

# Trusts in the World without Equity

## ～Comparative Studies on How Civil Law Jurisdictions Have Introduced Trusts～

Atsuko Sese  
(Kyoto Prefectural University)

As well known, Dr. Shinomiya's argument, "the trust system is quite characteristic of common law system, and therefore, when civil law jurisdictions introduce trust system, it is bound to be heterogeneous as if 'oil floating on water'" has almost become a dogma (hereinafter referred to as "Shinomiya's Dogma") that has continuously spellbound many scholars and Shinomiya's Dogma has been repeatedly mentioned in their theses on law of trust.

On the other hand, Professor Dogauchi challenges Shinomiya's Dogma by arguing that "As long as we consider law of trust as a sort of private law, we must not think that law of trust is something different from other legal system including contracts and legal persons based on civil law system."

Without doubt, Shinomiya's Dogma has taken on a life of its own. We must rethink about whether a trust can really be explained only by common law system and if so, which features of trust are contradicted with private law system in civil law jurisdictions.

Of course, the awareness of this issue is shared by many civil law jurisdictions in the process of their struggles in order to introduce trust.

Law of trust was produced in common law system which distinguishes legal (common law) right from equitable right, and "though the English do not lay exclusive claim to having discovered

God, they do claim to have invented the trust with two natures in one”.

Preamble of Hague Trust Convention stipulates:

“the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique institution”

In addition, the Privy Council has said that “the distinction between the legal and the equitable estate is of the essence of the trust.”

In short, the argument that a trust can only be explained in the context of common law system which distinguishes legal (common law) right enjoyed by a trustee from equitable right owned by a beneficiary has long spellbound civil law jurisdictions as if a sort of religion.

I have become aware of this issue in comparative studies on Chinese trust law.

One of the most important features of Chinese trust law is that it does not require any transfer of ownership of trust property.

However, both common law and civil law jurisdictions share the understanding that the transfer of property is an essential factor to create a trust. Not only England and the U.S. trust law but also Principles of European Trust Law take it for granted to transfer a trust property to a trustee. Chinese trust law is quite unique in this context.

Like Chinese trust law, trust law of Quebec does not require any transfer of ownership of trust property, either. This is considered as one of the mixture phenomena of French law and common law produced by the history of transfer from French territory to English territory in 1763. In other words, the fact that although a property is transferred to a trustee, it does not constitute the trustee's patrimony cannot be well explained by civil law system that does not distinguish

legal from equitable right like common law system. Therefore, Quebec trust law has established the principle that a property constitutes an independent patrimony that does not belong to anyone including the trustee, the settlor and the beneficiary.

Professor Nohmi calls such kind of trust including China and Quebec “Quebec -type Trust” and compares it with common law trust and Japanese trust, all of which require a property to be transferred to the trustee.

“Quebec -type Trust” reminds us of the fact that civil law jurisdictions have difficulties when they introduce trust system and each of those jurisdictions make some arrangement to solve the problems in different ways.

Therefore, in this thesis, I try to analyse how such civil law jurisdictions as China, Quebec, Japan, France, Germany and Scotland have made arrangement to adjust trust system with their civil law system.

First, I will solve the problem whether a trust really can be explained by common law system and be contradicted with civil law system without any special arrangement.

Second, which features of a trust is contradicted with civil law system must be clarified.

Third, whether common law system can consistently explain such features must be analysed.

Forth, how civil law jurisdictions have made arrangement to adapt trust to their own civil law systems must be explained.

