Giulia Terranova[1]

The Transplant of Trusts in Different Legal Jurisdictions: The Example of China

[1] Università degli Studi di Milano, Milano 20122, Italy, E-mail: giulia.terranova@unimi.it

Abstract:
Legal transplants are considered a significant factor in the evolution of legal systems. One example of transplant of a legal institution through its prestige is the diffusion of the trust from the English legal system to other common law systems and to many civil law countries. One of these is China that in 2001 enacted the Trust Law of the People's Republic of China. This paper wants to analyse the trust under the Trust Law and to compare it with the original model in the English legal system, understanding how far or how close it is from the original one.

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1 The study of legal transplants

Legal transplants are the subject of a traditional field of study in comparative law and are considered a significant factor in the evolution of legal systems.

The term refers to the circulation of legal systems and single legal institutions from one country or culture to another. Comparatists focus in particular on the legal changes triggered by transplants and their receptions. There are many cases of the circulation of juridical models having contributed to the formation of legal systems.[1]

One classic example is the reception of Roman Law in Europe, prompted by studies at Bologna University from the eleventh century onwards. Another typical case of transplant is the diffusion of the French Civil Code,[2] first in the countries conquered by Napoleon,[3] then to States not under his control[4]; the code was subsequently imitated in many countries under French colonial domination.[5]

The diffusion of common law is another example of the circulation of legal models, and was brought about through the growth of Britain as a world power. The English model was transferred to the British colonies around the world, and an English legal heritage remained part of these legal systems even after the end of British colonialism. This heritage consists, in particular, in the role of the judiciary, the style of legal decisions, and the method of education in law.

This is also the case of the USA, whose individual States were influenced by the reception of the English legal system. Many of the States adopted the English common law and Acts of Parliament and, in general, the US legal system was largely based on the English model. Today these systems are still profoundly influenced by the English heritage.

Comparatists generally divide the causes of legal transplants into two different categories: imposition by a conquering power, or emulation due to the prestige of the legal model or institution.

An example of the first category is the diffusion of the French Civil Code, initially as a consequence of the military domination of Napoleon. This kind of imposition may be followed by the ultimate rejection of the legal model or, conversely, the foreign institution may be imported definitively by the following dominating power.

An example of the second category is the case of the German professoriate, which became a model for American legal academia.[6]

The diffusion in this case arises from the desire to acquire something that appears better than what is already regulated in a legal system.[7]

2 The Trust: An example of legal transplant. The original English model

Another example that can be described as a legal transplant arising from the prestige of the institution is the spread of the trust around the world. The circulation of the trust has also been defined as a case of "legal flow"[8]:

Giulia Terranova is the corresponding author.

the transfer into a system of something extraneous that is perceived useful in order to provide a better solution for a specific issue than the ones already existent in the system.

The origin of the trust lies in the activity of the courts of equity, from the sixteenth century onwards. The trust has been defined as one of the most important contributions of equity to the English legal system[9] and derives in turn from the "use", which was a particular method of transferring property under feudalism, from the thirteenth century. Under this system, the owner (*feoffor*) transferred property to a trusted person (the *feoffee)* to hold for the use of a third party (*cestui que use*).[10]

The main reason for this practice was to allow land to be inherited, as under feudalism land could not be left by will,[11] whereas *inter vivos* transfers were permitted. Before his/her death a landowner conveyed the land to another person but for the use of a person or persons that the transferor wished to benefit. In this way, the owner could benefit his/her heirs, avoiding feudal incidents. The use can be defined as a kind of structured gift in favour of a person who cannot inherit from the original owner.

The trust is an evolution of the use, from the sixteenth century onwards. Generally, a common law trust is instituted when a settlor (the original owner) transfers his/her ownership of some assets, which become part of the trust assets or trust fund, to a trustee, for the benefit of a third party, the beneficiary. The trustee has a fiduciary duty to administer the trust assets in the interest of the beneficiary and not in his/her own.

Since the limitations imposed by the feudal system were abolished at this time, the reasons for the creation of trusts were different from those that gave rise to uses. For example, a trust can be set up to temporarily transfer some assets to a trustee, for the benefit of a person who cannot autonomously dispose of his/her property. A trust can also be used to preserve secrecy or to manage the land and its revenue over the entire lifetime of a spendthrift heir.[12]

The role of equity in the evolution of the trust was paramount. It enforced the beneficiary's rights if the trustee had violated his/her fiduciary duties through the notion of duality of ownership. Under this system, the Chancellor had the role of implementing the rule that the trustee acquired only the legal title to the trust assets, while the beneficiary kept the beneficial title to them. In this way, equity did not violate common law: it kept valid the principle that the trustee is the absolute owner of the property, while recognizing the beneficiary as the equitable owner.

In case of violation of fiduciary duties to the beneficiary, he/she could petition the Court of Chancery to protect his/her interests against the trustee or third parties that acquired titles inconsistent with those of the beneficiary.[13] In this way, the beneficiary's equitable interests were protected, without denying the trustee's legal title: the maxim "equity follows the law"[14] was fully complied with.

A trustee's legal ownership was limited by the equitable position of the beneficiary, and until the termination of the trust, the beneficiary's equitable ownership did not comprise the rights reserved to the trustee, such as the right of management of the assets.

Furthermore, through the implementation of the dual ownership rule, since the trustee was only the legal owner of the trust fund, his/her title did not fall within the trustee's estate in case of death, insolvency or claims from personal creditors (including, for example, his/her spouse): the beneficiary's interests were protected even in these circumstances.

After the abolition of the dual system of courts (Common Law and Equity) with the Judicature Acts of 1873–1875, the rules elaborated by the Court of Chancery continue to be applied in England by today's Courts.

Within the English legal system, trust law evolved to the point that it now encompasses multiple types of trusts. One such trust, for example, is the purpose trust: it has no beneficiaries and the trustee must satisfy a specific purpose, as defined by the settlor. Another type of trust is the self-declaration trust: the settlor simply declares that from that moment on he/she holds the property in trust for someone,[15] without any formal transfer of property.

Trust law also regulates trusts arising by operation of law, which are created on the basis of particular facts and not voluntarily by the settlor. These kinds of trust are constructive and resulting trusts.[16]

The evolution of the trust has reflected changes in society and in forms of wealth: modern trusts often hold financial assets, such as stocks, bonds and insurance policies. They differ from the original model of the trust as a device to manage real assets down through family generations[17] in that they are also used for business purposes.

3 The fundamental features of English trusts

Although over the course of its history the English system elaborated many different kinds of trust, all English trusts share some key features that characterize them.

One of these features is to be identified in the centrality of the beneficiary. As already mentioned, the trust can be defined as a structured gift in favour of one or more beneficiaries, who have the titularity of the beneficial ownership. From the setting up of the trust onwards, the material relationship is that between trustee and beneficiary, so that the entire activity of the trustee must be directed towards the beneficiary's interests.

This principle is the reason for another fundamental rule of English trusts, which is the "beneficiary principle",[18] under which a trust is not valid if no beneficiaries have been identified. In this case there would be no subject entitled to petition the court in case of the trustee's violation of the trust deed. Only a beneficiary, as beneficial owner of the trust assets, has the right to initiate legal proceedings for the protection of their interests. Moreover, in the absence of identified beneficiaries, nobody would be entitled to acquire the trust assets after the termination of the trust.[19]

In discretionary trusts,[20] this rule dictates that the trustee must choose the beneficiaries in order to distribute the property among a class of objects indicated by the settlor with sufficient precision. However, if the class of beneficiaries cannot be identified, the trust is void due to the absence of beneficiaries.[21]

The beneficiaries are the enforcers of the trust and, in order to fulfil their role, they have a right to see trust documents,[22] particularly the trust accounts. Another fundamental right of beneficiaries is the one established in the precedent of Saunders v Vautier.[23] It may be stated as the right of a beneficiary that is *sui juris*[24] and has an absolute interest[25] by virtue of the trust, to lay claim to the trust property that represents that interest. If both conditions pertain, the trustee is obliged to transfer his/her legal title to the trust assets to the beneficiary who claims the trust property.

Another corollary of the beneficiary principle is the "no purpose rule", under which equity does not recognise a trust's right to carry out a purpose, since the benefits of carrying out such purpose cannot be in the interest of an identified or at least -as in discretionary trusts- identifiable individual.

The only exception to this rule is represented by charitable purpose trusts. These are the only purpose trusts admissible under the English system and they are obliged to pursue one of the purposes specified in the Charities Act 2006 and 2011.[26] Since charitable purpose trusts have no beneficiaries, they are enforced by the Attorney General or by the Charity Commission.

Another fundamental rule that characterises all trusts in the English system is the role of the settlor after the setting up of the trust. Once the trust is created, the settlor loses the control of or any interest in the trust property, so that he/she drops out of the picture.[27] He/she is never allowed, in his/her capacity as settlor, to directly control the conduct of the trustee. Once the trust is created, the settlor is like a stranger in respect of the trust.[28]

The only way for the settlor to be entitled to control the trustee's activity is to be one of the beneficiaries. However, even in this case that right is not a consequence of the capacity as settlor but is a consequence of the capacity of beneficiary.

The -limited- role of the settlor is clearly a consequence of the beneficiary principle: in order to let the beneficiaries fully enforce the trust and control the trustee, the settlor cannot interfere in the management of the trust. The settlor's interest in donating something to someone was satisfied with the creation of the trust, after that, he/she no longer has any relevant position towards the trust assets.

4 The transplant of trusts in different legal systems

The system of trusts, as already noted, is one example of the transplant of a model into many different legal systems as a consequence of its prestige. Many other legal systems that originally had in place no regulation on trusts wished to benefit from this institution; as a result, today the trust has spread worldwide.

The success of the trust is not limited to the common law jurisdictions of Commonwealth countries,[29] but it includes mixed law jurisdictions[30] and civil law jurisdictions.[31]

From a comparative point of view the transplant of trusts among civil law jurisdictions is of major significance. Civil law jurisdictions have always shown interest in importing the institution of trusts. They saw many advantages applicable to both private and family contexts, for example, they considered the administration of family assets through different generations, and the facilitation of commercial transactions, for example, safeguarding the interests of creditors.[32]

However, scholars have been sceptical because the transplant of trusts into civil law jurisdictions and particularly the concept of duality of ownership presented compatibility issues with some fundamental legal principles.[33]

A first problem was the *numerus clausus* of property rights: the civil law real rights did not include the trustee's right to trust assets and the institution of equitable ownership. Secondly, Roman law has always con-

sidered property as an undivided right[34] and the trust's split ownership of trustee and beneficiaries is inconsistent with this notion.[35]

Notwithstanding these compatibility issues, many scholars overcame them and concluded that the trust is also implementable in civil law systems, even without the distinction between common law and equity.[36] The solutions theoretically elaborated were different from the English scheme, but with the same function.[37]

During the twentieth century, then, many civil law systems adopted specific domestic statutes on trust.

In particular, on the one hand, the transplant of trust was achieved by many countries that, even without the distinction between common law and equity, were influenced by English jurisdiction. This is the case of Guernsey, Jersey, the Isle of Man, Cyprus and Malta,[38] also known as Offshore Jurisdictions[39] for their fiscal advantages.

On the other hand, many civil law countries, not directly influenced by English jurisdiction, developed their own statutes on the trust, in an attempt to replicate it. This is the case, for example, of San Marino, Israel and Japan.[40]

Furthermore, the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition[41] carried out another important step in the transplant of trusts, to the effect that trusts in accordance with the Convention's terms are to be recognised by the signatory states, even if such states do not have a domestic statute on trusts.

The Hague Convention's main aim is to identify the law governing the trust, and for this reason it has to be considered as a private international law,[42] despite containing some articles which clarify certain substantial conditions that a trust has to fulfil.[43]

The domestic statutes on trust and the Hague Convention contributed to making the legal flow of the trust a global phenomenon. The study of its transplant, however, also contributes to an understanding of how different legal traditions and cultures in the countries into which the trust system is transferred can influence the very concept of the trust and, in some cases, can regulate an institution that differs substantially from the original one.

This is the case, as we will see further on, of the 2001 Trust Law enacted by the People's Republic of China ("Trust Law"), which came into effect on October 1, 2001.

Chinese Trust Law followed three other Asian statutes on trust: the Japanese Trust Act, in 1922, and the new Japanese Trust Act, in 2006[44]; South Korea's[45] Korean Trust Act, in 1961[46] and the Taiwanese Trust Law,[47] in 1996.[48]

5 The Chinese Law of 2001

China is a civil law jurisdiction, whose private legal system derives from Soviet Law[49] and, before the enactment of the Trust Law in 2001, it did not traditionally comprise the institution of trust, as envisioned in the English common law system. The beginning of the enactment process of the Trust Law dates from 1993, when the drafting process was initiated; the long road to the final draft was probably caused through unfamiliarity with the institution of the trust among Chinese scholars and practitioners.[50] The main reason that motivated the Chinese Government to the implementation of the Trust Law was the promotion of collective investment funds, rather than the demand for family succession and wealth planning.[51] The drafters, however, wrote a broad trust legislation that was generally applicable, since they wished for a wider future application of Trust Law.[52]

Trust law is one of the many already mentioned examples of the possibility of transplanting trusts in a civil law jurisdiction. It is of major significance from a comparative point of view because it provides an understanding of the way in which the trust has been transposed, focusing on similarities and differences with the traditional common law model and, particularly, with its key characteristics as highlighted above.

After the enactment of the Trust Law, other statutes on trusts were implemented in China, such as The Measures for the Administration of Trust Companies[53] or the Rules for Administration of Collective Capital Trust Plans.[54]

In 2016 China enacted the Charity Law of the People's Republic of China[55] that dedicates the Chapter V to Charitable trusts. Article 44 defines charitable trusts as "*public interest trusts, and as used in this Law refers to trustors lawfully entrusting their assets to a trustee for charitable purposes, and the trustee, in accordance with the wishes of the trustors and in the name of the trust, managing and disposing of assets in order to carry out charitable activities*".

Chinese Trust Law[56] comprises 74 Articles divided into seven parts: general provisions are found in Part I; Part II regulates the establishment of a trust; Part III is about the trust property; Part IV focuses on the parties to a trust; Part V is on variation and termination of a trust; charitable trusts are found in Part VI[57] and, finally, supplementary provisions are regulated in Part VII.

We will focus further on the nature of the trust under Chinese trust law, on the necessity or otherwise of the transfer of ownership of the trust assets and, finally, on the powers that can be reserved to the settlor after the institution of the trust and on the consequent position of the beneficiaries.

6 The nature of the trust under Chinese Law

A trust, in the original common law system, is completely set up when the settlor vests the property rights on the trustee, or, in the self-declared trust, when the declaration is made and so the title to the trust property (legal ownership) is in the hands of the trustee (who is the same person as the settlor).[58] Therefore, trusts can be considered as falling into the category of unilateral acts.[59] They do not have the structure of a contract, intended as two reciprocal commitments provided with consideration between two or more parties.[60]

Since trust is a unilateral act, the trust is set up when the settlor transfers the ownership on the trust fund to the trustee. From that moment on, the key relationship set up by the trust is between the trustee, who only administers the trust assets, and the beneficiary.

Under Trust Law, however, trusts fall into the category of contracts: Article 8 states that "*The establishment of a Trust shall be effected in written form. Written forms shall include Trust contracts, wills and other written documents stipulated in laws or administrative regulations*". Although the expression "*other written documents*" can potentially also include unilateral acts, scholars have pointed out that no such documents have yet been authorised. As a consequence, except for testamentary trusts, which can be established by will, the contract is the only form available for *inter vivos* trusts.[61]

Chinese Courts confirmed that trusts are contracts between settlor and trustee.[62] One consequence of this interpretation is that contract law[63] is applied to trusts, for example, in order to fill a gap in trust settlements.[64] The settlor is moreover considered a creditor who has the right to demand that the trustee (the debtor) perform obligations in the interest of the beneficiary (third party): in this way, the settlor maintains an active role even after the institution of the trust.

The trustee is obliged to the beneficiary and the beneficiary has rights but not obligations toward the trustee.[65] Beneficiaries' rights are stated by Articles 20–23 of the Trust Law[66] and are the same as those conferred on the settlor. The trustee, however, is also obliged to the settlor, who has the same rights as the beneficiary (Article 49).

7 Transfer of ownership to the trustee?

As pointed out earlier, one of the main features of the trust under common law systems is the transfer of property to the trustee. Only at this moment the trust can be considered fully set up.

Trust law in China, as in many other legal systems where trusts have been transplanted, offers a different solution referring to the transfer of ownership[67] since Trust Law seems to admit that trusts can exist even without it. Article 2 states "*the term Trust means the acts whereby the settlor, based on his trust in the trustee, entrusts the rights in his property to the trustee and the trustee manages or disposes of such property in his own name in accordance with the wishes of the settlor for the benefit of the beneficiary or for a specified objective*" [emphasis added].

The term "entrust" is not a new one in the Chinese legal system but is typically used in agency relationships, where transfer of ownership is not required[68]: in agency relationships, the principal remains the owner of the assets.

Moreover, some articles of the Trust Law seem to imply that the settlor maintains ownership of the trust assets. Article 15, for example, states that "*The Trust property and other property of the settlor not part of the Trust shall be kept separate*". Article 20, again, prescribes that "*A settlor has the right to be apprised of the management, use and disposal of his Trust property [..]*" [emphasis added].

At the same time, however, some articles of the Trust Law makes the framework more ambiguous because they may be interpreted as if the trustee acquires ownership of the trust assets. Article 14 provides that "*The property that the trustee obtains as a result of his accepting the Trust is the Trust property*". Article 16 states that "*The Trust property owned by the trustee shall be kept separate and the Trust property may not be included in the trustee's Own Property or become a part of the trustee's Own Property*".

In light of this ambiguity, scholars have concluded that under Trust Law there can be two kinds of trusts depending on who property rights are vested on.[69] If the property remains in the hands of the settlor, the trustee is like an agent that administers some assets of the principal.

Although maintaining property in the hands of the settlor facilitated the diffusion of the trust in China, there are some drawbacks deriving from ownership by the settlor. The main one is that the integrity of the

trust property is not adequately protected. Article 15 only stipulates that trust property shall be kept separate from other property of the settlor.

However, unlike in the case of the trustee, the Trust Law does not impose any further duty on the settlor not to misappropriate it. Furthermore, the settlor is not obliged to act for the benefit of the beneficiaries.[70] Therefore, only the trust deed may (though it is not mandatory) expressly impose on the settlor these duties and the rules he/she must follow. If, however, the trust deed is silent on this point, the settlor has no obligations towards the beneficiary. Trust Law does not specify, then, if beneficiaries have any remedy for breach committed by the settlor.[71]

Moreover, Trust Law does not provide any rule for substitution of the settlor, for example, in the case of his/her death.

The trustee, therefore, has limited powers to act in his/her own name and to manage the assets in the interest of the beneficiary.[72] The dual trust model, finally, creates uncertainties[73] among the practitioners, for example, as to the registration of the trust assets. All these circumstances contribute to make inefficient the maintenance of the ownership on the settlor.

The practice, however, demonstrated that the possibility that the settlor maintains the ownership on the trust fund is more theoretical than effective. Chinese scholars[74] and the practice,[75] in fact, followed a different path and today trusts generally are characterized by the transfer of ownership to the trustee, as in the common law model.

In a case of 2001, the Court of Shizhong District,[76] clarified the distinction between an agency contract and a trust contract, focusing in particular on the transfer of the ownership.

The case referred to a contract stipulated between Shandong Food Co. Ltd. ("Shandong Food") and an investment fund (Jinan Yingda International Trust and Investment Co, Ltd., "Jinan"), under which Shandong Food transferred some money to the investment fund that would have invested the money for a period of time The plaintiff (Shandong Food) claimed that the investment fund mismanaged its money issuing a loan with a company who failed to repay the loan

The Court stated that the contract concluded between the parties was a trust contract and Jinan was the trustee, who, as the owner of the trust property, acts in his/her own name to a third party. The rights and obligations deriving from these acts should bind the trustee rather than the settlor. The Court then clarified that "*The difference between a trust and an entrustment contract lies in the transfer of the ownership of the property. Transferring the ownership of the trust property from the settlor to the trustee is essential in creating a trust, while the ownership of the property is held by the principal in an entrustment contract*". Since Jinan Yingda was the owner and he made all the decision on the investment of the fund, rather than following the instruction of the settlor, the contract had to be considered a trust.

The trustee, as the owner of the trust fund, was responsible for mismanagement and had to give the money back to the trust fund.

In another case, where the assets were expressly transferred to the trustee, the Chongqing High People's Court[77] clarified that the trustee's ownership is only titular or formal, while the real or *de facto* ownership is either on the settlor or on the beneficiary. The judgment stated also that in some legal actions the formal ownership of the trustee does not even comprise the right to sue in the interest of the trust property.

The factual grounds of the case should be analysed deeper in order to understand better the interpretation of the Court, its perception of the trust and the consequences of its decision. In that case a settlor (Beijing Haidian Science & Technology Development Co. Ltd., "Haidian") set up a trust designating itself as a sole beneficiary and transferred the trust fund to the trustee.

The trust deed specified that the trustee had to acquire some shares through the trust fund and manage them for one year for the benefit of the settlor/beneficiary. Some issues arose when a third party (Shenzen Xinhua Jinyuan Touzi Fazhan Youxian Gongsi and Others, "Shenzen") claimed that the amount of money that the trustee spent in order to acquire the shares were borrowed from it by the settlor. Shenzen explained that Haidian, transferring the money to the trustee, brought the loan contract, since it prescribed to use the borrowed money only for a specific purpose that could have not been changed without the consent of the lender. Shenzen tried to freeze the trust assets.

The settlor, together with the trustee, sued Shenzen seeking confirmation by the Court that Haidian was the legitimate owner of the trust fund. The Court dismissed the defendant's right on factual ground, because he was not able to demonstrate where the money transferred to the trustee came from. The decision, however, is remarkable for what it stated referring to the ownership of the trust fund.

The Court recalled that provisions of the Trust Law, that we already mentioned earlier (Articles 2, 28, 29 and 54), and defined the settlor as a *de facto* owner, while the trustee only as a titular owner. In this framework the "real" ownership is the one of the settlor or the beneficiary (that in this case were the same company).

It is worth noting that the distinction between titular and real ownership does exist also among other civil law systems where the trust has been transplanted. For example, in Italy, some scholars qualified the trustee's

ownership as formal or even as a new atypical type of ownership[78]: the main feature that distinguishes this kind of ownership from the typical one is that the former has been set up in order to satisfy the interest of a third party, different from the trustee, or a specific purpose. For this reason, the trustee has to manage the property pursuing that specific interest or purpose, and, among his or her rights there is also the one to take legal actions.

The Chinese Court in the Haidian case, instead, went further, considering that the trustee does not have the right to sue in the interest of the property in title disputes against a third party. In these legal actions he or she does not have a direct interest in a legal action as required by article 108 of the Civil Procedure Law.[79]

It is important noting that the Court did not state that the settlor of the trust under Trust Law remains the (only) owner of the trust assets. On the contrary, it concludes that through the institution of a trust two kinds of ownerships are contemporarily existent: the formal one, of the trustee, and the real one, of the settlor or of the beneficiary.[80]

The judgment limited the procedural interest of the trustee only on title disputes against third parties, where the material interest in ascertaining the ownership is the one of the settlor or of the beneficiary, who eventually will be the owner of the property. In legal actions that do not concern the titularity of the title against third parties, the trustee has the interest to sue.

8 Settlor's powers and rights. The beneficiary's position

Another important feature of the common law trust is that the settlor, after the creation of the trust, loses the right of management and his/her interest in the trust property. Even if he/she can reserve an interest in the trust property, he/she is never allowed, in his/her capacity as settlor, to directly control the conduct of the trustee.[81] Once the trust is created, the settlor is like a stranger in respect of the trust.[82]

Once the trust has been set up, the trustee, in administering the trust assets, must follow the beneficiary's interests. One of the consequences of this rule, as mentioned before, is the beneficiary principle: the beneficiary must be identified or identifiable in order to have at least an enforcer of the obligations of the trustee. The settlor, on the other hand, no longer has a direct interest in the trust assets.

In the English system, the concentration of rights and powers in the hands of the settlor can also involve problems regarding the validity of the trust itself. If the trust deed prescribes that the settlor can control directly the trust property and so potentially interfere with the conduct of the trustee, "certainty of intention"[83] may be missing. The absence of certainty of intention renders the trust void.

The position of the settlor under the Trust Law is completely different. Even if property rights are vested on the trustee, the settlor still has a wide range of rights and powers.

The nature of the trust as a type of contract, as seen earlier, has a great influence in respect of the settlor's rights and powers. As a contractual party the settlor has a continuing role[84] even after the creation of the trust.[85]

Specifically, Article 20 provides the settlor with broad rights to have information on the administration of the trust assets. Article 21 provides that, in certain circumstances, the settlor may adjust the method of managing the trust property.[86] The settlor has also the right to dismiss the trustee if he or she acted counter to the trust's objective or was grossly negligent petition the court to dismiss him/her (Article 23).[87]

The settlor's control over the trust assets also includes, in some circumstances, the power to change the beneficiary or dispose of the beneficiary's rights (Article 51).

For these reasons, the beneficiary principle as stated under English common law can be considered superseded in the Chinese model by the "settlor principle",[88] since the settlor remains the central subject in the trust.

However, the removal of the beneficiary principle with the maintenance of rights and powers in the hands of the settlor is not an isolated example, but represents a modern trend in the law of trusts. Many domestic statutes enacted in various countries envisage that possibility.

The 1984 Trusts Law enacted in Jersey enumerates under Section 9A many rights and powers that the trust deed can reserve to the settlor. These include, for example, the right to revoke or amend the terms of a trust; the right to appoint or remove any trustee; the power to restrict the exercise of any powers or discretions of a trustee.

Another example is the 2007 Trusts Law of Guernsey, which, under Article 15, permits the reservation of certain powers to the settlor; similarly, the 1995 International Trusts Amendment Act of Cook Island, Section 13C; Section 14 of the Trust Law of the Cayman Islands (revised in 2017), and many other examples.[89]

The centrality of the settlor in the Chinese model also has a consequence on the position of the beneficiaries: their rights and powers are fewer than in the English system.

For example, the beneficiary's rights do not comprise the right to claim the trust property to the trustee before the termination of the trust if all the beneficiaries are *sui juris* and have an absolute interest (Saunders

v Vautier principle).[90] Under the Trust Law, by contrast, beneficiaries cannot obtain trust property before the termination of the trust.[91] As a consequence, their title before termination of the trust is only ever potential and contingent.

In the matter of the relationship between settlor and beneficiaries, the Trust Law prescribes that they have the same rights but without giving any further guidance as to whose interest should take priority in case of conflict. Since the settlor is perceived as the original owner with a continuing role after the creation of the trust, there is a great risk that the beneficiary's rights will be postponed.[92]

9 The scholars' perception of the centrality of the settlor

Unlike the settlor's theoretical possibility to maintain the ownership on trust assets, many Chinese scholars have been favourable on the centrality of the settlor's position under Trust Law, rather than his/her "exclusion", as in the original English common law.

Chinese scholars[93] are aware that the position of the settlor under the Trust Law is radically divergent from the one under the common law systems but they are convinced that the law of trust should strengthen the position of the settlor to ensure the optimal balance between settlors' and trustees' rights. So, they pointed out many advantages that the Chinese model presents on this point, compared to the common law discipline.

First of all, they underline that the presence of the settlor through the trust's life can be positive, since he/she, as the creator of the trust, can have a constructive role of the trust, clarifying to the trustee what exactly the trust purpose is and what the beneficiaries' actual interests are. Sometimes it can be difficult to evaluate the beneficiaries' best interest, especially if the trustee does not know them personally.

The right of information of the settlor in addition to the beneficiaries' one,[94] then, is fundamental in order to monitor the activity of the trustee and to verify that he/she fulfils the contract.[95]

The settlor's control on the trustee's activity is required also because many times the beneficiaries, who, under the common law, have that right of control, do not have the capacity or the willingness to supervise the trustee. Sometimes it can happen that beneficiaries do not even know to be beneficiaries of a trust.[96] The more efficient protection of the beneficiaries' interests is not always a direct consequence of the common law approach.

The highlighting by the Chinese scholars of the advantages deriving from the centrality of the settlor is very interesting from a comparative point of view, because, first of all, it points out the different reactions of different legal cultures to the transplant of the same institute.

The settlor's centrality, as seen earlier, is a feature that is common to many legal systems that implemented a law on trusts and also to that systems that transplanted the trust through the enactment of the Hague Convention.

One of these systems, for example, is the Italian one, where practice demonstrated that many settlors have been interested to maintain rights and powers on the trust fund also after the transfer of ownership to the trustees. In fact, in the Italian legal practice, it is common to choose laws that foresee that possibility, as the law regulating the trust.[97]

The reaction of the Italian case law, however, has been totally different from the Chinese one.

The Italian case law, in fact, often concluded that the institution of a trust with the maintenance of the settlor's control on the trust property can make the trust void. One of the material features that must characterise trusts is the loss of the settlor's control on the trust's assets. Settlors cannot get rid of the assets, transferring them to the trustee and, at the same time, still exercise property rights on them.[98] Otherwise, the trust has to be qualified as sham or simulated.[99]

The reason of this restrictive position is, firstly, the improper use of the trust that has been common in Italy since the ratification of the Hague Convention. Trusts have been used often as instruments for segregating assets only to the detriment of creditors. In that situations the settlors' attempt to control the trust fund was intended as a clue of the illegal reason of the institution of the trust. The aim of the restrictive position of the case law was to limit these kinds of trusts.[100]

Another reason of that approach is the still existent cultural scepticism about the limited ownership of the trustee, and so about the limitation of its right through the centrality of the settlor's position. The concept of the limited ownership, as seen earlier, is in contrast with the notion of property as an undivided right.

The concept of limited ownership, however, have been formally transplanted in the Italian legal system through the enactment of the Hague Convention and, as a consequence, the restrictive approach of the Italian case law, is not justified anymore.

The creditors' interests are protected through the ordinary internal legal instruments[101] and the use of some categories, as the one of the sham trusts and the simulation, is not necessary, as well as incorrect.[102] The main-

tenance of the settlor's control itself is not a ground of invalidity of the trust, if a mandatory rule is not violated by the trust.[103]

In light of this framework, the Chinese interpretation may be an example of a different attitude that a civil law system can have towards trusts.[104]

10 Conclusion

The analysis of the nature of the trust, the settlor's and beneficiary's positions after the creation of the trust and, even if only theoretically, the possibility not to transfer the ownership to the trustee demonstrates that the trust, as transplanted in the Chinese legal system, is a different institution from the English trust.

Under the Trust Law the key principles of the English trust are absent: the beneficiary is considered only as a third party of a contract between the settlor and the trustee.

The contractual nature of the trust is a direct consequence of the fundamental role of the settlor even after the creation of the trust. The beneficiary principle is supplanted here by the settlor principle and the beneficiary has a less important position within the trust, even if it could not be always true that the common law approach preserves beneficiaries better.

The tendency to concentrate rights and powers over the trust assets in the hands of the settlor, as previously noted, is common to many other legal systems. From this point of view, it is possible ideally to divide the model of trust into two categories.

The first comprises the English system, which designed the traditional trust model, inspired by the beneficiary principle; the second includes all those countries that enacted domestic statutes on trusts aiming to remove, to a greater or lesser extent, the beneficiary principle, in favour of the position of the settlor.

In these countries, trusts were transplanted because of their prestige, but in response to a different demand from that which led to the creation of trusts in the sixteenth century. That demand was for a device for the creation of segregated assets that could be still controlled by the settlor, until termination of the trust.

The trust as a structured gift[105] in favour of the beneficiary, where the settlor loses all powers and rights over the trust assets, is very distant from this model.

The aim of the study of legal transplants of the trust, however, is not to find a better or a worse model of trust: they are the answers of different needs and their value have to be considered in relation to that particular needs, not absolutely.[106] In this analysis, the solution offered by the legal systems where an institute originated is not necessarily the best one, as it could be the case for the settlor's position.

The comparison of the differences of an institute through the study of legal transplants, can be useful either to the recipients of the transplant, and to the systems where the institute originated, by giving different perspectives on similar issues. Sometimes, furthermore, as in the study of the settlor's centrality, the comparison can be useful also between different recipients' legal systems and their interpretation.

Notes

1 Michele Graziadei, "Comparative Law as the Study of Transplants and Receptions," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann-Reinhard Zimmermann (Oxford: The Oxford University Press, 2006), 442.
2 Antonio Gambaro-Rodolfo Sacco, "Sistemi giuridici comparati," in *Trattato di diritto comparato*, ed. R. Sacco (Milano: Utet giuridica, 2018), 259.
3 For example, in Belgium, Italy and Poland.
4 For example, in The Netherlands, Spain and Romania.
5 For example, in the territories of North Africa and Madagascar.
6 Mathias Reimann, "A Career in Itself: The German Professoriate as a Model for American Legal Academia," in *The Reception of Continental Ideas in the Common Law World 1820–1920*, elibrary.duncker-humblot.com/series/csc/*Comparative Studies in Continental and Anglo-American Legal History*, ed. Mathias Reimann (Berlin: Duncker & Humblot, 1993), vol. 13.
7 Elisabetta Grande, *Imitazione e diritto: ipotesi sulla circolazione dei modelli* (Torino: Giappichelli, 2002), 43.
8 Maurizio Lupoi, *Sistemi giuridici comparati. Traccia di un corso* (Napoli: Edizioni Scientifiche Italiane, 2006); Maurizio Lupoi, "I trust, i flussi giuridici e le fonti del diritto," *Trusts e attività fiduciarie*, no. 1 (2019): 5.
9 Frederic William Maitland, *Selected Essays* (Cambridge: Cambridge University Press 1936), 129; John H. Baker, *An Introduction to English Legal History* (London: Butterworths, 2002), 290.
10 James E. Penner, *The Law of Trusts* (Oxford: The Oxford University Press, 2016), 8; Mohamed Ramjhon, *Unlocking Equity and Trusts* (New York: Routledge, 2017), 6.
11 Penner, *The Law of Trusts*, 9.
12 Baker, *An Introduction to English Legal History*, 291.
13 Except the *bona fide* transferee of the legal estate for value without notice.

14 It was one of the maxims that governed equity and it meant that the Lord Chancellor and the Court of Chancery had to follow common law rules without contradicting them. For this reason, equity could not deny the trustee's title on trust assets but could only rule that the trustee had to comply with beneficiary's equitable interests. Ramjohn, *Unlocking Equity and Trusts*, 14.
15 Penner, *The Law of Trusts*, 16.
16 Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Oxford University Press, 1989); Peter Birks, "Restitution and Resulting Trusts," in *Equity and Contemporary Legal Developments*, ed. S. Goldstein (Jerusalem: Humaccabi Press, 1992), 335; Peter Birks, "Trusts Raised to Reverse Unjust Enrichment: The Westdeutsche Case," *Restitution Law Review* 4, (1996): 3; A. Burrows, "Swaps and the Friction between Common law and Equity," *Restitution Law Review* 3, (1995): 15; Robert Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997).
17 John H. Langbein, "The Contractarian Basis of the Law of Trusts," *Yale Law Journal* 105, (1995): 625–676, 637.
18 Armitage v Nurse and Others [1998] Ch. 241. Millet L.J. stated "*If the beneficiaries have no rights enforceable against the trustees there are no trusts*".
19 David Hayton, "Developing the obligation characteristic of the trust," *Law Quarterly Review* 117 (Jan. 2001): 96–108; in Re Astor's S.T., [1952] Ch. 534 at p. 541, Roxburgh J. stated "*A trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right, and the nature and extent of that could be worked out in proceedings for enforcement*".
20 A discretionary trust exists where the trustees are given a discretion to pay or apply property to or for the benefit of all or anyone selected from a group or class of objects on such terms and conditions as the trustees may see fit. (Ramjohn, *Unlocking Equity and Trusts*, 141).
21 Peter J. heinonline-org.pros.lib.unimi.it:2050/HOL/AuthorProfile?action=edit&search_name=Millett%2C%20P.J.&collection=journalsMillett, "The Quistclose Trust: Who Can Enforce It?," *Law Quarterly Review* 101 (1985): 269.
22 O'Rourke v. Darbishire [1920] A.C. 581; Re Londonderry's Settlement [1965] Ch. 918.
23 Saunders v Vautier (1841) 4 Beav 115.
24 A person is *sui juris* if he/she is of full age and sound mind.
25 An absolute interest is one that cannot be defeated. For example, if a beneficiary is entitled to receive the benefits of the property as matters stand at present. See Penner, *The Law of Trusts*, 81.
26 The 2011 Act repeals and replaces the Recreational Charities Act 1958, the Charities Act 1993 and most of the provisions of the 2006 Act save for Part 3, which concerns fund-raising. See Penner, *The Law of Trusts*, 447.
27 Hayton, "Developing the obligation characteristic of the trust". Re Astor's S.T. [1952] Ch. 534 at p. 542.
28 Ramjohn, *Unlocking Equity and Trusts*, 24.
29 Such as North America, Australia, New Zealand and Hong Kong.
30 Such as Louisiana, Québec, South Africa.
31 For example, Malta, Jersey, San Marino.
32 Henry Hansmann-Ugo Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis," *New York University Law Review* 73 (1998): 434; Antonio Gambaro, "Trust in Continental Europe," in *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions*, ed. Alfredo Mordechai Rabello (Jerusalem: Hebrew University of Jerusalem, 1997), 784; Tony Honoré, "On fitting trusts into civil law jurisdictions," *Legal Research Paper Series Paper No 27/2008*, describes some of the many purposes of the use of trusts in common law countries: "to keep property or its proceeds in a family; to protect the weaker members of society even if they are not legally incapable; to safeguard interests of creditors; … ".
33 Vera Bolgar, "Why no trusts in the civil law?" *American Journal of Comparative Law* 2 (1953): 204; Honoré, "On fitting trusts into civil law jurisdictions"; Tony Honoré, "Obstacles to the deception of trust law? The examples of South Africa and Scotland," in *Aequitas and Equity*, ed. Alfredo Mordechai Rabello (Jerusalem: Hebrew University of Jerusalem, 1997); James Koessler, "Is There Room for the Trust in a Civil Law System? The French and Italian Perspectives" (March 1, 2012), available at http://ssrn.com/abstract=2132074.
34 The indivisibility of ownership is well exemplified in Article 544 of the French Civil Code of 1804, which inspired many subsequent codifications, such as the Italian one. Article 544 stated: "*La propriété est le droit de jouir et disposer de choses de la manière la plus absolue, pourvu qu'on ne fasse pas un usage prohibé par la loi et par les règlements*".
35 Paul Matthews, "The Compatibility of the Trust with the Civil Law Notion of Property," in *The Worlds of Trust*, ed. L. Smith (New York: Cambridge University Press, 2013), 315; Istvan Sándor, "Different Types of Trust from an Ownership Aspect," *European Review of Private Law*, no. 6 (2016): 1189; Ruiqiao Zhang, "A comparative study of the introduction of trusts into civil law and its ownership of trust property," *Trusts & Trustees* 21, no. 8 (October 2015): 902.
36 G.L. Gretton, "Trusts without Equity," *International and Comparative Law Quarterly* 49, no. 3 (July 2000): 599–620.
37 Sandor, "Different Types of Trust from an Ownership Aspect," 1193.
38 Trust Guernsey Law 2007; The Trust Jersey Law 1984; The Trustee Act 1961 (Isle of Man); The International Trust Law 1992 of Cyprus; Trust and Trustees Act of Malta.
39 Maurizio Lupoi, *Istituzioni del diritto dei trust negli ordinamenti di origine e in Italia* (Padova: Cedam, 2016), 26.
40 Repubblica di San Marino, Legge del 1° marzo 2010, n. 42; Israeli Trust Law 1979; Japanese Trust Act 1922.
41 Italy was the first civil law jurisdiction that ratified the Convention, in 1990; then the Netherlands, in 1995; Switzerland, in 2007; and Cyprus, in 2017.
42 Article 6 of the Convention states: "A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case. Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply".
43 Article 2 of the Convention gives a definition of trust: "For the purposes of this Convention, the term "trust" refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose".
44 Act No. 512 of 1922 and Act No. 108 of 2006. Cfr. Makoto Arai, "Trust law in Japan: inspiring changes in Asia, 1922 and 2006," in *Trust Law in Asian civil Law Jurisdictions. A Comparative Analysis*, ed. Luisina Ho-Rebecca Lee (Cambridge: Cambridge University Press, 2013), 27.
45 Wu Ying-Chieh, "Trust law in South Korea: developments and challenges," in *Trust Law in Asian civil Law Jurisdictions. A Comparative Analysis*, ed. Luisina Ho-Rebecca Lee (Cambridge: Cambridge University Press, 2013), 48.
46 Trust Act of the Republic of Korea, Act No. 900 of 1961.
47 Wang Wen-Yeu-Wang Chih-Cheng-Shieh Jer-Shenq, "Trust law in Taiwan: history, current features and future prospects," in *Trust Law in Asian civil Law Jurisdictions. A Comparative Analysis*, ed. Luisina Ho-Rebecca Lee (Cambridge: Cambridge University Press, 2013), 63.
48 Trust Law of the Republic of Taiwan, promulgated on January 26, 1996; amended on December 30, 2009.
49 Luisina Ho-Rebecca Lee-Jin Jinping, "Trust law in China: a critical evaluation of its conceptual foundation," in *Trust Law in Asian Civil Law Jurisdictions. A Comparative Analysis*, ed. Luisina Ho-Rebecca Lee (Cambridge: Cambridge University Press, 2013), 80.
50 Charles Zhen Qu, "The Doctrinal Basis of the Trust Principles in China's Trust Law," *Real Property, Probate and Trust Journal* 38 (Summer 2003): 345, 349.

51 Ho- Lee-Jinping, "Trust law in China: a critical evaluation of its conceptual foundation," 81.
52 Luisina Ho, "Trust Law in China: History, Ambiguity and Beneficiary's rights," in *Re-imagining the Trust: Trusts in Civil Law,* ed. Lionel Smith (Cambridge, 2012).
53 Promulgated by the China Banking Regulatory Comm. January 23, 2007. Cfr. Ruiqiao Zhang, "Trust Law of China and Its Uncertainties: Examination of the Rights and Obligations of Trust and Ownership of Trust Property," *National Taiwan University Law Review* 10 (2015): 45, 52.
54 Promulgated by the China Banking Regulatory Comm. January 23, 2007. Id.
55 The Charity Law was passed by the National People's Congress on March 16, 2016, and came into effect on September 1, 2016.
56 Trust Law is translated in *China Law & Practice* (June 2001), 22.
57 Charitable trusts today are regulated also in the Charitable Law of 2016, mentioned above.
58 Penner, "The Law of Trusts," 222.
59 Some common law scholars (John H. Langbein, "The Contractarian Basis of the Law of Trusts"), 676 argues that the trust has a contractual nature, as consisting in a bargain between settlor and trustee. The majority, however, state that a trust is not a contract, but a conveyance from the settlor to the trustee (Austin Wakeman Scott, "The Nature of the Rights of the Cestui Que Trust," *Columbia Law Review* 17 (1917): 269, 270; Penner, *The Law of Trusts*; Ramjhon, *Unlocking Equity and Trusts*.
60 Ramjohn, *Unlocking Equity and Trusts*, 30.
61 Ho- Lee- Jinping, "Trust law in China: a critical evaluation of its conceptual foundation," 83; Luisina Ho, "China: trust law and practice since 2001," *Trusts & Trustees* 16, no. 3 (April 2010): 124–127; Zhenting Than, "Perfecting the Chinese Law of Trusts. A critical and Comparative Study of the Australian and the Chinese Law of Trusts," (Bond University, 2005).
The *inter vivos* trust, in particular, is established at the time the Trust contract is entered into (Article 8).
62 Beijing Haidan Science & Technology Development Co. Ltd V. Schenzen Xinhua Jinyuan Touzi Fazhan Youxan Gongsi and Others, 2006. This case is commented by L. Ho, "Trust Law in China: History, Ambiguity and Beneficiary's rights," in Re-imagining the Trust: Trusts in Civil Law, ed. Lionel Smith (Oxford, 2011). The Author defined this case as "*a typical example that the judges conceptualize the trust as but a sub-species of contracts*".
63 Contract Law of People's Republic of China, Adopted and Promulgated by the Second Session of the Ninth National People's Congress March 15, 1999, available at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn137en.pdf. Hereinafter Contract Law.
64 As happened in Yanxin Co. Ltd v. Huabao Trust and Investment Co. Ltd, Shangai Intermediate People's Court Case No. 226 of 2004, cited by Ho- Lee- Jinping, "Trust law in China: a critical evaluation of its conceptual foundation," 83.
65 Kay Lyu, "Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis," *Loyola of Los Angeles International and Comparative Law Review* 36 (2015): 447, 473.
66 These Articles are mentioned by Article 49 of Trust Law.
67 Sandor, "Different Types of Trust from an Ownership Aspect," 1193.
68 Zhang, "Trust Law of China and Its Uncertainties: Examination of the Rights and obligations of Trust and Ownership of Trust property,"
66. Zeng Mheng, *Ownership of Trust Property in China. A Comparative and Social Capital Perspective* (Singapore: Springer, 2017), 29, underlines: "At the time when the Trust Law was drafted, Chinese authorities worried that the requirement of transfer of ownership of trust property might have a negative implication on the practice. According to their contention, under this requirement, people are likely to be hesitant to enter into a trust contract with trust institutions, because of the risk of losing their ownership of property".
69 Luisina Ho, "Trust Law in China: History, Ambiguity and Beneficiary's rights" in *Re-imagining the Trust: Trusts in Civil Law*, ed. Lionel Smith (Oxford, 2011), 87; Lyu, "Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis," 456; Toby Graham-Peter Steen, "The Chinese Trust," *Trusts & Trustees*, 18, no. 1, (January 2012): 36–42; Mheng, *Ownership of Trust Property in China. A Comparative and Social Capital Perspective*, 29; Zhen Qu, "The Doctrinal Basis of the Trust Principles in China's Trust Law," 356.
70 Ho-Lee-Jinping, "Trust Law in China: A Critical Evaluation of its Conceptual Foundation," 87.
71 Zhang, "Trust Law of China and Its Uncertainties: Examination of the Rights and obligations of Trust and Ownership of Trust property," 70.
72 Zhang, "Trust Law of China and Its Uncertainties: Examination of the Rights and obligations of Trust and Ownership of Trust property," 70.
73 In the case *Shandong Food Co. Ltd v. Jinan Yingda International Trust and Investment Co, Ltd* (Court of Shizhong District, Jinan, Shangdong, First Instance Civil Case No. 1707, 2001) the court ruled that under a trust contract, the trust property is owned by the trustee. In the already cited Beijing Haidian Science & Technology Development Co. Ltd v. Shenzen Xinhua Jinyuan Touzi Fazhan Youxian Gongsi and others, the court held that the settlor is the real owner of the trust assets.
74 Zhenting Than, "Perfecting the Chinese Law of Trusts. A critical and Comparative Study of the Australian and the Chinese Law of Trusts," 370, writes that "*According to the definition of the trust provided for by article 2 of the Law (the Law of Trust), a trust includes the following three elements: a trust is created on the basis that the settlor has confidence in the trustee; the settlor mandates his/her property to the trustee; and the trustee administers the trust property for the interest of the beneficiary. Thus, a trust created by a trust contract is similar to an agency created by a mandate contract except for the distinction than the trustee is the legal owner of the trust property while the agent is not the owner*".
75 Luisina Ho-Rebecca Lee-Jin Jinping, "Trust Law in China: A Critical Evaluation of its Conceptual Foundation," in *Trust Law in Asian Civil Law Jurisdictions. A Comparative Analysis*, ed. Luisina Ho-Rebecca Lee (Cambridge: Cambridge University Press, 2013), 86.
76 *Shandong Food Co. Ltd v. Jinan Yingda International Trust and Investment Co, Ltd* (Court of Shizhong District, Jinan, Shangdong, First Instance Civil Case No. 1707, 2001.
77 Beijing Haidian Science & Technology Development Co. Ltd v. Shenzen Xinhua Jinyuan Touzi Fazhan Youxian Gongsi and others, 2006 Chongqing High People's Ct. 14 (Chongqing High People's Ct. March 19, 2007).
78 Ugo Morello, "Tipicità e *numerus clausus* dei diritti reali," in *Trattato dei diritti reali*, ed. Antonio Gambaro-Ugo Morello (Milano: Giuffrè, 2008), 125; Antonio Gambaro, "La proprietà," in *Trattato di diritto privato*, ed. Giovanni Iudica-Paolo Zatti (Milano: Giuffrè, 2017), 409.
79 Civil Procedure Law of the People's Republic of China, Order of the President of the People's Republic of China (No. 75), article 108 of the Civil Procedure Law provides: "The following conditions must be met when a lawsuit is brought: (1) the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case".
80 Civil law systems that adopted the distinctions between formal and *de facto* ownership, qualify only the beneficiary as the *de facto* owner: he or she (and not the settlor) eventually will receive the ownership of the trust fund. In the Haidian case, the Court qualified also the settlor as the real owner because he was at the same time the beneficiary.
81 He has the right to petition the Court if the trustee violates the trust but he cannot directly manage the trust property, giving directions to the trustee.
82 Ramjohn, *Unlocking Equity and Trusts*, 24.
83 Certainty of intention is one of the three certainties required in order to create a valid trust (following the precedent Knight v Knight (1840) 3 Beav 148). Certainty of intention is concerned with the question of whether the settlor clearly wishes/intends to create a trust.

(Penner, *The Law of Trusts*, 190). The maintenance of control by the settlor of/over the trust's assets can be considered as an indication of the absence of certainty of intention.
84 Graham- Steen, "The Chinese Trust," 37.
85 Zhen Qu, "The Doctrinal Basis of the Trust Principles in China's Trust Law," 367.
86 The right to directly micro-manage the trust's assets is never possible under the traditional common law system. (Penner, *The Law of Trusts*, 82). Even the beneficiaries do not have the right to interfere with the administration of the trustee. They only have the right to remove the trustee if they are of full age and capacity (taken together) and if they are absolutely entitled to the property subject to the trust. (Section 19, Trust of Land and Appointment of Trustee Act-TOLATA).
87 In the traditional common law system, the trust deed does not provide the power to directly remove a trustee. The court traditionally has the power to dismiss a trustee if he violates the interest of the beneficiaries (Letterstedt v Broers (1884) 9 App Cas 371). The only exception is prescribed by Section 19 TOLATA, see above n. 86.
88 Guoqing Liu, "Trust without Equity: the Commercial Nature of Chinese Trust Law," *Trusts & Trustees* 22, no. 10, (December 2016): 1130.
89 Nevis, International Exempt trust Ordinance 1994, Section 47; Bahamas Trustee Act, 1998, Section 3.
90 See above paragraph 3.
91 Articles 54 and 55 Trust Law.
92 Ho- Lee-Jinping, "Trust law in China: A Critical Evaluation of its Conceptual Foundation," 93.
93 Wang Qing & Guo Ce, "Annotated articles of the trust law of the People's Republic of China," 2001, 126, (original text in Chinese): "*In Anglo-American law countries, after the settlor establishes the trust, he generally does not possess any substantive rights in the trust if he is not a beneficiary and has not reserved pertinent rights in the trust instrument*"; Zhenting Than, "Perfecting the Chinese Law of Trusts. A critical and Comparative Study of the Australian and the Chinese Law of Trusts," 225 "*After the trust is created, the creator can hardly do anything to deal with the trust. Although a settlor can reserve rights in the trust instrument to retain some influence in relation to the trust property and the trustee, the settlor is not recognized as a party of the trust because he/she does not enjoy any rights nor bear any liabilities*".
See also the authors cited by F.H. Foster, "American trust law in a Chinese mirror," in *Minnesota Law Review*, (2010): 602.
94 Under common law, traditionally beneficiaries have the right of information on the trustee's activity (as documented in the trust documents). Today, after the case *Schmidt v. Rosewood* [2003] 2 AC 709, every beneficiary has the right of information, even if he/she is not vested, i. e. he/she is not titular of a non-discretionary right to have the trust fund at the end of the trust.
95 As seen earlier, article 20 of the Trust Law states: "*A settlor has the right to be appraised of the management, use and disposal of his Trust property and the details of receipts and expenditures connected therewith, and he also has the right to require the trustee to give explanations thereof. The settlor has the right to review, transcribe and photocopy Trust accounts related to his Trust property and other documents related to the handling of Trust affairs*".
96 Under the common law, beneficiaries of vested interests have right to be informed of their interest (Hawkesley v May [1956] 1 QB 304).
97 The law regulating the trust is chosen by the settlor. Article 6 of the Hague Convention states that: "A trust shall be governed by the law chosen by the settlor". One of the laws often chosen is, for example, the Law of Jersey, whose article 9A gives the possibility to reserve many rights and powers to the settlor (see above in this paragraph).
98 See, for example: Cass., February 25, 2015, nn. 3886 e 3735; Cass., February 7, 2014, n. 10,105. Among criminal decisions: Cass., July 25, 2017, n. 36801; Cass., July 20, 2017, n. 8041; Cass., September 30, 2016, n. 41089; Cass., March 7, 2016, n. 9226; Cass., April 16, 2015, n. 15084; Cass., January 14, 2015, n. 1341; Cass., November 7, 2014, n. 46137; Cass., May 27, 2014, n. 21621; Cass., May 30, 2013, n. 19099; Cass., March 30, 2011, n. 13,276.
99 As already demonstrated by the doctrine (Matteo Patrone, "Il *trust* sham e il diritto civile," in *Contratto e impr*., (Padova: Cedam, 2018), 985; Paola Manes, "L'interesse del beneficiario secondo la Corte di San Marino," in *Trusts e attività fiduciarie* (Milano: Ipsoa, 2018), 463; Maurizio Lupoi, "La Cassazione e il trust sham," in *Trusts e attività fiduciarie* (Milano: Ipsoa, 2011), 470) and by an important decision of the Court of San Marino (Causa n. 2017/04VG-ord., *www.cortetrust.sm*), the use of the institute of the sham trust is incorrect, since the Italian judges misunderstood this legal category and confused it with the institute of the simulation. But also the qualification of that trust deeds as simulated has been improper.
The case law, in particular, has qualified as simulated the transfer of the ownership on the trust fund. In order to be simulated, however, the transfer of ownership to the trustee, should be followed by a counter declaration stating that the settlor did not really want to transfer the ownership to the trustee.
But this is not what happens with trusts with reserved powers to the settlor. In these cases, in fact, settlors want to transfer the ownership to the trustee and to create the segregation thanks to the trust. The central element of the simulation here is missing.
100 Settlors' creditors, however, have other legal protection instruments in order to ensure their credits, such as the revocatory actions. The admissibility of the limited ownership of the trustee is one of the consequences of the ratification of the Hague Convention.
101 See above note n. 100.
102 See above note n. 99.
103 If the law chosen by the settlor as the one regulating the trust forbids the maintenance of the settlor's control, as it happens in the English system with the requirement of the certainty of intention (see above under paragraph 8), the trust will be void for violation of that rule.
104 It's interesting noting that there is also an American doctrine (F.H. Foster, American trust law in a Chinese mirror," Minnesota Law Review 602 (2010)) that observes that the Chinese trust model, even if it is transplanted, can offer an opportunity to improvement of the American trust law. The Chinese literature "*offers American trust law specialists a unique opportunity to view our own system critically from an outsider's perspective*". Through this analysis, the paper concluded that in a Chinese mirror, American settlors are weak and ultimately irrelevant. American trust law, in this perspective, results out of balance, in favour of trustees at the expense of settlors and beneficiaries. So, the study of Chinese trust law can be used as an example to improve the American trust law.
105 Penner, *The Law of Trusts*, 82. Trust as a structured gift is a device to give the benefits of property to the beneficiaries through the activity of the trustee.
106 As seen above, referring to the settlor's centrality inside the trust.