

Establishing an Independent System of Trust Registration

Chen Xingyu

People's Public Security University of China, Beijing 100038, China

ABSTRACT. *Legal nature and efficacy are two core issues of trust registration. There is merely some principles of trust registration stipulated in the Trust Law of the People's Republic of China(PRC). However, the Trust Law does not clarify the nature and validity of trust registration. Different from the concept of trust registration under the Measures for the Administration of China Trust Registration, the actual concept of that under the Trust Law is about the registration of property, and the nature of the trust registration should be real rights registry. At present, it is important to establish an independent trust registration system that is coordinated with the registration of ownership of property. On one hand, The dual registration system should be adopted only to the properties whose ownership can be changed only after the registration, which is called the registration antagonism doctrine, in other words, no trust can act against a third party unless registered and taking effect. On the other hand, a single registration system should be adopted to the trust established with other properties. The registration does not affect the trust to take effect, but have an effect against a third party.*

KEYWORDS: *Trust registration; Real rights registry; Registration of property; Registration antagonism doctrine*

1. Two Core Issues of Trust Registration

1.1 Issue of Legal Nature

At present, the nature of trust registration in China is just the registration of trust products, i.e., to register the trust products designed by the trust business entity, which generally contains the basic information such as the name of the trust products without trust property rights, to publicize the trust products, and to make the public understand the basic information of the trust by means of registration. There is no specific ownership of the right in the trust registration, which never involves the registration of right subject and the effect of changing property right. It is still required to register the transfer of property right.

As for the nature of trust registration, the points of views in the academics are as follow: First is the view that the nature of trust registration belongs to the

registration of trust property. According to Trust Law, where trust property shall be registered according to the provisions of laws or administrative regulations for the establishment of a trust, such property shall be registered.. In fact, even if the property that shall be registered for trust under the law does not establish trust, its changes of state also should be undertaken to register, trust is registered according to property registration where the trust property can be separated from other properties. Therefore, some scholars put forward that the object of trust registration is trust property, and in essence, trust registration should be the registration of trust property, which is a guarantee measure to realize the maximization of beneficiary's interests and be effectively protected by law. Second, the nature of trust registration is the registration of trust establishment. The so-called registration of trust products means that the trust registration institution approves the registration of the trust products operated by the trust institution, which is similar to the announcement of the establishment of trust products by the trust company, mainly includes the basic information of the trust such as the product name and the situation of the trustee. Because its legal effect is still unclear, it usually has function of promoting products as well as convenient enquiry. For example, the Shanghai Trust Registration Center established in 2006 and China Trust Registration Co., Ltd. established in 2016 only allow the registration of trust products, and there are no relevant legal provisions on how to coordinate between the efficacy of its own registration and other registration authorities. The third is the registration of property ownership and nature. Ownership of the trust property right and registration of nature in the trust property distinguish the trust property from the property of the trustor or the trustee, also can make the third party fully understand the ownership of the trust property and relevant information, so as to protect the safety of market transactions, prevent the trustee from abusing the management authority, and safeguard the interests of the beneficiary. Therefore, some scholars put forward that trust registration has two purposes: one is to ensure the independence of trust property, the other is to protect the interests of the beneficiaries. Registration of ownership and nature of trust property can help achieve the goal of trust registration. The nature of trust registration is the registration of trust legal relations. There is a difference between the trust registration and the real right registration, which makes it hard to depict the nature of trust. Moreover, the status of the trust property may change within the term of the trust, and the immediate registration of the trust property cannot be Implemented. Therefore, Taiwan scholars put forward that the trust property should be registered after the registration of ownership, and the registration of trust property should be the registration of trust legal relations. When the status of the trust property changes making it impossible to register for each change, the trust legal relations should be publicized.”

1.2 Efficacy

The Measures for the Administration of China Trust Registration stipulates that the trust institution should register the trust when it carries out the trust business, but does not stipulate anything about the efficacy of the trust registration. Although the registration and efficacy system stipulated by Trust Law is based on real right

registration, the doctrine of effectism can not be adopted to the trust registration because this doctrine has its own disadvantages. This doctrine is adopted to the registration of real properties rights in China. Any changes of property rights like creation, change and transfer of property rights shall be registered in accordance with the law. As for the special movable properties, the registration antagonism doctrine is adopted, no change of property rights like creation, change and transfer of property rights shall act against a third party unless registered. Although the real properties rights adopt the doctrine of effectism, the effect of the change of real right does not affect the efficacy of the contract. The trust registration based on real right registration is limited to the property which shall be registered according to the provisions of laws or administrative regulations, such as some real estates. However, according to the reality of the national unified trust registration institution, the nature of the trust registration is different from its purposes. The property involved in the trust registration is not only limited to the above mentioned property, but also includes other properties that do not need to register the change of ownership. Thus, the principles of efficacy in the ownership registration cannot be fully applied to the trust registration. As a necessary requirement for the trust to come into effect, the trust registration not only directly affects the external efficacy of the trust, but also affects the that of the trust relations formed among the parties to the trust. For example, under the Trust Law, the registration of the property to be registered by law for the establishment of trust shall be the prerequisite for the trust to take into effect. When adopting to the doctrine of trust effectism, as for the real properties required to register for the change of ownership or the general movable properties with no need to register for the change, it would not only run away from the principle of efficiency but also limit the flexibility of the trust system itself if all property had to be registered in order to be effective at the time of trust establishment.

2. Definition of the Nature of Trust Registration

2.1 Basis for Defining the Nature: Functions and Goals of Trust Registration

The functions of trust registration mainly include the following three aspects: The first function is public disclosure of trust properties, that is to say, publicizing to a third party to inform an unspecified person of the fact that a trust has been established on a property, and the situation in which the existence of the trust may lead to a special legal relation with the counterpart. After the trust is registered, the potential third party of the transaction may inquire about the trust information from the registration institution to know about the details of the trust, so as to help the third party protect its rights and interests. The public registration system of trust is prescribed in both civil law countries and common law countries. Under the US law, the establishment of business trust must be registered with the enterprise registration authorities, and the business trust engaged in specific business is also required to go through other proceedings of registration according to law. The second function is confirming rights and obligations and stabilizing trust relations. The trust is

established according to the contract concluded between the parties, and the rights and obligations of each party are mostly formed based on the agreement, which cannot guarantee the stability of trust relations. When a dispute arises between or between the parties to the trust and a third party, the trust relations will be shaken by such circumstances as whether the trust is effectively established and whether it has the right to be against the third party, such as the case of establishing a trust on the property that has been mortgaged. The third function is the protection of securities of beneficiaries and transactions. The beneficiaries have the right to benefit from the trust, but they are not the owner of the trust property. The third party is not able to know the authorities of the trustee to manage the trust, which is likely to cause the risk of damage to the beneficiary due to the overstepping of the trustee's authority. The beneficiaries cannot directly control the trust property, as a result, so many countries focus on the protection of the beneficiary's rights in the legislative level such as granting beneficiaries the right to revoke. However, in the meanwhile, in order to protect the interests of the third parties of transactions, certain restrictions on the beneficiaries' right to revoke through the registration system will be adopted by law. The beneficiaries cannot only rely on the trust documents to claim the right of revocation, in other words, after the trust registration, the third party can attain the status of the rights of the trust property and make a judgment on whether the trustee's behavior conforms to the provisions of the trust document. In doing so, the beneficiaries' rights have the effect against the third party. Trust registration can not only protect the interests of the beneficiaries, but also keep the transactions safe.

The purposes of trust registration mainly include confirming the independence of the trust property, making the public aware of the trust property, and protecting the safety of transactions. Some scholars point out that the purpose of trust registration is not to register the change of ownership, but to register the independence of the trust property. However, this viewpoint avoids discussing the key problem that the trust establishment needs to transfer the property right, and fails to fundamentally solve the contradiction between the trust establishment and the change of real right. As a method of publicity, the primary purpose of trust registration is not only to disclose the information of trust products to the public, but also to clarify the status of rights on trust property. The registration of real right cannot define the ownership of all types of properties, so it has to be completed by means of trust registration. The right status of the trust property publicized in the trust registration is the core of the trust registration. For example, it is more important for the third party to know the scope of the rights of the trustee in the operation and management of a trust than to know who is the trustee of the trust. The purpose of trust registration is to clarify the property rights of trust property, ensure the independence and limited liability of trust property, and then maintain the fairness and safety of trust transaction.

2.2 The Trust Registration is the Registration of Property Rights

The nature of trust registration should be determined based on the core functions and goals to be realized by the trust registration. It is not limited to the registration of trust product information, but involving the registration of trust property rights,

which has the following advantages:

The first is to affirm the right to represent the independence of trust property. The independence of the trust property is the most important feature of the trust, the basis of the trust registration and publicity, in the meanwhile, it is the basis of the management and use of the trust property by trustee. The registration of trust property rights confirms the independence of trust property, separates it from the inherent properties of the trustor and the trustee, and realizes the function of risk isolation. Generally, the trust property cannot be regarded as the heritages of trustee and the trustee or liquidation properties, and is not able to be claimed by the creditors of them. The trust registration clarifies the rights and obligations of the parties to the trust based on the trust property, establishes the identity of the trustee. The trustee can acquire the rights stipulated in the trust contract, but also need to undertake the corresponding fiduciary obligations.

The second is to clarify the ownership of the trust property rights and stabilize the trust relations. Under Trust Law, the provisions on the transfer of trust property are vague, resulting in the unclear ownership of trust property. The contents of trust registration in the trust registration under the Measures for the Administration of China Trust Registration issued by CBRC in 2017 do not involve the ownership of rights, either. The trust property belongs to the trustee in the form of appearance, but it cannot reflect the real ownership of the property and the scope of the trustee's rights, it may cause a large gap between the property enjoyed by the trustee in form and the property actually enjoyed by the trustee, which makes the relative party of the transaction overestimate the financial ability or solvency of the trustee excessively, and easily suffer losses when deciding to trade with the trustee. The trust property should be registered in the name of the trust itself, and the information of the trustee should be marked, so as to truly realize the trust property independence and clear ownership.

The third is to protect the rights and interests of third parties and beneficiaries. The benefit that registration of trust is the registration of property rights is to prevent against the risk of the trustee's overstepping the scope of the trustee's authority and some fraudulent behaviors that the trustee conduct against the interests of the creditors, and to strengthen the protection of the interests of the third party and the beneficiaries. At the same time, the publicity function of the registration of trust property rights enables the third party to fully understand the ownership status of the objects in the transaction and relevant information of that, such as by knowing whether the trustee shall enjoy the right of the disposition and whether the disposition of the trust property is restricted, and so on, to determine whether it is suitable for trading and confirm the conditions of the deal. In addition, as for the popular commercial trust in China, it is very hurried to solve the problem of achieving the orderly transfer of beneficial rights. Trust registered as the registration of property rights can seek market-oriented pricing way and promote the trust products of non-standard for unified "id card", so that it will enable the investors to obtain more accurate information about the beneficial right and its changes, guarantee the transfer and pledge of the beneficial right, and finally realize the transfer of the beneficial right of the trust.

3. The Verifying of Efficacy the Trust Registration

3.1 Selections between Registration Effectism Doctrine and Registration Antagonism Doctrine

The academic discussions on the efficacy of trust registration mainly distinguish into two views: registration effectism and registration antagonism:

First, the opinion for the registration effectism doctrine believes that the trust registration is the prerequisite for the trust to be effective. Without the legal registration procedure, the established trust cannot obtain the legal effect, it has no effect on the trust parties within and outside the trust relations. The trust registered by law can not only fight against the third party, but also against the parties of the trust. At present, registration effectism doctrine is adopted in China. Where a trust is established for a property that is legally required to be registered, the trust shall not be effective without being registered as a trust. In order to avoid extremely strict provisions, a supplementary provision is added, i.e., those who have not been registered can be made up. The academics hold critical attitude towards the registration effectism doctrine that it is too strict, because excessive intervention in the trust relations will affect the internal relations of the trust, restrict the flexible system design of the trust itself and other unique properties, which does not conform to the basic principle and function of the trust system, and may also lead to the instability of the trust relationship. For example, when the trust terminates, the trustee has transferred the property to the beneficiary or to the person specified in the trust documents, but if the trust is not registered, the trust is not effective under the registration effectism doctrine, which leads to invalidity of the previous disposition of the trustee's management of the trust property, and seriously affects the interests of the parties to the trust and the third party.

Secondly, the registration antagonism doctrine holds that the trust registration only has the effect of antagonizing the third party, but does not affect the trust itself. When the trust meets the statutory conditions, the trust can be established and take effect, which is binding upon the parties to the trust. Where a trust is legally registered, the parties to the trust may, on the basis of the existence of the trust relations, have rights against a third party, but a trust that has not been legally registered does not have this effect. For example, the registration antagonism doctrine is adopted in Japan, under which the rights against a third party are above the rights to claim by trustor within the responsibility or the claims over the scope of the trust property. Under the Trust Law in Japan, if the property right is not registered or going through the process of registration, it has no effect against a third party. This is consistent with the registration antagonism doctrine upon change of real rights under Civil Law in Japan. From the perspective of the registration of property rights in China, there are also some cases about registration antagonism, such as the registration of ownership and mortgage of ships. Under the registration antagonism doctrine, the scope of the party autonomy be enlarged, and the parties' consensus can make the trust take into effect and operate effectively. Except for the special circumstances stipulated by the law such as the trustee's overreaching disposition of

property, the trust behavior will not have a negative impact on the rights of the third party.

3.2 To Establish Registration Antagonism Doctrine in Trust Registration

The effect of trust registration is independent from that of change registration of real right. Compared with the registration effect doctrine, the registration antagonism doctrine conforms to the special nature of the trust and can protect the interests of the beneficiaries and the third party.

First, in terms of interest protection, the real right registration solves the problem of protecting the interests of the third party. In this point, there is no difference between registration antagonism doctrine and registration effectism doctrine. However, trust, should not only protect the interests of the third party, but also the parties in its internal relations, especially the protection of the beneficiaries. Based on the abovementioned reason, it is more reasonable to apply to registration antagonism doctrine. In the case of registration effectism doctrine, if there is no registration of the trust, even if the trust has been established, it does not have legal effect. In this situation, the established trust is not only unable to create the rights against the third party, but also unable to form constraints on the parties to the trust, which means the trustee has not acquired the trust property on the basis of the trust contract, and the trustor can retrieve the property at any time before the trust becomes effective. In terms of the external behaviors, the trust has not yet taken effect, and the trustor is still the owner of the property. So, the transaction between the trustee and a third party cannot have legal effect. The trustor can claim the right to the property and damage the interests of the third party in the transaction. However, under the registration antagonism doctrine, even if there is no registration, only the legal effect against external stakeholders cannot occur, which will not affect the validity of the trust act itself. The trust relations have been effectively created and are legally binding upon the parties to the trust, trustor no longer have absolute ownership and related rights to the trust property when property has been independent of its own property. In the meanwhile, the registration antagonism doctrine can also protect the interests of the third party, forming a certain degree of restrictions on the external rights of the parties to the trust. Finally, whether the real right held by the holder has the effect against the third party depends on whether the holder has made a reasonable public registration.

Second, in terms of the intervention by public power and selection of legal value, the registration system is the state's control over the trust behavior, which reflects the public power's intervention in the trust contract behavior. Under registration effectism doctrine, the scope of the party autonomy is limited to the creation of trust, and it cannot take legal effect into the established trust without registration. By contrast, under registration antagonism doctrine, the public power does not interfere in the trust relations between the parties. The trust established by the parties in accordance with the conditions stipulated by law is valid, and the parties enjoy rights and assume obligations based on the legal relations of trust. In addition, trust in China is currently and mainly a type of commercial trust, which also involves the

transfer of beneficiary right certificates and shares held by the fund. To ensure transaction efficiency and transaction safety has become the main value pursuit of regulating trust behavior. As a result, the boundary of trust behavior intervention should be based on the party autonomy. In order to safeguard the overall financial interests, the security and stability of the trust in the market transaction are emphasized. When the public power is involved in protecting the transaction order and the interests of the third party, it can achieve this goal well and improve the administrative efficiency, which conforms to the law of market economy.

4. Practical Paths: an Independent Trust Registration System

4.1 Necessity of Establishing an Independent Trust Registration System

Under the current trust laws in China, properties is required to the registration, mainly for the registration of real properties rights. But it does not distinguish between the registration of trust property and the registration of trust itself. At present, the existing legal ownership registration of property in China cannot fully realize the functions and goals of trust registration. Based on the registration under the rules that a change in property rights shall occur after registration pursuant to the real properties and movable properties statues and regulations, it is also necessary to conduct an independent trust registration which is different from the real right registration. The main reasons for establishing the trust registration system separated from the real right registration are as follows:

First, the trust registration can guarantee the independence of the trust property and protect the interests of the beneficiary and the third party. Different from the common law countries, China does not have specific legal rules to protect the interests of beneficiaries and the third persons. Under the current rules, only certain properties need to be registered, so the registration system cannot cover all forms of trust properties. The registration of property rights only shows the change of rights to the property, but not the fiduciary nature of the property. Capital trust is mostly gathered in the trust in China without the legal registration, but the independence of trust property can not be realized only according to the contract between the parties. In the absence of trust registration, funds as trust property cannot be distinguished from the inherent funds of the trustee. Besides, the trustor can set up a trust to escape the debts while the relevant right holder has no way to know. Therefore, the existence of the trust relations must be publicized through the trust registration to protect the interests of the beneficiaries or the third party in the transactions. More importantly, when establishing the trust, the trustor may make certain restrictive provisions on the trustee's rights to manage the trust property, however, the registration of property rights cannot show these restrictions to the third parties. The trust registration can not only publicize the scope of the rights of the trustee to the public, protect the right to know of the third party in the transaction, but also enable the beneficiary to obtain the rights against the third party, with which beneficiaries may exercise the revocation right to remedy the action of overstepping trustee's authority and protect the rights and interests of them.

Second, the trust registration is the requirement for the supervision institution to realize the effective supervision of the trust. In the trust industry in China, most trusts are commercial trusts, and trust industry has become one of the four major financial industries in China. The trust industry must be supervised more effectively as its fluctuation has had a big enough threat to the financial safety. The lack of trust registration system will lead to the lack of supervision. To implement the trust registration system, the supervisory authority can master the specific situation of the ownership of the trust property, the legal relationship of the trust, the beneficial right and its changes, so as to make a statistical analysis of the whole trust industry and take reasonable supervision measures through the data of the registration authority. In addition, the beneficial right is a kind of property right, which can be transferred through the securitization of the beneficial right in the commercial field. Unified trust registration can promote the standardization of trust products and realize the transfer of the beneficial right.

4.2 A Trust Registration System Combined with Legal Property Registration

The current law stipulates that the scope of trust property required to be registered cannot cover all forms of trust property, and the existing property registration system does not involve the registration of trust property. A trust registration system should be established to coordinate with the existing legal property registration under the existing ownership registration system. The Measures for the Administration of China Trust Registration provides a direct basis for the centralized registration of China trust, but its efficacy is lower than that of the registration of real properties, special movable properties and other properties that need to be registered as directly stipulated by law, which must be coordinated with the registration of real rights.

First of all, trust registration is combined with the registration of legal property ownership. Trust is created on the basis of trust contract, and the specific contents reflect the party autonomy, while the varieties and contents of real rights shall be stipulated by law according to the principle of numerus clauses. The basis of trust registration is the Measures for the Administration of China Trust Registration issued by CBRC, and the basis of real right registration is the Property Law. It is necessary to adjust the relation between the existing property registration system such as real right registration and trust registration so as to make the trust registration more in line with the practical needs of trust practice in China and consistent with the existing registration legal system. Although the trust registration adopts the registration antagonism doctrine, if the property that can be changed only when the real right of that can be registered by law is going to be used to create a trust, the trust property should be transferred only after the real right registration so as to ensure the independence of the trust property. Therefore, the trust shall be double registered for establishment of a trust where the property right itself can be transferred and the ownership can be attained after the legal registration. The kind of properties with the creation and transfer of real right for the establishment of a trust should go through a process of legal registration, which becomes the proof of

the efficacy of the trust. The effect against the third party based on the trust relation is obtained after the trust registration. Although the double registration increases the burden of the registration of the parties, it conforms to the relevant laws and regulations on the change of property rights, ensures the clarity of the ownership of trust property, and makes the trust registration consistent with the existing registration system in China.

Secondly, the establishment of a trust registration system coordinated with the legal property registration system is suitable for the requirements of efficiency and has a strong applicability. Whether to give the rights of the current legal registration of the ownership to the trust registration or adding the contents of trust registration in the existing ownership registration, it costs a lot in the reform and adjustment of the system, and at the same time, it will be objectively restricted by the existing laws and rules in China. For example, The properties currently stipulated to be registered legally for the ownership are mainly real properties, equity and intellectual property rights, etc., these properties are scattered in different registration authorities, and unable to register in the same system. The National Trust Registration Platform in China which is also called China Trust Registration Co., LTD., has been established with the relevant regulations are being gradually improved. The public interests of the trust registration system can be achieved at the lowest cost and coordinated with the principle of cost-benefit by combining the trust registration system with the existing property registration system and establishing an independent trust registration system to publicize the establishment of different properties .

Finally, the trust registration system should be combined with the characteristics of the trust itself. There is a great distinction between the trust registration and the real right registration. With the help of trust registration, the function of independence of trust property and bankruptcy remoteness can be fully achieved, which conforms to the basic principle of trust. The trust is concealed, which helps the creator of the trust is reluctant to open the trust of the property to the public under certain circumstances. If the trust registration is completely equal to the real right registration, the trust creator has to unwillingly publicize the trust property of the property while transferring the property right, which damages the party autonomy of the trust parties. Therefore, the protection of trust concealment should also be considered in the construction of trust registration system. Most trusts in China have the nature of private placement. In terms of the information registration of trusts, they should have certain confidentiality and disclose information judged from different degrees in combination with the characteristics of different types of trusts. In addition, the basic information of the trust plans with assembled funds involving a large number of stakeholders should be publicized and subject to social supervision, in the meanwhile, only the necessary information should be publicized based on the need to protect trade secrets.

Acknowledgments

This paper is the phased research achievement of the project “Research on Crime Risk and Prevention and Control Countermeasures of Virtual Currency” (Project No.:

2019JKF419).

References

- [1] Zheng Hebin (2016). The Analysis on the Trial Implementation Measures for the Registration of Trust, *Journal of Qiqihar University (Phi&Soc Sci)*, no.10, pp.93-94.
- [2] Hsiao Mark (2015). Chinese Trust Law: registration as the concept-substitution and a workout solution for investors(beneficiaries), *Trusts&Trustees*.
- [3] Li Longhao, Zhang Chunyu (2003). Establishment of Land Trust Registration System in China, *China Land Science*, vol. 17, no.4, pp.48-51.
- [4] Maurizio Lupoi (2000). *Trusts:A Comparative Study*, Cambridge University Press.
- [5] Tang Shumei (2008). On Building of Credit Registration System, *Law Science Magazine*, vol.43, no.6, pp.137-139.
- [6] Zheng Hong (2007). Comparative Study on the Institution of Trust Registration, *Hebei Law Science*, vol. 25, no.12, pp.148-150.
- [7] Qiu Siping (2017). On the Leal Bottleneck of the Real Estate Investment Trust from the Perspective of the Registration of Real Estate Trust, *Journal of Beijing University of Technology(Social Sciences Edition)*, vol.17, no.4, pp.56-60.
- [8] Zhong Ruidong (2006). On the Principle of Publication of Trust Property, *Journal of ZhengZhou University*, vol.39, no.1, pp.23-26.
- [9] Tamar Frankel (2014). *Towards Universal Fiduciary Principles*, *Queen's Law Journal*.
- [10] Jesse Dukeminier, Robert H Sitkoff (2013). *Wills, Trusts and Estates*. Aspen Publisher.