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ON FITTING TRUSTS INTO CIVIL LAW JURISDICTIONS¹

In discussing whether and on what lines the law of trusts might be introduced into the law of the people's Republic of China, it will be as well to sketch the constitutional, conceptual and politico-economic background, before turning to the obstacles, technical and political to the reception of trust law in civil law jurisdictions generally and in the PRC in particular.

The Background

1. Constitutional. The constitutional structure of Hong Kong in relation to the PRC is summed up in the maxim 'one country, two systems'. There is nothing new or unusual about having two different systems of law in a country that is in international law a sovereign state. In this connection different systems mean not two separate jurisdictions administering variants of the same system, as is the case with the common law states of the United States of America, but two systems that belong to different legal families. They may belong to the common or civil law families, or, within civil law systems, to the French- or German-type families. Moreover the differences to bear in mind are mainly in private rather than public law. The public law of a sovereign state has of necessity to be fairly uniform throughout its territory. Otherwise it would hardly amount to a coherent polity.

Even in private law it is usual, particularly in commercial law, for one system to prevail over the bulk of the territory. This is because, to be viable, a sovereign state requires a majority culture and a unified economy. A sovereign state is normally also a free trade area. In practice, in all the examples known to me, the two different private law systems in a single country do not prevail over areas of equal extent. There is a majority system and a minority system. One prevails over most of the country and another in a limited part of it, but one which is often significant in point of area, population or wealth². That is true, for example, of Scotland, Quebec, Louisiana and the Hong Kong Special Administrative Region. The first three, however, are civil or partly civil law systems in a common law environment, while Hong Kong is a common law system in a civil or partly civil law environment³. From that point of view its situation is without parallel, so far as I can tell, elsewhere.

The United Kingdom provides a good example of the operation of two systems in one country. Both England/Wales and Northern Ireland have common law legal systems that vary only in detail. Scotland on the other hand has a mixed civil and common law system. It has separate courts and a separate legal literature that reflects its former independence and present distinctness. It is separate in both private and criminal but not in public law. The Articles of Union, which led to the political fusion of 1707, provided for the continued existence of a distinct legal system in Scotland. This

¹ I am grateful to Donovan Waters and Simon Gardner for helpful comments on an earlier draft and to Lusina Ho for advice in regard to trust law in Hong Kong, Taiwan and the People's Republic of China.

² Not always. In the UK the Channel Islands and the Isle of Man have separate legal systems. From the point of view of tax law these may be of importance outside the jurisdiction, despite the small size of the jurisdictions in question.

³ That this remains true is clear from the Basic Law arts. 8,18,84. Art.8 refers among other sources to 'rules of equity'. Hong Kong SAR trust law is very like that of other common law jurisdictions: see especially Trustee Ordinance of 27 July 1934 as amended (Laws ch.29).

distinctness was not fully respected by the United Kingdom Parliament. For example, the House of Lords was made and still is the final court of appeal in matters of Scottish private law. Nevertheless Scotland has continued to have its own courts and judges and to develop its own legal culture. Indeed the continued existence of a separate system of Scots law is one of the factors that has led to the 1998 UK legislation that sets up a devolved legislature in Scotland. A separate legislature, even of limited competence, is a natural accompaniment of a separate system of laws. The 1998 Act does not, however, make the United Kingdom a federal state. The UK Parliament retains the right as a matter of UK law to put Scottish devolution into reverse. In practice it is inconceivable that it would exercise that right, unless the Scottish legislature and executive, with the support of Scottish opinion expressed in a referendum, asked it to do so.

In Quebec, on the other hand, the separate French system of private law is protected by the terms of the federal constitution. After the British conquest of Quebec in 1763 the victors, by the Quebec Act of 1774, retained French private (but not criminal) law as the law of the conquered area. Later the British North America Act of 1867 made Quebec a province in a federal union and allocated jurisdiction over private (but again not criminal) law, courts and procedure to the provinces. In the result there is a minority civil law system in Quebec and majority common law systems in the other nine provinces of Canada.

So the existence of two systems of law in one country does not necessarily imply a particular constitutional structure. The structure may be federal or unitary and, if unitary, may or may not include provision for a devolved legislature. One version of a unitary constitution is a union of different countries, as in the United Kingdom⁴. What this means in practice in the context of the Hong Kong SAR has been explored in an incisive way by Professor Yash Ghai of Hong Kong University⁵ and professors Wang and Leung of the City University of Hong Kong⁶. The position of the Hong Kong SAR resembles that of the future Scotland. It has a separate legal system, a subordinate legislature and a separate court system, but forms part of a unitary state, the PRC.

What, then, is essential for the survival of a minority system of law when two systems co-exist in a unitary state? What is needed is surely the acceptance of a constitutional convention by which the authorities in the unitary state respect the legal identity of the minority system. If the unitary state recognizes the separation of powers, as is the case to a limited extent in the UK, each branch of government (legislative, executive or judicial) must share this respect. In the UK the judicial committee of the House of Lords claims in deciding Scottish appeals to decide them as matters of Scots, not English law. Consequently weight, though not always decisive weight, attaches to the opinions of the two Scottish judges who are by convention chosen as Law Lords. If the unitary state does not recognize the separation of powers, as seems to be the case in the PRC, then the authorities who exercise combined government functions must in

⁴ *Constitutional Futures. A History of the Next Ten Years* (ed. R.Hazell 1999) chs. 2 and 3.

⁵ Y.Ghai, *Hong Kong's new Constitutional Order. The Resumption of Chinese sovereignty and the Basic Law* (Hong Kong 1997).

⁶ G.Wang and P.M.F. Leung, 'One country, two systems: theory into practice', in *Pacific Rim Law and Policy Journal* 7 (1998) 279-321.

fact respect the constitutional autonomy of the minority system. As we can see from the example of the UK and Scotland from 1707 onwards it is possible even in a unitary state for the necessary respect to exist, though not without some backtracking, to an extent sufficient to preserve the identity of the minority system in its main outlines.

2. *The Conceptual Background.* So much for the constitutional background. There are also conceptual problems to be considered. What is to count as a different legal system and what is to count as a trust? I have divided legal systems into common law, civil law and mixed. But the soundness of this division into legal families is now being questioned⁷. Given the variation within each category and the overlap between them, is it justifiable to go on speaking of common law, civil law and mixed systems?

I believe it is, at least in relation to the area of trusts and fiduciary obligations. The recent series of historical essays edited by Helmholz and Zimmermann⁸ may be thought to call this in question. These essays tend to undermine the idea put forward by Maitland in England and von Gierke in Germany that there is a great gulf fixed between the trust of Anglo-American law and the fiduciary institutions of European continental law⁹. There were fiduciary institutions in Roman law and have always been such institutions in the civil law systems influenced by Roman law and also in Germanic customary law. It is true that on the continent of Europe, unlike in English law, these did not give rise to separate courts of equity or to a distinction between legal and equitable title to property¹⁰. There was no exact equivalent of the English use or trust in the early historical record of continental law. But the history of *fiducia* and *Treuhand* presents more than a few parallels reflecting similar social conditions. They and institutions such as guardianship and curatorship provided and continue to provide a legal framework for the administration of the assets of another person, earmarked as separate, in the interest not of the administrator but of the owner or a third person or of an abstract purpose. Those who are charged with the administration – let us call them administrators - performed and still perform in civil law systems many of the functions that the trustee has traditionally fulfilled in Anglo-American systems.

But which, if any, of these institutions is equivalent to a trust? This depends on what are taken to be the essential features of a trust, by which is here meant a trust intentionally created rather than a constructive trust.¹¹ This in turn depends on the purposes we have in mind. To compare institutions in different jurisdictions it is important to attend to both structure and function. My selection of the essential features of a trust embraces both. Not all the features selected are peculiar to trusts, but the combination of them marks it out as a special legal institution. Structurally, a

⁷ *Itinera Fiduciaae. Trust and Treuhand in Historical Perspective* (ed. R.Helmholz and R.Zimmermann, Berlin 1998) p.27 n.2, citing Hein Kötz, 'Abscheid von der Rechtskreislehre?' (Goodbye to the doctrine of families of law?) ZEuP 6 (1998) 493ff.

⁸ Above n.7.

⁹ F.W.Maitland, 'The Unincorporate Body', in *The Collected Papers of Frederic William Maitland* (ed. H.A.L.Fisher 1911) vol. 3 p.272.

¹⁰ H.Coing, *Die Treuhand kraft privaten\ Rechtsgeschäfts* (1973) p.11ff.2

¹¹ These function to give effect to principles of unjust enrichment that civil law systems cater for in other ways

trust requires (i) assets which form an estate or patrimony separate from that of the settlor or trustee, (ii) a trustee to administer the assets (iii) a defined purpose other than the benefit of the trustee¹², and (iv) a court or administrative authority with a supervisory jurisdiction that can be called on to intervene, at least if the beneficiaries wish it, to ensure that the trust purpose is put into effect. These structural features are matched by civil law institutions such as guardianship, curatorship and the administratorship of deceased estates. They are not matched by the German *Treuhand* or the French *fiducie* as they stand at the moment. These institutions lack the supervisory jurisdiction of the court or a public authority that can be called upon to ensure that the purpose for which the assets have been set aside is carried out. They amount rather to special types of contract that give rise to contractual remedies.

Even the civil law institutions that are *structurally* trusts have not in general developed into a *functional* equivalent of the modern trust. The merit of the trust in common law jurisdictions is that it can be used for a wide range of purposes. It puts at the disposition of private citizens the opportunity to earmark assets for nearly all lawful purposes, provided they involve a benefit to some person or the advancement of some object that can be described as ‘charitable’ or is specially approved by the courts¹³. Though so-called charitable purposes include many objects for the public benefit that have nothing to do with charity, for example educating the rich, the state excludes other purposes (for example political purposes) for political and economic reasons. But over a large area private citizens can mark out trust assets and prescribe trust purposes in the knowledge that the courts will in the last resort enforce their wishes, if called upon by the beneficiaries or an official agency to do so. The state, through its courts, takes those purposes, as it were, on board. Anyone who is not subject to incapacity may set up a trust. Anyone not subject to incapacity may be a trustee. The permissible trust purposes are extremely wide. No official authorisation is needed. So the trust institution alters the balance of power between the state and the individual. The recognition of trusts in common law countries marks a liberal society in which the state backs choices freely made by private individuals. It balances this recognition of individual freedom, however, against the needs of a liberal economy which sets limits to the period of time¹⁴ for which assets can be withdrawn from the market.

In practice trusts in common law countries are used for a great variety of purposes, almost as a universal ‘fix-it’: to keep property or its proceeds in a family; to protect the weaker members of society even if (like drug addicts or alcoholics) they are not legally incapable; to safeguard the interests of creditors (debenture trusts); to enable shareholders to combine so as to exercise an influence proportionate to their joint shareholdings (voting trusts); to attract investors (unit trusts); to minimise tax liability (estate planning); to assemble the necessary finance for a building or engineering project (project finance trusts); to provide for the issue of shares or bonds to the public; to guarantee payment of a debt by transferring assets to be sold in the event of non-payment (trust indentures); to hold property in a convenient form; to provide for employees on retirement (pension trusts); to promote abstract purposes whether

¹² The first two requisites correspond to the French *patrimoines d'affectation*, separate estate or patrimony dedicated to a defined purpose, and the first to the German *Sondervermögen*, separate estate.

¹³ e.g. in England trusts for domestic animals.

¹⁴ In Anglo-American law by the rule against perpetuities, which has parallels in civil law systems.

technically charitable (charitable trusts) or, in some jurisdictions, simply, like sport and art, of social value (purpose trusts); to avoid a possible conflict of interest by transferring assets to a trustee to manage (blind trusts); to provide a substitute for incorporation; to promote freedom of association in all its forms; and generally to circumvent awkward rules of law without doing anything technically illegal. In future trusts will be employed for yet other purposes, though we cannot predict which. Some of these uses, relating to investment, security and perhaps property holding, may be of interest to the PRC.

Trusts are also used by legislatures in common law countries as an administrative framework for putting laws (e.g. about public health¹⁵) into effect and by judges, for example, for ensuring that an award of damages is properly administered. Moreover when trusts proliferate financial institutions such as banks and trust companies spring up that specialise, among other activities, in administering trusts¹⁶. The value of the assets held in trust in common law countries, though difficult to estimate, is very considerable¹⁷. Only in relation to carrying on business does the detailed regulation of partnerships and companies in common law countries usually rule out the possibility of trading as a trust. Even so, in South Africa, the country whose trust law I know best, those who wish to carry on a business have the option of doing so by way of trust. As a way of doing business there, the trust is more subject to regulation than a partnership but less so than a private company ('closed corporation')¹⁸.

Of the civil law parallels, on the other hand, nearly all are of more limited scope, so that they are functionally unlike Anglo-American trusts. Others are not even structurally trusts because they can be enforced only by resort to contractual remedies, which depend on the wishes of the contracting parties. The courts do not take their aims on board. Even though contracts may have played an important role in the genesis of the trust as an institution¹⁹, it is important to stress the difference between the two. The enforcement of contracts is purely a matter for the parties to the contract and their successors by assignment or on death. It is no business of the state, via the courts, to see that contracts are enforced if the parties choose not to insist on it. On the other hand a trust is not a *purely* private arrangement and in particular not purely a convenience for the settlor. Once the settlor has created a trust by earmarking assets and designating the trust purpose in the proper form it then becomes the duty of the court, if approached by a trustee or beneficiary²⁰ or, in the case of trusts for an abstract purpose, by a public official to ensure that a suitable trustee is appointed to administer the trust and an unsuitable trustee removed from office. The court may also be called on, if the settlor has failed to do so, to devise or endorse a suitable scheme to achieve the trust purpose or something that closely resembles it. The powers given to courts in modern times to vary trusts in order to ensure that the trust purpose or

¹⁵ In the UK for the management of the National Health Service. Numerous Hong Kong Ordinances set up trust funds for public purposes.

¹⁶ In Hong Kong they require to be registered under the Trustee Ordinance part VIII.

¹⁷ W.Goodhart 'Trust Law for the 21st Century' in *Trends in Contemporary Trust Law* (ed. A.J.Oakely 1996) p. 258 puts the value of assets held in occupational pension trusts in the UK in January 1992 at £500 billion.

¹⁸ T.Honoré and E.Cameron, *Honoré's South African Law of Trusts* (4 ed. 1992) p.10-1, 74-7

¹⁹ J.Langbein, 105 Yale L.J. (1995) 625f.

²⁰ In Quebec law also by the settlor or any other interested person: Code civil art.1290.

something close to it is achieved²¹ have no parallel in powers to vary contracts. Even if a trust is set up by contract in the first place, which it need not be, its enforcement is not left to the original contracting parties and their private successors.

One way of putting this point that I have often stressed²² is that a trustee holds an office²³. It is this office-holding, in my view, not the vesting of an equitable title to trust property in the trust beneficiary, that supplies the essential mechanism for the enforcement of trusts. The fact that trusteeship is an office does not entail that it need be subject to detailed control by the state via the courts. It can remain an area in which private decision-making predominates and trustees can be given wide discretions. But trusteeship as an office is consistent with a greater degree of state control than is usual in Anglo-American jurisdictions. How much control is desirable is a matter on which opinions may legitimately differ from country to country. For example must trusts be registered?²⁴ Does a trustee requires official authorisation before he can act as trustee?²⁵ If the trust property is of a registrable type must the existence of the trust be mentioned in the register?²⁶ Can trustees be required to give security²⁷? Must they render annual accounts not merely to the beneficiaries but to a state agency²⁸?

Civil law jurisdictions are likely as a condition of receiving trust law to insist on some at least of these controls. The appropriate level of control can be catered for in each jurisdiction in a Trustee or Administration Act. Though the English Trustee Act 1925 has been widely copied, there is no reason why such acts should be uniform. The controls will to some extent depend on the ethos of the country into which the institution is introduced. But that trusteeship is an office implies *some* degree of outside control over the arrangement made by the settlor. The settlor may be the *constituent* of the trust, but the trust instrument²⁹ is its *constitution*. In administering the trust the trustee cannot be the mere agent of the settlor or subject to his orders. Some modern developments, such as the use of trust protectors in off-shore trusts who are not themselves fiduciaries,³⁰ and of letters of wishes addressed by settlors to trustees that are not to be disclosed to the trust beneficiaries³¹, threaten to undermine

²¹ e.g. Hong Kong, Variation of Trusts Ordinance 34 of 1964 as amended (Laws ch. 253 s.3); Quebec, Code civil art. 1294; Taiwan, Trust Law art.16.

²² In various editions of *Honoré's South African Law of Trusts*; 'A Comparative Survey of the Law of Trusts and Trust-Like Institutions' in *International Court of Justice. Certain Phosphate Lands in Nauru. Memorial of the Republic of Nauru* vol. 1 (1990) pp 354-378; 'Trust' in *Southern Cross. Civil Law and Common Law in South Africa* (ed. R. Zimmermann and D.Visser 1996) pp. 849-872; '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* (ed. A.M.Rabello 1997) pp.792-818.

²³ In French *charge*: Quebec civil code art. 1299.

²⁴ They must be registered in South Africa (Trust Property Control Act 1988 s.4) and, if they are to last more than a year, in Liechtenstein (PGR art. 900).

²⁵ He does in South Africa since 1988 (TPCA 1988 s. 6) and in Mexico, Ley general de títulos y operaciones de crédito (1932) art. 350.

²⁶ It must be in South Africa (TPCA 1988 s. 11) and Liechtenstein (PGR art. 901)

²⁷ They can in South Africa: Trust Property Control Act 1988 s. 6.

²⁸ It was so provided in South Africa by the Administration of Estates Act 1965, Chapter III, but this part of the Act was never brought into force.

²⁹ It is not necessary to consider oral trusts, which are unlikely to be treated as valid in civil law countries.

³⁰ D.M.M.Waters, 'The Protector: New Wine in Old Bottles?' in *Trends in Contemporary Trust Law* (ed. A.J.Oakely 1996) pp.63f. In Belize the Trust Act 1992 imposes on a trust protector a fiduciary duty to the beneficiary of the trust or the trust purpose.

³¹ D.Hayton, 'The Irreducible Core Content of Trusteeship', in Oakley, *Trends*, above n.30 pp. 47-62.

the trust as a fiduciary institution. That trend, if not checked, will erode the moral standing of trust law and its attraction in civil law jurisdictions.

Moreover it is office-holding that provides a convenient bridge between common law trusts and the civil law. All civil law systems recognize offices such as those of guardian, curator, tutor, procurator, executor, factor and administrator. These offices are needed to provide for the affairs of minors, insolvents, the mentally disturbed, and the improvident, and to administer the estates of deceased persons. Different civil law systems recognize different offices and different categories of persons whose affairs need ultimately to be supervised by the court or an administrative agency. But they differ only in detail. Since all recognize administrative offices in some form it is no great step for a civil law system to extend recognition to another office, that of trustee. Since trusts may be concerned with family law, succession or commercial law, it is probably best for a civil law jurisdiction to assign them to a branch of the law of obligations, namely fiduciary obligations.

It is true that this view of the core of the trust institution has implications that may be controversial. One is that it does not matter where the title to the trust property is located. To locate it in the trustee, as in Anglo-American trust law, is convenient but not essential - a point to which we shall return. Equally important is the implication that if a trustee holds an office he owes a duty to the beneficiaries or the trust purpose. He must be loyal to the trust instrument, his constitution. But there are circumstances in which the beneficiaries, if agreed and of full capacity, may in many jurisdictions bring the trust to an end and restore the trusts assets to circulation³². This is one way in which a preference for unfettered ownership of assets and a regard for a market economy limits the enforceability of trusts according to their terms. But so long as the trust subsists, the trustee's duty to the terms of the trust instrument forms the core of his duty of loyalty, as opposed to the duty of good faith that requires him to avoid conflicts of interest and to be impartial³³. It is true that trustees can be given a great deal of discretion as to how they invest trust funds and how they distribute income and capital among beneficiaries. This flexibility enables trusts to adapt to changing circumstances. But a trustee cannot be a mere tool of the settlor, subject to his orders as to the way in which he administers the trust. The settlor may in the trust instrument reserve the right to revoke the trust but he cannot, while the trust subsists, tell the trustee how to administer it. Nevertheless the settlor's role is important. The trust instrument is his instrument and he chooses the trustees, as least in the first instance, as people likely to share his views about the way in which the trust should be administered.

3. *The politico-economic background.* Let us now next turn to the politico-economic framework of the problem of fitting trusts into civil law jurisdictions. The Hague Convention on the Law Applicable to Trusts and on their Recognition³⁴ lays down that trusts created in accordance with its terms are to be recognized and protected in the signatory states. The convention is in terms meant to deal with problems of private international law, for instance the choice of the law governing a trust and the

³² e.g. under the English rule in *Saunders v Vautier* (1841) Cr & Ph 240.

³³ Discussed by P.D.Finn, 'Fiduciary Law in the Modern Commercial World', in *Commercial Aspects of Trusts of Fiduciary Obligation* (ed. E McKendrick 1992) pp.153f.

³⁴ Signed on 20 October 1984.

recognition in civil law countries of trusts created in common law countries. Since trust investments are often located in a number of jurisdictions this recognition is clearly desirable from the point of view of the trustees and beneficiaries. But the impulse behind the Hague Convention was also partly one of attracting investment. If trustees, who are charged with the investment of great sums, are to invest with confidence in civil law countries, it encourages them to know that the trust institution is recognized in the country in which they intend to invest. As might be expected, a number of common law countries have ratified the Convention, including Hong Kong³⁵. Of civil law countries the convention has been signed only by Italy (1985), the Netherlands (1985), France (1991), Luxembourg (1985) and Malta (Recognition of Trusts Act 1994) and ratified so far only by Italy (1990), which brought the convention into force in 1992, the Netherlands (1995) which brought it into force in 1996, and Malta. Many civil law countries have been reluctant to recognize the trust even as a matter of private international law. One reason for this is probably that indirectly such recognition makes it possible for citizens of a civil law country to set up in a foreign jurisdiction trusts which will then be recognized in their own country. If trusts are not domestically available, the Hague Convention may therefore encourage investment abroad

This slow take-up of the Hague Convention may, however, create a misleading impression. In Italy interest in trust law has escalated. In particular Maurizio Lupoi has been untiring in his efforts to expound its virtues³⁶. He has published a collection of statutes on trust law drawn from countries other than the obvious common law jurisdictions³⁷. For instance neither the Hong Kong nor the Taiwan Trustee Act is included. But thirty-nine countries and jurisdictions are represented from South³⁸ and Central America³⁹, North America⁴⁰, Europe⁴¹, the Mediterranean⁴², Africa⁴³, the Indian Ocean,⁴⁴ Asia⁴⁵, and the Pacific⁴⁶. Many of the statutes are concerned solely with international or foreign trusts, and are designed to attract investment from outside. But others endorse trust law in the full functional and structural form in which it can be used for nearly all legitimate purposes and in which, trusteeship being an office, the courts or an administrative agency are given the power and duty to see that the trust purposes are carried out when called upon by an interested private individual or state official to do so. These jurisdictions include Ethiopia⁴⁷, Israel⁴⁸,

³⁵ Recognition of Trusts Ordinance 1989; Laws ch. 76.

³⁶ M. Lupoi, *Trusts* (1997); I. Beneventi, *I Trusts in Italia Oggi* (1996); E. Andreoli, *Il trust nella prassi bancaria e finanziaria* (1998)

³⁷ M. Lupoi, *Trust Laws of the World. A Collection of Original Texts* (Rome 1998). Though 'one no longer knows what a trust is' he includes laws 'which really belong to the trust family, now that the equitable foundation of trusts has been reduced ...to another English peculiarity'.

³⁸ Argentina, Chile, Colombia, Ecuador, Peru, Venezuela

³⁹ Anguilla, Belize, Cayman Islands, Mexico, Panama, St Lucia, St Vincent, Turks and Caicos Islands, Virgin Islands.

⁴⁰ Louisiana, Quebec, Barbados, Bahamas, Bermuda

⁴¹ Jersey, Liechtenstein, Guernsey, Isle of Man, Russia.

⁴² Cyprus, Israel, Italy, Malta.

⁴³ Ethiopia, Mauritius, South Africa.

⁴⁴ The Seychelles.

⁴⁵ Philippines, Japan. One could add Sri Lanka, a mixed civil law jurisdiction. See Trusts Ordinance no. 9 of 1917 as amended; L.J.M. Cooray, *The Reception in Ceylon of the English Trust* (Colombo 1971).

⁴⁶ Cook Islands, Nauru, Nevis, Western Samoa.

⁴⁷ Code civil I. 3.3. s.3 arts. 516, 520(2), 522, 528(2), 541.

Liechtenstein⁴⁹, Louisiana⁵⁰, Quebec⁵¹, South Africa⁵², Sri Lanka⁵³, and Taiwan⁵⁴. One can legitimately speak of a movement towards the partial (structural) or wholesale (functional) reception of trust law, mainly in countries that have been subject to British influence in the past, but also in some others. It is true that some civil law countries avoid the use of the term 'trust' even while adopting the substance of trust law. In Quebec the institution is called a *fiducie*,⁵⁵ in Ethiopia an Amharic term corresponding to *fiducie*, in Liechtenstein a *Treuhand*,⁵⁶ in Mexico a *fideicomiso*. To avoid seeming to succumb to Anglo-American legal imperialism it may be important to use a different term and a different legal technique, for example one by which the trustee-administrator is not the owner of the trust assets.⁵⁷

But clearly some countries hesitate for deeper reasons to adopt a general-purpose fiduciary institution. Would it be better to test the waters first by recognizing trusts in a limited area? France signed the Hague Convention and a legislative proposal was brought forward there in 1991 to introduce a trust-like *fiducie*⁵⁸. This would, in contrast with Quebec, have introduced fiduciary ownership into French law, but the project was put on ice because of fears that it would lead to tax avoidance. In the Netherlands the new Civil Code of 1992 contained from Meijers' 1954 draft onwards a section introducing a trust-like form of administration (*bewind*) of general application⁵⁹. Despite his powerful support, this has not so far been brought into force. The Netherlands has indeed ratified the Hague Convention, but it is not clear whether this is to be taken as a substitute for the all-purpose *bewind*.

What then should a civil law jurisdiction do? Should it ignore trust law, introduce it for a limited purpose such as encouraging foreign investment, recognize it in private international law via the Hague Convention, or adopt an all-purpose trust law on the Anglo-American model, though not necessarily in Anglo-American terminology? Clearly a civil law jurisdiction like the PRC which is contemplating enacting a trust statute must first reach some conclusion about the scope of the trust law that it wishes to enact. The decision will in the last resort be political and economic. But there are also technical obstacles, real or apparent, that need to be addressed.

⁴⁸ Trusts Law (1979) s.3(b), 21(c).

⁴⁹ Personen und Gesellschaftsrecht (PGR) of 20 Jan 1926 as amended, arts 897,904,906, requires the court to appoint a Treuhänder-trustee or terminate a trust when necessary. See K.Biederman, *Die Treuhänder kraft des liechtensteinischen Rechts dargestellt in ihren Vorbild, dem Trust des Common Law* (1981).

⁵⁰ Trust Code 1994.

⁵¹ Code civil arts. 1266,1277,1287,1288,1294.

⁵² Trust Property Control Act 57 of 1988.

⁵³ Trust Ordinance no. 9 of 19197 as amended s.4,61,73f,76.

⁵⁴ Trust Law of 26 Jan 1996.

⁵⁵ 'Trust' in the English translation.

⁵⁶ But the Treuhänder is explained in brackets as (Trustee oder Saalman).

⁵⁷ F.Ranville in *La Réforme du Code Civil* (Laval 1993) I.786: administration is not a property right.

⁵⁸ It would form book III title 16 bis of the Code Civil. Caroline Deneuille, *Le droit français et le trust* (0000) p.419 makes the point that in France the trust is still regarded with suspicion.

⁵⁹ Book 3 title 6 arts.3.6.1.1 to 3.6.2.7. The court can appoint administrators (*bewindvoerders*): art. 3.6.13 and the *bewind* can burden the assets before an administrator is appointed. Van Zeben, du Pon & Oethof, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (1981) p.474. The conception goes back to Meijers (1954) *Ontwerp* 3.6.

OBSTACLES TO RECEPTION: TECHNICAL AND POLITICAL

The technical obstacles arise from certain deep rooted differences between common and civil law systems. These are in part conceptual, not merely linguistic. I remember being struck when teaching in Quebec in 1961 by the difficulty English-speaking lawyers in that province had in understanding the law of the common law provinces of Canada⁶⁰.

The technical obstacles to the introduction of trusts in civil law jurisdictions centre on two related points. One is common law rule that the trustee has the legal title to the trust property, which in straightforward cases means that he owns it. The other is the rule that the beneficiary has an equitable title to the trust property, so that there is a split ownership of the trust assets.

The ownership of the trust assets

Let us take these points in turn. To a common lawyer it seems obvious that the legal title to the trust assets must be in the trustee⁶¹. But this is because English trusts grew up in a separate system of courts of Equity that had no jurisdiction over the legal title to the trust property. They had no power to allocate the legal title to the trust beneficiary. On the other hand a civil lawyer often finds it repugnant to accept that a pure administrator who has no beneficial interest in the trust assets can own them. Ownership is consistent with competing *beneficial* rights in property such as usufructs, mortgages and servitudes but not with the idea of an owner who is disentitled in either the short or long run to the enjoyment of the property. Moreover what someone owns should be available to their creditors, so that it difficult to accept that trust assets are not so available. It is easier for a civil lawyer to accept an arrangement by which the owner temporarily divests himself of the power to administer property in favour of a trustee-administrator. Remember that in western culture ownership has over many centuries been a key, perhaps the key legal conception⁶². One cannot play fast and loose with it. For this reason civil lawyers tend to prefer the type of fiduciary arrangement in which the administrator controls but does not own the property he administers. To this must be added the special status that codes, especially civil codes, possess in civil law countries. In these codes ownership and possession are the central concepts round which property law revolves. The code is what the student learns first and what remains the core of his and, later, the practitioner's perception of the law, despite its being overlaid or added to by statute.

A civil lawyer may also wish to deny that his sort of fiduciary arrangement (*fiducie*, *Treuhand*, *bewind*) is a 'trust' even if it possesses the structural features of a trust. In my book on South African trust law I ran into precisely this difficulty. In South Africa two sorts of fiduciary arrangement came to be received by custom and practice in the course of the nineteenth century. One, in which the fiduciary owned the property, was

⁶⁰ A difficulty since overcome by the institution of joint civil and common law university courses.

⁶¹ This is not without exception in common law systems, for example in regard to custodian trusteeship.

⁶² T.Honoré, 'Ownership' in *Making Law Bind* (1987) p.160; T.Bethell, *The Noblest Triumph. Property and Prosperity through the Ages* (1998) p.23

derived from English trust law and was introduced by English-speaking settlers, practitioners and judges. The other, in which the beneficiary owned the property and the fiduciary administered it, was derived from the Dutch law relating to administration and was introduced by Afrikaner settlers and practitioners – the *bewind*. In my book, first published in 1965, I treated them both as trusts, the first being an ‘ownership-trust’ and the second a ‘bewind-trust’. The legislator had indeed treated them for purposes of registration and the giving of security by the trustee/administrator on exactly the same footing. But a practitioner with antiquarian interests, who later became a judge – indeed the second senior judge in the South African Appellate Division – attacked my book vehemently and at length for confusing these two historically distinct institutions⁶³. I was not deterred and in the end the legislature enacted the Trust Property Control Act 1988, according to which a trust may be created in either form⁶⁴. It does not matter whether the trustee is technically the owner of the trust property, provided he has the power to administer it in the interest of the beneficiary or the abstract trust purpose.

Nevertheless common lawyers who are in contact with civil lawyers should bear in mind that civil lawyers will be sensitive about locating ownership in a pure administrator. This is evident, for example, in the reformed Quebec *fiducie*,⁶⁵ which introduces a genuine trust law⁶⁶ (actually called a ‘trust’ in the English translation) but provides that neither settlor nor trustee nor beneficiary has a real right in the trust patrimony⁶⁷. The trust assets are therefore unowned, though not in the sense that they are open to occupation by the first taker. In practice this will not hamper the administration of the trust, for the trustee has the powers given to administrators by articles 1299 to 1370 of the civil code on ‘administration of the property of others’⁶⁸. This may not seem entirely logical, since the trust assets are not owned by ‘another’, or indeed by anyone. It is expressly provided, in any case, that ‘the trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation’⁶⁹. His powers are therefore like those of an Anglo-American trustee. To deny him a ‘real right’ in the trust assets is merely to stress that as trustee

⁶³ C.P.Joubert, ‘n Kritiese Opvatting van Honoré se Beskouings oor die Trustreg’, 31 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (1968) pp.124-146 and 262-281. I replied shortly in 32 *Tydskrif* (1969) pp.126-133.

⁶⁴ Act 57 of 1988 s. 1 ‘trust’ means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –

- (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
- (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument. ..

⁶⁵ J.E.C.Brierly, ‘De certaines patrimoines d’affectation’ and F.Ranville ‘De l’administration du bien d’autrui’ in *La Réforme du Code Civil* (Laval 1993) I. 735-782.

⁶⁶ The court has power to appoint a trustee under art. 1277 and has further powers under art. 1291 and 1294.

⁶⁷ Code civil art.1261.

⁶⁸ D.-C. Lamontagne, *Biens et propriété* (2 ed. 1995) pp.111-2.

⁶⁹ art. 1278.

he has no beneficial interest in them, though he may of course happen to be one of the beneficiaries.

The Quebec law is designed to underline the fact that trust assets form a separate estate or patrimony⁷⁰ that does not form part of the settlor's or trustee's private estate but is set aside for the benefit of certain persons or objects. One way of giving effect to this line of thought, while retaining the principle that assets must have an owner, would be to treat the trust estate as a legal person. This solution has often been adopted in regard to fiduciary arrangements for charitable or other public objects. The assets set aside for these objects can be administered on behalf of a foundation (fondation, Stiftung, stifting) with legal personality. Consequently they do not form part of any natural person's private estate. Though foundations for private purposes are unfamiliar in civil law countries, they have existed since 1926 in Liechtenstein and were introduced into Austria in 1993⁷¹. They are free of state control except that details of the purposes, assets, duration, name etc. of the foundation have to be registered.

The Quebec law did not however adopt this solution. The conditions in which a natural person has the power to create a legal person (e.g. a company with limited liability) are controversial, and seem to call for a measure of state regulation, if only by setting up a register and appointing a registrar to ensure that the proper conditions have been fulfilled. Consistently with its aim of stressing the separation of trust assets the Quebec law mentions but rejects the idea of locating ownership of or a real right in the trust estate in the settlor or beneficiary. Other systems treat the settlor as retaining ownership of the trust assets but transferring to an administrator (*Treuhänder, fiduciaire, bewindhebber*) the power to administer them while the trust lasts. The settlor then remains technically owner but has at most a right to be consulted about certain decisions. This construction is adopted, for example, in the Liechtenstein *Treuhand*. Unless the trust instrument provides otherwise, the trust assets revert to the settlor when the trust ends. The trust assets belong to him but as a separate estate (*Sondervermögen, patrimoine d'affectation*). An alternative, but one of limited scope, is to locate the ownership of the trust assets in the beneficiary. This is indeed standard practice when property is administered by a guardian or curator on behalf of a person subject to incapacity. The incapable person owns the assets and the guardian or curator administers them. Many trusts designed to protect the weak and incapable lend themselves to this construction, but others do not. Even in trusts for the incapable there are complications when there are multiple and unborn beneficiaries. Moreover this construction cannot be used for abstract purpose trusts, where no beneficiaries are designated.

The thrust of the preceding argument is that fiduciary arrangements that are structurally trusts can be set up no matter where the ownership of the trust assets is located. It may be in the settlor, the trustee, the beneficiary, a legal person such as a foundation created to give the assets an owner, or in no one. It is a mistake for a common lawyer to insist that the legal title to the trust assets must be in the trustee in all systems of what from a structural point of view counts as trust law. Nevertheless the most *convenient* arrangement is in my view one in which the trustee is treated as

⁷⁰ 'Patrimoine d'affectation; Sondervermögen'.

⁷¹ Privatstiftungsgesetz (PSG) 1993.

owner, or at least, as in the Quebec law, as the person in whose name the titles relating to the trust assets are drawn up⁷². This avoids the complications that incorporation necessarily involves and the consequent regulation that it entails, while leaving open the possibility of treating the trust estate as a person for limited purposes, such as income tax. It is another matter whether in any registers such as the land register or register of shares the fact that the trustee holds as trustee should be recorded, so that third parties have notice of the existence and terms of the trust. That is a point on which jurisdictions may legitimately differ.

The nature of the trust beneficiary's interest

Another technical obstacle to the reception of trust in civil law jurisdictions is the notion that trust beneficiaries in Anglo-American law have a property right in the trust assets, sometimes described as equitable title or equitable ownership. This manner of speaking, again, grew up in Anglo-American trust law only because of the existence of separate courts of Equity, which now exist hardly anywhere. Given two separate systems of courts, it was tempting to treat the holder of the legal title as owner in courts of law, and the holder of the beneficial or equitable interest in trust assets as owner in courts of equity. But 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. Economically it is of course a form of property holding, but so is any chose in action. True, it may be important for the beneficiary's sense of autonomy and economic freedom that his relation to the trust assets be described as a form of ownership. But to speak of the beneficiary's ownership or property right is unpalatable to many civil lawyers, given the central position that ownership occupies in the civil law tradition. Moreover the main incidents of the beneficiary's rights in Anglo-American law can be translated into rights *in personam* that are familiar in civil law systems.

The character of the beneficiary's interest presents no real obstacle to the reception of trusts in civil law systems. How could it, since in impersonal trusts there are no identifiable beneficiaries? Beneficiaries have a right *in personam* (or *in personas*) against the existing and future trustees that they should carry out the trust and secure to the beneficiaries any right to income or capital that the trust instrument confers on them. Given that the trustee holds an office this is not merely a right to claim damages for breach of trust but a right to specific performance of the trust obligation. The court will if necessary order the trust to be carried out and devise a suitable scheme to this end. If a third party participates in a breach of trust the third party can of course also be sued by the beneficiary. Neither the right to enforce a trust or the right to sue for its breach is a proprietary right.

Beneficiaries also have a beneficial interest in the trust's assets because they are entitled to the income from or capital of those assets. Their interest is what I have elsewhere called a protected interest.⁷³ The trust assets form a separate estate protected from the claims of the trustee's private creditors. The assets from which the

⁷² Code Civil art. 1278 cf. Liechtenstein PGR art. 912. The Hague Convention makes it a characteristic of a trust that title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee (art.2 b). Note that it does not require the trustee to be the owner of the assets.

⁷³ Honoré, *Trusts*, above n.18, pp.473f.

beneficiary's claim can be satisfied are the trust assets as they exist from time to time, just as any ordinary creditor is entitled to be satisfied from his debtors assets as they exist from time to time. But beneficiaries claim against these assets as trust creditors, and their claim is concurrent with those of other trust creditors. Any creditor can claim against his or her debtor's assets, and here the 'debtor' is either the trust estate⁷⁴, or, if he is guilty of a breach of trust, the trustee. The beneficiary's protection consists in the right to exclude the trustee's private creditors, a right which can hardly be construed as a property right.

A beneficiary can also in Anglo-American law pursue a proprietary remedy⁷⁵. He can trace trust assets, provided they remain identifiable, into the hands of any third party other than a bona fide purchaser for value without notice of the trust. He can insist that they be returned to the trust estate. This rule, which is distinct from the rule about participation in a breach of trust, refers to *improper* alienations by the trustee of trust assets. If the trustee was entitled to alienate the assets, as is usual with trusts of shares, the shares that have been sold are replaced as trust assets by their proceeds in accordance with what in civil law is called real subrogation⁷⁶.

The tracing rule is proprietary in character and does not have an exact parallel in civil law systems. But civil law systems have other techniques for handling the problem. One is to provide that third parties are bound by terms of the trust limiting the powers of the trustee only when they know or should know of these terms⁷⁷. This may be combined with requiring that, when title to the trust assets is registrable, as is usual for land, a reference to the trust should be recorded in the register. A slightly different technique is the civil law doctrine of notice, according to which, if someone acquires property from another with notice that the transferor was under an obligation to transfer ownership of or a real right in the property to a third person, the acquirer is bound by the transferor's obligation. The same is true if the transferee acquires by lucrative title even without notice. This doctrine could, it seems, apply even in Quebec where no one has a real right to the trust assets, since the notice does not have to be notice of a real right but only notice of an obligation to transfer or create a real right. It is a matter for each civil law jurisdiction that receives the law of trusts to decide to what extent it wants to protect the beneficiary against third parties to whom trust assets are improperly alienated. For example Liechtenstein law cautiously provides that a trust can be set up in Liechtenstein according to foreign law. But in that case the relations between settlor, trustee and beneficiary are governed by the foreign law but the rights of third parties to the trust assets by domestic Liechtenstein law⁷⁸. Whatever decision the recipient jurisdiction reaches, it need not give the beneficiary the 'equitable' ownership of or title to the trust assets.

Anglo-American law also gives the beneficiary limited proprietary rights in regard to trust assets that have been wrongly mixed by the trustee with his own assets or

⁷⁴ I am assuming that the trustee is not personally liable for trust debts, which is true in some jurisdictions in Anglo-American law and not in others. If the beneficiary can sue the trustee personally he has an extra recourse, but it is a personal not a proprietary right.

⁷⁵ e.g. P.H.Pettit, *Equity and the Law of Trusts* (6 ed. 1989) pp.452-5.

⁷⁶ e.g. Ethiopia, Code civil art. 530; Israel, Trust Law 1979, s.5..

⁷⁷ Ethiopia, Code civil art. 529(1).

⁷⁸ PGR art. 931.

someone else's. The rather complex rules on this point can surely be left in a civil law jurisdiction to be dealt with under the rubric of unjust enrichment or by a special provision in the code. In the upshot a civil law jurisdiction need not be troubled with a doctrine of split ownership.

The moral is that civil lawyers who wish to adopt the trust for limited purposes or as an all-purpose institution can decide for themselves what rights to allocate to trust beneficiaries beyond the core right to insist that the trust purposes be carried out. This right is certainly more than a simple creditor's right to sue a debtor. It is a right to insist that the trust assets be devoted to the trust purpose or purposes. What frills attach to this right will depend on the decision of the country that receives what are structurally or functionally trusts. If it wishes them to be the same or nearly the same as in Anglo-American trust law, it can do so without difficulty.

Political obstacles

So far as the PRC is concerned it is perhaps relevant that a trust law along common law lines exists in the Hong Kong SAR and a trust law incorporated in a civil law jurisdiction in Taiwan⁷⁹. The Taiwan law possesses the structural features of a genuine trust law. The trust property forms a separate estate⁸⁰. The trust must be for the benefit of a beneficiary or for a specified purpose⁸¹. Trusteeship is an office⁸². The court has a supervisory jurisdiction over the administration of the trust⁸³. Moreover the law is functionally an all-purpose trust law. There is virtually no limit on the purposes for which a trust may be created provided that it is not contrary to mandatory legislation or good morals⁸⁴.

There are therefore models to hand, which could with some adaptation meet the requirements of the PRC, if the PRC wished to enact a general purpose trust law. But it seems unlikely that it would decide at this stage to go so far. The main obstacle to be overcome as regards a wide-ranging trust law is likely to be political - a reluctance to extend the sphere of law at the expense of that of state policy. Art. 6 of the PRC General Code of the Civil Law⁸⁵ lays down that the law shall apply to all civil acts, while state policy applies to acts not covered by law. To accept trust law is to extend the area covered by civil acts, namely the acts by which citizens create trusts and appoint trustees and by which settlors or beneficiaries insist on the trust being carried out. Art.7 lays down that civil acts shall respect social virtues and shall not harm the public interest or damage the economic plan. It would therefore seem to follow that trusts set up in the PRC should at least be registered⁸⁶, as is the case for example in

⁷⁹ The Taiwan law preserves the provisions of the Civil Code so far as the transfer of the beneficiary's right is concerned (art.20).

⁸⁰ Arts. 9-13,24.

⁸¹ Art.1.

⁸² Art.8

⁸³ Art.28,36,38,46,52-59 (trust supervisor), 60-1 (court supervision over trusts other than business and charitable trusts).

⁸⁴ Art.5. Trusts must not be set up for purposes of litigation or be in favour of a beneficiary not entitled to hold property.

⁸⁵ Law 860412.1 = The General Code of the Civil Law of the PRC.

⁸⁶ Trust and Investment Companies already require registration, and can be deregistered.

South Africa⁸⁷ and Liechtenstein⁸⁸, with details of the trust instrument, its date and place, the trusts purposes and the names of the trustees. The legality of the trust purpose should be a condition of the registration of the trust. Thus, for example, registration should take place only if the registrar or other state official is satisfied that the trust purpose is not, for example, contrary to the state economic plan.. One might also, in the interests of clarity, consider adopting a provision that a trust must be in writing, must be expressly called a trust, and must be given a name.⁸⁹ Another point for consideration is whether the trustee should have a duty to register the fact that trust property is subject to a trust when there is a land or other register for the type of property in question⁹⁰. If the Taiwan Trustee Law is taken as a model, some or all of these points could be added in order to adapt the legislation to a more cautious, less individualistic environment.

As to the functions of trust law in the PRC, one could argue that the PRC would be better off at this stage using Hong Kong, with its ready-made trust law, for investment purposes as the gateway to the US market and to trading with the west. It is a question how far there is at present a demand in the PRC to set up trusts for private purposes. On one view the present PRC draft Trust Law seeks to confine the core business of Trust and Investment Companies (TICs) to the provision of private and charitable trust services along lines familiar in developed trust law jurisdictions⁹¹. But there are few charitable trusts and few wealthy people willing to set up private trusts in the PRC at present. TICs, many of which began as trust departments of banks⁹², or were established by local authorities, or were set up by central or provincial governments to facilitate borrowing from overseas, operate as financial institutions.. Their range of business activities is wide. Some activities, like underwriting securities, are risk-taking ventures not suited to be undertaken by trusts. But TICs also organise finance for local authority construction projects, an activity often performed by trusts in other countries. They receive deposits for investment on their own terms or as directed by the depositor (entrusted and trust deposits). They act at least in some of their operations (e.g. in handling trust deposits) in a fiduciary capacity. But they have as yet no trust law to guide them and sometimes, despite the name, are not incorporated as companies and do not in fact observe the rules of company law.⁹³ From 1983 however they have been subject to administrative regulations⁹⁴, which for the present constitute the legal framework within which the TIC's operate⁹⁵.

Clearly some legal framework for the activities of trust and investment companies is called for and it is important to separate their fiduciary from their risk-taking market operations. A restricted form of trust law may meet the need. It is worth noting that in

⁸⁷ Trust Property Control Act 1988 s.4-6.

⁸⁸ PGR art. 900.

⁸⁹ All these are provided for in Liechtenstein PGR art. 899. By the Hague Convention art. 11 (d) the rights and obligations of any third party holder of the trust assets is subject to the law determined by the choice of law rules of the forum.

⁹⁰ As is required in South Africa by the Trust Property Control Act 1988, s. 11.

⁹¹ A.Kumar, N.Lardy, W.Albrecht, T.Chuppe, S.Selwyn, P.Perttunen, T.Zhang, *China's Non-Bank Financial Institutions. Trust and Investment Companies* (World Bank, Washington 1997) p.27.

⁹² Under the Commercial Bank Law 1995 art.43 banks cannot now engage in trust business.

⁹³ Kumar and others, above n.91.

⁹⁴ 'A Number of Rules on Opening up Trust Business'.

⁹⁵ Kumar and others, above n.91, at p.26.

Mexico and some other Latin American countries the trust was introduced by statute in a form that provides that only financial institutions or those authorised by state financial authorities can act as trustees⁹⁶. Whether a similar restriction is desirable in the PRC, at least to begin with, is for consideration. The advantage would be that financial institutions are usually regulated by the state in such a way as to make it likely that they will be able to pay compensation for any breach of trust of which they may be guilty. An alternative technique, used in South Africa, is to provide that trustees may be obliged to find security for the administration of the trust but may be exempted from security if the court official (the Master) considers that there is sound reason to do so.⁹⁷

There are arguments for introducing some form of what is structurally trust law into the PRC. How wide the functions that it is designed to fulfil should be is in the end a politico-economic matter on which it would be inappropriate to express an opinion. My aim has been to draw attention to some of the options open.

Tony Honoré

⁹⁶ Ley general de títulos y operaciones de crédito (1932) art. 350; Argentina, Ley 24.441 of 9 Jan 1995 Financiamiento de la Vivienda y la Construcción art. 5 (only financial entities authorised to act as trustees); Colombia, Código de Comercio tit. XI art. 1.226 (business trust: only establishments and fiduciary concerns authorised by Superintendancy of Banks can be trustees); Panama, Law of 3 Oct. 1984 art.4 (authorisation by national banking commission required); Peru art. 315 (only banks can be trustees); Argentina, Ley 24.441 of 9 Jan 1995 Financiamiento de la Vivienda y la Construcción art. 5 (only financial entities authorised to act as trustees); Colombia, Código de Comercio tit. XI art. 1.226. (business trusts only establishments and fiduciary concerns authorised by Superintendancy of Banks can be trustees) .

⁹⁷ South Africa, Trust Property Control Act 1988, s.6.