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Cross-Border Trust Disputes and Choice of Law in East Asia

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CROSS-BORDER TRUST DISPUTES AND CHOICE OF LAW IN EAST ASIA

Ying Khai Liew

Abstract: Since its introduction in East Asia over a century ago, trust law has seen much development, refinement, and domestic transformation. However, the treatment of trusts in private international law is severely underdeveloped. Due to the lack of comprehensive and dedicated choice of law rules in East Asia regarding trusts, there is much uncertainty in how forum courts treat cross-border trust disputes. This treatment derogates from a proper recognition of the trust as a distinctive legal device and fails to properly protect the autonomy and legitimate expectations of certain parties. Worse still, it puts East Asia out of step with most jurisdictions that actively use trusts. This is a regrettable situation in an increasingly globalized world, where incidences of cross-border trust disputes are on the rise. Ultimately, legislators in East Asian jurisdictions ought to consider enacting or reforming their choice of law rules to develop a comprehensive set of trust rules based on the Hague Trusts Convention.

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INTRODUCTION

Domestic trust law has flourished tremendously in Japan, the Republic of Korea (“Korea”), the Republic of China (“Taiwan”) and the People’s Republic of China (“China”). Since the enactment of the Japanese Trust Act of 1922, other East Asian jurisdictions have enacted trust legislation, including the Korean Trust Act of 1961, the Taiwanese Trust Act of 1996,¹ and the Chinese Trust Act of 2001.² There has also been an overhaul and reform of trust law in Korea (the Korean Trust Act of 2006)³ and Japan (the Japanese Trust Act of 2011).⁴

Today, the trust industry in these jurisdictions thrives. For example, in 2019, Japanese trust banks, which accounted for 23.5% of all Japanese banks, held 256.7 trillion yen (approximately USD 2.33 trillion) in funds;⁵ in 2020, Chinese trust companies held 21.33 trillion yuan (approximately USD 3.28 trillion) worth of assets.⁶ And in Korea, the value of assets held in trust in 2020 amounted to more than one quadrillion South Korean won (approximately USD 0.85 trillion).⁷ In addition to the commercial context, the domestic use of trusts is also growing exponentially, primarily for family planning, wealth management, or as will substitutes.⁸

In stark contrast to the success of domestic trust law stands the private international law aspect of trusts, which is severely underdeveloped. In Japan, Korea, and Taiwan, there is a complete absence of specific choice of law rules that are applicable to cross-border trust disputes. The general assumption by legal scholars in these jurisdictions seems to be that trust disputes can be adequately dealt with by using the existing categories of

¹ Trust Law of the Republic of China (“Taiwan Trust Act”).

² Trust Law of the People’s Republic of China (“China Trust Act”).

³ Trust Act of the Republic of Korea (“S. Kor. Trust Act”).

⁴ Trust Act of Japan (“Japan Trust Act”).

⁵ See L. Kettenhofen, *Value of Trust Bank Funds in Japan from Fiscal Year 2010 to 2019*, STATISTICA (Nov. 4, 2020), <https://www.statista.com/statistics/1172624/japan-value-of-trust-bank-funds/>.

⁶ See *China’s Trust Industry Reports Higher Revenue Growth in Q1*, THE STATE COUNCIL, THE PEOPLE’S REPUBLIC OF CHINA (June 13, 2020), http://english.www.gov.cn/archive/statistics/202006/13/content_WS5ee47dacc6d0a6946639c00f.html.

⁷ See *Stock Market Trends*, KOREA FIN. INVEST. ASS’N, <http://freesis.kofia.or.kr/> (last visited Oct. 13, 2021).

⁸ See, e.g., Masayuki Tamaruya, *The Transformation of Japanese Trust Law and Practice: Historical Contexts and Future Challenge*, in ASIA-PACIFIC TRUSTS LAW, VOL. 1: THEORY AND PRACTICE IN CONTEXT (Ying Khai Liew & Matthew Hardings eds., 2021); Ying-Chieh Wu, *Private Trusts as a De Facto Private Foundation and its Practical Usage in Korea*, in ASIA-PACIFIC TRUSTS LAW, VOL. 2: ADAPTATION IN CONTEXT (Ying Khai Liew & Ying-Chieh Wu eds., forthcoming 2022); Jian Qu, *Trusts and the Chinese Civil Code: Toward a New Era of Codification*, 27 TRUSTS & TRUSTEES 82 (2021) (discussing the codification of trusts in China).

choice of law rules found in each jurisdiction's Private International Law Act (PILA),⁹ such as those concerning contract, property, tort, unjust enrichment, and so on. The same assumption may also explain the law in China. In a lone provision, the Chinese PILA¹⁰ provides for choice of law rules applicable to trusts. However, due to its brevity and its limited applicability, the assumption seems to be that the rules applicable to other categories of case can fill in any gaps. But this assumption is flawed. The lack of a comprehensive and dedicated set of choice of law rules for trusts distorts a proper understanding of trusts law and frustrates the autonomy and legitimate expectations of parties to a trust. This situation is troubling. Because cross-border movement will only grow and the global commercial sector thrives on cross-border activity, the lack of dedicated trust choice of law rules seriously hampers the utility of trusts.

In assessing the law in East Asia, this paper analyzes the choice of law rules in the Hague Convention on the Law Applicable to Trusts and on their Recognition (referred to throughout the article as "the Convention"). This paper ultimately suggests that the four East Asian jurisdictions (Japan, Korea, Taiwan, and China) should develop comprehensive choice of law rules based on the Convention. The need for producing the Convention was raised by civil law jurisdictions, not common law jurisdictions, particularly those whose domestic law had no concept equivalent to trusts.¹¹ The reason is evident: those jurisdictions require guidance on how to deal with trusts in cross-border disputes. Surprisingly, few civil law jurisdictions—indeed, few jurisdictions at all—are signatories to the Convention.¹² Insofar as common law jurisdictions are concerned, the lack of interest in the Convention can be explained on the basis that the Convention does not offer any substantial advantage over existing common law trust choice of law rules because they are substantively similar in important respects.¹³

⁹ Japan Act No. 78 ("Japan PILA"); English translations are sourced from Kent Anderson and Yasuhiro Okuda, *Translation of Japan's Private International Law: Act on the General Rules of Application of Laws* [Hō no Tekiyō ni Kansuru Tsūsokuhō], Law No. 10 of 1898 (as newly titled and amended June 21, 2006) 8 ASIAN-PACIFIC L. & POLICY J. 138 (2006). Korea: Act No. 6465 of 2011 ("Korea PILA"); English translations are sourced from Kwang Hyun Suk, *New Conflict of Laws Act of the Republic of Korea*, 1 J. OF KOREAN L. 197 (2001). Taiwan: Act Governing the Choice of Law in Civil Matters Involving Foreign Elements ("Taiwan PILA").

¹⁰ Zhonghua Renmin Gongheguo Shewai Minshi Falvguanxi Shiyongfa, Law of the Application of Laws over Foreign-Related Civil Relations of the People's Republic of China ("China PILA").

¹¹ See David Hayton, *Reflections on the Hague Trusts Convention After 30 Years*, 12 J. OF PRIVATE INT'L L. 1 (2016).

¹² Jurisdictions where the Convention is in force are Australia, Canada, Hong Kong, Malta, Cyprus, and the UK (jurisdictions with common law influences); Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Panama, San Marino, and Switzerland (jurisdictions with civil law influences). The Convention has been signed, but not ratified, by France and the United States. For an up-to-date status table, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59>.

¹³ See Richard Garnett, *Identifying an Asia-Pacific Private International Law of Trusts*, in ASIA-PACIFIC TRUSTS LAW 381 (Ying Khai Liew & Matthew Harding eds., 2021); David Hayton, *Reflections on The Hague Trusts Convention After 30 Years*, 12 J. OF PRIVATE INT'L LAW 1, 2 (2016).

The lack of interest in many civil jurisdictions without trust law is also understandable. Unless the jurisdictions regularly deal with trust issues in cross-border litigation—an unlikely situation in non-trust jurisdictions—there is no real impetus to adopt the Convention. After all, the prospect of importing an unknown foreign institution¹⁴ is surely daunting, if not overwhelming. In contrast, it is surprising that civil law jurisdictions that have a mature law of trusts, such as the East Asian jurisdictions, lack enthusiasm for adopting a comprehensive, dedicated set of trusts choice of law rules.

Of course, the Convention is not the only regime that is open to the East Asian jurisdictions to adopt. Other templates include the trusts-related rules under the American Restatement (Second) Conflict of Laws¹⁵ or the Uniform Trust Code.¹⁶ But the Convention was designed specifically with the interest of civil jurisdictions in mind. For example, trusts to which the Convention applies are defined¹⁷ to accommodate the sort of “obligational trusts”¹⁸ recognized in East Asia. The Convention also contains safety valves that assuage concerns that the East Asian jurisdictions may have in adopting foreign trust practices.¹⁹ For these reasons, this paper argues that the Convention is an excellent reference point for East Asian jurisdictions to enact or reform their choice of law rules.

The structure of the paper is as follows. Part One sets out two yardsticks which will be used to evaluate the existing choice of law rules in East Asia. Parts Two, Three, Four, and Five scrutinize those rules, and each Part examines a specific aspect that causes certain difficulties. Part Six addresses the concerns that East Asian jurisdictions may have about the Convention. Part Seven concludes by recommending the adoption of dedicated trust choice of law rules based on the Hague Trusts Convention.

I. YARDSTICKS

In East Asia, as is the case in most choice of law regimes, the rules which apply to cross-border disputes are matters solely for the forum.²⁰ For this reason, the mere fact that East Asian jurisdictions apply different rules

¹⁴ Kurt Lipstein, *Trusts*, 3 INT’L ENCYCLOPEDIA OF COMPAR. LAW 23 (1994). See also Lionel Smith, *Stateless Trusts*, in *The Worlds of the Trust* 89, 99 (Lionel Smith, ed. 2013).

¹⁵ RESTATEMENT (SECOND) CONFLICT OF LAW § 10 (AM. L. INST. 1971).

¹⁶ UNIF. TR. CODE § 107 (UNIF. L. COMM’N 2010).

¹⁷ Convention on the Law Applicable to Trust and on Their Recognition, art. 2, July 1, 1985 [hereinafter *Convention on Law Applicable to Trust*].

¹⁸ See generally, Hayton, *supra* note 13.

¹⁹ Convention on Law Applicable to Trust, art. 2.

²⁰ That is, the law of the jurisdiction where the court action takes place. See O. Kahn-Freund, *General Problems of Private International Law*, 4 THE MODERN L. REV. 753 (1978). See also China PILA art. 8; JUN YOKOYAMA, PRIVATE INTERNATIONAL LAW IN JAPAN 64 (Roger Blanpain et al. eds., 2nd ed. 2019); Rong-Chwan Chen, *Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Taiwan*, in PRIVATE INTERNATIONAL LAW IN MAINLAND CHINA, TAIWAN AND EUROPE 19, 30 (2014).

to resolve cross-border trust disputes, as compared to their common law counterparts or signatories to the Convention, is neither here nor there. This is because variances in the laws of different jurisdictions on the same issue are commonplace and unremarkable. Nevertheless, this paper seeks to demonstrate that the adoption of such a view causes difficulties for a proper treatment of trusts.

To explain this point properly, this Part develops two important yardsticks against which the existing approaches in East Asia can be measured. The first yardstick touches on the trust aspect, specifically the extent to which existing choice of law rules maintain and promote trusts as a distinctive legal device. The second touches on the private international law aspect, specifically the extent to which those rules protect and enhance the autonomy and legitimate expectations of the parties to the trust.

A. *The Distinctiveness of the Trust*

The concept of “dual ownership,” which is often thought to be central to explaining the common law trust,²¹ is foreign to civilian legal thought. Thus, the Trust Acts in East Asia define the trust without reference to equity or the notion of ownership. Each Trust Act stipulates that a trust is an arrangement created when a settlor transfers property or entrusts his property rights to a trustee. This trustee is responsible for administering or disposing of the property for the benefit of a beneficiary or, more generally, to achieve a specified purpose.²²

Defined as such, it is easy to fall into the error of thinking that there is nothing distinctive about the trust. Since a contract may easily provide for such arrangements, the “majority thesis in East Asia”²³ is that the trust is a kind of contract. Support for this view may also be found in the civil law method of thinking, by which strict legal categorization is fundamental. The infrastructure of civil private law “is rooted in the Roman-Germanic basis, which adopts dichotomous system in respect of the private law dealing with property: the law of property and that of obligation.”²⁴ All four East Asian jurisdictions subscribe to the *numerus clausus* principle,²⁵

²¹ See, e.g., Tony Honoré, *Trusts: The Inessentials*, in RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 7 (Joshua Getzler ed., 2003); George Gretton, *Trusts without Equity*, 49 INT’L & COMPAR. L.Q. 599, 600 (2000).

²² Japan Trust Act art. 2(1); S. Kor. Trust Act art. 2.; Taiwan Trust Act art. 1; China Trust Act art. 2

²³ See Ying Chieh Wu, *East Asian Trusts at the Crossroads*, 10 NAT’L TAIWAN UNIV. L. REV. 79, 81–82 (2015).

²⁴ *Id.* at 81.

²⁵ Minpō [Minpō] [Civ. C.] art. 175 (Japan); Minbeob [Civil Act] art. 185 (S. Kor.); Minguo Xianfa art. 757 (Taiwan); Wuquanfa art. 5 (China); see Yun-chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms* 100 IOWA L. REV. 2275, 2301 (2015). The *numerus clausus* principle is the principle that there is an exhaustive list of property rights recognizable by the law.

and no jurisdiction has ever explicitly recognized a beneficiary's interest under a trust as a right *in rem*.²⁶ This might appear to lend support to the view that a beneficiary's right is simply contractual and that the trust is simply a kind of contract.

However, to conceive of a trust as nothing distinctive, is a mistake. One main reason is that East Asia trusts can be created not only by way of contract, but also by will (in all four jurisdictions) and by way of self-declaration (in Japan, Korea, and Taiwan).²⁷ As Wu has convincingly demonstrated, a contractual analysis is thoroughly unsustainable when it comes to testamentary trusts and self-declared trusts.²⁸ A trust created by will comes into being only upon the testator's death; it follows that there is no counter-party for a valid contract. As for self-declared trusts, one cannot contract with oneself. These two points indicate that the trust is not simply a subset of contract law.

A second reason is that numerous provisions in these four jurisdictions' Trust Acts are wholly incompatible with the characterization of the beneficiary's rights as being simply *in personam* in nature.²⁹ These include, for example, provisions securing the independence of the trust property,³⁰ the right to rescind dispositions in breach of trust,³¹ the continuity of the trust despite the trustee's death or bankruptcy,³² and the right of a sole beneficiary to the trust property upon termination.³³

A third reason is that the Trust Acts of all four jurisdictions provide a comprehensive set of mandatory and default rules which apply only to trusts, and no other—even closely analogous—relationship, such as agency, mandate, or contracts. This supports the view that the trust is a

²⁶ Wu, *supra* note 23, at 106–07. A right *in rem*, which approximates to a “property right,” means a property right recognizable by the law.

²⁷ Japan Trust Act art. 3; S. Kor. Trust Act art. 3; Taiwan Trust Act art. 2; China Trust Act art. 8. Note, however, that in Taiwan only charitable trusts can be created by self-declaration, subject to strict restrictions (Taiwan Trust Act art. 71). Note also that Art. 8 of the China Trust Act states that trusts can be created by “other documents”; but adding this clause is commonplace in Chinese statutes, and in the trusts context no “other documents” have been recognized as capable of creating trusts. See Lusina Ho et al., *Trust Law in China: A Critical Evaluation of its Conceptual Foundation*, in TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS 81 (Lusina Ho & Rebecca Lee eds., 2013).

²⁸ Wu, *supra* note 23, at 84–85.

²⁹ See, e.g., Lusina Ho, *The Reception of Trust in Asia: Emerging Asian Principles of Trust?*, SING. J. LEGAL STUD. 287, 300 (2004); Masayuki Tamaruya, *Transformation of Trust Ideas in Japan: Drafting of the Trust Act 1922*, 103 IOWA L. REV. 2229 (2013) (detailing that an *in personam* right approximates to a “personal right”).

³⁰ Japan Trust Act art. 16–18; S. Kor. Trust Act art. 22–27; Taiwan Trust Act ch. II; China Trust Act art. 15–16. The preservation of the independence of trust property in the Chinese Trust Act is a crucial attribute which signifies the uniqueness of the Chinese trust despite the fact that Art. 2 of the Chinese Trust Act enables a trust to be created even where a settlor retains ownership of the trust property. See Ho et al., *supra* note 27, at 85–88.

³¹ Japan Trust Act art. 27; S. Kor. Trust Act art. 75; Taiwan Trust Act art. 18.; China Trust Act art. 22.

³² Japan Trust Act art. 75; S. Kor. Trust Act art. 23–24; Taiwan Trust Act art. 45; China Trust Act art. 52.

³³ Japan Trust Act art. 182; S. Kor. Trust Act art. 101; Taiwan Trust Act art. 65; China Trust Act art. 54.

distinctive legal institution.

The fact that the trust is a distinctive legal device becomes even clearer when seen from an historical perspective. The first Trust Act enacted in the region, the 1922 Japanese Trust Act, “was shaped by the extensive use of English and American treatises and case law, the Californian Civil Code and the [Indian Trust Act],” and hence “[t]he concept of trust that the Trust Act embraced was unmistakably based on the common law.”³⁴ Indeed, “in 1921 the trust concept meant for most lawyers across the world the common law trust.”³⁵ And when the 1922 Act inspired Korea, Taiwan, and China to construct their own laws, “the [common law] trust was imported into [those jurisdictions] via Japan.”³⁶ It is therefore unsurprising that, as Masayuki Tamaruya has incisively observed, “[d]espite the civil law scholars’ herculean efforts [to elucidate the nature of the trust], one can perceive the sense of resignation that fitting the trust idea into a neat conceptual model is an unattainable task.”³⁷

However, one might object, positing that domestic law arguments are irrelevant for the purposes of private international law. It is well accepted that the exercise of characterization³⁸ for private international law purposes, while undertaken according to the law of the forum (*lex fori*), need not mirror domestic legal categories—the exercise of characterization is a *functional* exercise.³⁹ The potential objection, therefore, is that the uniqueness of the trust in domestic law does not demonstrate the need for choice of law rules to recognize, let alone protect, the uniqueness of the trust institution.

There is no basis for this objection, however, because “although characterization in private international law need not mirror domestic

³⁴ Stelios Tofaris, *Trust Law Goes East: The Transplantation of Trust Law in India and Beyond*, 36 J. LEGAL HIST. 299, 324 (2015).

³⁵ D.W.M. Waters, *The Future of the Trust: Part I*, J. INT’L TR. 179, 211–12 (2006).

³⁶ Wu Ying-Chieh, *Trust Law in South Korea: Developments and Challenges*, in TRUST LAW IN ASIAN AND CIVIL LAW JURISDICTIONS 46–47 (Lusina Ho & Rebecca Lee eds., 2013); CHANG YUN-CHIEN, CHEN WEITSENG & WU YING-CHIEH, PROPERTY AND TRUST LAW IN TAIWAN 113 (2017); see also Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 IOWA L. REV. 2229, 2246–47 (2018); Yamada Akira, *Sintak rippo katei no kenkyu [Study on the Process of Legislation on Trusts]*, in TRUST LAW IN ASIAN AND CIVIL LAW JURISDICTIONS 97 (Lusina Ho & Rebecca Lee eds., 2013).

³⁷ Tamaruya, *supra* note 29, at 203(112). For the purposes of this paper, it is not necessary to speculate how best the trust should be conceptualized in East Asia. But note that Wu suggests that the doctrine of separate patrimony provides the best plausible analysis. Wu, *supra* note 23, at 108.

³⁸ That is, the determination of the legal category or categories within which the facts of a case fall, for the purpose of applying the choice of law rule or rules that are applicable to that category or categories.

³⁹ See, e.g., TIONG MIN YEO, CHOICE OF LAW FOR EQUITABLE DOCTRINES 71 (2004); GEORGE PANAGOPOULOS, RESTITUTION IN PRIVATE INTERNATIONAL LAW 33 (Colin Harvey ed., 2000); ZHENG SOPHIA TANG, YONGPING XIAO & ZHENGXIN HUO, CONFLICT OF LAWS IN THE PEOPLE’S REPUBLIC OF CHINA 30, 284 (2016); Weizuo Chen & Gerald Goldstein, *The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law*, J. OF PRIV. INT’L L. 411, 421 (2017); Walter Wheeler Cook, *Logical and Legal Bases of Conflict of Laws*, 33 YALE L.J. 457, 458–70 (1923–1924); *Wight v. Eckhardt Marine GmbH* [2003] UKPC 37.

categories of case, the classifications under domestic law exert a highly persuasive influence at the conflicts level.”⁴⁰ On the one hand, because forum courts determine the applicable choice of law rules, judges, when determining that issue, cannot be completely detached from the domestic law analysis of the type of claim in question. The one always affects the other.⁴¹ On the other hand, the choice of law rules that forum courts apply have the real possibility of directly affecting the health or status of domestic law. This is particularly pertinent where the domestic law in question can facilitate cross-border activity; the trust is not a purely domestic device. In East Asia, a trust’s primary domain is the commercial arena;⁴² and commercial life attracts and thrives on cross-border activity. A vigorous set of trust choice of law rules may facilitate and encourage the development of the outward-facing aspects of trust law, through ensuring certainty and predictability where cross-border trust disputes occur.⁴³ This increases confidence in, and the usage of, domestic trust laws, and increases the attraction of foreign investment in the region.

In sum, the first yardstick by which East Asian choice of law rules can be assessed is the extent to which they recognize and promote the distinctiveness of the trust.

B. Autonomy and Legitimate Expectations

The trust, like a contract, is a facilitative device made available for people to “realis[e] their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.”⁴⁴ The provision of private law facilitative devices is an expression of the state’s commitment to recognizing and protecting personal autonomy. It also allows individuals to have the freedom to use such facilities to achieve their aims or goals.⁴⁵ If the protection of autonomy is one side of a coin, its flipside is the protection and vindication of legitimate expectations. If the law allows individuals the freedom to use facilitative devices, it follows

⁴⁰ Adeline Chong, *The Common Law Choice of Law Rules for Resulting and Constructive Trusts*, 54 INT’L & COMPAR. L.Q. 855, 861 (2005).

⁴¹ This point has also been made in East Asia. See, e.g., YOKOYAMA *supra* note 20, at 65; Zhengxin Huo, *An Imperfect Improvement: The New Conflict of Laws Act of the People’s Republic of China*, 60 INT’L & COMPAR. L.Q. 1065, 1075 (2011).

⁴² See Tamaruya, *supra* note 8 (Japan); Chang, Chen & Wu, *supra* note 36, at 47; Chang, Chen & Wu *supra* note 36, at 113; Ho et al., *supra* note 27, at 79–82.

⁴³ A similar point has been made in relation to the Taiwanese PILA more generally: “It is beyond doubt that the provisions of the [PILA] on international contracts, torts, property rights and family relationship played an important role in supporting the ties of international trade, cross-border tourism and transnational marriage.” See generally Chen, *supra* note 20.

⁴⁴ H.L.A. HART, *THE CONCEPT OF LAW* 27–28 (2nd ed. 1994).

⁴⁵ See Ying Khai Liew, *Justifying Anglo-American Trusts Law*, 12 WM. & MARY BUS. L. REV. 685 (2021).

that these individuals can expect legal effect to be given to legitimate choices made within the bounds of the relevant facilitative device.

The enhancement of personal autonomy and the protection of legitimate expectations also inform the choice of law rules which relate to domestic facilitative devices. In relation to the protection of autonomy, this can be detected in the East Asian jurisdictions' choice of law rules for contracts,⁴⁶ the Chinese choice of law rules for trusts,⁴⁷ and the Convention,⁴⁸ which allows the relevant parties to choose the governing law. In relation to the protection of legitimate expectations, an influential paper written by Max Rheinstein in 1945 is instructive.⁴⁹ There, Rheinstein argued that the protection of legitimate expectations is one of the main rationales of any choice of law rule.⁵⁰ In particular, "one of those expectations is that we ought not to be subjected to punishment, liability or other legal detriment for conduct which we had good reason to believe would not subject us to such troubles,"⁵¹ as would be the case if a dispute were to be decided "under a law whose application would take the parties by surprise."⁵² There is good reason to think that there ought to be consistency between autonomy and expectations, certainly in relation to facilitative devices. Thus, contractual freedom is matched by the freedom of the parties to select the governing law of their contract, the choice of which, if not generally respected, would "take the parties by surprise." The same ought to be the case in relation to trusts.

The enhancement of autonomy and the protection of legitimate expectations, taken together, form the second yardstick. Thus, for example, the law would detract from these rationales if the parties that create a trust expressly or impliedly select a governing law, but the trust is categorized as a contract in some cases or as a form of property in others. Another example is where a settlor chooses a governing law to apply to a specific aspect of the trust, but this law is essentially overridden by the forum's courts due to the choice of law rules employed: this would detract from the enhancement of autonomy and protection of legitimate expectations, unless such overriding is otherwise justified by, for example, public policy considerations.

II. CHARACTERIZATION

⁴⁶ Japan PILA art. 7; S. Kor. PILA art. 25(1); Taiwan PILA art. 20(1); China PILA art. 41.

⁴⁷ Japan Trust Act art. 182; S. Kor. Trust Act art. 101; Taiwan Trust Act ch. VII; China Trust Act art. 54.

⁴⁸ See Convention on Law Applicable to Trust, art. 6.

⁴⁹ Max Rheinstein, *Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4 (1945).

⁵⁰ *Id.* at 17–24.

⁵¹ *Id.* at 22.

⁵² *Id.* at 23.

To assess the choice of law rules that may be applicable to cross-border trust disputes, it must first be noted that all four East Asian jurisdictions follow the classical methodology for determining the applicable law.⁵³ This classical methodology provides that the forum court must first categorize or characterize the dispute at hand and then deduce the connecting factor prescribed by the relevant category. This section considers the issue of characterization, and Part Three considers connecting factors.

Under the Convention, clear guidance is given as to the issue of characterization: “legal relationships created—inter vivos or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose”⁵⁴ and “created voluntarily and evidenced in writing”⁵⁵ will be characterized as a “trust.” Article 2 further clarifies that:

A trust has the following characteristics:

- (a) the assets constitute a separate fund and are not a part of the trustee’s own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

Because this definition of a “trust” does not strictly reflect the common law concept of “equitable ownership,”⁵⁶ there is no doubt that a significant majority of trusts, presently recognized in East Asia, would fall within its ambit. This is likely to be true even in China, where the curiously drafted Article 2 of the Trust Act defines a trust as arising where a settlor “entrusts” property rights to the trustee—a provision which has caused much uncertainty as to whether the trustee must have title to the trust assets. A Chinese trust established without transfer of trust property to the trustee still fits the Convention, as it involves “assets ... placed under the control

⁵³ See YOKOYAMA, *supra* note 20, at 64–65; Hongsik Chung, *Private International Law*, in INTRODUCTION TO KOREAN LAW 271, 283 (Korea Legislation Research Institute ed., 2013); Chen, *supra* note 20, at 30 (discussing the Taiwan Supreme Court’s decision Tai-Kang 165 of 2005); Huo, *supra* note 41, at 1075.

⁵⁴ See Convention on Law Applicable to Trust, art. 2.

⁵⁵ See Convention on Law Applicable to Trust, art. 3.

⁵⁶ DAVID J. HAYTON ET AL., UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES 100.51, 100.58 (13th ed. 2016).

of a trustee.”⁵⁷ It may well be said that title to the trust assets is “in the name of [the settlor] on behalf of the trustee.”

In East Asia, however, the issue of characterization is not straightforward. The reason for this, insofar as Japan, Korea, and Taiwan are concerned, is that their PILAs make no specific provision for trusts. In China, a specific provision is made for trusts, but as discussed below, this provision is far from comprehensive and creates similar characterization issues.

A. *Trusts Created by Contract (“Trust Contracts”)*

As a matter of first impression, courts in Japan, Korea, and Taiwan are likely to assume that trusts created by contract attract choice of law rules pertaining to contracts. This is consistent with the prevailing view that domestic trusts are a kind of contract. In the case of China, the dedicated trusts choice of law rules in Article 17 of the Chinese PILA⁵⁸ are likely to be assumed to be applicable.

However, because domestic and choice of law legal categories need not mirror one another, these characterizations are not a foregone conclusion. In the case of China, the highly influential view that a trust is a contract⁵⁹ may lead courts to characterize a trust as a contract for choice of law purposes. Another possibility in all four jurisdictions is to characterize a trust dispute as concerning property. This characterization is consistent with the occasional—but potentially misguided—analysis that, in East Asian civil jurisdictions, trust beneficiaries have a right *in rem* over trust funds.⁶⁰ It is also possible that a trust created by contract almost always involves the creation or acquisition of real rights, at two points in time at least. The first is when the settlor transfers trust assets to the trustee.⁶¹ The second is upon termination of the trust, when residual trust assets will vest in the beneficiary, the settlor, or such persons as provided for in the trust instrument.⁶² Moreover, this characterization may follow if a trust dispute is conceptualized as a dispute to determine the title or ownership of the relevant property.

⁵⁷ Rebecca Lee, *Conceptualizing the Chinese Trust*, 58 INT’L & COMPAR. Q. 655, 662 (2009) (quoting Convention on Law Applicable to Trusts, art. 2).

⁵⁸ Japan Trust Act art. 182; S. Kor. Trust Act art. 101; Taiwan Trust Act ch. VII; China Trust Act art. 54.

⁵⁹ See Lee, *supra* note 57, at 659–62; Ho et al., *supra* note 27, at 87–88.

⁶⁰ See Wu, *supra* note 23.

⁶¹ Even in China, “in practice an overwhelming majority of Chinese trusts do involve the transfer of trust property to the trustee.” Ho et al., *supra* note 27, at 86.

⁶² Japan Trust Act art. 182; S. Kor. Trust Act art. 101; Taiwan Trust Act ch. VII; China Trust Act art. 54.

B. Trusts Created by Will (“Testamentary Trusts”)

In East Asia, the Trust Acts recognize that not all trusts are created by contracts. But when we move away from the notion of trusts as contracts, the instinct to apply the contract characterization becomes less compelling.⁶³ In relation to China, it also becomes impossible to apply Article 17 of the Chinese PILA. That provision states:

The parties concerned may choose the laws applicable to trust by agreement. If the parties do not choose, the laws at the locality of the trust or of the fiduciary relation shall apply.

The phrase “may choose ... by agreement” is a translation of “协议选择,” which implies a discussion between the relevant parties from which a consensus is achieved.⁶⁴ Thus, Article 17 is applicable only where there is a contract, it cannot apply where there is none.

Testamentary trusts are likely to be characterized as relating to succession, since a testamentary trust increases or decreases the portion of the testator’s estate from which an individual will inherit. However, for the reasons below, this is not a foregone conclusion.

The first reason concerns the nature of the property in question. In the Chinese PILA, Article 31 provides that the succession of immovable property is governed by the *lex situs*.⁶⁵ Although the distinction between movable and immovable property for the purpose of succession choice of law rules is not explicitly drawn in the other three PILAs, it has been suggested that in Japan, succession of immovable property is also governed by the *lex situs*.⁶⁶ In any case, where the *lex situs* is applied, the testamentary trust is characterized as a matter of property, as opposed to succession. The property characterization also becomes more likely to be applied if East Asian courts take their role in a testamentary trust dispute as being to identify the rightful *owner* of the deceased’s immovables.

The second reason arises due to the interrelationship between succession and wills choice of law rules. In the Chinese PILA, a bright line is drawn between “statutory succession” (which includes intestate succession) and “testate succession” (which involves a will).⁶⁷ This may suggest that testamentary trusts always fall within the latter set of rules, but matters may not be this straightforward. In China, as well as in Japan, Korea, and Taiwan, where such a distinction is not drawn, a will does not

⁶³ See Wu, *supra* note 23.

⁶⁴ I thank Hui Jing for bringing this to my attention.

⁶⁵ That is, the law of the place where the property is situated.

⁶⁶ YOKOYAMA *supra* note 20, at 343.

⁶⁷ China PILA, art. 31 (intestate succession), arts. 32–33 (testate succession).

govern all aspects of succession matters relating to the deceased's property. A clear example is forced heirship,⁶⁸ to which a will must yield. When it comes to testamentary trust disputes, it may be difficult to determine whether the case falls within the succession or wills provisions.⁶⁹

The problem does not end there. The Japanese and Taiwanese PILAs contain a category of choice of law rules applicable to "juridical acts."⁷⁰ Given that the execution of a will is a juridical act, it may be possible to characterize a testamentary trust as a "juridical act" for choice of law purposes.⁷¹

C. *Created by Self-Declaration ("Self-Declared Trusts")*

As previously mentioned, in Japan and Korea, and Taiwan to a more limited extent,⁷² trusts may be created by self-declaration. That is, settlors can constitute themselves trustees for the intended beneficiaries. For choice of law purposes, a property characterization may be appropriate due to the reasons discussed earlier, namely on the basis that beneficiaries have *in rem* rights in trust assets, or on the basis that real rights are acquired or transferred when a trust terminates. But the former basis is likely to be theoretically unsound, as discussed earlier, and the latter basis may flounder where, when the dispute arises, the trust is nowhere near its end. Alternatively, self-declared trusts may attract the choice of law rules relating to juridical acts.

D. *Breach of Trust*

Regardless of the means by which a trust is created, three other possibilities arise where the dispute concerns an alleged breach of trust. It may be possible for the courts to characterize a claim as concerning unjust enrichment or *negotiorum gestio*⁷³ (for example, where the claim concerns an errant trustee making a personal profit) or tort⁷⁴ (for example, where the claim concerns a breach of trust causing a loss to the trust fund) for choice of law purposes, depending on the nature of the alleged breach.

⁶⁸ On which see discussion in Part 6.2. below. Forced heirship is a statutory scheme of mandatory distribution of a deceased's estate.

⁶⁹ Japan PILA art. 36 (succession), art. 37 (wills); S. Kor. PILA: art. 49 (succession), art. 50 (wills); Taiwan PILA: art. 58 (succession), art. 60 (wills).

⁷⁰ Japan PILA art. 7–8; Taiwan PILA art. 20. "Juridical acts" are acts which are expressions of a person's will that are intended to have legal consequences. The Korea PILA contains rules concerning the *formal* validity of "juridical acts," but none which govern their *essential* validity. The China PILA contains no specific rules concerning juridical acts.

⁷¹ See, e.g., YOKOYAMA, *supra* note 20, at 360.

⁷² See Ho et al., *supra* note 27.

⁷³ These are discussed in Section III.A below.

⁷⁴ This is discussed in Section III.B below.

E. Uncertainty in Characterization

As the discussion above illustrates, there are various ways in which East Asian courts may characterize a cross-border trust dispute. The variety of options, coupled with the fact that there is an absence of guiding principles, causes concern.

On the one hand, the difficulty in characterizing a trust dispute detracts from the protection of autonomy and the vindication of legitimate expectations. The freedom of parties to select the applicable law is significantly curbed if the parties are unable to know what to expect in terms of the choice of law. To treat what was intended as a trust as something else, for choice of law purposes, fundamentally disappoints the legitimate expectations that the device was to be treated as a trust.

On the other hand, by characterizing trusts as something other than a trust, East Asian private international law is out of sync with the approach adopted by jurisdictions that are most active on the international trust scene. These are jurisdictions that also take a similar approach to the choice of law issue, given that they are usually common law jurisdictions and/or signatories to the Convention. This provides a disservice to the distinctive nature of the trust, both domestically and globally. It detracts from the central objective of the exercise of characterization, namely “harmony of decision wherever the case is heard.”⁷⁵

There is also the potential knock-on effect of discouraging individuals and companies from entering into trust relationships which relate to or utilize the laws of the East Asian jurisdictions. This is because these parties are unable to foresee how those forum courts might resolve the choice of law question were a cross-border dispute to arise.

III. CONNECTING FACTORS

The differences in characterization would be inconsequential if these distinctions were simply different paths to the same applicable law. Yet, this is far from the case. Each of these categories have substantively different connecting factors.⁷⁶ Apart from causing a disservice to the protection of party autonomy and legitimate expectations, this diminishes the distinctiveness of the trust. As Tiong Min Yeo notes, “[c]hoice of law categories ... are intended to bring together problems which, because of their similarity, ought to share the same connecting factor.”⁷⁷ By characterizing the trust as something other than a trust for choice of law purposes, East Asia jurisdictions send the unfortunate message that a trust

⁷⁵ YEO, *supra* note 39, 3.04.

⁷⁶ A connecting factor is that which links a legal category or issue with a particular legal system.

⁷⁷ YEO, *supra* note 39, 3.09.

is not a distinct concept that ought to be treated in a unitary manner.

Part Three discusses the connecting factors applicable to the categories of succession and wills, property, juridical acts (which includes contracts), and Chinese “trusts.” Unjust enrichment, *negotiorum gestio*, and tort will then be scrutinized in Part Four, as these categorizations are relevant in a narrower range of trust claims, namely when there is a breach of trust claim.

A. *Succession and Wills*

In Japan, Korea, and Taiwan, the connecting factor for succession and wills is the testator’s *lex patriae* (nationality). However, the point in time at which nationality is determined differs. This point in time may be at the time of death for succession or at the time of execution for wills. In China, the applicable law to succession is the testator’s habitual residence at the time of death and the *lex situs* for immovables. For wills, it is the habitual residence at the time of death or the testator’s *lex patriae*. Thus, the connecting factors for succession and wills are not identical.

Both categories, will and succession, do not provide the proper scope for testators to select the law applicable to their testamentary trust. But there is no reason to deny testators the autonomy to do so, as giving effect to an express choice does not appear to introduce any amount of instability or difficulty in ascertaining the applicable law. In situations where the *lex patriae* is applied, this also denies the distinctiveness of the trust by treating testamentary trusts as entailing nothing more than succession or family law, when in reality a trust is a flexible device that may be of relevance beyond any existing a succession or family-related aim. The same problem arises where a distinction is made between movables and immovables. This fragmented approach detracts from recognizing a trust as a distinctive institution, which applies regardless of the nature of the trust assets.

All the above can be contrasted with the Convention, which provides latitude to settlors (including testators) to exercise autonomy. Their express or implied choice of governing law will normally take effect, unless the chosen law does not recognize the specific trust or type of trust.⁷⁸ In the absence of a choice, the applicable law is the law with which *the trust*, not the testator, has the closest connection—a rule consistent with the distinctive nature of the trust. In addition, under the Convention, the relevant point in time is clear. This is the time the testator *executes* the will, whether in relation to an express or implied governing law of choice⁷⁹ or

⁷⁸ See Convention on Law Applicable to Trust, art. 6.

⁷⁹ *In the Estate Constantinou* [2012] QSCR 332 (Austl.); see also HAYTON ET AL., *supra* note 56, at 100.146.

in relation to the law with the closest connection to the trust.⁸⁰ This approach is adopted to provide certainty and protect the expectations of the testator.⁸¹ These key considerations may be overlooked if the relevant time used is the time of the testator's death.

B. *Property (Rights in Rem)*

In relation to property, Japan, Korea, and Taiwan reflect a similar approach: the connecting factor for both movable and immovable property is the *lex situs* of the subject matter.⁸² In China, the same position is adopted in relation to immovables, movables attract the *lex situs* rule when the parties have not agreed on a governing law.⁸³

In the context of trust disputes, these approaches are problematic for three reasons. First, with the limited exception in China, a property characterization denies settlors the autonomy to choose the governing law. This contrasts with the position under the Convention, where an express choice of governing law by the settlor generally takes effect, even if it differs from the *lex situs*. This approach “places a higher currency on settlor autonomy than on the risk of unenforceability overseas.”⁸⁴

Second, even in the absence of an express choice, the property characterization overemphasizes the *lex situs* at the expense of other factors. Consider the position under the Convention. On the one hand, when determining whether there is an *implied* choice of law under Article 6, “[t]he situs of the assets may be an important factor where the bulk of the trust property is immovable. However, where movable property is concerned, the situs appears to be a relevant, but not especially important factor.”⁸⁵ Ultimately, the basal criterion is the settlor's subjective intention⁸⁶ and the *lex situs* is important only insofar as it sheds light on that criterion. Thus, the Convention better protects the legitimate expectations of the parties rather than simply using the property characterization. On the other hand, absent an express *or* implied choice of law, Article 7 provides that the applicable law is the law with which the trust is most closely connected, with particular reference made to:

- a) the place of administration of the trust designated by the settlor;

⁸⁰ HAYTON ET AL., *supra* note 56, at 100.153.

⁸¹ *See In the Estate Constantinou* [2012] QSCR 44 (Austl.); HAYTON ET AL., *supra* note 56, at 100.153.

⁸² Japan PILA art. 13; S. Kor. PILA art. 19; Taiwan PILA art. 38.

⁸³ China PILA art. 36–37.

⁸⁴ HAYTON ET AL., *supra* note 56, at 100.137.

⁸⁵ LAWRENCE COLLINS ET AL., *DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS* (Adrian Briggs et al. eds., 2018).

⁸⁶ HAYTON ET AL., *supra* note 56, at 100.141.

- b) the situs of the assets of the trust;
- c) the place of residence or business of the trustee;
- d) the objects of the trust and the places where they are to be fulfilled.⁸⁷

The *lex situs* is merely one of these four non-exhaustive criteria. Moreover, the *lex situs* is not necessarily a particularly weighty factor: “[t]he situs of the assets of the trust may deserve little weight: the movables included in a trust are usually intangible, e.g., stocks, shares, and bonds; and the situs of an intangible movable is to some extent a fiction.”⁸⁸ By not according the *lex situs* undue weight, the Convention better recognizes the distinctiveness of the trust. Trust law is not a matter of property law per se but is a unique legal institution that should be taken when applying the close connection test.

Third, the *lex situs* approach is practically problematic. As David Hayton notes,⁸⁹ it is increasingly common for *inter vivos* trusts to be created where its assets are initially of nominal value, only for substantial assets to be added later as accretions to the fund. In relation to testamentary trusts, the trust fund often contains assets across multiple jurisdictions. In these cases, the *lex situs* is not an important factor. To give undue weight to the *lex situs* in these cases would be to impose an outcome that does not align with the legitimate expectations of the settlor when creating a trust and of the beneficiary who does not expect the trust to be treated as a matter of property, even for choice of law purposes.

C. *Juridical Acts (Including Contracts)*

As observed above,⁹⁰ Japan and Taiwan have dedicated choice of law rules governing the essential validity of “juridical acts” in their PILAs. This category is absent in Korea and China. Instead, the latter two jurisdictions make explicit reference to *contract* choice of law rules,⁹¹ a category absent in Japan and Taiwan. These two phenomena are related: entering into a contract is undoubtedly a juridical act. Therefore, in Japan and Taiwan, the “juridical acts” category is intended to cover contracts. One upshot of this strategy, insofar as trusts are related, is that the more widely crafted “juridical acts” category can, in addition to trust contracts, include testamentary trusts. This is because the execution of a will is also a juridical act. In the following discussion, the generic label “juridical acts”

⁸⁷ See Convention on Law Applicable to Trust, art. 7.

⁸⁸ COLLINS ET AL., *supra* note 85, at 29–121.

⁸⁹ Hayton, *supra* note 13, at 13.

⁹⁰ See Japan PILA art. 7–8; Taiwan PILA art. 20.

⁹¹ S. Kor. PILA art. 25; China PILA art. 41.

refers to the choice of law rules for that category (including contracts and wills) in Japan and Taiwan, as well as contract rules in Korea and China.

Structurally, all four jurisdictions share a similar approach. Parties are free to choose the governing law, and in the absence of a choice, a close connection test applies. The same structure is adopted in the Convention. However, important differences exist between the rules in the East Asian jurisdictions and compared to the Convention.

1. Party Choice

Of the four jurisdictions, only the Korean PILA⁹² makes specific mention of giving effect to *express* and *implied* choice of law. The terms of the Japanese and Chinese PILAs are non-specific.⁹³ While Japanese courts have given effect to implied choices,⁹⁴ the position in China remains unclear.⁹⁵ Taiwan strictly recognizes *express* choices only.⁹⁶

To the extent that express choices carry the day, the position in East Asia, just as under the Convention,⁹⁷ protects and enhances party autonomy. But where implied choices of law are denied, there is a derogation from party autonomy. It is not clear why a choice—not stated in so many words, but which clearly reflects the actual intention of the parties—is not given effect.⁹⁸

There are two subtle, but important, differences between the regimes in East Asia and the Convention. First, where the juridical acts choice of law rules are engaged as a result of characterizing a trust as a contract, it is the bilateral intention of the parties as expressed in their contract which matters, rather than the unilateral intention of the settlor as under the Convention. Where a trust is created by way of contract, there is almost invariably an overlap between the parties' bilateral intention and the settlor's unilateral intention. Nevertheless, confounding unilateral and bilateral intention erodes the distinctiveness of the trust by failing to recognize the distinction between trusts and contracts. Second, the Convention provides a limitation that is absent in East Asia: an express choice is disregarded if the law chosen does not recognize trusts. This is a

⁹² S. Kor. PILA art. 25(1).

⁹³ Japan PILA art. 7; China PILA art. 41.

⁹⁴ See YOKOYAMA, *supra* note 20, at 133 n.120.

⁹⁵ *But see* GUANGJIAN TU, PRIVATE INTERNATIONAL LAW IN CHINA 142 (2016) (saying yes); TANG, XIAO & HUO, *supra* note 39, at 8.07–8.08.

⁹⁶ Taiwan PILA art. 20(2); *see also* David J.W. Wang, *The Revision of Taiwan's Choice-of-Law Rules*, in *CONTRACTS IN PRIVATE INTERNATIONAL LAW IN MAINLAND CHINA, TAIWAN, AND EUROPE* 185 (Jürgen Basedow & Knut B. Pissler eds., 2014); Rong-Chwan Chen, *The Recent Development of Private International Law in Taiwan*, in *CODIFICATION IN EAST ASIA* 233, 241 (Wen-Yeu Wang ed., 2014).

⁹⁷ JONATHAN HARRIS, *THE HAGUE TRUSTS CONVENTION* 166–69 (2002).

⁹⁸ As is the case under the Convention. *See* HAYTON ET AL., *supra* note 56, at 100.142; the Japan PILA; Chung, *supra* note 53, at 288–89.

consequence of the fact that, while all established legal systems have contract law, not all of them recognize trusts. Without such a rule, however, the juridical acts choice of law rules fail to recognize the distinctiveness of the trust.

2. *Absence of Party Choice*

Of the four jurisdictions, there is an affinity of approach between Japan, Korea, and Taiwan, where there is no selection of the governing law.⁹⁹ In these jurisdictions, the most closely connected law governs, with two presumptions applying. First, where there is a characteristic performer,¹⁰⁰ this performer's habitual residence (Japan and Korea) or domicile (Taiwan) is presumed to be the law with the closest connection. Secondly, where the juridical act concerns immovable property, its *lex situs* is presumed to be the most closely connected law. In China,¹⁰¹ the governing law is the law of the characteristic performer's habitual residence, or the law most closely connected with the contract.

It is convenient to first deal with China's position, where the problem with the approach is easily stated. The principles of characteristic performance and closest connection are given equal footing. However, both principles will not always yield the same applicable law. Thus, it is impossible to predict on which principled basis the courts would determine the applicable law.¹⁰²

As for Japan, Korea, and Taiwan, their approach is similar to the position under the Convention, which also utilizes a close connection test. But there are fundamental differences. First, unlike the Convention, which provides a non-exhaustive list of factors of special importance, the three PILAs contain no specific guidance. This causes uncertainty in relation to trust disputes, which upsets the parties' legitimate expectations.

Second, it is true that the two presumptions are simply *presumptions*, in that they will not apply if the juridical act in question is obviously more closely connected with a different law.¹⁰³ However, it is implicit in the nature of presumptions that courts will not rebut an otherwise applicable presumption unless the "closeness" of the connection with a different law is significant. This suggests that the presumptions would be applied far more frequently than not, which gives rise to the risk of "applying the

⁹⁹ Japan PILA art. 8; S. Kor. PILA art. 26; Taiwan PILA art. 20.

¹⁰⁰ The "characteristic performer" is the party who undertakes substantial performance under the contract (excluding an undertaking simply to pay money).

¹⁰¹ China PILA art. 41.

¹⁰² See Zhengxin Huo, *An Imperfect Improvement: The New Conflict of Laws Act of the People's Republic of China*, 60 INT'L & COMP. L.Q. 1065, 1086 (2011); TANG, XIAO & HUO, *supra* note 39, at 8.55.

¹⁰³ See YOKOYAMA, *supra* note 20, at 37, 138; Korean PILA art. 8(1); Wang, *supra* note 96, at 187.

‘wrong’ law, which is a law with little connection” to the trust.¹⁰⁴ This is liable to disappoint the legitimate expectations of the parties to a trust.

Third, in relation to the principle of characteristic performance, there is little doubt that this refers to the theory, found (*inter alia*) in the European Union Rome Convention and Rome I Regulation. According to this theory, the party who undertakes simply to pay money, is disregarded and the connecting factor is crafted around the other party who undertakes substantial performance.¹⁰⁵ When applied in the trust context, it immediately runs up against the problem of fragmentation. The characteristic performance test is applicable, if at all, only to contracts and is capable of dealing only with trust contracts and not testamentary or self-declared trusts. This fragmented approach detracts from the recognition of the trust as a distinctive institution. Even in relation to trust contracts, the characteristic performance test is inapplicable because that test focuses on the parties’ bilateral intention while a proper analysis of trusts should concern only the settlor’s unilateral intention. Of course, with some analytical gymnastics, it is possible to say that the characteristic performer is the trustee, since it is the trustee who administers the property to carry out the purpose of the trust.¹⁰⁶ Even then, the position is different from Article 7 of the Convention, where one of the relevant factors to be considered is “the place of administration of the trust *designated by the settlor*.”¹⁰⁷ As Jonathan Harris explains,¹⁰⁸ “the place of administration would not be worthy of such a lofty place in the hierarchy of Article 7 if it were to include cases where nothing was said on the matter by the settlor ... [W]here the place of administration ... is not specified[,] ... [it] does not manifestly merit a rank above e.g. the situs of the assets.”

Fourth, the singling out of immovables for application of the *lex situs* presumption gives rise to difficulties in the trusts context. It is inconsistent with the view that the trust is a distinctive institution, whose core features and characteristics do not differ according to the type of property held on trust. It is also likely to disappoint the legitimate expectations of settlors, who would not have expected that different choice of law rules might apply depending on the nature of the trust property. In contrast, the Convention does not prescribe differing approaches according to the nature of the property, an approach which is consistent with the distinctive nature of the trust.

¹⁰⁴ HARRIS, *supra* note 97, at 216.

¹⁰⁵ YOKOYAMA, *supra* note 20, at 141 (Japan); Chung, *supra* note 53, at 290 (Korea); David J.W. Wang, *supra* note 96, at 184–85 (Taiwan); Zhengxin Huo, *supra* note 41, at 1086 (China).

¹⁰⁶ HARRIS, *supra* note 97, at 216 n.598.

¹⁰⁷ Convention art. 7(a) (emphasis added); *see also* M. ALFRED E. VON OVERBECK, EXPLANATORY REPORT 387 (1976).

¹⁰⁸ HARRIS, *supra* note 97, at 218–19.

D. “Trusts” in the Chinese PILA

In the Chinese PILA, Article 17 specifically provides choice of law rules for trusts. As previously noted, this provision does not sufficiently deal with all trusts. On its terms, Article 17 applies only to trusts that are based on an agreement or consensus between the settlor and trustee. Thus, it is applicable only to trust contracts, and cannot apply to testamentary trusts which are not agreement-based trusts. This again results in a fragmented approach towards trusts choice of law rules and detracts from the distinctive nature of the trust.

In relation to trust contracts, Article 17 allows parties to choose the applicable law. The difficulties with this approach are the same as those discussed in relation to juridical acts above. As discussed earlier, it is unclear whether an implied choice of law will be given effect; and if it is not given effect, it is unclear why not. In addition, Article 17 looks to bilateral intention while a trust is concerned with the settlor’s unilateral intention. Moreover, and a choice of law is not disregarded if the law chosen does not recognize trusts. These difficulties pose problems for the protection of party autonomy and legitimate expectations of parties to a trust.

In the absence of a choice of law, Article 17 provides that the governing law is the law “at the locality of the trust or of the fiduciary relation.” But it is impossible to predict how courts will choose a governing law if the trust’s locality and the locality of the fiduciary relationship point to different applicable laws. Furthermore, these two options provide “hard and fast connecting factors” and “[g]iven the complexity of the disputes arising out of trusts, ... such a rigid arrangement may be problematic.”¹⁰⁹ The flexible, but principled, approach provided for by Article 7 of the Convention better protects legitimate expectations.

IV. BREACH OF TRUST

Once the trust is characterized as falling within one of the categories discussed above (contract, property, or succession, etc.), it might be thought that the applicable law selected will also govern the trustee’s liability for breach of trust. However, where a breach of trust is the main dispute in question—that is, when the claim arises specifically where the beneficiary seeks redress against an errant trustee—it is possible for courts to characterize the dispute in three other, additional ways: unjust enrichment, *negotiorum gestio*, and tort.

¹⁰⁹ Zhengxin Huo, *supra* note 41, at 1079.

A. *Unjust Enrichment and Negotiorum Gestio*

A trustee commits a breach if they exploit a trust opportunity (the “trust opportunity” case) or sell trust information (the “trust information” case) for personal gain. In a claim by a beneficiary against the trustee for wrongfully obtained money, a court might classify the case as one of unjust enrichment or *negotiorum gestio*. The unjust enrichment characterization is consonant with the domestic laws in East Asia, which essentially provide that a party must return an enrichment obtained at another’s expense without legal cause if the latter suffers loss or prejudice.¹¹⁰ Given that each domestic Trust Act removes the requirement for “loss,” trustees must disgorge wrongfully obtained profits even if the trust suffers no corresponding loss.¹¹¹ Thus, in trust opportunity and trust information cases, it is possible that a claim for disgorging gains against a trustee might be understood as a claim for unjust enrichment. On the other hand, the *negotiorum gestio* characterization is consonant with an understanding of the trust opportunity case as one of “quasi *negotiorum gestio*,” that is, a case where “the principal [i.e., the beneficiary] is entitled to *deem* the person as having used the opportunity for the principal’s interest and proceed to assert that the managing person [i.e. the trustee] should be personally liable to return the profit.”¹¹² The status of quasi *negotiorum gestio* is unclear in East Asian domestic law,¹¹³ particularly because of the difficulty of analyzing an opportunity which could not have been exploited for the trust’s benefit¹¹⁴ as having been used “for the principal’s interest.” However, the Trust Acts in East Asia dispense of the need for loss in a claim for disgorgement of profits, and this may be taken to dispense of the need to establish a clear deprivation of benefit. Thus, it is possible for such cases to be characterized as relating to *negotiorum gestio*.

Choice of law rules for unjust enrichment and *negotiorum gestio* in the four East Asian jurisdictions differ widely. In Japan, the applicable law for both categories is the law of place where events causing the claims occurred.¹¹⁵ In Korea, it is the law of the place where the enrichment and

¹¹⁰ Japanese Civil Code art. 703; Korean Civil Code art. 741; Taiwanese Civil Code art. 179; Civil Code of the People’s Republic of China, art. 985 (2020).

¹¹¹ Japan Trust Act art. 40(3); S. Kor. Trust Act art. 43(3); Taiwan Trust Act art. 24; China Trust Act art. 26.

¹¹² Ying Chien Wu, *Constructive Trusts in the Civil Law Tradition*, 12 J. OF EQUITY, 319, 328 (2018) (emphasis in original).

¹¹³ For instance, Korean academics reject the concept. See, e.g., Seo-gi Kim, *An Examination on the Doctrine of Negotiorum Gestio*, 34 KYUNGPOOK NATL. UNIV. L.J. 115, 119 (2010). On the other hand, Japanese academics are open to it. See, e.g., Sachiko Uemoto, *Prevention of Unreasonable Gain-Reexamination of Semi-Administrative Management*, KAGOSHIMA UNIV. L. COLLECTION 19 (2015).

¹¹⁴ In East Asian domestic law, *negotiorum gestio* requires the management of the affairs for another person. See Japanese Civil Code art. 697; Korean Civil Code art. 734; Taiwanese Civil Code art. 172; Civil Code of the People’s Republic of China, art. 979.

¹¹⁵ Japan PILA art. 14.

management took place, or the law governing the legal relationship if the enrichment or management is effected on the basis of a legal relationship.¹¹⁶ Taiwan follows the Korean approach, with the exception that the “legal relationship” exception applies only to unjust enrichment and not to *negotiorum gestio*.¹¹⁷ And in China, the parties may choose the governing law by agreement; if an agreement is absent the law of their common habitual residence applies, and where there is no common habitual residence the law of the place of the enrichment or management will govern.¹¹⁸

Characterizing a breach of trust claim as concerning unjust enrichment or *negotiorum gestio* significantly threatens settlor autonomy and the legitimate expectation that the governing law of the trust will govern the consequences following a breach of trust. In all jurisdictions except China, there is no room for parties to choose the governing law. And even in China, a choice takes effect only if it specifically relates to the enrichment or *negotiorum gestio*, rather than to the trust relationship itself.¹¹⁹ Similarly, in Korea and Taiwan, settlor autonomy is not protected. Since the enrichment or management will not be within the scope of the trustee’s duties, the enrichment or management cannot be said to arise “on the basis of a legal relationship”. Therefore, it is not possible to apply the law of the parties’ relationship to protect the parties’ autonomy.

Moreover, there is also a disservice done to the distinctiveness of the trust. Most applicable connecting factors are *enrichment-* or *management-* specific. Applying those connecting factors overlooks the fact that the wrongfulness of a trustee’s gain is not freestanding or due to a lack of legal basis, but instead is wholly grounded in the preexisting trust relationship between the trustee and the beneficiary. Treating enrichment or management in isolation for choice of law purposes fails to recognize the distinctiveness of the trust.

B. Tort

In certain situations when a beneficiary claims compensation against the trustee for breach of trust, the case may be characterized as a tort claim for choice of law purposes. Examples include cases where a trustee wrongly misappropriates trust property or causes a loss through the negligent management of trust property. Characterizing these cases as tort claims may be consistent with the Civil Codes in East Asia, which provide that a person who intentionally or negligently infringes upon a right of

¹¹⁶ S. Kor. PILA art. 30 (*negotiorum gestio*), art. 31 (unjust enrichment).

¹¹⁷ Taiwan PILA art. 23–24.

¹¹⁸ China PILA art. 47.

¹¹⁹ See TANG, XIAO & HUO, *supra* note 39, at 10.28.

others is liable for damage caused.¹²⁰

In the four East Asian jurisdictions, the starting point for determining the governing law is the *lex loci actus* (the law of the place where the act causing the tort occurred) or, in the case of Japan, the *lex loci delicti* (the law of the place where damage occurs).¹²¹ These are merely starting points, since their PILAs also provide other connecting factors under specific circumstances. These include the law of the place of the parties' common habitual residence (Korea, China); a governing law the parties have agreed to after the event (Korea, China); the close connection test (Taiwan); or the *lex loci actus* (Japan). Here, no room is given for an *ex-ante* choice of governing law to apply.

Perhaps more alarming is the potential for a tort characterization to unduly prejudice beneficiaries with a money claim against their trustee under a foreign common law. In the four East Asian jurisdictions, recovery in tort by application of a foreign law is exclusively limited to types of damages recognized by domestic law.¹²² Therefore, a beneficiary's recovery can be limited unnecessarily.

According to common law, there are two distinct types of compensatory claims a beneficiary may bring against a trustee for breach of trust.¹²³ The first type of claim is a "substitutive performance" claim. It arises where the trustee misappropriates trust assets. Where trust assets are misappropriated, the beneficiary has a continuing right in the trust assets, and therefore may compel the trustee to specifically restore the misappropriated assets to the trust (i.e., restoration *in specie*). When this is not possible—for example where the assets can no longer be recovered—the trustee is liable to effectuate "substitutive performance." The award here is a money payment, measured by the current objective value of the assets the trustee ought to have restored to the trust fund at the date of judgment. The theory behind this award is that the trustee's ongoing duty to hold the assets in trust does not evaporate simply due to misappropriation. The second type of claim is a "reparation" claim, which is a claim for loss compensation. Unlike a substitutive performance claim, the sum for which the trustee is liable depends on the extent to which the trustee had caused a loss to the beneficiary. Causation and remoteness of loss must be proved in a reparation claim for the beneficiary to succeed.

The situation is different in East Asia. According to all four East

¹²⁰ Art. 709 Japanese Civil Code; art. 750 Korean Civil Code; art. 184 Taiwanese Civil Code; art. 1164 Chinese Civil Code.

¹²¹ Japan PILA art. 17; S. Kor. PILA art. 32; Taiwan PILA art. 25; China PILA art. 44.

¹²² See Japan PILA art. 22(2); S. Kor. PILA art. 32(4); Wang Wen-Yeu, Wang Chih-Cheng & Shieh Jer-Shenq, *Trust Law in Taiwan: History, Current Features and Future Prospects*, in TRUST LAW IN ASIAN AND CIVIL LAW JURISDICTIONS 63 (Lusina Ho & Rebecca Lee eds., 2013); TANG, XIAO, AND HUO, *supra* note 39, at 9.72–9.77 (China).

¹²³ See general discussion in Hayton et al., *supra* note 56, at 87.11.

Asian Trust Acts, a beneficiary only has two kinds of remedy against a trustee who misappropriates trust property: restoration of the property to its original condition, or pecuniary compensation where restoration is impossible or impracticable.¹²⁴ In common law terms, only reparation claims are recognized. Thus, for cases resulting in a substitutive performance award, an East Asian court might bar the recovery of that sum or limit the award to the amount of loss which the beneficiary can prove was caused by the trustee.

Limiting the beneficiary's claim disappoints the settlor's and beneficiary's legitimate expectations. Where a trust is properly established, the settlor and the beneficiary can legitimately expect that the trustee will deal with the trust assets precisely, as provided by the trust instrument. Moreover, limiting the beneficiary's claim detracts from the distinctiveness of the trust by failing to hold trustees to the high standards required to protect the institution of the trust. Barring substitutive performance claims may encourage trustees to misappropriate trust assets for selfish ends based on the hope that they may not have to repay the full objective value of the assets. And that amount may well fall short of the objective value of the assets. For example, fortuitous intervening events, multiple sufficient causes of the loss, or an unskilled lawyer acting for the plaintiff all might lead to the inability to prove causation of loss equivalent to the objective value of the misappropriated trust property.

C. The Solution Under the Convention

The solution under the Convention is straightforward. Article 11(3)(d) of the Convention establishes that the beneficiary's right against the trustee for breach of trust is governed by the law applicable to the trust. Using the law applicable to the trust to determine the trustee's liability for breach is not only consistent with the settlor's legitimate expectation, but also consistent with the inherent nature of a breach of trust. A trustee commits a breach of trust by acting inconsistently with the terms of the trust instrument, as supplemented by statutory, mandatory, or default rules, and the awarded remedy aims to put things right by reference to the trust. The intertwinement between the trust itself and a claim for breach of trust suggests that they ought to be treated by the same applicable law.

V. SCOPE

In the East Asian jurisdictions, once the applicable law is determined

¹²⁴ Japan Trust Act art. 40; S. Kor. Trust Act art. 43(1); Taiwan Trust Act art. 23; China Trust Act art. 22.

by a category of choice of law rules, there is no limit to the scope of that law's applicability to the trust dispute at hand.¹²⁵ This approach is not nuanced enough and overreaches its application to trust disputes in two significant respects as discussed below. The point is best made by comparing the positions of East Asian jurisdictions to the Convention.

A. Rocket Launcher versus Rocket

Under the Convention, a distinction is drawn between “preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee,”¹²⁶ to which the Convention does not apply, and the trust itself once in existence, to which the Convention does apply. This distinction is commonly illustrated by the imagery of a rocket launcher and rocket.¹²⁷ Matters pertaining to “rocket launching,” such as the substantive and formal validity of transfers from a settlor to the trustee,¹²⁸ are determined by the forum's choice of law rules. Matters pertaining to the “rocket”—the trust—are governed by the Convention. This distinction is absent in the four East Asian jurisdictions, meaning that the applicable law will apply to the trust dispute, from start to finish.

The East Asian PILAs do not distinguish between rocket launcher and rocket. This might seem unremarkable, since it is arguably “more coherent for a single law to determine whether a trust has come into operation.”¹²⁹ However, it is crucial to draw such a distinction if the law is to properly recognize the trust as a distinctive institution which exists only if the preconditions for its existence are fulfilled.

One aspect of this, which applies to all four East Asian jurisdictions, concerns testamentary trusts. It is clear that the formalities for a valid will¹³⁰ must be complied with before a testamentary trust is validly created. If choice of law rules apply to the relevant category of case in question, it follows that rules concerning wills ought to apply to determine the validity of wills, but not to a trust. Another aspect concerns the preliminary matter of the settlor's capacity to deal with his property. It seems that property choice of law rules ought to determine this matter, leaving the proper law

¹²⁵ There are, of course, provisions for mandatory rules of the forum (S. Kor. PILA art. 7; Taiwan PILA art. 7; China PILA art. 4) and rules concerning public policy (Japan PILA art. 42; Taiwan PILA art. 8; China PILA art. 5) to override the applicable law. Such provisions are also found under the Convention. See Convention on Law Applicable to Trust, art. 16, 18. The discussion in the main text focuses on trusts-specific limitations.

¹²⁶ See Convention on Law Applicable to Trust, art. 4.

¹²⁷ VON OVERBECK, *supra* note 107, at 381; see also D. McClean, *Common Lawyers and the Hague Conference*, in E PLURIBUS UNUM, LIBER AMICORUM GEORGES A L DROZ, ON THE PROGRESS 217 (1996).

¹²⁸ VON OVERBECK, *supra* note 107, at 415.

¹²⁹ HARRIS, *supra* note 97, at 4.

¹³⁰ See c; Korean Civil Code arts. 1065–72; Taiwanese Civil Code arts. 1189–98; Civil Code of the People's Republic of China, ch. III.

of the trust to govern issues concerning the trust once properly set up.¹³¹

A further aspect concerns the transfer of trust property from settlor to trustee. As observed above, in China, a transfer is not strictly necessary for a trust to be created. Conversely, in Taiwan, the Supreme Court has held¹³² that it is necessary for a trust to be created, insofar as trust contracts are concerned. The position in Japan and Korea is more ambivalent. While the Korean Trust Act is silent on the matter, the Japanese Trust Act provides that “[a] trust ... become[s] effective when a trust agreement is concluded between the [parties].”¹³³ But it is arguable that, in both jurisdictions, a transfer is necessary for a trust to be created. Thus, Article 2 of the Korean Trust Act contemplates that a trust is a legal relation which arises where the settlor “transfers a specific piece of property” to the trustee; and Article 2(1) of the Japanese Trust Act contemplates a trustee “administer[ing] or dispos[ing] of property,” which surely presupposes a transfer. Moreover, the rights and duties of settlors, trustees, and beneficiaries found in the Trust Acts presuppose that the trust property is already in the trustee’s name; they cannot apply in any meaningful sense until and unless the trust property is transferred to the trustee. If this is correct, then in Japan, Korea, and Taiwan, property choice of law rules should apply for the transfer of trust property and the proper law of the trust should determine questions about the trust once properly established.

In sum, the lack of dedicated trusts choice of law rules in East Asia means that there is no distinction made between the rocket launcher and rocket, and this represents a failure to recognize the distinctiveness of the trust and to treat it as such for the purposes of private international law.

B. *Third-Party Liability*

The approach in East Asia is also not nuanced enough to deal with issues of third-party liability, as distinct from the liability of trustees.

Article 11(3)(d) of the Convention provides for the recovery of trust assets against an errant trustee. However, that subsection contains the proviso that “the rights and obligations of any third-party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.” Where one of the four East Asian jurisdictions is the forum,¹³⁴ the applicable choice of law rules are those relating to property, that is, the *lex situs*. Therefore, if the property is located in a common law jurisdiction, then the beneficiaries will be recognized “as having equitable

¹³¹ Hayton et al., *supra* note 56, at 100.102, 100.105, 100.109.

¹³² Wang Wen-Yeu et al., *supra* note 122, at 71.

¹³³ Japan Trust Act art. 4(1).

¹³⁴ As is the case if England is the forum. *See Akers v. Samba Financial Group* [2017] UKSC 2 (appeal taken from Eng.).

proprietary interests binding everyone except bona fide purchasers of the full legal title without notice of the equitable interest.”¹³⁵ If the property is in a civil jurisdiction, then “third parties will take free from the rights of beneficiaries though they may be subject to some civil law remedies in respect of fraud or unjust enrichment as provided by the law determined by the choice of law rules of the forum.”¹³⁶ And if the property location is in one of the four East Asian jurisdictions, then the beneficiaries may also rescind the transaction between the trustee and the third party under certain circumstances provided for under the Trust Acts.¹³⁷

The East Asian PILAs, however, make no distinction between trustee and third-party liability. The result is that third-party liability is likely to be determined using the same law as determined by the choice of law rules applied to the trust. For example, if a trust contract provides that English law is the governing law, then any third-party volunteer who receives trust property may be compelled to give it up, even if the property, the third party, or the third party’s receipt of the property are all located or occur in a civil jurisdiction. This is troubling because it overlooks the third-party’s legitimate expectations.¹³⁸ A third-party located in a civil jurisdiction would normally expect to keep their property and would be caught off-guard if English law was taken to apply and hence would deprive them of that property. This is even more concerning given that drafters of the Convention “had in mind specifically claims to recover trust property from banks, although the provision is not so limited.”¹³⁹ If the application of choice of law rules risk volunteer banks being compelled to give up trust assets received in good faith without knowledge of the trust, then it is equally detrimental to cross-border commercial activity.

VI. THE APPROPRIATENESS OF THE CONVENTION

The previous discussion demonstrates that the state of affairs of choice of law rules applicable to cross-border trust disputes in East Asia is far from ideal. East Asian jurisdictions should look to the Convention as a starting point for answers. This section addresses the suitability of the Convention in providing the basis for constructing a comprehensive set of trusts choice of law rules. It responds to two previously raised concerns regarding the Convention and civilian legal thinking, which may cause hesitancy in East Asian jurisdictions.

The East Asian jurisdictions are not simply faced with a binary

¹³⁵ Hayton, *supra* note 13, at 16–17.

¹³⁶ *Id.* See also Hayton et al., *supra* note 56, at 100.78, 100.216.

¹³⁷ Japan Trust Act art. 27; S. Kor. Trust Act art. 75; Taiwan Trust Act art. 18; China Trust Act art. 49.

¹³⁸ Third-party expectations are the reason why the Convention does not extend to determine third-party liability. HARRIS, *supra* note 97, at 323.

¹³⁹ HARRIS, *supra* note 97, at 322.

choice: to adopt the entire Convention, or not. The experience of other jurisdictions indicates that the Convention may be adopted with modifications,¹⁴⁰ or its key principles may be incorporated into the forum's law.¹⁴¹ Part Six demonstrates that the Convention's provisions provide a starting point for constructing a comprehensive set of trusts choice of law rules.

A. *Autonomy Overkill?*

One concern is whether a settlor's choice of governing law will be respected by using the Convention as a starting point.¹⁴² This concern has been raised by Lionel Smith, the Sir William C. Macdonald Professor at McGill University, who argues that because trusts have significant effects on outside parties, the principle of freedom of choice of law may not be suitable.¹⁴³ Smith argues that although the Convention purports not to concern itself with third parties or the proprietary effects of trusts, it remains that the recognition of a trust entails recognizing its effects on third parties.¹⁴⁴ For example, trust assets are not part of the trustee's own estate¹⁴⁵ and the trustee's personal creditors have no recourse against the trust assets.¹⁴⁶ Given the effects of recognizing a trust, Smith concludes that "it is not at all clear why full settlor autonomy as to governing law [is] thought to be appropriate."¹⁴⁷

Though Smith's concern is a legitimate one when a non-trust jurisdiction is in issue, it falls away in East Asia. The four jurisdictions have already enacted Trust Acts. Because those statutes already recognize the independence of trust property in domestic law, the adoption of settlor autonomy as the starting point in choice of law rules does not entail importing a foreign concept, at least insofar as the independence of trust property is concerned.

As previously discussed, the trust is undoubtedly a facilitative device whose availability within a legal system reflects the state's recognition of property owners' autonomy to deal with their own property.¹⁴⁸ Unless there is good reason to the contrary, it seems logical and consistent for a legal system to adopt a principled approach of granting property owners the freedom to create trusts and to choose the governing

¹⁴⁰ See, e.g., Recognition of Trusts Act 1987 (Eng.) (which omits art. 13 Convention).

¹⁴¹ As is the case in Belgium. See Smith, *supra* note 14, at 95.

¹⁴² See Convention on Law Applicable to Trust, art. 6.

¹⁴³ Lionel Smith, *Give the People What They Want? The Onshoring of the Offshore*, 103 IOWA L. REV. 2155, 2164 (2018).

¹⁴⁴ See Smith, *supra* note 14, at 97–98.

¹⁴⁵ See Convention on Law Applicable to Trust, art. 2(a).

¹⁴⁶ See Convention on Law Applicable to Trust, art. 11(a).

¹⁴⁷ See Smith, *supra* note 14, at 98.

¹⁴⁸ See *supra* text accompanying note 43.

law. After all, the same consistency is already found in relation to the facilitative device of the contract, which grants the parties the freedom to choose the governing law. In addition, it is important to stress that the Convention does not take settlor autonomy as an immutable principle: it is only a starting point.¹⁴⁹ Thus, recognizing settlor autonomy does not lead to “autonomy overkill” in East Asia.

B. Civilian Legal Thinking

Civilian legal thinking differs fundamentally from its common law counterpart in important respects. That difference comes to a head in relation to the question of trust transplantation. Given that the trust as traditionally understood is a characteristically common law device, many aspects of the trust potentially trespass on core civilian legal principles. The compromise achieved in the East Asian Trust Acts to reconcile tensions from differences in legal thinking has received wide coverage in contemporary comparative trusts literature.¹⁵⁰ Concerns may be raised as to whether the Convention’s provisions are consistent with civilian legal thinking. To that end, the below discussion addresses three key differences and the ways in which these are mitigated through “safety values” in the Convention.

The first aspect concerns the discoverability of rights affecting property. The notion that a beneficiary’s interest under a trust can be hidden from plain sight is offensive to civilian legal thinking, where transparency of rights is paramount. The discoverability principle is reflected in two closely related legal features: the requirement of registration of rights,¹⁵¹ and the non-enforceability of rights against third parties in the absence of necessary registration. Both legal features are retained and reflected in the Trust Acts of the four East Asian jurisdictions. Thus, they all provide that the existence of a trust over registrable property trust must be registered in the relevant public register. If such registration is not completed, the trust remains valid between trustee and beneficiary, but cannot be enforced against third parties.¹⁵²

Given the centrality of the discoverability principle to civilian legal thinking, East Asian jurisdictions would likely not allow the registration requirement or the enforceability of trusts against third parties to be overridden by the application of a foreign law. The Convention contains safety valves which preserve the forum’s sovereignty in relation to these

¹⁴⁹ See, e.g., Smith, *supra* note 14, at 90–91; Lionel Smith, *supra* note 143, at 2163.

¹⁵⁰ The most influential of which is probably the collection of essays in Ho et al., *supra* note 27.

¹⁵¹ Also known as the “principle of publicity.” See Wu, *supra* note 23, at 101.

¹⁵² Japan Trust Act art. 14; S. Kor. Trust Act art. 4; Taiwan Trust Act art. 4; China Trust Act art. 10.

matters. In relation to the registration requirement, Article 12¹⁵³ makes clear that the trustee's ability to register a trust is not precluded by the rules contained in the Convention. Moreover, Article 15, which allows for the application of mandatory rules of the forum, would allow East Asian jurisdictions to require registration as a precondition to third party enforceability.¹⁵⁴ All this is complemented by Article 11(3)(d), which provides that the forum's choice of law rules will govern "the rights and obligations of any third-party holder of the assets."

The second aspect concerns forced heirship. Forced heirship is a typical and often sacred feature of civil jurisdictions, where freedom of testation is much more restricted than its common law counterparts. Trusts—particularly those created by will—have the potential to infringe forced heirship rules, something which the East Asian jurisdictions will find contentious. Reliance on three "safety valves" in the Convention provides strategies to avoid such infringement. First, part of Article 4 provides that the Convention does not apply to "preliminary issues relating to the validity of wills." Forced heirship rules can be conceptualized as concerning the preliminary question of whether the property in question can be subjected to a trust at all or not, therefore falling outside the scope of trusts choice of law rules and within those involving succession.¹⁵⁵ Second, forced heirship rules can be treated as mandatory rules which, according to Article 16, "must be applied even to international situations, irrespective of rules of conflict of laws." Third, forced heirship can be conceptualized as concerning public policy such that the otherwise applicable trusts provisions may be disregarded by virtue of Article 18. In Japan, the latter strategy finds support in case law from a 2018 Tokyo District Court decision that "clarified that forced heirship constitutes the public order under the Japanese law of succession."¹⁵⁶

The third aspect concerns constructive trusts. It is trite that "constructive trusts" is a label used to describe a wide range of discreet situations (or "doctrines") in which such trusts may arise by operation of law in common law jurisdictions and is not a unitary concept.¹⁵⁷ In relation to a number significant doctrines, Ying-Chieh Wu has emphatically demonstrated that they are not recognized as trusts (or proprietary-rights generating) in civil jurisdictions.¹⁵⁸ Among the doctrines Wu surveys are constructive trusts arising in the context of: tracing-related proprietary

¹⁵³ "Where the trustee desires to register assets, ... he shall be entitled ... to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed."

¹⁵⁴ See discussion in HARRIS, *supra* note 97, at 338.

¹⁵⁵ HARRIS, *supra* note 97, at 54–55.

¹⁵⁶ [party names unknown] 30 KIN'YŪ HŌMU JIJŌ 78 [Tokyo Dist. Ct.] Sept. 12, 2018. See generally the discussion in Tamaruya, *supra* note 8.

¹⁵⁷ See generally YING KHAI LIEW, *RATIONALISING CONSTRUCTIVE TRUSTS* (2017).

¹⁵⁸ See Ying-Chieh Wu, *supra* note 112.

claims against third party recipients, trustees making a profit in breach of their fiduciary duties, specifically enforceable contracts of sale, secret trusts, mutual wills, and the “common intention constructive trust,” (CICT) which arises in the family homes context.¹⁵⁹ However, influential authors have suggested that the constructive trusts arising in the above situations may fall within the ambit of the Convention, provided the “voluntariness” and “writing” prerequisites of Article 3 are met by the facts of the case.¹⁶⁰ This may be a source of worry in East Asia, whose courts could be unwilling to allow these constructive trusts to be enforced domestically simply because an express choice of law term is included in relevant documents. This is also covered by a “safety value” in the Convention. Article 13 provides:

No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have . . . the category of trust involved.

Adopting Article 13¹⁶¹ would mean that an East Asian court would not be obliged to recognize a constructive trust if the significant elements of the constructive trust are more closely connected with the forum. This would hold true even if the settlor expressly chooses a common law jurisdiction as the governing law.

CONCLUSION

Trust law has seen much development, refinement, and transformation in East Asia since it was first introduced in the region a century ago. In contrast, trusts have been neglected in the private international law sphere. Due to the lack of comprehensive and dedicated trust choice of law rules in East Asia, there is much uncertainty in how forum courts are likely to treat cross-border trust disputes. This situation

¹⁵⁹ In the context of English law, these doctrines are discussed, respectively, in Ying Khai Liew, *supra* note 157157, at § 16.1.2.3., chs. 5, 8, 10, 12, and 14.

¹⁶⁰ For a discussion on tracing, see HARRIS, *supra* note 97, at 129. *But cf.* Hayton et al., *supra* note 56, at 100.78. For a discussion on fiduciary profits, see Hayton et al., *supra* note 56, at 100.75-100.76. For more information on contracts of sale, see Harris, *supra* note 97, at 122, 128. For a discussion on secret trusts, see Hayton et al., *supra* note 56, at 100.81 and Hayton, *supra* note 13, at 11. *But cf.* HARRIS, *supra* note 97, at 131. For a discussion on mutual wills, see Hayton et al., *supra* note 56, at 100.80; Hayton, *supra* note 13, at 11, HARRIS, *supra* note 97, at 128. For a discussion on the common intention constructive trust, see Hayton et al., *supra* note 56, at 100.82, Hayton, *supra* note 13, at 11. *But cf.* HARRIS, *supra* note 97, at 132.

¹⁶¹ The UK has not adopted Art. 13, which potentially causes problems. See Smith, *supra* note 14, at 94.

derogates from a proper recognition of the trust as a distinctive legal device and fail to properly protect both the autonomy and the legitimate expectations of the parties. Worse still, it puts East Asia out of step with most trusts-active jurisdictions which have developed dedicated trusts choice of law rules. This is a regrettable situation in our increasingly globalized world, where incidences of cross-border trust disputes will only increase. Serious thought ought to be given by the legislators of the East Asian jurisdictions to enact or reform their choice of law rules to develop a comprehensive set of trusts rules based on the Convention.