Exploring Solutions to the Conflict between the Ownership of Trust Property and the Numerus Clauses

Wanyi Jin$^{1,*}$ and Yijia Li$^2$

$^1$ Henan University of Economics and Law, School of Civil Commercial and Economic Law, Zhengzhou, Henan Province, China
$^2$ Jiangsu Normal University, School of Law, Xuzhou, Jiangsu Province, China

Abstract. The principle of numerus clausus is the basic principle of civil law countries, and trusts, as a product of the common law system, are bound to diverge from it. Among them, the conflict between the ownership of trust property and the numerus clauses is the most significant. How to ease the conflict between the two in order to promote the long-term development of trusts in China has attracted a lot of attention. Trusts are developing rapidly around the world, and a comparative study approach has been adopted, of which the following are representative views: (i) Japanese scholars consider that trust is a legal relationship with both jus in rem and obligations, and thus hold the view that trust property has both owner’s right and creator’s right. (ii) the common-law scholars deem that the legal nature of a trust is that the trustee and the beneficiary share the ownership of the trust property, namely dual property rights, which is a kind of “a bundle of rights”. This article argues that the contradiction between the ownership of trust property and the legal principle of property rights can be alleviated by strengthening the practical regulation and the improvement of the relevant laws based on the essence of trusts, which are based on trust.

Keywords: Business Law, the Principle of Statutory Jus in Rem, the Ownership of Trust Property, Civil Law.

1. The Conflict between the Principle of Statutory Jus in Rem and the Ownership of Trust Property

The principle of statutory jus in rem means that the type and content of property rights are established by law, and any parties are not allowed to create them randomly, including the type, content, effect, and method of publicity. It is a fundamental system of property law in civil law countries, which plays an important role in maintaining the security of transactions, increasing the efficiency of the deal, facilitating the regulation of the country, and improving the system of property law. In the system of trust, the property originally owned by the principal is transferred to the trustee based on trust, and the trustee manages and disposes of the trust property based on the trust document. The income belongs to the beneficiary. According to the civil law system's numeros clausus, the ownership of the trust property should fully belong to the trustee after the principal transfers the ownership of the property to the trustee, but the trust is also a particular kind of entrustment relationship. The two are very prone to conflict in this situation.

The conflict between the principle of statutory jus in rem and the ownership of trust property is mainly reflected in two specific aspects. Firstly, based on the trust system, the trustee enjoys nominal ownership of the trust property and thus can manage and dispose of it. Whereas the beneficiary enjoys substantial ownership of the trust property and the proceeds belong to the beneficiary. Exactly, both the ownership of the trustee and the beneficiary are incomplete and they enjoy different interests. However, this inherent relationship is in serious contradiction to China’s numeros clausus, i.e., one property, one right. The principle of statutory jus in rem is based on absolute ownership, while the property owner of a trust derives multiple ownership rights, which directly disrupts the underlying logic of our property law. The line between a trustee and beneficiary ownership is blurred, which is generally deemed as judicial discretion.

A typical example is the case of Walley v. Walley happened in 1687. In this case, the plaintiff, John Walley, was a minor, and his father, John Walley, was the defendant. The plaintiff's grandfather left several estates to the plaintiff in the testamentary trust, and the defendant was designated as trustee. The plaintiff requested the proceeds that he should own and the property that had passed out should be returned to his account. The court upheld the plaintiff's complaints and concluded When the trustee disposed of the trust...
property, the beneficiary disagreed with such disposition and argued that the trustee failed to fulfill its fiduciary duty.

The disputes could not be resolved under the context of the numeros clausus in the civil law system. After all, the trust property nominally belongs to the plaintiff, the rights boundary between the plaintiff and the defendant is difficult to define. Therefore, it is clear that the conflict between the principle of statutory jus in rem and the ownership of trust property is inherent and inevitable. Only by analyzing the reasons behind them can we find a reasonable and legitimate way to alleviate the conflict between them.

2. Analyzing Reasons for the Principle of Statutory Jus In Rem and the Ownership of Trust Property

First of all, the numeros clausus has an absolutely strict restriction on the type and content of jus in rem from the historical origin of them. In contrast, the prototype of trust law originated in England, which was born to facilitate the disposal of property by free will and avert the restrictions of the law. Besides, the numeros clausus focuses on the publicity of property rights to protect the transaction security, while the trust law is not concerned with publicity or not, but rather with the protection of the trust between any parties. Thus, the two legal systems have been irreconcilably contradictory from their birth due to their opposite philosophies.

Secondly, in terms of restrictions on parties' autonomy, the principle of statutory jus in rem strictly restricts the type and content of property rights created by the parties' free wills, and thus directly prohibits their autonomy will. Everything depends on the provisions of the law, however, The trust system was established mainly due to the autonomy of the will. For example, the creation of a trust contract fully demonstrates the freedom of the parties in the legal relationship.

Thirdly, from the perspective of practical needs, the massive use of trust in the financial field has caused many problems due to the conflict between the principle of statutory jus in rem and the ownership of trust property, which has become an urgent problem to be solved. The trust plays a significant role in many areas such as estate broker, tax avoidance, privacy protection, marital property protection, and segregation of property security. However, under the civil law system's principle of statutory jus in rem, the trustee enjoys ownership of the trust property and has the right to manage and dispose of it, while the beneficiary enjoys certain property rights including the cancellation right, right to manage and dispose of it. This view also remains difficult to the logic of civil law, which does not provide for a separate right to manage the property. Without a clear definition of the ownership of the trust property, it is difficult to make a decision when it comes to a conflict between the trustee and the beneficiary. In short, the view is not realistic to resolve this problem.

Most common law countries think that both beneficiaries and trustees enjoy the incomplete ownership of trust property to absolute property. This view mainly stems from the conception that the property right is the relative ownership and could be divided into two parts, namely "a bundle of rights". The trustee is the common law owner of the trust property, and the beneficiary is the equity owner of the trust property. This view is based on the common law system and is not compatible with the basic principles of civil law systems.

Japanese scholars consider that trust is a legal relationship with both owner and creditor's effects, in which the trustee enjoys ownership of the trust property and has the right to manage and dispose of it, while the beneficiary enjoys certain property rights including the cancellation right and recourse right. The beneficiary and trustee form a structure of claim based on the trust property. The disadvantage of this view is that the rights of beneficiaries and trustees are not fully covered by property rights and claims. Moreover, civil law systems do not acknowledge such intermediate rights as a blend of rights in rem and claims.

All the above four extraterritorial countries' methods have certain shortcomings. None of them can be directly introduced to Chinese trust law. Among them, the theory of beneficiary and the theory of intermediate right are contrary to the principle of statutory jus in rem of Chinese property law. The theory of dual property rights is incompatible with the underlying logic of property law in China, and the theory of independent property is difficult to be applied in real cases.

3. The Analysis of Extraterritorial Theories

German scholars hold the view of the theory of beneficiary. Based on the summary of trust jurisprudence, they mainly believe that the ownership of trust property belongs to the beneficiary. The trustee enjoys a kind of independent restricted property right "trust right" (Treuhandrecht), and his/her management and disposal of the trust property is only an agency action. The trust property does not belong to the trustee. This view is mainly from the summary of the actual trust precedent, which can make it more convenient to resolve the conflict between the two in reality. However, the disadvantage of this view is that it does not completely accord with the objective existence of the principle of statutory rights in rem. The legal precedent does not create a new right in rem.

Quebec scholars deem that trust property is a kind of separate property and any parties do not have ownership rights of it. The trustees have only partial ownership rights as administrators- the right to manage and dispose of it. This view also remains difficult to the logic of civil law, which does not provide for a separate right to manage the property. Without a clear definition of the ownership of the trust property, it is difficult to make a decision when it comes to a conflict between the trustee and the beneficiary. In short, the view is not realistic to resolve this problem.

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4. The Reforming Methods of the Conflict between the Principle of Statutory Jus in Rem and the Ownership of Trust Property in China

The reforming methods of the conflict between the principle of statutory jus in rem and the ownership of trust property in China. Chinese trust system urgently needs a solution insisting on the principle that the trustee enjoys ownership of the trust property and takes into account the interests of beneficiaries in addition. It is difficult to apply the appropriate law in solving the practical relevant problems due to the conflict between the numeros clausus and the ownership of trust property and also hard to clarify the ownership of trust property and restrict the innovative development of financial trusts in China. Therefore, reasonable and legal reforming methods need to be found. First of all, making clear the essence of trust originates from the trust between the principal and the trustee is necessary. It is possible to recognize the trustee's ownership of the trust property to clarify the boundaries of the trustee's rights, consequently facilitating disposing and managing of the trust property to make the best of the value of the trust property. This also does not violate the principle of statutory rights in rem. Secondly, the law should strengthen the protection of beneficiaries' rights. As the trustee does not follow the fiduciary duty and maliciously damages the beneficiaries' interests or a third party infringes on the beneficiaries' interests, the beneficiaries can claim their rights from the trustee and request them to stop the infringement, return the original property and compensate for the loss. Under the premise of the trustee's property rights, the trustee has more information than their beneficiaries about the trust property. Thus, beneficiaries need further protection from the problem of asymmetric information. In entity, the principle of presumption of strict liability of the beneficiary can be adopted after encountering the interest conflict. In the procedure, beneficiaries should be given more rights to know. We can strengthen the system in these two aspects and give full play to the function of trusts. Thirdly, the law should improve the trust publicity system. Establishing an authoritative national unified trust publicity platform with all network connectivity is for further improving the system of publishing conduct of the ownership of trust property vested in the trustee, while from both institutional and procedural aspects based on clarifying that the essence of trust is derived from the trust between the principal and the trustee, it argues that the protection of beneficiaries' rights should be strengthened from both institutional and procedural aspects based on the ownership of trust property vested in the trustee, while further improving the system of publishing conduct of trust property, to alleviate the conflict between them. Of course, there are limitations to this paper, especially since the findings of this paper cannot be tested in practice. We hope that this issue will attract the attention of both the practical and theoretical communities and that deep research will be conducted by the academic community. In this way, we can better promote the localization of trusts, return the trust business to its original purpose, enhance the status of trusts, which are originally located in a marginal position, and achieve the healthy development of China's trust business.

5. Conclusion

The conflict between the principle of statutory jus in rem and the ownership of trust property is an inherent contradiction between the civil law system based on numeros clausus and the trust law which is derived from the common law system. The principle of statutory rights in rem is the basis of our civil law property rights, and the corresponding method is found through the improvement of the existing trust property ownership. This paper mainly draws on the extraterritorial solution, and based on clarifying that the essence of trust is derived from the trust between the principal and the trustee, it argues that the protection of beneficiaries' rights should be strengthened from both institutional and procedural aspects based on the ownership of trust property vested in the trustee, while further improving the system of publishing conduct of trust property, to alleviate the conflict between them. Of course, there are limitations to this paper, especially since the findings of this paper cannot be tested in practice. We hope that this issue will attract the attention of both the practical and theoretical communities and that deep research will be conducted by the academic community. In this way, we can better promote the localization of trusts, return the trust business to its original purpose, enhance the status of trusts, which are originally located in a marginal position, and achieve the healthy development of China's trust business.

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