trust properties, and draw an adequate balance between the need to grant trustees the right to dispose of trust property and to protect beneficiaries’ rights. Moreover, because most of the trusts established in China aim to be collective investment schemes, the investors would transfer their investment to the trustees anyway. Therefore the drafters might not have thought it necessary to state that the ownership of trust property had to be transferred to the trustees.

Although specific rights of the beneficiary are regulated in various provisions (articles 43-49), there is no explicit provision in the Trust Law of China that stipulates the nature of the beneficiary’s interests. It does not indicate whether the right to claim against the trustees and the right to exclude interference from third parties are in the nature of real rights or personal claims. Moreover, apart from the right to receive distributions, the beneficiary’s entitlements to monitor the trustee and bring actions for breach are granted by way of duplication of the settlor’s rights. Those unique regulations of the settlor’s rights imply that most Chinese trusts are ‘bare trusts’: the investment trusts that are prevalent in China are ones in which investors are both settlors and beneficiaries.¹⁹ However, when the settlor is not the sole beneficiary, granting the same rights to both settlors and beneficiaries, or more specifically, retaining the beneficiary’s rights as to settlors, as regulated in article 49, will cause conflicts between those

¹⁸ Trust Law of China, n 15 above, art. 2. All translations of Chinese legislation are by the author.

¹⁹ L. Gao, *The Misunderstood Trust: Principles on Trust Law* (Shanghai: Fudan University Press, 2010) 267 [translated by author].

two parties. Although these conflicts can be solved by the court, the efficiency of the trust's management will be decreased. This is also a problem in many offshore jurisdictions where settlors are increasingly give more powers to retain control over trust property and distribution of trust property. For those reasons, the research of this article is significant: it does not only advise on the legal reform of Chinese law, but also provide a developed understanding of the beneficiary's interests that is widely applicable outside China.

THE ESSENCE OF TRUSTS

To provide a developed understanding of the beneficiary's interests in commercial trusts, which could respond to the evolved needs for commercial uses and also maintain the fundamental rule of the trust as a separate mechanism, the question that needs to be answered is which aspects of trust law relating to property and obligations are essential to a trust? The essence of trusts, i.e. a split between management and enjoyment of trust property, gives life to commercial uses of trusts.

A trust depends upon properly elaborating the various personal and proprietary rights, powers and duties that make up this relationship. The essence of the common law trust is the imposition of an equitable obligation on a trustee requiring the trustee to act in good faith when dealing with trust property in favour of the beneficiary. The beneficiaries have no direct control over the trust property. Thus the realization of their rights depends upon trustee's performance. This means that the beneficiaries' rights are the converse of the obligations of the trustee owed to them in respect of the trust property. The focus of the trust is on property. There will be no

equitable proprietary remedy available where the property at issue is unidentified or where that property has disappeared leaving no traceable substitute.²⁰

In a sense the whole point of the trust is to separate the benefit of property from the right to exercise the powers that go with having legal title. The essence of the traditional common law trust is not in the separation of legal titles — a trustee’s legal ownership of the assets of the trust and a beneficiary’s equitable title to those same assets — but is ‘a split between management/administration and benefit/enjoyment’.²¹ The idea of separate funds and a split between administration and enjoyment is not confined to common law systems. It has also been admitted by other legal systems. Indeed, ‘there is a much greater acceptance of the idea in modern civil law that the owner of an asset may hold it for the benefit of others rather than for his own.’²²

The common law concept of dual ownership is not the essence of trusts, and it does not prevent the introduction of trusts in civil law or the worldwide development of trusts for commercial purposes, also because the definition of ownership in common law and civil law is different. As Wesley Newcomb Hohfeld put it, the difference in terminology used to study the trust is misleading, as the language used to discuss the law of trusts in both the civil and common law system is so disparate as to be misleading.²³ Additionally, Frederic William

²⁰ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12. The only exception to this rule is the constructive trust imposing personal liability to account for dishonest assistance in a breach of trust.

²¹ T. Honoré, ‘Trusts: The Inessentials’ in J. Getzler and E.H. Burn (eds), *Rationalizing Property, Equity, and Trusts: Essays in Honour of Edward Burn* (London: LexisNexis UK, 2003) 1, 11.

²² P. Matthews, ‘The Compatibility of the Trust with the Civil Law Notion of Property’ in L. Smith (ed), *The Worlds of the Trust* (Cambridge: Cambridge University Press, 2013) 313, 338.

²³ W. N. Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale L. J.* 710, 718.

Maitland holds that some of the basic terminology of trust law, such as ownership, almost carries unexpected meaning, which tends to deviate from its strict definition.²⁴ As a result, the argument, which is based on the misunderstanding of the essence of trusts, that a civil law trust or commercial trust is not a “real” trust is a mistake.

In Chinese law, ownership is both perpetual and exclusive. It comprises four kinds of rights: rights of possession, use, beneficial enjoyment, and disposal of property.²⁵ Article 39 of the Property Law of the People’s Republic of China²⁶ (Property Law of China) stipulates that ‘[t]he owner of a real property or chattel is entitled to possess, utilise, seek profits from and dispose of the realty or chattel in accordance with law.’²⁷ In contrast to the civilian model of ownership however, ‘[t]he old common law never thought in terms of absolute ownership’²⁸, and people do not own things (a physical approach), they own rights in things (a metaphysical approach). Ownership tends to be a practical gathering together of uses and entitlements over the property under common law.

To clarify the different terminology of ownership also helps to provide a theoretical basis for the case study of Chinese law, or any comparative studies, because different meanings of

²⁴ F. W. Maitland, *Equity: A Course of Lectures* (Cambridge: Cambridge University Press, 2nd ed, 1936) 23.

²⁵ This follows in the same tradition as the French theory, the most well-known model for a civil law system in modern times. See *Code Napoléon* (1804), ownership includes a complete power of three types of rights over the thing: *usus* – the right to use the thing, *fructus* – the right to take its fruits, and *abusus* – the right to destroy or alienate it.

²⁶ Property Law of the People’s Republic of China (adopted at the Fifth Session of the Tenth National People’s Congress, promulgated by Order No. 62 of the President of the People’s Republic of China on 16 March 2007, and effective as of 1 October 2007).

²⁷ *ibid*, art. 39.

²⁸ D. W. M. Waters, M. Gillen and L. Smith, *Waters’ Law of Trusts in Canada* (Toronto: Carswell, 4th ed, 2012)

ownership lead to differences in the rights and obligations of trust parties. The true meaning of terminology should be interpreted based on a review of its context and function.

THE NATURE OF THE BENEFICIARY'S RIGHT

After examining the essence of trusts, addressing misunderstandings relating to civil law trusts and commercial trusts, and clarifying the theoretical basis for the research, i.e. the difference in terminology of ownership, the real question now is how to interpret the nature of the beneficiary's right in order to facilitate the evolved role of trusts in commercial activity.

There are various academic theories about the beneficiary's rights. Taking China as an example, in 1987, He Xiaoyuan suggested that the ownership of trust property be transferred to a trustee, while a beneficiary has the right to revoke the trustee's disposition of trust property in breach of trust purpose and a right to follow the trust property.²⁹ Xie Zaiquan considered the trustee's right as a limited real right, i.e. a real right on the property of other people and for their interests.³⁰ On the other hand, Wen Shiyang proposed a different explanation in 2005. He stated that beneficiary's equitable right is a genuine ownership; trustees' ownership is only a right of administration.³¹ As early as in 1994, Jiang Ping raised the dual attributes of real rights and personal claims. He indicated that the trustee's right to administer the trust property in his

²⁹ X. He, 'Studies of Trust Law' (1987) 1 *Chung Hsing Law Review* 1, 6 [translated by author]. The right to revoke trustees' disposal of trust property and the right to follow the trust property are the two sides of the same kind of right.

³⁰ Z. Xie, *Real Rights in Civil Law* (Beijing: China University of Political Science and Law Press, 1999) 165 [translated by author].

³¹ S. Wen and X. Feng, 'Ownership of Trust Property: On the Improvement of China's Legislation' (2005) 2 *Wuhan University Journal* 203, 206 [translated by author].

own name is in the nature of real right, but his obligation to distribute the trust income is a personal claim.³² In addition, Zhou Xiaoming in 1996³³ and Li Qunxing in 2000³⁴ raised the argument of a new type of right or right combination.

The author argues that, to better fulfil the function of a trust, especially its commercial aspect, the trust is better understood as a binary system of real rights and personal claims, where the trustee is entitled to a *prima facie* ownership that is limited to the right to control and administer the trust property (although settlors may retain the ownership), and the beneficiary holds a right in the nature of ‘a special personal claim’.

The trustee’s ownership is claimed to be ‘a *prima facie* ownership’ because the trustees cannot obtain benefits arising from trust assets. Moreover, the trustee cannot arbitrarily dispose of trust property. This can be demonstrated in several ways: unlike a real owner, the trustees cannot freely abandon trust property but have duties to safeguard the trust property and exercise reasonable care over it, they have no right to put up trust property as collateral on their own personal obligation and they are not liable for any accidental losses of the trust property, or for costs awarded to a third party in an action against the trustees as legal owners of the trust property.³⁵ Those differences between a trustee’s ownership and real ownership are due to the fact that the real purpose of the trust is not to give the trust property to the trustees as a gift, but simply to authorise them to manage and administer the trust property for the benefit of the beneficiaries or a specified purpose. Therefore, obligations, especially fiduciary duties, are

³² Jiang, n 17 above, 59 [translated by author].

³³ X. Zhou, *Comparative Studies of Trust Law* (Beijing: Law Press, 1996) 210 [translated by author].

³⁴ Q. Li, ‘The Legal Nature and Basic Principles of Trust’ (2000) 3 Chinese Journal of Law 118, 121 [translated by author].

³⁵ See *Benett v Wyndham* (1862) De GF & J 259; *Re Raybould*, [1900] Ch 199.

imposed on the trustees so as to ensure that they exercise their unitary ownership for the interests of beneficiaries or for the fulfilment of a certain purpose.

The nature of beneficiary's interest is argued to be a special personal claim. To support this position, the author starts out with explaining why the beneficiary's right should not be characterized as a real right, and then analyses how the beneficiary's right should be conceptualized. Last but not least, she explains why 'a special personal claim' is a relatively unified understanding of the beneficiary's interest, in particular in commercial context.

Problems with theories that the beneficiary has a real right

Firstly, it is worth nothing that a trustee is the person who should be granted exclusive powers of management over the trust assets in order for a trust to function. Therefore, even if the ownership of trust property were granted to beneficiaries, the right of management would still be conferred on the trustees.

If the beneficiary, but not the trustee, were the owner of the trust property, there would be a number of weaknesses: it would be hard to explain why the trustee can transfer good title to a third party because it violates the principle of *nemo plus juris ad alium transferre potest quam ipse habet* (nobody can confer a greater right on another than he has to give), which precludes the non-owner trustee from transferring title to the trust property. Furthermore, if the beneficiary's real right theory were to prevail, the ownership of trust property would be in legal limbo for a certain period in some cases, such as the charitable trust, private purpose trust, and discretionary trust, that has no certain class of beneficiaries. For example, in the civil law case *Royal Trust Co. v Tucker*, primary beneficiaries did not exist when the deed of donation and the trust were made; consequently, for a certain period of time ownership of the property in the

trust would have been vested in no one.³⁶ Last but not least, secrecy is deemed to be one advantage of the trust system. If the beneficiary's right was considered as a real right, it should be registered and in that case the beneficiary's identity would have to be revealed.

In China, the beneficiary's real right theory faces a number of challenges. First, the beneficiary's right does not satisfy the definition of real right (物权) in the Property Law of China. Article 2, paragraph 3 of the Property Law of China stipulates a real right as 'the exclusive right of direct control over a specific thing in accordance with law, and includes (exhaustively) ownership, usufructuary rights, and security rights.'³⁷ Nevertheless, the Trust Law of China grants the beneficiary no exclusive right to manage or control the trust property. Moreover, the beneficiary's right cannot be viewed as a usufructuary right since a usufructuary right requires the possession of the relevant property.³⁸ As noted, because in trusts it is the trustee rather than the beneficiary who holds the possession of trust property, this right would appear to be immediately precluded. In a similar vein, the beneficiary's right is not a security right because a security right gives a secured creditor a priority over unsecured creditors in having his claim be paid with the trust property.³⁹ However, the beneficiary has no priority against other trust creditors except for the personal creditors of a trustee due to the independence of trust assets.⁴⁰

Furthermore, the beneficiary's right cannot be attributed to any specific type of real rights. Pursuant to article 5 of the Property Law of China, '[t]he varieties and contents of real rights

³⁶ *Royal Trust Co. v Tucker*, 1982, SCC, 264-265.

³⁷ Property Law of China, n 26 above, art. 2.

³⁸ X. Sun, *Property Law* (Beijing: Law Press, 2008) 79 [translated by author].

³⁹ Z. Wang, *Principles of Personal Claims* (Beijing: Beijing University Press, 2009) 13 [translated by author].

⁴⁰ D. Chen, *Trust Law and the Innovation of Trust System in China* (Shanghai: Lixin Accounting Publishing House, 2003) 113 [translated by author].

shall be prescribed by law.’⁴¹ Nevertheless, the beneficiary’s right is not expressly or implicitly regulated as a type of real right by the Trust Law of China or other legislation. In order to avoid recognizing the beneficiary’s right as a right directly enforceable against trust property, the Trust Law of China stipulates that the legal bases of the enforcement of the beneficiary’s rights are the trust documents but not the legislation itself.⁴² Moreover, although article 5 of the Property Law of China does not prevent legislation from creating new types of real rights, it is still difficult to classify the beneficiary’s right as a real right because of the instability inherent in the nature of (typically fungible) trust property. While a real right requires stability of the property, the particular assets which make up the trust fund are liable to change from time to time dependent on the trustee’s management. For example, the trust fund could readily be converted from cash to securities depending on the trustee’s management decisions. Additionally, if the beneficiary’s right is viewed as a real right, it will result in assets held in charitable trusts becoming ownerless, as there is no beneficiary as such, but rather just a purpose for which the trust exists. Incidentally, charitable trusts exist in English law but they does not preclude the finding that the beneficiary has a proprietary interest. As a consequence, the beneficiary’s right cannot be defined as a real right. The Chinese trust law does not recognise it as a real right, at least not until the trust is terminated and the ownership is transferred to the beneficiary.

The beneficiary’s right as a special personal claim

⁴¹ Property Law of China, n 26 above, art. 5.

⁴² Trust Law of China, n 15 above, art. 9: The following items shall be stated clearly in the written documents required for the creation of a trust: ... (5) the form and means through which the beneficiary gains benefits from the trust.

Compared with the above two theories, the main argument proposed in this article appears to be closer to the personal claim theory. It differs, however, in its assertion that the beneficiary's right has a broader meaning as compared to a typical personal claim. First, the beneficiary's rights are beyond the scope of personal claims, such as the right to supervise trust affairs. Furthermore, it is different from a typical personal claim that binds two parties in a creditor-debtor relationship,⁴³ a beneficiary's right can affect a third party's right in the trust property. Although the beneficiary's claim is not directly against a third party, it can affect the third party's rights in trust property by annulling trustee's transfer of the property to the third party.

The special personal claim theory is different from the recent argument of common law scholars, which claims that equitable property rights are best understood as rights against rights, but not as property rights (rights against things) or as personal rights (rights against persons)⁴⁴. Firstly, the notion of rights against rights, a type of right belonging to neither real rights nor personal claims, finds no place in the Chinese or maybe other civilian legal frameworks. More important, the broader meaning of personal claims in interpreting beneficiary's interest under the special personal claim theory, nevertheless, does not prevent the beneficiary's right from being characterised to a personal claim, as opposed to a real right. Although in general only real rights are exigible against third parties, secondary personal claims can arise against third parties who are guilty of interference in the performance of the trustee's performance of their primary duties to the beneficiary. As Professor Smith argues '[t]his idea is not alien to the civil law, which also recognizes that while a personal obligation does not create a real right but only

⁴³ Z. Wang, *Principles of Personal Claims* (Beijing: Beijing University Press, 2009) 15 [translated by author].

⁴⁴ B. McFarlane and R. Stevens, 'The Nature of Equitable Property' (2010) 4(1) *The Journal of Equity* (2010)

<<http://ssrn.com/abstract=1350437>> accessed 31 December 2019.

a claim against a particular debtor, nonetheless it is possible that there might be claims in delict against third parties who wrongfully interfere in the performance of an obligation'.⁴⁵

This article argues that the beneficiaries' right to supervise trust affairs and annul a trustees' wrongful disposal of trust property, both of which are beyond the narrow scope of personal claims, can be interpreted as the appurtenance and the preservation of the personal claims respectively. This is for the following reasons:

Firstly, jurists have interpreted the beneficiary's right to supervise trust affairs as appurtenant to or incidental to their personal claims to enforce the trustee's duties to distribute assets according to the trust terms.⁴⁶ It is suggested that although the right of supervision directly falls into neither personal claims nor real rights, it is in essence derived from the beneficiary's personal claims to ensure that the trustee carries out the terms of the trust. The reason to support this opinion is that the right of supervision must be transferred along with the transfer of beneficiaries' personal claims. In the same fashion, once the beneficiaries waive their personal claims, the right of supervision must also be waived.⁴⁷ From the perspective of its function and position therefore, the right of supervision is in a subordinate position, to support and realise the beneficiaries' personal claims. Thus, the right to supervision is essentially an auxiliary and derivative right of the personal claims which are the beneficiary's core rights.

Secondly, with regards to the beneficiary's right to annul the trustee's disposal of trust property against the trust purpose, the view advanced here that this right also exists to preserve

⁴⁵ L. Smith, 'Trust and Patrimony' (2009) 28 *Estates, Trusts & Pensions Journal* 332, 343.

⁴⁶ H. Yu, 'China's Reception of the Dual Ownership of Anglo-American Trust' (2010) 3 *Modern Law Science* 159, 164 [translated by author].

⁴⁷ H. Yu, *How to Localise the British and American Law on Trust Property in China* (Beijing: China University of Political Science and Law Press, 2011) 111 [translated by author].

the beneficiaries' personal claims. This right comes from the nature of a creditor's right to revoke, rather than a right of recovery based on real rights.

Taking Chinese law as an example, the beneficiary's right of revocation is granted by articles 49 and 22 of the Trust Law of China. That is, where the trustee disposes of the trust property in breach of the purposes of the trust, or causes losses to the trust property due to his departure from his administrative duties or improper handling of trust business, the beneficiary shall have the right to apply to the People's Court for annulling such disposition and the right to ask the trustee to restore the property to its former state or make compensation. Where a transferee of the said trust property accepts the property while knowing the violation of the purposes of the trust, he shall return the property or make compensation.⁴⁸

These regulations present similarities between the right of revocation in trusts and the right of recovery under the real rights regime – '[w]here a realty or chattel is under an unauthorised possession, the right holder may require the returning of the original object'⁴⁹. However, this ignores that the right of recovery in real rights is not the only analogue of the beneficiaries' right of revocation, and real rights are not the only basis of the right of revocation.

In fact, the right to annul the trustee's wrongful disposal can also be based on personal claims. Likewise, and pursuant to the right of revocation in personal claims, a creditor may also request the court to annul a debtor's disposal of property or right when it jeopardises the realization of personal claims. As regulated in article 74 of the Contract Law of the People's Republic of China⁵⁰ (Contract Law of China):

⁴⁸ See Trust Law of China, n 15 above, art 22 and art 49 "The beneficiary may enjoy the rights of the settlor prescribed in Articles 20 to 23".

⁴⁹ Property Law of China, n 26 above, art. 34.

⁵⁰ Contract Law of the People's Republic of China (adopted at the Second Session of the Ninth National People's Congress, promulgated by Order No. 15 of the President of the People's Republic of China on 15 March 1999,

If a debtor disclaims its due creditor's rights or transfers gratis its property and thus causes losses to the creditor, the creditor may apply to a people's court to rescind the debtor's action. The creditor may also apply to a people's court to rescind the debtor's action if the debtor causes losses to the creditor by transferring its property at a low price evidently unreasonable and with awareness of the transferee. The scope for exercising the right of rescission is limited to the creditor's rights enjoyed by the creditor. The expenses required by the creditor in exercising its right of rescission shall be borne by the debtor.⁵¹

It can be seen therefore the right of revocation is not necessarily based on real rights, but can also be exercised by a creditor exercising his personal claims when his interests are harmed by debtors. The condition of exercising a creditor's right of revocation is when the creditor's interests are harmed by debtors as a result of the debtors abandon their matured obligatory rights, transfer property without consideration, or transfer property at an unreasonable low price. This condition is similar to the circumstance under which a beneficiary can exercise his right of revocation, i.e. when the beneficiary's interests are harmed by trustee's improper management of trust that causes losses to the trust property.

This article argues that the beneficiary's right of revocation is in the nature of a creditor's revocation right but not a recovery of real rights. That is because, on the one hand, in contrast to the recovery of real rights of which the purpose is to resume the control of property,⁵² the right of revocation in the trust aims mainly at preserving the trust property instead of controlling

and effective as of 1 October 1999).

⁵¹ *ibid*, art. 74.

⁵² L. Wang, *Property Law Research* (Beijing: China People's University Press, 2007) 201.

them. Even when the trust property is returned to the trust as a result of the beneficiary's right of revocation, it reverts back to the control of the trustees⁵³ while the beneficiary still has no power over the trust property. On the other hand, unlike the right of recovery, which is part of the real right, the beneficiary's right to annul trustees' act is not tied to real rights in the trust property. This power to annul is instead the same as the characteristic of a creditor's right to annul. For example, when a trustee releases the debts that are held as trust property, the beneficiary's right to annul this disposal can only be by a creditor's right to annul for the reason that an application of the recovery of real rights requires the trustee to dispose of the trust property.⁵⁴ By contrast, a creditor's right to annul can be used to preserve the trust property.⁵⁵ As a result, it is more reasonable to characterise the beneficiary's right to annul trustee's disposal as a creditor's right of revocation, rather than a right of recovery connected to real rights.

In sum therefore, this article makes a unique contribution and defines the beneficiary's right as a special personal claim that consists three parts: the main claim (personal claims), appurtenant rights (rights of supervision), and security rights (rights of revocation). Working together with the basic rule of trusts – the independence of trust property that requires the trust assets to be separated from trustees' personal assets, the beneficiary's interest is secured in the event of the trustees' bankruptcy or death.

The theory of special personal claim provides a developed understanding of the beneficiary's interest

⁵³ The innocent trustees or newly appointed trustees in case of bad faith dispositions by a trustee.

⁵⁴ *ibid*, 204.

⁵⁵ Wang, n 43 above, 190.

The ‘special personal claim’ provides a more unified and developed understanding of the beneficiary’s interest, because (a) it suits better in civil law systems comparing with the theory of rights against rights, and (b) it is applicable to both traditional family trusts and modern commercial trusts. The ‘special personal claim’ causes no fundamental change to neither the basic rule of trusts nor civil law framework.

As discussed above, the recent common law theory of rights against rights is hard to fit into civil law systems, because it proposes a type of right belonging to neither real rights nor personal claims. In contrast, the ‘special personal claim’, which does not prevent the beneficiary’s right from being characterised to a personal claim, is more suitable into civilian jurisdictions.

Furthermore, compared to the traditional common law argument of equitable rights, which may be both personal and proprietary, the ‘special personal claim’ provides a more developed and unified understanding of the beneficiary’s interest that is applicable to both traditional family trusts and the use of trusts in commercial applications.

Under common law, a broadly accepted theory of the nature of a beneficiary’s right holds that a beneficiary has a variety of equitable rights arising from the trust, which may be both personal and proprietary. That is, a beneficiary’s rights can be predicated both on his or her personal rights against the trustees and on any proprietary interests in an external relationship with a third party.⁵⁶ By this reading, a beneficiary may bring proceedings *in personam* against trustees for a breach of trust; however, such a claim may be subject to time limits imposed by a limitation statute.⁵⁷ Moreover, a proprietary right may be instituted against the trustees to

⁵⁶ P. S. Davies and G. Virgo, *Equity & Trusts* (Oxford: Oxford University Press, 2nd ed, 2016) 485.

⁵⁷ For example, see Limitation Act 1980 (c.58), s. 21 Time limit for actions in respect of trust property, para (3) ‘an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for

recover (trace) the trust property.⁵⁸ As Professor Smith notes, '[t]he rights of beneficiaries in the common law trust are neither purely personal rights against the trustee, nor are they real rights in the trust property, but rather they are rights over the rights which the trustee holds as trust property; they have a proprietary character since they persist against many third party transferees of the trust property.'⁵⁹ Specifically, a beneficiary's proprietary rights under common law were recognised by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*.⁶⁰ The beneficiary has a proprietary interest in the trust property, which is, in equity, enforceable against any subsequent holder of the property other than a purchaser for value of the legal interest without notice. Nolan makes a classic statement on the nature of a beneficiary's proprietary rights: 'The key proprietary features of a beneficiary's interest under a trust are his primary negative right to exclude non-beneficiaries from enjoyment of trust assets and secondary rights to vindicate that primary right if it is infringed.'⁶¹

While maintaining the fundamental rule of common law, the theory of a beneficiary's special personal claim is more developed than the traditional common law argument of equitable rights, which may be both personal and proprietary. This is because the 'special personal claim' theory provides a simple, unified restatement of the beneficiary's interests that applies to different types of trusts, both fixed and discretionary. In contrast, traditional common law analysis perceives the nature of a beneficiary's rights as dependent on the type of trust.⁶²

which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued'.

⁵⁸ M. Ramjoin, *Text, Cases and Materials on Equity and Trusts* (Oxon: Routledge Cavendish, 4th ed, 2008) 539.

⁵⁹ L. Smith, 'Trust and Patrimony' (2009) 28 *Estates, Trusts and Pensions Journal* 332, 332.

⁶⁰ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705.

⁶¹ R. Nolan, 'Equitable Property' (2006) 122 *Law Quarterly Review* 232, 236.

⁶² Davies and Virgo, n 56 above, 485.

The proprietary right is recognised in fixed trusts but not in a discretionary trust. In *Gartside v IRC*,⁶³ Lord Wilberforce made clear that the object of a discretionary trust, a trust under which the trustee has the discretion to select for distribution amongst members, does not have a proprietary right to trust property. Since ‘[o]ne consequence of the beneficiary having a proprietary interest in the trust property is that, if the trustee becomes insolvent, the property will not be available to the trustee’s creditors’⁶⁴, the common law theory of personal and proprietary rights seems to suggest that a beneficiary cannot be protected from the claims of a trustee’s personal creditors in a discretionary trust. This notion conflicts with the essence of trusts: that trust assets are independent from trustees’ personal property. Furthermore, according to the common law proprietary theory, the beneficiary in a discretionary trust is unable to recover trust property when the property is misappropriated by the trustee and transferred to a party, which is another consequence of bringing a proprietary claim. Therefore, when comparing with the common law theory of personal and proprietary right, the theory of special personal claim provides more comprehensive protection to beneficiaries, which is beyond the limits of the consequences of a proprietary claim.

A universal restatement of the nature of a beneficiary’s interests not only resolves any discrepancy in applying the law to different types of trusts, but also corresponds to the development of trust in a commercial context. Commercial dealings have significantly influenced the beneficiary’s rights.⁶⁵ Influences drive the development of the law. First,

⁶³ *Gartside v IRC* [1968] AC 553, 617.

⁶⁴ Davies and Virgo, n 56 above, 487.

⁶⁵ Commercial dealings have significantly influenced the beneficiary’s rights in relation to both the proprietary tracing action and equity’s personal actions for knowing receipt and dishonest assistance. See Wilson, n **Error! Bookmark not defined.** above, 450 and 452. ‘The so-called commercial swap agreements from the 1990s involving public authorities have been enormously influential in shaping the nature of the proprietary tracing

nowadays virtually all of the litigation surrounding the proprietary tracing claim and the ‘knowing’ stranger personal actions, are ones where parties are in a contractual relationship and at least one of the parties is a commercial actor, such as in *Halifax BS v Thomas*⁶⁶. It is also the case that beneficiary’s actions commonly involve those who have been victims of fraud or theft, even outside of the context of a contractual relationship.⁶⁷ In both cases, whether a contractual relationship or a tort, personal claims have been used as the main remedies. Thus, the theory of special personal claim provides a consistent understanding of a beneficiary’s rights in commercial trusts. Furthermore, as envisaged by some of the key common law advocates themselves, commercial cases would seek to accommodate the proprietary entitlement of owners in law and in equity alike, and allow the simplicity of the common law’s approaches, namely, Lord Millett’s envisioned unified set of tracing rules. What has encouraged this has been the huge volume of commercial fiduciary litigation that has continued to simultaneously affirm and question the requirement for a universal set of tracing rules.⁶⁸ The

claim for the twenty-first century. A number of cases – famously, *Westdeutsche*, but also *Guinness Mahon & Co. v Kensington and Chelsea RLBC* [1998] 2 All ER 272 and earlier *Hazell v Hammersmith* [1991] 2 WLR 372 – became the battleground for competing views on proprietary entitlement and restitution.’ With respect to the liability for knowing receipt, the significance of the commercial dealings has been crucial in the difficulties experienced in establishing the standard for liability to arise. ‘Indeed as a number of cases prior to *BCCI (Overseas) Ltd v Akindele* [2000] 3 WLR 1423 demonstrate, it is the speed of commercial transactions that is seen as being responsible for difficulties in determining what degree of knowledge under *Baden Delvaux* [1983] BCLC 325 was required for liability to arise, and it is another commercial context case that ensures that *Starglade* provides the most current statement on the law relating to knowing receipt.’

⁶⁶ *Halifax BS v Thomas* [1996] Ch 217.

⁶⁷ S. Wilson, *Todd & Wilson’s Textbook on Trusts & Equity* (Oxford: Oxford University Press, 12th ed, 2015) 451.

⁶⁸ See *ibid*, 452.

theory of special personal claim just conforms to the envisioned universal, simplified rule, and provides a solution for it.

Last but not least, the theory of a beneficiary's special personal claim can be drawn from a case study of the Chinese law of a civilian jurisdiction, and fits well into the civil law property system where ownership is absolute. There is a long-standing historical debate on the nature of a beneficiary's rights, and it is particularly concerned with the application of the civil law notion of ownership – rights *in rem* and rights *in personam* to the English law of property – where it is ill-fitting.⁶⁹ The theory of a beneficiary's special personal claim overcomes such difficulty, and provides a developed understanding of the beneficiary's interests that not only provides a response to the evolution of trust for commercial uses, but also broadly applies in a worldwide context, where the concept of equitable ownership does not apply.

CONCLUSION

In the modern world, trusts have developed to be more often used as a valuable device for commercial applications. Because of the trust's advantages in investment, banking, financing and property management, China, like other civilian jurisdictions, took the bold step of introducing the trust into domestic law. The evolution of trusts and their introduction in civil law requires a developed understanding and new judicial interpretations of the beneficiary's interests.

Through a comparative study of Chinese trusts – an example of trusts in civil law and for commercial uses – this article provides a developed, unified understanding of the beneficiary's interest in modern trusts. The author argues that the beneficiary's rights can be explained as

⁶⁹ J. E. Penner, *The Law of Trusts* (Oxford: Oxford University Press, 11th ed, 2019) 53.

personal claims, as opposed to real rights, yet they are special because beneficiaries have some rights beyond the traditional scope of personal claims. The special personal claim consists of three parts: the main claim (personal claims), appurtenant rights (rights of supervision), and security rights (rights of revocation).

It is hoped that this article will give rise to a reassessment of the traditional theory of the beneficiary's interest.