

## Chapter 2

# Trust Law of China and Its Uncertainty Regarding the Location of Ownership of Trust Property

**Abstract** This chapter starts with an observation and description of the historical background of Chinese trusts, which is essential to understand why it was necessary for China to enact the trust law in 2001. In Sect. 2.1, it firstly describes the development and problems of trust and investment companies in modern China; and then examines the reasons for the need of trust industry in China before the enactment of the trust law; it also explains why the Chinese legislature considered the trust law as a necessary solution to the further development of trust industry; and finally it describes the legislative procedure of the trust law in China, showing the disputes among legislators during the legislative procedure. In Sect. 2.2, it moves on to outline the origin of trust law in common law system, and the recent trend in the reception of trust in a global context, and then discusses the conflicts between the concept of “trust” and conventional way of thinking by lawyers of civil law jurisdictions. Section 3 of this chapter focuses on Article 2 of Chinese trust law, explaining the practical problems accompanied with it.

As is well known, trust law has long been considered by scholars as one of the major features distinguishing the common law systems from the civil law systems.<sup>1</sup> The law of trusts originated in the England. This mechanism has greatly facilitated the economic growth in the modern world, especially commercial trusts (such as securities trusts, fund trusts, and real estate trusts) contributes a lot to the development of financial markets in developed counties.<sup>2</sup> In civilian jurisdictions, there have emerged trends in the reception of trusts. By the year 2000, except for the main common law jurisdictions (such as England, US, Canada, Australia, Hong Kong, Singapore, India), up to 53 jurisdictions in the world have laws expressly or impliedly providing for the trust, and the number is going up.<sup>3</sup>

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<sup>1</sup>Hansmann and Mattei (1998), p. 436. See also Fisher (1911), pp. 271–272. The renowned English historian Maitland said of trust: “If we were asked what was the greatest and most distinctive achievement performed by Englishmen is the field of Jurisprudence, I cannot think that we could have any better answer to give than this, namely, the development from century to century of the trust idea”.

<sup>2</sup>See Graziadei et al. (2005), D’Angelo (2014), Schwarcz (2003).

<sup>3</sup>Waters (2006), p. 180.

China introduced the concept of “trust” around a century ago,<sup>4</sup> though this concept was not generally implemented in Chinese trust practice.<sup>5</sup> Trust institutions faced problems in doing business during the development of Chinese trust industry. For example, among the problems are: the disorder of management of trust institutions, the shortcomings of company internal control, the common practice of unlawful management of property, the insufficient quality of the capital and the huge potential risks, etc.<sup>6</sup> It is considered by Chinese scholars that such problems were partially caused by the fact that the concept of trust was not generally implemented in the practice, because the trust institutions were simply utilized as a tool for financing for the local governments,<sup>7</sup> without developing corporate governance.<sup>8</sup> China enacted the Trust Law in 2001 (No. 50 of 2001), the year when China entered into the WTO, with the expectation to regulate the trust industry and to facilitate economy growth of China.<sup>9</sup> The Trust Law was expected to provide new ways of business transactions which cannot be achieved through other transaction structures, and create increased business opportunities for both domestic and foreign investors.

However, because of the possible or actual tension between the concept of the common law “trust” and the indigenous civil law regimes (such as the possible conflict between the concept of “dual ownership” and “absolute ownership”),<sup>10</sup> scholars in civilian jurisdiction have often endeavored to find solutions for theoretical and technical problems when introducing trust law. These problems in the understanding of lawyers of civil law jurisdictions include the absolute nature of ownership; the doctrine of *numerus clausus*; the necessity of formality and public notice for a right to be enforceable against third parties; and the existence of rules in civil law jurisdictions that are applicable to the trust scenario but yield different results; the absence of some key trust incidents in indigenous civil law (such as the duty of loyalty).<sup>11</sup>

Chinese Trust Law also faces difficulties in integrating trust principles into its own legal regimes based on conventional civil law framework. Among others, Article 2 of Chinese Trust Law has given rise to hotly debate regarding “the location of ownership to trust property.” Chinese law practitioners are not much concerned with such theoretical conflict, because currently trust properties in China are almost money.<sup>12</sup> In few cases, the settlor sets a trust on properties (such as real

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<sup>4</sup>There are scholars arguing that China has its own origin of the “trust” in ancient times, but the trust industry in China is basically based on the concept of “trust” originated in the UK.

<sup>5</sup>Wang (2002), p. 285.

<sup>6</sup>Wang (2002), p. 286.

<sup>7</sup>In this context, local governments usually refer to the governments of Chinese prefectures.

<sup>8</sup>Wang (2002), p. 285.

<sup>9</sup>Wang (2002), p. 285.

<sup>10</sup>The concept of “dual ownership” and “absolute ownership” will be explained in Sect. 3.1.

<sup>11</sup>Specific explanation on each issue will be illustrated in this chapter.

<sup>12</sup>According to Chinese law, the ownership of money is held by the person or legal entity that possesses money.

estates) that need registration, however, according to Chinese practitioners, trusts on such properties that need registration are emerging and will develop fast in the near future in China.<sup>13</sup> Since China has not enacted registration rules for trust property, law practitioners in China might face difficult to deal with the issue on the location of the ownership of trust property.

## 2.1 Background of Chinese Trust Law

### 2.1.1 *The Development and Problems of Chinese Trust Business Before the Enactment of Trust Law*

Trust business in China started with the emerging trust and investment companies, which mainly did commercial trust business. Trust and investment companies were introduced to China more than a century ago, but they were abolished for nearly 30 years after the foundation of the People's Republic of China in 1949.<sup>14</sup> It was only since 1979 when the Reform and Open Door Policy was adopted that trust and investment companies were re-established in the wake of China's financial reform.<sup>15</sup>

At the early stage of the Reform and Open Door Policy, the Chinese financial system was reformed by the government, with the attempt to cast off the limitations stemming from the Chinese traditional financial system<sup>16</sup> and the "planned economy", and to facilitate the development of market economy.<sup>17</sup> In a planned economy, a central authority, usually a government agency, formulates a plan in which decisions regarding production and investment are embodied. Since 1979, the planned economy system was collapsed by actions of the government, and developed towards the market economy. In a market economy, it is generally

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<sup>13</sup>Reference to the interviews the author conducted with Chinese citizens, as explained in Chap. 5.

<sup>14</sup>There were political reasons for this phenomenon, after the foundation of People's Republic of China in 1949, the Chinese government launched anti-capitalism campaigns. For example, the Cultural Revolution (文化大革命) in China has had immense negative influence on the development of trust and investment companies.

<sup>15</sup>Gebhardt and Hanisch (2002), p. 1.

<sup>16</sup>See Allen and Qian (2014). "After the founding of the People's Republic of China in 1949, all of the pre-1949 capitalist companies and institutions were nationalized by 1950. Between 1950 and 1978, China's financial system consisted of a single bank—the People's Bank of China (PBOC). This bank was owned and controlled by the central government under the Ministry of Finance. It served as both the central bank and a commercial bank, controlling about 93% of the total financial assets of the country and handling almost all financial transactions."

<sup>17</sup>Regarding the relevant regulations, see e.g. Guowuyuan guanyu zhongguo renmin yinhang zhuanmen xingshi zhongyang yinhang zhineng de jue ding (国务院关于中国人民银行专门行使中央银行职能的决定) (Decision on PBOC exercising the functions of the central bank) (1983); Guowuyuan guanyu jinrong tizhi gaige de jue ding (国务院关于金融体制改革的决定) (Decision of the State Council on Reform of the Financial System) (1993).

considered that decisions regarding investment, production, and distribution mainly depend on supply and demand. In modern economy, trust, among banking, security and insurance, is considered as one of the four mainstays of financial system, which was already evidence in developed economies, therefore, the People's Bank of China<sup>18</sup> issued a document of *Actively Experimenting with Running Various Kinds of Trust Business* in 1980, seeking to make trust play an important role in Chinese financial market.

Consequently, local governments, enterprises and other institutions followed the requirements of this document, establishing trust and investment companies of various forms and sizes.<sup>19</sup> After 1979 when the first trust and investment company - China International Trust & Investment Co.<sup>20</sup>—was established, trust companies mushroomed throughout China, the number of which reached more than 1000 at its peak in 1998.<sup>21</sup> However, trust system tended out to be employed by Chinese local governments to accumulate as much foreign and domestic capital as possible to make these funds available for investment within China.<sup>22</sup> These trust companies typically were state-owned companies, whose chief managers are always officials in local governments. The local governments raised funds for construction or infrastructure through their own trust companies, instead of getting loans from banks.<sup>23</sup> According to relevant regulations<sup>24</sup> in 1980s, trust institutions had similar business scope to commercial banks. To some extent, trust companies played a role of substitution for commercial banks.

The trust institutions whose names contain the word “trust”, in fact, rarely did trust business. The “trust” business they operated were “trust deposits”,<sup>25</sup> “trust loans”, and “trust investments”,<sup>26</sup> which involved the taking of capital from

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<sup>18</sup>The People's Bank of China is the central bank of China with the power to control monetary policy and regulate financial institutions in mainland China.

<sup>19</sup>Wang (2002), p. 285.

<sup>20</sup>Today, China International Trust & Investment Corporation has transformed into a wholly state-owned company through comprehensive restructuring and changed its name to CITIC Group Corporation (中国中信集团有限公司), short for CITIC Group. See its website: [http://www.citicgroup.com.cn/wps/portal/!ut/p/b1/04\\_Sj9CPyKssy0xPLMnMz0vMAfGjzOI9w8zcLULdQoM9XV1MDRXL283H09DE3MjPQLsh0VAc0LKs8!/](http://www.citicgroup.com.cn/wps/portal/!ut/p/b1/04_Sj9CPyKssy0xPLMnMz0vMAfGjzOI9w8zcLULdQoM9XV1MDRXL283H09DE3MjPQLsh0VAc0LKs8!/).

<sup>21</sup>Gebhardt and Hanisch (2002), p. 1.

<sup>22</sup>Wang (2002), p. 285.

<sup>23</sup>Gebhardt and Hanisch (2002), p. 1.

<sup>24</sup>See e.g. *Jinrong Xintuo Jigou Guanli Zanxing Guiding* (金融信托机构管理暂行规定) (Provisional Regulations for the Control of Financial Trust and Investment Institutions) (1986, repealed).

<sup>25</sup>“Trust deposits”, in its original language “信托存款”, had no significant difference from bank deposits. The trust funds were on the balance sheet of the trust company.

<sup>26</sup>“Trust loans” and “trust investments”, in its original language “信托贷款” and “信托投资”, had two different types of businesses. One type was in fact entrustment business rather than trust business, where the principal entrusts funds to trust company and order the trust company to invest into a particular project. The profits (and losses) of the funds went to the customers. The other type of business is similar to bank loans. Trust companies raised fund by bonds, stocks, trust deposits

customers to be invested (through loans) by the companies for a fixed period of time in return for interest upon maturity. These were essentially deposit-taking activities, especially since there were no requirements for segregation of trust funds from trustee's own assets, and the profits (and losses) of the trust funds went to the companies rather than to the customers.<sup>27</sup> Many trust companies operated in violation of regulations and did not bring into full play the function that the trust should have. During the development of trust and investment companies in China, a variety of problems occurred. Among them are: the excessive number of trust institutions, the disorder of management of trust institutions, the shortcomings of company internal control, the common practice of unlawful management of property, the insufficient quality of the capital and the huge potential risks, etc.<sup>28</sup> As a result, the government took five rounds of nationwide clearing and rectification of trust business in 1982, 1985, 1988, 1993 and 1999 respectively.

The first round of clearing and rectification in 1982 mainly dealt with rectifying the trust institutions. At that time, many local governments frequently made decisions of transferring "special funds deposits" in banks into "trust deposits" managed by the local governments, which influenced the overall balance of receipts and payments of credit funds.<sup>29</sup> In this movement, this kind of activities were stopped by the State Council of China, and only the trust companies that obtained the approval from the State Council of China were allowed to run trust business.<sup>30</sup>

The second round of clearing and rectification in 1985 focused on the rectification of trust business. The overheating economy in China in 1984 led to an upsurge of Chinese trust industry. The investment hotspot of the trust funds focused on the market of fixed assets. The fixed assets expansion caused the runaway credit and the over-issued currency, therefore, a new regulation<sup>31</sup> was promulgated,

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(Footnote 26 continued)

etc. to be invested. Trust funds were not separate from other assets of the trust company, and not even off balance sheet. The profits (and losses) of the funds went to the trust companies. See *Zhongguo Xintuoye Fazhan de Lishi Mailuo* (History of Chinese Trust Industry) (Oct. 8, 2014), available at <http://www.investide.cn/news/20141008/108540/5.html>. Accessed 16 July 2015.

<sup>27</sup>See Jiang and Zhou (1994), p. 54. See also Ho (2012), pp. 186–192.

<sup>28</sup>Wang (2002), p. 286.

<sup>29</sup>Unlike bank deposits which have strict credit requirements, trust deposits in China were less regulated because of the lack of relevant regulations. Therefore, trust scheme were abused by local governments by means of transferring bank deposits into trust deposits, and investing trust funds into overheating markets. See *Zhongguo Xintuoye Fazhan de Lishi Mailuo* (History of Chinese Trust Industry) (Oct. 8, 2014), available at <http://www.investide.cn/news/20141008/108540/5.html>. Accessed 16 July 2015.

<sup>30</sup>See the regulation *Guowuyuan Guanyu Zhengdun Guonei Xintuo Touzi Yewu he Jiaqiang Gengxin Gaizao Zijin Guanli de Tongzhi* (国务院发出关于整顿国内信托投资业务和加强更新改造资金管理的通知) (Notice of the State Council on Rectifying Domestic Trust Investment Business and Strengthening the Update and Transformation of Fund Management) (1982).

<sup>31</sup>See the regulation *Jinrong Xintuo Touzi Jigou Guanli Zanxing Guiding* (金融信托投资机构管理暂行规定) (Provisional Regulations for the Administration of Financial Trust Institutions) (1986).

aiming to limit the trust business scopes, to regulate the governance structure of trust companies, and to raise the standards regarding the approval procedure of trust institutions.

In 1988, the domestic economy in China was overheating, with the constant disorder of economy and high rate of inflation, and the trust business roared to its peak.<sup>32</sup> Meanwhile, irregular activities of trust companies (such as unlawfully raising funds, illegally interbank borrowing and lending) occurred, and their internal governance was extremely out of order. For instance, the decision making of trust companies were heavily relied on the local governments rather than the market. All of this resulted in a third round of rectification in trust industry, which emphasized the improvement of corporate internal governance and the construction of Chinese trust system.

Large amount of cases in which trust companies did fake trust business had constantly occurred since 1986, and trust institutions began to do business in inter-bank loan market illegally since 1992, which led to the fourth round of rectification. Consequently, the central bank of China reevaluated all the trust institutions and issued business licenses only to those meeting the requirements.<sup>33</sup> At the same time, the principle which provides that the banking sector, the trust sector, and the security sector are separate from each other was established by the Commercial Bank Act of China and Chinese Securities Law.

The fifth round of clearing and rectification of Chinese trust business was held in 1999 when credit crisis<sup>34</sup> threatened trust industry as a whole. At this stage, a large number of trust companies were closed or reorganized by the Central Bank of China in order to drive trust business to play its expected roles.

With the deepening of the financial reform in China, trust business gradually shrunk and its operation faced difficulties. In 1998, the bankruptcy of the second largest trust company in China—the Guangdong International Trust and Investment Company—marked a turning point in the development of the trust industry.<sup>35</sup> After this, the number of trust companies was reduced to 218 from 1000 of 1988, which were to be further merged into only 60 remaining independent entities.<sup>36</sup>

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<sup>32</sup>In this period, the Central Bank of China, various commercial banks, and local governments established trust and investment companies in various forms. The total number of trust investment companies in China reached 1000 at its peak, and the total assets under management of trust companies was more than CNY 600 billion, accounting for 1/10 of the total financial assets in China at that time.

<sup>33</sup>See Trust and Fund Research Institution (2012).

<sup>34</sup>The credit crisis gripped much of East Asia beginning in July 1997 and raised fears of a worldwide economic meltdown due to financial contagion. Indonesia, South Korea and Thailand were the countries most affected by the crisis. Hong Kong, Laos, Malaysia and the Philippines were also hurt by the slump. Brunei, China, Singapore, Taiwan and Vietnam were less affected, although all suffered from a loss of demand and confidence throughout the region.

<sup>35</sup>See e.g. Farley (1999) Chinese investment firm gitic collapses. <http://articles.latimes.com/1999/jan/12/business/fi-62726>. Accessed 16 July 2015.

<sup>36</sup>Gebhardt and Hanisch (2002), p. 2.

### ***2.1.2 The Necessity for Chinese Economy of Further Development of Chinese Trust Industry***

Given the frustrating situation of Chinese trust industry outlined above, Chinese authorities were forced to decide whether to continually support the development of trust industry or not. After extensive discussion, a general consensus among the government officials was reached.<sup>37</sup>

It is widely admitted in China that the emergence of large number of trust activities is the inevitable outcome of the market-oriented reform and open door policy.<sup>38</sup> Although for various reasons the trust industry in China operates a mixed range of businesses, the actual trust business<sup>39</sup> constituted about 25% of the overall business of the trust industry by the end of twentieth century.<sup>40</sup>

In addition, trust was demanded in the large scale of the potential wealth management market in China, because there has emerged a comparatively large property market requiring external management. With the Chinese economy developing rapidly, new factors—such as the demand of enterprises for appreciation of their properties, the increase of national wealth, the elaborateness of the division of labor in society—require the assistance of external property management activities. Specifically, for one thing, with the high-speed increase of GDP in China, investment and financial system (especially that of infrastructure programs) demanded effective way to manage its large sum of money. For the other thing, increasingly more private wealth of Chinese people offers a huge market for trusts, however, most of them currently were saved in banks.<sup>41</sup> According to statistics, 75% of Chinese residents' financial assets were deposited in banks by 2005, the savings of residents reached CNY 1490 billion.<sup>42</sup> Furthermore, more and more institutional investors such as social security funds, enterprise annuities, housing accumulation funds and various public welfare funds, which reached around CNY 1000 billion by 2005,<sup>43</sup> need external capital management.

More importantly, there was a demand for trust to improve the structure of Chinese financial market. The majority of Chinese financial business have been dealt with in banks where accumulates a high financial risk. However, a certain number of businesses can gain more effectiveness if the financial scheme

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<sup>37</sup>Gebhardt and Hanisch (2002), p. 2.

<sup>38</sup>Zhou (2002), p. 293.

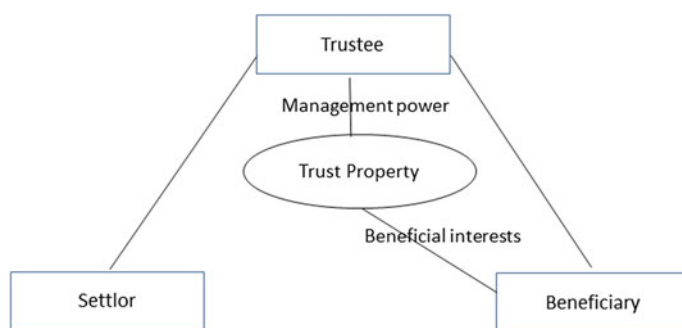
<sup>39</sup>The actual trust business means that the business run by Chinese trust companies that is really utilizing the trust scheme, namely, the trust company manage the trust funds for the benefit of the beneficiary rather than for its own benefits.

<sup>40</sup>Zhou (2002), p. 297.

<sup>41</sup>See Trust and Fund Research Institution (2012).

<sup>42</sup>See China Trustee Association, Trust Industrial Data, <http://www.txh.net/txh/index.jhtml>. Accessed 22 June 2015.

<sup>43</sup>Trust and Fund Research Institution (2012), p. 28.



**Fig. 2.1** External property management system provided by trust

implementing trust is introduced, because trust, as a tool of property management, could contribute to the financial system innovation and financial risk diversification.<sup>44</sup>

According to the common law concept of “trust”, the most important function of trust is to supply an excellent external property management system for the society (see Fig. 2.1). External management means that the owner of the property does not manage and dispose of his/her property by him/herself, rather, through others. Obviously, the demand for an external property management system will become stronger with the development of the society.<sup>45</sup> The trust separates the managerial and beneficial interests of property. The legal title to the trust property belongs to the trustee, based on which the trustee manages, invests and disposes of the trust property, while the beneficiary (sometimes, the beneficiary is the settlor itself) chosen by the settlor or the purpose set forth by the settlor enjoy all the benefits from those actions. The division of the rights and benefits resulting from the trust property, as well as the division of the managerial and beneficial interests of the trust property makes the beneficiary free from the responsibility to manage the property himself, and instead allow him/her merely to enjoy the benefits of the property.

Because of the characteristic outlined above of the trust concept, it is generally considered that trust is suitable for people who are not able to manage their own assets or to make arrangements for them, due to lack of time, mental or other capacity, legal constraints etc. Furthermore, it is an efficient way to realize one’s own ideas concerning the disposition of one’s property upon death. Therefore, trust has been playing an important role in many aspect of society in many countries, such as the management of property, inheritance of family property, investment and financing, business activities, public welfare utilities, social security, and even the political life. For all those purposes the scheme of trust can be applied into Chinese society.<sup>46</sup>

<sup>44</sup>Hansmann and Mattei (1998).

<sup>45</sup>Zhou (2002), p. 293.

<sup>46</sup>Zhou (2002), p. 295.



### ***2.1.3 Trust Law as a Necessary Solution for the Problems of Chinese Trust***

After justifying the necessity of the development and reorganization of trust industry in China, the next big step for Chinese government is to enable trust system to play its expected role effectively. Unlike other financial institutions such as banks, security companies and insurance companies having grown based on universal financial schemes, trust companies in China grew in the soil lacking trust tradition and trust concept.<sup>47</sup> From the very beginning, the majority of trust companies in China were lack of independent governance policies and clear developmental direction of business,<sup>48</sup> therefore, their function was unclear and their scope of business was non-standardized.

It has been widely accepted that the most important cause of the problems of trust industry in China was the lagging legislation and the lack of needed legal regimentation and protection for the trust industry. During a period of more than 20 years since 1979, the only regulation particularly applicable to trust companies in China was the “Provisional Regulations for the Control of Financial Trust and Investment Institutions” promulgated by the central bank of China on April 26, 1986. This document provides exclusively the supervision over trust and investment institutions, not including any provisions on the question of what the concept of trust actually is under Chinese law. Furthermore, even the supervisory provisions in this regulation have long been regarded by Chinese scholars and practitioners as insufficient to ensure the orderly operation of the trust industry.<sup>49</sup>

Thus, after the five rounds of clearing and rectification, the Chinese government started to put forth the idea that it is necessary to regulate Chinese trust by legislation, which aimed to supply an orderly environment for trust activities.

### ***2.1.4 The Legislative History of Chinese Trust Law***

Chinese lawmakers had made great effort to the legislation of the Trust Law (see Table 2.1). In August 1993, the Financial and Economic Committee of the National People’s Congress (NPC) organized a draft workshop consist of experts and scholars. It worked out the draft of Trust Law, and in December 1996 the draft was presented to the 23rd session of the NPC Standing Committee for first deliberation. But the public appearance of the trust law was suspended due to great disputes.<sup>50</sup>

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<sup>47</sup>Jiang and Zhou (1994), p. 54.

<sup>48</sup>Jiang and Zhou (1994), p. 54.

<sup>49</sup>Gebhardt and Hanisch (2002), p. 2.

<sup>50</sup>Gebhardt and Hanisch (2002), p. 1.

**Table 2.1** Legislative history of Chinese trust law

Year	Procedure
August 1993	A draft workshop consisting of experts and scholars was organized
December 1996	The draft of trust law was presented to the 23rd session of the NPC Standing Committee
1998	The motion of legislation of trust in China was proposed again
2001	The trust law of China was enacted

The motion of legislation of trust in China was proposed again in 1998. The main dispute among lawmakers, experts and scholars was whether the new Trust Law should regulate the basic trust relationship or regulate exclusively the trust business. A certain consensus had been reached in the NPC regarding the framework of the Trust Law: a law which regulates the basic trust relationship should be adopted first, while the specification of the functions of the trust institution, their business scope and the problem of supervision shall be left to the State Council to be regulated by different norms. Then once practical experience is gathered, further legislation shall be enacted. Finally, the Trust Law of China containing basic trust relationship regulations was enacted in 2001.<sup>51</sup>

The Trust Law of China has a total of 74 articles and is divided into seven chapters as follows: Chapter One, General Provisions; Chapter Two, Creation of Trusts; Chapter Three, Trust property; Chapter Four, Trust Parties; Chapter Five, Variation and Termination of Trusts; Chapter Six, Charitable Trusts; and Chapter Seven, Supplementary Provision.<sup>52</sup>

### 2.1.5 *Modern Chinese Law Established on Civilian System*

Although over 5000 years of history makes China classified as one of independent legal tradition in the world,<sup>53</sup> Chinese law has experienced a comprehensive westernization since late Qing Dynasty (at the end of nineteenth century), to meet the demand of the legal system reform. This resulted in a dramatically different legal system from its traditional one.<sup>54</sup>

It is generally acknowledged that modern Chinese private law has been established largely on civil law models.<sup>55</sup> The first attempt in Chinese legal history to

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<sup>51</sup>Bian (2002).

<sup>52</sup>Chapter Seven of Chinese Trust Law comprises only one article, namely, Article 74, which provides for the date from which the Law came into effect.

<sup>53</sup>Zweigert and Kötz (1998).

<sup>54</sup>Chen (2010), pp. 160–164.

<sup>55</sup>Searching from the literature databases in China, numerous books and papers that illustrate the civil law tradition of Chinese current legal system can be found.

establish a civil code was the Draft Civil Code of the Great Qing by the late Qing government since 1907. It is notable that the civil code used the archetype of the German model via Japan.<sup>56</sup> Although the Qing's Draft Civil Code never came into use, it laid the foundation for the codes based on European legal system to be used in the future to develop a set of Chinese Civil Laws. It was not until 1930 that the first Chinese Civil Code was promulgated. Having revised and reexamined the Qing's Draft Civil Code, the Drafting Committee of the Republic of China<sup>57</sup> drew on the experiences of Roman law countries such as Germany, Japan and Switzerland to develop its civil law legislation.<sup>58</sup>

Since the People's Republic of China (PRC) was founded in 1949, social, political and economic conditions have substantially changed in China. In February 1949, the Communist Party of China (CPC) Central Committee announced the abolition of the legal system of the Republic of China. A tentative policy consensus was reached among government officials about the need to reform the state-planned economy and build a legal system that would support economic growth.<sup>59</sup> Since 1978 when the Economic Reform and Open Door Policy<sup>60</sup> was launched by the leader of China, Deng Xiaoping (邓小平), the reconstruction of Chinese legal framework has been put on the agenda of the National People's Congress of China (全国人民代表大会). Although China inevitably learned from both common law systems and civil law systems when developing its modern legal system, if its private laws newly established since 1978 are carefully scrutinized, the civil law tradition can be identified, because of the influence of pre-1949 legal westernization in China.<sup>61</sup>

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<sup>56</sup>Chen (2010), pp. 163–164. (“It followed the German Bürgerliches Gesetzbuch (Civil Code, BGB) by dividing the code into five books, namely ‘General Principles’, ‘Law of Obligations’, ‘Law of Things’, ‘Family’ and ‘Succession’. In addition, the Qing Civil Code Draft followed the German approach when it separated the civil code from a special commercial code.) (There is little wonder that Chinese legislation and legal theory were influenced by Japan. Since modern Japanese law was introduced from Germany and to lesser extent from France Japanese law, indirectly, has a Roman law tradition. Chinese law trod, though perhaps lightly, almost the same path as Japan in adapting the Continental Civil Code to its own eastern legal tradition.”).

<sup>57</sup>China was governed by the Republic of China from 1912 to 1949.

<sup>58</sup>Chen (2010), p. 169. (“This structure was exactly the same as the Qing's Civil Code Draft and was passed down from the German model... [T]his early Civil Code (1929–1931) is still applicable in Taiwan despite numerous amendments since its enactment.”).

<sup>59</sup>Potter (2004). Chinese Cultural Revolution (文化大革命) between 1966 and 1976 has a significant influence to the economy and society, where the attempt of establishing the principle of the rule of law was destroyed. It is after the Cultural Revolution that Chinese modernization returns to normal and has demonstrated rapid development.

<sup>60</sup>Chen (2010). (Open doors to foreign investment, attracting foreign investment hinged on improving the legal system and placing a greater reliance on law. Civil law is the heart of a state's system of regulations for business and property transactions as well as issues of liability.).

<sup>61</sup>Chen (2010).

Although the Draft Civil Code is still on the way as of today after several stops and restarts for various complex social and political reasons,<sup>62</sup> the main parts of Civil Code has been legislated as separate laws, namely the General Principles of Civil Law (GPCL, No. 37 of 1986), Contract Law (No. 15 of 1999), Property Law (No. 62 of 2007), Marriage Law (No. 9 of 1980), Adoption Law (No. 54 of 1991), and Law of Succession (No. 24 of 1985).<sup>63</sup> Chinese Trust Law was enacted in 2001, and it has been classified as a special law of Chinese Civil Law by Chinese legislators and scholars.<sup>64</sup>

## 2.2 Difficulties for Civilian Lawyers to Understand the Common Law “Trust”

The concept of “trust” is considered to be one of the creations by the common law system. Scholars in civil law countries have long shown the conflicts between the common law concept of trust and the civil law principles.<sup>65</sup> This section first outlines the origin of trust law in common law system, then explains the recent trend in the reception of trust in a global context, and in the end of this section it discusses the main conflicts between trust law and civil law.

### 2.2.1 *Trust Law: A Typical Common Law Construct*

Trust is basically one of legal devices by which one person is enabled to own, manage, control and deal with property for the benefit of another person. Other such devices include agency and guardianship. However, the trust is peculiarly an outcome of the Anglo-American legal system.

The law of trust originated and developed under the circumstance that in England there were separate courts of common law and chancery for centuries.<sup>66</sup> After it is ruled by the common law courts in the thirteenth century that real property was not capable of being devised by will, lawyers of that time tried to avoid operation of this rule by having the owner of property transfer the property to a third party, under the proviso that the transferee hold the property for the use of

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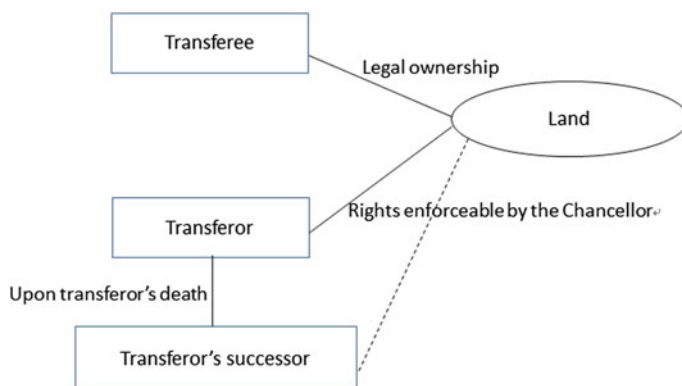
<sup>62</sup>For the history and the reason why China chose civil law system as the model, see Chen (2010) (“After 1949, the first attempt to draft a civil code occurred in the 1950s, followed by attempts in the 1960s and again in the 1980s.”).

<sup>63</sup>The structure of current draft civil code has a similarity with the German BGB. Law school students who are becoming the lawyers, judges and scholars in China are educated to be familiar with the traditional civil law doctrines and to think in the way of civil law logic.

<sup>64</sup>See e.g. Wang (2008).

<sup>65</sup>See Bolgár (1953). See also Lawson (1955), Koessler (2012).

<sup>66</sup>Restatement of the Law Third, Trusts (US, 2003), Part 1 Chap. 1 IN NT.



**Fig. 2.2** Devices of *use*

the transferor for his life, and upon his death for someone else designated by the transferor. The common law recognized the transferee as obtaining legal ownership of the real property through the conveyance, and yet the original owner of the real property retained the economic and personal benefits. After the death of the transferor, these benefits would shift to his/her successors. In the common law courts, when the owner of the trust property who had transferred his property to a “*use*” died, he/she owned nothing subject to the rules of succession.<sup>67</sup>

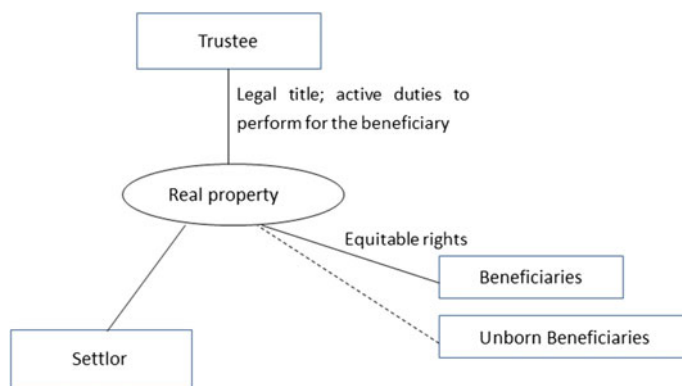
Without legal enforcement of the obligation and duty of the transferee, the devices of “*use*” (see Fig. 2.2) would have been vulnerable to abuse by the transferee. However, because the common law of contract had not yet been developed at the time of “*use*” was popular, the English courts could not enforce the obligation of the trustee to protect the beneficiaries’ interests. This is where the equitable jurisdiction of the Chancellor fills the gaps.<sup>68</sup> If the transferee of the property in a “*use*” refused to respect and recognize the rights of the transferor or his successor, the Chancellor would compel the transferee to perform his/her duty expressed in the transfer. The common law courts would do nothing because the rights alleged in such context were not legal rights. However, the Chancellor enforced the duties, and as a result the “*use*” became a recognized form of conveyance.

The Statute of Uses (1536) put a stop to the loss of revenue to the Crown caused by the “*use*” device.<sup>69</sup> However, in order to circumvent this Statute, owners of properties transferred legal title in their real property to the transferee while the

<sup>67</sup>See Pettit (1997), Riddall (1999).

<sup>68</sup>The King began referring such cases to the Chancellor, who had historically only a type of ministerial authority. But because the King and Council were the “supreme depositaries of power,” and the Chancellor’s authority was granted by the King, the Chancellor eventually began issuing decrees and doling out justice in ways not authorized by the common law. See Schenkel (2009).

<sup>69</sup>Restatement of the Law Third, Trusts (US, 2003), Part 1 Chap. 1 IN NT.



**Fig. 2.3** Devices of trust

transferee had active duties to perform for the beneficiary. This scheme was recognized by the Chancellor, because the Chancellor ruled that the said Statute was intended only to execute “passive” *uses* (the mere holding of title). The fiduciary relationship between the trustee and the beneficiary which results from the separation of the legal and equitable interests in the property marked the beginning of the modern trust.<sup>70</sup> Therefore, separate systems of enforcement (legal and equitable) conspired to the creation of the trust. If either system had not done its part, the beneficiary of the *use* would not have been able to enforce his/her interest and the scheme of *use* would not have worked. It is the unwitting combination of the common law with the Chancellor’s equitable power to enforce obligations based on nothing but moral obligations and good faith that created the trust.<sup>71</sup>

Another factor that is crucial to the development of the trust as a device for flexible, long-term management of family property has been the common law concept of future interests (see Fig. 2.3). Peculiar to such concept is a tolerance for time-divided ownership that permits a variety of present and future interests (legal as well as equitable), even in potential, unborn beneficiaries and including conditions and powers of appointment, which would surprise most lawyers in other legal systems. Flexibility is one of the most important characteristics of the trust device, both in the law and in practice.<sup>72</sup>

Moreover, mutual trust<sup>73</sup> between owners of real properties and the distinguished persons or churches that are potential trustees is also indispensable for the development of trust in England. Since the trustee is recognized as the owner of real property by the common law courts, the land owner may be hesitated to transfer the land to the trustee unless there is a certain degree of trust between them. Similarly,

<sup>70</sup>Andersen and Bloom (2012).

<sup>71</sup>Schenkel (2009).

<sup>72</sup>Restatement of the Law Third, Trusts (US, 2003), Part 1 Chap. 1 IN NT.

<sup>73</sup>Mutual trust is a sociological concept. For more details, see Chap. 4.

the institutionalized trust<sup>74</sup> in the Chancellor played a crucial role in the development of trust. Going to the Chancellor or the equitable court was the only way for the beneficiary to get remedies from the trustee in breach of trust. People’s confidence on the legal system in England made this legal device possible to exist and develop for centuries.

### 2.2.2 *Trend in the Reception of Trust All Over the World*

The trust in England had been employed as the vehicle for estate planning by English farmers and then by urban middle-income people for centuries. Before the mid-twentieth century, for common law lawyers, trust had been related to testamentary and *inter vivos* personal or family trusts.<sup>75</sup>

However, nowadays, trust is used not only for family settlements during life and for the flexible disposition of decedents’ estates, but it also is used in many kinds of commercial transactions and business relationships, such as trust of receivables, business trust etc., and collective fund trust.<sup>76</sup> Commercial trusts are now widely utilized in many jurisdictions that have a developed financial infrastructure (e.g. US, UK, Japan, Canada, Australia, China, Hong Kong, Singapore etc.). Trust confers significant advantages for commercial trading and corporate transactions. It provides protections from the insolvency of the trustee and the highest required standards of management performance of the trustee. For example, trust funds are required to separate from other assets of the trustee, and are off balance sheet of the trustee, which makes the trust funds immune from the insolvency, bankruptcy, or the claim of private creditors of the trustee.

European civil law countries made great efforts in embracing the trust, partially due to the demand for trust as a legal vehicle for professional financial management, and partially because of the pressure within the European Community to reduce the barriers among the private law systems of the member states, particularly between the common law and civil law systems.<sup>77</sup> The efforts in Europe lead the trend of reception of trust in the global context. By the year 2000, except for the main common law jurisdictions (such as England, US, Canada, Australia, Hong Kong, Singapore, India), up to 53 jurisdictions in the world have laws expressly or impliedly providing for the trust, and the number is going up.<sup>78</sup>

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<sup>74</sup>For the explanation of institutionalized trust, see Chap. 4.

<sup>75</sup>Waters (2007).

<sup>76</sup>Restatement of the Law Third, Trusts (US, 2003), Part 1 Chap. 1 IN NT.

<sup>77</sup>von Bar and Clive (2010).

<sup>78</sup>See Waters (2006).

### 2.2.3 *The Conflicts Between Common Law Trusts and Civil Law*

As many civilian scholars observed, the civil law lawyers have difficulties to understand the common law trust, let alone adopt it into domestic law.<sup>79</sup> It also makes common law scholars to reconsider the cores and inessentials of trust.<sup>80</sup>

There is an ongoing debate among scholars as to what are the core elements of the common law concept of Trust.<sup>81</sup> However, according to the academic commentaries regarding the nature of the common law trust, four main features might be discerned: the transfer of legal ownership of the trust property from the settlor to the trustee; the segregation of trust property from other assets of the trustee; the imposition of fiduciary duties on the trustee; and the equitable tracing of the property, followed by the imposition of proprietary remedies on third party recipients who are not *bona fide* purchasers for value without notice.<sup>82</sup>

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<sup>79</sup>See Waters (2006). See also e.g. Bolgár (1953), Martinez (1981), Lepaulle (1927), Keeton and Sheridan (1976), Banakas (2006), Lawson (1955).

<sup>80</sup>See Honoré (2003), Hayton (1996), Koessler (2012).

<sup>81</sup>Banakas (2006); see also Hayton (1996). As Professor Hayton suggested, the irreducible core of the Anglo-American Trust includes:

- (i) assets which form an estate or patrimony separate from that of the settlor or trustee, and unreachable for the spouse, other relatives or creditors of the trustee;
- (ii) trustees to administer and manage the assets for the benefit of a beneficiary or, in the case of charitable trusts, a beneficial purpose;
- (iii) a defined purpose other than the benefit of the trustee;
- (iv) a court or administrative authority with a supervisory jurisdiction that can be called on to intervene, at least if the beneficiaries or, in the case of charitable trusts the public interest represented by an official, so wish, to ensure that the trustees do their job properly in fulfilling the purpose of the Trust;
- (v) legal title of ownership vested in the trustee;
- (vi) equitable or beneficial ownership vested in the beneficiary, with the right of tracing the assets in the hands of third parties;
- (vii) intentional trusts can be oral or even secret;
- (viii) constructive trusts may be imposed ex post facto by the courts on parties without their consent, most notably in the process of tracing trust property;
- (ix) as the assets settled on trust are out of circulation, trusts cannot exist in perpetuity except charitable trusts so authorised by the State;
- (x) third parties who deal with the trustee in trust property acquire property interests only if they have purchased from the trustees directly for value and without notice (ie in good faith); if trust property has been passed on by the trustees to a third party without these conditions being present, subsequent purchasers are not protected against the beneficiary's undeclared equitable interest and will be holding such assets in a (constructive) trust for the benefit of the beneficiary, unless any such purchasers can show that they purchased bona fide and for value.

<sup>82</sup>Ho (2004), see also Meng (2015), p. 493.



Common law lawyers generally consider the “dual ownership” (legal and equitable ownership) as a key concept of trusts, however, in some civilian scholars opinion, trust existing for a purpose must be only temporary and must come to an end when the purpose of the trust has been fulfilled. They contend that temporary ownership is not consistent with the principle of the unlimited powers of the legal owner in civil law systems.<sup>83</sup>

## 2.3 Significant Problem: Focusing on Article 2 of Chinese Trust Law

### 2.3.1 *Legal Uncertainty Regarding the Ownership of Trust Property in China*

China also needs to solve the conflicts between trusts and civilian legal principles when transplanting trust law in 2001. Article 2 of the Chinese Trust Law defines a trust as an arrangement whereby “the settler, on the basis of confidence on the trustee, *entrusts* certain property rights it owns to the trustee and the trustee manages or disposes of the property rights in its own name in accordance with the intentions of the settler and for the benefit of the beneficiary or for specific purposes.”<sup>84</sup> It requires the settlor “entrusts” rather than “transfer”<sup>85</sup> his property rights to the trustee. The requirement of transfer of ownership was replaced in the last circulated draft of the Chinese Trust Law by the equivocal terminology of “entrust”.<sup>86</sup> If the word “transfer” is used in this Article, the ownership of trust property has to be assigned from the settlor to the trustee in order to establish a trust. 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 hesitated to enter into a trust contract with trust institutions, because of the risk of losing their ownership of property.

The use of the word “entrust” raises the question as to whether it suggests an absence of vesting of property rights in the trustee (or whether the settlor remains his ownership on trust property when establishing a trust). Some scholars argue that the use of “entrust” causes the ambiguity or is even a failure of legislation. It is now

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<sup>83</sup>Banakas (2006).

<sup>84</sup>Cai (2008).

<sup>85</sup>“Transfer” in Chinese is “转让”. Typically, under a sales contract, the seller transfers the ownership of the goods to the buyer, and the buyer transfers the money to the seller.

<sup>86</sup>Ho (2012), p. 201. For more details, see Bian (2002), pp. 255–278.

unclear whether, in light of the inconsistencies between the provisions themselves,<sup>87</sup> it is necessary for the law to define that the settlor shall transfer ownership of the relevant property in order for the trustee to set up a trust.<sup>88</sup>

Then, there may be two kinds of trust scheme in Chinese Trust Law: one that involves the transfer of the settlor's ownership in the underlying trust property to the trustee, and another that does not. If the trust property is not registrable, such as money or tangible movable property (but for automobiles, ships, aircrafts, etc. subject to registration similar to real estate), and the settlor does transfer the property to the trustee, the trustee will appear to the public as if he is the full owner. This is because under Chinese Property Law, the rights of ownership comprise the rights of possession, use, beneficial enjoyment and disposal of the property.<sup>89</sup> Once a settlor transfers such types of property to the trustee by means of giving the possession and use of the trust property to the trustee, the trustee will have all the external representations of ownership provided in the Property Law. Moreover, the Chinese Trust Law also clearly grants the trustee the right to manage and dispose of the trust property. It is true that the trustee's rights of possession, use and disposal of the property are qualified by the beneficiaries' right to beneficial enjoyment of the property, however, such beneficial rights are not visible to the public. Accordingly, the trustee is indistinguishable from a full owner, at least from the perspective of a third party who would become possible assignee of the same trust property. On the other hand, where the trust property is registrable, such as rights in relation to land or house or automobiles, ships, aircrafts, etc., there needs to be trust registration to make trust public to a third party. However, as of today, there are no further rules about the details of trust registration in China. One can only speculate that any such registration system will at least involve revealing and disclosing or publicizing that the trust property is subject to a trust. Under such conditions, the trustee's apparent ownership will be significantly qualified by trust, because any third parties dealing with the trustee will know that his/her rights over the trust property are subject to the trust. For example, it would be made clear to the public that the trust property will not fall within the bankruptcy properties of the trustee when it is bankrupted; or the personal creditors of the trustee cannot assert claims on the trust property when the trustee is insolvent. Comparatively, according to Japanese Trust law, the ownership of trust property is clearly vested to the trustee,

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<sup>87</sup>More details in Chap. 3. For example, Article 15, 20, 28, 29, 30 are inconsistent with Article 14, 16 of Chinese Trust Law.

<sup>88</sup>Ho (2004).

<sup>89</sup>Property Law of the People's Republic of China (2007), official English translation *available at* [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471118.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm) (last accessed on June 14, 2015).

and the registration of trust is a matter of whether the parties to trust can claim to a third party, rather than a matter of the establishment of trust.<sup>90</sup>

Alternatively, a settlor may retain his/her ownership of the trust property, entrusting his rights of the property to the trustee. However, the distinction between this form of trust and an agency relationship is fuzzy. Theoretically, such trusts are distinguishable from agency relationship, on the grounds of that: (1) the trustee has a general management power on the trust property, while the agent only has limited power granted by the principal; and (2) the trust property is supposed to be segregated from the settlor's own property, while the principal continues to own property entrusted to the agent, without distinction from his/her general properties. However, the first distinction is only in respect of the scope of the trustee's and agent's power on the property. It is difficult for the court and also a third party to distinguish them from each other, when a principal grants a general power to the agent. For the second difference, although the Trust Law provides for segregation of the trust property from the settlor and the trustee's own assets, there is no further detailed instructions as to how this is to be achieved and made visible to the public.

### 2.3.2 *Practical Problems Caused by Article 2 of Chinese Trust Law*

Although there is very few trust case in China, the Chinese courts have shown different understandings concerning the location of ownership of trust property. In the case *Shandong Food Co. Ltd. v. Jinan Yingda International Trust and Investment Co. Ltd.* (2001) (hereinafter referred as *Shandong Food v. Jinan Yingda*, see Fig. 2.4),<sup>91</sup> the court ruled that under a trust contract, the trust property is owned by the trustee, and therefore the investment risk of the trust property should be taken by the trustee. In the decision, the court explained that:

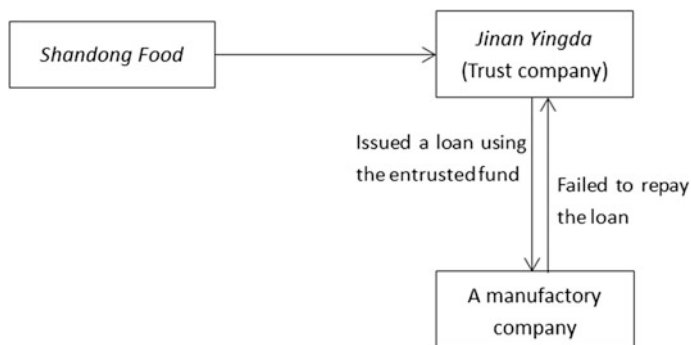
<sup>90</sup>See Article 14 of Japanese Trust law (in its original language)

登記又は登録をしなければ権利の得喪及び変更を第三者に対抗することができない財産については、信託の登記又は登録をしなければ、当該財産が信託財産に属することを第三者に対抗することができない。

Its translation into English, available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=1936&vm=04&re=02> Accessed 16 July 2015.

With regard to any property for which the acquisition, loss, and modification of any right may not be duly asserted against a third party unless it is registered, the fact that such property belongs to the trust property may not be duly asserted against a third party unless the fact that the property is under the trust is registered.

<sup>91</sup>The Court of Shizhong District, Jinan, Shangdong, First Instance Civil Case No. 1707 (2001).



**Fig. 2.4** Illustration of *Shandong Food v. Jinan Yingda*

In a trust, as the owner of the trust property, the trustee acts in his/her own name to a third party. The rights and legal obligations deriving from these acts should bind the trustee rather than the settlor. 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. In this case, it is Jinan Yingda who makes all the decision on the investment of the fund, rather than following the instruction of the settlor. Therefore, the ownership of the fund can be deemed as being transferred from Shandong Food to Jinan Yingda, and the agreement between them is a trust contract. ... Jinan Yingda should take the risk for the investment of the fund, and shall return a same sum of money with interest to Shandong Food. (Translated by the author.)

However, in case *Beijing Haidian Science & Technology Development Co Ltd v Shenzhen Xinhua Jinyuan Investment and Development Co., Ltd. and others* (hereinafter referred as *Beijing Haidian v. Shenzhen Xinhua*, see Fig. 2.5),<sup>92</sup> the court commented that even if ownership of the trust property has been transferred to the trustee, the settlor is the owner of the trust property. The judgement of this case explains that:

According to the Chinese Trust Law, the settlor entrusts, rather than transfer, the trust property to the trustee when establishing a trust. Meanwhile, the wording of “the settlor’s trust property” in Article 28 and 29 of Chinese Trust Law also indicates that the settlor is the owner of trust property. ... Though the Trust Law and other relevant laws do not regulate transfer of the settlor’s rights, they do not expressly prohibit it... Those contracts [between the original settlor and Beijing Haidian] do not breach any laws or mandatory provisions under administrative regulations, and do not violate others’ legal rights. Moreover, they were recognized and registered by the Xinhua trust and further served to the China Banking Regulatory Commission’s office at Chongqing. Hence, the contracts shall be valid. (Translated by the author.)

These two cases represent two typical different understandings of Article 2 of Chinese Trust Law as well as the concept of trust. In the author’s opinion, in *Shandong Food v. Jinan Yingda*, the court conveyed a misunderstanding of the concept of trust.

<sup>92</sup>Chongqing High People’s Court First Instance Civil Case No. 14 (2006).

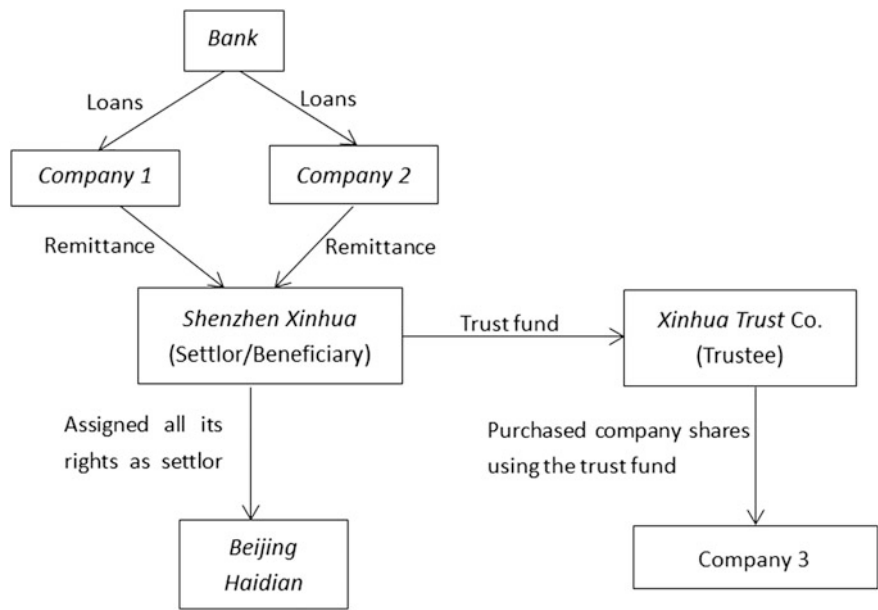


Fig. 2.5 Illustration of *Beijing Haidian v. Shenzhen Xinhua*

According to the decision of the court in this case, after the establishment of a trust, the ownership of trust property is transferred from the settlor to the trustee, therefore, all the legal effects concerning the trust property bind the trustee rather than settlor, and the trustee should return the trust property to the settlor when the trust is terminated. This understanding does not comply with the function of the mechanism of the trust in the conventional understanding in China. It is generally understood that the trust property should be independent to all the parties to a trust relationship, thus the loss of the property should be taken by the trust property itself, rather than being compensated by the trustee’s own assets. Regarding the case *Beijing Haidian v. Shenzhen Xinhua*, in the author’s point of view, the decision was relatively reasonable. It is noted that the court commented in the decision that “for the relationship among the internal parties (settlor, trustee, and beneficiary) to a trust, it does not matter who is the owner of the trust property, as long as the rights and duties among them are clearly defined. The issue on the location of the ownership of trust property becomes important when a third party assert claims concerning the trust property.”

2.4 Interim Conclusion

This chapter has outlined the historical background of Chinese Trust Law and its uncertainty regarding the location of ownership of trust property. It described the development and problems of trust and investment companies in modern China,

and the five rounds of nationwide clearing and rectification of trust business in 1982, 1985, 1988, 1993 and 1999 respectively. This chapter found that it is widely admitted that the existence of the trust phenomenon in China is an indisputable fact. In addition, trust was demanded in the large scale of the potential wealth management market in China, because there has emerged a comparatively large property market requiring external management. This chapter also explained why it has been widely accepted that the most important cause of the problems of trust industry in China was the lagging legislation and the lack of needed legal regulation and protection for the trust industry; and then this chapter described the legislative procedure of the trust law in China, and explained the civil law tradition of Chinese legal system.

Then this chapter outlined the origin of trust law in common law system, and the recent trend in the reception of trust in a global context, and then discusses the conflicts between the concept of “trust” and conventional way of thinking by lawyers of civil law jurisdictions. This chapter also explained the main obstacles to the reception of the trust in modern civil law, which are: a conception of absolute ownership; the principle of *numerus clausus* of property rights; the principle of publicity of property rights; a variety of devices serving to a degree the same functions as trusts.

Finally, this chapter focused on Article 2 of Chinese Trust Law, explaining why the terminology of “entrust” in this article caused uncertainty regarding the location of the ownership of trust property. It also outlined the theoretical and practical problems accompanied with it. Theoretically, it is difficult to interpret the trust law regarding the location of ownership of trust assets. Either of the settlor, the trustee, and the beneficiary can be interpreted to be the owner of trust property in the context of Chinese Trust Law. Practically, through two cases and two types of trust business, this chapter explained that different courts or different types of trust business deal with the ownership of trust property in totally different approaches.

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