

The irreducible core of trustee duties in East Asian trusts

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Abstract

This article examines the idea of the “irreducible core” of trustee duties in relation to East Asian trusts. Although the Japanese Trust Act of 2006 has designated many duties as non-core, the extent of reduction is far from certain. This is because regulatory law continues to apply, as well as the court’s policy interest in giving effect to the trust only where this is intended by the parties. The New Zealand Trust Act of 2019, which highlights the centrality of good faith rather than self-denial, clearly identifies the duties which stand at the core of the Japanese and Chinese trusts.

introduced a modernised Trust Act as part of a wider overhaul of its private law.³ Japan is one of the civil law jurisdictions where the trust is the primary legal form used in commercial situations including securitisation and pensions, which contrasts with the situation in continental Europe, where *sui generis* solutions are usually preferred.⁴

The discussion on the irreducible core is an important part of the Japanese trusts debate. The passage of the Trust Act has prompted a debate on core and non-core trustee duties, as the new act retreats from the old act’s stricter core duties, which Arai Makoto describes as “rigid” and going “against the interests of beneficiaries”,⁵ in favour of settlor autonomy. Yet, the extent of reduction of core duties under the 2006 act is far from certain. In particular, scholars dispute whether the duties designated as non-core in the new act are in fact non-core, by reference both to the Trust Business Act which continues to apply where a professional trustee is involved,⁶ and by cross-referencing

This article examines the idea of the “irreducible core” of trustee duties, as coined by David Hayton and Millett LJ,¹ in relation to East Asian trusts. In civil law Asia, the trust dates to 1905 with Japan’s Secured Bonds Act and the first Trust Act of 1922,² and for a long time it was restricted to commercial uses. In 2006, Japan

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1. David Hayton, “The Irreducible Core Content of Trusteeship” in AJ Oakley (ed), *Trends in Contemporary Trust Law* (OUP 1996); *Armitage v Nurse* [1998] Ch 241, 253.

2. Lusina Ho and Rebecca Lee, “Reception and the Trust in Asia: An Historical Perspective” in Ho and Lee (eds), *Trust Law in Asian Civil Law Jurisdictions* (CUP 2013) 15. For informative accounts on the historical and current context of the East Asian trust in English, see Masayuki Tamaruya, “Japanese Law and the Global Diffusion of Trust and Fiduciary Law” (2020) 34 *Tru LI* 35; Ying-Chieh Wu, “Trusts Reimagined: The Transplantation and Evolution of Trust Law in Northeast Asia” (2020) 20 *Am J Comp L* 1; Lusina Ho, “Business Trusts in China: A Reality Check” (2020) 88 *U Cin L Rev* 767; Ruiqiao Zhang, “A Guide to the Chinese Legal Regime of Commercial Trusts” (2017) 23 *Trusts & Trustees* 866.

3. Takahashi Masahiko, *Shōkenka to zaiken jōto fainansu* (“Securitisation and Finance by Assignment of Obligations”) (NTT 2015) 160.

4. Michele Graziadei, Ugo Mattei and Lionel Smith (eds), *Comparative Trusts in European Private Law* (CUP 2005) 25–26.

5. Arai Makoto, “Trust Law in Japan: Inspiring Changes in Asia, 1922 and 2006” in Ho (n 2) 34.

6. Trust Business Act, Act No 154 of Heisei 16 (2004), art 2.

general civil law concepts,⁷ including the general provision on good faith,⁸ the duty of care in mandates,⁹ and the public policy interest in giving effect to a trust only where it is intended.¹⁰ It is submitted that a set of core duties analogous to good faith, but framed as the duties of loyalty and of care can be readily identified in the present Japanese trust.

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In this article, China is dealt with more briefly. As is well known in the English-language literature, the Chinese Trust Law (2001) allows a strong retention of settlor powers without requiring either the vesting of trust property, or imposing any fiduciary or other duties on the settlor.¹¹ While this paper does not address the settlor's role directly, it is submitted that the level of detail in the Japanese debate provides a robust blueprint for the likely goals of the Chinese trust. As the use of the Chinese trust expands, further judicial or legislative acts are likely to move it in the direction of the Japanese trust given the similarities between the two systems of private law.

This article is divided into three parts: after an examination of the issues from the perspective of the common law, I examine the core trustee duties as they

currently exist in Japan, before discussing more briefly the duties as they are found in China.

I. The “irreducible core” debate

In the common law trust, trustee duties stand at the centre of the trust. As Tony Honoré stresses, it is the nature of trusteeship as an office which determines whether an arrangement meets the minimum requirement to be characterised as a trust.¹² Although the label fiduciary duty is often used to explain trustees' duties, there is a lack of clarity in the concept,¹³ even as the exclusion of *all* fiduciary duties is likely to indicate the absence of a trust relationship in most, if not all, situations.¹⁴ Consequently, it is fruitful to break down the concept of fiduciary duties into its constituent components, including the duties of loyalty and good faith.

Even if English law has accepted that there is a minimum “core” of trustee duties, there is no consensus on its content. At the very minimum Millett LJ suggested that the duty does not exist beyond the duty not to commit fraud,¹⁵ which has been criticised by commentators including James Penner,¹⁶ given the inherent inability of such a limited concept both in defining the trust and in allowing the performance of its core functions. In contrast, the initial creator of the “irreducible core” concept, Hayton, emphasises good faith and trustee's duty to account. In particular, Hayton stresses that the trustee's duty to account must have a correlative right of the beneficiary to

7. Thomas Krebs explains cross-referencing in the context of German law as “incorporating a rule spelled out for one situation by reference into a different context”, which is widely used in some areas of law. Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish 2001) 19.

8. Civil Code, Act No 89 of Meiji 29 (1896), art 93.

9. *Ibid.*, art 644.

10. Trust Act, Act No 108 of Heisei 18 (2006), art 90. Okino Masami, “Jutakusha no ‘chūjitsu gimu no nin’i kiteika’ no imi” (“The meaning of the ‘defaultisation of the duty of care’ of trustees”) in Nōmi Yoshihisa, Nomura Toyohiro et al (eds), *Minpō no mirai: Nomura Toyohiro Sensei koki kinen ronbunshū* (“The future of civil law: an essay collection to commemorate the seventieth birthday of Professor Nomura Toyohiro”) (Shōji Hōmu 2014) 474–475.

11. Trust Law of the People's Republic of China, Order No 50 of 2001, art 2; Ho, Lee and Jin Jinping, “Trust Law in China: A Critical Evaluation of Its Conceptual Foundation” in Ho (n 2) 85.

12. Tony Honoré, “On Fitting Trusts into Civil Law Jurisdictions” (2008) 27 *Oxford Legal Studies Research Paper*, 6.

13. Japan is not an exception to the problem; as Matsumoto Nobuko notes the term is used in a particularly loose way by the Financial Services Agency in the official policy context. However, she also sees the case of Supreme Court, Heisei 28-9-6, Kinhan 1503-2 (2016) as supporting the view that legally fiduciary duty can be interpreted as the duty of care where the it is necessary to entrust property or discretion in order to obtain a particular service. Matsumoto Nobuko, “Kin'yū bunya ni okeru ‘Faidūshari dūti’ no yōgohō ni tsuite no ichi kōsatsu” (“A study on the use of the term ‘fiduciary duty’ in the financial field”) in Nōmi, Higuchi Norio and Kanda Hideki (eds), *Shintaku hōsei no shinjidai:shintaku no gendaiteki tenkai to shōrai tenbō* (“The new age of the trust law system: the modern development of the trust and future prospects”) (Kōbundō 2017) 226–227, 242–244.

14. John Langbein, “Mandatory Rules in the Law of Trusts” (2004) 98 NW U L Rev 1105, 1124; *McNeil v McNeil*, 798 A.2d 503, 509 (Del. 2002). The classic English authority *Morice v Bishop of Durham* (1805) 10 Ves 521 requires, at minimum, a beneficiary and the court's jurisdiction.

15. *Armitage* (n 1) 253–254.

16. James Penner, “Exemptions” in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (2002) 250.

have the court enforce the duty, and hence the vital importance of access to trust information.¹⁷ Hayton does not maintain that there is a core duty of care other than good faith, although the trustee may not use trust funds in such a way that amounts to absolute ownership.¹⁸

The New Zealand Trust Act of 2019 has placed the debate into the realm of substantive law. Despite its small size New Zealand is a large user of trusts, with trust holdings accounting for 19% of household assets.¹⁹ It is highly significant that the act expressly recognised the importance of distinguishing between core and non-core duties. Core duties include the need to know trust terms, to act in accordance with these terms, good faith, and to act for the benefit of the beneficiaries or for the purpose of the trust. Clauses purporting to limit or exclude a trustee's liability for dishonesty, willful misconduct or gross negligence are separately invalidated.²⁰ As Charles Mitchell notes, it follows from these duties that there are also core duties to segregate, to keep accounts, to inform beneficiaries of their interest and to provide them with trust information, and to submit to the court's supervisory jurisdiction.²¹ The inclusion of good faith is particularly significant, in part because it reflects a growing consensus compatible with *Armitage* that the lack of good faith would make the trust illusory.²² Significantly, self-denial beyond good faith is not recognised as part of the core, in part because it would make it impossible for the trustee to be a beneficiary or to have a discretionary trust.²³

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II. Core trustee duties in Japan

Japan's Trust Act of 2006 was a watershed moment in the development of the East Asian trust which aimed to loosen the strong prescriptive requirements of the old act, and in doing so the act designated the trustee duties of loyalty, good management and to segregate property as non-core duties.²⁴ However, jurists such as Okino Masami have argued that the duties of loyalty and to segregate property remain core duties, in part based on the view that derogation would render the trust illusory.²⁵ As the Trust Business Act continues to apply to commercial trusts, the higher core duties that regulatory law imposes also effectively neutralise the effects of the 2006 act.

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2.1 Duty of loyalty

In his influential text on the old Trust Act in 1989, Shinomiya Kazuo defines the duty of loyalty as consisting of: firstly, the avoidance of conflicts of interest; secondly, the no profit rule; and thirdly, that the trustee

17. Hayton (n 1) 49–50; and highlighted in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

18. Hayton (n 1) 57–58. As David Fox explains, in such an event *intra* or *ultra vires* use of the trustee's powers would be inconsequential. Fox, "Non-Excludable Trustee Duties" (2011) 17 *Trusts Trustees* 17, 20.

19. Phil Briggs, *Family Trusts: Ownership, Size and their Impacts on Measures of Wealth and Home Ownership* (Reserve Bank of New Zealand 2006) 2.

20. Trust Act 2019 (New Zealand), cll 37 and 39.

21. Charles Mitchell, "Good Faith, Self-Denial and Mandatory Trustee Duties" (2018) 32 *Tru LI* 92, 101.

22. *Fattal v Walbrook Trustees (Jesey) Ltd* [2010] EWHC 2767 (Ch); *Spread v Hutcheson* [2012] 2 AC 194; *Barnsley v Noble* [2017] Ch 191.

23. In *Citibank NA v MBIA Assurance SA* [2007] 1 All ER (Comm) 475, Arden LJ upheld a term permitting trustees to disregard beneficiaries' interests when acting on MBIA instructions, where the trustee's duties are not reduced to the extent he ceases to be a trustee.

24. Teramoto Masahiro, *Chikujō-kaisetsu atarashii shintakuhō* ("Article by article commentary to the new Trust Act") (Shōji Hōmu 2008) 117.

25. Okino (n 10) 458–459; Nakata Hiroyasu, "Shin Shintakuhō no tokushitsu" ("Special features of the new trust law") in Arai, Kanda and Kinami Atushi (eds), *Shitaku hōsei no tenbō* ("Prospects of the trust law system") (Nihon hyōronsha 2011) 17–18.

cannot serve the interests of third parties. As the second and third duties were not expressly stated in the Trust Act, Shinomiya argues that fiduciary relations flow naturally from the duty of loyalty.²⁶ Shinomiya's view of the core nature of the duty of loyalty derives from the fact that it would be unreasonable for parties to exclude the right to petition the court, which was required under the old law in order to obtain a remedy against breach.²⁷

Under the 2006 act the duty of loyalty became a non-core duty on paper. Although the general duty of loyalty is now stated more clearly in Article 30, and supplemented by Article 31 which prohibits conflicts of interest, and Article 32 which imposes constraints on commercial competition between trustees and beneficiaries, certain exceptions are now accepted under Article 31(2). These include breach permitted by a trust act (the trust deed), where the trustee has obtained the consent of the beneficiary, where the trustee obtains the property by inheritance, and more controversially where the breach is a reasonable act necessary to achieve a trust purpose. Clearly, the last sub-section is particularly open to discretion and can put beneficiaries in a vulnerable position.

The content of the duty of loyalty under the new act was examined in a 2010 case in Osaka, in which a local authority transferred land to two trust banks to be held on trust for the purpose of constructing a sports recreational facility. The trust banks were to use funds they hold on trust for other clients to construct the facility, and in return, the local authority would grant the leisure company selected by the trustees 95% of the profits of the facility. As the trust banks were unable to obtain the necessary funds to commence construction, the local authority sued for a return of the trust funds as well as damages for delay. In particular, the local authority alleged that the trustees breached the duty of care and loyalty by obtaining a profit from the

arrangement, misleading the settlor/beneficiary by an overambitious and unrealistic construction proposal, reaching unsatisfactory deals with other parties which increased the cost of the project, and prioritising the interests of a third party over those of the beneficiaries. The appellate court rejected the local authority's claims by holding that there was no rule that prevented trustees from using existing trust funds and profiting from the arrangement, and that there was insufficient evidence to prove a breach of the trustees' duty in its communication with the settlor-beneficiary or its contracts with other parties.²⁸

Although the court's decision can be criticised in that it determined there was no breach without identifying the expected level of duty; as attorneys Fujiike Tomonori and Matsumoto Ryōichi note, the court nonetheless referred clearly to the fact that the beneficiary/settlor consented to the proposal, and that there was no evidence to suggest that inadequacies in the trustee's explanation led to an error of judgement on the part of the beneficiary/settlor.²⁹ Therefore, rather than subscribing to an abstract notion of the duty of loyalty, it is submitted that the Japanese court attaches primary importance to parties' agreement where they had the opportunity to designate the appropriate level of duty, and failure to do allows the trustee to plead the settlor's consent as a defence against the breach of trust. This is not an unreasonable position to take: if the point of the duty of loyalty is to deter opportunistic behaviour, then it is not illogical for the court to reach its decision on the ground that there was no clear breach of the duty. Further, the case appears to show that self-denial beyond good faith is not a core duty in the Japanese trust. The focus on issues such as whether trust terms were adequately communicated, or whether internal processes were duly followed, suggests an indirect concern with fiduciary relations at the stage of contract

26. Shinomiya Kazuo, *Shintakuhō* ("Trust law") (Yūhikaku 1989) 231.

27. *Ibid.*, 234. In England, *Morice* (n 14) holds that the court's jurisdiction cannot be ousted.

28. Osaka High Court, Heisei 22-5-14, *Kinhō* 1935-59 (2010).

29. Fujiike Tomonori and Matsumoto Ryōichi, "Kōyūchi shintaku ni okeru jutakusha no kanri shittō no yūmu" ("Whether there is trustee mismanagement in a trust of public land") in Mizuho Trust Bank and Hori Law Office (eds), *Shōkai shintaku hanrei—shintaku jitsumu no kanten kara* ("Commentary on trust cases: from the perspective of trust practice") (Kin'yū zaisei jijō kenkyūkai 2014) 141.

formation,³⁰ meaning that the duty of loyalty can be upheld as a core duty where bad faith is alleged.

Japanese court attaches primary importance to parties' agreement where they had the opportunity to designate the appropriate level of duty. Self-denial beyond good faith is not a core duty in the Japanese trust

2.2 Duty of care

In Japanese law, as Dōgauchi Hiroto explains, the duty of care is distinct from the duty of loyalty primarily in terms of its effects. In principle where there is a breach of the duty of loyalty, for example through a conflict of interest, liability is strict and it should not be necessary to examine the trustee's subjective view of the situation. However, once a remedy is sought and the trustee's duty to compensate is invoked, it is open to the trustee to mount the defence that he did not realise a conflict existed by pleading one of the conditions set out in Article 31(2), which exculpates the trustee from breach. In particular Article 31(2)(iv) which exempts the trustee from breach that was "necessary" to "achieve the purpose of the trust" opens a wide door to discretion.

At such a point the discussion becomes one of the standard of care, in other words whether the trustee has fallen below the standard in making an assessment as to whether breach was "necessary".³¹ This is objectively determined, and the standard imposed differs depending on whether the trustee is a professional or a layman.³² As Dōgauchi puts it, there is a difference between the duty of loyalty, which is focused on prevention, and therefore it seeks to provide a remedy to the beneficiary regardless of the subjective viewpoint of the trustee, and the duty of care which is the

beneficiary's basis for challenging the defence against the remedies sought by the beneficiary.³³ This is unlike the situation for company directors where there is no substantial difference between the two duties in Japanese law.³⁴ However, in trust law loss in the case of a breach of the duty of loyalty is measured in terms of the trustee's gains, in other words it is restitutionary in nature; whereas the remedy for the breach of the duty of care is compensatory.³⁵

The 2006 act allowed parties to alter the standard of care, although like the duty of loyalty, Article 28(2) of the Trust Business Act does not allow exemption from the duty. Given that the duties of loyalty and care often work in tandem in practice, it is submitted that, although the standard of care can be varied by the parties, it would not be possible to altogether exclude the duty of care, not least because it can be used to justify bad faith.

It would not be possible to altogether exclude the duty of care

2.3 Duty to follow the terms of the trust

Article 29 requires the trustee to administer trust affairs "in line with the purpose of the trust". In a key ruling in 1934 the Supreme Court of Judicature held that the trustee is under no duty to follow instructions given by the settlor and beneficiary which contradicted the purpose of the trust, "so long as the trust contract remains operative".³⁶ There is no suggestion that this has changed under the new law.

2.4 Duty to supervise delegated persons

It is also uncontroversial that under Article 28 trustee duties can be delegated within certain limits, although Article 35 stipulates that the trustee is under the duty

30. Although parties tend not to owe fiduciary relations in arms-length negotiations this is sometimes possible at least in Australian law. Mark Lemming, "The Scope of Fiduciary Obligations: How Contract Informs, But Does Not Determine, the Scope of Fiduciary Obligations" (2009) 3 J Eq 1 28–34.

31. Dōgauchi Hiroto, *Shintakuhō* ("Trust Law") (Yūhikaku 2017) 225–226.

32. *Ibid.*, 168–169. Civil Code (n 8), art 827.

33. Dōgauchi (n 31) 226.

34. Civil Code (n 8), art 644.

35. Dōgauchi (n 31) 226–227.

36. Supreme Court of Judicature, *Shōwa* 9-5-29, *Hyōron* 23 shohō 400 (1934).

to supervise any delegated person, upon whom the trustee must enforce the same standards in the duties of loyalty and care.³⁷

2.5 Duty of impartiality

Where there are multiple beneficiaries, Article 33 imposes a duty of impartiality, which can also be construed as part of a broader duty of loyalty. There is no indication that it is a non-core duty; however, given the acceptance in the case of commercial trusts of the division of beneficial interests into senior and residual classes, the duty of impartiality is unlikely to apply in all circumstances.³⁸

2.6 Duty to inform beneficiaries of their beneficial interest

As Japanese trusts are often contractual arrangements between the settlor-beneficiary and the trustee, it is unlikely that beneficiaries would be unaware of the trust. Similarly, the main proposals for private trusts do not appear to significantly expand the types of trusts formed by donative intent, and hence this duty is not a key issue in the context of the Japanese trust.

2.7 Duty to segregate trust property

Article 34 imposes a strict division between property which can be registered under Article 14, and those which cannot. The purpose of the rule is so that trust property can be readily identifiable to third parties, in order to facilitate and justify the trust's asset-shielding functions in insolvency.³⁹

2.8 Duty to keep accounts and to provide information

On the surface the Japanese trust conforms to Hayton's core duty to keep trust accounts and provide

information, without which it would be impossible for the beneficiary to hold the trustee to account. Articles 36, 37 and 38 require trustees to keep accounts and allow beneficiaries to inspect accounts. This duty appears to be variable per Article 38(4), which states that parties can agree to restrict beneficiaries' access to information on the basis of reasons listed under Article 38(1), which expressly allows the trustee the right to refuse to provide information where it is not related to a legitimate exercise of a beneficiary's interests in the trust fund: for example to obtain information on fellow beneficiaries who may otherwise be commercial rivals in Article 38(2)(iv). However, the trustee does not have the right to refuse to provide information other than in the enumerated list of situations.

The primary issue concerning the duty to keep accounts and to provide information relates to situations where there are multiple beneficiaries. In a 2001, decision which predated the new Trust Act, the Tokyo District Court held that the right to read trust documents is limited to the trust contract between a particular beneficiary and the trustee; in other words, beneficiaries have no right of access to information concerning *other* beneficiaries in a multi-party trust arrangement. In that case 18 beneficiaries were unable to secure the trustee's consent to transfer their beneficial interests to a third party, which was given to 8 other beneficiaries. In response, the dissatisfied beneficiaries sued the trustee alleging that the trustee bank had breached the duty of fairness by withholding consent. The court rejected the beneficiaries' argument by holding that, although there was a single trustee, the beneficiaries were linked only by economic interests, and did not form a single collectivity bound by destiny (*unmei kyōdōtai*).⁴⁰

Although there was a single trustee, the beneficiaries were linked only by economic interests,

37. Articles 29(2) and 30 applied by analogy. Nakahigashi Masafumi, "Jigyō shōkei o mokuteki to suru kabushiki shintaku—sashizukensha to jutakusha no shin'nin gimu" ("Trust of stocks with the aim of facilitating succession to an enterprise: fiduciary duties between a person authorised to give instructions and the trustee") in Nōmi, Higuchi and Kanda (n 13) 206.

38. Arai, *Shintakuhō* ("Trust Law") (Yūhikaku 4th edn 2014) 280–281.

39. To Henry Smith, one of the trust's strengths is as "modules that present a relatively clean interface to the outside world" by reducing the information burden, and registration/segregation is partly necessary for third parties to be able to identify the trust. Smith, *Equity as Second-Order Law: The Problem of Opportunism* (2015) *Harvard Public Law Working Paper No 15-13*, 36.

40. Tokyo District Court, Heisei 13-2-1, Hanta 1074-249 (2001).

and did not form a single collectivity bound by destiny

Although the case was only a first instance judgement which came before the passage of the 2006 act, it nonetheless signals the strong presumption of the Japanese court that trust relationships exist only in a compartmentalised fashion between individual parties. As Nakano Masatoshi observes, much depends on whether the trust is conceived as a single entity in a narrow sense. A distinction can be made between arrangements where there is a single settlor and multiple beneficiaries, and cases where there are multiple settlors and beneficiaries, with the latter being prone to the court's characterisation of the overall trust as a series of disparate trust contracts.⁴¹ Thus, although in principle there is a duty for trustees to provide information, it is actually a weak duty as beneficiaries only have access to the information concerning their specific interests, and not the trust as a whole.

Beneficiaries only have access to the information concerning their specific interests

2.9 Remedies against breach and gross negligence

In the common law, where a trustee acts in breach of duty, the beneficiary can either choose to adopt the transaction, or he can falsify the account and bring the trustee under the compensatory liability to restore trust funds.⁴² In Japan, courts favour the remedies available under Article 40,⁴³ which require the trustee to restore the property, or failing that, to provide compensation. Unlike English law,⁴⁴ Japanese law makes a sharp distinction between bad faith and gross

negligence, and ordinary negligence. Under Article 27, a trustee's actions cannot be rescinded except in bad faith and gross negligence, and Article 41 imposes personal liability on the trustee company's officers.

2.10 Conclusion on core duties

In Japan, the duties of loyalty and care not exceeding good faith, the duty to register property where it is registerable and to keep it identifiable, and the duty to provide information subject to restrictions are core trustee duties. Other duties such as duty to follow the terms of the trust can be presumed as core duties in the absence of contrary indication; whereas more needs to be done to develop the duty to inform beneficiaries of their interest and remedies, if the Japanese trust were to expand in the direction of testamentary trusts.

The duties of loyalty and care not exceeding good faith, the duty to register property where it is registerable and to keep it identifiable, and the duty to provide information subject to restrictions are core trustee duties

III. The Chinese trust as a comparative example

Compared to Japan, the trust in China is a young institution dating back to the 2001 Trust Law. Courts continue to lag behind in the recognition of trust principles even after the introduction of the act, as they often choose to ignore trust principles when they are pleaded or where the identity of one of the parties as a trust bank strongly suggests a trust relationship.⁴⁵ The Chinese trustee is subject to the usual duties to pay make payments to beneficiaries,⁴⁶ perform his duties "with honesty, good faith, prudence and efficiency",⁴⁷

41. Nakano Masatoshi, *Shintakuho hanrei kenkyu* ("Studies on trust law cases") (Sakai shoten 1989) 262–265.

42. For example *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (Lewison J).

43. Nakano (n 41) 206.

44. *Spread* (n 22).

45. Zhang Chun, *Zhongguo xintuofa teselun* ("A thesis on the special character of Chinese trust law") (Falü chubanshe 2013) ch10.

46. Trust Law (n 11), art 34.

47. *Ibid.*, art 25.

and to report to the settlor and beneficiary on his administration of the trust.⁴⁸ Like in Japan, the Chinese trust is mainly used in commercial spheres.⁴⁹

The main difference from Japan concerns the limited liability of the Chinese trustee. Article 37 provides that the trustee's liability is restricted to the trust fund. As submitted earlier, the absence of personal liability implies a total exclusion of potential checks on the trustee, and is capable of disrupting trust functions to such an extent as to raise doubts over the valid formation of the trust.⁵⁰ While Japan's 2006 act also provides for limited liability trusts, this is subject to specific restrictions such as a registration requirement.⁵¹

Main difference from Japan concerns the limited liability of the Chinese trustee

Although for a period of time, Chinese courts have interpreted many trusts cases as contract, they have nonetheless moved in a positive direction concerning basic trustee duties, by upholding the positions of parties based on the Trust Law and trust contracts (deeds). Since Zhang's survey which concluded that Chinese courts did not apply the Trust Act in the 2000s,⁵² a number of cases concerning trustee duties can be found from the mid-2010s. In one case, Jiangsu Beili Engineering Machinery Limited ("Beili") acquired a trust investment package worth RMB¥2.5 million offered by Shanghai International Trust Limited, but the parties disagreed on the correct distributions. Beili claimed that the trustees' accounts were inadequate, and that the classification of beneficiaries into "class A" (senior) and "class B" (residual) was in breach of

banking regulations. Both the first instance and appellate courts rejected the claims, holding that based on the trust document, the trustee was entitled to consider the trust interests of beneficiaries with higher priority first, and also to deduct necessary costs and remuneration. As Beili did not supply evidence to substantiate its query with respect to the trustees' calculations, its claims were rejected, and the court held further that banking regulations affected neither the validity of the contract nor the outcome of the case.⁵³

While existing Chinese trusts cases have been relatively simple at the level of law, they are nonetheless a significant breakthrough in that the court applied the basic provisions of the Trust Law, as opposed to relying on contract law alone, and analysed the interests of the parties expressly as those of beneficiaries and trustees. In the Beili case, the court stated unequivocally that it was the trustee's duty to advance the beneficiary's maximum interests, and accepted Shanghai Trust Company's costs, remuneration and distributions as legitimate trust acts which can only be impeached with sufficient evidence. As the Japan model has suggested, a solution at the level of general law that tightens up the duties of trust parties is usually preferable to a complex framework of regulations. Thus, an authoritative interpretation by the Supreme People's Court or a legislative amendment at the level of general law remains the best way forward for the Chinese trust.⁵⁴

The court applied the basic provisions of the Trust Law, as opposed to relying on contract law alone

48. *Ibid.*, art 33.

49. Ho (n 2); Zhang (n 2).

50. This provision may be subject to art 53 of China's Contract Law, Order No 15 of 1999, which prohibits reliance on an exemption clause in cases of intentional misconduct or gross negligence. However, not all trust arrangements are contractual, and the principle contained in art 37 is not strictly speaking an exemption clause, but rather an *a priori* limitation of liability.

51. Zhao Lianhui observes that in Japan it is not possible to completely exempt trustee duties, but appears to believe that the same restriction does not apply in China. Zhao Lianhui, *Xintuofa jieshi lun* ("An explanatory thesis on trust law") (Zhongguo fazhi chubanshe 2017) 306–307.

52. Zhang (n 45) ch 10. See also Jian Qu, "Trust Law in Chinese Courts: Judicial Decisions as Data (2001–2017)" (2019) 25 *Trusts & Trustees* 761; Fan Lihong and Zhou Quan, "Woguo xintuo gongsi yunyingzhong cunzai de wenti ji duice: yi 2002–2011 nian Shanghai Shi Di'Er Zhongji Renmin Fayuan she xintuo gongsi shangshi an'jian wei yangban" ("Existing problems and solutions in the operation of trust companies in China: based on cases pertaining to trusts at the Shanghai Second Intermediate People's Court between 2002 and 2011") (2013) 36 *Liaoning shifan daxue xuebao* (shehui kexue ban) 178.

53. Shanghai No. 2 Intermediate People's Court, Hu'erzhong minliu(shang) zhongzi di 303 hao (2015).

54. The promulgation of the Civil Code of 2020 suggests that China is committed to the path of rationalising its current patchwork of specific laws into a more coherent framework.

Conclusion

It is submitted that the doctrinal coherence of the Japanese trust suggests strongly that it is possible to have a highly developed civilian trusts system based upon core trustee duties, which carries with it the advantage of concentrating decision-making powers in the hands of trustees. As Graziadei, Mattei and Smith point out, the transfer of decision-making powers to the trustee can only occur in a legal system which grants substantial powers to the beneficiary, and in doing so achieves an efficient division of labour between trustee and beneficiary.⁵⁵ Notwithstanding the usual strict division between property and obligations in civil law, it is submitted in Japan core trustee duties are successful

in providing the flexibility required by settlors-beneficiaries while keeping the danger of trustee fraud at an acceptable level. For civilian jurisdictions in the developing world, the availability of the Japanese trusts model offers a strong alternative to more complex European pathways, especially in commercial situations such as securitisation and pensions.

It is possible to have a highly developed civilian trusts system based upon core trustee duties. Core trustee duties are successful in providing the flexibility required by settlors-beneficiaries while keeping the danger of trustee fraud at an acceptable level

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55. Graziadei, Mattei and Smith (n 4) 39.