 Trusts & Trustees, Vol. 29, No. 1, February 2023, pp. 62–78

In depth

Re-exploring the nature of dual ownership in English trusts: a Scottish law perspective

Chi Zhang*

Abstract

Owing to the unique social and historical background, the ownership of trust assets of English trusts is divided into two parts, namely the ownership in common law, which is held by the trustee, and the ownership in equity which is held by the beneficiary. In consideration of the unified ownership principle in civil law jurisdiction, most scholars argued that there is no theoretical compatibility between the common law trust and civil law tradition. This article aims to re-explain the legal nature and economic functions of the dual ownership structure of English trusts by re-considering the origins of the trust in medieval England and comparing the practices of quasi-trust regimes in continental and mixed jurisdictions, and finally this article argues that the success of the Scottish trust in functioning as an equivalent asset management mechanism to the English trust may have provided an answer to the above paradox.

Introduction

Ever since the legal historian F.W. Maitland mentioned regarded the 'idea of trust' as the most significant institutional innovation of England at the outset of last century,[1] the law of trusts has been widely accepted as the most unique but also mysterious legal regime in comparative law scholarship. Based on a series of particular historical factors, the ownership of a trust property is split into two parts: the one is called 'legal title' which is held by trustee, and the other is called 'equitable title' which is held by the beneficiary. Although trusts or quasi-trust regimes have been widely transplanted or created by legal practitioners in both continental and mixed jurisdictions, in an academic sense, the dual-ownership structure of English trusts is still a difficulty for the law scholars out of common law countries. This article aims to reconsider the legal nature of the dual ownership structure of English trusts from a comparative perspective by which the economic advantages in protecting beneficiaries (investors) of English trusts will be illustrated, and then the institutional nature of dual ownership structure will be re-defined resorting to transaction cost economics.

The institutional features of trusts: origins and economic functions

The origins of dual ownership in English trusts

Trust as the most typical legal regime in common law jurisdiction sprung from a series of fortuitous products in medieval English law, the most important of which was the formation of equity system. During the medieval period in England, judicial or legal issues were regulated and organized by a writ system, which means

*Dr. Chi Zhang, Lecturer, Commercial Law, The University of Glasgow. Email: Chi.Zhang@glasgow.ac.uk

1. See Frederic W Maitland, 'Trust and Corporation' and 'The Unincorporated Body' in David Runciman & Magnus Ryan (eds), *State, Trust and Corporation* (Cambridge University Press 2003).

 https://doi.org/10.1093/tandt/ttac113
Advance Access Publication 12 November 2022

that anyone who failed to get the proper writ for a specific type of remedy, any compensation was unable to be granted by common law.[2] As early as the fourteenth century, more and more individuals could not be fairly remedied by the courts. When such unfair circumstances became intolerable, the Chancellor was required by the King's decrees to grant remedies *in personam* to the parties in disputes,[3] which were gradually developed as today's so-called equity in England and Wales. The dual system of common law and equity was not born until the Court of Chancery was established by the fifteenth century.[4]

Most legal historians believed that English trust law originated from *Uses* in medieval ages, which was initially applied by Englishmen for some specific speculative purposes. The most important reason for the emergence of *Uses* is that in the middle ages lords had the right to sub-feu the lands to tenants. In turn, the latter were bound to render a variety of services and 'incidents' to the lords. One of these incidents was a duty to make payment to the superior on succession to the land after the death of a former tenant. To avoid this expense, tenants invented the so-called *Use* by which they alienated the land to a third person who promised to manage the land and pass the benefit of the land on to the heir. As a consequence, the payment of feudal incidents could be prevented.[5] Secondly, as a great number of English knights went off to the Crusades in the thirteenth century, the *Uses* were also applied to maintain the life of the family members of the knights: for instance, the knight vested his estate in land to a trustworthy friend who had to possess the estate in the interests of the knight's family.[6] In addition, in English feudal law only the eldest son was entitled to be the heir; the Englishman could not leave the lands to other offspring by will, therefore, the application of *Uses* made it possible to leave the land to daughters and younger sons of the Englishman.[7] The typical English trust was not developed from medieval *Uses* until 1535 when the Statute of Uses was promulgated.[8]

The trouble with *Uses* or the trust-like relationship is that, under common law, the ownership of the managed estate is fully owned by the 'manager of the property' (or the trustee). Consequently, in the circumstance where the trustee unfaithfully transfers the managed property to a third party, neither the settlor nor the beneficiary could turn to the court for a remedy.[9] On the contrary, equity recognized beneficiaries' interests in the trust property; if the unfaithful trustee breaches the duty under the deed between him and the settlor, the beneficiary would be protected by the equitable remedies.[10] At the same time, the manager (trustee) still obtains the ownership fully under common law. This ownership structure in English law is known as the 'dual ownership structure' between the common law and equity.

In practical terms, on the one hand, since the beneficiary obtains the equitable ownership of the trust property, in principle the beneficiary is entitled to trace the interests in the trust against anyone who obtained the property through the trustee's improper disposition, unless the purchaser is *bona fide* and paid the true value of the trust property. On the other, the trustee obtains the legal ownership of the trust property and once the property is transferred to the trust fund, the trustee is the only party who has the power to dispose or administer the trust property exclusively; neither the settlor nor beneficiary can meddle in the management of trust.

Based on the dual ownership structure, the nature of trust can be construed as follows: first, the beneficiaries' proprietary right of trust assets is a supplementary

2. Jill E Martin, *Modern Equity* (18th edn, Thomason Reuter (Legal) Limited 2008) 6.
3. Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law, Vol. Framework* (Tony Weir tr, 2nd edn, OUP 1992) 194.
4. Frederic W Maitland, 'Trust and Corporation' in David Runciman and Magnus Ryan (eds), *State, Trust and Corporation* (Cambridge University Press 2003) 84.
5. Graham Moffat, Gerry Bean and Rebecca Probert, *Trusts Law: Text and Materials* (5th edn, Cambridge University Press 2009) 37; Zweigert and Kotz (n 3) 195–196.
6. Alastair Hudson, *Understanding Equity and Trusts* (3rd edn, Routledge–Cavendish 2008) 13.
7. Maitland (n 4) 84.
8. Hudson (n 6) 12.
9. Martin (n 2) 8.
10. Henry Hansmann and Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73 New York University Law Review 434, 443–444.

remedy for the loss of proceeds or 'benefits'[11] of trust assets but not for the loss of 'ownership' or control of trust assets. That is to say, the beneficiary's 'equitable ownership' is essentially a proprietary right of the advancement from trust assets but not the property right of the trust asset itself. Secondly, the 'legal owner' of the trust property means that the trustee's management should not be influenced by anyone including the beneficiary, unless the trustee breaches the duties.

The functions of trust law

Fiduciary duty as flexible protection for beneficiaries

It is common that fiduciary duty are widely applied as default rules for cost-efficiently protecting beneficiaries' interests in a trust. In a modern economy, the division of labor in different professions makes it impossible to require market participants to understand all the details, techniques and knowledge in each deal; Particularly in professional financial activities, the complexity in assets management has increased risks and uncertainties in investment. To promote economic efficiency, fiduciary duty rules are developed as default rules in trusts, by which settlors and trustees can accomplish their deals more efficiently.

The fiduciary duty rules automatically provide gap-filling protection in drafting trust agreements. For example, when a settler entrusts capital to a fiduciary for investment, the duty of care requires the person who is acting as a fiduciary to make decisions prudently and the duty of loyalty is aimed at minimizing the conflicts of interest between the trustee and beneficiary. Although some scholars and judges have recently found that in practice investors have tended to agree to waive or at least mitigate the manager's (including trustees, directors of companies, etc.) fiduciary duty by clear contractual clauses in trust deeds for efficiency and flexibility[12] in present UK statutes, they insist on stringently enforcing the trustee's fiduciary duty for protecting public interests as a part of public policy.[13] In fact, the judicial attitude towards this issue reflects that the function of fiduciary duty in trusteeship induces the trustee to perform well by imposing the 'after-the-fact liability' for the failures of the trustee.[14]

In addition, the fiduciary duty in trust law provides a protective mechanism without the beneficiary's or trustor's active monitoring. Firstly, if the beneficiary spends inordinate amounts of time in self-monitoring the trustee, the efficiency of the trust may be reduced. Secondly, the exclusion of the beneficiary's active participating can avoid unprofessional and irrational intervention, which can also cut down the transaction costs in trust fund management.[15] Thirdly, if the transaction security is lodged by instructions in trust deeds or disempowerment, the trustee's managerial power would be overly restricted. By contrast, the fiduciary duty rules can entitle managers to a wide range of power deal flexibly with practical issues in different circumstances.

Bankruptcy remote as firewall against trustees' creditors

Another advantage of trusts is that the partitioning of different assets in a trust fund can better protect the beneficiary's interests from challenges of trustees' personal creditors. First of all, once the trust asset is transferred to a trustee, the ownership of the trust asset is separated from the trustee's personal property, which means that the beneficiary's interests in a trust fund can be protected from the fiduciary's creditors' claim when the trustee goes insolvent.[16] In the case of insolvency,

11. According to the adjudication in *Re C.L.* [1969] 1 Ch. 587, the definition of the term *benefit* in trusts is commonly referred to an 'advancement' for a beneficiary that does not require a financial advantage.

12. See details from the related analysis in practical terms, related cases: *Armitage v Nurse* [1998] Ch 241; *Alexander Forbes Trustee Services Ltd v Halliwell* [2003] EWHC 1685 (Ch).

13. See Financial Services and Markets Act 2000 (FSMA2000), s 253; Pension Act 1995, s 33.

14. Robert H Sitkoff, 'The Economic Structure of Fiduciary Law' (2011) 91 Boston University Law Review 1039, 1043.

15. Ibid., 1041.

16. This point has also been accepted by some EU regulators and scholars who have been trying to draft a Directive on Protected Funds in EU jurisdiction, the bankruptcy remoteness is regarded as one of the basic protection mechanisms of such a protected fund. Sebastianus Constantinus Johannes Josephus Kortmann, David Hayton, Dennis Faber, Kenneth Reid and Jan Biemans (eds), *Towards an EU Directive on Protected Funds* (Kluwer Legal Publisher 2009) 21.

the beneficiary is still entitled to obtain the interest of the trust asset. Second, the principles of bankruptcy remote of trust law also require the trustee to keep the independence between various trust funds that are managed by the same trustee. Specifically, each trust fund should have its own independent account and should never be commingled with other trust funds. As a consequence, even if one of the trust funds becomes insolvent, the creditors have no right to claim compensation from other trust funds.

Similarly, the independence of trust assets is also applicable to the settlor. Once a certain amount of property is entrusted to a trustee, the settlor will have no right to dispose or utilize the trust property on his or her own. Any creditor of the settlor is not allowed to make any claim against the trust property. Generally, the trust property is not regarded as the settlor's heritage: when the natural person settlor dies, the beneficiary can still gain the interests from the trust fund. In the case where the settlor is a corporation, the beneficiary interests in the trust property can also be protected from the settlor's bankruptcy.

Beneficiaries' enforcement against trustees

One of the basic rules in trust law is that the beneficiary is entitled to enforce the trustee duly to manage the trust asset for the beneficiary's interests. By contrast, before the enactment of the Contracts (Rights of Third Parties) Act 1999, the third party in a contract under UK laws was unable to enforce the contracts.[17] Therefore, the English trust historically was and currently is providing more effective enforcement protection of the third party beneficiary than the law of contract.[18] In this term, the law of trust entitles a series of legal powers to the beneficiary to enforce the trustee to fulfil duties properly, namely the tracing right against a third party purchaser and claim right or judicial remedy against the trustee.

On the one hand, in the event where the trustee unduly transfers trust property to a third party, the transferee must be *bona fide* and have supplied a true value as the consideration, otherwise the beneficiary can directly compel the transferee to return the trust asset to the trust fund. This means that even a third party beneficiary is not a contractual party to the trust deed or enjoy a title under property law, he or she can keep the proprietary right in the trust property. The Chancellor's willingness to recognize the beneficiary's enforceability against an outsider is factually protecting 'the beneficiary's (and the settlor's) reliance upon the trustee's promise'[19]; in other words, the enforceability by tracing creates protection for the beneficiary without resorting to the settlor or the trustee. Moreover, the direct tracing right for beneficiaries forces the third party purchaser to ensure that the trustee's disposition of the trust asset is legal and does not amount to breach of trust, otherwise the third-party purchaser will be at the risk of tracing,[20] which can be regarded as another low-cost monitoring mechanism for protecting the beneficiary's interests.

On the other hand, if the trustee breaches his or her duties and infringes on the beneficiary's interest, the beneficiary has the right to require the trustee to make good the losses caused by any breach of trust and return any profit gained from the trustee's misfeasance.[21] In addition, the beneficiary can also request the court to remove the unsatisfactory trustee to avoid further damage to the beneficiary's interests.[22] Specifically, because the trustee obtains powerful control of the trust assets and is conferred to discretionarily determine the utility and management of the trust fund, the trustee's discretion in managing trust assets may cause some potential damages to or reduce the profit for the beneficiary. In these circumstances, the court has the power to restrict the trustee's discretion or even appoint a new trustee to protect

17. Neil H Andrews, 'Does a Third Party Beneficiary Have a Right in English Law?' (1988) 8 (1) Legal Studies 14.
18. Hansmann and Mattei (n 10) 445.
19. John Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 The Yale Law Journal 627, 647.
20. Martin (n 2) 711–745.
21. Moffat, Bean and Probert (n 5) 568–569.
22. Ibid., 154.

the beneficiary's interests.[23] Compared with the third-party beneficiary contract, beneficiaries in trusts can enjoy more direct and effective protection from the judicial system.

The judicial protection for beneficiaries in commercial trusts of England

Duty of care

Unprofessional trustees: ordinary prudent man standard

The duty of care in English case law is not a subject that solely belongs to the law of trusts. Instead, duty of care also exits in tort law, partnership law and company law.[24] As for English trust law, the clarification of the duty of care did not derive until the famous case *Speight v Gaunt* (1883),[25] where Jessel MR set out a practical standard for judging whether a trustee has duly fulfilled the duty of care, namely the 'ordinary prudence' standard. In this case, Gaunt, the defendant, who had no professional investment experience was appointed as a trustee of a family settlement. The beneficiaries instructed the trustee to invest in local government debentures by buying securities at regional stock exchanges. To carry out this instruction, the trustee appointed a stockbroker to manage the trust business. However, the trustee did not know that the stockbroker was nearly insolvent. Finally, the stockbroker presented a forged bought note as evidence that he had successfully invested the trust funds into the securities, but actually the stockbroker had embezzled the trust funds to pay off his personal debts and then vanished. The beneficiaries filed a lawsuit against Gaunt for the breach of fiduciary duty to preserve trust funds, because the trustee did not prudently verify the truth of the bought note.

In brief, the core debate between the Court of Appeal and Chancery was whether the trustee should be unconditionally and absolutely liable for the loss of trust funds through delegation. According to general equitable rules, any defaults by a trustee's agent or delegation will result in liability to the trustee. This is a compulsory rule that may not compromise with any market practice.[26] However, in this case the Court of Appeal did not accept this argument and held that 'if you once arrive at the conclusion that Gaunt was informed by the bought-note that the purchase had been made in that way, there was no obligation on him to make any further inquiry'.[27] The main two reasons for this decision were that first the defendant was not an expert in stock investment and second the strict duty of verification would be too high for him. Actually, in this case the plaintiff had previously known that the trustee was not a professional in investment. Accordingly, he was not entitled to expect performance by the trustee at as high a level as a professional. Consequently, the Court of Appeal held that '[a] trustee investing trust funds is justified in employing a broker to procure securities authorized by the trust and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments', if the legal liability of trustees is stricter than this standard, it would be impossible to employ any trustee to do anything.

Furthermore, commercial transactions were likely to be much more complicated than ever before, which means that the delegation of the employment of agents by a trustee is increasingly common and even inevitable. Moreover, practically any legal rules must give regard to business practice. In this case, if the court stuck to the rule that the trustee must verify every detail in

23. Ibid., 165–166.

24. According to the leading case of British fiduciary law, *Bristol and West Building Society v Mothew* [1998] Ch 1, in a general sense, a 'fiduciary' was defined as 'someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence', whose duty of care should arise when 'there was the requisite proximity between the parties, and there was foreseeability of damage.' The above descriptions of both fiduciary and duty of care have been widely accepted and cited both theoretically and practically in UK commercial law.

25. *Speigh v Gaunt* (1883) 22 Ch. D 727 (CA).

26. Ibid.

27. *Speigh v Gaunt* [1883] 9 App. Cas. 1.

transactions by a broker employed by him, the overly strict verification or supervision duty of trustee may destroy the basic trusteeship in commercial co-operations. In addition, the function of delegation is an amelioration of economic efficiency. If the law requires trustees to verify or supervise all the conducts by the employed agents, economic efficiency will be reduced seriously.

Professional managers: modern expert standard

With the development of professionalism and division of labor in modern business, the 'ordinary prudent man' standard that was commonly applied to unremunerated or unskilled trustees has not been suitable for those fiduciaries with particular skills or qualifications. Differently, a stricter standard was proposed for remunerated and professional trustees, such as solicitors, stockbrokers and real estate managers. In the past, trustees' duty of care mainly referred to an obligation to preserve the value of trust assets and prevent speculative conduct that might cause loss to the beneficiaries. In modern markets, the above 'prudent trustee' standard has been developed and extended, which means that 'trustees were obligated to maximize financial returns to trust funds as well as preserve the capital'.[28]

The leading case regarding duty of care in modern financial investment trusts, *Bartlett & others v Barclays Bank Trust Co Ltd (1980)*[29] shows a standard for judging the duty of care of professional trust corporations. The plaintiffs were the beneficiaries of a trust holding 99.8% shares of a company, Barclays Bank Trust Co., Ltd as the trustee committed to exercise the voting and managerial powers attached to the shareholding on behalf of the plaintiff. Therefore, the trustee would have the controlling interest in the company, but there was no representative of the trust corporation on the board of directors. To raise finance, in 1961 the board announced the policy that the company would invest in the real estate market, although the trust corporation had been advised by a merchant banker that the proposed investment was likely inappropriate. However, the trustee neither made more inquiries nor required the board to provide further information on this investment. One of the projects seriously failed and caused losses to the beneficiary.

Pursuant to the 'ordinary prudent man' standard, in general circumstances, the law does not require a trustee to verify the information provided by a 'trustworthy' party in trust transactions. However, here the court held that a trust corporation was different from an ordinary trustee, as it usually had specialized skills and relatively high-level professional experience in particular businesses. Hence, a trust corporation's duty of care should be higher and stricter than an ordinary trustee. In this case, Barclays Bank Trust Co., Ltd as a professional trust manager 'should not have relied only on information given at annual general meetings of the property company',[30] but ought to have made further consultation of the investment in person for the purpose of prudently safeguarding the interests of the trust. Therefore, the bank had breached the trust and should be liable for the loss suffered by the beneficiary.

Another question is if a trustee holds the majority of a company's shares, what the trustee should do in corporate governance to prevent being regarded as violating the duty of care. In *Re Lucking's Will Trusts* (1968)[31] a trust fund held 70% of a private company's shares and one of the two trustees was employed as one of the directors of the company. However, the business of the company was managed by an executive director but not the trustee director. The executive director wrongfully took £15,000 from the company's bank for personal ends and then went bankrupt, and the money was lost consequently. The trustees were eventually deemed in breach of trust for their failed supervision of the other directors' misconduct in corporate management. Cross J held that in consideration of the trustees that they had held the majority shareholding of the company; in other words, the trust fund was the major

28. Joshua Getzler, 'Duty of Care' in Peter Birks and Arianna Prettoed (eds), *Breach of Trust* (Hart Publishing 2002) 70.
29. *Bartlett and Others v Barclays Bank Trust Co Ltd* [1980] 1 Ch 515.
30. Ibid.
31. *In Re Lucking's Will Trusts* [1968] 1 WLR 866.

interested party in the corporate governance, and the trustee director as the single representative of the beneficiaries should have been involved in managing the company to actively secure the beneficiaries' interests in the company.[32] Although the trustee director may not be an executive on the board, nevertheless, 'he may find someone who will act as his nominee on the board and report to him from time' or 'ought to ensure so far as they can that they have such information as to the progress of the company's affairs as directors would have'.[33] The duty of care rule requires the trustees who hold the controlling interest in a company act responsibly as possibly as he or she can for prevent any misappropriation or unauthorized disposition of the trust assets.[34]

From the above review of a series of leading cases in English trust law, the 'process-oriented' standard of duty of care can be labelled as one of the core features of English trusts. This point means that because the practical standards of fiduciary duty in English trusts were mainly developed from the judicial practices through a long history and in most situations the judges tended to consider the trustees' performance of the process of fund management instead of the rigid standard of the duties nor the result of trust management, thus the boundary of trustee's liability and the standard of performance can be adjusted flexibly in different circumstances and ages.

Duty of loyalty

The rules of profit: conflicts of interest

In early cases that were concerned with the renewal of a lease by a trustee, if the trustee renewed a lease in his or her own name, then he or she might be deemed in breach of duty of loyalty and the profit of the new lease would be judged as the profits from a constructive trust that must be returned to beneficiaries.[35] This rule was gradually developed as a strict rule that a trustee should not make personal secret profit by means of his or her advantageous position in a trust, unless the beneficiaries had expressly authorized such action. The leading case that clarified the rule of profit is *Aberdeen Railway Co. v Blaikie* (1854),[36] in which the judge declared that both the director of a company and the trustee in a trust are the position of a fiduciary who should never make profits by contracting with the company or trust fund.[37] Although it is a case about the director's duty of loyalty in company law, its fundamental statement of duty of loyalty in commercial law is also significantly influential on trustees, especially in commercial trusts. Later, following the approach in the case *Aberdeen Railway*, Lord Wright opined in the case of *Regal (Hasting) Ltd v Gulliver* (1942) that 'if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not investigate whether the other person is damnified or has lost a profit which he otherwise would have received. The fact is in itself a fundamental breach of the fiduciary relationship'.[38] The same attitude towards this issue was also maintained by Lord Hodson's in his opinion in the case of *Boardman and Another Appellants v Phipps Respondent* (1967) that '[t]he proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other

32. Ibid
33. Ibid.
34. In detail, in the above-mentioned *Bartlett and Others v Barclays Bank Trust Co Ltd* (1980), Brightman J specified Cross J's implication of the duty of care in the similar circumstance where a trustee represents a trust fund holding the majority shares in a company as follows: for example, the trustee may require the board to provide the copies of minutes of board meetings and financial statements regularly and inform the main information of each important trading in relation to the use of trust assets.
35. *Keech v Sandford* [1726] Sel Cast King 61; *Knowles Will Trusts, Re* [1948] 1 All E.R. 866.
36. *Aberdeen Railway Co. v Blaikie* [1854] 17 D (H.L.); hereinafter referred to as *Aberdeen Railway.*
37. *Aberdeen Railway* note 38, 20.
38. *Regal (Hasting) Ltd v Gulliver* [1942] 1 All E.R. 378.

person'.[39] Although the case law has established a bundle of strict rules to prevent trustees from making personal profits from the trust, the fiduciary may also be absolved from such obligations in the circumstances where the trust agreement permits a particular form of profit or the authorization has been sought for the profit.[40]

Self-dealing and fair-dealing: no third-party involved

Having considered the rules of conflicts regarding a trustee's managerial discretion, the discussion now shifts to the conflicts of interest in transactions between the trustee and the trust fund or beneficiaries. One aspect of this is the self-dealing rule which aims to regulate the proposed purchase of trust assets by a fiduciary and the other is the fair-dealing principle which confines the fiduciary's purchase of a beneficiary's interests in a trust fund.

The self-dealing rule originally derived from the English case *Keech v Sandford* (1726),[41] in which a trustee was strictly prevented from renewing a lease regarding trust estate in his own name. The Lord Chancellor's basic reason for this verdict was that if the court allowed a trustee to make a deal involving the trust asset with the beneficiary, the trustee was on both sides of the deal, and he or she might hardly act to secure the best price for the beneficiary and himself at same time. This is the reason why self-dealing is commonly banned. The further question is that if a trustee who proposes to carry out a transaction with the trust fund in a fair price, whether such a deal is acceptable. In a series of traditional trust law cases the court tended to interdict any self-dealing regardless of whether or not the dealing price was fair. Again, in *Aberdeen Railway* it was held in the House of Lords that the prohibition of self-dealing between a director/trustee with the company/trust fund was a universal and strict rule regardless of the fairness or unfairness of the price of the deal. In the case of *Re Thompson's Settlement* (1986)[42] the proceeds of sale and rent of a series of certain estates were conveyed to a trust for the interest of the grandchildren of the settlor. The trustees then conveyed the lease of the trust property to the company and partnership in which the trustees were the directors and then the majority shareholders. The court held that although the company and partnership had agreed to pay the rent at a fair market price, the self-dealing rule still strictly prohibited the trustee from putting himself in the position where his duty and interest conflicted. Therefore, the transfer of the lease of the trust property was invalid. In fact, where a trustee makes a deal with the trust fund it means that the trustee will have an advantageous opportunity of knowing the true market value of the trust property. However, the beneficiary as the counterparty hardly gains such information pertaining to the deal; in other words, the trustee may have benefited at the expense of the beneficiary.

The basic reason for prohibiting self-dealings is the unavoidable conflicts of interest between a trustee's private interest and fiduciary duty when he or she is on both sides of any transaction concerning the trust property. By contrast, if a trustee just proposes to make a deal with the beneficiary of the trust, the law fair-dealing rule will apply which commonly limits, but not absolutely excludes such transactions. In the widely cited case of *Tito v Wadell (No.2)* (1977),[43] Megarry V-C held that 'if a trustee purchases the beneficial interest of any of his or her beneficiaries, the transaction was not voidable *ex debito justitiae*, but could be set aside unless the trustee could show that he or she had taken advantage of his or her position and had made full disclosure to the beneficiary, and that the transaction was fair and honest'; in other words, if the procedure of the transaction proposed by the trustee was truly disclosed to the beneficiaries of a trust fund and the price of the deal was demonstrated as not unduly lower than a market price, then the transaction proposed by the

39. *Boardman and Another Appellants v Phipps Respondent* [1967] 2 A.C. 46.
40. Alastair Hudson, *The Law on Investment Entities* (Sweet & Maxwell 2000) 85.
41. *Keech v Sandford* (n 35) 61.
42. *Re Thompson's Settlement* [1986] 2 All E.R. 720.
43. *Tito v Wadell (No. 2)* [1977] 3 All E.R.129.

trustee should be lawful. If the disclosure of the transaction was not given to the beneficiaries, then the transaction would be set aside by the court.

Overall, in English trust law, the biggest distinction between the nature of the fair-dealing and self-dealing rules is that (i) the cases falling within the fair-dealing rule are mostly where the beneficiary is directly involved in the transaction with the trustee, and the beneficiary is fully informed and expressly consents to this, whereas (ii) the cases falling within the scope of self-dealing are mostly where the beneficiary is not normally the counterparty of the transaction and the trustee does not faithfully disclose the information of the transaction, so the beneficiary may not make a fair judgment nor give consent to the deal.[44]

The protection mechanisms of trusts in mixed and civil law jurisdictions

Historically, scholars in civil law countries insisted that any practice of property law must follow the unitary theory of property rights[45] and *numerus clausus*, which meant that in civil law countries (i) any property or estate could only have one sole owner and (ii) the content of ownership should only be stipulated by statutes but not discretionarily determined or contracted by the parties[46]; in other words, the civil law entitled the 'owner' of one property in Roman law countries to exercise his or her property rights exclusively in lawfully possessing, using, disposing and profiting from the property without any restriction by any other persons. As a consequence, the division of ownership between beneficiary and trustee in English trusts became a challenge to continental law systems. In trust law, once a settlor transfers the asset to a trustee, the trustee will obtain the legal title over the trust assets. However, the trustee can only manage trust assets in accordance with a trust deed, rather than dispose of the asset on behalf of himself or herself. In English trust law, if a trustee unduly disposes of trustee assets, the beneficiary has the right to trace the property from the third party. Moreover, in a general sense, beneficiaries are not allowed to intervene in fund management. This particularity is also considered as unacceptable that if the beneficiary has ownership of trustee assets, he or she should not only have a tracing right, but also the right to control the management of the property, whereas English trust law avoids beneficiaries away from the trust management in most circumstances.

It Is well known that the systemization of fiduciary rules in the Anglo-American legal system was developed from not only judicial practices, but also the dichotomy of equity and common law. By contrast, the abovementioned legal structure in English trusts never existed in civil law jurisdictions. To a large extent, the dual ownership in English trust law is the main incompatibility with the legal institutions in continental law family. In consideration of the high level of flexibility of the trust structure in financial investments, more and more civil law countries attempt to import business trusts into their domestic private law. To remove the incompatibility between the two legal traditions, different countries invented different approaches based on their own legal traditions to construct equivalent functions for protecting beneficial parties.

The protection mechanism of the trusts in mixed jurisdictions

Scotland: segregation of the trustee's patrimonies

As one of the typical legal regimes in common law countries, Scottish trust law displays how the advantages of trusts can be reserved in a civil law system. Historically, the origins of Scottish trusts can be traced to the seventeenth century by common law rather than by legislation.[47] As discussed above, the dilemma of

44. Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010) 138–139.
45. Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 3 International Review of Law and Economics 3, 9.
46. Avihay Dorfman, 'Property and Collective Undertaking: The Principle of Numerus Clausus' (Summer 2011) 61 (3) University of Toronto Law Journal 467.
47. George L Gretton, 'Trusts Without Equity' (July 2000) 49 (3) The International and Comparative Law Quarterly 599, 619.

importing trust law into civilian legal jurisdictions is that there is no counterpart in the civil law tradition as the division of ownership between common law and equity. As a result, when the trustee unduly disposes of the trustee asset and causes a loss to the beneficiary, the beneficiary is unable to exercise the equitable tracing right to recoup from the third party. Accordingly, in Scots trust law, the ownership of trust property is always in the hands of the trustee and dual ownership is never accepted.[48] The beneficiary's right is a kind of right *in personam*, but not a right *in rem*[49]; in other words, the function of the fiduciary duty regime in English case law is replaced in Scots law with a kind of remedial power against trustees without an equity system.

In terms of the bankruptcy remoteness of trust assets, Scottish trust law also forms a ring-fenced fund that can separate the trust assets from the trustee's private creditor's claim. Although there is no dual ownership structure in Scottish trusts, the separation of the trustee's patrimonies can provide an explanation for this phenomenon. The trustee of a Scottish trust fund has two separate patrimonies, the one is his or her private patrimony, which is available to his or her private claimant, the other is the trust patrimony that should only be liable for trust liabilities.[50] Therefore, in the circumstance where a trustee's creditor claims against the trustee, the trustee can only use his or her private property to repay the debt, but the trust assets will not be claimed. Additionally, if the trustee mixes the two kinds of patrimonies and the liabilities incurred by the trust patrimony, the beneficiary is entitled to require the trustee to transfer the corresponding amount from his or her private patrimony to the trust patrimony.

Because the trustee of a Scottish trust is the exclusive owner of the trust assets, the trustee may exercise the discretionary power to transact the trust fund with third parties. The beneficiaries will be at the risk of the trustee's breach of trust. The separation of the trustee's patrimony can also provide enforceability by the beneficiary to protect the trust interests from the trustee's misconduct. Based on the principle of contract, transactions between a trustee and third parties are lawful, because the trustee is the only owner of the trust assets and 'a contract cannot be set aside on the ground of breach of duties'.[51] If the trustee breaches the duties to transact the trust property with a third party, however, no matter whether or not the trustee discloses the trusteeship to the counterparty, the counterparty can only claim for the liabilities against the trustee's private patrimony but not the trust patrimony.[52]

In fact, the nature of the remedial mechanism in Scottish trust law is an allocation of liabilities between the trustee's personal and trust patrimonies. On the one hand, the dual patrimony structure in Scottish trusts effectively achieves economic functions of English trusts by establishing a 'transferring platform' between the liabilities of trustee's private property and the trust property for striking a balance between the protection of third parties and beneficiaries' interests. On the other hand, the protective mechanism in the Scottish legal system also reserves the unified ownership principle in the civil law tradition which reduced the costs in legal transplantation. For example, the beneficiary cannot directly manage the trust assets, because he or she has no proprietary right to the trust fund. In this way, the independent management of Scottish trusts is maintained by excluding the intervention of the beneficiary.[53]

48. Ibid., 619.
49. Ibid., 619; *Inland Revenue v Clark's Trustees* [1939] S.C.11.
50. Kenneth Reid, 'National Report for Scotland' in Kortmann, Hayton, Faber, Reid and Biemans (eds) (n 16) 263–264.
51. Ibid., 266.
52. Ibid., 266–268.
53. In this regard, a famous case in Scottish trust law can illustrate how the divided patrimonies mechanism may decrease the intervention by beneficiaries: in the case of *Armour v Glasgow Royal Infirmary* ([1909] S.C. 916), the trustee of a testamentary trust wrongly paid the trust interests to the defendant, namely Glasgow Royal Infirmary, then the pursuers raised an action against the wrongly paid beneficiary and added the trustee as the additional defendant. The defendant argued that owing to the absence of equity in Scottish law, the legal relationship between a third party and the beneficiary could not be a kind of relationship in property law, therefore, the beneficiary could only sue the trustee, instead of the trustee's debtor. Lord Skerrington held that 'the testamentary trustees have been called as defenders, and they concur with the Infirmary in maintaining that the money was properly paid, and that the pursuers are not entitled to insist on its repayment. In these circumstances, I think that the pursuers have a good and sufficient title to maintain this action to the effect of demanding that the money shall be repaid to the trustees'; in other words, the beneficiary as an interested person in a trust has the right to cancel an unlawful transaction and then the asset can return to the trust patrimony, but the beneficiary is not allowed to directly trace the trust assets from a third party.

Quebec: real right nihilism

Another mixed jurisdiction in common law countries is Quebec in Canada where trust law was also adopted from the common law system but applied on the basis of continental law. Quebec has been a colonial province of France since the mid-seventeenth century as a result of the Seven Years' War between Great Britain and France (1756–1763). Quebec was ceded to the British Empire. The transplanted French civil law in Quebec was reserved through the promulgation of the Quebec Act of 1774,[54] which was importantly regarded as the fundamental statute of Canadian politics. The Constitution of 1867 further established a federal system in Canada, the French civil law system in Quebec has been permanently admitted by the Canadian constitution.[55]

According to the Civil Code of Québec 1994,[56] a trust is defined as: 'A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer',[57] which means that the trust property belongs to neither a trustor nor a trustee. Moreover, under Quebec Civil Code, the legal nature of a trust is regarded as 'a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right'[58] and based on the French civil law tradition, a trust fund is established by (i) a contract/will between a settlor and a trustee and (ii) the acceptance of the trustee(s).[59] In sum, it can be concluded that the uniqueness of a Quebec trust is that the 'dual ownership' has been avoided and the key issue of a trust is the trustee's managerial obligations, which are commonly based on contractual agreements between the trustor and trustee.[60]

The remedies for beneficiaries under Quebec trust law are quite similar to Scottish trusts. Because the Quebec Civil Code repudiates any party's ownership of trust property, the remedy for a beneficiary cannot be a tracing right that is only valid based on an existing property right. Furthermore, since the law deems the relationship between a settlor and a trustee as contractual, the settlor is not allowed to trace the trustee property as well. Pursuant to s 1290 of the Quebec Civil Code, however, any of the settlor, beneficiary or even an interested third party of a trust is entitled to take action against the trustee and compel him or her to fulfil the obligation under the trust contract. As a consequence, any undue disposition of the trustee assets by a fiduciary must be recovered or corrected by the fiduciary; in other words, the Quebec civil law system has reorganized the legal relationship in trusts focusing on the trust property only, and both the settlor and beneficiary can exercise the claim right against the trustee to secure trust interests.

South Africa: a contract regulated by the court

South Africa was governed by the Netherlands from the mid-seventeenth century until the early nineteenth century when the British Empire took over power from the Dutch.[61] Before the arrival of the British, the legal system in South Africa was mainly organized according to the principles of the Dutch law. The legal transplant of trusts in South Africa appeared as early as the 1800s. However, the legal features of today's South African trusts have been developed side by side with Dutch regimes[62] and differ from the typical English trusts. At present, the basic principles of South African trusts are outlined in the Trust Property Control Act 57 of 1988.[63]

54. Nancy B Foulds, *Quebec Act* <http://www.thecanadianencyclopedia.com/en/article/quebec-act/>, accessed 27 March 2016.
55. Patrick Malcolmson and Richard Myers, *The Canadian Regime: An Introduction to Parliamentary Government in Canada* (4th edn, University of Toronto Press 2009) 58–65.
56. The full text of the official version is available at <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html>.
57. Section 1260.
58. Section 1261.
59. Sections 1263, 1264.
60. Maurizio Lupoi, *Trusts: A Comparative Study* (Simon Dix tr, Cambridge University Press 2000) 288.
61. Ibid., 297.
62. Ibid.
63. Hereinafter the 'TPCA 1988'. The full text of this statute is available at <http://www.justice.gov.za/legislation/acts/1988–57.pdf>.

The definition of a South African trust is different from an English trust in that the trust is a kind of legal 'arrangement' that is mainly determined by trust instruments.[64] The ownership of trust assets can be transferred to either a trustee or a beneficiary.[65] In the first circumstance the trustee is required to manage the trust property in the interest of a beneficiary, whereas in the latter circumstance, although the ownership of trust asset is directly possessed by the beneficiary, the trust assets can only be controlled by a trustee who must manage the trust asset in accordance with the trust instruction.[66] Moreover, a trust under South African law is revocable, unless the trust arrangement is accepted by the beneficiary.[67] Therefore, it can be seen that the legal nature of a trust in South Africa is based on the law of contract.

With respect to the segregation of trust assets, however, South African law does not prioritize the interests of beneficiaries. In a case where the trust property has been (i) unlawfully assigned to a *bona fide* third party by the trustee or (ii) claimed by the trustee's private creditors, if the ownership of trust assets is in the hand of the beneficiary (a *bewind trust*), the beneficiary can get the assets back because he or she is the owner of the trust assets, whereas if the beneficiary is not the owner of the trust fund, the beneficiary can only file an action against the trustee for remedy.[68]

As regards the protection mechanism for beneficiaries' interests, the South African law entitles a wide range of powers to the court. Firstly, any trust instrument must be registered with a Master appointed by the Supreme Court of South Africa[69] who has the duty and power to monitor the management of the trust and intervene in certain particular situations. In addition, before a trusteeship commences, the appointment of a trustee must be approved by the Master[70] and the property of the trust assets must be registered with the Master.[71] In this way, the trust asset can be segregated from the trustee's private assets.[72] Secondly, according to the same legislation, in the application to the Master or any interested persons in the trust fund, the court is entitled not only to adjust trust provisions of fund management, but also to remove a delinquent trustee[73] if the trust instrument is regarded as inappropriate for reaching the trust purpose or the trustee has breached his or her duty to beneficiaries. In sum, it can be seen that under the South African legal system, the protective function of fiduciary duty can also be substituted by a strong judicial power without an equity system.

The protection mechanism of the trusts in civil law jurisdictions

France: the protection of trust purposes

In continental Europe, the Roman the situation is different: the legal tradition has set up a barrier to import of trust law in civilian countries. Although Quebec civil law was transplanted from France, however, the import of trusts into the French Civil Code was much later than Quebec. Before 2007, French lawyers still insisted that the division of ownership in English trusts were incompatible with the civil law inheritance. In consequence, any trust-like regimes in France were addressed by analogy, namely the 'fiduciary relationship' in testament or contract of mandate, a testamentary executor or an agent under contract would be regarded as trustees; in

64. TPCA 1988, s 1.

65. This may be the most unique point of South African trusts which reflects the influence of Roman-Dutch law. In English trusts or even other civil law trusts such as Scottish trusts or French *fiducie*, the ownership of trust assets is never in the hands of beneficiaries. By contrast, the South African law makes it possible. In the Dutch trust-like legal regime (*bewind*), beneficiaries obtain the ownership of the fund assets, the trustee (*bewindvoerder*) is required to manage the fund on behalf of beneficiaries. Thus, in fact, the trustee acts as an agent of the beneficiary. Because the *bewindvoerder* is not the owner of the trust assets, the recourse of trustee's creditors cannot be taken against the trust assets. Sebastian Kortmann, Dennis Faber and Jan Birmans, 'National Report for The Netherlands' in Kortmann, Hayton, Faber, Reid and Biemans (eds) (n 16) 344–345.

66. TPCA 1988, s 1.

67. Herman Robert Hahlo, 'The Trust in South African Law' (1961) 78 The South African Law Journal 195, 204.

68. Lupoi (n 60) 300–301.

69. TPCA 1988, s 1.

70. TPCA 1988, s 6.

71. TPCA 1988, s 11.

72. TPCA 1988, s 12.

73. TPCA 1988, ss 13 and 20.

other words, under traditional French civil law, there was neither a separate rule of 'fiduciary duty' nor a uniform legal system dealing with the trust-like issues.[74] By 2007, a French legal term *fiducie* as a kind of independent institution was introduced into the French Civil Code, this was regarded as the first independent legal institution that established fiduciary rules in French legal system.[75] According to s 2011 of the French Civil Code, in a *fiducie* the settlor's asset is transferred to a fiduciary who must separately hold the entrusted assets for the benefit of a third person.[76] In addition, a *fiducie* must be established by contracts or statute[77] and there is no expression of the division of ownership between a trustee and beneficiary.[78]

Accordingly, in French law the remedial approaches for beneficiaries are also formed on the basis of obligation law. For instance, French law requires that any natural person trustor must assign at least one protector who will be responsible for securing beneficiaries' interests by supervising the trustee's conducts. As a result, the relationship between a protector and a settlor is contractual, the range of protector's supervisory power will depend on the trustor's authorization in the contract.[79] In the situation of breach of duties, French *fiducie* law allows the trustor to enforce the fiduciary to perform his or her duties on behalf of the beneficiary. Importantly, the French law also entitles the protector to judicial power, which means that the protector may exercise the power against the trustee for guaranteeing that the trustor's will can be properly satisfied.[80] In terms of the separation of trust property, if the trustee unduly disposes of the trust assets and incurs liabilities for the trust fund, the third party generally has the right to claim against both the trustee's private and trust properties, unless the third party was aware of the trustee's limited power to dispose of or sell the trust assets.[81]

The above shows that in French law the rules of fiduciary duty and beneficiaries' right to claim have been integrated into the traditional obligation law. Therefore, it is clear that between the interests of the third contractual party and beneficiary, the French law tends to prioritize the former one and the beneficiary is not allowed to directly trace the trust assets from the third party. Compared with the legal reform in the Quebecan civil law, on the one hand, based on a similar tradition, the 'trust laws' in both jurisdictions do not entitle the beneficiary with any 'property right' or ownership. Therefore, the beneficiary may not directly exercise a remedial power to trace the property; in other words, the beneficiary right in France and Quebec is still a kind of right *in personam*, which can only be realized by compelling the trustee to fulfil his or her duty. On the other hand, however, under French trust law the trustee is the owner of the trust asset, but the Quebecan law denies any concept of an owner of trust assets.

Germany: entitles settlors with strong contractual power

German private law is well known for its systematization. However, the 'trust' or 'trust-like' regime in Germany was not organized in separation. On the contrary, the German trusts, that is, the so-called *Treuhand*, was a special legal concept that was summarized from a series of judicial activities of the German courts and academic studies of traditional German laws since the nineteenth century.[82] The definition of *Treuhand* is a fiduciary relationship in which the settlor entrusts certain rights to a trustee (*Treuhänder*) and enables the trustee to exercise pre-agreed rights in the beneficiary's (*Treugeber*) interests.

74. Jean C Goldsmith, 'Trust in France' (1996) 2 (2) Trust and Trustees 5.
75. Pierre Crocq, 'National Report for France' in Kortmann, Hayton, Faber, Reid and Biemans (eds) (n 16) 99.
76. Ibid., 106.
77. James Douglas, 'Trusts and Their Equivalents in Civil Law Systems' (2013) 13 (1) QUT Law Review 19.
78. Gary Watt, *Trusts and Equity* (6th edn, OUP 2014) 27.
79. Martin Gdanski and Tara Pichardo-Angadi, 'The French Law on *Fiducie* and Its Application to Banking and Finance Transactions' (2007) 22 (8) Journal of International Banking Law and Regulation 434.
80. Douglas (n 77).
81. Crocq (n 75) 112.
82. Jing Sun, 'An Introduction to German Trusts Law' (2004) 1 Journal of Comparative Law 85.

In terms of the bankruptcy remoteness of the *Treuhand*, although the ownership of trust assets is assigned to the trustee *(Treuhänder)*, the trust assets under a *Treuhand* are generally not protected by a ring-fenced fund. In the case where the trustee goes bankrupt, the creditor of the trustee can obtain the access to the entrusted assets.[83] Where a trustee (*Treuhänder*) unduly disposes of trust assets or assigns trust assets to a third purchaser, the beneficiary is entitled to be compensated by suing the trustee. However, the transaction between the trustee and the third party is still valid[84]; in other words, if the trustee abuses his or her power to sell or dispose of the trust assets, the beneficiary's remedial power is only *in personam* instead of exclusive right *in rem*.

In respect of the beneficiary's (*Treugeber*) right, similar to the *fiducie* in France, German trust law also entitles the settlor to active powers in the management of *Treuhand* and the duties or rights of a trustee are also more flexible on the basis of contractual autonomy. If the beneficiary has been added as a contractor into a trust deed in advance, the beneficiary will have a power against the trustee and compel the trustee to fulfill the duties agreed in a contract. However, if the beneficiary is not a contractual party in the *Treuhand* contract, the beneficiary will not be entitled to any direct remedial power and can only obtain a remedy or compensation by resorting to the settlor. In addition, the Chapter of Delegation law (*Auftrag*) of the German Civil Code is different from English trusts in that any adjustment of German trust fund management should be approved by the settlor,[85] which means that the settlor can obtain a contractual right to influence the trustee's management.

In sum, it can be seen that the remedial regime for beneficiaries' trust interest under German civil law is organized according to the principles of contract. As a result, where trustees breach their fiduciary duty, only a contractual party can exercise a right of claim to obtain a remedy and protect the beneficiary's interests. In the meantime, the trustors' contractual power of intervention may have substantially removed the principle of independent management in trust law. The incompatible civil law system in German law also fails to adopt the concept of 'fund patrimony' to keep the trust assets away from the claims of the trustee's private creditors. Therefore, the regime of *Treuhand* under German law can hardly provide a protection mechanism and efficient governance structure for the beneficiaries' interests that are equivalent to English trusts.

Legal and economic comparison of protection mechanisms for beneficiaries

The comparative analysis above shows that in the solution to the agency problem in trusts or trusteeship, the legal rules of fiduciary duty differ from one jurisdiction to the next. What is useful for legal practice is to discover the function of the fiduciary duty rules for business trust investments. In terms of English business trusts, the basic principle is that (i) for trustors/beneficiaries, prior to the establishment of a trust fund, trustors/beneficiaries will be required to carry out necessary investigation of the trustee's professional skills and commercial reputation in specific business and (ii) if a settlor rationally entrusts a fiduciary to carry out an investment on behalf of a beneficiary, the trustees are obliged to manage the trust property diligently and prudently in the best interest of beneficiaries, and in the circumstance of a breach of trust, the law will compel the trustee to be liable for the loss to the beneficiary.

From an economic point of view, the English case law has unconsciously admitted the 'principle of the rational man' in a free market. The consequence is that any investor of business trusts should be aware of, and liable for, the risk in the market. Correspondingly, if a 'rational trustor' is defined as an investor who has prudently considered the potential risk before making an entrustment and rationally believes that the trustee can competently manage the funds, then it may be true that

83. Dieter Krimphove, 'National Report for Germany' in Kortmann, Hayton, Faber, Reid and Bieman (eds) (n 16) 117.
84. Ibid., 117–119.
85. German Civil Code, s 665 and 675. The English version is available at <http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf>.

the nature of the fiduciary duty rules is a legal mechanism that aims to save transaction cost of (i) irrational investment (the standard of fiduciary duty depends on what principal's expectation of a trustee's performance is) and (ii) contracting (fiduciary duty rules as default rules) and (iii) supervising the agent's performance (fiduciary duty rules act as deterrents to the fiduciary).

In contrast, owing to the lack of an independent system of equity, the trust laws in civil law jurisdictions are primarily established on the basis of obligation law or contract law. As a result, most civil law countries tend to (i) establish a dichotomy between trust patrimony and trustee's private patrimony (Scotland/Quebec); (ii) entitle settlers to direct intervention power (Germany) or (iii) compulsorily employ an external protector (France/South Africa) for the purpose of securing the interest of beneficiaries. In brief, the transaction costs of the civil trusts in various jurisdictions can be measured by two factors, namely (i) who is entitled to intervene in the trustee's management or claim a remedy; and (ii) at which juncture(s) would the intervention be allowed:

Table 1 indicates that in order to secure the interests of beneficiaries, most civil law or mixed jurisdictions' laws tend not only to restrict trustees' discretionary power in the process of trust management, but also entitle both beneficiaries/trustors or external protectors to direct intervention powers. Consequently, on the one hand, fiduciaries in civil law countries have to compromise with trustors/beneficiaries' requirements in trust deeds to reduce unnecessary compliance risk. On the other hand, because the laws legislate that the duties and rights of trustees are basically determined by trust contract, trustors or beneficiaries will be motivated to argue for more direct intervention powers in the process of trust management.

To put it differently, it is clear that fiduciary duty rules in English trusts not only provide a series of expected and practical legal remedies for beneficiaries, but also impose substantial regulation on fiduciaries to reduce moral hazard. In fact, the economic effects of English trusts can be summarized as follows: (i) the exclusion of the trustor's/beneficiary's intervention in trust management reduces the cost of negotiation for both trustors/trustees and avoids the irrational decision-making by unprofessional principals; (ii) the strict deterrence of fiduciary duty rules make it unnecessary to introduce external monitors to supervise trustees' conduct; and (iii) the 'process-oriented' standard of fiduciary duty rules effectively maintain the flexibility and efficiency of fund management, which can be regarded as the most advantages of English trust.

It can be concluded from the above comparative analysis that although the dual ownership in English law does not exist in other jurisdictions, there are still some cost-efficient approaches to introduce the protection mechanism of English trust law into Roman law traditions. The related experience in Scottish trusts offers a costless model for keeping the independent management by professionals and effectively regulating the agent's behavior. In a civil law or mixed jurisdiction, the legal nature of the so-called equitable right should be regarded as a kind of *in personam* right, which is mainly a remedial power for the beneficiary. At the same, the ownership of trust assets must be completely conveyed to the trustee who is expected to remove the beneficiary's control of the trust assets. Meanwhile, unless the third party or trustee's private creditors are *bona fide*, the trust assets can be protected from the claims of the above persons and the beneficiary has the right to claim against the trustee in court.

At the same time, the judicial practices of trusts in England has provided a practical standard of manager's legal liability in different circumstances and some cases also show that for rational investors, the rational expectation of a trustee's performance and reasonable market risk is required; in other words, the fiduciary duty rules should reflect not only the legal requirement and regulation of a trustee, but also the basic awareness of commercial risk of an investor who is intending to engage in trust investment, both of which should always be the fundamental principles of any business legal systems.

The nature of the dual-ownership of English trusts

Compared with the strict logic construction of civil law theory in the continental jurisdiction, the so-called 'dual-ownership structure' in English trusts

Table 1: The transaction costs of the remedial mechanisms of trusts in different jurisdictions

Jurisdictions	Actors of intervention	Time-points of intervention
England	Beneficiaries	Breach of trust
Scotland	Beneficiaries	Breach of trust
Quebec	Trustors/Beneficiaries	Breach of trust
South Africa	Interested Persons/Protectors	Breach of trust/Management
France	Trustors/Protectors	Breach of trust/Management
Germany	Trustors/Beneficiaries	Breach of trust/Management

coincidently emerged from particular history background and social demands. From an economic perspective, the above study has shown that the primary economic advantage of English trusts is the full separation of ownership and control between the trustee and beneficiary. In other words, the governance and decision-making process of a trust fund is exclusively determined by the fiduciary without intervention from other parties. Therefore, the costs of governance inside a classic trust fund is cost-efficient. Similarly, it has been displayed that the Scottish court also excluded the intervention power of the trustee in fund management, which achieved similar institutional efficiency in professional management as that in English trusts.

In the circumstances where the trustee has illegally transferred the trust property to a third, Scottish judges did not allow the beneficiary directly trace back the trust property itself, instead, the beneficiary is empowered to directly trace the fruit of the trust property. Simultaneously, the trustee will be enforced by Scottish court to fulfill his/her fiduciary duties, therefore the legal ownership of trust property must come back to the trustee. Inspired by such judicial practice of Scottish trust law, it is clear that the nature of the 'equitable title' held by the beneficiary can be construed as 'the ownership of the fruit of the trust property', and the fiduciary holds the ownership of the trust property itself.

From the perspective of remedies, the following fact in legal practice can also support the above idea of the dual-ownership of English trusts. It is a general principle in civil law that legal fruits are fungible, hence any reasonable consideration paid by a *bona fide* third party means that the value of fruit of trust property has been maintained, and then the beneficiary's tracing right will be deprived by the law.

Finally, common sense also reminds us that if we always consider the 'dual-ownership' as a undividable right as a whole of the trust property, it means that 'the trust asset is mine but indeed it is never mine', because neither the fiduciary nor the beneficiary holds a complete proprietary right of trust property. This must be ridiculous and troublesome in people's economic life in reality. Instead, if we shift the perspective from 'subject' to 'object', that is to say, dividing the proprietary rights of trust asset into (i) the interest of trust property itself and (ii) interest of any fruit of trust property, the dual-ownership can be compatible with both common law and civil law systems.

Conclusion

The debates of the legal nature of the separated ownership structure of the English trust have never been terminated by legal comparatists from both common law and continental jurisdictions, the core problem of this topic is the negligence of its inherent economic functions in protecting the residual claim of beneficiaries. The nature of a trust or investment fund, indeed, is an institutional creation for asset management which is built up on a basis of high level separation of ownership and control. This article reviews and compares the economic structures of English trusts and quasi-trust regimes in both continental and mixed jurisdictions, by which the legal nature of the dual-ownership of English trusts can be redefined as: the so-called 'equitable title' of trust beneficiaries is never a kind of ownership of trust property itself, but indeed, it is the beneficiary's exclusive ownership of the fruit of trust property. In such a way, the debate and confusion of the dual-ownership of English trusts may be sorted across the legal academia in different legal traditions.

Dr Chi Zhang *teaches corporate & financial law at School of Law, The University of Glasgow. His research interests include corporate law, commercial trusts, venture capital and sustainable finance.*