Article

Trusts and Choice of Law Rules in Taiwan

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ABSTRACT

Taiwan has recognised trusts in its general law for 25 years now. However, it does not contain specific choice of law rules applicable to trusts. This is a regrettable state of affairs in our increasingly globalised world, where incidences of cross-border trust disputes will only be on the rise. This paper argues that the lack of a dedicated set of choice of law rules relating to trusts causes much confusion and uncertainty, not only as to how Taiwanese courts would characterise a trust dispute and the inconsistent connecting factors that would apply, but also in relation to the scope of the applicable choice of law rules (whichever they may be) and the special difficulties raised by a breach of trust claim. All these difficulties derogate from a proper recognition of the trust as a distinctive legal device and fail properly to protect the autonomy and legitimate expectations of the parties. These problems can, however, be easily surmounted by adopting the Hague Trusts Convention.

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CONTENTS

I. INTRODUCTION

Although the Republic of China ("Taiwan")'s legal system reflects a civil law tradition, trusts law is not foreign to it. The Trust Law of the Republic of China ("Trust Act")[1] has, since its passing in 1995 and coming into force in January 1996, provided for the general integration of trusts law in Taiwan--although in specific contexts, and to a much more limited extent, trusts were already recognised in the legal system prior to that date.[2] Given its statutory framework and practical use in Taiwan, it is fair to say that Taiwanese law reflects a mature domestic law of trusts.

However, in the private international law context, specifically in relation to the choice of law rules which apply to cross-border trust disputes, the situation is diametrically different. It is observable that Taiwanese law does not contain specific choice of law rules applicable to trusts. This is, of course, not a cause for concern in and of itself. After all, it is trite that private international law categories need not perfectly mirror domestic legal categories of case; therefore, it might be assumed that 'trusts' in domestic law can adequately be dealt with in the private international law context using existing and established choice of law categories such as contract, property, tort, unjust enrichment, and so on, and related rules found in the 2010 Taiwanese Private International Law Act ("PILA").[3] However, as this paper seeks to demonstrate, this assumption is flawed: existing Taiwanese choice of law rules cannot deal competently with cross-border trust disputes, at least without distorting a proper understanding of trusts law and disappointing the autonomy and legitimate expectations of parties. This is troubling, not only in view of our increasingly globalised world where cross-border movement will only increase, but also given the inherent nature of the trust, which--at least in its most common area of use, the commercial arena--cannot help but involve cross-border activity.

While making this point, this paper compares the prevailing Taiwanese choice of law rules to those provided under the Hague Convention on the

1. English translations in this paper are taken from: Law & Regulations Database of the Republic of China, *Trust Law* (Ministry of Justice, Dec. 30, 2009), http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I0020024.

2. For a general overview of trusts law in Taiwan, *see* 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, 63-79 (Lusina Ho & Rebecca Lee eds., 2013).

3. Act Governing the Choice of Law in Civil Matters Involving Foreign Elements 2010. English translations are taken from: Law & Regulations Database of the Republic of China, *Act Governing the Choice of Law in Civil Matters Involving Foreign Elements* (Ministry of Justice May 26, 2010), https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000007. For a consideration of the changes the 2010 act made to its 1953 predecessor, *see* Rong-Chwan Chen, *Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Taiwan*, *in* PRIVATE INTERNATIONAL LAW IN MAINLAND CHINA, TAIWAN AND EUROPE 17, 20-21 (Jürden Basedow & Knut B. Pissler eds., 2014).

Law Applicable to Trusts and on their Recognition ("the Convention"), and ultimately concludes that serious consideration ought to be given to adopting the Convention. As its title indicates, the Convention, which came into existence on 1 July 1985, provides rules for determining the governing law for trusts. According to David Hayton, who was the head of the UK Delegation for the Hague Conference that adopted the Convention, the need for producing a convention relating to trusts in the private international law context was raised by civil law, and not common law jurisdictions, in particular those whose domestic law had no concept equivalent to trusts.[4] The reason for this is obvious: those jurisdictions perceived the need for guidance on how to deal with trusts in cross-border disputes. Surprisingly, however, there are few civilian jurisdictions--indeed, few jurisdictions at all--in which the Convention is operative.[5] Insofar as common law jurisdictions which have not adopted the Convention are concerned, this is unsurprising: trusts choice of law rules at common law are substantively similar in important respects to the provisions in the Convention.[6] The lack of interest of civilian jurisdictions which do not have domestic trust laws is also unsurprising: unless they deal regularly with trust issues which arise in cross-border litigation--an unlikely situation in a non-trust jurisdiction--there is no real impetus to consider adopting the Convention. In contrast, the lack of enthusiasm of civilian jurisdictions which have a mature law of trusts, such as Taiwan, is a source of great surprise.

Of course, in principle, the Convention is not the only trusts-related choice of law regime open to the Taiwanese Legislative Yuan to adopt: other templates include, for example, the trusts choice of law rules provided under the American Restatement (2nd) Conflict of Laws. But the unique feature of the Convention is that it was designed specifically with the interest of Civilian jurisdictions in mind. For this reason, this paper argues in favour of adopting the Convention, since it provides the most easily adoptable model for Taiwanese law.

The structure of the paper is as follows. Part 2 sets out the two

4. DAVID HAYTON, "TRUSTS" IN PRIVATE INTERNATIONAL LAW 58 (vol. 366, Collected Courses of the Hague Academy of International Law) (2014).

5. Jurisdictions where the Convention is in force are Australia, Canada, Hong Kong, Malta, Cyprus, and the UK (jurisdictions with common law influences); Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Panama, San Marino, and Switzerland (jurisdictions with civil law influences). The Convention has been signed, but not ratified, by France and the United States. An up-to-date status table can be found at *Status Table 30: Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition* (Hague Conference on Private International Law, Sept. 19, 2017), https://www.hcch.net/en/instruments/conventions/status-table/?cid=59.

6. *See* discussion in Richard Garnett, *Identifying an Asia-Pacific Private International Law of Trusts*, *in* ASIA-PACIFIC TRUSTS LAW: THEORY AND PRACTICE IN CONTEXT 381, 382 (Ying Khai Liew & Matthew Harding eds., 2021) and David Hayton, *Reflections on the Hague Trusts Convention after 30 Years*, 12 J. PRIV. INT'L L. 1, 2 (2016).

yardsticks which the rest of the paper will utilise to evaluate the appropriateness of existing Taiwanese choice of law rules for dealing with cross-border trust disputes. These yardsticks are: the extent to which the distinctive nature of trusts is recognised and respected, and the extent to which the autonomy and legitimate expectations of parties are protected. With the benefit of these two yardsticks, Parts 3-6 then scrutinise the existing choice of law rules in Taiwan, with each Part addressing a specific area where the law would face difficulties. Those areas are: characterisation of a trust dispute, the connecting factors to be applied, the scope or extent to which the choice of law rules apply to the trust dispute, and specific issues arising in breach of trust claims. Part 7 concludes.

II. YARDSTICKS

It is trite that the choice of law rules which apply to a cross-border dispute are rules of the *lex fori*: it is *the forum's* law which guides the selection of the applicable law.[7] Therefore, on one view at least, the mere fact that those rules differ from those adopted by other jurisdictions is neither here nor there: variances in the laws of different jurisdictions on the same issue is commonplace and to be expected in any area of law. In the trusts context, this view would suggest that nothing ought to be made of the fact that Taiwanese private international law deals with trust disputes differently than under the Convention. But adopting such a narrow view causes difficulties, as this paper seeks to demonstrate.

In order properly to explain the point, it is necessary to assess the current Taiwanese choice of law rules against two important yardsticks. The first yardstick, which primarily relates to trusts, is the extent to which existing Taiwanese choice of law rules maintain and promote trusts as a distinctive legal device. The second, which primarily relates to private international law, is the extent to which those rules protect and enhance the autonomy and legitimate expectations of parties.

A. *The Distinctiveness of the Trust*

According to Art. 1 of the Trust Act, "the term 'trust' refers to the legal relationship in which the settlor transfers or disposes of a right of property

7. OTTO KAHN-FREUND, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW 231 (1976), cited by Christopher Forsyth, *Characterisation Revisited: An Essay in the Theory of the English Conflict of Laws*, 114 L.Q. REV. 141, 153 (1998). *See also* Rong-Chwan Chen, *Taiwan*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, 2560, 2562-63 (Jürgen Basedow et al. eds., 2017); Chen, *supra* note 3, at 19, 30; Rong-Chwan Chen, *General Provisions in the Taiwan Private International Law Enactment 2010*, *in* PRIVATE INTERNATIONAL LAW IN MAINLAND CHINA, TAIWAN AND EUROPE, *supra* note 3, at 65, 78.

and causes the trustee to administer or dispose of the trust property according to the stated purposes of the trust for the benefit of a beneficiary or for a specified purpose." On one reading, this definition might suggest that there is nothing distinctive about the trust: since a contract may easily provide for such an arrangement, one might be tempted to conclude that a trust is simply *a kind of* contract. Indeed, this is the "majority thesis in East Asia," including in Taiwan.[8] Those who subscribe to this view might also point to the *in personam* analysis of Taiwanese trusts for support. In Taiwan, as in other civilian jurisdictions, ownership is conceived of as an absolute concept. Strict categorisation is part of the "DNA" of civilian legal systems: as Ying-Chieh Wu explains, the infrastructure of civilian private law "is rooted in the Roman-Germanic basis, which adopts dichotomous system in respect of the private law dealing with property: the law of property and that of obligation."[9] Certainly, Art. 757 of the Taiwan Civil Code[10] takes on a less-strict approach to the *numerus clausus* rule, allowing for new forms of property where "provided by the [*sic*] statutes or customs."[11] Yet, the trust has not been recognised as a property form, with legal analysis placing it at best "partway between contract and property."[12] Indeed, the Trust Act provides beneficiaries with the right to rescind or revoke dispositions of trust property made in breach of trust,[13] and such a right suggests that the beneficiary's right has a personal character, since that right would not be necessary if the beneficiary's right were straightforwardly proprietary in nature.[14] All this might suggest that the trust is simply a kind of contract.

However, to conceive of the trust as nothing distinctive is to fall into error. One main reason for this is that Art. 2 of the Trust Act prescribes that trusts can be created by a contract or a will.[15] As Wu has aptly demonstrated, where a trust is created by will, the contract analysis is thoroughly unsustainable.[16] A trust created by will exists only when the will

8. *See* discussion in Ying-Chieh Wu, *East Asian Trusts at the Crossroads*, 10 NAT'L TAIWAN U.L. REV. 79, 81-82 (2015).

9. *Id*. at 81.

10. English translations of the Taiwan Civil Code are taken from: Law & Regulations Database of the Republic of China, *Civil Code* (Ministry of Justice Jan. 20, 2021), https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001.

11. *See* discussion in Yun-Chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275, 2301(2015).

12. Yun-Chien Chang, *The Evolution of Property Law in Taiwan: An Unconventional Interest Group Story*, *in* PRIVATE LAW IN CHINA AND TAIWAN: LEGAL AND ECONOMIC ANALYSES 212, 232 (Yun-Chien Chang et al. eds., 2016). *See also* Wang et al., *supra* note 2, at 67; Chang & Smith, *id*. at 2303.

13. Sintuofa [Trust Act], art. 18(1) (1996) (amended 2009) (Taiwan).

14. YUN-CHIEN CHANG ET AL., PROPERTY AND TRUST LAW IN TAIWAN 122 (2017).

15. Article 71 of the Trust Act also provides for self-declared trusts, but only for the creation of charitable trusts, and subject to the approval of the industry's regulatory authority. Charitable trusts are not discussed in this paper, given the unlikelihood of a cross-border dispute arising in that context.

16. Wu, *supra* note 8, at 84-85.

takes effect, which is "the time of the death of the testator,"[17] and so there is no counter-party for a valid contract. This indicates that the trust is not *simply* a subset of contract law.

Another reason to reject the view that the trust is simply a kind of contract is found in the fact that many of the provisions in the Trust Act are incompatible with a characterisation of the beneficiary's rights as *simply* personal in nature.[18] They include those concerned with the independence of the trust property,[19] the continuity of the trust despite the trustee's death or bankruptcy,[20] and the right of a sole beneficiary to the trust property upon termination.[21]

A third reason is that, where a trust is created (through whatever method), numerous mandatory and default rules arise, as provided for by the Trust Act--rules which certainly do not apply to contracts in general. For example, the Trust Act provides default rules concerning the persistence of the trust despite the settlor's or trustee's death,[22] the entitlement of the beneficiary to benefit from the trust,[23] the possibility of termination of a trust jointly by the settlor and the beneficiary,[24] and the devolution of trust property following termination of a trust.[25] These rules are default in nature as the Trust Act provides that they apply in the absence of provision to the contrary in the trust instrument. On the other hand, the Trust Act also contains many mandatory rules--rules that cannot be overridden by the trust instrument (and, to the same extent, by contract)--for example the independent nature of the trust fund,[26] the beneficiary's right to rescission or revocation of property disposed in breach of trust,[27] and many of the trustee's duties and liabilities.[28] These comprehensive rules are unique to trusts, which indicates that the trust is a distinctive legal institution.[29]

The fact that the trust is a distinctive legal device in Taiwanese law is unsurprising, when viewed from its historical context. As Yun-chien Chang,

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17. Minfa [Civil Code], art. 1199 (1929) (amended 2021) (Taiwan).

18. *See, e.g.*, Lusina Ho, *The Reception of Trust in Asia: Emerging Asian Principles of Trust?*, SING. J. LEG. STUD. 287, 300 (2004)--although note that this is in no way to say that beneficiaries have proprietary rights as extensive as their common law counterparts: at 302-303.

19. Sintuofa [Trust Act], chap. II (1996) (amended 2009) (Taiwan).

20. *Id*. at art. 45.

21. *Id*. at art. 65.

22. *Id*. at art. 8.

23. *Id*. at art. 17.

24. *Id*. at art. 64.

25. *Id*. at art. 65.

26. *Id*. at chap. II.

27. *Id*. at art. 18.

28. *See, e.g., id.* at arts. 22-24, 31-32, 34.

29. For the purposes of this paper, it is not necessary to speculate how best the trust should be conceptualised in Taiwan. However, note that Wu suggests that the doctrine of separate patrimony provides the best plausible analysis: Wu, *supra* note 8.

Weitseng Chen, and Ying-Chieh Wu note, the Trust Act "was heavily influenced by the Japanese Trust Act promulgated in 1922 which primarily adopted common-law principles with some modifications. Therefore, it can be said that common-law trusts law was imported into Taiwan via Japan."[30] At common law, although judges and scholars remain divided as to whether the nature of beneficial interests is best analysed as proprietary, personal, a hybrid of both, or *sui generis*,[31] it is beyond doubt that trusts are not part of contract law, property law, or any other legal institution *per se*: the trust is undoubtedly recognised as an unique institution.[32] In particular, it bears emphasising that, despite there being a forceful argument[33] that beneficial interests are *personal* in nature, the trust has never been understood *simply* as a type of contract. Given the influence of the common law conception of the trust on the introduction of trusts in Taiwan, it is unsurprising that the Taiwanese trust is also a distinctive legal device.

However, there might be another objection. Even if the distinctiveness of the trust is accepted for substantive law purposes, one might object that, *for the purposes of private international law*, whether the trust is a distinctive legal institution is irrelevant. The reason this objection might be raised is that the exercise of characterisation for private international law purposes, while undertaken according to the *lex fori*, need not be identical to the characterisation of domestic legal institutions:[34] characterisation is a *functional* exercise.[35] As Lord Hoffmann observed in *Wight v Eckhardt Marine GmbH*,[36] an observation which no less applies in Taiwan than in England, "the purpose of the conflicts taxonomy is to identify the most appropriate law. This meant that one has to look at the substance of the issue rather than the formal clothes in which it may be dressed." The potential objection, therefore, is that the uniqueness of the trust in domestic law does not itself indicate that Taiwanese law ought to develop choice of law rules which are uniquely applicable to trusts.

It is submitted, however, that there is nothing to this objection, for

30. CHANG ET AL., *supra* note 14, at 113.

31. For an overview of these views, *see* Peter Jaffey, *Explaining the Trust*, 131 L. Q. REV. 377, 377-401(2015).

32. *Id*.

33. *See* F. W. MAITLAND, EQUITY: A COURSE OF LECTURES (J. Brunyate, rev. ed., 1936); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995). But see discussion in Ying Khai Liew, *Justifying Anglo-American Trusts Law*, 12 WILLIAM & MARY BUS. L. REV. 685 (2021).

34. T. M. YEO, CHOICE OF LAW FOR EQUITABLE DOCTRINES 71 (2004).

35. *See*, *e.g.*, Weizuo Chen & Gerald Goldstein, *The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law*, 13 J. PRIV. INT'L L. 411, 421 (2017); Walter Wheeler Cook, *Logical and Legal Bases of Conflict of Laws*, 33 YALE L.J. 457, 458-70 (1924).

36. Wight & Ors v. Eckhardt Marine GmbH (Cayman Islands) [2003] UKPC 37, ¶ 12 (appeal taken from Eng.).

"although characterisation in private international law need not be the mirror image of domestic categories of case, the classifications under domestic law exert a highly persuasive influence at the conflicts level."[37] For one thing, because it is the forum's courts which determine which choice of law rules apply to any dispute, judges in determining those rules do not--and, indeed, cannot--answer that question being completely detached from the domestic law's characterisation of the claim in question. For another, the choice of law rules which a forum court applies have the real possibility of directly affecting the health or status of domestic law. This last-mentioned point is particularly pertinent where the domestic law in question is capable of facilitating cross-border activity. It is obvious that the trust is not a *purely* domestic or domestically-geared device. Indeed, "it cannot be denied that most trusts are created for commercial purposes" in Taiwan;[38] and commercial life, for obvious reasons, attracts--indeed, thrives on--cross-border activity. With a vigorous set of trusts choice of law rules, Taiwanese private international law is capable of better facilitating and encouraging the development of the outward-facing aspects of trusts law, through ensuring certainty and predictability where cross-border trust disputes occur.[39] The upshot is likely to be increased confidence in and usage of Taiwanese trust law and the increased attracting of foreign investments into Taiwan.

In sum, then, the first yardstick by which Taiwanese choice of law rules can be assessed is the extent to which they recognise and promote the distinctiveness of the trust device.

B. *Autonomy and Legitimate Expectations*

It is obvious that the trust, like contract, is a facilitative device made available for people to "realis[e] their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law."[40] The provision of such private law facilitative devices is an expression of the state's commitment to recognising and protecting personal autonomy--that individuals have the freedom to utilise such facilities at will

37. Adeline Chong, *The Common Law Choice of law Rules for Resulting and Constructive Trusts*, 54 INT'L & COMP. L.Q. 855, 861 (2005).

38. CHANG ET AL., *supra* note 14, at 113.

39. A similar point has been observed by Rong-Chwan Chen in relation to the provisions of the PILA more generally. He writes: "[i]t is beyond doubt that the provisions of the Taiwanese PIL Act on international contracts, torts, property rights and family relationship played an important role in supporting the ties of international trade, cross-border tourism and transnational marriage": Chen, *supra* note 3, at 20. *See also* Chen, *supra* note 3, at 21, where "practical predictability" is cited as one of the core aims of the PILA 2010.

40. H. L. A. HART, THE CONCEPT OF LAW 27-28 (2d ed. 1994).

to achieve their aims or goals. And if the protection of autonomy is one side of a coin, the flipside of the same coin is the protection and vindication of legitimate expectations, for if the law allows individuals the freedom to utilise facilitative devices, then it follows that those who do so can expect that legal effect will be given to legitimate choices made within the bounds of the relevant facility.

The enhancement of personal autonomy is a norm which underlies not only facilitative devices in substantive law: it is also mirrored in the choice of law rules which relate to those facilitative devices. This is undoubtedly the case under the Convention, where Art. 6 provides that an express or implied choice by a settlor as to the law applicable to his trust will be given effect. Under Art. 20(1) of the PILA, a similar provision governs a choice of applicable law by contracting parties. The protection of legitimate expectations can also be detected in choice of law rules. In 1945, Max Rheinstein wrote an influential paper on tort choice of law rules;[41] and in the course of his discussion he made the important point that the protection of legitimate expectations is one of the main rationales of choice of law rules.[42] He clarified that this rationale is not exclusive to the private international law arena; it underlies many substantive legal practices and rules. For example, it explains why consistency in judicial decisions is so important to the protection of business or commercial practices;[43] it informs the institution of contract, particularly in the credit-based economy of the modern day, which allows investors and creditors legitimately to expect that debtors will use proper use of borrowed money and to receive repayment;[44] and to the same extent it explains the law of trusts and wills, which are special applications of the same principle.[45] Rheinstein elaborated that "one of those expectations is that we ought not to be subjected to punishment, liability or other legal detriment for conduct which we had good reason to believe would not subject us to such troubles,"[46] as would be the case if a dispute were to be decided "under a law whose application would take the parties by surprise."[47]

Even beyond the rules relating to contracts in the PILA, a strong desire to enhance autonomy and protect parties' legitimate expectations can be detected in other categories of case. For example, the PILA provides that other non-contractual juridical acts which result in a relationship of

41. Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4 (1945).
42. *Id*. at 17-24.
43. *Id*. at 21.
44. *Id*. at 21-22.
45. *Id*. at 22.
46. *Id*. at 22.
47. *Id*. at 23.

obligation[48] are governed by the applicable law "determined by the intention of the parties."[49] And in relation to rights *in rem* (rights in things) and succession, the applicable connecting factors--respectively the *lex situs*[50] and the deceased's national law[51]--strongly reflect the protection of legitimate expectations. Thus, one of the reasons for adopting the *lex patriae* extensively in the PILA was to respect the identity of individuals[52] --something which can be said to provide respect to vindicate legitimate expectations. And one of the reasons for the *lex situs* rule in relation to property is due to its close connection to the place where the property is situated,[53] which protects of the expectations of third parties which deal with or potentially have dealings with the property.

The enhancement of autonomy and the protection of legitimate expectations, taken together, forms the second yardstick against which Taiwanese choice of law rules can be measured. For example, the law would detract from these rationales if the parties in substance have created a trust and have expressly or impliedly selected a governing law, but for choice of law purposes it is inconsistently categorised, say as a contract in some cases but as a form of property in others, and if each yields a different connecting factor which may point to a different governing law. Another example is that, if a settlor chooses a governing law to apply to a specific aspect of the trust, but this is in essence overridden by Taiwanese courts due to the choice of law rules they end up employing, then this would detract from the enhancement of autonomy and protection of legitimate expectations, unless such overriding is otherwise justified for example by public policy considerations.

III. CHARACTERISATION

To begin the assessment of the choice of law rules which Taiwanese courts might apply to resolve a cross-border trust dispute, it can first be noted that the classical methodology for discovering the applicable law is for the forum court first to categorise or characterise the dispute at hand, and then to deduce the connecting factor prescribed by the relevant category,

48. Note that the art. 20 of the PILA, which governs "juridical act[s] which result in a relationship of obligation," is clearly intended to cover contracts (*see* David J. W. Wang, *The Revision of Taiwan's Choice-of-Law Rules in Contracts*, *in* PRIVATE INTERNATIONAL LAW IN MAINLAND CHINA, TAIWAN AND EUROPE, *supra* note 3, at 181, 183); but it is not so limited, and therefore may govern other juridical acts which create relationships of obligation.

49. PILA, art. 20(1).

50. *Id*. art 38(1).

51. *Id*. art 58.

52. Chen, *supra* note 7, at 67.

53. Yao-Ming Hsu, *Property Law in Taiwan*, *in* PRIVATE INTERNATIONAL LAW IN MAINLAND CHINA, TAIWAN AND EUROPE, *supra* note 3, at 119, 120.

which will indicate the applicable law.[54] This section considers the issue of characterisation; the next considers connecting factors.

Under the Convention, clear guidance is given as to the issue of characterisation: "legal relationships created--inter vivos or on death--by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose"[55] and "created voluntarily and evidenced in writing"[56] will be characterised as a "trust." Article 2 further clarifies that:

A trust has the following characteristics:

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

There is no doubt that a significant majority (if not all) trusts presently recognised under Taiwanese law would fall within the ambit of the Convention. In particular, this is owing to the fact that the conception of a trust under the Convention extends beyond the common law trust to civilian jurisdictions which recognise certain core characteristics of the trust:[57] it does not rely on the common law concept of "equitable ownership."[58] However, Taiwan has not adopted the Convention. Moreover, the PILA make no specific provision for trusts, nor does it provide any useful guidance on the problem of characterisation.[59] For these reasons, the characterisation of cross-border trust disputes is by no means straightforward.

We may begin with a relatively uncontroversial point. As previously mentioned, the prevailing view in Taiwan is that trusts are contracts. The main reason for this is that, to date, trusts have mainly been used for commercial purposes, and in that context trusts almost always arise from a

54. This methodology also applies in Taiwan: *see* Rong-Chwan Chen, *The Recent Development of Private International Law in Taiwan*, *in* CODIFICATION IN EAST ASIA 233, 238 (Wen-Yeu Wang ed., 2014). *See also* the Zuigao Fayuan [Sup. Ct.], Civil Division, 94 Tai-Kang Tzu No. 165 (2005) (Taiwan), and discussion in Chen, *supra* note 3, at 30; Chen, *supra* note 7, at 77.

55. Hague Convention on the Law Applicable to Trusts and on their Recognition, art. 2, July 1, 1985 [hereinafter Convention].

56. *Id*. art. 3.

57. DAVID HAYTON ET AL., UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES ¶ 100.51 (19th ed. 2016).

58. *Id*. at ¶ 100.58.

59. Chen, *supra* note 54, at 238.

contract between the relevant parties. It follows that, for choice of law purposes, Taiwanese courts are likely to characterise trusts functionally as contracts--more specifically the choice of law rules pertaining to "juridical act[s] which [result] in a relationship of obligation."[60] This characterisation is likely even though the substantive analysis of trusts as nothing more than specific types of contracts is probably doctrinally flawed, as discussed earlier: after all, characterisation for choice of law purposes need not perfectly mirror domestic categories of case.

However, this characterisation is by no means a foregone conclusion, because the non-mirroring of domestic and choice of law categories of case may work the other way. That is to say, even "trust contracts," while considered as contracts in domestic law, may well be characterised as something other than contracts for choice of law purposes. For example, they may be characterised as agency, because the trustee might be conceived of as acting for and on behalf of the settlor. Alternatively, they may be characterised as concerning property (rights *in rem*). This characterisation may be possible due to the minority (but probably wrong)[61] academic analysis that, in East Asian civil jurisdictions, trust beneficiaries have a right *in rem* over trust funds.[62] It is also a possible characterisation due to the fact that a "trust contract" involves the creation or acquisition of real rights at least at two points in time--first when the settlor transfers trust assets to the trustee, and then upon termination of the trust, when residual trust assets will vest in to the beneficiary, the settlor, or such persons as provided for in the trust instrument, as the case may be.[63] Moreover, this characterisation may easily follow if a trust dispute is conceptualised as a dispute to determine the title or ownership of the relevant property.

When a trust is created by will, it is even more unlikely to be considered as a contract for choice of law purposes since, as discussed earlier, there will usually be no contract at all. The most likely characterisation is succession, since a testamentary trust increases or decreases the portion of the testator's estate which an individual will inherit, depending on the individual. However, this is not a foregone conclusion due to the presence of a will. It is trite that the creation of a will is a juridical act,[64] and a trust relationship is clearly a "relationship of obligation." If so, then testamentary trusts can be situated within the wording of Art. 20 PILA, falling to be characterised as a "juridical act which results in a relationship of obligation" for choice of law

60. Sintuofa [Trust Act], act. 20 (1996) (amended 2009) (Taiwan). There are no dedicated "contracts" choice of law rules under the PILA: *see supra* note 48.

61. *See* Wu, *supra* note 8, at 100ff.

62. *See id*. at 100 n. 76.

63. As to which, *see* Sintuofa [Trust Act], chap. VII (1996) (amended 2009) (Taiwan).

64. *See* Chen, *supra* note 54, at 240.

purposes. This characterisation would align the choice of law rules for trusts created by will with trusts created by contract, even though a testamentary trust is not considered to be a contract.

Regardless of the means by which a trust is created, two other possible types of characterisation are added to the mix where the dispute concerns an alleged breach of trust: it may well be possible for the courts to characterise the claim as unjust enrichment (for example, where the claim concerns an enrichment accruing to an errant trustee) or tort (for example, where the claim concerns a breach of trust causing a loss to the trust fund) for choice of law purposes, depending on the nature of the breach.

As can be seen, there are various possible options open to Taiwanese courts in relation to characterising a cross-border trust dispute. This variety of options, coupled with the fact that there is an absence of guiding principles by which courts should approach the matter, are causes for concern. On the one hand, the difficulty in characterising a trust dispute detracts from protecting autonomy and vindicating legitimate expectations. The autonomy of parties to select the applicable law is significantly curbed if they are first and foremost unable to know what to expect when it comes to the question of choice of law; and to treat what was intended as a trust as something else for choice of law purposes fundamentally disappoints the legitimate expectations of the parties that the device would be treated as a trust. On the other hand, by characterising trusts as something other than a trust for choice of law purposes, Taiwanese private international law is out of sync with the approach adopted by jurisdictions which are most active on the international trusts scene--jurisdictions which happen to take a similar approach to trusts choice of law questions, given that they are usually common law jurisdictions and/or those which have adopted the Convention. This provides a disservice to protecting the trust as a distinctive legal device, both domestically and on the global stage. Not only does this detract from a central objective of the exercise of characterisation, namely "harmony of decision wherever the case is heard";[65] there is also the potential knock-on effect of discouraging individuals and companies from creating trusts which relate to Taiwan or utilise Taiwanese law, since parties are unable to foresee how Taiwanese courts might resolve the choice of law question, should a cross-border dispute arise.

65. YEO, *supra* note 34, at ¶ 3.04.

IV. CONNECTING FACTORS

The differences in characterisation would be formalistic or superficial if they were simply different paths to determining more-or-less the same applicable law to cross-border trust disputes. But this is far from the case, as most of these categories have substantively different connecting factors. Apart from causing a disservice to the protection of party autonomy and legitimate expectations, this state of affairs diminishes the distinctiveness of the trust. As TM Yeo notes, "[c]hoice of law categories are functional categories in the sense that they are intended to bring together problems which, because of their similarity, ought to share the same connecting factor."[66] By characterising the trust as something other than a trust for choice of law purposes, Taiwanese law sends the unfortunate message that the trust is not a distinct concept which ought to be treated in a unitary manner.

In this Part of the paper, the differences in the connecting factors between the Convention and the choice of law rules for succession, property, and "juridical act[s] which [result] in a relationship of obligation" under the PILA will be discussed. The categories of unjust enrichment and tort will be subject to scrutiny in Part 6 below, as the potential relevance of these categorisations arise in a narrower range of trust claims, namely where there is claim for breach of trust.

A. *Succession*

Consider first the application of succession choice of law rules to trusts. According to Art. 58 of the PILA, "succession upon death" is governed by the national law of the deceased. By virtue of Art. 60 same connecting factor applies to the formation and effect of a will, although in relation to the *formalities* for the creation of a will Art. 61 allows for a wider scope of connecting factors.[67]

It is at once noticeable that the succession choice of law rules provide no scope for testators to exercise freedom of choice in selecting the law applicable to their testamentary trust. This is concerning, because there seems to be no good reason to deny testators the autonomy to do so: giving effect to an express choice does not appear to introduce any amount of instability or difficulty in ascertaining the applicable law to testamentary trusts. Moreover, applying the *lex patriae* denies the distinctiveness of the

66. *Id.*

67. A will is effectively made or revoked if the formalities of the following laws are complied with: the place of the execution of the will; the place of the testator's domicile at death; and, in relation to immovables, the place where the property is located.

trust by treating testamentary trusts as necessarily entailing nothing more than involving succession or family law, when in reality the trust is so flexible a device that it allows and facilitates testators to do much more than that. In contrast, the Convention provides more latitude to settlors (including testators) to exercise autonomy: their express or implied choice of governing law will normally take effect except where the chosen law does not recognise the trust or type of trust in question.[68] Moreover, in the absence of a choice, the applicable law is the law with which *the trust*--not the settlor/testator--has the closest connection, a rule consistent with the distinctive nature of the trust.[69]

Another important respect in which the two regimes differ relates to the issue of timing. Under the Taiwanese succession choice of law rules, it appears from Art. 58 that it is the deceased's national law at the time of his death which governs "succession," while Art. 60 uses the testator's *lex patriae* at the time of the will's formation. It is unclear which of the two points in time would be used in a dispute concerning a testamentary trust. In contrast, under the Convention the relevant point in time is clear: it is the time the testator *executes* the will, whether in relation to an express or implied choice of governing law by the testator,[70] or in relation to determining the law with the closest connection to the trust.[71] This approach is adopted precisely to provide certainty and to protect the expectations of testators[72]--key considerations which are overlooked if the relevant time used is the time of the testator's death.

B. *Property (Rights in Rem)*

Under the PILA, the connecting factor for both movable and immovable property is the *lex situs* of the subject matter.[73] If a cross-border trust dispute is characterised as a property dispute, the application of the *lex situs* as the connecting factor causes problems. The point can best be made by observing three significant respects in which the approach under the Convention offers a far superior solution than the property choice of law rules.

First, under the Convention, an express choice of governing law by the

68. Convention, art. 6; subject, of course, to other exceptions, for example, public policy (art. 18) and mandatory rules (art. 15).

69. This is not to say, however, that Taiwanese forced heirship rules (as to which, *see* Taiwan Civil Code arts. 1223-25) will be nullified if the Convention applied: the consensus is that those rules will continue to apply, since they are issues preliminary to the trust: *see* Jonathan Harris, THE HAGUE TRUSTS CONVENTION: SCOPE, APPLICATION AND PRELIMINARY ISSUES 54-55 (2002).

70. *Re Constantinou* [2012] QSC 332 (Austl.); Hayton, *supra* note 6, at 13, HAYTON ET AL., *supra* note 57, ¶ 100.146.

71. HAYTON ET AL., *supra* note 57, ¶ 100.153.

72. *See Re Constantinou*, *supra* note 70, at ¶ 44; HAYTON ET AL., *supra* note 57, ¶ 100.153.

73. PILA, art. 38; Hsu, *supra* note 53, at 120.

settlor will invariably take effect (so long as a jurisdiction which recognises trusts is selected), even if it differs from the *lex situs*. This approach "places a higher currency on settlor autonomy than on the risk of unenforceability overseas."[74] The autonomy of settlors is jealously protected, unlike the solution provided by the property choice of law rules.

The second differing respect is that, under the Convention, when we move away from express choice of governing law, the *lex situs* is but one among a number of factors to be taken into account. Thus, when determining an implied choice of governing law for the purposes of Art. 6, "[t]he situs of the assets may be an important factor where the bulk of the trust property is immovable. However, where movable property is concerned, the situs appears to be a relevant, but not especially important factor."[75] Ultimately, the basal criterion is the settlor's subjective intention;[76] therefore, the *lex situs* is important only insofar as it sheds light on that criterion. The approach under the Convention better protects the legitimate expectations of the parties than simply using the *lex situs* approach.

In the absence of an express or implied choice, Art. 7 provides that the applicable law is the law with which the trust is most closely connected, with reference being made in particular to:[77]

1. the place of administration of the trust designated by the settlor;
2. the situs of the assets of the trust;
3. the place of residence or business of the trustee;
4. the objects of the trust and the places where they are to be fulfilled.

As can be seen, the *lex situs* is but one of four non-exhaustive criteria to which courts may make reference. And again, it is clear that the *lex situs* is not a particularly weighty factor. As *Dicey, Morris, and Collins* comment:[78]

> The situs of the assets of the trust may deserve little weight: the movables included in a trust are usually intangible, e.g. stocks, shares and bonds; and the situs of an intangible movable is to some extent a fiction. That said, one might expect the role of the situs to be stronger where the trust property consists wholly or principally of immovables.

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74. HAYTON ET AL., *supra* note 57, ¶ 100.137.

75. LORD COLLINS OF MAPESBURY & JONATHAN HARRIS, DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶ 29-020 (2018).

76. HAYTON ET AL., *supra* note 57, ¶ 100.141.

77. Convention, art. 7.

78. LORD COLLINS OF MAPESBURY & HARRIS, *supra* note 75, at ¶ 29-021 (footnotes omitted).

By not according the *lex situs* undue weight, the Convention better recognises the distinctiveness of the trust: it is not a matter of property law *per se*, but a unique legal institution which should be assessed as a whole in order to determine the law with which it has the closest connection.

Thirdly, Hayton has noted that, under the Convention, the *lex situs* often has little significance in practice.[79] It is increasingly common for *inter vivos* trusts to be created where its assets are initially of nominal value, only for substantial assets to be added as accretions to the fund down the road. And in relation to testamentary trusts, the trust fund often contains assets across multiple jurisdictions. In these cases, the *lex situs* is not an important factor. To give undue weight to the *lex situs* in these cases would be to impose an outcome which does not cohere with the legitimate expectations of the settlor when creating a trust, and of the beneficiary who would expect a trust not to be treated simply as a matter of property even for choice of law purposes.

C. *"Juridical act[s] which [result] in a Relationship of Obligation"*

As discussed earlier, "a juridical act which results in a relationship of obligation" is capable of including both a "trust contract" and a testamentary trust (even though not analysed as contractual in nature). The reason for this state of affairs is that the PILA does not contain any explicit reference to *contract* choice of law rules, such rules being intended to be subsumed within the more widely couched phraseology. In the discussion from this Part on, references to a "juridical act" characterisation are intended to include both contractual and non-contractual cases, unless otherwise noted.

A juridical act characterisation provides the highest degree of similarity to the rules under the Convention as compared to the other possible classifications under the PILA. Structurally, both sets of rules share the same approach: effect is given to the parties' chosen applicable law, and where that is absent a close connection test determines the applicable law. Nevertheless, important differences exist.

Consider first a choice of law by the parties. According to Art. 20(1) of the PILA, the formation and effect of a juridical act is determined by "the intention of the parties."[80] Unlike the case under the Convention,[81] effect will only be given to an express, explicit choice:[82] implied choices do not count. To the extent that express choices carry the day, both regimes are in

79. Hayton, *supra* note 6, at 13.

80. The wording of art. 20(1) suggests that the chosen law need not have any substantial connection to the contract or will.

81. Convention, art. 6.

82. Wang, *supra* note 48, at 185; Chen, *supra* note 54, at 241.

favour of party autonomy.[83] However, by denying effect to an implied choice, Art. 20(1) derogates from party autonomy: it is not clear why a choice should be denied if it is not stated in so many words, but the court is satisfied that it reflects the actual intention of the parties.[84]

There are further important differences. Where the choice of law rules for juridical acts are engaged as a result of characterising a trust as a contract, it is the bilateral intention of the parties as expressed in their contract which matters, rather than the unilateral intention of the settlor as provided for under the Convention. Certainly, where a trust is created by way of a contract in Taiwan, there is almost invariably a coincidence between the bilateral intention of the parties and the unilateral intention of the settlor. Nevertheless, confounding unilateral and bilateral intention is liable to erode the distinctiveness of the trust by failing to recognise the distinction between trusts and contracts. Another difference is that the Convention provides a limitation which is absent in the PILA: an express choice is disregarded if the law chosen does not recognise trusts. This is a consequence of the fact that, while all established legal systems have contract law, not all of them recognise the trust. Without such a rule, however, the juridical acts choice of law rules fail to recognise the distinctiveness of the trust.

Next, consider the rules which apply where there is an absence of a choice of applicable law. Under Art. 7 of the Convention, the position is straightforward: a close connection test is applied, whereby, as mentioned earlier, there is a non-exhaustive list of factors courts should take into account to discover the law of the closest connection.[85] Under the PILA, however, the position is complicated. By virtue of Art. 20(2), the applicable law is "the law which is most closely connected with the juridical act." This provision is, however, subject to two qualifications in Art. 20(3). First, where the relationship between the parties contemplates characteristic performance, then the law of the domicile of the characteristic performer is presumed to be the law with the closest connection. Secondly, if the juridical act "concerns immovable property," then the *lex situs* of the property is presumed to be the most closely connected law. The fact that the qualifications in Art. 20(3) are phrased as "presumptions" indicates that Art. 20(2) cannot be read in isolation without regard of Art. 20(3),[86] but also that the presumptions in Art. 20(3) can be "rebutted" or disregarded where there is a different law with a more obvious close connection.[87] It is convenient to take the

83. As to the Convention, *see* Harris, *supra* note 69, at 166-69.
84. As is the case under the Convention: *see* HAYTON ET AL., *supra* note 57, ¶ 100.142.
85. *See* main text from *supra* note 77.
86. Wang, *supra* note 48, at 184.
87. *Id*. at 184-85.

provisions in Art. 20 in reverse order.

First, consider the immovable property qualification in Art. 20(3). The singling out of immovables for the application of the presumption of the *lex situs* stands in contrast to the Convention, which does not prescribe differing approaches depending on the type or nature of the property held under trust. The former approach gives rise to difficulties in the trusts context, because it is inconsistent with the view that the trust is a distinctive institution, whose core features and characteristics do not differ according to the type of property held on trust. It is also likely often to disappoint the legitimate expectations of settlors, who would not have expected that different choice of law rules might apply depending on the nature of the property held on trust.

Secondly, consider the characteristic performance qualification in Art. 20(3). It is notable that nowhere in the PILA is the idea of "characteristic performance" explained or defined, nor are examples given to help the ascertainment of the characteristic performer. Nevertheless, there is little doubt that this subsection refers to the characteristic performance theory, found (*inter alia*) in the EU Rome Convention and Rome I Regulation, whereby the party who undertakes simply to pay money is disregarded, and the connecting factor is crafted around the other party who undertakes substantial performance.[88] When applied to the trusts context, this subsection immediately runs up against the problem of fragmentation. The "characteristic performance" test is applicable only to contracts, and is thus at best capable of dealing only with "trust contracts"; it is irrelevant in the case of trusts created by wills or self-declaration. This fragmented approach detracts from a recognition of the trust as a distinctive institution.

Even in relation to "trust contracts", strictly speaking the "characteristic performance" test is inapplicable, since that test focuses on the parties' bilateral intention, while on a proper analysis the focus in the case of trusts ought to be on the unilateral intention of the settlor. Of course, with some analytical gymnastics, it is possible to say that the characteristic performer is the trustee, since it is he who administers the property to carry out the purpose of the trust.[89] Even then, the position is different from Art. 7 of the Convention, where one of the relevant factors to be considered is "the place of administration of the trust *designated by the settlor*."[90] As Jonathan Harris explains,[91] "The place of administration would not be worthy of such

88. *Id*.

89. Harris, *supra* note 69, at 216 n. 598.

90. Article 7(a) of the Convention (emphasis added); M. Alfred E. von Overbeck, *Explanatory Report on the Convention on the Law Applicable to Trusts and on Their Recognition*, *in* PROCEEDINGS OF THE FIFTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 1984, BOOK II-TRUSTS-APPLICABLE LAW AND RECOGNITION 370, ¶ 78.

91. Harris, *supra* note 69, at 218-19.

a lofty place in the hierarchy of Article 7 if it were to include cases where nothing was said on the matter by the settlor . . . [W]here the place of administration . . . is not specified [,] . . . [it] does not manifestly merit a rank above e.g. the situs of the assets."

Finally, consider Art. 20(2). It is certainly true that this subsection is capable of "overriding" the two presumptive qualifications in Art. 20(3); and therefore it might be said that those two subsections will not apply if the juridical act in question is obviously more closely connected with a different law. Indeed, David JW Wang has argued that, in practice, courts appear to have "unanimously by-passed the doctrine of characteristic performance', such that Art. 20(3) 'seems to play a decorative role only."[92] This might lead one to take the view that the position is, after all, similar to Art. 7 of the Convention, since Art. 20(2) and (3) of the PILA, taken as a whole, ultimately applies a close connection test. But this view misses two crucial points. First, the fact that Art. 20(3) provide *presumptions* implies that, at least on a proper reading of the statute, courts ought to be hesitant to rebut an otherwise applicable presumption unless the "closeness" of the connection between the trust and the different law is of a significantly high degree. After all, Wang also notes that, ultimately, "the doctrine of characteristic performance remains judicially untested";[93] and if and when the question arises squarely for consideration, it would be expected that the wording of the Article would carry the day. If applied properly, Art. 20(3) would be engaged far more frequently than not, in circumstances falling within that provision. This not only gives rise to difficulties, as observed earlier in the discussion of the two qualifications; it also means that there is the risk of "applying the 'wrong' law, that is one of little connection" to the trust.[94] It goes without saying that doing so is liable to disappoint the legitimate expectations of the parties to the trust. Secondly, unlike Art. 7 of the Convention which contains a non-exhaustive list of specific factors of special importance to determining the law applicable to trusts, Art. 20(2) contains no specific guidance. The Art. 20(2) solution therefore does a much poorer job of recognising the distinctive nature of trusts; it also causes uncertainty, which lays the parties' legitimate expectations to the wayside.

V. SCOPE

Once the applicable law is determined, whether under the Convention or by way of whichever category under the PILA, a further question arises concerning the scope of the applicable law: does it exhaustively cover *every*

92. Wang, *supra* note 48, at 187.
93. *Id*. at 187.
94. Harris, *supra* note 69, at 216.

aspect of the trust dispute at hand, or are there limits to its scope?

As is the case with most choice of law regimes, there are provisions in the Convention and the PILA allow the forum's courts to disapply an otherwise applicable foreign law which is contrary to the forum's public policy[95] or overriding mandatory rules;[96] and these provide an outer limit to the scope of the applicable law. Any uncertainty in determining what counts as a mandatory provision or public policy contravention is inherent in the very nature of such concepts, and no obvious differences arise between the position under the Convention and the PILA.

However, the PILA and the Convention diverge on two significant aspects in terms of scope, all of which are united by the fact that the Taiwanese approach overreaches--ie is not nuanced enough--in terms of its application to trust disputes.

A. *"Rocket Launcher" vs. "Rocket"*

First, under the Convention, a distinction is drawn between "preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee,"[97] to which the Convention does not apply, and the trust itself once in existence, to which the Convention does apply. The relationship between those preliminary issues and the trust itself is commonly illustrated by the imagery of a "rocket launcher" and the "rocket."[98] "Rocket launching" matters, for example, substantive and formal validity of transfers from a settlor to the trustee,[99] are determined by the choice of law rules of the forum; while matters pertaining to the "rocket"--the trust--are governed by the Convention. In contrast, such a distinction is absent under the PILA--an unsurprising fact, given that it contains no dedicated trust rules. Thus, for example, Arts. 20(1) and 60(1) respectively provide that the "formation and effect" of a juridical act and the "making and effect" of a will is to be governed by the applicable law as determined under the relevant section. If applied to trust disputes, the effect is that the relevant choice of law rule will apply to the trust, from start to finish.

It might be thought to be curious that the PILA should be criticised for failing to draw the distinction between the "rocket launcher" and the "rocket" since, at least on one view, it is "more coherent for a single law to

95. *See* Convention, art. 18; PILA, art. 8.

96. *See* Convention art. 15; PILA, art. 7.

97. Convention, art. 4.

98. von Overbeck, *supra* note 90, at ¶ 53. David Hayton introduced this analogy: *see* David McClean, *Common Lawyers and the Hague Conference*, *in* E PLURIBUS UNUM, LIBER AMICORUM GEORGES A L DROZ, ON THE PROGRESS 205, 217 (Alegría Borrás et al. eds., 1996).

99. von Overbeck, *id*. at ¶ 55.

determine whether a trust has come into operation."[100] However, it is submitted that the distinction is a crucial one to draw if the law is properly to recognise the trust as a distinctive institution which exists if and only if the preconditions for its existence are fulfilled. For example, there is no doubt that a testator must fulfil the formalities for a valid will[101] for a testamentary trust to be created. And in relation to a trust contract, the Taiwan Supreme Court has held[102] that the constitution of trust property from the settlor to the trustee is essential for the creation of a trust. If choice of law rules are properly to apply to the relevant category of case in question, it would follow that succession choice of law rules ought to apply to the validity of wills, and property choice of law rules ought to apply to the constitution of trust property in the case of a trust contract, but that neither is suited to determine questions concerning the trust once properly set up.

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

B. *Third-Party Liability*

Secondly, the Taiwanese approach is liable to overreach when the issue of determining the applicable law concerning third-party liability arises. Under the Convention, Art. 11(3)(d) provides for the recovery of trust assets against the trustee where the trustee mingles trust assets with his own property or dissipates trust assets in breach of trust. However, that subsection contains the proviso that "the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum." Where Taiwan is the forum,[103] the applicable choice of law rules would be those relating to property, which according to Art. 38 of the PILA is the *lex situs*. Thus, should the property be situated in a common law jurisdiction, then the beneficiaries will be recognised "as having equitable proprietary interests binding everyone except bona fide purchasers of the full legal title without notice of the equitable interest."[104] On the other hand, if the property is in a civilian jurisdiction, then normally "third parties will take free from the rights of beneficiaries though they may be subject to some civil law remedies in respect of fraud or unjust enrichment as provided

100. Harris, *supra* note 69, at 4.

101. *See* Minfa [Civil Code], art. 1189-98 (1929) (amended 2021) (Taiwan).

102. Zuigao Fayuan [Sup. Ct.], Civil Division, 95 Tai-Shang Tzu No. 500 (2006) (Taiwan), and *see* discussion in Wang et al., *supra* note 2, at 71.

103. As is the case if England is the forum: *see Akers v Samba Financial Group* [2017] AC 424.

104. Hayton, *supra* note 6, at 16-17.

by the law determined by the choice of law rules of the forum."[105] To this it may also be added that, in certain civilian jurisdictions such as Japan,[106] South Korea,[107] and Taiwan[108] which have enacted Trust Acts, beneficiaries may also *rescind* the transaction between the trustee and the third party where, for example, the third party has knowledge of the trustee's breach.

Given that the PILA contains no dedicated trusts rules, however, no distinction from the perspective of choice of law is made between trustee liability and third-party liability. The result is that it is likely for the liability of third parties to be determined using the same applicable law as selected by whatever choice of law rules are applied to the trust. For example, if a trust contract expressly provides that English law is the governing law, then *any* third party volunteer who receives trust property may be compelled to give up the property *in specie* even if (say) the property, the third party, and his receipt of the property are all located or occur in a civilian jurisdiction. The reason why this is troubling is that overlooks the third party's legitimate expectations:[109] he would surely be caught off guard if English law applied in order to deprive him of the property, when according to the civilian jurisdiction where he is, he would expect not to be deprived of the property where he acts in good faith. This becomes even more worrying when it is noted that drafters of the Convention, in drafting the proviso in Art. 11(3)(d), "had in mind specifically claims to recover trust property from banks, although the provision is not so limited."[110] If the application of choice of law rules may risk volunteer banks being compelled to give up trust assets received in good faith without knowledge of the trust, then this is also detrimental to cross-border commercial activity.

VI. BREACH OF TRUST

As mentioned earlier, by way of Art. 11(3)(d) of the Convention, the right a beneficiary has against a trustee for breach of trust is governed by the law applicable to the trust. Using the law applicable to the trust to determine the trustee's liability for breach is not only consistent with the legitimate expectation of the settlor; it is also consistent with the inherent nature of a breach of trust. A trustee commits a breach of trust where he acts inconsistently with the terms of the trust instrument, as supplemented by

105. *Id*. *See also* HAYTON ET AL., *supra* note 57, ¶¶ 100.78, 100.216.

106. Sintakuhō [Trust Act], Law No. 108 of 2006, art. 27 (Japan).

107. Sintagbeob [Trust Act], Act No. 900, Dec. 30, 1961, last amended by Act No. 15022, Nov. 1, 2018, art.75 (S. Kor.).

108. Sintuofa [Trust Act], art. 18 (1996) (amended 2009) (Taiwan).

109. Third-party expectations are the rationale underlying the fact that the Convention does not extend to determine third-party liability: Harris, *supra* note 69, at 323.

110. Harris, *id*. at 322.

statutory mandatory or default rules; and the awarded remedy aims to put things right by reference to the trust. The intertwined relationship between the trust itself and a claim for breach of trust entails that they ought to be treated by way of the same applicable law.

In the earlier discussion, we have seen that Taiwanese courts may, for choice of law purposes, characterise a trust as a matter of succession, property, or juridical act. Any of these categorisations is likely to result in the same consistency: the applicable law governing the trust will govern the trustee's liability for breach of trust. However, in certain cases where a claim is made against the trustee for breach of trust, two further options appear to be possible: unjust enrichment and tort.

Consider unjust enrichment first. Where a trustee obtains a bribe or secret commission in carrying out his duties, or sells trust information for personal gain, he clearly commits a breach of trust.[111] However, in a claim by a beneficiary against the trustee specifically for the restoration of the wrongfully obtained money, a court might for choice of law purposes classify the case as one of as unjust enrichment. Such a characterisation is consonant with Taiwanese domestic law, where Art. 179 of the Civil Code defines an unjust enrichment claim in the following terms: "[a] person who acquires interests without any legal ground and prejudice to the other shall be bound to return it." As En-Wei Lin explains, unjust enrichment can arise not only out of rendered performance, but also out of the infringement of an interest,[112] and it is clear that the errant trustee would have infringed the beneficiary's interest in obtaining the enrichment. According to Art. 24 of the PILA, the applicable law is the law of the place where the enrichment was received. There is also a proviso: where the unjust enrichment "arises from the intended performance of an obligation," the governing law is "the law applicable to the relationship which gave rise to the intended performance." In the examples cited above, it is difficult to say that the trustee's receipt of a bribe, secret commissions, etc arises as a result of the "intended performance of an obligation," since the trustee's not obliged *to obtain* those gains for the beneficiary, but rather he was obliged *not to benefit* from his position.[113]

Next, consider the tort characterisation. Suppose a trustee wrongly misappropriates trust property or causes a loss through his negligent administration of the trust property. In a claim by a beneficiary against the trustee for compensation, there is a likelihood that a court may characterise the case as concerning tort. This is consonant with Article 184 of the Civil Code, which states, in relation to tort, that "[a] person who, intentionally or

111. CHANG ET AL., *supra* note 14, at 119.

112. En-Wei Lin, *New Private International Law Legislation in Taiwan: Negotiorum Gestio, Unjust Enrichment and Tort*, *in* Basedow & Pissler, *supra* note 3, at 241, 244.

113. *See* Sintuofa [Trust Act], art. 34 (1996) (amended 2009) (Taiwan).

negligently, has wrongfully damaged the rights of another is bound to compensate him for any injury arising therefrom. . . .
A person, who violates a statutory provision enacted for the protection of others and therefore prejudice to others, is bound to compensate for the injury." According to Art. 25 of the PILA, the law applicable to a tort is "the law of the place where the tort was committed," unless another law is more closely connected with the tort.

At once, it can be noticed that an unjust enrichment or tort characterisation significantly threatens the autonomy of settlors to choose the governing law and the expectation that that law would govern the consequences of a breach of trust. Thus, where a trust is created by way of a trust contract, the applicable law is the law with the closest connection to the contract, a rule which conveniently overlooks any express choice of law by the contracting parties. The situation is not helped by the exception provided for in Art. 31 of the PILA, which allows parties to an unjust enrichment or tort dispute to agree to the application of Taiwanese law after a suit has been commenced: the exercise of party autonomy here is limited to a time *after* the breach has occurred, and also takes effect only where the *lex fori* is chosen.

Specific problems also arise in relation to the tort characterisation. In a judicial decision concerning tort choice of law rules, the Supreme Court has held[114] that since only compensatory damages can be claimed by way of general tort,[115] a judgment awarding punitive damages by a foreign court could not be enforced in Taiwan as a contravention of public policy. In the trusts choice of law context, this seems to suggest that, under a tort characterisation, beneficiaries can only claim compensatory damages against an errant trustee; any other measure of damages would be contrary to public policy and therefore the foreign law allowing for those claims would be disapplied by virtue of Art. 8 of the PILA. This unduly prejudice beneficiaries with a money claim against their trustee for misappropriation of trust property under an otherwise applicable foreign law.

To explain this point, it should first be noted that, according to orthodox common law, there are two distinct types of compensatory claim a beneficiary may bring against a trustee for breach of trust.[116] The first type of claim arises where the trustee misappropriates trust assets. Here, the beneficiary has a continuing right in the trust assets, and therefore may compel the trustee to restore the misappropriated assets to the trust *in specie*.

114. *See* Zuigao Fayuan [Sup. Ct.], Civil Division, 100 Tai-Shang Tzu No. 552 (2011) (Taiwan), discussed in Wang et al., WANG WEN-YEU ET AL., TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 246 (Lusina Ho & Rebecca Lee eds., 2013).

115. *See* Minfa [Civil Code], art. 184 (1929) (amended 2021) (Taiwan).

116. *See* general discussion in HAYTON ET AL., *supra* note 57, ¶ 87.11ff.

Where this is not possible, for example where the assets have been dissipated and can no longer be recovered, then the trustee can be made liable to effectuate "substitutive performance." The award which would be made by the court is a money payment measured by the current objective value of the assets the trustee ought to have restored to the trust fund at the date of judgment, because the trustee's ongoing duty to hold the assets on trust does not evaporate simply due to his misappropriation of the assets. The second type of claim is a claim for compensation for loss--what can be termed a "reparation" claim. Unlike a "substitutive performance" claim, the sum for which the trustee is liable under a "reparation" claim depends on the extent to which the trustee had *caused* a *loss* to the beneficiary: causation (and remoteness) of loss must be proven for the beneficiary to succeed. The situation appears to be different in Taiwan Article 23 of the Trust Act contemplates only two types of remedies against an errant trustee: "pecuniary compensation for damage caused to the trust property" or "restor[ation of] the damaged property to its original condition." Using the common law terminology, this suggests that Taiwanese law only recognises 'reparation', and not "substitutive performance" claims. It follows that, where a "substitutive performance" award would be made under the law applicable to the trust, there is a real possibility that a Taiwanese court might either bar entirely the recovery of that sum or to limit the award only to the amount of loss which the beneficiary can successfully show to have been caused by the trustee, on the basis that recognising the full extent of a "substitutive performance" claim is contrary to public policy in Taiwan.

To so limit the beneficiary's claim disappoints the settlor's and beneficiary's legitimate expectations. Where a trust is properly set up, the settlor and the beneficiary can legitimately expect that the trustee will deal with the trust assets precisely as provided for by the trust instrument. Moreover, so limiting the beneficiary's claim also detracts from the distinctiveness of the trust by failing to hold trustees to the high standards required to protect the institution of the trust. In particular, barring "substitutive performance" claims would have the effect of "encouraging" trustees to misappropriate trust assets for their selfish ends based on the (not unlikely) hope that they may not have to repay the full objective value of the assets, since compensation would in effect be limited to the amount of loss caused to the trust property. And it is clear that that amount may well fall short of the objective value of the assets, for example, due to fortuitous intervening events, multiple sufficient causes of the loss, or an unskilled lawyer acting for the plaintiff, which leads to the inability to prove causation of loss equivalent to the objective value of the misappropriated trust property.

VII. CONCLUSION

As Chen has observed of the 2010 PILA, its enactment "was a legislative response which incorporates the ideas and goals of international uniformity."[117] Unfortunately, the lack of dedicated trust choice of law rules means that there is a grave danger of lack of uniformity insofar as cross-border trust disputes are concerned, both in terms of how Taiwanese courts are likely to treat such disputes, as well as in terms of global uniformity. This is a regrettable state of affairs in our increasingly globalised world, where incidences of cross-border trust disputes will only be on the rise. In particular, the lack of a dedicated set of choice of law rules relating to trusts causes much confusion and uncertainty, not only as to how Taiwanese courts would characterise a trust dispute and the inconsistent connecting factors which would apply, but also in relation to the scope of the applicable choice of law rules (whichever they may be) and the special difficulties raised by a breach of trust claim. All these difficulties derogate from a proper recognition of the trust as a distinctive legal device, and fail properly to protect the autonomy and legitimate expectations of the parties. These difficulties are, however, easily surmountable under the Convention, where a consistent set of choice of law rules emerge. Serious thought ought, therefore, be given by the Legislative Yuan to adopt the Convention.

117. Chen, *supra* note 3, at 21.

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臺灣的信託與法律選擇規範

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摘 要

臺灣在其一般性的規範中承認信託已有25年之久。然而卻沒有適用於信託關係之具體選法規則。在日益全球化的世界中，這是一個令人遺憾的狀況，蓋跨境信託爭議的發生只會越來越常見。本文主張，一套關於信託的選法規則的缺乏所造成之混亂與不確定性，不僅導致臺灣法院對信託爭議事件的定性與採用的關聯事實產生歧異，並會影響到所適用的法律選擇範圍（無論可能是什麼法律）以及因違反信託之主張所生之特殊困境。這些種種的困難減損了信託作為一種獨特的法律工具的認識，並未能適當保護當事人自主以及合法期待。然而這些問題都可以透過適用海牙信託公約而輕易地解決。

關鍵詞：國際私法、選法規則、信託