

Trusts and Choice of Law in South Korea: The Case for Adopting the Hague Trusts Convention

Ying Khai Liew*

Abstract

Despite having recognised the trust for 60 years now, South Korean law does not contain specific choice of law rules applicable to trusts. This is a regrettable state of affairs in our increasingly globalised world, where incidences of cross-border trust disputes will only be on the rise. This paper argues that the lack of a dedicated set of choice of law rules relating to trusts causes much confusion and uncertainty, not only as to how South Korean courts would characterise a trust dispute and the inconsistent connecting factors which would apply, but also in relation to the scope of the applicable choice of law rules (whichever they may be) and the special difficulties raised by a breach of trust claim. All these difficulties derogate from a proper recognition of the trust as a distinctive legal device, and fail properly to protect the autonomy and legitimate expectations of the parties. The paper suggests that these problems would easily fall away if the South Korean legislature adopts the Hague Trusts Convention.

KEYWORDS: Private International Law, Trusts, Choice of Law, South Korea, Hague Trusts Convention

Manuscript received: Dec. 28, 2020; review completed: Feb. 9, 2021; accepted: Feb. 9, 2021.

I. Introduction

The Hague Convention on the Law Applicable to Trusts and on their Recognition ('the Convention') came into existence on 1 July 1985. As its title indicates, the Convention provides rules for determining the applicable law to trusts. According to David Hayton, who was the head of the UK

* Associate Professor in Law, University of Melbourne. I thank Ying-Chieh Wu and Richard Garnett for comments on an earlier draft. The present author is not a native Korean speaker, and this article has been written based on materials available in English.

Delegation for the Hague Conference that adopted the Convention, the need for producing a convention relating to trusts in the private international law context was raised by civil law, and not common law jurisdictions, in particular those whose domestic law had no concept equivalent to trusts.¹⁾ The reason for this is obvious: those jurisdictions needed guidance on how to deal with trusts in cross-border disputes. Surprisingly, however, there are few civilian jurisdictions—indeed, few jurisdictions at all—in which the Convention is operative.²⁾ Insofar as common law jurisdictions which have not adopted the Convention are concerned, this is unsurprising: trusts choice of law rules at common law are substantively similar (although not identical) to the provisions in the Convention.³⁾ The lack of interest of civilian jurisdictions which do not have domestic trust laws is also unsurprising: unless they deal regularly with trust issues which arise in cross-border litigation—an unlikely situation in a non-trust jurisdiction—there is no real impetus to consider adopting the Convention.

In contrast, the lack of enthusiasm of civilian jurisdictions which have long accepted the trust, such as South Korea, is a source of great surprise. Despite having recognised the trust for 60 years now, South Korean law does not contain specific choice of law rules applicable to trusts. In an increasingly globalised world where cross-border activity will only increase, this lacuna in the law may be thought to be surprising—indeed, even troubling.

One reason for this lacuna may be sourced in the thinking that existing South Korean private international law rules are more than capable of

1) David Hayton, “Trusts” in *Private International Law*, in 366 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 58 (The Hague Acad. of Int’l L. ed., 2013).

2) Jurisdictions where the Convention is in force are: Australia, Canada, Hong Kong, Malta, Cyprus, and the UK (jurisdictions with common law influences); Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Panama, San Marino, and Switzerland (jurisdictions with civil law influences). The Convention has been signed, but not ratified, by France and the United States. An up-to-date status table can be found at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59>.

3) See discussion in Richard Garnett, *Identifying an Asia-Pacific Private International Law of Trusts*, in *ASIA-PACIFIC TRUSTS LAW: THEORY AND PRACTICE IN CONTEXT* (Ying Khai Liew & Matthew Harding eds., forthcoming 2021); David Hayton, *Reflections on The Hague Trusts Convention After 30 Years*, 12 J. OF PRIV INT’L L. 1, 2 (2016).

dealing adequately with trusts-related choice of law issues. After all, private international law and domestic legal categories of case need not perfectly mirror one another; therefore, it might be thought that what domestic law recognises as a 'trust' can easily be dealt with by existing choice of law categories such as contract, agency, property, tort, unjust enrichment, and so on.

This paper argues to the contrary: that the existing South Korean choice of law rules cannot deal competently with cross-border trust disputes, at least without distorting a proper understanding of trusts law and disappointing the autonomy and legitimate expectations of parties; and therefore that serious consideration ought to be given to adopting the Convention.

The structure of the paper is as follows. Part 2 sets out two yardsticks for evaluating the state of South Korean choice of law rules in relation to trusts, namely the extent to which they recognise and respect the distinctiveness of the trust, and the extent to which they protect the autonomy and legitimate expectations of the parties. With the benefit of these two yardsticks, Parts 3-6 then subjects South Korean choice of law rules to scrutiny, each Part examining a specific area where the law would face difficulties. Those areas are: characterisation of a trust dispute, the connecting factors to be applied, the scope or extent to which the choice of law rules apply to the trust dispute, and specific issues arising in a breach of trust claim. Part 7 concludes.

II. Yardsticks

It is trite that the choice of law rules which apply to a cross-border dispute are rules of the *lex fori*: it is *the forum's* law which guides the selection of the applicable law.⁴⁾ Therefore, on one view at least, the mere fact that South Korean choice of law rules differ from those adopted by other jurisdictions is neither here nor there: variances in the laws of

4) Christopher Forsyth, *Characterisation Revisited: An Essay in the Theory of the English Conflict of Laws*, 114 L. Q. REV. 141, 153 (1998) (citing OTTO KAHN-FREUND, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW 231 (1976)).

different jurisdictions on the same issue is commonplace and to be expected in any area of law. In the trusts context, this view would suggest that nothing ought to be made of the fact that South Korean private international law deals with trust disputes differently than under the Convention. But adopting such a narrow view causes difficulties, as this paper seeks to demonstrate.

In order properly to explain the point, however, it is necessary to establish two yardsticks against which the current South Korean choice of law rules can be assessed. The first yardstick is the extent to which those rules maintain and promote trusts as a distinctive legal device. The second yardstick is the extent to which those rules protect and enhance the autonomy and legitimate expectations of parties.

1. *The Distinctiveness of the Trust*

According to Art 2 of the 2011 South Korean Trust Act ('the Trust Act'),⁵⁾ a 'trust' means 'a legal relation that a person who creates a trust [the settlor] transfers a specific piece of property ... to a person who accepts the trust [the trustee], establishes a security right or makes any other disposition, and requires the trustee to manage, dispose of, operate, or develop such property or engage in other necessary conduct to fulfil the purpose of the trust, for the benefit of a specific person [the beneficiary] or for a specific purpose, based on a confidence relation between [the settlor] and [the trustee].'⁶⁾ Although this definition might suggest that a *transfer* of property is an prerequisite for a valid trust to be created, this must be read in the light of Art 3, which prescribes three different methods of creating a trust. In relation to the first method, 'a contract between the [settlor] and the trustee' (Art 3(1)), it remains an open question in South Korea whether a *trust* (as opposed to a mere contract) exists before the settlor transfers the

5) Sintakbeob [Trust Act], Act No. 10924, July 25, 2011, amended by Act No. 15022, Oct. 31, 2017 (S. Kor.). For an excellent overview of this act, see Ying-Chieh Wu, *Trust Law in South Korea: Developments and Challenges*, in TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 46 (Lusina Ho & Rebecca Lee eds., 2013).

6) English translations of the Trust Act in this paper are sourced from Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/main.do (search required).

trust property to the trustee;⁷⁾ but it is at least clear that the other two methods—by way of a will (Art 3(2)) or self-declaration (Art 3(3)) do not require a transfer for a trust to exist.

The foregoing three methods of creating a trust reflect those found in jurisdictions with a common law heritage. Indeed, this is unsurprising, given the historical passage through which the trust was introduced in South Korea. As Ying-Chieh Wu notes,⁸⁾ the Trust Act 1961—the 2011 Trust Act's predecessor—drew upon the Japanese Trust Act 1922; and the 1922 Act made important references to English law. Moreover, the reform committee whose work led to the enacting of the 2011 Trust Act studied not only the (reformed) 2006 Japanese Trust Act, but also English trust principles, the US Uniform Trust Code, and the Restatement (Third) of Trusts.⁹⁾ The upshot is that many of the specific provisions found in the 2011 Trust Act, for example concerning the independence of trust property and the concept of a fund (Chapter III), and the rights and duties of trustees (Chapter IV) and beneficiaries (Chapter V), bear close resemblance to those rules typically found in Anglo-Commonwealth law.

But a crucial and as yet unresolved matter in South Korea concerns how the trust is best conceptualised. At common law, although the precise answer remains elusive, it is beyond doubt that trusts are not part of contract law, property law, or any other legal institution *per se*: the trust is an unique institution.¹⁰⁾ One of the reasons why common lawyers are comfortable with what might seem an ambivalent position is found in the historical development of the trust. The trust is the product of the English Court of Chancery, in particular the body of rules called 'Equity', which was developed in order to soften the rough edges of 'common law' rules.¹¹⁾ Equity and common law, therefore, work in tandem, which means that the concept of 'ownership' can simultaneously exist at both levels without contradiction.

7) *But see* text accompanying *infra* note 92.

8) Wu, *supra* note 5, at 48.

9) *Id.* at 46-48.

10) Peter Jaffey, *Explaining the Trust*, 131 L. Q. REV. 377 (2015).

11) See 3 Frederic William Maitland, *The Unincorporate Body*, in THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND (H. A. L. Fisher ed., 1911).

This concept of ‘dual ownership’, which avoids the need strictly to pigeon-hole the trust as ‘contract’, ‘property’, or other institution, is radically different from civilian legal systems, where ownership is an absolute concept. Strict categorisation is part of the ‘DNA’ of these jurisdictions: as Wu explains, the infrastructure of civilian private law ‘is rooted in the Roman-Germanic basis, which adopts dichotomous system in respect of the private law dealing with property: the law of property and that of obligation.’¹²⁾ Thus, the prevailing view in South Korea is that trusts are understood as a type of contract.¹³⁾

However, as Wu has demonstrated in a thorough consideration of this point, the contractual understanding of the trust is flawed.¹⁴⁾ Two reasons for this conclusion can be highlighted for present purposes. The first is that, as observed earlier, a ‘trust contract’ is but one way to create a trust; where a trust is created by will or by self-declaration, it is absolutely clear that there is no contract.¹⁵⁾ A trust created by will is created when the will takes effect, which is when the testator dies, and so there is no counter-party for a valid contract;¹⁶⁾ and as to self-declared trusts, one cannot contract with oneself. Evidently, a trust is not *simply* a subset of contract law, although it may reflect certain features of contract law. The second reason can be found through a careful examination of the Trust Act, in which we can identify numerous mandatory and default rules which do not apply to contracts in general. To cite but a few, the Trust Act contains mandatory provisions such as those concerning the independence of the trust fund,¹⁷⁾ rights of beneficiaries which cannot be excluded by the trust deed,¹⁸⁾ circumstances

12) Ying-Chieh Wu, *East Asian Trusts at the Crossroads*, 10 NAT’L TAIWAN UNIV. L. REV. 79, 81 (2015).

13) *Id.*

14) *Id.*

15) *Id.* at 84-85.

16) See Gukjesabeob [Act on Private International Law], *wholly amended by* Act No. 6465, Apr. 7, 2001, *amended by* Act No. 10629, May 19, 2011, Art. 49 (S. Kor.).

17) Sintakbeob [Trust Act], Act No. 10924, July 25, 2011, *amended by* Act No. 15022, Oct. 31, 2017, Arts. 22-27 (S. Kor.).

18) *Id.* Art. 61.

under which a trust is enforceable against third parties,¹⁹⁾ and circumstances in which a trust terminates;²⁰⁾ it also contains default rules such as the detailed provisions concerning trustees' duties²¹⁾ and beneficiaries' rights.²²⁾ These comprehensive rules are unique to trusts, which indicates that the trust is a distinctive legal institution.²³⁾

However, even if the distinctiveness of the trust institution is accepted, one might object that, *for the purposes of private international law*, whether the trust is a distinctive legal institution is irrelevant. The reason this objection might be raised is that the exercise of characterisation for private international law purposes, while undertaken according to the *lex fori*, need not be identical to the characterisation of domestic legal institutions:²⁴⁾ characterisation is a *functional* exercise.²⁵⁾ As Lord Hoffmann held in *Wight v Eckhardt Marine GmbH*,²⁶⁾ 'the purpose of the conflicts taxonomy is to identify the most appropriate law. This meant that one has to look at the substance of the issue rather than the formal clothes in which it may be dressed.' The possible objection, therefore, is that the uniqueness of the trust in domestic law does not itself indicate that South Korean ought to develop choice of law rules which are uniquely applicable to trusts.

It is submitted, however, that there is nothing to this objection, for 'although characterisation in private international law need not be the mirror image of domestic categories of case, the classifications under domestic law exert a highly persuasive influence at the conflicts level.'²⁷⁾ For

19) *Id.* Art. 4 para. 1.

20) *Id.* Art. 98.

21) *Id.* chapter 6.

22) *Id.* chapter 5.

23) For the purposes of this paper, it is not necessary to speculate how best the trust should be conceptualised in South Korea. But note that Wu suggests that the doctrine of separate patrimony provides the best plausible analysis: see Wu, *supra* note 12.

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

25) See, e.g., Weizuo Chen & Gerald Goldstein, *The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law*, 13 J. OF PRIV. INT'L L. 411, 421 (2017); Walter Wheeler Cook, *Logical and Legal Bases of Conflict of Laws*, 33 YALE L. J. 457, 458-470 (1923).

26) *Wight v. Eckhardt Marine GmbH* [2003] UKPC 37, [12].

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

one thing, because it is the forum's courts which determine which choice of law rules apply to any dispute, judges in determining those rules do not—and, indeed, cannot—decide that question being completely detached from the domestic law's characterisation of the claim in question. For another, the choice of law rules which the forum courts apply have the real possibility of directly affecting the health or status of domestic law. This last-mentioned point is particularly pertinent where the domestic law in question is capable of facilitating cross-border activity. It is obvious that the trust is not a *purely* domestic or domestically-g geared device, even in South Korea. As Wu notes,²⁸⁾ one of the reasons why the South Korean government saw it necessary to modernise the original 1961 Trust Act²⁹⁾—which led to the 2011 Trust Act—was because of the increased 'demand for financial investment and asset management', matters which, for obvious reasons, attracts cross-border activity. With a vigorous set of trusts choice of law rules, South Korean private international law is capable of facilitating and encouraging the development of the outward-facing aspects of trusts law, through ensuring certainty and predictability where cross-border trust disputes occur. The upshot is likely to be increased confidence in and usage of South Korean trust law and the increased attracting of foreign investments into South Korea.

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

2. *Autonomy and Legitimate Expectations*

It is obvious that the trust, like contract, is a facilitative device made available for people to 'realis[e] their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law'.³⁰⁾ The provision of such private law facilitative devices is an expression of the state's commitment to recognising and protecting

28) Wu, *supra* note 5, at 47.

29) Act No. 900 of 1961 (S. Kor.).

30) HLA HART, *THE CONCEPT OF LAW*, 27-28 (2nd ed. 2006).

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

The enhancement of personal autonomy is a norm which underlies not only the domestic law of facilitative devices: it is also mirrored in the choice of law rules which relate to those facilitative devices. For example, Art 25(1) of the South Korean Private International Law Act ('PILA')³¹⁾ allows contracting parties expressly or impliedly to choose the governing law of the contract; and a similar provision is found in Art 6 of the Convention in relation to an express or implied choice by a settlor.

The same is equally true of the protection of legitimate expectations: it is not only a feature of domestic law but also of choice of law rules. In 1945, Max Rheinstein wrote an influential paper on tort choice of law rules;³²⁾ and in the course of his discussion he made the important point that the protection of legitimate expectations is one of the main rationales of choice of law rules.³³⁾ He clarified that this rationale is not exclusive to the private international law arena; it underlies many substantive legal practices and rules. For example, it explains why consistency in judicial decisions is so important to the protection of business or commercial practices;³⁴⁾ it informs the institution of contract, particularly in the credit-based economy of the modern day, which allows investors and creditors legitimately to expect that debtors will use proper use of borrowed money and to receive repayment;³⁵⁾ and to the same extent it explains the law of trusts and wills, which are special applications of the same principle.³⁶⁾ Rheinstein

31) Act No. 6465, Apr. 7, 2011 (S. Kor.). Translations of the PILA are taken from Kwang-Hyun Suk, *New Conflict of Laws Act of the Republic of Korea* 1 J. KOREAN L. 197 (2001).

32) Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law* 4 TULANE LAW REVIEW 19 (1945).

33) Rheinstein, *supra* note 32, at 17-24.

34) *Id.* at 21.

35) *Id.* at 21-22.

36) *Id.* at 22.

elaborated that ‘one of those expectations is that we ought not to be subjected to punishment, liability or other legal detriment for conduct which we had good reason to believe would not subject us to such troubles’,³⁷⁾ as would be the case if a dispute were to be decided ‘under a law whose application would take the parties by surprise’.³⁸⁾

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

III. Characterisation

To begin the assessment of South Korean choice of law rules which may apply to trusts, it can first be noted that the classical methodology³⁹⁾ for discovering the applicable law in a cross-border dispute is for the forum court first to categorise or characterise the dispute at hand, and then to deduce the connecting factor prescribed by the relevant category, which will indicate the applicable law. This section considers the issue of characterisation; the next considers connecting factors.

Under the Convention, clear guidance is given as to the issue of

37) *Id.* at 22.

38) *Id.* at 23.

39) Which also applies in South Korea: see Hong-Sik Chung, *Private International Law, in, INTRODUCTION TO KOREAN LAW 283* (KOREA LEGISLATION RESEARCH INSTITUTE ed., 2013).

characterisation: ‘legal relationships created—inter vivos or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose⁴⁰⁾ and ‘created voluntarily and evidenced in writing’⁴¹⁾ will be characterised as a ‘trust’. Article 2 further clarifies that:

A trust has the following characteristics:

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

It is clear that trusts presently recognised under South Korean law would fall within the ambit of the Convention. In particular, the conception of a trust under the Convention was intended to extend beyond the common law trust, to civilian jurisdictions which recognise certain core characteristics of the trust;⁴²⁾ it does not rely on the concept of ‘equitable ownership’.⁴³⁾ However, because South Korea has not adopted the Convention, and because the PILA make no specific provision for trusts, the issue of characterisation by no means yields a straightforward answer.

We may begin with a relatively uncontroversial point. As previously mentioned, the prevailing view of trusts in South Korea is that they are contracts. The main reason for this is that, to date, and for various reasons in practice, trusts have mainly been used not for domestic, but for financial

40) Article 2 of the Convention.

41) Article 3 of the Convention.

42) DAVID HAYTON, PAUL MATTHEWS AND CHARLES MITCHELL, UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES, (19th ed. 2016).

43) DAVID HAYTON, PAUL MATTHEWS AND CHARLES MITCHELL, *supra* note 42.

purposes;⁴⁴⁾ and in the commercial context trusts almost always arise from a contract between the relevant parties. It follows that, for choice of law purposes, Korean courts are likely to characterise trusts functionally as contracts. This is likely to be so, even though the contractual understanding of trusts is probably doctrinally flawed, as discussed earlier,⁴⁵⁾ because characterisation for choice of law purposes need not mirror domestic categories of case.

However, the contracts characterisation is by no means a foregone conclusion, because the non-mirroring of domestic and choice of law categories of case may work the other way. That is to say, even ‘trust contracts’ may well be characterised as something other than contracts for choice of law purposes. For example, ‘trust contracts’ may be characterised as agency, because the trustee might be conceived of as acting for and on behalf of the settlor.⁴⁶⁾ Alternatively, a ‘trust contract’ may be categorised as concerning property (real rights). This characterisation may be possible due to the minority (but probably wrong)⁴⁷⁾ academic analysis that in South Korean domestic law beneficiaries have a right in rem over trust funds.⁴⁸⁾ It is also a possible characterisation due to the fact that a ‘trust contract’ always involves the creation or acquisition of real rights, at least at two points in time—first when the settlor transfers trust assets to the trustee, and then upon termination of the trust, when the trust assets will devolve to the beneficiary, the settlor, or such persons as provided for in the trust instrument, as the case may be.⁴⁹⁾ This characterisation is even more likely where the dispute concerns an issue of title or ownership.

When a trust is created other than by way of a ‘trust contract’, it is even more unlikely to attract contract choice of law rules since, as discussed earlier, there will usually be no contract at all. Trusts created by will are most likely to be characterised as a matter of succession law. As for trusts

44) Wu, *supra* note 5, at 47.

45) See Wu, *supra* note 12.

46) See Art. 114, Minbeob [Civil Act], Act No. 741, Feb. 22, 1958, *amended by* Act No. 14965, Oct. 31, 2017, Art. 844 (S. Kor.).

47) see Wu, *supra* note 12.

48) DONG-SIK CHOI, SINTAKBEOP [THE LAW OF TRUST] 328-329 (2006).

49) As to which see Art. 101, Sintakbeop [Trust Act], Act No. 900, Dec. 30, 1961, *amended by* Act No. 15022, Oct. 31, 2017 (S. Kor.).

created by self-declaration, for the purposes of determining their formal validity they are likely to be characterised as 'juridical acts'. As to other related matters, for example of *essential* validity and substance, however, there is much uncertainty. A property characterisation may be possible, either on the basis of the view that beneficiaries have rights in rem in trust assets, or on the basis that real rights are acquired or transferred when a trust terminates. But the former basis is probably theoretically unsound, as discussed earlier, and the latter basis may flounder where, when the dispute arises, the trust is nowhere near its end.⁵⁰ If self-declared trusts are not characterised as property, however, then they defy characterisation, since they do not fit easily within any of the categories of case provided for in the PILA.

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

As can be seen, that there are various possible categories by which South Korean courts may characterise a cross-border trust dispute. This variety of options, coupled with the fact that there is an absence of guiding principles by which courts should approach the issue of characterisation, are causes for concern. On the one hand, the difficulty characterising a trust dispute detracts from the autonomy and legitimate expectations of the parties: parties are *unable* to know what to expect when it comes to the question of choice of law; and to treat what was intended as a trust as something else for choice of law purposes disappoints the legitimate expectations of the parties that the device would be treated as a trust. On the other hand, by characterising trusts as something other than a trust for choice of law purposes, South Korean private international law is out of sync with the approach adopted by common law jurisdictions and those which have adopted the Convention. This provides a disservice to protecting the trust as a distinctive legal device, both domestically and on the international stage.

50) And note that the Trust Act contains no perpetuity periods.

IV. Connecting Factors

The differences in characterisation would be formalistic or superficial – a mere matter of semantic labelling – if they all yielded the same applicable law. But this is far from the case, as each of these categories have substantively different connecting factors. As a result, uncertainty as to how a trust dispute will be characterised detracts from a central objective of the exercise of characterisation, namely ‘harmony of decision wherever the case is heard’,⁵¹⁾ in particular, because South Korean courts would invariably characterise a trust dispute differently than a common law jurisdiction or under the Convention. This causes a disservice to the protection of the parties’ autonomy legitimate expectations. In addition, it also diminishes the distinctiveness of the trust. As TM Yeo notes, ‘[c]hoice of law categories are functional categories in the sense that they are intended to bring together problems which, because of their similarity, ought to share the same connecting factor.’⁵²⁾ By characterising the trust as something other than a trust for choice of law purposes, South Korean law sends the unfortunate message that the trust is not a distinct concept which ought to be treated in a unitary manner.

In the discussion below, the differences in the connecting factors between the Convention and the choice of law rules for succession, property, and contract under the PILA will be discussed. This excludes the categories of agency, unjust enrichment, and tort from the discussion. The reason for this exclusion is that the provisions in the PILA concerning agency provide that the governing law is that which governs the ‘legal relationship’ between the parties to the agency,⁵³⁾ and the provisions concerning unjust enrichment and tort provide that the applicable law is the governing law of the parties’ ‘legal relationship’ where the unjust enrichment or tort arises from an existing legal relationship.⁵⁴⁾ The discussion here concerns the choice of law rules applicable to the parties’

51) Yeo, *supra* note 24.

52) *Id.*

53) Art. 18(1) of the PILA.

54) Art. 31, 32(3) of the PILA.

'legal relationship', in relation to which succession, property, and contract choice of law rules are most pertinent.⁵⁵⁾

1. Succession

Consider first the application of succession choice of law rules to trusts created by will ('testamentary trusts'). Article 49 of the PILA, which governs succession choice of law rules, provides only a narrow scope for testators to exercise freedom of choice: an expressly selected governing law is effective only if he selects 'the law of a country in which the deceased had his habitual residence at the time of designation',⁵⁶⁾ or, 'as regards inheritance of immovables, [the] law of the place where they are situated.'⁵⁷⁾ In all other cases, 'inheritance shall be covered by the *lex patriae* of the deceased at the time of his death'.⁵⁸⁾

These connecting factors have no resemblance to those provided for in the Convention. For one thing, the Convention provides much more latitude to settlors (including testators) to exercise autonomy: their express or implied choice of governing law will normally take effect except where the chosen law does not recognise the trust or type of trust in question.⁵⁹⁾ Moreover, in the absence of choice, the applicable law is the law with which *the trust* – not the settlor/testator – has the closest connection, a rule consistent with the distinctive nature of the trust. the settlor's residence or nationality is not relevant, nor is the nature of the property held on trust.

Another important respect in which the two regimes differ relates to the issue of timing. The *lex patriae* of the testator is determined at the time of his death. In contrast, under the Convention the relevant point in time is the time the testator *executes* the will, whether in relation to an express or implied choice of governing law by the testator,⁶⁰⁾ or in relation to

55) Tort choice of law rules are discussed in Section 6 below.

56) Art. 49(2)1 of the PILA, provided 'the deceased has maintained until his death his habitual residence in that country'.

57) Art. 49 para. 2 subpara. 2 of the PILA.

58) Art. 49 para. 1 of the PILA.

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

60) Queensland Supreme Court [Qld S. Ct.], *Re Constantinou* [2012] QSC 332, Nov. 9, 2012

determining the law with the closest connection to the trust.⁶¹ This approach is adopted precisely to provide certainty and protect the expectations of testators⁶²—key considerations which are overlooked if the relevant time used is the time of the testator’s death.

2. Property

Under the PILA, South Korean property (real rights) choice of law rules in general provide that the connecting factor is the *lex situs* of the subject matter. This position obtains in relation to immovables, movables, rights subject to registration,⁶³ and certificated bearer bonds.⁶⁴ What is relevant is the *lex situs* ‘at the time of the completion of the causal action or event’; and that law governs the ‘acquisition, loss, or change’ of those property rights.⁶⁵ The connecting factor for other intangible rights is found in Art 23, which provides that ‘contractual security interest in claims, shares, and other rights, and the securities which embody such claims, shares and other rights shall be governed by the law governing the subject right of such security interest.’ However, provision is not made for securities held indirectly through intermediaries, and securities transactions concluded by account transfers, both of which attract the PRIMA (place of the relevant intermediary) approach.⁶⁶

In contrast, the approach under the Convention differs from the property choice of law rules of the PILA in four significant respects.

Most straightforwardly, the Convention does not prescribe differing approaches depending on the type or nature of the property held under trust. This is wholly consistent with the view that the trust is a distinctive institution, whose core features and characteristics do not differ according to the type of property held on trust.

(Austl.); and *see supra* note 3, at 13; *supra* note 42.

61) *supra* note 42.

62) *See supra* note 60; *supra* note 42.

63) These are found in Art. 19 para. 1 of the PILA.

64) Art. 21 of the PILA.

65) Art. 19 para. 2 of the PILA.

66) *supra* note 39, at 299.

Secondly, an express choice of governing law by the settlor will invariably take effect (so long as that law recognises trusts), even if it differs from the *lex situs*. This has led *Underhill & Hayton* to comment that the Convention 'places a higher currency on settlor autonomy than on the risk of unenforceability overseas.'⁶⁷⁾

The third differing respect is that, when we move away from express choice of governing law, the *lex situs* is but one among a number of factors to be taken into account. Thus, when determining an implied choice of governing law for the purposes of Art 6, '[t]he situs of the assets may be an important factor where the bulk of the trust property is immovable. However, where movable property is concerned, the situs appears to be a relevant, but not especially important factor.'⁶⁸⁾ Ultimately, the basal criterion is the settlor's subjective intentions;⁶⁹⁾ therefore, the *lex situs* is relevant only insofar as it sheds light on that criterion. The approach under the Convention better protects the legitimate expectations of the parties. In the absence of an express or implied choice, Art 7 provides that the applicable law is the law with which the trust is most closely connected, with reference being made in particular to:⁷⁰⁾

- a) the place of administration of the trust designated by the settlor;
- b) the situs of the assets of the trust;
- c) the place of residence or business of the trustee;
- d) the objects of the trust and the places where they are to be fulfilled.

As can be seen, the *lex situs* is but one of four non-exhaustive criteria to which courts may make reference. And again, it is clear that the *lex situs* is not a particularly weighty factor. As *Dicey, Morris, and Collins* comment:⁷¹⁾

The situs of the assets of the trust may deserve little weight: the

67) *supra* note 42.

68) LORD COLLINS OF MAPESBURY & JONATHAN HARRIS, *DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS* (15th ed. 2018).

69) *supra* note 42.

70) Art. 7 of the Convention.

71) *supra* note 68 (footnotes omitted).

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

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

Finally, Hayton has noted that, under the Convention, the *lex situs* may have little significance in practice.⁷²⁾ It is increasingly common for *inter vivos* trusts to be created where its assets are initially of nominal value, only for substantial assets to be added as accretions to the fund down the road. And in relation to testamentary trusts, the trust fund often contains assets across multiple jurisdictions. In these cases, the *lex situs* is not an important factor. To give undue weight to the *lex situs* in these cases would be to impose an outcome which does not cohere with the legitimate expectations of the settlor when creating a trust, and of the beneficiary who would expect a trust not to be treated simply as a matter of property even for choice of law purposes.

3. Contract

The South Korean contract choice of law rules are the rules with the highest degree of similarity to the Convention. Structurally, both sets of rules share the same approach: effect is given to an express or implied choice of law, in the absence of which a close connection test is utilised to determine the applicable law.

Consider first an express or implied choice of governing law. According to Art 25(1) of the PILA, a contract is governed by the law expressly or impliedly chosen by the parties to the contract. The same position obtains under the Convention.⁷³⁾ In addition, under both regimes, an implied choice

72) Hayton, *supra* note 3, at 13.

73) Art. 6 of the Convention.

will only be taken to have been made if the court is satisfied that it reflects the actual intention of the relevant parties.⁷⁴⁾ Another similarity is that both regimes do not require the chosen law to have any substantial connection with the contract or trust.⁷⁵⁾ Both regimes are therefore overwhelmingly in favour of party autonomy.⁷⁶⁾ A decision in the South Korean Supreme Court in 2013 confirms this. In that case, a reference in a contract to the 'law of the United States' was held not to be invalid automatically, and instead the court made great effort to deduce whether the parties intended to apply the law of any precise state or uniform federal laws.⁷⁷⁾ In essence, the court was willing to bend over backwards to give effect to a choice of law expressly stipulated by the parties.

These similarities notwithstanding, important differences exist. First, while the contract choice of law rules look to the bilateral intention of the parties, as expressed in their contract, the Convention is concerned with the unilateral intention of the settlor. Certainly, where a trust is created by way of a 'trust contract' in South Korea, there is almost invariably a coincidence between the bilateral intention of the parties and the unilateral intention of the settlor. However, where a trust is created by will or self-declaration, a bilateral intention may well be absent, and therefore the contract choice of law rules will be rendered inapplicable; nevertheless, the unilateral intention of the settlor remains present. The South Korean contract choice of law rules, therefore, are unable perfectly to protect the autonomy of *the settlor* to set up a trust.

Secondly, the Convention provides a limitation which is absent in the South Korean contract choice of law rules: an express choice is disregarded if the law chosen does not recognise the trust. This is a consequence of the fact that, while all established legal systems have contract law, not all of them recognise the trust. Without such a rule, however, the South Korean

74) As to Art. 25 of the PILA, *see* Chung, *supra* note 39, at 288-289. As to the Convention, *see supra* note 42.

75) *See* Art. 8 para. 2 of the PILA; *supra* note 42.

76) As to the Convention, *see* JONATHAN HARRIS, THE HAGUE TRUSTS CONVENTION 166-169 (2002).

77) Supreme Court [S. Ct.], 2009Da77754, Oct. 25, 2013 (S. Kor.); *see* discussion in Young-Seok Lee, Sae-Youn Kim, and Sy-Nae Kim, *Republic of Korea' in ASIAN CONFLICT OF LAWS: EAST AND SOUTH EAST ASIA* 93 (ALEJANDRO CARBALLO LEYDA eds., 2015).

contract choice of law rules fail to recognise the distinctiveness of the trust.

Thirdly, South Korean courts appear to have discretion to disregard an express choice of law if it is ‘unreasonable and unfair’, as was held in a Supreme Court decision in 1997.⁷⁸⁾ It is unclear what ‘reasonableness’ and ‘fairness’ entail, but this may expose the reasons for which the settlor chooses the particular applicable law to scrutiny – an exercise which detracts from party autonomy.

Next, consider the case where there is no express or implied choice of governing law. Both the contract choice of law rules and the Convention apply a close connection test, as indicated by Art 26(1) of the PILA and Art 7 of the Convention. However, the precise test prescribed differs.

Article 26(2) and (3) of the PILA provides a list of presumptions which will apply. Subsection (2) focuses on the party who is the transferor, grantor, or provider of services (depending on the type of contract), and presumes that the governing law is the law of that party’s habitual residence or place of business (where the contract is entered into in the course of the relevant party’s profession or business activity). Subsection (3) presumes that the *lex situs* is the governing law where the contract concerns a right in immovables. As Hongsik Chung notes, the approach reflected in Art 26(2) and (3) is based on the theory of ‘characteristic performance’, found in the EU Rome Convention and Rome I Regulation, which disregards the party who undertakes simply to pay money, and crafts the connecting factor around the other party who undertakes substantial performance.⁷⁹⁾ The presumption is rebuttable: as Art 8(1) provides, ‘[i]f the governing law designated by this Act has only a slight connection with the related legal relationship, and it is evident that there is a law of another country which has the closest connection with the legal relationship, the law of that other country shall apply.’ However, as Chung notes, this provision is strictly interpreted, and in no reported case has it been invoked by the courts.⁸⁰⁾

This approach is substantively different from that found in Art 7 of the

78) Supreme Court [S. Ct.], 96Da20093, Sept. 9, 1997 (S. Kor.); see discussion in Chung, *supra* note 39, at 289.

79) Chung, *supra* note 39, at 290.

80) *Id.* at 287.

Convention. Clearly, the Convention is not limited to a trust arising by way of contract; indeed, even where there is a contract, the applicable law is not determined by focusing on the parties' bilateral intention, as observed earlier. Therefore, the 'characteristic performance' theory is inapplicable in the trust context. Instead, as mentioned earlier, Art 7 provides a non-exhaustive list of factors to be taken into account to discover the law of the closest connection.⁸¹⁾ Common law courts have also taken other factors into account, for example, the settlor's domicile, the legal style of the trust document, the beneficiary's domicile, and the place of execution of the trust instrument.⁸²⁾ What is essential is to discover the law which has the closest connection with *the trust*, as opposed to the contract (if there is one). Therefore, under the Convention, but not under the South Korean contract choice of law rules, the distinctiveness of the trust is recognised, and the autonomy and legitimate expectations of the parties in creating *a trust* are protected.

4. *Juridical Act*

As mentioned earlier,⁸³⁾ for the purposes of determining the formal validity of self-declared trusts, the relevant characterisation is juridical acts. According to Art 17(1) of the PILA, the 'form of a juridical act shall be subject to the governing law of the act.' Subsection (2) states that '[a] juridical act is formally valid if it satisfies the formal requirements of the law where the act was effected' – which is essentially an adoption of the principle of *locus legit actum*.⁸⁴⁾ It is not entirely clear how the two subsections interrelate. If subsection (2) applies to self-declarations, then self-declared trusts will be formally valid if the self-declaration takes place in a jurisdiction which recognises the trust. If subsection (1) applies, however, then the question arises as to what the 'governing law of the act' is. The relevant act is a declaration of trust; but the PILA contains no

81) See main text from *supra* note 70 above.

82) See *supra* note 68.

83) See main text from *supra* note 49 above.

84) Moon-Sook Kim, *On the Korean Private International Law*, 51 JAP. Y.B. INT'L. L. 327, 333 (2008).

dedicated trust choice of law rules to determine the governing law of trusts. How then is a court to determine which law applies? There seems to be an impasse. This problem is not merely fanciful: it is compounded when it is noticed that subsection (5) provides that subsection (2) 'shall not apply to the form of a juridical act the subject matter of which is the creation or disposal of a real right or any other right which is subject to registration.' According to Art 4(1) of the Trust Act, a trust over 'any property right that can be registered' must be registered in order for the beneficiary's right to be enforceable against third parties. The creation of a self-declared trust over such registrable properties appear, therefore, to fall within Art 17(5) of the PILA; and if so, this disables Art 17(2) from applying, leaving the law with the impossible task of determining the 'governing law of the act' for the purposes of Art 17(1). And the inability to characterise self-declared trusts does not end there: as discussed earlier,⁸⁵⁾ it is impossible to determine the law applicable to questions of essential validity and *substance* in relation to self-declared trusts: they do not fit within any of the categories of case found in the PILA, and therefore it is unclear what connecting factors should apply. It goes without saying that these difficulties detract from the distinctiveness of trusts and jeopardise the legitimate expectations of those who are party to self-declared trusts.

All these problems are, of course, sidestepped if the Convention is adopted, where no unnecessary distinction is made between trusts created by self-declaration and trusts created by transfer to a trustee.

V. Scope

Once the applicable law is determined, whether under the Convention or by way of whichever category of case under the PILA, a further question arises concerning the scope of the applicable law: does it exhaustively cover *every* aspect of the trust dispute at hand, or are there limits to its scope?

As is the case with virtually all choice of law regimes, both the

85) See main text from *supra* note 49.

Convention and the PILA preserve ‘public policy’⁸⁶⁾ and ‘mandatory’⁸⁷⁾ domestic provisions as a matter for the *lex fori*. Any uncertainty in determining what counts as public policy or a mandatory provision is inherent in the very nature of such a concept, and no obvious differences arise between the position under the Convention and the PILA.

However, both choice of law regimes diverge on three important fronts, all of which are united by the fact that the approach under South Korean private international law overreaches – ie is not nuanced enough – in terms of its scope of application to trusts.

1. ‘Rocket Launcher’ vs ‘Rocket’

First, under the Convention, a distinction is drawn between ‘preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee’,⁸⁸⁾ to which the Convention does not apply, and the trust itself once in existence, to which the Convention does apply. The relationship between those preliminary issues and the trust itself is commonly illustrated by the imagery of a ‘rocket launcher’ and the ‘rocket’.⁸⁹⁾ ‘Rocket launching’ matters, for example, substantive and formal validity of transfers from a settlor to the trustee,⁹⁰⁾ are determined by the choice of law rules of the forum; while matters pertaining to the ‘rocket’ – the trust – are governed by the Convention. In contrast, such a distinction is absent under the PILA – an unsurprising fact, given that it contains no special trust rules. Thus, for example, Art 29(1) provides that the ‘formation and validity’ of contracts are governed by the

86) Art. 18 of the Convention.

87) Art. 15 of the Convention; Art. 7 PILA.

88) Art. 4 of the Convention.

89) M Alfred E von Overbeck, *Explanatory Report on the Convention on the Law Applicable to Trusts and on their Recognition* in PROCEEDINGS OF THE FIFTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 1984, BOOK II – TRUSTS – APPLICABLE LAW AND RECOGNITION 370 (M Alfred E von Overbeck ed., 1984). David Hayton introduced this analogy: see David McClean, *Common Lawyers and the Hague Conference*, in *E Pluribus Unum, Liber Amicorum Georges A L Droz, On The Progress* (ALEGRÍA BORRÁS, ANDREAS BUCHER, TEUN STRUYCKEN, ET AL., ET AL. eds., 1996) 217.

90) Von Overbeck, *supra* note 89.

applicable law as determined under the PILA.

It might be doubted that the PILA should be criticised for failing to draw the distinction between the ‘rocket launcher’ and the ‘rocket’. After all, ‘it may be thought more coherent for a single law to determine whether a trust has come into operation’.⁹¹⁾ However, it is submitted that the distinction is a crucial one to draw if the law is properly to recognise the trust as a distinctive institution which exists if and only if the preconditions for its existence are fulfilled. For example, in South Korea, it is arguable that parties who purportedly enter into a ‘trust contract’ do not in fact succeed in creating *a trust* if the settlor fails, for whatever reason, to transfer the relevant trust property to the trustee;⁹²⁾ similarly, a testator who purports to create a trust by will but does not fulfil the preconditions for a valid will⁹³⁾ fails to create *a trust*. If choice of law rules are properly to apply to the relevant category of case in question, then it follows that trusts-specific choice of law rules ought only to apply once a trust is created. This means that trusts-specific rules ought to apply only when a trust has properly been set up, but that other PILA provisions should govern those preliminary matters—for example, property choice of law rules in relation to the transfer of trust property, or succession choice of law rules in relation to the validity of wills. Conversely, failing to distinguish between the ‘rocket launcher’ and ‘rocket’ is a failure to recognise the distinctiveness of the trust and to treat it as such for the purposes of private international law.

2. *Third-Party Liability*

Secondly, the South Korean approach is liable to overreach when the issue of determining the governing law concerning third-party liability arises. Under Art 11 of the Convention, which concerns the recognition of trusts, subsection (3)(d) provides for the recovery of trust assets against the

91) Harris, *supra* note 76, at 4.

92) After all, Art. 2 of the Trust Act contemplates that a ‘trust’ is a legal relation which arises where the settlor ‘transfers a *specific piece of property*’ to the trustee; and moreover, the rights and duties of settlors, trustees, and beneficiaries contemplated in the Trust Act cannot apply in any meaningful sense until and unless the trust property is transferred to the trustee.

93) See Arts. 1065-1072 Civil Act.

trustee where the trustee mingles trust assets with his own property or dissipates trust assets in breach of trust. However, that subsection contains the proviso that ‘the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.’ Where South Korea is the forum,⁹⁴⁾ in most cases the applicable choice of law rules would be those relating to property (real rights), which according to Art 19(1) of the PILA is the *lex situs*. Thus, should the *lex situs* be a common law jurisdiction, then the beneficiaries will be recognised ‘as having equitable proprietary interests binding everyone except bona fide purchasers of the full legal title without notice of the equitable interest’.⁹⁵⁾ On the other hand, if the *lex situs* is a civilian jurisdiction, then normally ‘third parties will take free from the rights of beneficiaries though they may be subject to some civil law remedies in respect of fraud or unjust enrichment as provided by the law determined by the choice of law rules of the forum’.⁹⁶⁾ To this it may also be added that, in certain civilian jurisdictions such as South Korea,⁹⁷⁾ Japan,⁹⁸⁾ and Taiwan⁹⁹⁾ which have enacted Trust Acts, beneficiaries are given the right to *rescind* the transaction between the trustee and the third party where, for example, the third party has knowledge of the trustee’s breach.

Given that South Korean private international law contains no dedicated trusts rules, however, no distinction from the perspective of choice of law is made between trustee liability and third-party liability. The result is that it is likely for the liability of third parties to be determined using the same applicable law as selected by whatever choice of law rules are applied to the trust. For example, if a trust contract expressly provides that English law is the governing law, then *any* third party volunteer who receives trust property may be liable to give up the property *in specie* even if

94) As is the case if England is the forum: see *Akers v Samba Financial Group* (2017) AC 424.

95) Hayton, *supra* note 3, at 16-17.

96) Hayton *supra* note 3, at 16-17. see too *Underhill and Hayton, supra* note 42. But see Kye Joung Lee, *A Study on the Theory of the Disgorgement and Its Implications—the Changeover from Loss-Based Remedy to Gain-based Remedy*, 169 THE JUSTICE 37 (2018).

97) Sintakbeob [Trust Act], Act No. 900, Dec. 30, 1961, amended by Act No. 15022, Oct. 31, 2017 Art. 75 (S. Kor.).

98) Sintakhou [Trust Act], Act No. 108, 2006 Art. 27 (Japan).

99) Xintuofa [Trust Act], Jan. 26, 1966, amended by Dec. 30, 2009 Art. 18 (Taiwan).

(say) the receipt, the property, and the third party is located in a civilian jurisdiction. The reason why this is troubling is that overlooks the third party's legitimate expectations:¹⁰⁰⁾ he would surely be caught off guard if English law applied in order to deprive him of the property, when according to the civilian jurisdiction where he is, he would expect not to be deprived of the property where he acts in good faith. This becomes even more worrying when it is noted that drafters of the Convention, in drafting the proviso in Art 11(3)(d), 'had in mind specifically claims to recover trust property from banks, although the provision is not so limited.'¹⁰¹⁾ If the application of choice of law rules may have the effect of compelling volunteer banks to give up trust assets received in good faith without knowledge of the trust, then this is also detrimental to cross-border commercial activity.

3. *Dépeçage*

The third point of divergence as to scope concerns *dépeçage*. Although *dépeçage* is permitted under both the Convention¹⁰²⁾ and the PILA,¹⁰³⁾ there is an important difference between the two regimes.

Under the Convention, different applicable laws can apply to different *aspects* of a trust. Most commonly, this occurs where a different law is chosen to govern the *administration* of the trust than the governing law of other aspects of the trust, although in theory it has been argued that any 'severable'¹⁰⁴⁾ aspect of the trust can be governed by a different law. Under Art 25(2) of the PILA, by contrast, contracting 'parties can choose the law applicable to the whole or a part only of a contract.' This suggests that parties are able only to split up a trust contract by choosing different governing laws to apply to different *terms*.

The fact that South Korean law does not appear to allow settlors to

100) Third-party expectations is the rationale underlying the fact that the Convention does not extend to determine third-party liability: Harris, *supra* note 76, at 323.

101) Harris, *supra* note 76, at 322.

102) Art. 9 of the Convention.

103) Art. 25(2) PILA. See Kwang Hyun Suk, 'Korea,' in *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW* 2279 (JÜRGEN BASEDOW, GIESELA RÜHL, FRANCO FERRARI, ET AL. eds., 2017).

104) Although *Underhill and Hayton*, *supra* note 42.

choose a different governing law for the administration of a trust (perhaps unless the particulars of what constitutes ‘administration’ is stated explicitly in so many words) not only erodes the autonomy of settlors and defeats their legitimate expectations, arguably it also fails to recognise the distinctiveness of the trust. A trust is not simply the sum of all the terms contained in the trust instrument: as discussed earlier,¹⁰⁵⁾ many mandatory and default rules apply to trusts, and a significant number of those rules concern trustees’ administrative duties¹⁰⁶⁾ during the lifetime of a trust. Moreover, as Art 2 of the Trust Act recognises, the trust is a multifaceted device, which often ‘requires the trustee to manage ... operate, or develop’ trust property. The administrative aspect is thus arguably an aspect of trusts which distinguishes them from mere contracts. Not to allow settlors to select a governing law specifically applicable to matters concerning the administration of trusts reflects a failure to recognise a trust for the unique device it is.

VI. Breach of Trust

As mentioned earlier, by way of Art 11(3)(d) of the Convention, the rights a beneficiary has against a trustee for breach of trust is governed by the law applicable to the trust. Using the law applicable to the trust to determine the trustee’s liability for breach is not only consistent with the legitimate expectation of the settlor; it is also consistent with the inherent nature of a breach of trust. A trustee commits a breach of trust where he acts inconsistently with the terms of the trust instrument, as supplemented by statutory mandatory or default rules; and the awarded remedy aims to put things right by reference to the trust. The intertwined relationship between the trust itself and a claim for breach of trust entails that they ought to be treated by way of the same applicable law.

¹⁰⁵⁾ See main text from *supra* note 4 above.

¹⁰⁶⁾ See, for example, Arts. 37, 44 Trust Act, concerning trustee’s duty to *manage* trust assets separately; Art 41 Trust Act, concerning a trustee’s default method of carrying out his duty to *manage* money; and Art 27 Trust Act, concerning property acquired by a trustee in *managing* the trust.

In South Korea, if a claim for breach of trust is characterised as a matter of succession, property, or contract, there is no reason to doubt that the same consistency will follow: the applicable law governing the trustee's liability is the law which governs the trust. However, as discussed earlier, it is not always clear that a trust dispute is susceptible to be characterised as falling within one of these categories, particularly in the difficult case of self-declared trusts.¹⁰⁷⁾ Given the lack of dedicated trust choice of law rules, there is also the possibility that South Korean courts might characterise a breach of trust claim as a tort in difficult cases, for want of a better category. After all, the elements required to make out a tort case in South Korean domestic law – 'unlawfulness, wilfulness or fault, damage and a causal connection between the act and the damage' – are so flexibly applied in practice such that they are applicable to 'a seemingly infinite variety of situations';¹⁰⁸⁾ and with some creative analogy, coupled with the lack of dedicated trusts choice of law rules, there is the real possibility that courts would characterise a breach of trust claim as a tort for choice of law purposes.

Should a breach of trust claim be characterised as a tort, insuperable difficulties arise. In order to explain this point, it can first be noted that, according to orthodox common law, there are two distinct types of compensatory claim a beneficiary may bring against a trustee for breach of trust.¹⁰⁹⁾ The first type of claim arises where the trustee misappropriates trust assets. Here, the beneficiary has a continuing right in the trust assets, and therefore may compel the trustee to restore the misappropriated assets to the trust *in specie*. Where this is not possible, for example where the assets have been dissipated or have gone into the hands of a bona fide purchaser for value without notice, then the trustee can be made liable to effectuate 'substitutive performance'. The award which would be made by the court is a money payment measured by the current objective value of the assets the trustee ought to have restored to the trust fund at the date of judgment, because the trustee's ongoing duty to hold the assets on trust does not

107) See Part 4.4. above.

108) Youngjoon Kwon, *Civil Law and Civil Procedural Law in INTRODUCTION TO KOREAN LAW 125* (KOREA LEGISLATION RESEARCH INSTITUTE ed., 2013).

109) See general discussion in *Underhill and Hayton*, *supra* note 42.

evaporate simply due to his misappropriation of the assets. The second type of claim is a claim for compensation for loss—what can be termed a ‘reparation’ claim. Unlike a ‘substitutive performance’ claim, the sum for which the trustee is liable under a ‘reparation’ claim depends on the extent to which the trustee had *caused a loss* to the beneficiary: causation (and remoteness) of loss must be proven in order for the beneficiary to succeed.

It is highly arguable that this distinction between ‘substitutive performance’ and ‘reparation’ claims is not irrelevant in South Korean trust law. According to Art 43(1) of the Trust Act:

Where a trustee has violated his/her duties incurring any loss to the trust property, the settlor, beneficiary, or other trustees where a number of trustees exist, may request the relevant trustee to reinstate the trust property: Provided, That where it is impossible or substantially impracticable to reinstate the trust property, or excessive expenses are incurred in such reinstatement, or where any special ground exists making reinstatement inappropriate, a claim for damages may be raised.

In addition, Art 393(1) of the Civil Act, which speaks to the scope of compensation for damages, provides that ‘the compensation for damages arising from the non-performance of an obligation shall be limited to ordinary damages.’ But the phrase ‘ordinary damages’ is left undefined; and it is clear only that it stands in contrast to ‘special damages’ in Art 393(2), which provides that ‘the obligor is responsible for reparation for damages that have arisen through special circumstances, only if he had foreseen or could have foreseen such circumstances’. The phrase ‘ordinary damages’, therefore, does not foreclose the distinction between ‘substitutive performance’ and ‘reparation’ claims and the different bases upon which these claims rest. On the one hand, the loss to the trust property may occur due to the trustee’s misappropriation of the property: it would have been possible to reinstate the trust property at the time of misappropriation, but subsequent events have occurred such that it then becomes impossible, impracticable, etc to reinstate the property to the trust, such as where it has been dissipated, or sold to a good faith third party. This is what the most straightforward reading of Art 43(1) of the Trust Act seems to entail. But on

the other hand, it may well be that a claim is made by the beneficiary in circumstances where it was *never* possible for the trustee to reinstate any trust property, for example where the claim is not based on misappropriation, but on the basis that the trustee has caused a loss to the trust fund due to his failure to invest properly according to express provisions in the trust instrument.¹¹⁰⁾ In the former situation, the trustee's *ongoing* duty to hold the property according to the terms of the trust surely ought not to be mitigated or removed simply by reason of his misappropriation of the trust property; hence there is no reason why 'ordinary damages' would not be valued according to the objective value of the trust property at the date of judgment in order to reflect that ongoing duty. In the latter situation, 'ordinary damages' would be valued according to the extent of the loss caused by the trustee, since there is no trust property in relation to which the trustee has an ongoing duty by which damages can be valued.

To return to the choice of law discussion, if a breach of trust claim is characterised as a tort, then Art 32 of the PILA, which concerns tort choice of law rules, comes into play. According to subsection (4), '[i]n cases where a tort is governed by foreign law ..., damages based upon a tort shall not be awarded if the nature of the damages is clearly not for appropriate compensation for damage to the victim, or to the extent the damages is substantially in excess of appropriate compensation for damage to the victim.' Explaining this section, Chung notes that 'Korean laws, in principle, only consider and permit the compensatory damage that is to properly compensate the victim and, hence, are proportional to the victim's harm or loss; punitive, treble, or exemplary damages, which focus on punishment or retribution, are not recognised in South Korea.¹¹¹⁾ This is consistent with the 'definition of torts' found in Art 750 of the Civil Act, which provides that a tortfeasor 'who causes losses to ... another person ... shall be bound to make compensation for damages arising therefrom.'

The limitation imposed on a beneficiary's claim found in Art 32(4) of the PILA, which is, of course, absent in the Convention, causes difficulties in

110) The limited list of permissible investments of trust money found in Art 41 Trust Act is a default list, which can be displaced by express terms: *see* Wu, *supra* note 5, at 55-56.

111) Chung, *supra* note 39, at 295.

relation to 'substitutive performance' claims. As already discussed, such claims are not limited by the extent to which the trustee can be shown to have caused a loss to the trust fund. However, where a 'substitutive performance' award would be made under the law applicable to the trust, there is a real possibility that South Korean courts would hold such damages to be inappropriately extensive, and to limit the award only to the amount of loss which the beneficiary can successfully show to have been caused by the trustee.

To so limit the beneficiary's claim disappoints the settlor's and beneficiary's legitimate expectations. Where a trust is properly set up, the settlor and the beneficiary can legitimately expect that the trustee will deal with the trust assets precisely as provided for by the trust instrument; Art 43(1) of the Trust Act also provides good basis for an expectation that misappropriated trust assets will either be reinstated *in specie* or by way of a monetary award of equivalent objective value, as discussed earlier. To reduce that sum due to Art 32(4) of the PILA would disappoint those expectations.

Moreover, so limiting the beneficiary's claim also detracts from the distinctiveness of the trust by failing to hold trustees to the high standards required to protect the institution of the trust. In particular, an application of Art 32(4) of the PILA would have the effect of 'encouraging' trustees to misappropriate trust assets for their selfish ends based on the (not unlikely) hope that they may not have to repay the full objective value of the assets, for example, due to fortuitous intervening events, multiple sufficient causes of the loss, or an unskilled lawyer acting for the plaintiff, which leads to the inability to prove causation of loss equivalent to the objective value of the property misappropriated by the trustee.

VII. Conclusion

For the past 60 years the trust has been no stranger to South Korean domestic law. By contrast, the treatment of trusts in private international law in South Korea is severely underdeveloped. This is a regrettable state of affairs in our increasingly globalised world, where incidences of cross-border trust disputes will only be on the rise. The lack of a dedicated set of

choice of law rules relating to trusts causes much confusion and uncertainty, not only as to how South Korean courts would characterise a trust dispute and the inconsistent connecting factors which would apply, but also in relation to the scope of the applicable choice of law rules (whichever they may be) and the special difficulties raised by a breach of trust claim. All these difficulties derogate from a proper recognition of the trust as a distinctive legal device, and fail properly to protect the autonomy and legitimate expectations of the parties. These difficulties are, however, easily surmountable under the Convention, where a consistent set of choice of law rules emerge. Serious thought ought, therefore, be given by the South Korean legislature to adopt the Convention.