Scientific Research Publishing

Beijing Law Review, 2022, 13, 1051-1082
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Trust Law Concept Challenging Civil Law System: Mongolian Example

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How to cite this paper: Oyuntungalag, J. (2022). Trust Law Concept Challenging Civil Law System: Mongolian Example. *Beijing Law Review, 13,* 1051-1082.
https://doi.org/10.4236/blr.2022.134066

Received: November 17, 2022
Accepted: December 27, 2022
Published: December 30, 2022

Abstract

This article aims to demonstrate that law trust concept can contribute to the improvement of property law as a comprehensive device external to the tradition of the civil legal system. At the same time, an incorrect or incomplete understanding of trust principles may give rise to problems such as the defrauding of creditors, the circumvention of laws prohibiting certain activities or the unfair distortion of the fabric of existing law. While trust law concept originated in common law systems plays an important role in property management system all over the world, especially in financial and banking sectors, the civil law system with its absolute ownership concept and remedial structure based on obligation law still challenge in receipt of the trust law rules. Therefore, this article will cover the standards applicable to trust relationships in the legal systems of the United States of America and Japan, for the purpose of identifying norms that may help in the further development of the property relationship in Mongolia from a legal and economic point of view. The author has chosen these two jurisdictions as a particular reference not only because of the size of their economies, but also because of the characteristics of their social and legal structure. Japan is a civil law country which has more than 80 years' experience with trust regulation, and is now in the process of reforming its own law. The United States is a country having statutory trust regulation and successfully developing trust structure in both of the social and commercial sphere. The existence of the UTC is a big factor, too, because it is more compact than a mass of case law provided by English law of equity.

Keywords

Trust Law, Ownership, Property Law, Fiduciary Duty, Remedy, Unjust Enrichment

1. Introduction

Concept of trust property is generally considered to be essentially common law concepts, and not recognized in civil law jurisdictions (like Mongolia) due to incompatibility with the underlying absolute ownership concept (Dyer 1999). Mongolian settled social life starts with the socialist framework, which dates to 1920s. Even though market based economic relation is not well developed, main civil law concepts of the Western legal system have been firmly constituted in the country. Due to relatively late economic liberalization process, practical application of the civil and commercial law regulations requires proper academic and judicial interpretation. There are 829 laws adopted by the Mongolian parliament, State Great Khural proposed to regulate social and economic sphere of the country (https://legalinfo.mn/mn/law, n.d.) whereas the Civil Code of Mongolia establishes basic framework for both economic and civil relations.

However, trust rules relating to management of property can be a source of good examples for the formulation of legal regulations necessary to develop property law in a system undergoing transition.

Mongolia is a developing country which is making efforts to move from a centrally planned economy to a property-based open market economy. This transition process began in the 1990s,[1] and since then, as a result of liberalization of industrial and trade sector, Mongolian people engage in various business activities which their educational background and former life style have not prepared them (https://wenr.wes.org/2022/08/education-in-mongolia, n.d.).

Lack of knowledge and experience in property management, in the commercial, social[2] and personal[3] spheres combine with inadequate legal infrastructure to create difficulties for the people. Moreover, in Mongolia's young and developing market, business and private affairs are conducted in a rather informal way due to various reason, such as lack of experience, high tax burden and transaction cost. These factors have contributed to increased fraud crimes (General Department of Police of Mongolia, 2022)[4], breach of confidential relationships, and the abuse of legal tools for unjust purposes.

Poor quality in asset management service has brought potentially serious harm to society, through loss of trust in law and the marginalization of courts (nihilism) in the pursuit of pure advantage or of remedies for violated rights. These bad effects on the legal mentality of general public are a potential barrier to the development of a free and transparent economy. It is necessary to provide

[1]The new Constitution of Mongolia was adopted in 1992, which is followed by much legislation, particularly in the economic sector, including the new Civil Code 1994 and 2002.

[2]Various social, pension and other public benefit funds, schools and hospitals are still state owned being heavy burden on the state budget and cannot meet the public demand. So, it is already decided (the social sector privatization program) to separate some of them from state management.

[3]For example, overseas remittance constitutes a majority of the income of beneficiary households in Mongolia but is losing value due to inflation, unproductive investment by agents and increased levels of fraud.

[4]From this statistic data fraud has been increased both for recent decades in quantity, in quality these types of crimes are getting more serious, as characterized by a rise in the professionalism of the criminals, and in the number of victims affected.

an adequate system for protecting citizens' property rights, in order to close the shutters on this bad scenery.

On the other hand, due to rich mineral resource, mining sector plays important role in Mongolian economy whereas property management and investment protection requires adequate legal structure. As a civil law country property law protection is based mainly on absolute ownership concept, which recognize undividable owner's interest. However, trust law as a flexible regulatory mechanism which applies to both the structure of property management providing a general legal structure (Yoshihisa, 2004). In other words, it can extend or build upon existing legislation,[5] by providing standards for determining the status of property held in law by one party in another's interest, provide a set of default provisions applicable to fiduciary relationships and the management of property by another.

2. Fundamental Principles, Usages and Types of Trusts

2.1. Trust-Like Regulations in Mongolia

For developing trust law concepts which can contribute to the development of property management and protection, exploration of the existing legal relationships having some elements of trust by escaping various side effects produced by the gaming of existing regulations.[6] Many gaps remain in legislation in Mongolia in areas that involve trust-like relationships. The other question is that "Is there any similar or equivalent to trust legal instrument in Mongolian legislation?", consequently the following institutions, which have some characteristics of the trust.

Contract on estate entrustment.[7] This is a relatively new type of contract in the Civil Code of Mongolia originating from the German *Treuhand*. According to the legislative definition, such a trust is a contract in which a settlor is obliged to transfer moveable property or a right[8] to a trustee and the latter is obliged to receive it and dispose of the settlor's right and interest for the benefit of the settlor. (CCM 2002, art.8.2.4, 406.4) Although the law refers to the recipient of the property or right as a "trusted owner" and stipulates that he enjoys the powers of the real owner of the trust property against third parties, there is no transfer of the owner's right, because expenses and risks still fall on the settlor (CCM, 2002, art.406.3). So it is used like agency for long term period to perform fiduciary duty on behalf of himself.

There cannot be any third parties benefiting from the trust property since the article 406.6[9] of the Civil Code of Mongolia, settlor is the only beneficiary from

[5]Company Law, Civil Code, Law on Social Insurance, Law on Issuing pension allowance and payment from the social welfare funds, Law on the fees of the pension of the personalized pension accounts are covering some areas of common law trust law in Mongolia.

[6]For example, legislation allowed Non bank institutions deal with trusts, but did not give any regulations related to the duties and rights of the trust participants, that is putting the consumers in very dangerous situations.

[7]Translation of the title as well as following provisions are made by the author.

[8]"Right" is understood as one of the non material assets, which gives to its possessor benefit and right on claim

[9]A trustor will own income and benefit from trusted property.

the trusts. Consequently, it seems that the regulation is lacking possibility of third-party beneficiary.

Nonbank financial institutions have already begun to offer trust banking services under the Law on Non-Bank Financial Activities (Law on Non Bank Financial Activities (Mong.) 2002, art.7.1.8). Whether the Civil Code provisions on Treuhand will apply to these activities only, or whether these provisions regulate trust relationships more generally is waiting comprehensive answers from the policymakers.

Trusts dealt by Non-Bank Financial Organizations. Law On Non-Bank Financial Activities determined "trust" as following (Law on Non Bank Financial Activities (Mong.) 2002, Art. 4.1.7): "Trust service" shall mean an arrangement whereby a trustee temporarily controls, uses and manages assets (cash, loan, other assets) of a beneficiary on the basis of an agreement with the beneficiary with the purpose of preserving the value of the assets and earning a profit. The problem here is that the legislative regulations related to this activity is limited only by these definitions, whereas regulatory authority provided standards related to the trustee's property management in 2015[10]. The regulation covers assets thresholds and professional criteria for non-bank financial institutions to get license for trust and estate management activity and forms of estate management through financial instruments.

Contract for third parties. According to the Civil Code both of the third person and obligation assignee of the contract can require the performance of the contract from obligee. The existence of the third parties right to require and how to exercise the right will be determined by the contract and objectives of the contract, if these issues are not specially stipulated by the contract. Third person-beneficiary's position is very vague, but this is a contract, but not property relationship, it is assumed that no property right is given to the beneficiary of this contract, whose counterpart in trusts relationship has such rights (CCM 2002, art.203).

Usufruct. Usufruct is defined in Civil Code of Mongolia as a right to possess and use other's property with limits for earning property and benefit. The usufruct possessor is entitled on the same right as the real owner except to dispose it through the comprehensive transfer to third person. The usufruct possessor should take permission from the owner in case of pledge and rent of the property. This is similar to the trusts in sense of that it limits the owner's right, but it is not the complete limit of the ownership rights like trusts, because the usufruct possessor has no right to dispose (CCM 2002, art.152).

Transfer of the immovable property to the other's administration. This will be attached only to the immoveable subject to the hypothec. It is one type of the measures to ensure the performance of the obligation and an alternative method of selling property by auction and established by the court on the request of the obligation assignee with hypothec claiming rights on the property. It

[10]Financial Regulatory Committee approved the Regulation of Bank bus financing activity in 2015.

is very similar to trusts, since administrator has a right of ownership, such as right to dispose and distribute benefits earned from the administration to the entitled on it people according to the plan approved by the court. But it is distinguished from the trusts as a short-term structure and can be initiated only by the obligation assignee who is not the owner of the property. Moreover, after the complete performance of the obligation the remained property should be returned to the owner of the property (CCM 2002, art.181).

Contract on fiducia. It is also one way of ensuring performance of obligation by transferring a legal title to an obligation assignee. It is similar to the trust in that the legal title is transferred to others and fiduciary relationship, but it is not independent contract. From the scholastic interpretation the transferor of the property is losing all his property right, so he has only right on damage claim but not property claim from the fiduciary, that is evidencing impossibility of the ownership separation (CCM 2002, art.235).

Contract on agency. According to the contract an agency is to do certain actions on behalf of and at the expenses of a principle and the principle should pay for a service. It differs from trusts as an action undertaken by the agent is on the name of the principle. There is no transfer of the ownership right, although agent is acting for the benefit of others and holding the fiduciary duties like trustees, but he is entitled only on certain actions instructed by the principle (CCM 2002, art.399).

Contract on guardianship. The article is also one of the confusing articles of the Civil Code and it does not stipulate directly that the guardian has ownership rights and some other property rights on the assets of the ward (CCM 2002, art.483). But it is assumed that guardian is legally entitled on the property as article 485.2 stipulates that "…in case of death of the guardian the successor of the transferred property will have obligation to take care of the ward…" Here the transferred property means the property transferred to the guardian from the ward for guardianship as the article 483.2 stipulates that "…in case of the contract termination the transferred property shall be returned to the ward…". If the successor of the guardian can receive the transferred property, logically it means that the property is included into the guardian's will. Consequently, the guardian has a legal title on the property like trustee in the trusts, but he is not entitled on disposition, because law requires the consent of the ward for it. This provision is evidencing the sensitiveness of the civil law system in division of ownership rights.

However, these above listed relationships are having some elements of the trusts, they cannot be considered as trust relationship[11] due to lack of one or more of the following characteristics of the trusts.

Gift contract concluded for special purposes. In this type of contract asset is given to the full ownership of the receiver upon creating or certain or reaching certain goals, whereas grantor can is entitled to demand to create conditions and

[11]See table 1 "Distinction of the trusts from other similar relationships".

the achieve goals. In case of receiver's failure grantor may renounce the contract. 279.4 Gift contract for special purpose shall be concluded in written form. The goal created in this type of contract should be for third party beneficiary (CCM 2002, art.479).

Securities Trust Operations. According to the legislative definition the securities trust operation is an exercising ownership rights of the securities and other relevant assets of the client within limits of the trust agreement. The law has established duty to inform conflict of interest, prohibiting to compensate own obligation by the securities of the beneficiary, whose right is determined by trust agreement. Thus, the legislation leaves the separation owner's interest and fiduciary duty to be set by the specific regulation on conducting trust operations shall be set by the Commission (Law on Securities Market 2013, art.7).

Investment fund asset management. Investment fund is considered as professional regulated activity governed under the Laws on Securities market and Law on Investment fund. Investment funds can be created only in the form of legal person according to the Mongolian laws. Asset management is an activity, whereas an investment management company carries out asset management for benefit of investors with duty of record keeping and reporting. The law also establishes conditions of establishment for investment funds, basic rule for undertaking management of fund assets, taking into custody and registering fund assets, distribution of information to investors and relations related to operations by the securities market's regulated legal entities. In other words, the provides general legal duties of separation of assets and duties to inform and accounting (Law on Investment funds 2018, art.47).

2.2. Common Law Trust Concept *versus* Mongolian Trust Like Institutions

There is no strictly stated trust definition in common law, because its structure is very clear and deceptively simple for common law system. Thus, Scott has stated that "…the definition results from the rules, and not the rules from the definition" (Austin W. Scott (3rd ed., 1967)) and he has mentioned that trust is understood in two ways, such as broader and narrower sense. In broader sense, trust is a fiduciary relationship including all like bailment, executorships, guardianship and so on. In narrower sense, the term is applied to the definition of the Second Restatement and he gave main characteristics of trusts, such as intentionally created fiduciary relationship, related to the property, and existence of equitable duties, benefit of another people.

But the definitions are needed for giving general idea, namely for answering question "What is trust?" and for distinguishing it from other concepts, like bailment, and agency for civil lawyer. (ed., Itinera Fiduciae: Trust and Treuhand in Historical Perspective 1998, 37) Specially in statute-based system of law like Mongolia regulations begin from the definition. Thus, according to the Article 1 of the Trust Law of Japan (1922) trust is a transfer and otherwise dispose of a

property right and cause another person to administer or dispose the property for a specific purpose. This article did not give the trust form[12] but the characteristic and content of the trust relationship, as an instrument to cause trustee to administer and dispose the property for the benefit of others.

Basing on the opinions of the scholars and definition of the legislations the author compared the common characteristics of the trusts given by them (Schwarcz, 2003), the following description is made for trusts: "Trust is a legal relationship where a person (trustee) to manage the other's property (trust property) for special purpose (charitable or for the benefit of the beneficiary)[13]. The main binding[14] characteristics of the trust are ownership and interests in related property are a) separated between trustee and beneficiary, b) fiduciary duties of the trustee in administration and disposition of trust property, and 3) for benefit of other than legal owner (trustee) of the property."

The composition of these 3 main characteristics makes trusts distinct from other similar institutions, such as bailment, agency, guardianship, contract for special purposes, investment funds and others (Table 1).

Usages and types of the trusts

Economic behavior is a social exchange model in which people want resources from others and engage in organized life, where the motivation is a desire to maximize their gain of resources and minimize losses (Tylor, 2001). The trust is a flexible device that opens possibilities of exchange that are not supported by the strict rules of a Civil Code or judicially establish property regime.

Table 1. Distinction of the trusts from other similar relationships[15].

	Trust	Bankruptcy bailment	Agency	Guardian ship	Receivership in bankruptcy[16] /by court decision/	Contract for third parties	Usufruct	Fiducia	Trusts dealt by Non-Bank Financial Organizations.	Asset entrustment in Civil Code	Transfer of immoveable to other's administration
For benefit of other than legal owner	Y	Y	Y	Y	Y	Y	N	N	Y	Y	Y
Fiduciary duty	Y	N	Y	Y	Y	Y	N	Y	Y	Y	Y/N
Separation of ownership and interest	Y	N	N	N/Y	N	N	Y	N	Y/N	N	Y

[12]Trust form means how or by what document trust can be created.

[13]Definition applies only to the express trust.

[14]"binding" is used as that if even one of these characteristics is missing it can not be considered as an express trust.

[15]The table is based on the Bogerts comparisons, though there are many other comparisons, for instance Edward and Stockwell made comparison with contract, bailment, administration of estate, condition and power.

[16]According to Mongolian Bankruptcy Law (Art. 3.1.4) receivership is performed by a trustee in bankruptcy procedure, who is a person appointed by the court with claimants proposals for executing work of liquidation and recapitalization, protecting and controlling assets of the defendant.

In the legal theory trust as a legal concept is born by Courts of Equity in England to avoid unjust results under inflexible Common law rule on land rights (Black's Law Dictionary, 2019). Trust law has become an established element of English law because it has proven to be useful instrument for dealing managing of settled land and property, establishment of business entities and pursuing charity, defining right and obligation in various types of transactions (Edward & Stockwell, 1992). So, understanding of usages and types of the trusts will help to compare trusts to the civil law concepts fulfilling similar functions and to identify applicable sphere of trust concepts in civil law.

Usages of the trusts. Modern usages of trust are wide arranging from family asset planning to investment and security tools. For instance, in the USA historically, the trust is being used and recognized as a device for intra-family wealth transfer, but in recent times it has begun to play a significant role in the capital market as a commercial tool, as shown by the fact that pension trusts and mutual funds hold 40 percent of all US equity securities and 30 percent of corporate and foreign bonds (Hansmann & Mattei, 1998). Since modern usages of trust is very diverse and uncountable, such as family and personal property planning and preservation, giving charity, providing safe pension fund for employees, commercial purposes, minimizing tax burden, business control (Waters, 1984), remedial instrument[17]. These can be considered as more common uses of trusts in common law jurisdiction[18].

Types of the trusts. Hence, it's usages are potentially unrestricted and trusts can fulfill so many functions because of its flexibility which is expressed by its structure and various types. The main two characteristics of the trusts make it similar to the corporate structure by the separate patrimony[19] as well as to contracts, giving freedom of identify relationship by the agreement (Tylor, 2001: p. 6). Understanding about general types of the trusts will help to understand rules applying different types of the trusts.

Most traditional classification of trust is related to the creation of trusts dividing it into express and implied, which is divided into types such as resulting and constructive (Hayton, Hayton, & Marshall, 1996: p. 46). Express trusts are a trust created by the intentional expression of the settlor (Parker & Mellows, 1971: p. 31). Theoretically, it is not necessary to use exactly the word "trust", but it should be clear that settlor is intended to create trust from the declaration of the settlor, in other words all necessary characteristics should be included into the statement of the settlor. In author's opinion, trust is possible to be created as express or statutory trusts in civil law counties, since main source of law is statutory legislation. Implied (resulting) and constructive is a trust imposed by the court for providing justice and good conscience in property relationship. Although there can be difficulty directly impose due to current level of court expe-

[17]Courts in common law system imposing constructive trusts to the prevent unjust enrichment and recover fair parties right.

[18]Almost all books on trust issues clearly describes the trust usages, therefore the author generalized these purpose and mentioned which are more popular and common.

[19]Patrimony used as set of not only assets and rights, but also obligations related to the property.

rience and statutory legislation, main principles of the constructive trusts can enrich and fulfill gaps in the remedial system in Mongolia.

Depending on the purposes trust is classified private (family, commercial and other) and public (charitable), where types of the beneficiary is differed. For example, in case of the commercial and private trusts, it is necessary that the beneficiary is identified more clearly and individually. But in the charitable trusts, as the beneficiaries are multiple subjects, the important is the purpose rather than individually identified persons. Moreover, according to the UTC private trusts require determined (ascertainable) beneficiaries, on the other hand charitable trusts are created for public interests. Interesting is that the UTC allowed to create trusts for animals, and other trust of non-charitable purposes, which is named as honorary trusts. Valid period, requirement for identifying beneficiary purposes and enforceability (English, Uniform Trust Code and Its Application to Ohio, n.d.) and property distribution at the end of the trust is differed, so the principles of charitable activities also will be applied to it.

Depending on the possibility of withdrawal by the settlor trust is sorted as a revocable and an irrevocable. In the revocable trusts settlor preserves some rights on trust, namely the rights to appoint, resign or change trustees and others. Revocable trust is used for avoiding probable process as a substitute for a will in the USA. In contrary to the common law concepts, according to the UTC trusts are presumed to be revocable. On the other hand, in irrevocable trust, a settlor loses all his property interest on the trust property and the beneficiary who is the only capable person to enforce duties by the trustee. Consequently, the rights of the creditors of the trust parties also will be quite different in these two types of the trusts, so is the distribution of the trust's property after the end of period of the trusts.

Relating to the duties of the trustee, trust is classified like simple and special trusts. In simple trust, sometimes named as passive or bare trusts, trustee has only duty to hold legal title to the property. But in active trusts trustee has active management responsibility (Emnett, 1999) and depending on the level of his discretionary power it also can be divided into two types like, ministerial and discretionary (Tylor, 2001: p. 58). In the ministerial or fixed trusts, the settlor determines the exact benefit which each beneficiary should receive and in the discretionary trusts, the trustee has a power to decide the shares of the beneficiary.

From the trust descriptions and its comparison to the Mongolian Civil law concepts having similar characteristics, the author has come into the conclusion that there are no similar concepts fulfilling the functions Anglo American trusts. So, from the summarizing of various usages of the trusts in common law jurisdictions, it is becoming clear that trust concepts cannot be applied in such broad sphere in civil law jurisdiction like its counterpart in common law jurisdiction, because some of these usages are covered by the current legislation related to the corporation, non-government organization and contract law.

But its standards related to the holding of trust property independently, imposing fiduciary duty on managers of other's funds can help to address the de-

regulations of the current legislation related to the property management and protection. Since the rules related to the above-mentioned trusts differ depending on the types of the trusts and such types are arisen from the case laws as a result of social needs for them, it would be impossible challenge to develop all types of the trust in Mongolia.

Because Mongolian economy and legal structure is still young and immature comparing to the conditions of the Japan and USA, when trust was introduced. For example, for developing express trusts, there should be more justified legal and economic infrastructure, on contrary it would be either a law on paper in best case, or the tools to abuse unsophisticated citizens who blame the government for legislations lacking institutional and legal tools to protect citizens from abuses. Therefore, trust principles related to the trust property and fiduciary duties will be a good standard which can shape property remedial system of Mongolia.

3. Trust Property *versus* Absolute Ownership Concepts

Mongolia as it is becoming very popular to transfer money or property to others by fraud or basing on contract, they can claim compensation on contract and the property claim if their right is broken. But in real life it is very difficult for plaintiffs to claim their property, loss and value on that property because they cannot prove them when the funds are mixed. Consequently, courts are not able to recover equity in this relationship, which is criticized not only by Mongolians but also foreign donors and investors (https://mn.usembassy.gov/2022-investment-climate-statement-mongolia/, n.d.). For example, people who has given the money to the Loan& Saving Cooperative are blocking the building of the cooperative in order to save the materials identifying where their money has gone (https://www.mongolnews.mn/, 2006).

According to current legislation they have no such rights, however from the justice side they can be justified. But in author's opinion if there were legal regulations in management of other's funds and clear requirements on holding such funds, these people could protect their property in other's hand more easily and there were not necessary to block the building in this case. The regulations of the Japan and USA are introducing such standards related to status of the trust law; however, methods and details are slightly differing in these two countries. For example, the certification requirement for keeping records is well set up in the UTC, the condition related to time is lacking in it contrary to the Japanese trust legislation, however it seems that both of them are important in proper maintenance of the record keeping.

Moreover, with providing independence of the trust property, rights and duties of trust participants should be more clearly determined both for protecting their rights and identifying responsibilities.

3.1. Independence of Trust Property

As the purpose of employment of the trust instrument is reaching maximum

benefit from the property, so the property should be protected from the creditors both of the settlor and trustee. Trust property is always changing its form due to trustee's management and disposal (Yoshihisa, 2004: p. 58), it is important to have clear understanding about the scope of the trust property both for beneficiary. A beneficiary, who is the sole interested and capable person in enforcement of the trust, cannot exercise her right if she has no idea about the scope of her interest in the property (Hansmann & Mattei, 1998).

According to the bill of the Japanese trust law, any property acquired by the trustee through administration, disposition, distinction, damage or other causes shall be considered trust property. It is showing that the product from the trust property will go to the trust property, but not to the possessor of the property, so trust is a property relationship, but not a contract creating a mere personal obligation (Restatement (Second) of Trusts, 1959) and differed from civil law concept in this respect. For example, according to Civil Code of Mongolia, product of the property will be the property of the legal owner if otherwise is not stated by the law or contract (CCM 2002, art.93).

The independence of the trust property is occurred in two stages, which are related to the creation and administration of the trusts will provide clarity in the scope of trust property.

3.2. Separation of the Trust Property from the Settlor's Patrimony

In creation of a trust the settlor must identify which property is transferred to the trust, and it should be ascertainable by the external world, unless it cannot be a valid trust (Scott (3rd ed., 1967), 684). Certainty of the property is the main requirements for the subject matter of trust and it does not mean that the property should be physically described, but it should be capable to be determined and used for the trust purposes (Wilce v. VanAnden, 1911).

According to the Japanese trust law (art.3), the ways to identify trust property by the settlor is clear in the case of the immoveable, valuable instrument and some securities, as they should be registered and recorded as well as included into the related entry. But there were no legal requirements for identification of other property, which could lead to uncertainty of them, as long as the announcement of the trust was not well provided by the law as a method of creation of the trust. However the bill of the new trust law recognizes three different ways of trust creation, such as contract, will and declaration of the trust by the settlor and the main requirement for the declaration is notice for the beneficiaries about the content of the certificate of the trust declaration (Emnett, 1999). One of the advantages in the bill is that it regulates the rights of the bona fide creditors and beneficiaries in case of the trust creation by the settler for the reduction own property against creditors.

The UTC recognizes three ways of creation of the trusts, transfer of the property to the trustee other than himself, declaration of himself as a holder of the identifiable property as a trustee and exercising power of the appointment (Code

2005, sec.401). In case of the transferring property to another person, the trust property can be identified by the transfer, but in case of self-declaration the best mean of identification of the property is reregistration of the trust property on the name of the owner as a trustee. However, trust creation can be recognized without transfer of the title, if the trust property is properly identified by the schedule list certifying the intention to create trust by the settlor.

3.3. Separate Administration of the Trust Property

Segregation requirement (Langbein (October, 1997) is one of the most important conditions for the trust existence and administration and it also makes trust more transparent. According to Japanese trust law (art.28) separate administration of the trust is directly stipulated by the law and methods are more clearly defined in the legislation. For instance, apart from the property able to be registered and recorded officially, the way to separate other properties is determined. Thus, moveable properties should be administered in the condition which gives possibility to distinguish it by external form and clear sum is determined for the money (Emnett, 1999: p. 22).

The other provisions related to the scope of the trust property, distinction of the trust property from trustee's own property, and prohibited set off trust property and obligation unrelated to the trust property are all together complementing the segregation requirement. But they cannot be implemented in the life without the provision which is related to the keeping account books and records. Hence trustee is obliged to keep books on the management of affairs and accounts as well as prepare inventory at the acceptance of the trust property and regularly once a year, moreover the documents should be kept for the certain period of time. In this respect the settlor, his heir and beneficiary are policing the execution of the duty and obligation of the trustee to inform about the content of the documents on administration makes the regulation stronger. The period, and methods of the record keeping is well addressed by the legislation, however keeping of records only by the trustee seems insufficient and it can be answered positively basing on the trustee's fiduciary duty. Thus, the UTC stipulates that record of the trust property interest should be certified by the third parties other than trustee and beneficiary (Code 2005, Section 810(c)).

3.4. Trust Property and Ownership Concept of Civil Law

Since a settlor transfers his legal title and disposition right to the trustee, and the right to benefit from the property[20] to the beneficiary by creation of the trusts. On the other hand, trustee's right is also restricted by his fiduciary duty to the beneficiary and trust instrument, so trustee cannot decide the destiny of the property by his will or wish. That is why trust is considered as a relationship with respect to property (Scott (3rd ed., 1967), 37), so the trust property is independent from any persons and is under the control of the trust purpose.

[20]Use is here referred to the term "fructus".

The purpose of this article is to clarify differences between the civil law absolute ownership and trusts. Therefore, it is worth to give brief description on ownership concepts of civil law and its adoption in Civil Code of Mongolia. Furthermore, the ownership rights of the trust participants will be discussed in comparison of Japanese and USA trust legislation.

Most of civil law countries are not accepting the fragmenting ownership rights on the trust property because of the principle of the absolute ownership. The absolute ownership right consists of three rights, such as usus, fructus and abuses. The usus includes the right to use property without exploiting benefits from the property or the factual possession, but the fructus means the right to take benefits from the property, and the abuses means the right to dispose property on his own will (Black's Law Dictionary, 2019: p. 693). Moreover, ownership is always connected to the control of the property, in other words ownership cannot exist without control (Baev, 1995) over the particular property.

But in common law system ownership interests is capable to be divided in time and content (Edward & Stockwell, 1992: p. 46), so trust instrument frequently creates future and contingent interests in ways that may contradict with basic concepts of ownership (Yoshihisa, 2004: p. 12). Thus, determining the ownership rights of the parties is important in following purposes of determining how and what extent the beneficiary will exercise her right on benefit and who will be responsible for the damage from the property.

Ownership in Civil Code of Mongolia. The legal concepts of the ownership in modern civil law are impacted by many historical factors and it has conceptual differences even in itself. In Roman law ownership is an exclusive right, in other words only one subject can own the object at the same time, if other person holds any right on that object his right should be less than the ownership (Watkin, 1999: p. 225). Therefore, the ownership right gives to its holder the right on that property against any one which is called as right in rem, and but in the obligation relationship holder has the right only against the particular person which is called as right in persona for the illegally lost property.

According to the Civil Code of Mongolia ownership right is determined as a right of ownership to freely possess, utilize and dispose the object on his own discretion and protect from any encroachment within the limits and scope stipulated by the law without breaking other's legal rights (CCM, 2002, art.101). Moreover, a person possessing material assets for certain period of time according to the other's authorization for the interest of the that person will not be considered as a possessor. In this case the possessor will be the person who gave authorization (CCM, 2002, art.89). From the provisions it is assumed that interest in property and factual possession are not possible to be separated. It is showing traditional civil law concept of the ownership and right in rem is clearly set up in Civil Code of Mongolia.

Beneficiary and equitable interests. The main right of the beneficiary is the right to receive benefit from the trust property, which is called as an equitable

right in common law. If the trustee transfers the trust property to non bona fide purchaser, or if the trustee becomes insolvent, the beneficiary is still entitled to the property. Meanwhile if the property is lost or destroyed without fault of the trustee, the loss will be suffered by the beneficiary (Scott (3rd ed., 1967), 102). Moreover, even there where contract between settlor and professional trustee, only the beneficiary can sue for breach of contract (Rudden, 2002: p. 88).

So, the beneficiary of the trust has something more than the merely personal claims which a creditor has against his debtor, as he is an equitable owner of the trust property. In other words, beneficiaries have right in rem concerning to the trust property (Code 2005, Section 1001-1002), but creditor of the beneficiary have no right to claim on trust property, as it is not covered by the full ownership of the beneficiary. From here it is getting apparent that the right but not the property itself is included into the patrimony of the beneficiary. So, creditors of the beneficiary can apply only to the benefit. In Japan as the bill allowed to transfer right on benefit to the third person, creditors of the beneficiary can apply to the benefit. According to the UTC creditors of the beneficiary can reach beneficiary's interest in trust property in simple trust, but in case of the spendthrift trust, they can reach it only after distribution by the trustee. But this kind of restrictions are exempting the special creditors, who are titled on it by other legislations, such as bankruptcy and *other legislations* (Code 2005, Section 503). On contrary English law refused to recognize spendthrift rule for the reason that it will make risk to confuse creditor's expectations (Edward & Stockwell, 1992).

Trustee's property right and power. Trustee is a person who should follow the trust purpose and responsible before the beneficiaries for good management of the trust property (Watkin, 1999: p. 86) in modern usages of the express trust. Trustee's legal title gives right in rem on that property in other words he is entitled to protect property against anyone, including both of beneficiary and settlor (Waters, 1984: p. 4) though this right is conditioned by his duty to hold trust property separately from his own and other patrimony in order to prevent trust property from his own creditors.

In Anglo-American trust law, determination of the scope of the duties and powers of the trustee is influenced by the origin and development of the trust idea (Scott (3rd ed., 1967), 1255), consequently, trustee's duties initially were negative duties and he had no power to manage and deal with land if it is not clearly manifested by the feoffor. Therefore, courts are tending to deny trustee's powers which are not determined by the terms of the express or by necessary implication in case if such powers are not provided by the legislation. But this approach seems too inflexible and weakens the effectiveness of the trust management.

The first and the most certain way is to directly state the power in the trust instrument, which is considered a well-drawn document (Bogert 1963: p. 237). It enables trustee to freely and quickly act without delay and expense for asking authorization on the certain activity from the court. Especially, this kind of ex-

pression will be very beneficial in the case of holding trusts for business purpose. But from the other hand the possibility of the necessary actions not mentioned in the trust instrument is limited.

The next way is that the court authorizes the trustee with necessary and convenient for accomplishing trust purpose powers which are called as implied powers. For example, if a settlor created trust and transferred the real estate to the trustee to provide his family with the income from that estate, the right to lease for making income from the estate will be implied power because it is the normal way of making income from the real estate.

The third way is looking for legal power or statute power, where essential powers of the trustee are determined by the legislations, as a default rule. For example, several states of the USA have such statute provisions (Bogert & Bogert, 1978: p. 551) which can be effective way to determine trustee's power in the civil law countries with no experience of the equity jurisdiction.

Finally, as the ultimate purpose of the trust institution is to provide beneficiary with benefit, powers of the trustee should be assumed more as bundle of duties rather than rights. This principle can be seen from the provisions of the UTC, where duties and powers of the trustee are gathered in one article (Code 2005, section.8). In Japanese trust law, trustee's main duty is to administer trust property following to the principal of the trust (Parker& Mellows, 1971: p. 18). Following this provision, the law stipulates duty of loyalty, duty of care of good management more detailed than it was before.

Control over the property and liability from it. The property is always connected to the patrimony, which consists of not only right on particular property but also liabilities before creditors. Because of its dual ownership characters, it would be difficult to determine liable person when damage overwhelmed trust property. For example, according to the CCM there are several rules (CCM 2002, art.502.2) of the tort, in which not only tortfeasor but also owner or possessor are responsible for the damage from the property (CCM 2002: pp. 499-502). In this situation who will be considered as the owner, that should eliminate harm.

There are 3 different rules are applying in the Anglo-American trust law (Reabody, 1994) related to the possibility for damage from the trust property. First is the traditional rule, which is stating unlimited liability to the trustee because he is a holder of the legal title the property, consequently he should take care of the trust property in order not to harm by it. The next rule is established by the 1959 Restatement (Second) of Trusts, which limits trustee's liability to the extent of the trust assets, because it is considered unfair to impose unlimited liability to innocent trustee (Scott (3rd ed., 1967), 2251). When harm is caused in absence of the trustee's fault, it would be baseless to require any compensation, consequently all damages shall lay on the sufferer. But this problem is not only related to the damage but also environment problems, which is touching public interests (Reabody, 1994), so the issue should be dealt with more care. The third rule is the English rule which holds the beneficiary liable. The reason of that is

according to the Lord Linley's explanation in the case of *Hardon v. Ballios*, for meeting the principle of justice, that the person who gets all benefits of the property should bear its burden… (Hardoon v. Belilios, 1900) But it seems unfair to impose liability on the person who is impossible to control over the property.

Although these three approaches are diverse in significance of the interest of the trust participants and third parties, it is difficult to completely justify either of them. Thus, the legislators as well as policymakers in this field should solve this issue depending on the policy purpose and current need in legislation, in other words the problem is related to the value and balance of the various interests. In Mongolia this issue can be decided with analogue of the liability of the legal persons, in other words all liability related to the trust property should be limited by the extent of the trust property. But for protecting public interest, such as environment the first rule, which is requiring trustee to care about the trut property should apply.

Basing on the above description of the absolute ownership and trust concepts, the trust law requiring segregation of rights in trust property, gives real possibility of independence of trust property from its titled owners, consequently trust property becomes more secured from the creditors of the trustee and enables beneficiary to control the titled owners and identify extension of own rights and conditions his property on other's hand. Therefore, these rules can be good standards for all sphere in managing other's property and can fulfill prophylactic function preventing abuses of beneficiaries by the fiduciary or trustee in fiduciary relationships, such as estate entrustment, guardianship, agency, trusts dealt by non-bank financials.

Since the absolute ownership concepts in Civil Code does not recognize equitable and titled owner's rights, it is impossible to identify beneficiary's right and corresponding to it duty of trustee from the current legislation. Therefore, it is important to determine both of right *in rem* and *persona* of the beneficiary and essential duties of the trustee in fiduciary relationship for protecting bona fide participants of the relationships by legislation and courts. Trust law can fill the gaps in property management sector, that cannot be adequately addressed by the ownership and contract regulations provided by the Civil Code of Mongolia. For proper introducing trust law concept, fiduciary duty and proper remedy should be addressed.

4. Fiduciary Duty of the Trustee

Relating to current market environment of Mongolia, where economic interests are prevailing morality and confidence and introducing extensive new social orders in Mongolia unsophisticated citizens are getting to be the victims of the fraud in fiduciary relations. Because people rather act with bias through personal relationship than on legal and official instruments, which are evidenced by the Mongolian sayings such as face of the friend is hot", "the acquainted devil is

better than unfamiliar angel" expressing the mentality of the people and they still cannot completely adopt into this new environment and continuing to be cheated. In author's opinion state should not only warn them, but also should provide adequate regulations protecting fiduciary relationships. Standards related to the fiduciary duties of the Anglo-American trust can be one of the examples of such regulations since they are born from the life, but not from the state promulgations of rights.

4.1. General Understanding of the Fiduciary Duty and Its Relation to the Trust

There are plenty of services requiring fiduciary relationships, where the fiduciary can be a lawyer, an officer of the corporation as well as a trustee, consequently a beneficiary is a client, a shareholder or a beneficiary of the trust or a creditor in the bankruptcy. Here we can see that the fiduciaries are supplying the service to the users, who are benefiting from the service, which is highly influential on their personal wellbeing.

Since fiduciary relationship emerges between parties of the confidential relationship, where a trustee has a trustworthiness decision or choose action for the beneficiary, who is the original holder of the resource and lacking ability or skill to deal with it, so fiduciary law regulates standards of the transaction made by the trustee (Langbein, 1995). Although the attempts to rationalize the fiduciary duty were not successful, there are some theories to distinguish it from non-fiduciary relationship, one of which is critical resource theory (Smith, 2002), which is more concentrating on property issue.

Under this above-mentioned theory common reasons for entering into the fiduciary relationship are critical resource controlled by the beneficiary, who is vulnerable on breach of the duty by the trustee, impossibility to describe completely all the action of the duty holder /for example in selling trust property the cost, time and other conditions are depending on the trustee's discretion.

As above mentioned, that fiduciary relationship is characterizing not only trust, but also other relations, the specialty of trust is that the fiduciary duty is so high level of intense (Scott (3rd ed., 1967), 1298), that trust cannot exist without it (Alexandar, 2002). Because it is historically proven that the fiduciary duty makes the trust enforceable and the ultimate purpose of the trust reachable. Thus, before the late 14th century the uses, from which trust was born, was employed without giving trustee power of the management and trustee was only the holder of the legal title for enabling equity to monks and avoiding creditors. And from the 14th century, trustees gradually began to be bound by the management powers, where controlling the trustee by the beneficiary was almost impossible, because of absence of equitable remedy and settlors were seeking for reliable persons who can be trustees for their property, so chancellor began to impose remedy and fiduciary duty to the trustee (Hayton, Hayton, & Marshall, 1996).

Furthermore, 14th century shows popularization of the professional trustees activity due to the development of the effective management of the financial as-

sets (Langbein, 1997), where a trustee is provided with extensive power to deal with the trust property, consequently issue of the fiduciary duty became more important in fulfilling functions of protecting interest of the beneficiary, who is vulnerable in the discretion of the trustee as well as being guidance /general principle/ of the trustees behavior or conduct in trust affairs, which is impossible to be determined detail by detail by the terms of the trust.

Corresponding to these 2 functions there are two main principles in the fiduciary law, such as duty of loyalty and prudence, which are sometimes called as general duties of the trustee (Bogert, 1963: p. 336) showing that they should apply into all actions of the trustee. Because all other fiduciary duties are arisen from these duties and they are called as sub fiduciary duties such as duties of holding account and information, invest prudently, protect trust property, make trust property productive in trusts, although these duties are performing different functions. The common character of them is that they proposed to make clear and easier to control and enforce the main two fiduciary duties, duty of loyalty and duty of care, for instance duty to hold account and information gives beneficiary to be informed and able to know the course of the trust affairs, furthermore, the other duties such as to protect and to make trust property productive, minimizing expenses are making standards of fiduciary clearer. For example, under the duty of loyalty many rules related to the purchasing, investment, use of trust property is established (Restatement (Second) of Trusts, 1959, 170) as a fiduciary duty.

The two components of the fiduciary duty, such as duty of loyalty and duty of prudence are not only different, but also complementing each other, for example, the person who is performing his duty with due diligence, cannot direct his actions to personally benefit from the trust property.

Duty of loyalty. The duty of loyalty requires the trustee act honestly and with finest and undivided loyalty to trusts and standard is not level of honor of the simple officer, but punctilio of honor of the most sensitive in Riegler *v.* Riegler (Riegler v., Riegler, 1977).

The main concept of this duty is that a trustee is to refrain from benefiting through use of the trust property (Austin W. Scott (3rd ed., 1967), 1225). This rule is the strongest duty held by the trustee, as its function is not only altruistic but also prophylactic (Stikoff, 2004), which gives the complete priority to the beneficiary in case of interest conflict between the trustee and beneficiary. This duty strictly prohibit trustee to be personally included in any transaction with trust property although a trustee can do it with the permission of the court if there are no other purchaser.

The stricter character of the duty of loyalty is conditioned by the sole interest rule (Alexandar, 2002) which was justified by the fact that there was lack in the fact findings, weak mechanism and standard of the fiduciary duties of the trustee in the 17th century when this rule is established. This rule is going to be outdated due to the corporate trustee's activity development, as serving only the

sole interest of the beneficiary makes barriers to effective management of the trust, all transaction which has other interests not conflicting but supporting the best interests of the beneficiary will be avoided according to this rule. On the other hand, courts are referring to the best interest of the beneficiary when they are solving whether the transaction was for the sole interest (Alexandar, 2002).

Duty of Prudence. This duty is arisen from the discretion and manner in administration of the trust property and it is different from the duty of loyalty in that it requires active deed with highest level of skill and care. Its function is not protectionist like duty of loyalty, but enabling more effective management of trusts. Furthermore, it has very personal characteristics, because the skill and manner of every person has its own specifics, so it seems that highest level will of skill and manner will apply differently case by case. On contrary duty of loyalty is equal to all the trustee without exception.

On the other hand, duty of prudence requires from the trustee to display the skill and care which of ordinary capable and careful man would use in his own business. But the level of the skill is getting to be increased due to the professionalism and complexity of the property management development, in result of which trusts are mostly dealt by the professional trustees, who should have not only ordinary person skill, but necessarily professional skills. The requirement to the skill that it should be the same as employed by the trustee in his own business (G.G. Bogert & G.T. Bogert 1978, 244) is doubtful, because it is not guaranteed that all capable and skilled professionals are doing well in their own business (Austin W. Scott (3rd ed., 1967), 1409).

The suggestion that corporate trustees such as banks and trust companies should show more skill and diligence than natural person is reasonable, because they are professional entities organized specially for the purpose of the asset management, who has more experience, information and registered or attested by the proper authority for it. This advanced level of the professionalism is stipulated by the special legislations or regulations related to their activities (Hylton, 1992).

4.2. Instruments to Enforce the Fiduciary Duties

As a trustee has an extensive power over the trust property, future of the trust property and benefits of the beneficiaries are strictly depending on the performance of the duties by the trustee. Furthermore, the problem how to make trustee fulfill his fiduciary duty for the beneficiary is one of the main questions related to the compliance of trust and civil law. Liability of the trustee, removal of the trustee, prohibition of the certain action for the trustee, clear determination of necessary fiduciary duties, appointment of co trustees or trust protector, some or all of which can apply into the particular trust to push trustee to perform fiduciary duties by the trustees.

Removal of trustee. Trustee removal issue has two different concepts giving preference either to the settlor's intention or to the beneficiary's interests. Be-

cause right of beneficiary to remove their corporate trustee is having protectionist characteristics (Wilhelm, 2005), and on the other hand such rights of the beneficiary can break the intention of the settlor, especially when settlor has chosen the trustee for his personal characters. Thus, according to the basic concept of the trust law a trustee is not to be removed without any cause (English, The Uniform Trust Code: Significant and Policy Issues, 2002) as well as unlimited power of beneficiary to remove the trustee could break ownership division between trustee and beneficiary (Shenkmen, The Complete Book of trusts, 1997). However, the "cause" in this concept is considered by the courts as a reason related to the fitness of the individual to perform duties (Fleet National Bank's Appeal from Probate, 2004) or serious reasons such as against public policy, substantial change of the circumstances, danger to escape trust property (Claflin v, Claflin, 1889). English common law tends to give preference to beneficiary's interest over the settlor's intent, as if all beneficiaries are for the trustee's removal (Ziomek & Chester, 2002). The Restatement Third accepted both of these approaches and basing on the Claflin *v.* Claflin[21] rule that trustee can be removed by the all beneficiaries if it does not contradict with the material purpose of the trusts.

According to the UTC trustees may be removed by the court on the request from the settlor, co-trustee and beneficiary or on his own initiatives. The criteria for making decision for removal of the trustee are serious breach of the trusts, absence of cooperation among co trustees, substantial change of the circumstances, request by all beneficiaries (Code 2005, section 607).

In the case of the revocable trusts, there is no dispute as settlor is keeping control over the trusts. But in the case of the irrevocable trusts, where settlor has already lost any interest and rights (Yoshihisa, 2004: p. 37) it is somehow odd that settlor can influence on the trusts by the trustee removal. The main fiduciary relations between beneficiary and trustee, so the person who is entitled on the trustees removal issue seems to be only the beneficiary, as main reason for removal of the trustee is protecting interests of the beneficiary (Newman, 2005). For balancing of the interests of the beneficiary and intention of the settlor the purpose of the trusts, the UTC has given settlors right to state the rule related to the removal of the trustee by the trust terms, since the code did not include the removal issues into the mandatory rule (Code 2005, Section 105).

Liability of the trustee for breach of the trusts the liability of the trustee for breach of the trusts is serving two purposes, such as property compensation and prevent the trustee from self-benefiting (Shenkmen, The Complete Book of trusts 1997, 37). The damages in breach of trusts consist of loss of trusts property, benefit gained by the trustee, and lost profit to the trust property if the breach was not occurred. This compensation mechanism is reasonable both from the equity (Comments on Uniform Trust Code, sect.1011 2005) as well as tort law and, it also can be decided by the beneficiary's persona rights against trustee

[21]In this case, courts have found that if there is no good reason such as against public policy and etc., there is no necessity to terminate trusts even whole beneficiaries want so.

(Ziomek & Chester, 2002). Therefore, there is no potential difficulties with liability of the trustee even in civil law system. But problem is the extent of the trustee's liability whether the settlor can limit trustees' liability excusing the breach of trust by the trust terms which is called exculpatory provision (Bogert 1963, p. 245)

Generally, trust as a flexible instrument and proposed for the effective management, as well as trustee is not an insurer of the trust property (Hardy v. Hardy, 1964), exculpatory provision is not prohibited generally unless it is covering the willful break (Bogert, 1963: p. 245). Since exculpatory provisions relieve trustee from the liability for his wrongdoing which is affecting the beneficiary's interest, it is important that to clearly define the exceptions from the exculpatory provisions by the legislation for protecting interest of beneficiaries. Exculpatory provisions apply when there was no bad faith or reckless, indifference to the purpose or interest of the beneficiaries as well as result an abuse of confidential relationship with settlor by the trustee. As this limitation on exculpatory provision is one of the mandatory rules of the UTC, settlor cannot empower trustee on breach of trusts without limits.

Appointment of the trust protector or a co-trustee. The figure of trust protector was used in England for reassurance by the settlor about the powers of the trustee entered into the American trust law with offshore jurisdiction, as an instrument protect assets from the settlors' creditors (Sterk, 2006). But the status of the protector is diverse, for instance, the Belize statute stated that protector owes fiduciary duty to the beneficiary, on contrary, in the British Virginia Islands the protectors are free from the liability before the beneficiary. It is showing that status of the trust protector is very disputable and vague so it would arise difficulties in determining or distinguishing rights and duties of the participant in the trusts.

Appointing co-trustees can be useful for controlling the trustee by division of the function (Ziomek & Chester, 2002) which will not only protect from abuses of the trustees, it also can serve as distribution of work among trustees exploiting more special skills of each trustee. But here the main attention should be paid on the division of the responsibilities among them, otherwise all other trustees who are not in charge of the deed will be responsible for others actions, because it is a general rule that trustees are acting collectively and responding it jointly. (Code 2005, Section 703(f), (h), (g))

Court role and other methods to enforce fiduciary duties. The methods /techniques/ to enforce trustees' fiduciary duties are not limited by the certain instruments, but these above-mentioned ways are very reasonable in trust. But there are other effective and necessary instruments serving for this purpose partly, such as court intervention, clear and detail description of the sub fiduciary duties and others which are applying more narrowly, for example trustees' bonds. These rules are having general characteristics that they can be used almost for all civil transactions as a method for enforcement of the obligation.

Court was playing important role in the trust inherently and historically (Sterk, 2006), since fiduciary duties began to be enforced by the chancery for protecting the beneficiaries from the abuse of the trustee (Edward & Stockwell, 1992). The most important role of the courts is imposing constructive trusts in case of the breach of trusts for recovering equity and justice in property and fiduciary relationship.

Since the above-described instrument are focusing on different issues and giving impact on the different factors of the trusts, settlor and beneficiaries can choose these instruments concerning the purpose of the trusts, capacity of the trustee, real interest of the beneficiary and environment in which trusts functioning.

From the above-described summary of the fiduciary duty it can be concluded that absence of fiduciary legislation is one of the reasons of increased abuses in Mongolia, so this chapter tried to give general idea about the fiduciary duties and way to enforce them on the example of the USA and English fiduciary norms. Mongolia is not adopting such fiduciary norms because of the considerations that these duties are impossible to be determined by the statute legislation and enforced by the courts. But it cannot justify absence legal regulation and protection of fiduciary relationship, where such relationship is already existing in society and becoming start point of the cheating. Since legal regulation of fiduciary duties fulfills both of altruistic and prophylactic function, standards on fiduciary duties will be useful in not only prevention of the unsophisticated citizens, but also establishing order in informal transactions. Historically court plays important role in protection of fiduciary relationships of trusts providing constructive trusts as a remedy in breach of trusts, which is consequently developed as a remedial system to recover justice in both of property and fiduciary relationship to prevent unjust enrichment.

5. Remedy against Breach of Trust and Fiduciary Duty

Remedial issue is more concerned with money compensation, causation of damage and faulty action (inaction) of the defendant within the contract and tort liability in Mongolia, however there is need for looking at this issue from the other angle. Thus, Civil Code of Mongolia also provides some remedy mechanisms within the vindicate right of the owner, transaction validity and unjust enrichment which have diverse characteristics. The titled owners and possessors are protected by these mechanisms relatively, but the other participants such as equitable owners, who have no legal title but real justifiable interests in particular property are not protected by law. The following example cases are most familiar and problematic issues needed adequate remedial mechanism.

Example 1. P (plaintiff) gave to his friend 10,000 dollars (which was planned for microbus for his private business need) to D (Defendant) who promised him to return it after a week. D invested this money for the profitable business instead of returning it to the P and decided not to return it until court decision is

taken. P was asking to him to return him back money trying not to go the court, because he did not want to breach their friendship. Finally, after 2 years D sued and the Court has provided his claim within the amount of the money which he transferred to the D as damage. But P's real loss is more than 10,000, if he could buy a bus 2 years ago, he could earn money, the next problem is no the bus costs not 10,000 but 12,000. On the other hand, D has gained 4000 from his investment using P s money during 2 years period.

Example 2. P (plaintiff) has given money to the Loan & Saving Cooperative" D" (defendant), the director of the D has spent all this money in Casino and went bankrupt. P cannot take any from D, but he knows all these money went to the casino, but he cannot take it from casino since he is not employed by such instruments according to the current law or in best cases it would take very round way to reach the right to claim back the funds from the Casino.

This issue is resolved in common law system by constructive trust remedy which is an instrument for providing right to reclaim back the property from other's illegal possession and preventing unjust enrichment. In author's opinion, constructive trust gives more systematical approach in providing remedy for unjust enrichment and breach of confidential relationship, which is conditioned by its equity mechanism of court. Moreover, the overall effect and function of employment of constructive trust on society is attracting more interest. This analysis will be done through a comparative description of constructive trusts with careful accounts of differences in Mongolian legal system, ownership and sources of law.

5.1. Constructive Trust as a Remedy in Common Law

Constructive trust is understood as a fictional trust constructed by the court for working out justice (Bogert, 1963: p. 208). But according to the Scott, constructive trust is a remedy for "construing" a trust relationship (Scott (3rd ed., 1967), 3410), and he has mentioned that constructive trust has no similar characteristics of the express trust, as a management instrument. From these descriptions it is becoming clearer that constructive trust is a remedial instrument but not regulatory mechanism, which is the core of the express trust. This remedial instrument is called as "constructive trusts" because of its origin from the trusts, in which the court imposed "trusts" as a remedy for breach of fiduciary duty (Mowbray, 1964) and now its usages extended to the unjust enrichment (Sherwin, 2001).

In common law courts, the main purpose of the constructive trusts is to recover justice in property relationship is reached by providing a plaintiff with the tracing right and taking away gains of the defendant preventing unjust enrichment (Duggan, 2005). Since civil law of Mongolia does not recognize these tools of common law it is worth to discuss them for finding out their advantages by comparing them to the vindicate right and unjust enrichment provisions of Mongolia.

Tracing right of the plaintiff. By the constructive trusts the plaintiff is receiving right to trace the specific property until it is obtained by the bona fide purchaser. Plaintiff can reach exchanged form of the lost property from the defendant or take it from the non bona fide subsequent transferees, using his tracing right, however plaintiff should identify the property in both cases.

However original owner's property right is protected by the traditional principle of the property rights" no one can transfer greater title than he owns" (Ellis, 1980), a bona fide purchaser is the exemption from the rule, where good faith of the bona fide purchaser gives him right against titled owner of the property. This exception is justified by the commercial needs in security of the transactions and good faith is related to the value, place, time and other conditions of the transfers. According to the general trust principal identity of the property is possible even it is money mixed with defendant's money in one bank account or fund (Waters, 1996), which is unknown remedy in civil law of roman tradition.

Tracing right provided by the constructive trusts give plaintiff following advantages, such as right to trace actual property against non bona acquirer, priority over other creditors of the defendant (Wonnel, 1996), as an equitable owner, reach all gains taken by defendant using plaintiff's property (Long, 2006), since the all gains using trust property is considered trust property.

Unjust enrichment as a property remedial system in common law. Not only opinions of the scholars but also judicial practice is very diverse in the grounds for the relief on constructive trusts, for example according to the Bogert the ground for every constructive trust is fraud, unconscionable and unethical conduct, however Scott, on the contrary, considers not only fraud but also mistakes can be a reason to impose a constructive trust. Moreover, Hayton and Marshall noted that constructive trusts are an equitable instrument which will not allow a statute law to be used as an instrument of fraud (Hayton, Hayton, & Marshall, 1996: p. 330).

But all of them consider that the main ground of imposing constructive trusts is unjust enrichment, which covers all of above-mentioned categories. So, it is considered as the most important function of the constructive trusts because of two reasons: 1) plaintiff should be compensated for losses caused by the defendant (Stephan, 2003); 2) defendant should not be permitted to profit from loss he was imposed on (Waters, 1996). These issues are not concerned well in general civil liability, which focuses on harm to the plaintiff and its causation to the fault of the defendant.

5.2. Property Remedial System in Mongolia

Historical background and general principle. Historically, the property law issue is one of the weak points in Mongolia, since the understanding of the property was quite different from the settled society due to its nomadic life. Most of property relationships were regulated by customary norms, although there were some legal norms in property for certification of customs (Munkhjargal,

2003: p. 31). For example, in 12 the century, "Ich yasa"[22] (Riasanovsky, 1965) contained provisions about right and duties of the possessor of the stolen and lost cattle and original owner, and bona fide purchaser, moreover in 17th century "Khalkha Juram" also regulated relationship between possessor of lost cattle and original owner.

More systematic approach in protection of the property right is occurred from the first Civil Code of 1926 and following Codes of 1952, 1964. 1994 and 2002, which have their own specific characteristics attracting the social changes and state policy in the property sphere. For instance, Civil Code 1994 was protecting absolute right of the original owner against bona fide possessor in article 154, on contrary Civil Code 2002 recognizes rights of the bona fide possessor against even the original owner (CCM 2002, art.90). This is showing that legislation is changed tending encourage market transactions guarantee fair participants. The general civil law principles, such as sanctity of the property, recovering of breached right, and court protection are recognized by the Civil Code. The Civil Code methods to protect property, such as Owner's right to claim own asset from other's illegal possession (CCM 2002, art.106.1) (*revindication*), to recognize right (admitting right) (CCM 2002, art.9.4.1), to stop action breaking the rights (CCM 2002, 106.2) (*negatory*) and recover in original conditions (halting acts violating the rights and restoring the pre-violation conditions) (CCM 2002, art.9.4.2) through compensation of damage are applying to the people who had already legal title on the particular property.

Currently, the right to require specific property from other's possession is regulated by two different institutions in Mongolia according to the civil law systematization: vindicate claim, which is included in property relations and obligation from the unjustified enrichment, which is based on law of obligation (Oyuntungalag 2020).

Vindicate claim of owners. This right is considered as property claim, where legal owner of the property has a right to claim back the property from other's illegal possession, which is considered the most important claim (Kayut, 2006: p. 426) and the precondition for the claim are that the plaintiff is the owner of the property, defendant is the possessor of the property and the possessor has no legal title on the property (CCM 2002, art.425). Whether "fair" possessor has this right is not clear from the new legislative description, legal owner is a person who has legal title on that property, but "fair" possessor is the person who lacks the title, but obtained the property in legal way.

The analysis of ownership and possession claims under the Civil Code can be complicated because of its conflicted norms and mixture of the different categories such as "legal" and "fair" owner. For example, Article 90.1 of the Code stipulates that "A person, legally possessing an asset or having definite possession entitlement on the property, shall be fair possessor", Article 93.1 "A property shall not be demanded from its legal possessor", Article 94.1 "A fair possessor

[22]Great Yasa" is to be said as customary law of Chingiz Khan, which is the best known and most ancient of Mongol Laws.

not entitled on such possession or lost the right shall be responsible to the authorized person to return the property". These provisions are from one side clearly mixing the "legal" and "fair" possessor, but from the other side they are stipulating different right and duties of each type of possessors. The differences between "legal" and "fair" possessors are seen in many articles of the Code, the main difference related to the property claim right is mentioned here. So, it is very important to have at least theoretically and logically acceptable clear distinction between legal or titled owner and fair or bona fide possessor.

Unjustified enrichment the obligations arisen from the unjustified enrichment are divided into three types, such obligation from the possession and acquire of other's property groundlessly (CCM 2002, art.492), obligation from the illegal disposition of other's property (CCM 2002, art.495), enrichment on other's expenses and savings of own funds (CCM 2002, art.496) (the person who is benefited from other's disbursement into his obligation or other's contribution into his property).

Obligations from the possession and acquire other's property groundlessly, which arise from 3 following grounds such transfer in absence of obligation, transfer on reliance, transfer under undue influence.

Transfer in absence of obligation is described in the Civil Code of Mongolia as "if a plaintiff transferred the property to the third person to perform obligation to his obligor, where no obligation is existed and serious dispute makes real obligor unable to claim". This provision seems too strict, since the plaintiff need to prove impossibility of his obligor to claim the property. On the other hand, this provision is breaching the principle that "this thing is mine…therefore you must give it to me" (Smith, 2001). **Transfer on reliance** is described in the code as "if a person transferred the property desiring another to act or intact, but the desired result is not reached or inconsistent with his desire. However, this provision seems one of important issues in current economic situation, where most of transaction are carried in informal way and in absence of sufficient regulation for preventing fiduciary relationship, but courts are not using this article due to their preference on documented or formal relationship[23]. **Transfer under undue influence** is described as "if the property is transferred because of violation and threatening". The problem is whether the plaintiff, who did not transfer the property can claim back the property. For protecting such person's right, it

[23]Spouses in de facto marriage established Company A, where wife's father, wife and husband have equal share and also Company B where wife and husband has equal share. After 7 years cohabitation spouses are separated. But in separation they agreed on followings orally: wife promised to help him obtain visa and go to USA and give husband 26,000 USA dollars; husband signed on the company documents to transfer his share of Company A to wife's brother and of Company B to wife, where his main purpose was to go to USA with help of wife. After giving agreed sum wife has canceled all connection with husband. Husband claimed to the court to recognize his right in the Company A and B, because he the basis for the transfer of the shares where the promise of the wife which is not fulfilled. Both of courts of first instance and appeal refused his claim, basing on the that husband has given his consent on transfer of the Companies' shares, since he has duly signed the necessary documents. In this case if the court had alternatives to solve the issue, where the results are different. If the court considered that the husband's property right is really breached, it could use the article about the unjust enrichment or articles about invalid transactions.

would be desirable to issue Supreme court interpretation recognizing this article to cover such plaintiff's right.

Scope of claimed property under unjustified enrichment obligation consists of transferred property, income and benefit from the property, if the property is not existing, other things taken in exchange of the property, costs of the property if the property is impossible to be returned. Plaintiff can trace property from the third party who received free of charge. It is also one of the points which requires judicial interpretation that inadequate remedy is considered as equal to free of charge possession.

Illegal disposition without consent of the legal owner or possessor is occurred in following forms using other' property, mixing it with other substances, consolidating, reprocessing. In this form of obligational remedy, the plaintiff has only right on compensation of the damage and income from the disposition, but no right on the property claim (vindication), however the property can be saved even in the disposition of the above noted forms of disposition. The exemption from the unjustified enrichment is the no knowledge about the lack of the right without any fault, on contrary his knowledge about the lack of right and intention will give right to the plaintiff to demand profit over the damage.

The person who benefited from other's disbursement into his obligation or contribution to his property such as the defendant exempted from the debt because the plaintiff has paid, or t enriched because the plaintiff contributed to his property. Consequence is reimbursement of the plaintiff's expenses.

From the legislative description of the above-described unjustified enrichment, the consequences are diverse as follows depending on the forms of the enrichment and availability of restitution, such as returning property, compensation of damage and reimbursement.

These unjustified enrichment rules are showing that the Code concerns rather plaintiff's loss rather defendants gain obtained through unjust enrichment, that can be result of the strict definition of the sphere of the unjust enrichment rule. Sphere of unjustified enrichment seems too narrow from its legislative formulation, however in practice its applicable score is not limited by only these three conditions.

5.3. Judicial Power in Recovering Justice in Property Relationship

The main instrument to recover fairness and justice in property relationship is of course court, whose decision is based on the law and factual ground. Since court is the last and most powerful source to protect property rights and recover violated right it is necessary to look at the judicial power in this respect. As it is mentioned before constructive trust remedy is based on the equity court decision for recovering justice and equity.

In Mongolian system, courts have no power of lawmaking, therefore it reaches justice by its decision in individual cases, as the guarantee of justice ([Law on Court 2020, art.4). Courts are obliged to be subordinated to only law ([Law on

Court 2020), so judges are making their decision strictly within the framework of the legislation (Barne, 2005). But it does not mean that courts cannot make any decision if there is no legislation on the matters, since courts are obliged to solve the claims from the citizens and prohibited not to resolve cases by reason, has absence of legal norms and principles. In Mongolian jurisprudence courts cannot refuse to use the laws which they consider unjust or inconsistent with moral norms. These rules demonstrate the hierarchy of relation between the court power and positive law norms expressing the absence of the legislative power in the court.

While courts should more depend on the legal principles specially when quality of the legislation is questionable. According to the civil procedure rules the laws should be applied by the court in hierarchical order, such as direct provisions of civil legislation, provisions regulating similar relationship, principle stipulated by Civil Code (equal rights and autonomy of the participants, sanctity of the property, contract freedom, noninterference into the personal affairs, exercising civil right and obligations without limitation, recovering of breached right, and court protection), constitutional principles (content, general principle and concept of the Constitution), international standards and customs in relation where foreign element is involved.

Using general legal principles and theory will close the possibility of circumvention of laws and making court decision more logical and understandable to the public. Therefore, understanding of equity principle and theoretical basis of property relationship would improve protection of property interest in civil law system.

6. Conclusion

In Mongolian law, civil remedy is arisen from the contract and tort. For imposing civil liability causation between fault of the defendant and damage to the plaintiff is required, whereas damage is more related to loss to the plaintiff. But constructive trust is more flexible remedy, since there is not necessary of the fault and causation, the concentration is given on the loss from the plaintiff and unjust enrichment to the defendant, so this principle should be taken into the account in both of judicial and legislative decision making for protecting property right of the bona fide participants and preventing unjust enrichment. From comparison of the constructive trust and remedial system of Mongolia, the following issues are needed more clarification for development of Mongolian civil remedial system, which can guarantee protection of property right of the participants of commercial and civil relationship.

Sphere of unjustified enrichment law should be broadened for giving courts to make justice in property relationship, prevent unjust result using legal tools or breaching fiduciary relationship. Not only titled owner but bona fide (equitable) owners should be protected by the courts. The people who have no title but equitable right (who are equitable owners in common law) cannot protect their

right applying to current provisions related to the vindicate right and unjustified enrichment.

The status of bona-fide purchaser: however, the new code provisions which are giving to the purchaser with charge more preference are consistent with the international standard, but other factors should be taken into the account in deciding relationship between plaintiff's and bona fide purchaser's property right, such as place and costs of the purchase, position of the seller. Obtaining property with charge cannot be the only requirement for determining good faith.

It is impossible to determine all details of the civil relationships, since they are changing constantly, so the code should give only set of standards and principles for making justice decision by the court in broad range of relationships. But for example, unjust enrichment provisions of the new Civil Code are showing opposite position comparing to the old law provisions, which is clarifying situation for unjust enrichment from one side, but narrowing applicable area from the other side.

With adaptation of the new Constitution of 1992 granting private ownership right, the legal reform in the sphere of the commercial and economic sphere has begun. Although the government is making effort to build necessary institutional and legal structure for the development of market economy and providing human right with the assistance of the international donors and organizations, people are still suffering many problems with current legislation, such as lack of harmonization, no implementation in legislations. One of these vital and most important issues seeking proper regulation and protection is the property management and fraud issue, which is connected to many aspects of the civil, commercial and civil procedure law.

From this research it is recognized that trust institution is closely connected to institutional and legal structure of the particular country and is being developed on specific path depending on economic and commercial condition, level of commercial and legal culture. Therefore, direct transplant of common law trust institutions in property management and commercial sphere of Mongolia is problematic due to its young and undeveloped economy, lack of legal and institutional infrastructure, especially law on the property management and financial activities as well as bankruptcy, civil procedure, contract enforcement is very incoherent to each other and weak.

But fundamental principles of the trusts related to the holding other's property and protecting fiduciary relationship can help to address the issues which are not regulated or protected by the strict civil law rules of Mongolian legislation by following ways. Standards on holding and administering trust property, such as recordkeeping, accounting, separation of the property from the trustee's patrimony, prohibition of set off will be useful and practical to control and benefit from the property under other's management and enhance the possibility to identify the scope of the property of the beneficiaries in civil relationships having similar characteristics to the trusts.

The rules on identifying scope of trust property will make proof of own rights and interest in the particular property easier and control trustee. Rules related to the trustee's fiduciary duties can be a guideline to the parties of including into the relationship based on the confidence, on the other hand it fulfills both of altruistic and prophylactic functions, which will be helpful to block the intentions to benefit using other's confidence.

Finally, the courts as a last recourse to recover broken rights of the citizens should be more implemented necessary for this tool. These tools are of course proper legislations, principles of justice and equity, which is not actively used in civil law courts. However, court is recognized by the law as a guarantee of justice, Mongolian courts are criticized by both of foreign and Mongolian experts as a stiff in recovering justice and equity approaches because of its excessive formalism and lack of interpretation skill.

Titled owners right is relatively protected under the current civil law mechanism on tort and contract liability, property claim and unjust enrichment, but the other participants, such as beneficial owners and spouses in factual relationship are not protected by the legislation. The above noted trust principles, especially the constructive trust remedy focusing on loss of plaintiff and benefit of defendant gives more possibility to these participants of the civil relationships.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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