

# Japanese Law and the Global Diffusion of Trust and Fiduciary Law

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## I. INTRODUCTION

From the seventeenth century onward, the idea of trust spread outside England as part of the British Empire’s colonial activities and as a result of

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London's prominence in the international capital market. The path of trust diffusion diverged into two routes. One route went around the Cape of Good Hope toward the East, through South Africa and India, and then to Japan. The other path went West, crossing North America and the Pacific Ocean to reach Japan in the early twentieth century. Thus, the two routes merged in early twentieth century Japan. The California Civil Code of 1872 and the Indian Trust Act of 1882, as well as the contemporary commercial practices of American trust companies, provided important sources of reference for the drafter of Japanese trust legislation in 1922.<sup>1</sup>

The diffusion of trust law did not end in Japan. The westbound diffusion continued to Taiwan and Korea through Japanese imposition of its law and industry regulation as part of its colonial expansion in the early twentieth century.<sup>2</sup> While the colonial impact diminished over time after World War II, the common self-identification as civil-law jurisdictions and the similarities in economic growth models can explain the presence of parallel trust doctrines in these East Asian jurisdictions. On the eastbound route, Hong Kong and Singapore have emerged as the two major commercial hubs in Asia with vibrant trust practices based on English common law. Today, these two routes converge in mainland China. Trust industries have played a vital role in the development of the Chinese market economy since Deng Xiaoping declared the opening up policy in 1979. While the westbound influence can be seen in the Chinese trust legislation in 2001, Hong Kong and Singapore on the eastern route cater to the needs of wealthy clients in China through the use of offshore trusts.<sup>3</sup>

This Article will trace these less frequently traversed paths of trust law diffusion, with the dual aim of identifying the role of Japanese law in shaping the global evolution of the fiduciary norm and examining the doctrinal and conceptual implication that the understanding of these historic paths can bring about. Part II traces the process of Japanese reception of trusts. This complicated process, under various economic and geopolitical pressures, defined the particular context in which trust was introduced and developed in Japan and East Asia. Part III looks at the reception of trusts in East Asian jurisdictions and examines the complex and sometimes troubling role that Japan and its law played in the process. Part IV discusses the development in the past three decades and examines the deepening of the fiduciary norm in Japan and East Asia. We will see that these historical, comparative, and conceptual inquiries help us envision the future course of trust law and practice in an increasingly globalized and competitive landscape.

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1. See *infra* Part II.C.

2. See *infra* Part III.A.

3. See *infra* Part III.C.

## II. JAPANESE RECEPTION OF TRUSTS

In April 1900, Masayoshi Takagi set out on a corporate mission for Daiichi Bank, modern Japan's first commercial bank, to survey the operation of American trust companies.<sup>4</sup> He visited Chicago, Buffalo, Syracuse, New York, Philadelphia, Baltimore, Washington D.C., and Boston to meet with officials at major trust companies.<sup>5</sup> His report upon his return in 1901 divided the trust companies' lines of business into family asset management and commercial services, but his primary interest was in the latter.<sup>6</sup> While recording his observations about the American trust companies' organizational structures,<sup>7</sup> fund management methods,<sup>8</sup> income and expenses,<sup>9</sup> and directors' compensations,<sup>10</sup> he extensively discussed state regulatory legislation.<sup>11</sup> In the final chapter, Takagi argued that the establishment of reliable trust companies in Japan would help introduce foreign capital, which he saw as the pressing national agenda.<sup>12</sup>

Introducing foreign capital by using trusts and regulating trust companies are topics that are barely mentioned in today's law school classes on trust law or even in academic law journals in the United States or the U.K.<sup>13</sup> Nevertheless, these commercial aspects of American trust practices provided the chief motive for reception of trusts not only in Japan but also in many East Asian jurisdictions in later years.

### A. INTERNATIONAL BOND ISSUES AND AMERICAN MORTGAGE TRUSTS

The Secured Bond Trust Act of 1905<sup>14</sup> was the first significant legislation to introduce the concept of the trust in Japan.<sup>15</sup> This was intended to facilitate collateral bond issues by authorizing trust companies to hold and manage certain corporate assets in trust as collateral.<sup>16</sup> Under this legislation, trustee

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4. MASAYOSHI TAKAGI, THE REPORT OF THE AMERICAN TRUST COMPANY BUSINESS PRACTICES i (1901).

5. *Id.* at i–iv.

6. *Id.* at 7, 111–14.

7. *Id.* at 30–44.

8. *Id.* at 86–96.

9. *Id.* at 106–09.

10. *Id.* at 110.

11. *Id.* at 67–86.

12. *Id.* at 117–20.

13. See, e.g., LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 134–35 (2009); Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 563 n.58 (1964).

14. Tanpo-tsuki shasai shintaku-hō [Secured Bond Trust Act], Law No. 52 of 1905 (Japan) (providing for trust contract to secure collateral for bond issues; hereinafter Secured Bond Trust Act).

15. For the historical account of Japanese Trust Law, see Makoto Arai, *Japan, in* TRUSTS IN PRIME JURISDICTIONS 255, 256–61 (Alon Kaplan ed., 4th ed. 2016).

16. TSUNEO ŌTORI, THE LAW OF CORPORATE OBLIGATION 74–75 (1958); TORAJIRO IKEDA, ON THE LAW OF TRUSTS FOR SECURED BONDS 112–13 (1907).

companies were required to sign a written trust contract with bond issuers, and trustees were duty-bound to preserve and execute the security interest for the benefit of all bondholders.<sup>17</sup>

This form of transaction followed the American practices known as mortgage trusts. In the 19th century, mortgage trusts in the United States were used to finance internal development projects, and most importantly, used to construct railroads.<sup>18</sup> At the time, the United States was a debtor nation vis-à-vis European powers such as Britain and France. Unlike in Britain, where most transportation businesses were financed by stock and share capital, American railroad companies were predominantly financed through bonded debt.<sup>19</sup> The following is an observation about European investors by a Dutch journalist based in London at the time:

[The] [i]nvestors displayed little or no inclination to become owners of the properties [of the American railroad companies], because in that case they would have had to share all risks, apart from being at the mercy of their directors; hence they sternly refused to become anything else than creditors, and, in addition, they would only advance money against security. It need scarcely be said that the promoters had to accede to these wishes, for otherwise they would have obtained no money.<sup>20</sup>

Japan found itself in a similar situation in the late 1890s and early 1900s.<sup>21</sup> Japan won a war against China in 1895 and another war against Russia in 1905. With no compensation forthcoming from Russia, however, Japan struggled to secure funding to expand its military and domestic infrastructure. In 1905, Japan for the first time publicly offered its government bonds in the United States.<sup>22</sup>

Because America was now a creditor nation, its position in the international financial market shifted in the early 20th century.<sup>23</sup> During World War I, the U.S. Government sanctioned the issue of collateral loans with corporate trustees acting for Great Britain and France.<sup>24</sup> Between 1923 and 1931, Japanese electricity companies issued bonds in the United States

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17. Secured Bond Trust Act § 70 (Japan).

18. JAMES G. SMITH, *THE DEVELOPMENT OF TRUST COMPANIES IN THE UNITED STATES* 295-311 (1928).

19. S. F. VAN OSS, *AMERICAN RAILROADS AND BRITISH INVESTORS* 108-09 (1893).

20. *Id.* at 109-10.

21. TOSHIO SUZUKI, *JAPANESE GOVERNMENT LOAN ISSUES ON THE LONDON CAPITAL MARKET* 1870-1913, at 157-62 (1994).

22. Thomas W. Lamont, *Foreign Government Bonds*, 88 ANNALS AM. ACAD. POL. & SOC. SCI. 121, 125 (1920). Thomas W. Lamont was a partner of J.P. Morgan and Co. and was influential in the 1930s in both international finance and politics. TAICHIRO MITANI, *WALL STREET AND THE FAR EAST* 69-77 (2009).

23. MITANI, *supra* note 22, at 72-74.

24. Lamont, *supra* note 22, at 127.

and U.K., with 16 issues of 22.8 million U.S. dollars and 9.9 million pounds in total.<sup>25</sup> Ten of these issues were accompanied by bond trusts, with the Industrial Bank of Japan acting as a trustee for the first three times and the Mitsui Banking Co. for the next seven times.<sup>26</sup> The last bond issue was by Taiwan Electric Power Company in 1931.<sup>27</sup> After the Great Depression, the appetite for foreign issues quickly dissipated in the American bond market, and amid the decline of Yen the Japanese power companies scrambled to reduce foreign debts.<sup>28</sup> As discussed later in Part III.B, the use of trusts to introduce foreign investment was repeated in other East Asian jurisdictions. These trust practices reflected the shift in powers in the sphere of international finance.

### B. COMMERCIALIZATION OF TRUSTS AND THE RISE OF TRUST COMPANIES

In 1906, the first Japanese trust company was established: the Tokyo Trust Company.<sup>29</sup> The number of trust companies steadily increased to 41 in 1910, to 320 in 1915, and to 425 in 1920.<sup>30</sup> However, many self-professed trust companies engaged in questionable practices, such as loan sharking and land speculation, and their capital foundations were often unsound.<sup>31</sup> To curtail those abusive practices that have little to do with trusts became one of the major regulatory priorities for the financial regulator, the Treasury.<sup>32</sup> At the same time, the government was keen to promote the healthy growth of the trust industry, which served as an essential source of capital for individuals and mid- to small-size businesses that had no recourse in the formal banking industries.<sup>33</sup> In 1912, the Banking Bureau of the Treasury began to draft a regulatory registration, which became the Trust Business Act of 1922.<sup>34</sup>

The Japanese trust practitioners and financial regulators sought to emulate an American innovation from the early 19th century.<sup>35</sup> In 1818, the

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25. *Sale of Foreign Bonds or Securities in the United States: Hearings Before the Committee on Finance*, 72nd Cong. 898, 901, 903, 912 (1932) (statement of J.R. Swan, President, Guaranty Co. of New York); TAKEO KIKKAWA, *THE DEVELOPMENT OF JAPANESE ELECTRIC INDUSTRY AND MATSUNAGA YASUZAEMON* 104–35 (1995).

26. KIKKAWA, *supra* note 25, at 106–07 tbl.1-32.

27. *Id.* at 129–32.

28. *Id.*

29. SHOICHI ASAJIMA, *THE HISTORICAL STUDY OF JAPANESE TRUST COMPANIES* 21–52 (2001).

30. The Korean Trust Company, *The First Ten Years of the Korean Trust Company* (1943), in *JAPANESE ECONOMIC HISTORY AS SEEN IN VARIOUS EDITIONS OF CORPORATE HISTORY* 132–34 (Shoichi Namikata et al. eds., 2004).

31. SHOICHI ASAJIMA, *ON THE LEGISLATIVE HISTORY OF JAPANESE TRUST BUSINESS LAW* 105 (1980).

32. *Id.* at 106; Arai, *supra* note 15, at 256–57.

33. AKIRA YAMADA, *ON THE LEGISLATIVE PROCESS OF THE TRUST LAWS* 21–25 (1981).

34. Shintaku gyōhō [Trust Business Act], Law No. 65 of 1922 (Japan) (hereinafter Trust Business Act of 1922); YAMADA, *supra* note 33 at 23.

35. YAMADA, *supra* note 33, at 29–30.

Massachusetts Hospital Life Insurance Company was incorporated by the Massachusetts Legislature to act as the first corporate trustee in America.<sup>36</sup> As trust companies' numbers steadily increased in the latter half of the century, many state legislatures adopted general statutes for the incorporation of trust companies.<sup>37</sup> By the end of the century, corporate trustees dominated the business of the railroad mortgage trust.<sup>38</sup> Trust companies increasingly competed with commercial banks, which prompted progressive states to subject trust companies to regulations that were similar to those for banking institutions.<sup>39</sup> Recall Masayoshi Takagi, a Japanese banker who traveled through the United States in 1900 to visit various American trust companies.<sup>40</sup> His report contained a detailed study of the New Jersey trust companies legislation, along with a comparative survey of similar legislation in New York, Massachusetts, Illinois, and Pennsylvania.<sup>41</sup>

The Trust Business Act of 1922, which provided the regulatory framework for the Japanese trust industry, addressed many issues covered by the New Jersey legislation concerning trust companies.<sup>42</sup> Similar to the New Jersey statute, the 1922 Act required trust companies to apply to the banking authority for a license or certificate,<sup>43</sup> maintain a minimum amount of capital,<sup>44</sup> deposit certain funds to cover potential liability,<sup>45</sup> and make reports to the banking authority.<sup>46</sup> The Act also authorized the banking authority to inspect the trust companies<sup>47</sup> and initiate proceedings against unsafe companies.<sup>48</sup>

36. SMITH, *supra* note 18, at 239 n.1-2 (quoting Laws of Massachusetts, 1817, ch. 180 (Feb. 24, 1818); Laws of Massachusetts, 1823, ch. 51 (Jan. 17, 1824)).

37. FRANKLIN BUTLER KIRKBRIDE, J.E. STERRETT & HENRY PARKER WILLIS, *THE MODERN TRUST COMPANY* 4-7 (6th ed. 1925).

38. SMITH, *supra* note 18, at 305.

39. GEORGE CATOR, *TRUST COMPANIES IN THE UNITED STATES* 47-59 (1902).

40. *See supra* notes 4-12.

41. TAKAGI, *supra* note 4, at 67-86.

42. An Act concerning trust companies (Revision of 1899), 1899 N.J. Laws 450 (hereinafter NJ Trust Companies Act of 1899); for historical background, see JAMES B. DILL, *THE LAWS OF NEW JERSEY, RELATING TO BANKS AND BANKING, TRUST COMPANIES AND SAFE DEPOSIT CORPORATIONS*, I-V (1899).

43. Trust Business Act of 1922 § 4 (Japan); NJ Trust Companies Act of 1899 § 5 (issuing a certificate upon satisfaction of prescribed requirements).

44. Trust Business Act of 1922 § 2 (setting a one-million yen minimum); NJ Trust Companies Act of 1899 § 1 (setting a \$100,000 minimum).

45. Trust Business Act of 1922 § 7 (requiring a deposit of 10% of capital, not exceeding one-million yen); NJ Trust Companies Act of 1899 § 9 (requiring liabilities not exceeding five times the value of the fund, unless the fund exceeds \$100,000, in which case liabilities shall not exceed ten times the value of the fund).

46. Trust Business Act of 1922 § 13 (requiring reports every half year); NJ Trust Companies Act of 1899 § 16 (requiring reports every half year).

47. Trust Business Act of 1922 § 17; NJ Trust Companies Act of 1899 § 21.

48. Trust Business Act of 1922 § 18; NJ Trust Companies Act of 1899 § 22.

Furthermore, the Japanese Trust Business Act placed more stringent restrictions on trust companies' business operations than its New Jersey counterpart. It narrowly defined the scope of trust companies' non-trust services, making it impossible to offer banking services.<sup>49</sup> Within their trust operation, trust companies were allowed to receive money, securities, choses in action, and ownership and the leasing of land.<sup>50</sup> At the same time, when they invest on movables on their own account, the trust companies had to convince the financial regulator that they would not be used for speculation and issued permission.<sup>51</sup> These provisions reflected the tightening of the government's trust industry policy during the ten years of drafting in which many large trust companies began operation in Japan.<sup>52</sup> The Japan-U.S. Trust Company was established in 1918, intending to engage in cross-border financial operations.<sup>53</sup> The banking institutions that were feeling a competitive pressure lobbied the government to restrict the scope of trust companies' operation.<sup>54</sup>

The trust companies fought against this restriction during the parliamentary debate. Lord Michitaka Sugawara, the President of the Japan-U.S. Trust Company and the President of the Trust Companies' Association at the time, argued that the bill was very similar to the English model, which was primarily concerned with traditional family trusts.<sup>55</sup> In his view, this approach would fail to address the demands of the era, given that the trust companies had already developed their businesses following the American model.<sup>56</sup> Although he demanded that Japanese trust companies should be authorized to conduct as broad a range of transactions as their American counterparts, his argument failed to bring about any amendment.<sup>57</sup> By the time Japan passed the legislation in 1922, the Japan-U.S. Trust Company was in financial trouble after failing in its debt guarantee business.<sup>58</sup> The Japanese Treasury gave the company permission to conduct trust business in 1926, only after a significant restructuring of its non-performing assets and the removal of Sugawara and other management members.<sup>59</sup> The company was re-named

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49. Compare Trust Business Act of 1922 § 5 (enumerating the limited range of powers that a trust company can exercise), with NJ Trust Companies Act of 1899 § 6 (granting broader power, including the power to receive deposits and loan money on securities).

50. Trust Business Act of 1922 § 4.

51. *Id.* § 11–13.

52. YAMADA, *supra* note 33, at 129–33.

53. ASAJIMA, *supra* note 31, at 137–88.

54. YAMADA, *supra* note 33, at 160, 174.

55. *Id.* at 253–54.

56. *Id.* at 254.

57. *Id.* at 256–58, 53–64.

58. ASAJIMA, *supra* note 31, at 155–61.

59. *Id.* at 161–65.

Chiyoda Trust Company, but it never demonstrated significant trust operations and faded into obscurity by the early 1930s.<sup>60</sup>

The Japanese government's policy on trust companies underwent another shift in the 1940s. Japan was fighting in World War II, and mergers between financial institutions were encouraged to reduce intermediation costs for shifting funds to military-related industries.<sup>61</sup> Under the 1943 legislation allowing commercial banks to provide trust services,<sup>62</sup> the number of trust banks was reduced from 21 in 1943 to seven in 1945.<sup>63</sup> As discussed below in Part II.D, this legislative scheme continued to form the basis of trust services after World War II, with all trust companies converting to banking institutions.<sup>64</sup>

Over the 20th century, trust companies in both Japan and the United States found themselves in various forms of competition and combination with banking institutions. As discussed below in Part III.B, this pattern would be repeated in South Korea, Taiwan, and mainland China, where placing trust banks properly within the national financial market and providing the appropriate oversight constituted the major policy concerns for banking authorities.<sup>65</sup>

### C. CODIFICATION OF SUBSTANTIVE TRUST LAW

Japan's Ministry of Justice began to draft the substantive trust law in 1918.<sup>66</sup> The chief architect of the substantive legislation was Torajiro Ikeda, who had previously been involved in drafting the Secured Bond Trust Act of 1905 at the Ministry of Justice.<sup>67</sup>

Ikeda and other drafters used two examples of trust law codification. One was the California Civil Code of 1872, which was modeled after the Draft Civil Code prepared in New York in 1862.<sup>68</sup> The other was the Indian Trust Act of 1882, which Ikeda thought was the codification of English trust law, but was

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60. *Id.* at 74–88.

61. Juro Teranishi, *Financial Sector Reform After the War*, in 1 BANKING POLICY IN JAPAN: THE EVOLUTION OF JAPANESE BANKING, 1868–1952, at 140–42 (William M. Tsutsui ed., 1999).

62. Kin'yūkikan no shintaku gyōmu no ken'ei-tō ni kansuru hōritsu [Act on Engagement in Trust Business Activities by Financial Institutions], Law No. 43 of 1943, § 1(1), *translated in* (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=2662&vm=2&re=02> (Japan).

63. Teranishi, *supra* note 61, at 141.

64. *See infra* notes 109–11 and accompanying text.

65. *See infra* Part III.B.

66. YAMADA, *supra* note 33, at 78–86.

67. *Id.* at 3–4, 94; Torajiro Ikeda, *Outline of the Trust Bill*, 38(7) HOGAKU KYOKAI ZASSHI 11 (1920).

68. *See generally* COMM'RS OF THE CODE, DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK (1862) (proposing legislation to define the rights and obligations of people and property within the state of New York).



in fact, indirectly influenced by the New York Draft Civil Code.<sup>69</sup> Nevertheless, he did not blindly follow these legislative examples. Ikeda sought to incorporate the trust doctrine he found in the English case law faithfully into the draft, and often referred back to English cases particularly where the Californian Code and the Indian Act were unclear.<sup>70</sup> Toward the end of the drafting process, drafters were compelled to make adjustments so that the proposed trust law provisions fit well with the Japanese private law based on the European-style Civil Code.<sup>71</sup>

Ikeda's thought process in introducing trust ideas into Japan can be exemplified in his approach to characterizing the nature of trust.<sup>72</sup> In his view, trust should best be understood as a relationship where the trustee holds the property and owes an obligation to administer and dispose of it for the benefit of the beneficiary.<sup>73</sup> This is consistent with the approach of both the California Civil Code and the Indian Trusts Act.<sup>74</sup> Nevertheless, Ikeda was aware that the common law trust jurisprudence had not settled on this issue, and in his treatise he carefully reviewed the contemporary academic writings.<sup>75</sup> One group of commentators sought to explain trust as a property arrangement where the trustee held the nominal ownership and the beneficiary also has a proprietary entitlement to enjoy the benefit of the trust property.<sup>76</sup> Another group of commentators explained a trust as an obligation that the trustee owes to the beneficiary, where the title to the trust property belongs solely to the trustee.<sup>77</sup> In Ikeda's view, the former property theory was appropriate for passive trusts, where trustees nominally hold the assets and beneficiaries are like owners.<sup>78</sup> However, Ikeda believed that the latter obligation theory was persuasive for active trusts, where trustees play an active

69. Stelios Tofaris, *Trust Law Goes East: The Transplantation of Trust Law in India and Beyond*, 36 J. LEGAL HIST. 299, 312–13 (2015).

70. YAMADA, *supra* note 33, at 96–97, 114; Ikeda, *supra* note 67, at 23.

71. YAMADA, *supra* note 33, at 97, 106.

72. Masayuki Tamaruya, *Transformation of Trust Ideas in Japan: Drafting of the Trust Act 1922*, 88 RIKKYO L. REV. 97, 99–100 (2013).

73. Ikeda, *supra* note 67, at 23; IKEDA, *supra* note 16, at 130, 150.

74. CAL. CIV. CODE § 2216 (West 1883) (repealed 1986) (“A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.”); The Indian Trust Act, No. 2 of 1882, § 3, [http://bdlaws.minlaw.gov.bd/sections\\_detail.php?id=47&sections\\_id=1529](http://bdlaws.minlaw.gov.bd/sections_detail.php?id=47&sections_id=1529) (“A ‘trust’ is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner . . . for the benefit of another . . .”).

75. IKEDA, *supra* note 16, at 131–41.

76. *Id.* at 131–37 (citing JOHN W. SALMOND, JURISPRUDENCE OR, THE THEORY OF THE LAW 278–84 (1902); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 147–49 (Carter Pitkin Pomeroy & John Norton Pomeroy, Jr. eds., 2d ed. 1901)).

77. IKEDA, *supra* note 16, at 137–41 (citing as representative literature FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 208 (7th ed. 1902); THOMAS LEWIN, A PRACTICAL TREATISE ON THE LAW OF TRUSTS 11–15 (Cecil C. M. Dale ed., 10th ed. 1898)).

78. IKEDA, *supra* note 16, at 144–49.

role in managing the assets.<sup>79</sup> Ikeda's conclusion was a practical one. He chose the obligation approach because he predicted that active trusts would dominate future trust practices.<sup>80</sup>

The drafting of the Japanese Trust Act took a further pragmatic turn. Compared to the definition of trusts in the Californian and Indian legislation, the definition of trust in section 1 of the Japanese Trust Act of 1922 is functional: "[t]he term 'trust' as used in this Act means an arrangement where one transfers or makes other disposition of certain property right and requires the other to manage or dispose of such property for a specific purpose."<sup>81</sup> This definitional clause was introduced at a later stage in the drafting process when Japan's government policy shifted to restrict the scope of trust companies' business so that the trust companies should devote themselves to managing their clients' trust assets and abstain from engaging in quasi-banking operations.<sup>82</sup> This definition proved to be influential in the subsequent legislation in East Asia.<sup>83</sup>

Both Ikeda and his contemporaries were undoubtedly attracted by the American innovation of trust law with commercial overtones. Unlike in England, American courts at the time allowed trustees to receive reasonable compensation.<sup>84</sup> As already seen, the corporate practice of trusteeship had created a whole new industry in the United States.<sup>85</sup> Beyond this, however, the Trust Act of 1922 only haphazardly followed the broader transformation of the trust law that the American cases had brought about during the 19th century.<sup>86</sup> Although American courts allowed trustees and settlors at the time to control trusts even against the contrary wishes of the beneficiaries,<sup>87</sup> the 1922 Act gave beneficiaries the power to apply to terminate trusts.<sup>88</sup> The same power was extended to beneficiaries' creditors, who could also apply for the court to terminate trusts if the beneficial interest needed to be liquidated to

79. *Id.* at 149–51.

80. *Id.* at 152–53.

81. Trust Act, Law No. 62 of 1922, § 1 (Japan).

82. YAMADA, *supra* note 33, at 135–36.

83. Trust Act, Act No. 900, Dec. 30, 1961, § 1(2) (S. Kor.), *translated in* Korean Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=1051&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=1051&lang=ENG); Trust Act, Law of Jan. 26, 1996 § 1 (Taiwan), *translated in* Lawbank, <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT01.asp?lsid=FL022060>.

84. *See* Barrell v. Joy, 16 Mass. 221, 228–29 (1819).

85. *See supra* notes 35–41 and accompanying text.

86. THOMAS E. BATOR & HEIDI A. SEELY, *THE BOSTON TRUSTEE: THE LIVES, LAWS, & LEGACY OF A VITAL INSTITUTION* 70–95 (2015).

87. *Claffin v. Claffin*, 20 N.E. 454, 456 (Mass. 1889).

88. Trust Business Act of 1922 § 58 (Japan). This provision is further discussed below in the context of East Asian evolution. *See supra* notes 172–84 and accompanying text.

satisfy their debts.<sup>89</sup> This position was contrary to the American case law that sanctioned the so-called “spendthrift trust” in the previous century.<sup>90</sup>

For Japanese drafters, American case law development may well have been more difficult to track than statutory texts. However, perhaps more importantly, Japan lacked the infrastructure and social need that had driven the transformation of trust doctrine in America. According to Lawrence Friedman, these changes were rooted in the growing needs among the industrial rich in New England, who wished to perpetuate the accumulated wealth in what he termed “the dynastic trust.”<sup>91</sup> Similarly to the growth of the industrial wealth in 19th century America, Japan witnessed the rise of its industrial rich in the early decades of the 20th century. However, the Japanese law of succession allowed the wealth to be accumulated in the house (*ie* 家) without relying on trusts.<sup>92</sup> Additionally, the control over the household assets (*katoku*) was handed over from one house head (*koshu*) to the next, who was the eldest son unless otherwise designated.<sup>93</sup> However, after World War II, the family system was abolished under the new Constitution that enshrined individual dignity and equality of the sexes.<sup>94</sup> At the same time, much of the wealth that could have been kept in dynastic form was also dissipated by the destruction during the War, as well as the post-War land reform and dissolution of industrial conglomerates (*zaibatsu*).<sup>95</sup>

The Japanese Trust Act was introduced in 1922.<sup>96</sup> This 1922 Act came before the significant reformulation of trust law by Austin W. Scott and the Restatement of the Law of Trusts,<sup>97</sup> for which Scott served as reporter.<sup>98</sup> This left divergence between the Japanese legislation in 1922 and the Restatement’s position on fundamental issues such as the nature of beneficial interest and the formulation of fiduciary duty.<sup>99</sup> Furthermore, both the Indian Trust Act and the California Civil Code quickly became irrelevant.<sup>100</sup>

89. This part of section 58 was removed in 2006, but current Japanese trust law does not clearly give effect to the American style spendthrift trusts.

90. *Broadway Nat’l Bank v. Adams*, 133 Mass. 170, 173 (1882). A spendthrift trust is a trust that prohibits the beneficiary from transferring the beneficial interest and also prevents a creditor from attaching that interest. RESTATEMENT (THIRD) OF TRUSTS § 58 (AM. LAW INST. 2003).

91. Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 547–48, 582–83 (1964).

92. HIROSHI ODA, JAPANESE LAW 201–02 (2009).

93. *See id.* at 210.

94. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], § 24(1)(2) (Japan); ODA, *supra* note 92, at 201–02.

95. On the post-WWII development, see *infra* notes 106–26 and accompanying text.

96. Japanese Trust Act, Law No. 62 of 1922.

97. RESTATEMENT OF THE LAW OF TRUSTS (AM. LAW INST. 1935).

98. Austin Wakeman Scott, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 1266, 1266 (1931).

99. Austin Wakeman Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 290 (1917); Austin Wakeman Scott, *The Trustee’s Duty of Loyalty*, 49 HARV. L. REV. 521, 564–65 (1936).

100. For the Indian context, see Tofaris, *supra* note 69, at 317–19.

By the 1920s, Californian courts had begun to ignore the statutory language of the Civil Code.<sup>101</sup> Criticized as being “as functional as a vermiform appendix” in 1955,<sup>102</sup> the trust section of the Californian Code was overhauled and placed within the Probate Code in 1986.<sup>103</sup> The primary source of the Californian revision was the Restatement of the Law (Second) of Trust.<sup>104</sup> This new section of the Probate Code formed the basis for the Uniform Trust Code, another American codification effort that was completed and published in 2000.<sup>105</sup>

In summary, transplanting trust law into Japan was complicated. The sources were English and American, seen either directly by the drafters or through the lens of Indian or Californian legislation. The transplant was not complete with just two pieces of Japanese legislation in 1922. The law of trust continued to evolve both in common law jurisdictions and in Japan. Furthermore, the interaction between them continued, extending beyond Japan to other East Asian jurisdictions.

#### D. POST-WAR INTERACTION

The American influence on Japanese law became pronounced after World War II. Upon Japanese surrender, the General Headquarters, Supreme Commander for the Allied Powers (“GHQ-SCAP”) implemented measures to democratize Japanese politics and industry.<sup>106</sup> The New-Deal-inspired lawyers drafted the new Constitution and introduced antitrust law, securities and exchange legislation, and other regulations.<sup>107</sup> Corporate legislation was revised to provide for the directors’ duty of loyalty and shareholders’ right to derivative action.<sup>108</sup>

The implication for the trust industry was complicated. The war had destroyed trust companies’ client bases, and severe inflation made attracting

101. See generally *Title Ins. & Tr. Co. v. Duffill*, 191 Cal. 629, 648 (Cal. 1923) (narrowly construing section 863 of the Civil Code); see also cases cited in GEORGE T. BOGERT, *TRUSTS* 136 n.21 (6th ed. 1987).

102. Orrin B. Evans, *Observations on the State, etc., of the California Laws of Uses and Trusts*, 28 S. CAL. L. REV. 111, 111 (1955).

103. CAL. PROB. CODE §§ 15000–19403 (1990).

104. CAL. LAW REVISION COMM’N, RECOMMENDATION PROPOSING THE TRUST LAW 507 (1985).

105. UNIF. TRUST CODE, prefatory note (UNIF. LAW COMM’N amended 2005). See generally John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069 (2007) (explaining the gradual expansion of the statutory intervention in the field of trust law in the United States).

106. See THEODORE COHEN, *REMAKING JAPAN: THE AMERICAN OCCUPATION AS NEW DEAL* 32–48, 353–77 (1987); Alex Y. Seita & Jiro Tamura, *The Historical Background of Japan’s Antimonopoly Law*, 1994 U. ILL. L. REV. 115, 145–65.

107. Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Law No. 54 of 1947 (Japan); Securities and Exchange Act, Law No. 25 of 1948 (Japan).

108. COMMERCIAL CODE, Law No. 48 of 1899, § 254-3 (duty of loyalty), § 267 (derivative suits), as amended by Law No. 167 of 1950 (Japan). Today, these provisions have been carried over to Corporation Act, Law No. 86 of 2005, §§ 355, 847 (Japan).

funds difficult.<sup>109</sup> Furthermore, the newly introduced securities regulation prohibited trust companies from engaging in securities-related services.<sup>110</sup> The solution was to follow the American model, converting trust companies into banking institutions.<sup>111</sup>

Another measure was to introduce a new product called loan trusts, a Treasury-supervised form of collective investments authorized under legislation in 1952.<sup>112</sup> Trust companies would accept funds from a large number of investors and administer those funds by making long-term loans to the heavy industries.<sup>113</sup> The trust contract routinely guaranteed the return of capital and expected dividend.<sup>114</sup> Both policymakers and trust bankers were aware that loan trusts were not the proper form of trusts; they were intended as temporary crisis-avoidance measure.<sup>115</sup> Nevertheless, the product was popular among the post-war, middle-class population, fulfilling the stated purpose of “facilitat[ing] ordinary investors’ financing of the industries and thereby contribut[ing] to the continuous long-term supply of funds to the exploitation of natural resources and other industrial activities.”<sup>116</sup> The funds accumulated by loan trusts dwarfed the scale of investment trusts created under the Securities Investment Trust Act of 1951,<sup>117</sup> with total assets peaking at 50.7 trillion yen in 2003.<sup>118</sup>

After the War, American scholarship also gained importance in Japan. The American Restatements and Scott’s writings were routinely cited in post-war writings on trust law in Japan.<sup>119</sup> For instance, Scott’s writings and the Restatement pushed the proprietary account of trust to a dominant position, causing Japanese academics to re-think the underlying theory of trusts.<sup>120</sup>

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109. Arai, *supra* note 15, at 258.

110. Securities and Exchange Act § 65(1).

111. Act on Engagement in Trust Business Activities by Financial Institutions, Law No. 43 of 1943 (Japan); *see also* Teranishi, *supra* note 61, at 145.

112. *See generally* Kashitsuke shintaku-hō [Loan Trust Act], Law No. 195 of 1952 (Japan) (providing statutory authorization for loan trusts).

113. *Id.* § 2.

114. Takanori Kamibayashi, *The Rise and Fall of Loan Trusts and the Future of Trust Banks*, 68(2) KEIZAI SHIRIN 247, 253 (2000).

115. *Id.*

116. Loan Trust Act, § 1 (Japan).

117. The first investment trust certificate was issued in 1941, modeled after the unit trust in England. NOMURA SECURITIES RESEARCH DEPARTMENT, EMPIRICAL STUDIES OF INVESTMENT TRUST (1942). The earlier form of collective investment had been attempted in 1937.

118. Kamibayashi, *supra* note 114, at 258–60.

119. KIMIO OSAKADANI, AMERICAN TRUST LAW RESTATEMENT (Ministry of Justice Research Bureau No. 293, 1946); Kazuo Shinomiya, *Trustee’s Duty of Loyalty*, in *ANGLO-AMERICAN PRIVATE LAW: FESTSCHRIFT FOR PROFESSOR SUENOBU SANJI* (1963).

120. SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 248 n.3 (2d ed. 2003) (stating that the victorious view was stated by Scott, *supra* note 98, and F. W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 106–16 (2d ed. revised by J.W. Brunyate, 1936), and the defeated view was expressed by Harlan F. Stone, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 467 (1917)).

Kazuo Shinomiya, a leading trust law scholar in post-war Japan, argued that some of the 1922 Trust Act's provisions could not be reconciled with the understanding of trust as an obligation combined with trustees' full entitlement to the ownership of trust assets.<sup>121</sup> For instance, the 1922 Act's remedial provision, which entitled the beneficiaries to rescind the trustees' transactions that were entered into by the trustee and the third party in violation of trust, affected the party outside the trust relationship who knew or should have known that the transaction was against the trust.<sup>122</sup> The Act's provision on subrogation also had proprietary consequences because assets that were obtained by trustees as a result of administration, disposition, loss, and other reasons, formed part of the trust assets.<sup>123</sup> Although he stopped short of recognizing beneficiaries' proprietary interest in trust assets, Shinomiya proposed to treat trust assets as essentially a legal entity, thereby recognizing beneficiaries' direct entitlement to trust assets.<sup>124</sup>

Despite herculean efforts, these analyses remained academic while loan trusts yielded steady profits and few court cases were filed to test the limits of trust law.<sup>125</sup> As discussed in Part IV.A., all of this changed in the 1980s, when the trust industry engaged in more complex trust transactions such as securities trusts and real estate trusts.<sup>126</sup>

### III. EAST ASIAN RECEPTION AND JAPANESE LAW

#### A. COLONIAL IMPOSITION

Twentieth-century Japan stood on the donor side of trust law transplants, but its role was complicated by its colonial history.<sup>127</sup> After the Sino-Japanese War (1894–95), Japan acquired Taiwan from the Qing dynasty of China.<sup>128</sup> After it fought the war against Russia, Japan gradually extended its sphere of influence over Korea, ultimately annexing it in 1910.<sup>129</sup>

121. KAZUO SHINOMIYA, TRUST LAW 59–62 (rev. ed. 1989).

122. Japanese Trust Act of 1922 § 31. The drafters intended this remedy to be an equivalent of the common-law constructive trust. YAMADA, *supra* note 33, at 141, 152.

123. Japanese Trust Act of 1922 § 14. YAMADA, *supra* note 33, at 137. The Trust Act's other provisions, such as section 15, which stated that trust assets do not devolve to trustees' heirs, and section 27, which allowed restoration of trust assets to remedy a breach of trust, were also considered difficult to reconcile with the *in personam* theory. *Id.* at 137, 141.

124. Shinomiya was also influenced by the theory proposed by a French scholar Pierre Lépaulle. SHINOMIYA, *supra* note 121, at 68 (citing PIERRE LÉPAULLE, TRAITÉ THÉORIQUE ET PRATIQUE DES TRUSTS EN DROIT INTERNE, EN DROIT FISCAL ET EN DROIT INTERNATIONAL 43 (1931)).

125. Arai, *supra* note 15, 259–60.

126. See *infra* notes 220–24 and accompanying text.

127. Lusina Ho & Rebecca Lee, *Reception of the Trust in Asia: An Historical Perspective*, in TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 10, 10–11 (Lusina Ho & Rebecca Lee eds., 2013).

128. *Id.*

129. *Id.*

In East Asia, the modernization of the law was carried out simultaneously with European and Japanese colonization. An example is the local trust-like arrangement called *tootuk* (投托) in Korea.<sup>130</sup> Under this traditional transaction dating back to the 17th century, farmers entrusted their land to royal landlords to mitigate tax, but continued to manage the land as royal officials called *dojang* (導掌).<sup>131</sup> As part of the modernization of the royal land management and property system, the Korean Empire abolished *tootuk* and *dojang* in 1907, returning lands to their original owners.<sup>132</sup> This had significant implications for the Japanese colonial government after the Korean Annexation in 1910, as royal property could be sold to private interests to encourage settlement, while land formerly held in *tootuk* was returned to private owners and could not be sold by the government.<sup>133</sup> The ambiguous line between these two categories of land led to numerous disputes, in which the Oriental Development Company, a Japanese company established to encourage Korean settlement, was keenly interested from an early stage.<sup>134</sup>

In both Taiwan and Korea, trust companies emerged not long after the rise of the Japanese trust industry. The first Korean trust company was established in 1910.<sup>135</sup> By 1930, more than 80 companies were in operation.<sup>136</sup> In 1931, the Japanese Trust Act was made applicable in Korea, and an accompanying trust regulation was introduced.<sup>137</sup> The first Taiwanese trust company was established in 1917, and the number of trust companies peaked at 24 in 1920.<sup>138</sup> In the 1930s and 1940s, the industries in both Japan and its colonies were subject to increasing government control under the Second Sino-Japanese War and World War II.<sup>139</sup> As already seen, Japanese trust companies at the time were consolidated into a handful of trust companies. Similarly, the Korean trust companies were consolidated into a

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130. Mantaro Nakamura, *The Establishment of a Modern Trust System in Korea*, 1 RES. ON INDUSTRY & ECON. 140, 141–42 (1955); Korean Trust Company, *supra* note 30, at 113.

131. Korean Trust Company, *supra* note 30, at 114–22.

132. *Id.* at 123–26.

133. Ichiro Wada, *Disputes over State-Owned Properties*, in 22 THE REPORT OF RESEARCH ON KOREAN CUSTOMS (The Legislative Research Bureau of the Governor-General of Korea and Privy Council, 1922).

134. The Oriental Development Company, *Survey on National and Royal Household Land*, in 13 THE REPORT OF RESEARCH ON KOREAN CUSTOMS (1909). For another form of trust-like arrangements in Korea that still continues to this day, see Kim Sang Yong, *The Legal Construction, Problems and Control by Public Law of the Name Trust*, 30 COMPARATIVE L. REV. 67 (1996–1997); Korean Trust Company, *supra* note 30, at 126–29.

135. Nakamura, *supra* note 130, at 147; Korean Trust Company, *supra* note 30, at 140.

136. Nakamura, *supra* note 130, at 147–50; Korean Trust Company, *supra* note 30, at 141–44.

137. Amendment to Korean Private Law Ordinance of 1931; Korean Trust Business Ordinance and Implementing Regulation of 1931.

138. CHIH-CHENG WANG, THEORY AND DEVELOPMENT OF TRUST LAW IN TAIWAN 2–3 (Makoto Arai trans., 2014).

139. Nakamura, *supra* note 130, at 168–69.

single trust company, the Korean Trust Company,<sup>140</sup> and the Taiwanese trust companies were consolidated into the Taiwan Trust Company in 1944.<sup>141</sup>

The plight of the trust industries in Korea and Taiwan did not end with the liberation from Japanese rule after World War II. In Korea, the severe depreciation of land prices caused by the post-War land reform made trust operation on real property virtually impossible.<sup>142</sup> Severe inflation and the Korean War further afflicted trust businesses.<sup>143</sup> In Taiwan, the Taiwan Trust Company was seized by the government, and by 1950, trust business had effectively ceased.<sup>144</sup>

### B. TRUST COMPANIES AND BANKING REGULATION

In post-war South Korea and Taiwan, the trust industries recovered along with the national economies.<sup>145</sup> In South Korea, the Civil Code was enacted in 1958 following the German model, and the Trust Act was introduced in 1961.<sup>146</sup> As South Korea underwent rapid economic development in the mid-1960s onward, securities-investment trust legislation was introduced in 1969 and numerous investment trust companies were established in the 1970s.<sup>147</sup> While the investment trust legislation went through many revisions, the Trust Act of 1961 remained largely unchanged for five decades. The Trust Act was finally overhauled in 2011 to reflect the economic development and the increased wealth of the Korean people.<sup>148</sup>

The Taiwanese government began to encourage establishment of trust investment companies in the late 1950s to facilitate the supply of mid- to long-term financing services.<sup>149</sup> Thus, major trust investment companies were

140. *Id.*; Korean Trust Company, *supra* note 30, at 179–98.

141. WANG, *supra* note 138, at 2–3.

142. Nakamura, *supra* note 130, at 140–41, 169.

143. *Id.*

144. WANG, *supra* note 138, at 3.

145. On modern South Korean trust law, see generally Sung-Po An, *Overview of the Reception and Implementation of the Trust in Korea*, in LIBER AMICORUM MAKOTO ARAI 661 (Dagmar Coester-Waltjen et al. eds., 2015); Hyeok-Joon Rho, *Developing Trusts and Their Jurisprudences: Real Estate Trusts in Korea*, in Symposium, *Law of Trusts in Asia: Current Situation, Problems and Perspective*, 40 STUDY L. TR. 1, 185 (2015); Wu Ying-Chieh, *Trust Law in South Korea: Developments and Challenges*, in TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 46 (Lusina Ho & Rebecca Lee eds., 2013).

146. Trust Act, Act No. 900, Dec. 30, 1961, *amended by* Act No. 5454, Dec. 13, 1997; Act No. 6627, Jan. 26, 2002; Act No. 7428, Mar. 31, 2005 (S. Kor.).

147. Wu, *supra* note 145, at 47–48; Ho & Lee, *supra* note 127, at 17.

148. Trust Act, Act No. 10924, July 25, 2011 (S. Kor.).

149. On modern Taiwanese trust law, see generally YUN-CHIEN CHANG ET AL., PROPERTY AND TRUST LAW IN TAIWAN 113–25 (2017); WANG, *supra* note 138; Wang Wen-Yeu et al, *Trust Law in Taiwan: History, Current Features and Future Prospects*, in TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 63 (Lusina Ho & Rebecca Lee eds., 2013); see also Ying-Chieh Wu, *East Asian Trusts at the Crossroads*, 10 NAT'L TAIWAN U. L. REV. 79 (2015) (discussing broad implications of current East Asian Trust Law structures).



established around the 1970s.<sup>150</sup> Until the privatization of the banking sector in the 1990s, Taiwanese banks were mostly state-owned, so trust companies were, in effect, private organizations wishing to engage in the banking business.<sup>151</sup> During this time, trust businesses were subject to various legislation and regulations, such as the Banking Act, the Securities and Exchange Act, and the Trust and Investment Companies Regulatory Rules.<sup>152</sup> However, court cases left ambiguities as to even the basic issue of the definition of a trust.<sup>153</sup> The Trust Act was passed in 1996 as a general trust legislation, followed by the Trust Business Act in 2000.<sup>154</sup>

The post-war development of trust businesses in China began with the declaration of the Opening Up policy by Deng Xiaoping in 1979.<sup>155</sup> In the same year, the International Trust Investment Company was created as the first trust investment company established under the communist regime. In the following years, numerous state-owned trust investment companies were established in order to raise money for the provincial government.<sup>156</sup> Despite this growth, not all trust investment companies were managed properly. In 1999, Guangdong International Trust and Investment Corporation filed for bankruptcy, representing the most prominent failure in Chinese history at the time.<sup>157</sup> This and similar events provided the impetus to regulate the trust industries.<sup>158</sup> The Trust Act was introduced in 2001, which was the same year China acceded to the World Trade Organization.<sup>159</sup> The use of trusts as

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150. WANG, *supra* note 138, at 6–7.

151. YVONNE S.W. FONG, MANIVEST INTERNATIONAL SPECIAL REPORT: TRUST LAW IN TAIWAN 2 (2003); Wen-Yeu et al., *supra* note 149, at 63.

152. Banking Act, promulgated on March 28, 1931 (Taiwan); Securities and Exchange Act, promulgated on April 30, 1968 (Taiwan); WANG, *supra* note 138, at 6 (referencing the Trust Investment Companies Regulatory Rules (1973)).

153. See e.g., Supreme Court of Taiwan Case No. 42 of 1977, as quoted in WANG, *supra* note 149, at 65.

154. Trust Business Act, promulgated on July 19, 2000 (Taiwan).

155. Lusina Ho et al., *Trust Law in China: A Critical Evaluation of Its Conceptual Foundation*, in TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 80–81 (Lusina Ho & Rebecca Lee eds., 2013); LUSINA HO, TRUST LAW IN CHINA 3–5 (2003); WANG QING & GUO CE, ANNOTATED ARTICLES OF THE TRUST LAW OF THE PEOPLE'S REPUBLIC OF CHINA (2001); THE CHINESE TRUST LAW—MATERIALS ON THE DRAFTING PROCESS (Zhu Shaoping & Ge Yi eds., 2002); STUDIES ON CHINESE TRUST LAW (Hideki Kanda ed., 2016).

156. Ho et al., *supra* note 155, at 81.

157. Mark Landler, *International Business: Bankruptcy the Chinese Way; Foreign Bankers are Shown to the End of the Line*, N.Y. TIMES (Jan. 22, 1999), <http://www.nytimes.com/1999/01/22/business/international-business-bankruptcy-chinese-way-foreign-bankers-are-shown-end-line.html>.

158. Vincent A. Pace, Comment, *The Bankruptcy of the Zhu Kuan Group: A Case Study of Cross-Border Insolvency Litigation Against a Chinese State-Owned Enterprise*, 27 U. PA. J. INT'L ECON. L. 517, 539–40 (2006).

159. HO, *supra* note 155, at 1 n.1.

shadow credit products continued to pose policy challenges, attracting attention both domestically and internationally.<sup>160</sup>

For many years after World War II, South Korea, Taiwan, China, and Japan did not use the trust for family asset management.<sup>161</sup> If anything, the pre-War years may have seen a more diverse use of trusts.<sup>162</sup> In war-torn East Asia, particularly after democratic reform to deconcentrate landholdings, few individuals possessed sufficient assets to justify administration under trusts.<sup>163</sup> Instead, trusts were used for commercial purposes to attract either domestic or foreign investment to raise capital for major industries.<sup>164</sup> Thus, the trust industry served important national interests in each jurisdiction, and yet, trusts occupied a rather complex position relative to the regulated banking and financial sectors.<sup>165</sup> As a result of commercial use of the trust industry, trust legislation carried a more regulatory overtone than in common law jurisdictions, often operating in conjunction with banking, securities, and other financial rules and legislation.<sup>166</sup>

### C. CODIFICATION IN EAST ASIA

After Japan was defeated in World War II in 1945, its colonial impact diminished over time in South Korea, Taiwan, and China.<sup>167</sup> Nevertheless, these jurisdictions continued to self-identify as civil-law jurisdictions and had similarities in economic growth models that led to what might be seen as an evolution of trust law across these East Asian civil-law jurisdictions.<sup>168</sup> In the years immediately after the war, the Japanese Trust Act served as the main source of reference as seen in the South Korean Trust Act of 1961.<sup>169</sup> In later years, the drafters of the Taiwanese Trust Act of 1996 and the Chinese Trust Act of 2001 made more direct references to American trust law via the Restatement and the Uniform Trust Code and, to a lesser degree, English trust jurisprudence.<sup>170</sup> The most recent revisions of the Trust Acts in Japan in

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160. KPMG, 2015 CHINA TRUST SURVEY 10 (2015); IMF, THE PEOPLE'S REPUBLIC OF CHINA 18–19 (IMF Country Rep. No. 16/271, August 2016).

161. Ho & Lee, *supra* note 127, at 15–16.

162. *Id.* at 13–14; Arai, *supra* note 15, at 258–61.

163. Kamibayashi, *supra* note 114, at 249–50; Nakamura, *supra* note 132, at 140–41, 169.

164. Ho & Lee, *supra* note 127, at 16–18.

165. See *supra* notes 149–60 and accompanying text.

166. Arai, *supra* note 15, at 256–58; Wu, *supra* note 145, at 47; WANG, *supra* note 138, at 5–7; HO, *supra* note 155, at 3–6.

167. Ho & Lee, *supra* note 127, at 10–13.

168. *Id.*

169. Wu, *supra* note 145, at 46.

170. WANG, *supra* note 138, at 19 (reference to Restatement (Second) of Trusts in Taiwan); THE CHINESE TRUST LAW—MATERIALS ON THE DRAFTING PROCESS, *supra* note 155, at 294–300 (reference to Restatement of Trusts (edition unspecified) and Uniform Trust Code in China).

2006 and South Korea in 2011 involved further reform to increase flexibility in the trust legislation to meet the diverse needs of trust practices.<sup>171</sup>

The regional evolution can be illustrated with provisions on termination of trusts. In the East Asian legislation, the provisions on termination are typically bifurcated into two situations. The first is where the settlor and the beneficiary are identical, a common situation when trust is used in commercial transactions. The Japanese Trust Act of 1922 set the tone by providing that the settlor-beneficiary can terminate the trust at any moment.<sup>172</sup> This was followed by South Korean legislation in 1961 and Taiwanese legislation in 1996.<sup>173</sup> These trust laws consistently provide that if trusts are terminated at a time that is detrimental to the interest of trustees, the settlors are liable to make compensation.<sup>174</sup> That the trustee can sue the beneficiary if he or she is dissatisfied with termination may sound anomalous in common law, but for the East Asian drafters, this was consistent with the analogous Civil Code provision on agency contract, known as “mandate,” in the respective jurisdictions.<sup>175</sup>

The second situation is where the settlor and the beneficiary are not identical. Note here that the American court departed from the traditional English approach during the 19th century by allowing greater scope for settlors’ free disposition.<sup>176</sup> On this point, Asian trust law gradually evolved from the English model to the American model. Similar to the English approach, section 58 of the Japanese Trust Act of 1922 provided that “the court can, with the application by the beneficiary or interested parties, terminate the trust.”<sup>177</sup> This approach was followed by South Korea in 1961<sup>178</sup> and China in 2001.<sup>179</sup>

171. The emerging trust needs included real estate investment trusts, security trusts, and asset securitization trusts. For details, see Arai, *supra* note 15, at 260–61; Wu, *supra* note 145, at 47–48; *infra* Part IV.A.

172. Shintakuho [Trust Act] of 1922 (hereinafter JTA 1922) § 57 (Japan).

173. Sintagbeob [Trust Act], Act. No. 900, Dec. 30, 1961 (hereinafter SKTA 1961) § 56 (S. Kor.); Xintuō fǎ [Trust Act], promulgated on Jan. 26, 1996 (hereinafter TTA) § 63 (Taiwan).

174. Trust Business Act of 1922 § 57 (Japan); SKTA 1961 § 56; TTA § 63.

175. MINPŌ [CIV. CODE], Law No. 89 of 1896, § 651(2), *translated in* Japanese Law Translation, [http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=02&vm=&id=2057#en\\_pt1ch2sc2at3](http://www.japaneselawtranslation.go.jp/law/detail_main?re=02&vm=&id=2057#en_pt1ch2sc2at3) (Japan); Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, § 689(2) (S. Kor.); Mínfǎ [Civil Code], promulgated on May 23, 1929, *amended* June 10, 2015, § 549 (Taiwan).

176. *Claffin v. Claffin*, 20 N.E. 454, 456 (Mass. 1889). The English approach is represented by the leading case of *Saunders v. Vautier* (1841) 49 Eng. Rep. 282, and the subsequent legislation of Variation of Trust Act 1958, 6 & 7 Eliz. 2 c. 53, § 1(1) (Eng.).

177. This provision applies where the beneficiary needs the trust asset to satisfy his debt, and the creditor is in a position to make an application as one of the “interested parties.” This reflects the drafters’ negative attitude towards the use of a trust for asset protection purposes.

178. SKTA 1961 § 57.

179. Xintuō fǎ [Trust Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 28, 2001), § 53(4) (hereinafter CTA). Although this provision ambiguously provides that a trust can be terminated when “the parties to the trust consult and agree with each other,” one of

In 1996, the Taiwanese legislation took an approach closer to the American position by providing that “the trust may be jointly terminated by the settlor and the beneficiary at any time and from time to time.”<sup>180</sup> Furthermore, the same provision extended the analogy of agency contract by providing for trustees’ entitlement to compensation for early termination.<sup>181</sup> Similar provisions were introduced in the South Korean Trust Act after the 2011 reform.<sup>182</sup> The Japanese Trust Act of 2006 is more closely aligned to the United States. Section 164(1) collapses the bifurcated provisions and provides that “the settlor and the beneficiary may terminate a trust at any time by an agreement between them.”<sup>183</sup> Nonetheless, the agency contract analogy is retained, for if the termination is detrimental to the trustee, “the settlor and the beneficiary shall compensate the trustee for any damages.”<sup>184</sup>

East Asian trust law evolution can also be observed in the formulation of trustees’ obligation. The duty of care provision has been fairly consistent across the East Asian legislation.<sup>185</sup> Prototypical is section 20 of the Japanese Trust Law of 1922 which states that “the trustee shall follow the trust purposes and administer the trust with the due care of a faithful administrator.”<sup>186</sup> The duty of care of faithful administrator is a familiar concept found in many private law codifications in jurisdictions that follow the Civil Law tradition.<sup>187</sup>

The exact standard of care could vary depending on specific aspects of trust administration or different levels of the trustee’s specialization. None of the civil law trust legislation in East Asia has elaborated on this issue. The drafters of the Japanese Trust Act of 2006 considered incorporating the prudent investor rule, a body of rules developed in the United States that require trustees to assess a trust’s risk tolerance and avoid risks by diversifying the trust investment portfolio.<sup>188</sup> The reformers accepted that trust banks

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the commentaries to the Trust Act states that this implies agreement among the settlor, the trustee, and the beneficiary. WANG & GUO, *supra* note 155, at 134.

180. TTA § 64.

181. *Id.*

182. Sintagbeob [Trust Act], Act. No. 10924, Jul. 25, 2011, § 99 (S. Kor.) (hereinafter SKTA 2011), translated in Korean Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=43240&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=43240&lang=ENG).

183. Shintaku hō [Trust Act], Law No. 108 of 2006, § 164(1) (Japan) (hereinafter JTA 2006), translated in Japanese Law Translation, <http://www.japaneselawtranslation.go.jp/law/detail/?id=2476&vm=02&re=02>. For background of the 2006 reform, see footnotes 247–53 and accompanying text.

184. *Id.* § 164(2).

185. SKTA 1961 § 28; TTA § 22; CTA § 25(2); SKTA 2011 § 32.

186. JTA 1922 § 22.

187. See, e.g., HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 347, translation at [https://www.trans-lex.org/124800/\\_/joachim-willi-e-the-reasonable-man-in-united-states-and-german-commercial-law-15-complybint-l-bus-1992-at-341-et-seq/#Footnote-Inline-88d633cddc57ac7eedab77eedo4203ea](https://www.trans-lex.org/124800/_/joachim-willi-e-the-reasonable-man-in-united-states-and-german-commercial-law-15-complybint-l-bus-1992-at-341-et-seq/#Footnote-Inline-88d633cddc57ac7eedab77eedo4203ea) (Ger.) (“Sorgfalt eines ordentlichen Kaufmanns”); CÓDIGO CIVIL (Civil Code) § 1104 (Spain) (duty of “un buen padre de familia”).

188. UNIF. PRUDENT INVESTOR ACT §§ 2–3 (UNIF. LAW COMM’N 1994); RESTATEMENT (THIRD) OF TRUSTS § 90 (AM. LAW INST. 2007).

routinely used diversified portfolios in trust investment, but the rule was not adopted for fear that imposing such a duty could cause unintended consequences in small-scale trusts.<sup>189</sup>

The current Trust Acts in South Korea and Japan allow reducing the level of duty of care by a specific provision in a trust instrument.<sup>190</sup> However, at least in Japan, trust instruments typically do not contain waivers of duty of care because the duty of care provision of the Trust Business Act does not specifically permit such waivers.<sup>191</sup> The Chinese Trust Act's provision on the duty of prudent management mirrors the language of administrative regulations on collective trust fund investment and trust investment companies.<sup>192</sup> These attitudes imply that administrative regulation plays a more important role than civil enforcement with regard to these trustee duties.

Duty of loyalty provisions have undergone a more complex evolution. In the early 20th century, the formulation of fiduciary notion was still fluid even among common law jurisdictions.<sup>193</sup> The English court had emphasized the strict nature of trustees' duties since the 18th century and continued to develop separate no-profit and no-conflict rules on a case-by-case basis.<sup>194</sup> In America, the First Restatement of Trusts and Austin W. Scott formulated the duty of loyalty about a decade after the Japanese Trust Act of 1922 was drafted.<sup>195</sup> Following the California Civil Code and the Indian Trust Act, the Japanese 1922 Act prohibited profiting from trusts and self-dealing and required management of trust assets separately from trustees' own assets.<sup>196</sup> These provisions were followed by South Korea, Taiwan, and China.<sup>197</sup>

East Asian trust legislation has routinely allowed exceptions to the prohibition of self-dealing to reflect the real needs of commercial trusts. While the Japanese Trust Act in 1922 required court approval before trustees were exempt from the prohibition, the Trust Business Act of the same year did not apply this approval with respect to trust companies. Instead, where

189. MASAHIRO TERAMOTO, COMMENTARY ON NEW TRUST ACT 144 (rev. ed. 2008); Yasuhiro Kawaguchi, *Trustee's Duty of Good Faith Administration*, 1261 J. FIN. & COM. L. 56 (2007).

190. JTA 2006 § 29(2); SKTA 2011 § 32.

191. Shintaku gyō-hō [Trust Business Act] Law No. 154 of 2004, § 28(2) (Japan) (hereinafter Trust Business Act of 2004) *translated in* Japanese Law Translation, <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&id=1946&re=01&vm=02>.

192. HO, *supra* note 155, at 106–07.

193. JIANG XUELIAN, THE EVOLUTION AND FUNCTION OF THE TRUSTEE'S DUTY OF LOYALTY (2014).

194. For the foundational case, see generally *Keech v Sandford* (1726) 25 Eng. Rep. 223.

195. RESTATEMENT OF TRUSTS § 170 (AM. LAW INST. 1935); Austin Wakeman Scott, *The Trustee's Duty of Loyalty*, 49 HARV. L. REV. 521 (1936).

196. JTA 1922 §§ 9, 22, 28, 34; CAL. CIV. CODE §§ 2229–33; Indian Trust Act §§ 14, 38, 51–54. On this point generally, see YAMADA *supra* note 33, at 138–40.

197. For the no-profit rule, see CTA § 26; JTA 1922 § 9; SKTA 2011 § 29; TTA § 34. For the prohibition of self-dealing, CTA, § 27; JTA 1922 § 22; SKTA 2011, § 31; TTA § 35. For the duty of separate management, see CTA 2011, § 29; JTA 1922 § 28; SKTA 2011 § 30; TTA § 24.

there was an open market price for specific trust asset, trust companies were allowed to engage in self-dealing in such assets to the extent authorized by the trust instrument and necessary for the trust administration.<sup>198</sup> Taiwan's Trust Act has a similar exception.<sup>199</sup>

As the trust business became increasingly complex and diverse, these categories of prohibited transactions were seen as both under-inclusive and over-inclusive. Thus the Japanese Trust Act of 2006 introduced an elaborate category of prohibited self-dealing and a duty of non-competition,<sup>200</sup> and at the same time reduced the mandatory nature of the prohibitions.<sup>201</sup> A conflict of interest transaction would be permitted according to the authorization in the trust instrument, upon informed consent by the beneficiary, or when it was reasonably necessary to achieve the trust's purposes.<sup>202</sup> Additionally, a conflict of interest transaction will be permitted if the beneficiary's interest remains unaffected or whenever it is justifiable in reference to specific facts of the case.<sup>203</sup> The current South Korean legislation is analogous but less convoluted.<sup>204</sup>

Generic duty of loyalty was also introduced in Japan in 2006 and in South Korea in 2011.<sup>205</sup> Whether this provision has more than symbolic significance is uncertain, as both Acts contain an elaborate list of prohibited transactions constituting breaches of duty of loyalty in common law jurisdictions.<sup>206</sup> Furthermore, the Japanese court ruled that the duty of loyalty provision that was introduced in corporate legislation in 1950 merely elaborated on the traditional duty of care provision in the Civil Code that was applicable to corporate directors.<sup>207</sup>

Designing remedies for the breach of trusts has been a challenge for lawyers not practicing in common law jurisdictions.<sup>208</sup> Although a broad proprietary remedy, such as tracing, is not available in any of the East Asian trust statutes, they provide for a remedy that is the equivalent of a constructive trust. Thus, if trustees enter into a transaction with a third party in a breach of trust, the beneficiary can rescind the transaction to the extent that the third party transacted in bad faith.<sup>209</sup> Once the transaction is rescinded, the

198. Trust Business Act of 1922 § 10 (Japan).

199. TTA § 35.

200. JTA 2006 § 31(1).

201. *Id.* § 31(2).

202. *Id.*

203. *Id.*

204. SKTA 2011 § 34(2).

205. *Id.* § 33; JTA 2006 § 30.

206. SKTA 2011 § 34; JTA 2006 § 31.

207. Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 894 (2003).

208. Lusina Ho, *Trusts: The Essentials*, in THE WORLDS OF THE TRUST 1, 10-13 (Lionel Smith, ed. 2013).

209. JTA 1922 § 31; JTA 2006 §§ 27, 31(7); SKTA 2011 § 75; TTA § 18; CTA § 22.

property can be restored following the Civil Code's general provisions and unjust enrichment provisions.<sup>210</sup>

All four jurisdictions have provided for both compensation of loss and reinstatement of lost property.<sup>211</sup> Earlier legislation failed to provide for the disgorgement of profit, but in this respect, Taiwanese legislation contains an important innovation. The 1996 Act in Taiwan allows disgorgement as a remedy for trustees' failure to manage trust assets independently of their own assets or the assets of other trusts; it also provides a remedy for self-dealing.<sup>212</sup> The current South Korean statute also forces trustees to disgorge profit following a breach of duty of loyalty, a conflict of interest transaction, or a failure to earmark.<sup>213</sup> The Japanese Trust Act of 2006 stopped short of introducing a disgorgement remedy.<sup>214</sup> Nevertheless, when trustees cause loss as a result of conflicts of interest, competing transactions, or disloyal conduct, the loss is presumed to be equivalent to the trustees' profits.<sup>215</sup> Furthermore, if trustees enter into competing transactions, beneficiaries can deem that the transactions were entered into for the trust.<sup>216</sup> Where trustees cause loss to a trust's property after failing to segregate the trust's assets, the trustees cannot escape liability for compensation or reinstatement unless they prove that the loss would have occurred even if they had properly earmarked the assets.<sup>217</sup>

#### IV. THE RISE OF FIDUCIARY LAW

Given that trust legislation was transposed on the trust industries that had already flourished in East Asia, there is no assurance that the fiduciary norm would smoothly translate into law in practice. In fact, for most of the latter half of the twentieth century, there were only a few contested cases over trust legislation.<sup>218</sup> This was so even though the legislation was often drafted in general language and amendments were made only infrequently. Nevertheless, there are signs that the situation is changing. Since the 1970s,

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210. MINPŌ [CIV. CODE], Law No. 89 of 1896, §§ 121, 703–04 (Japan); Minbeob [CIV. C.] §§ 141, 741 (S. Korea); Bín-hoat [CIV. C.] §§ 114, 179, 181 (Taiwan); Mínfǎ diǎn [CIV. C.] §§ 122, 155 (China).

211. JTA 2006 § 40(3); SKTA 2011 § 43; TTA § 23; CTA, § 22.

212. TTA §§ 24, 35, respectively.

213. SKTA 2011 § 43(3).

214. Yoshihisa Nomi, *Disgorgement of Profits in Japanese Law*, in DISGORGEMENT OF PROFITS: GAIN-BASED REMEDIES THROUGHOUT THE WORLD 429, 437–38 (Ewoud Hondius & André Janssen eds., 2015).

215. JTA 2006 § 40(3).

216. *Id.* § 32(4).

217. *Id.* § 40(4).

218. See, e.g., Saikō Saibansho [Sup. Ct.] Mar. 14, 1961, 15(3) SAIKŌ SAIBANSHO MENJI HANREISHŪ [MINSHŪ] 444 (Japan). The case concerned Japanese Trust Act of 1922 § 11, which prohibits the creation of trusts for the purpose of entrusting the pursuit of court proceedings. Although this provision was rather unique when the Japanese Trust Act was introduced in 1922, similar provisions are found in East Asian trust legislation today. See CTA § 11(4); JTA 2006 § 10; SKTA 2011 § 6; SKTA 1961 § 7; TTA § 5(3).

several developments have taken place across East Asia, bringing about serious re-thinking about the fiduciary norms within East Asian trust laws on the ground.<sup>219</sup>

#### A. JAPANESE REFORM MOVEMENTS

In Japan, the use of trusts in commercial contexts has become increasingly complex since the 1970s. Trust banks began to serve as trustees for pension funds in 1962.<sup>220</sup> The assets held for securities investment trusts consistently increased in the 1970s, and with the rise of stock prices in the 1980s, exceeded the scale of loan trust in 1987.<sup>221</sup> When real estate trusts began to be used in 1984, trust banks received the real estate, developed and managed the property, supplied necessary funding, and returned the profit to the beneficiary.<sup>222</sup> The steep rise of real estate property brought an influx of money into real estate trusts.<sup>223</sup> Nevertheless, Japan's bubble economy burst in 1991, followed by a long recession in the 1990s and later.<sup>224</sup> The Japanese court grappled with some untested issues concerning trust legislation, which served as catalysts for the reform movements.

*Mitsubishi UFJ Trust Bank v. Hyogo Prefecture*<sup>225</sup> involved a real estate trust that was hit hard by the collapse of the economic bubble. In 1987, Hyogo Prefecture, a local government in the east part of Japan, conveyed its real property to Toyo Trust Bank, a major trust bank in Japan, so the latter would hold the real property in trust for the benefit of the local government.<sup>226</sup> Under the trust contract, the trustee was to develop and maintain recreational facilities upon the land, and the financing of the project to be procured by mortgaging the trust property.<sup>227</sup> However, as the value of land quickly depreciated in the 1990s, the operation faced difficulties, resulting in debts far exceeding the value of the trust property.<sup>228</sup> The trust bank paid off the debt and issued proceedings against the beneficiary to seek reimbursement

219. In Japanese contexts, see generally NORIO HIGUCHI, *THE ERA OF FIDUCIARY: TRUSTS AND CONTRACTS* (1999).

220. Corporate Tax Act, Law No. 28 of 1947, § 12(2), as introduced by Law No. 45 of 1962 (repealed) (Japan); Arai, *supra* note 15, at 260.

221. Data supplied by the Trust Companies Association of Japan (on file with the author). The collapse of stock price brought sharp decline in the securities investment trust in the early 1990s but by the turn of the century it had rebounded and left the loan trusts far behind.

222. Symposium, *The Arrival of Real Estate Trusts*, 827 JURIST 6 (1984).

223. Data supplied by the Trust Companies Association of Japan (on file with the author).

224. See Geoffrey P. Miller, *The Role of a Central Bank in a Bubble Economy*, 18 CARDOZO L. REV. 1053, 1058–69 (1996) (describing the collapse and struggles of the Japanese economy in the 1990s).

225. *Mitsubishi UFJ Trust Bank v. Hyogo Prefecture*, [Sup. Ct.] Nov. 17, 2011, 2136 HANJI 30.

226. *Id.* at 33. Toyo Trust Bank was subsequently acquired by and renamed as Mitsubishi UFJ Trust Bank.

227. *Id.*

228. *Id.* at 34.



of expenses.<sup>229</sup> The trust contract provided that the construction cost, debt incurred, and other expenses necessary for the trust administration were to be paid out of the trust's assets and that the parties would confer on the outstanding debt on completion of the trust's terms.<sup>230</sup> The Kobe District Court interpreted these provisions to exclude the trustee's right to seek reimbursement from the beneficiary and ruled in favor of the defendant.<sup>231</sup> However, the decision was reversed on appeal, and the Japanese Supreme Court ruled that those provisions were not intended to exclude the right to compensation as provided in the 1922 Trust Act, but rather created an opportunity for the parties to discuss the actual steps to deal with the outstanding debts.<sup>232</sup> Following the 2006 reform, the current Trust Act provides that the trustee can be reimbursed from the beneficiary only upon agreement.<sup>233</sup> Trust contracts in complex business arrangements today routinely provide for the trustees' right to reimbursement from the beneficiary in the event the trustees incur debts on behalf of trusts.<sup>234</sup>

In *Nakata Construction Co. v. East Japan Construction Guaranty Corp.*,<sup>235</sup> the Japanese Supreme Court for the first time implied a trust where none of the parties had expressed a wish to create one. In this case, a construction company had received advance payment from the local government for the agreed service under a construction contract, but went into bankruptcy before completing its work.<sup>236</sup> The bankruptcy administrator sought to collect the advance payment kept in a separate bank account as part of the bankrupt estate.<sup>237</sup> The defendant had paid out to the local government upon the bankrupt company's default pursuant to its guarantee obligation for the bankrupt company's provision of service.<sup>238</sup> The Japanese Supreme Court rejected the bankruptcy administrator's claim and held that upon receipt of advance payment in the special account, a trust contract arose in which the recipient held the fund for the benefit of the government.<sup>239</sup> The Court considered it material that under the relevant legislation and contractual

229. JTA 1922 § 36(2) as then applicable provided that when the trustee paid out tax or other expenses or suffered loss during the course of trust administration without any fault on his part, he shall be entitled to exercise his right to compensation.

230. Mitsubishi UFJ Trust Bank v. Hyogo Prefecture, 2136 HANJI, at 34.

231. Mitsubishi UFJ Trust Bank v. Hyogo Prefecture [Kobe District Ct.] Feb. 21, 2009, 1324 KINHAN 42, 53.

232. Mitsubishi UFJ Trust Bank v. Hyogo Prefecture [Osaka High Ct.] May 14, 2010, 2136 HANJI, at 35, affirming 1935 KINHO 59.

233. JTA 2006 § 48(5).

234. TRUST LAW AND PRACTICE 114 (Mitsubishi UFJ Trust Bank ed., 2015).

235. Nakata Construction Co. v. East Japan Construction Guaranty Corp. [Sup. Ct.] Nov. 17, 2002, 56(1) MINSHU 20 (Japan).

236. *Id.* at 21–23.

237. *Id.* at 23.

238. *Id.* at 22–23.

239. *Id.* at 23.

arrangements, the bankrupt company could withdraw from the separate bank account only for the purpose of the specific construction work and by following designated procedures subject to the guarantee company's audit.<sup>240</sup>

In the late 1990s, trusts were deployed for asset securitization purposes.<sup>241</sup> Nevertheless, it took years and rounds of legislation to emulate American innovation and securitize illiquid assets held by financial institutions.<sup>242</sup> The trust law and surrounding legislation were seen as overly restrictive and inflexible.<sup>243</sup> Japanese trust lawyers' attention was naturally drawn to the so-called contractarian account of trust, according to which trust is essentially a contractual arrangement that possesses the flexibility to serve the business needs that arise from various commercial deals.<sup>244</sup> The proponent of this theory, Professor John Langbein, was an influential American academic, who was heavily involved in reform works on the law of trust and estate in the United States, and most notably as the reporter and principal drafter for the Uniform Prudent Investor Act.<sup>245</sup> There was also an extensive theorizing of trust law's asset partitioning and bankruptcy shielding function, which attracted renewed interest among corporate restructuring and asset-protection lawyers.<sup>246</sup>

With these theoretical bases, commercially-oriented trust lawyers led the overhaul of trust legislation, which culminated in the overhaul of Trust Business Act in 2004 and Trust Act in 2006.<sup>247</sup> Under the new legislation, the

240. *Id.* at 23–24.

241. Hideki Kanda, *Securitization in Japan*, 8 DUKE J. COMP. & INT'L L. 359, 361–66 (1998). In 1997, the Stock Exchange Act Application Ordinance was amended so that the beneficial interest in a trust can be treated as a security under the Securities Exchange Act “where the trust property is any loan from a financial institution.” *Id.* at 364.

242. See Regulation of Business for Specific Claims Act, Law No. 77 of 1992, *repealed* by Law No. 154 of 2004; Act on Securitization of Assets, Law No. 105 of 1998 (Japan), *amended by and renamed as* Asset Securitization Act, Law No. 97 of 2000 (Japan); Act on Special Provisions, etc. of the Civil Code Concerning the Perfection Requirements for the Assignment of Movables and Claims, Law No. 104 of 1998 (Japan), *amended by and renamed as* Special Treatment of the Perfection of Assignment of Movables and Obligation Rights in the Civil Code Act, Law No. 148 of 2004 (Japan).

243. Kanda, *supra* note 241, at 374–77.

244. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627–28 (1995). The same year saw the publication of Hideki Kanda, *Japanese Commercial Trusts—An Introduction*, in Festschrift for Professor Tsuneto Ootori: The Trajectory and the Future of Modern Corporate Legislation (Seiichi Ochiai et al. eds., 1995).

245. UNIF. PRUDENT INVESTOR ACT (UNIF. LAW COMM'N 1994); RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (AM. LAW INST. 1992).

246. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998); Hatsu Morita, *Trusts within Organizational Law: Reaction to Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law*, in TRUST LAW IN TRANSITION 1 (Tohoku Trust Law Study Meeting ed., 2006).

247. THE COMMERCIAL TRUST STUDY GROUP, A STUDY OF COMMERCIAL TRUST LAW—A DRAFT PROPOSAL FOR THE COMMERCIAL TRUST ACT (2001).

trust instrument can now provide for trustees' limited liability,<sup>248</sup> trusts can issue securities,<sup>249</sup> and beneficiaries' meetings can be convened in a manner similar to corporate shareholders' meetings.<sup>250</sup> Trusts can merge<sup>251</sup> or be divided,<sup>252</sup> liquidated, or put to bankruptcy just like in corporate reorganization.<sup>253</sup> South Korea implemented some of these reforms. Nevertheless, not all of these new procedures have been widely used.

A recent case tested the extent of duty owed by trust companies under a national employee pension fund scheme.<sup>254</sup> Here, the trust bank had acted as trustee for the settlor-beneficiary pension fund since 1971. After the liberalization of pension fund management in 2000, the pension fund and the trust bank agreed that the investment decision would follow the advice of a pension investment consultant who was newly appointed in 2002.<sup>255</sup> While the trust bank limited itself to a custodial role, the pension fund shifted the investment policy to increase high-risk investment and, in particular, to a highly leveraged real estate investment fund.<sup>256</sup> By 2011, the fund suffered large losses and the pension fund sued the trust bank for breach of duty of care.<sup>257</sup> The court rejected the claim, holding that the trustee is required by the law to follow the pension fund's investment policy and not required to advise beyond the mandate as to the diversified investment of the entire pension fund.<sup>258</sup> Reference was made to the broad imposition of fiduciary responsibility in the United States under the Employee Retirement Income Security Act of 1974, but the court rejected the direct inference, stating that the Japanese legislative scheme imposes more compartmentalized obligation on trustees.<sup>259</sup>

This and similar cases revealed the difficulty of implementing fiduciary governance in the investment chain within the large pension system and securities market.<sup>260</sup> Following publicized failures of employee pension funds,

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248. JTA 2006 §§ 216–47.

249. *Id.* §§ 185–215.

250. *Id.* §§ 106–22.

251. *Id.* §§ 151–54.

252. *Id.* §§ 155–62.

253. *Id.* §§ 175–84.

254. *Kyushu Petroleum Industry Employee Pension Fund v. Risona Bank* [Osaka District Court] March 29, 2013, 2194 HANJÍ 56.

255. *Id.* at 58–59.

256. *Id.* at 59–60.

257. *Id.* at 60.

258. *Id.* at 75.

259. *Id.* In *Zen-Kyushu Electric Engineering Industry Employee Pension Fund v. Risona Bank*, [Tokyo High Court] Jan. 21, 2016, 2016 WLJPCA 01216003, the court similarly denied the duty of the trustee bank in its custodial role to independently monitor the consulting firm's investment strategies and inform the pension trustees of the accounting practices.

260. Norio Higuchi, *Lessons from the AIJ Case: A Society without Fiduciary Law*, 1986 SHOJIHOMU 16 (2012); see TAMAR FRANKEL, *FIDUCIARY LAW* (Tokyo UFJ Trust Bank Fiduciary Law Study Group & Masayuki Tamaruya trans., 2014).

a new administrative regulation was introduced which requires custodian trustees to provide more effective checks on investments by, for example, obtaining investment reports directly from administrators and not from investment advisors.<sup>261</sup> In 2014, the term fiduciary duty first appeared in the Financial Services Agency's policy statement for monitoring of financial institutions, exhorting them to align their businesses with their customers' interests.<sup>262</sup>

### B. EAST ASIAN DYNAMISM

Around the turn of the 20th century, Taiwan and South Korea also began to witness the use of trusts in increasingly complex and varied contexts. In Taiwan, where the Trust Act was introduced in 1996 and the Trust Business Act in 2000, the first real estate development trust project began in 2002.<sup>263</sup> Several prominent figures began to settle personal trusts both for private and charitable purposes in the 2000s.<sup>264</sup> In South Korea, the government began encouraging real estate trusts in the early 1990s and, although the financial crisis in the late 1990s posed a major challenge, the real estate trust industry now holds 23.8 percent of the country's entire trust assets.<sup>265</sup> The real estate trusts were also major sources of litigation involving interpretation of trust legislation, which set the context for reforming the Trust Act in 2006. South Korea's Trust Business Act was repealed, and trust companies are now regulated under the Capital Market and Financial Investment Business Act.<sup>266</sup>

In the 1990s and 2000s, Hong Kong and Singapore became increasingly active in the international trust business, exposing the East Asian region again to the eastbound influence of trust diffusion.<sup>267</sup> While both Singapore and Hong Kong were occupied by the Japanese military during World War II, these former British colonies have inherited the English common law.<sup>268</sup> In both Hong Kong and Singapore, the earlier statutory foundation of trust law was also based on the U.K. Trustees Act of 1925, and both jurisdictions

261. Cabinet Office Order on Financial Instruments Business, Cabinet Office Order No. 52 of 2007, §§ 123(1)(xxix), 130(1)(xv).

262. FIN. SERVS. AGENCY, FINANCIAL MONITORING POLICY FOR 2014-2015 (POLICY FOR SUPERVISION AND INSPECTION) 2-3 (2014), <http://www.fsa.go.jp/en/news/2014/20141225-1/01.pdf>.

263. TTA 1996; Trust Business Act, promulgated on July 19, 2000 (Taiwan); Wang, *supra* note 138, at 64.

264. WANG, *supra* note 138, at 51, 64-70.

265. Rho, *supra* note 145, at 190, 193.

266. Capital Market and Financial Investment Business Act, Act No. 8635, Aug. 3, 2007, *amended most recently by* Act No. 12383, Jan. 29, 2014 (S. Kor.).

267. On Hong Kong trust law, see Philip Munro, *Hong Kong*, in *TRUSTS IN PRIME JURISDICTIONS* 219, 220-21 (Alon Kaplan ed., 4th ed. 2016); Lusina Ho, *Trust Law in Hong Kong*, 40 *STUDY OF THE L. OF TR.* 111, 126 (2015). On Singapore trust law, see generally David Chee & Seah Ching Ling, *Singapore*, in *TRUSTS IN PRIME JURISDICTIONS* 381 (Alon Kaplan ed., 4th ed. 2016); Hang Wu Tang, *An Introduction to Trust Law in Singapore*, 40 *STUD. L. TR.* 163 (2015).

268. Ho, *supra* note 267, at 111; Tang, *supra* note 267, at 163.

updated their trust statute largely in line with development in the U.K. and other Commonwealth jurisdictions.<sup>269</sup>

While taking advantage of the credibility bestowed by the English common law heritage, the trust practitioners in Hong Kong and Singapore sharpened their trust jurisprudence to match the needs in their international operation. In Hong Kong, the family trust practice that emerged in the 1980s and continued into the 1990s focused mainly on establishing offshore trusts for local clients wishing to mitigate estate taxes.<sup>270</sup> After the U.K. handed over the sovereignty of Hong Kong to China in 1997, Hong Kong has become the major provider of offshore family trust services to international clients, particularly those from mainland China.<sup>271</sup> In the 2000s, Singapore began competing with Hong Kong for the position of Asian financial center and wealth management service provider.<sup>272</sup>

In 2004, the Singapore legislature passed an amendment to the Trustees Act, which contained provisions that paralleled the reform in the U.K. Trustee Act 2000, including those conferring general investment powers to trustees and allowing trustees to delegate powers.<sup>273</sup> Almost simultaneously with the Trustees Act amendment, the Business Trusts Act was enacted in October 2004 to exploit the trust mechanism in managing a complex set of income-generating assets.<sup>274</sup> Soon after, a major reform took place in Hong Kong, which ultimately resulted in the passage of the Trust Law (Amendment) Ordinance 2013.<sup>275</sup> In addition to updating the Ordinance in line with the U.K. Trustee Act 2000, the 2013 amendment contained a number of provisions designed to attract offshore trust business to Hong Kong.<sup>276</sup> As the government report made clear, the reform was motivated by the wish to “strengthen the competitiveness of Hong Kong’s trust services industry and will further consolidate [its] status as an international asset management centre.”<sup>277</sup>

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269. Hong Kong based the Trustee Ordinance, (1934) Cap. 29 (H.K.), and Singapore based the Trustee Act of 1967 (Sing.), on England’s Trustee Act 1925, 15 & 16 Geo. 5 c. 19 (Eng.).

270. Ho, *supra* note 267, at 125–27.

271. Munro, *supra* note 267.

272. Tang, *supra* note 267, at 163.

273. Trustees (Amendment) Act (No. 45 of 2004) (Sing.); *see id.* § 4 (introducing a new § 4 which describes the general power of investment); *id.* § 5 (listing the standard investment criteria)); *id.* § 19 (introducing §§ 41A–41K which describes the appointment of agents, nominees, and custodians).

274. Business Trusts Act (No. 30 of 2004) (Sing.).

275. Trust Law (Amendment) Ordinance, No. 13, (2013) (H.K.).

276. Ho, *supra* note 267, at 115–16; *see* Trust Law (Amendment) Ordinance, No. 13, (2013) § 27 (H.K.) (introducing *inter alia* § 41X (settlor’s reserved powers) and § 41Y (protection from foreign forced heirship rules)); *id.* § 47 (repealing rule against perpetuities).

277. FIN. SERVS. & TREASURY BUREAU, DETAILED LEGISLATIVE PROPOSALS ON TRUST LAW REFORM 2 (2012) (H.K.), [http://www.hksfa.org/upload/menu\\_content\\_detail/original/059705541041.pdf](http://www.hksfa.org/upload/menu_content_detail/original/059705541041.pdf).

## C. THE RISE OF FAMILY TRUSTS

In recent years, more people in East Asia have been interested in the use of trusts as a family asset management mechanism, heralding a shift in practices where trusts have almost exclusively been used in commercial contexts.

China is witnessing the new launch of family trust products by the mainland financial institutions, although the scale is yet very limited as compared to those of offshore trusts that have been offered mainly from Hong Kong and Singapore.<sup>278</sup> In 2013, a number of Chinese banks started family trust businesses,<sup>279</sup> and other banks and trust companies are reportedly preparing to enter the market.<sup>280</sup> These services are currently targeted at so-called “high-net-worth individuals,” and the typical threshold of trust assets is said to be RMB 30 million (equivalent to USD 5 million).<sup>281</sup> With this limited scope, it is uncertain whether the onshore family trust services will flourish.<sup>282</sup> Nevertheless, these services have received authoritative endorsement. In a guidance note issued in 2014, the Chinese Banking Regulatory Commission called for the trust industry to transform itself into a true wealth-management industry capable of providing bespoke family trust services to China’s wealthy class.<sup>283</sup>

Japanese interest in family trusts arose as a result of the growing realization that the population is rapidly aging. In 1999, the Civil Code was amended to modernize guardianship.<sup>284</sup> After this, the use of guardianship increased, from 2,980 in 2000 to 26,146 in 2015.<sup>285</sup> Simultaneously, abuse sky-rocketed. Typical examples are where an adult child acts as his old parent’s guardian and uses up, or embezzles, the ward’s money, or where the guardian borrows money from the ward and invests in the business he “succeeded” from him to end up with a failure.<sup>286</sup> The government estimated that 21.3 billion yen was lost for 2,949 cases of abuse between 2011 and

278. Lusina Ho, *Family Trusts for Chinese Clients*, 20 TR. & TRUSTEES 93, 93 (2014).

279. *Id.* at 96–97.

280. See Yumei Zhang, *Trust Business in China: The Challenges of Moving Towards Family Trust Service*, in CHINA & H.K. TAX & REG. UPDATE 1 (2014), [http://hktrustees.com/upload/article/China\\_Development\\_-\\_newsletter\\_issue\\_8.pdf](http://hktrustees.com/upload/article/China_Development_-_newsletter_issue_8.pdf).

281. *Id.* at 2.

282. See Stephen Tensmeyer, *Modernizing Chinese Trust Law*, 90 N.Y.U. L. REV. 710, 728–40 (2015).

283. China Banking Regulatory Commission’s Guidance Note, No. 99 (April 2014).

284. Consensual Guardianship Contract Act, Law No. 150 of 1999 (introducing contract to authorize a durable power of attorney); MINPŌ[CIV. C.] §§ 838–876–10, amended by Law No. 149 of 1999 (introducing three types of guardianship graduating the level of care by the level of incompetency).

285. The Supreme Court General Secretariat Family Division, *Overview of Adult Guardianship Cases* (2001 and 2016).

286. STATISTICS SUBMITTED TO CABINET OFFICE COMMITTEE ON PROMOTION OF THE USE OF ADULT GUARDIANSHIP, ABUSE PREVENTION WORKING GROUP 1 (October 19, 2016), available at [http://www.cao.go.jp/seinenkouken/iinkai/wg/huseibousi/1\\_20161019/pdf/siryō\\_3.pdf](http://www.cao.go.jp/seinenkouken/iinkai/wg/huseibousi/1_20161019/pdf/siryō_3.pdf).

2015.<sup>287</sup> In 2012, the Japanese Supreme Court introduced guardian-support trusts, where trust banks keep assets that are not needed for daily expenditure for the benefit of those subject to guardianship and distribute only upon court approval.<sup>288</sup> In 2017, 18,528 guardian support trusts were created with assets totaling 544.7 billion yen.<sup>289</sup> The Japanese Trust Act of 2006 introduced a number of provisions to authorize private use of trusts as will-substitutes or guardian substitutes:<sup>290</sup> power of appointment,<sup>291</sup> trust for will substitute,<sup>292</sup> and trusts with successive beneficiaries.<sup>293</sup> Trust banks began to accept trusts for will-substitutes and trusts with successive beneficiaries in 2009.<sup>294</sup> Will-substitute trusts became quickly popular and 148,410 of them were created by 2016.<sup>295</sup> In 2013, the government began to provide several tax incentives for lifetime gift-giving, and trust banks now offer qualifying trust products.<sup>296</sup> Between 2013 and 2017, 178,983 qualifying trusts were created for financing education with total assets of 1.238 trillion yen.<sup>297</sup> Between 2015 and 2017, 5,136 qualified trusts with assets totaling 13.2 billion yen were created to prepare for marriage and childrearing.<sup>298</sup> Because gift tax exemption is limited to 15 million yen (equivalent to USD 140,000), the scale of trust operation is inevitably limited, particularly when compared to Chinese services that cater to wealthy clients.<sup>299</sup>

Some challenges may exist in these East Asian shifts to family asset management. Conventional wisdom states that trust law could cause friction with local family law outside common law jurisdictions.<sup>300</sup> The Japanese Trust

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287. *Id.*

288. Supreme Court General Secretariat Family Division, *On the Use of Guardian-Support Trusts: January-December, 2016* (2017), available at [http://www.courts.go.jp/vcms\\_lf/20170425sintakugaikyou\\_h28.pdf](http://www.courts.go.jp/vcms_lf/20170425sintakugaikyou_h28.pdf).

289. Trust Companies Association of Japan, *The Overview of Trusteeship as of March 2017*, 271 TRUSTS 177, 180–81 (2017).

290. See House of Representatives' Resolution Supplementary to the Trust Bill and the Implementing Legislation in Relation to Enforcement of Trust Act Bill on November 11, 2006 ("In order to facilitate better living in the anticipated ultra-aging society, wide-ranging policy consideration should be given to welfare improving trusts in support of elderly and handicapped people, including the possible entry of lawyers, NPOs and others as service providers."); see also the House of Councilors' Resolution Supplementary to the Trust Bill and the Implementing Legislation in Relation to Enforcement of Trust Act Bill on December 7, 2006.

291. JTA 2006 § 89.

292. *Id.* § 90.

293. *Id.* § 91.

294. Trust Companies Association of Japan, *supra* note 289, at 179.

295. *Id.*

296. Megumu Teramoto, *Recent Development on Will-Substitute Trusts*, 2 TR. F. 57, 58–59 (2014).

297. *Id.* at 181.

298. *Id.* at 181–82.

299. To be compared with the figure mentioned in the text corresponding with *supra* note 281.

300. See Frances H. Foster, *The Dark Sides of Trusts: Challenges to Chinese Inheritance Law*, 2 WASH. U. GLOBAL STUD. L. REV. 151, 155 (2003) (examining this friction in the Chinese context).

Act of 2006 did not resolve the tension between trusts and forced heirship, leaving many seemingly basic questions unanswered.<sup>301</sup> Should the forced share claimant sue the trustee, the beneficiaries, or both? Would a successful claimant receive an annulment of the trust, a certain portion of the trust's assets, or joint entitlement to the beneficial interests? How should mandatory share be computed? On these issues, no significant case has yet been reported in Japan, and the issues are also left open in legislation in other East Asian civil-law jurisdictions.

Trustees who manage family assets can serve more than one generation of beneficiaries; therefore, it can no longer be assumed that settlors are always in a position to enforce trusts. As trustees' duties become more personalized, financial institutions subject to formal banking and financial regulation may not be the most suitable trustees.<sup>302</sup> One approach may be to extend the state regulation to a broader cohort of potential trustees. Additional regulatory measures and further tax incentives may also be needed before much broader deployment of family trust services across East Asia.<sup>303</sup> Alternatively, private parties could look to courts for enforcement of trusts. If more diverse trustees are to serve equally diverse sets of beneficiaries through particularized forms of trusts, their obligations under trusts may be tested and proprietary remedies sought in more complex and fact-specific contexts. If people wish to seek more effective ways to mitigate tax and control debt liabilities, the limit of trust law may be sought in broader directions. However, all these developments may depend on the courts' sophistication and willingness to entertain such claims.

## V. CONCLUSION

The history of trust diffusion is filled with ironies. Mortgage trusts and trust company regulation, which quickly lost the attention of common law lawyers, were what animated the interests of early 20th century policy-makers in Japan and later in other East Asian jurisdictions. The use of trusts as family-asset-management devices and will substitutes, which initially escaped attention in Japan and other Civil Law jurisdictions in East Asia, constituted the major driver of trust evolution in the United States and other common law jurisdictions. Nevertheless, trust legislation and trust practices of all those

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301. For academic discussions, see Masami Okino, *Trust Law and Succession Law*, 10 Q. JURIST 132 (2014); Kiyoko Nishi, *Theoretical Inquiry on Will Substitute Trusts—An Approach from the Civil Code and the Trust Act*, 2 TR. F. 52 (2014).

302. In Japan, whether persons other than trust banks should be allowed to serve as trustees has been a thorny issue. Currently, those wishing to engage in the trust business are required to obtain a license from the Prime Minister. Trust Business Act of 2004 § 21 (Japan). This has not been altered, despite protestation from certain quarters of lawyers. Symposium, *Private Trusts and Lawyers*, 66(5) LIBERTY & JUST. 37, 37–44 (2015).

303. Ho, *supra* note 278, at 96–97; Ho and Lee, *supra* note 127, at 26.



jurisdictions continued to interact with each other to accommodate further evolution and meet the shifting needs of the modern world.

Over a long period of time and across a number of jurisdictional borders, many factors interacted to shape the law and practice of trusts. Those factors included financial pressures, legislative imitations, academic exchange of ideas, colonial rules, commercial competitions, and shifts in national wealth and demographics. With the growth of personal wealth and the more recent phenomenon of an aging society, Japanese and East Asian interests in the use of trusts for family asset management are growing. While this may lead to the harmonization of trust law worldwide, in the increasingly competitive global economy, trust service providers and their host jurisdictions are vying with each other for comparative advantages.