

Part II

**Challenging Perceptions of Property
and Trusts**

Shapeless Trusts and Settlor Title Retention: An Asian Morality Play

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I. THE CHINESE SHAPELESS TRUST

THE FIRST 11 years of the present century have seen several jurisdictions formulate and enact new trust regimes, including the French statutory *fiducie*, the British Virgin Islands' VISTA trust, the Uruguayan *fideicomiso*, the *affidamento fiduciario* of the Republic of San Marino and the trust chapters of the new draft civil codes of the Hungarian and Czech Republics.¹ From a comparative perspective, the most challenging of the new regimes may be the People's Republic of China's Trust Act of 2001.² In not specifying who of the three main protagonists of the trust—the settlor, the trustee or the beneficiary—must hold title in the trust assets, and permitting the settlor's retention of title in those assets without his declaring himself a trustee, China has produced a truly 'shapeless' trust.

The 'shapeless trust' moniker was coined by Maurizio Lupoi, one of Italy's great trust scholars, for the definition of the trust in the Hague Convention on the Law

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¹ See: (a) France: loi n°2007-211 du 19 février 2007 instituant la fiducie, amending several codes, including the Code Civil, to which new Articles 2011–31 were added; see discussion in F Barrière, 'The French Fiducie, or the Chaotic Awakening of a Sleeping Beauty' in L Smith (ed), *Re-imagining the Trust: Trusts in the Civil Law* (Cambridge, Cambridge University Press, 2012) 222–57; P Crocq, 'National Report for France' in SCJJ Kortmann et al (eds), *Towards an EU Directive on Protected Funds* (Deventer, Kluwer, 2009) 99–113; (b) the British Virgin Islands: Virgin Islands Special Trusts Act 2003; see discussion in G Thomas and Ar Hudson, *The Law of Trusts*, 2nd edn (Oxford, Oxford University Press, 2010) 1167–79; (c) San Marino: Law of 1 March, 2010, no. 43, on the *affidamento fiduciario*; see discussion in M Lupoi, 'The New Law of San Marino on the "Affidamento Fiduciario"' (2011) 25 *Trust Law International* 51–59; (d) Uruguay: Ley de Fideicomiso, No 17.703; see discussion in DWM Waters, 'The Future of the Trust—Part I' (2006) 13 *Journal of International Trust and Corporate Planning* 179, 197–98; (e) Hungary: 2009 évi CXX. Törvény a Polgári Törvénykönyvről (Law no 120/2009 on the Civil Code [not yet in force]) ss 5:583–95; see discussion in N Csizmazia, 'National Report for Hungary' in Kortmann et al (cited above) 175, 184–91; (f) Czech Republic: see discussion of the new draft civil code in T Richter, 'National Report for the Czech Republic' in Kortmann et al (cited above) 59, 65–70.

² Trust Law of the People's Republic of China, 28 April 2001, Order of the President of the People's Republic of China (No 50), with effect from 1 October 2001 (official translation at www.npc.gov.cn/englishnpc/Law/2007-12/10/content_1383444.htm), hereinafter 'the Chinese Trust Law'.

Applicable to Trusts and on their Recognition.³ This defined the trust as ‘the legal relationships created—*inter vivos* or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose’, adding that it is a characteristic of trusts that ‘title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee’.⁴ Lupoi substantiated his description of the Convention definition as ‘shapeless’ by noting that as it does not require, as American, English and Commonwealth trust law does, that title to the trust assets vest in the trustee, the definition seems to include under the term ‘trust’ a great many types of relationships, both bilateral and trilateral, including relationships leaving the settlor as owner of the trust fund despite his having appointed, rather than become, a trustee.⁵

The definition of the trust in the Chinese Trust Act is no less shapeless than that in the Hague Convention. The Chinese definition provides ‘that the settlor, based on his faith in trustee [*sic*], *entrusts* his property rights to the trustee and allows the trustee to, according to the will of the settlor and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purposes’.⁶ The precise meaning, in this context, of the term ‘entrusts’—*weituo*—is obscure. It does not, according to Professor Lusina Ho of the University of Hong Kong, amount to a requirement that settlors transfer title in the trust assets to their trustees; the Chinese term for ‘transfer’ is *zhuan yang*. Chinese courts, having started to interpret and apply the Act, have similarly ruled that the Act does not mandate the transfer of title in the trust assets from the settlor to the trustee.⁷ Ho and others note that Chinese law uses *weituo* in describing the relationship of principal and agent.⁸ The phrase ‘allows the trustee ... [to administer or dispose of the property] according to the will of the settlor’ also carries considerable echoes

³ M Lupoi, ‘The Shapeless Trust’ (1995) 1 *Trusts & Trustees* 15; and see full discussion in M Lupoi, *Trusts: A Comparative Study* (S Dix trans, Cambridge, Cambridge University Press, 2000) 327–67.

⁴ Convention on the Law Applicable to Trusts and on their Recognition, concluded 1 July 1985, entered into force 1 January 1992 (hereinafter ‘the Convention’), art 2.

⁵ Such situations should be distinguished from ‘declaration of trust’ situations, where the settlor declares that he holds assets on trust, thereby making himself into a trustee and transforming his ownership of the trust assets into fiduciary ownership. For Lupoi’s discussion, mentioning several further points of doctrine on which the Convention stakes no position at all, thus rendering its trust concept ‘shapeless’, see Lupoi, ‘Shapeless Trust’ (n 3) 16–17, and Lupoi, *Trusts* (n 3) 339.

⁶ Chinese Trust Law, s 2, emphasis added.

⁷ *Beijing Haidian Science & Technology Development Co Ltd v Shenzhen Xinhua Jinyuan Touzi Fazhan Youxian Gongsi and others* (First Instance Civil Cases, Chongqing High People’s Court, 19 March 2007), discussed, eg, in L Ho, ‘China: Trust Law and Practice since 2001’ (2010) 16 *Trusts & Trustees* 124, 126–27.

⁸ My discussion of the Chinese Act in the following paragraphs draws on the following materials: L Ho, ‘Trust Laws in China: History, Ambiguity and Beneficiary’s Rights’ in Smith (n 1) 183–221; L Ho, ‘The People’s Republic of China’ in J Glasson and G Thomas (eds), *The International Trust*, 2nd edn (Bristol, Jordans, 2006) 825–38; L Ho, ‘Reception of the Trust in Asia: Emerging Asian Principles of Trust?’ (2004) *Singapore Journal of Legal Studies* 287–304, 293–303 (referring, at 294, n 35 and text thereto, to the use of the term *weituo* in an agency or mandate context in the General Principles of Civil Law of China, Order no 37 of the President of the People’s Republic of China, adopted on 12 April 1986, arts 64 and 65); L Ho, *Trust Law in China* (Hong Kong, Sweet & Maxwell Asia, 2003); Ho (n 7); D Hayton, ‘The Core of the Chinese Trust Law 2001’ (2005) 3 *Trust Quarterly Review* 24–27; R Lee, ‘Conceptualizing the Chinese Trust’ (2009) 58 *ICLQ* 655–69; Waters (n 1) 219–22; FH Foster, ‘American Trust Law in a Chinese Mirror’ (2010) 95 *Minnesota Law Review* 602–51.

of agency. English law, noticeably, uses the verb 'entrust' to describe fiduciary relations generally, rather than a trust.⁹

The Chinese Act includes several other provisions that appear to envision a continuing connection between the settlor and the property he has already transferred into trust. The Act provides that 'the trust shall be differentiated from other property that is not put under trust by the settlor'.¹⁰ Under most trust regimes, such differentiation is achieved by transferring title in the trust assets from the settlor to the trustee. Where such transfer is a fundamental feature of any trust, a provision enjoining differentiation of trust property from the settlor's non-trust property is unnecessary, other than, perhaps, in 'declaration of trust' situations. Rules of law enjoining the *trustee* to keep trust and non-trust property separate are far more common.¹¹ Yet the Chinese provision just quoted is not restricted to 'declaration of trust' scenarios.¹²

The Act gives the settlor of an already-constituted trust an impressive array of powers, demonstrating an understanding of the trust as a continuing contractual relationship between the settlor, the trustee and the beneficiary.¹³ It provides, for example, that 'the settlor shall have the right to know the administration, use and disposition of, and the income and expenses relating to, *his* trust property, and the right to request the trustee to give explanations in this regard';¹⁴ that 'if, due to special reasons unexpected at the time the trust is created, the methods for administering [*sic*] the trust property are not favorable to the realization of trust purposes or do not conform to the interests of the beneficiary, the settlor shall have the right to ask the trustee to modify such methods';¹⁵ that 'where the trustee's appointment is terminated, a new trustee shall be appointed according to the provisions in the trust documents; where there are no such provisions in the documents, the settlor shall make the appointment';¹⁶ and that under certain circumstances, 'after a trust is created, the settlor may replace the beneficiary or dispose of his right to benefit from the trust'.¹⁷

In the decade since its enactment, the unique approach of the Chinese Trust Act has drawn the attention of numerous scholars, both in China and elsewhere.¹⁸ Much of the discussion has centred on the Act's not requiring that the settlor

⁹ In *Reading v The King* [1949] 2 KB 232 (CA), Asquith LJ explained, at 236, that 'a "fiduciary relation" exists (a) whenever the plaintiff *entrusts* to the defendant property ... and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorised by him' (emphasis added).

¹⁰ Chinese Trust Law, s 15.

¹¹ See, eg, Restatement of Trusts, 3rd, §84 and cmt b (enjoining trustees 'to keep the trust property separate from the trustee's own property'); Chinese Trust Law, s 16 (providing that 'the trust property shall be segregated from the property owned by the trustee').

¹² See discussion of s 15, quoted earlier in the present paragraph, and its implications for the Chinese Act's fundamental trust model in Ho, 'Reception of the Trust in Asia' (n 8) 295, nn 42-43 and text thereto.

¹³ See, eg, Ho (n 7) 125; H Wang, L Ho and Y Zhou, 'Contract or Trust: Examining the First Trust Decision of the Chinese Courts' (2007) 5 *Trust Quarterly Review* 11-14, 12, 14.

¹⁴ Chinese Trust Law, s 20, emphasis added.

¹⁵ *Ibid*, s 21.

¹⁶ *Ibid*, s 40.

¹⁷ *Ibid*, s 51.

¹⁸ See the sources in n 8 above.

transfer title in the trust assets to the trustee.¹⁹ As the principal point was recently put by Scottish property scholar Kenneth Reid, ‘the location [under Chinese trust law] of title [in the trust assets] is a matter of choice—an arrangement unparalleled, so far as I know, in any other country’.²⁰ A shapeless trust indeed.

In commenting on the Chinese Act, Professors Ho and Reid noted that trusts the trustees of which do not own the trust assets raise several difficulties. Following recent comparative trusts literature, Reid admitted that trustees’ ownership of trust assets cannot be described as ‘an essential feature of a trust’, further admitting that ‘the difficulties of [placing ownership in the settlor or beneficiary] are practical rather than doctrinal’.²¹ The difficulties raised by Reid and Ho are as follows:

- (i) ‘A trustee who derives powers indirectly, from the ownership of others, will have the tiresome burden of proving these powers to the satisfaction of third parties.’²²
- (ii) If ownership of the trust assets is placed in settlors or beneficiaries rather than trustees, situations may arise where trust assets have no owner, or where the identity of some or all of their owners is disputed. The settlor or beneficiary might die or be dissolved. While the Chinese Act provides a mechanism for replacing a dead or dissolved trustee,²³ no such mechanism is provided for replacing a dead or dissolved settlor or beneficiary.²⁴ Some

¹⁹ See, eg, Ho’s criticism of this feature of the Act in her ‘Reception of the Trust in Asia’ (n 8) 293–96.

²⁰ KGC Reid, ‘Conceptualising the Chinese Trust: Some Thoughts from Europe’ in Remco van Rhee and Lei Chen (eds), *Towards a Chinese Civil Code: Historical and Comparative Perspectives* (Leiden, Brill, 2012); University of Edinburgh School of Law Working Paper Series No 2011/06, at 9.

²¹ *Ibid*, 9, internal quotes omitted. For comparative trusts scholarship counting the ‘essential features of trusts’ and finding that trustees’ ownership of the trust assets is not one of them, see Ho, ‘Reception of the Trust in Asia’ (n 8) 289–90; T Honoré, ‘Trust: The Inessentials’ in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts—Essays in Honour of Edward Burn* (London, Butterworths, 2003) 1–2, 4, 12 ([‘the South African and Quebec trust regimes show that] the essential relation of a trustee to the trust assets is one not of ownership but of control’); T Honoré, ‘On Fitting Trusts into Civil Law Jurisdictions’, available at: ssrn.com/abstract=1270179, at 7 (‘it does not matter where the title to the trust property is located. To locate it in the trustee, as in Anglo-American trust law, is convenient but not essential’), and see also at 12; L Thévenoz, ‘Trusts—The Rise of a Global Legal Concept’ in M Bussani and F Werro (eds), *European Private Law: A Handbook*, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1723236, at 22–23 (‘The actual legal owner of the trust property also appears not to be critical. It is the trustee in Scotland; it can be either the trustee or the beneficiary under South African law; but there is no legal owner under the recent codification of Quebec. One should infer that the vesting of legal title with the trustee is inconsequential’). For the view that trustees’ ownership of the trust assets is an essential feature of all trusts properly so called, see GL Gretton, ‘Trusts without Equity’ (2000) 49 *ICLQ* 599, 603 (‘though it functions as a trust, the *bewind* is not trust, for a simple reason: the location of legal title is the reverse of the trust’); M Lupoi, ‘The Civil Law Trust’ (1999) 32 *Vanderbilt Journal of Transnational Law* 967, 970 (noting that ‘the transfer of property to the trustee, or a unilateral declaration of trust’ is part of the ‘definition of the trust in comparative law terms’).

²² Reid (n 20) 7; the same point was noted by Ho, ‘Reception of the Trust in Asia’ (n 8) 295–96; Ho, ‘Trust Laws in China’ (n 8) 200–01.

²³ Chinese Trust Law, s 40; under s 52, a trust is not terminated by the death, insolvency or incapacity of its settlor or trustee.

²⁴ Section 15 provides that where a settlor is not also a beneficiary, on his death, dissolution, cancellation or bankruptcy, ‘the trust shall subsist, and the trust property shall not be his legacy or liquidation property’.

trusts have no living, identified or identifiable beneficiaries, for a time or permanently. The identity of a trust's beneficiaries can also be disputed.²⁵

- (iii) Settlers who never parted with ownership in the trust assets seem, under Chinese law, to owe no fiduciary duties. Thus:

[I]f the settlor misappropriates the trust assets, and it is very easy for him as the owner to do so, there is very little the beneficiaries could do. As the property is not owned by the trustee, any action against him will face the difficulty of proving lack of prudence on his part in not pre-empting the conduct of the settlor, who is after all the legitimate owner of the trust assets ... any direct action against the settlor will meet the even greater difficulty that the Chinese Trust Law does not subject him to any duties.²⁶

Are those difficulties enough to condemn trust regimes under which title to the trust assets is left in the settlor, despite his having appointed, rather than become, a trustee, as inferior to the conventional model, under which that title is in the trustee? And what of the 'shapeless trust' itself? Is the Chinese Act's silence on the locus of title in the trust assets inferior to a trust regime positing one—any one—of the three points of the 'eternal triangle of the trust'²⁷ as the locus of that title?²⁸ Or is it inferior only to the conventional model locating that title in the trustee?

It is the task of the present chapter to begin an examination of the relative efficacy of 'shapeless' trust regimes, which permit, among other configurations, trusts the assets of which remain in the settlor despite his having appointed, rather than become, a trustee. Empirical data on the operation of such regimes is limited, however, due to their small number. The Chinese regime is still too recent for empirical data to be available in useful quantities. As late as 2010, even judicial decisions interpreting or applying the 2001 Act appear to have been rare.²⁹ While South Africa, Germany and the Netherlands, as well as Quebec and its Uruguayan and Czech offshoots, offer examples of regimes placing title to the trust assets elsewhere than in the trustee, their trust models are the opposite of shapelessness—they are clear, definite and concrete regarding the locus of title.³⁰ Alone among this group,

²⁵ Reid (n 20) 7, 10–12.

²⁶ Ho, 'Reception of the Trust in Asia' (n 8) 296.

²⁷ Cf M Mautner, 'The Eternal Triangles of the Law: Toward a Theory of Priorities in Conflicts Involving Remote Parties' (1991) 90 *Michigan Law Review* 95–154.

²⁸ Lupoi's criticism of the 'shapeless trust' was confined to its use in the Hague Convention's description of the class of legal instruments to which it applies as a matter of conflicts law. His criticism did not extend to the adoption of a 'shapeless' definition of the trust as part of a specific jurisdiction's substantive trusts regime. See his 'The Shapeless Trust' (n 3) 16–17 and his *Trusts* (n 3) 339.

²⁹ Ho, 'Trust Laws in China' (n 8) 202–03; Ho, 'China: Trusts Law and Practice' (n 7) 126.

³⁰ South Africa and the Netherlands both allow the *bewind*, according to which title to the assets is in the beneficiary, though the *bewindvoerder* (in the Netherlands) or *bewindhebber* (in South Africa) enjoys an exclusive right to administer and dispose of them. For the Netherlands, see SCJJ Kortmann and HLE Verhagen, 'National Report for the Netherlands' in David Hayton, SCJJ Kortmann and HLE Verhagen (eds), *Principles of European Trust Law* (The Hague, Kluwer, 1999), 195–215, 199–200. For South Africa, see Trust Property Control Act, Act 57 of 1998, s 1, s. v. 'trust', and E Cameron et al, *Honoré's South African Law of Trusts*, 5th edn (Lansdowne, Juta Law, 2002) 272–77. The Civil Code of Quebec provides that 'the trust patrimony ... constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right' (art 1261). Studies of the Quebec trust are many. See, for example, JB Claxton, *Studies on the Quebec Law of Trust* (Toronto, Thomson, 2005) especially ch 2. Uruguay has adopted, and the Czech Republic is apparently about to adopt, the Quebecois solution; see sources cited in n 1. For Germany, see the next two notes and text thereto.

the German *unechte treuhand* is notable for leaving title in the settlor (who *treuhand* law assumes to also be the beneficiary);³¹ shapeless, however, it is not.³² I hope to examine its operation in a future article.

Fortunately, however, the efficacy of shapeless trusts, a question made urgent by the Chinese Trust Act, may be illuminated by the annals of a jurisdiction at the other end of continental Asia: Israel. Pre-dating the Hague Convention by a few years, the Israeli trust regime under the Trust Act of 1979³³ seems to have been the world's first shapeless trust regime. In Part II, I discuss this regime, focusing on express private trusts. I first describe the regime's shapelessness, and then the courts', practitioners' and academics' responses to this shapelessness. Finally, I describe the Israeli shapeless trust model's impending demise with the upcoming enactment of the Israeli Civil Code, which will rearrange the local trust model, expressly granting title in the trust assets to the trustee. In Part III, I conclude the chapter by trying to tease out the lessons of the Israeli experience for the general viability of 'shapeless' trust regimes, permitting, among other configurations, 'settlor title retention trusts'. The upshot is that despite the flaws of existing Chinese and Israeli legislation, as well as the many doctrinal difficulties created by those innovative trust models grating against established doctrine, which reflects the traditional trust model, both 'shapeless trusts' and 'settlor title retention trusts' could have their uses, particularly, perhaps, in making trusts more understandable and accessible for populations foreign to traditional Anglo-Saxon trust culture.

II. THE ISRAELI SHAPELESS TRUST: THE TRUST ACT OF 1979

A. The Israeli Shapeless Trust Regime

The Israeli Trust Act of 1979 is designedly vague regarding several key aspects of the trust relationship, not defining either the trustee's or the beneficiary's rights in the trust property. It rests content with a definition of a 'trust' as 'a relationship to property by which a trustee is bound to hold the same or act in respect thereof, in the interest of a beneficiary or for some other purpose'.³⁴ The notion of 'trustee' implicit in this definition includes fiduciaries such as executors, administrators, guardians and liquidators.³⁵ The beneficiary's rights in the trust property not being

³¹ S Grundmann, 'Trust and Treuhand at the End of the 20th Century: Key Problems and Shift of Interests' (1999) 47 *American Journal of Comparative Law* 401–28, 402–03, n 8 and text thereto.

³² See D Krimphove, 'National Report for Germany' in Kortmann et al (n 1) 115–43, 116–17.

³³ Trust Act, 5739-1979, 941 *Statutes*, 3 August 1979 at 128 (hereinafter 'the 1979 Act' or 'the Act').

³⁴ 1979 Act, s 1. An unofficial English translation of the Act, as promulgated in 1979, was published in the (1980) 15 *Israel Law Review* 418 ff. While the Act was thrice amended since then, these amendments are not material to our discussion.

³⁵ The application of statutory trust regimes beyond trustees on the common law trust model by an extended use of the terms 'trust' or 'trustee' is not unheard of in England. The English Trustee Act 1925 (15 and 16 Geo 5 c 19), for example, provides in s 68(17) that 'the expression ... "trust" ... extend[s] to ... the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative'. The difference is that in England, this extended application of rules principally applicable to trustees is not achieved by transforming the traditional trust concept.

defined, it appears that the common law, split ownership model of trusteeship, characterizing the beneficiary as the 'owner in equity' of the trust property, is not part of Israeli law; rather, an Israeli beneficiary has, like Indian, Scottish and Chinese beneficiaries, an obligatory right vis-a-vis the trustee.³⁶

Following this general definition, the Act contains two distinct trust regimes. One applies only to 'trusts created by an instrument of endowment', which, where not created by will or by beneficiary designation under an insurance policy or pension plan, must be created by the settlor signing a trust instrument before a notary.³⁷ The other, focused largely on trustees' duties and powers, applies to any fiduciary relationship involving property which the fiduciary must hold, use or 'act in respect of', applying the term 'trust', unconventionally, to this large class of relationships. Imposing duties which traditional common law trust law made specific to trustees on a much wider class of fiduciaries, this second regime serves as a common background to specific Israeli statutory regimes governing fiduciary situations such as those of the executor, administrator, guardian, liquidator, trustee in bankruptcy, banker and legal practitioner.³⁸

Many familiar rules of common law trust law appear in the 1979 Act only as regards 'trusts created by an instrument of endowment'. A key example is the requirement that where the settlor and trustee are different persons or entities, in order for the trust to be constituted, the trust's initial assets must be transferred from the settlor to the trustee. Applied only to trusts created by an instrument of endowment, this fundamental rule does not apply where a trust is created 'by contract with a trustee' or 'by statute'—the two other ways in which a trust may be created under the 1979 Act.³⁹ Significantly, even where a trust is created by an instrument of endowment, only control of the property, not title, must be transferred.⁴⁰ Many of the Act's other fundamental provisions, such as the provisions governing the appointment of trustees,⁴¹ their resignation and removal,⁴² the modification

³⁶ For beneficiaries' rights under Indian trust law, see BM Gandhi, *Equity, Trusts and Specific Relief* (Lucknow, Eastern Book Company, 1983) 372–77; for their rights under Scots law, see K Reid, 'National Report for Scotland' in Hayton, Kortmann and Verhagen (n 30) 67–84, 69–72; for their rights under Chinese law, see Ho, 'Trust Laws in China' (n 8) 210–19. See discussion of some of the 1979 Act's unconventional features in I Rabinovich-Brun, 'The Trust and Private International Law: An Israeli Perspective' in A Gambaro and AM Rabello (eds), *Towards a New European Ius Commune* (Jerusalem, Sacher Institute, 1999) 685, 688–94.

³⁷ This regime is contained in ss 17–24. Formal requirements regarding the creation of trusts 'by an instrument of endowment' are contained in s 17(a); see discussion in S Kerem, *Trusts*, 4th edn (Tel Aviv, Perlstein-Ginossar, 2004) 633–76.

³⁸ See discussion of this second, more general 'trusts' regime as 'a general framework applicable to any trust ... [including] trust relationships governed by other legislation', in *ibid.*, 142–43.

³⁹ 1979 Act, s 2. Post-1979 cases eventually provided that the s 2 list of ways in which trusts may be created is not exhaustive: Application for Permission to Appeal 5715/95 *Weinstein v Fuchs Piskei Din* (hereinafter 'PD') 54(5) 792 (2000). For the transfer requirement in English law, see *Knight v Knight* (1840) 3 Beav 148, 173; 49 ER 58, 86; *Milroyd v Lord* (1862) 4 De GF & J 264, 274; 45 ER 1184, 1189; internationally, see P Panico, *International Trust Laws* (Oxford, Oxford University Press, 2010) 16–27.

⁴⁰ See Discussion in A Alter, 'Taxation of Ordinary Trusts in Israel' (PhD Thesis, Tel Aviv University, 1985) 38, n 86.

⁴¹ 1979 Act, s 21.

⁴² *Ibid.*, s 22.

and termination of the trust,⁴³ and revocability,⁴⁴ as well as the provisions that the court may issue directions to the trustee⁴⁵ and that the settlor or another may, at any time, add to the trust property,⁴⁶ appear in the Act's second chapter, entitled 'A trust under an instrument of Endowment'. It is thus, at best, unclear if they apply to trusts created in the other ways recognised by the Act—by contract or by statute.⁴⁷

Both trust regimes in the 1979 Act appear to be strikingly shapeless. Even Lupoi's original 'shapeless trust', the trust concept which appears in the Hague Convention, is not quite as vague as the trust concept under the 1979 Act. The Convention's definition of a trust as 'the legal relationships created—*inter vivos* or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose' shares with the general definition of a trust in the 1979 Act the catch-all description of the trust as an unspecific 'legal relationship'.⁴⁸ The Convention is, further, content to refer, as the 1979 Act does in discussing trusts created by an instrument of endowment, to assets being placed 'under the control' of a trustee, not requiring that title pass from the settlor, or indeed that title pass at all.⁴⁹ The 1979 Act, however, is of still broader application, in that under trusts created other than by an instrument of endowment, trustees do not even need to have the trust property 'under their control', but may merely 'act in respect of' that property.⁵⁰ The Convention's concept of a trust is also rather more specific than the sentence I have just quoted from it implies, for it also provides, unlike the 1979 Act, that among the 'characteristics' of a trust is the fact that 'title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee'.⁵¹ Israeli trustees, contrastingly, can be reduced to 'acting in respect of' property title to which is not even in another on their behalf.

Further, the definition in the 1979 Israeli Act is even more 'shapeless' than the Chinese definition of 2001. The former does not require, as the latter does, that trustees necessarily administer or dispose of the trust property, or that they do so 'in their [the trustees'] name'.⁵² An Israeli trustee may merely 'act in respect of' the trust property, in the settlor's name or in the name of any other person.

Title in the trust assets may thus, under the 1979 Act, remain in the settlor. Appropriately, the Act gives settlors of already-constituted trusts powers which traditional common law trust law does not give them, while stopping short of the

⁴³ *Ibid*, s 23.

⁴⁴ *Ibid*, s 18(b).

⁴⁵ *Ibid*, s 19.

⁴⁶ *Ibid*, s 18(a).

⁴⁷ Kerem believed that they do not: Kerem (n 37) 139.

⁴⁸ The Convention, art 2. See Lupoi's critique of the convention in his *Trusts* (n 3) 327–67; and see further criticism of art 2 in Hayton, Kortmann and Verhagen (n 30) 38–40.

⁴⁹ The Convention, art 2. Lupoi noted the 'closeness' of the definition in s 1 of the 1979 Act to that in the Hague Convention: Lupoi, *Trusts* (n 3) 279, 334. See also 305, n 228, where Lupoi described the Israeli definition as 'the only legislative formulation which defines the relationship without indicating its source'. The Israeli definition lost its exclusiveness in 2001 with the enactment of the Chinese Trust Law. Lupoi's statement appears to have been correct when he made it: the original (Italian) version of his book appeared in 1994.

⁵⁰ 1979 Act, s 1.

⁵¹ The Convention, s 2.

⁵² Chinese Trust Act, s 2; see the discussion in Part I above.

panoply of powers that the Chinese Act grants settlors. The 1979 Act provides that the court, on the application of the settlor, may modify or strike out provisions of trusts created by an instrument of endowment.⁵³ However a trust is created, the settlor may always apply to the court in any matter concerning the trust. These provisions contrast with the English rule that holds the settlor to have no standing regarding the trust, without express provision to the contrary, once the trust has been launched and the trust property transferred to the trustee.⁵⁴

The 1979 Act thus provided not one but two trust regimes: one a 'shapeless', generalised scheme of fiduciary duties, applicable to any fiduciary who must hold property or act in respect thereof, the other a regime for donative trusts, complete with several features reminiscent of the trust regimes Caribbean island jurisdictions offer non-residents, such as the possibility of creating trusts for non-charitable purposes,⁵⁵ and even a statutory default spendthrift clause.⁵⁶ How have the two regimes been received since their introduction in 1979?

B. Responses to the 1979 Israeli Trust Regime: Courts, Practitioners and Academics

Significantly for our examination of the efficacy of shapeless trust regimes, the reception of the 1979 Israeli Act, especially of those of its features which contradict common law trust orthodoxy, has been mixed. In brief, the *courts*, having only fairly recently started to produce a sizeable body of case law on the 30-year-old Act, now read it literally, acknowledging its not requiring that title in the trust assets vest in the trustee. While the Act has seen use in practice, some *practitioners*, especially those creating sophisticated family and tax-planning trusts, continue their pre-1979 practice of using other legal systems' trust regimes, though this practice appears to have nothing to do with the 'shapelessness' of the Act's trust regime. However, the Act has met with significant *academic* criticism, which has been focused on its

⁵³ 1979 Act, s 23(a). See discussion in Alter (n 40) 33. Under English trust law, once a trust has been created, its provisions may be modified by agreement between the trustees and beneficiaries, or, under the rule in *Saunders v Vautier* (1841) 4 Beav 115, 115 ER 282 (M.R.), aff'd Cr & Ph 240, 41 ER 482 (LC), by agreement of the (ascertainable, *sui juris*) beneficiaries alone: see discussion of the English law of trust modification in G Moffat, G Bean and R Probert, *Trusts Law: Text and Materials*, 5th edn (Cambridge, Cambridge University Press, 2009) 323–55.

⁵⁴ Moffat et al, *ibid*, at 14.

⁵⁵ Section 1 defines a trust as 'a relationship to property by virtue of which a trustee is bound to hold the same or to act in respect thereof, in the interest of a beneficiary or for some other purpose'. Section 17 defines an 'endowment' as 'the dedication of property in favor of a beneficiary or for some other purpose' (emphasis added). Both sections leave the nature of the purpose referred to open. See the discussion in Alter (n 40) 32–33.

⁵⁶ Section 20 provides that beneficiaries' rights under a trust created by an instrument of endowment may not be transferred, charged or attached. A court may transfer, charge or attach a beneficiary's entitlement under such a trust, without an express exclusion of the statutory default spendthrift clause, only in order to satisfy maintenance, child support or taxes due from that beneficiary, or, 'under special circumstances', in order to collect other debts due from him or her. One commentator believes this power of the court, as to debts other than maintenance or taxes, to run only to property the time to distribute which has come according to the terms of the trust: Kerem (n 37) 706–07.

deviating from common law orthodoxy. Let me describe the reaction of each of these three components of the legal community in more detail.

More than legal practitioners, who often can, so far as trusts are concerned, choose a foreign trust regime of their liking, or academics, who can criticise the local law as they wish, it has been the *courts* that, at length, have recently started to breathe life into the Israeli shapeless trust regime. While reasoned judicial discussions of this regime have long been few and far between, they have seen a modest renaissance in the last decade or so. That judicial consideration of the 1979 Act has been slow to appear is a consequence of the long life of many trusts, of the time problems take to develop, come to light and be litigated, of limitation periods only starting to run, in trust cases, once beneficiaries are aware of trustees' breach,⁵⁷ as well as of many Israeli practitioners often employing trust regimes other than that of the 1979 Act. Many of the early post-1979 cases dealt with trusts subject to pre-1979 law.⁵⁸ Cases applying the 1979 Act started to appear in the mid-1980s. Most direct judicial discussion of the Act's innovations has focused on the shapelessness of its trust model—its seeming omission of the common law requirement that title in the trust assets vest in the trustee. Israeli courts have, until recently, tended to ask themselves whether the Act really meant to let go of this requirement. Several decisions sought refuge in indecision, refusing to pick a side.⁵⁹ Those that did stake a position, however, tended to follow the Act's vague definition of the trust as 'a relationship to property by which a trustee is bound to hold the same or act in respect thereof', holding that trustees under Israeli law do not necessarily have title in the trust assets.⁶⁰ They thus recognised and gave effect to the Israeli trust regime's shapelessness.

⁵⁷ For this rule in Israeli law, see Civil Appeal 5964/03, *Estate of the Late Edward Aridor v Petah-Tikva Municipality* 60(4) PD 437 (2006) 467 and the older cases cited there. In England, see the Limitation Act 1980 c 58, s 21(1), providing that no limitation period shall apply to a beneficiary's action in respect of the trustee's fraud or fraudulent breach of trust, or to recover trust property which the trustee has converted to his use.

⁵⁸ Civil Appeal 34/88, *Josephina Rutenberg Reis v Estate of Hanna Eberman* 44(1) PD 278 (1990); Civil Appeal 410/87, *Estate of the Late Mrs. Liberman v Junger* 45(3) PD 749 (1991); Civil Appeal 369/84, *Michael Beril v Ran Bar Lev* (decided June 1988, published online); Civil Appeal 414/87, *Assessing Officer for Large Factories v Kiryat Nordau Development Company Ltd* 46(5) PD 387 (1992); Civil Case (Tel Aviv) 688/87 'Ramatayim', *a Cooperative, Ltd v Popular Housing Ltd* District Court Decisions 510 (1988(2)); Application (Beer-Sheva) 48/88, *Ben Gurion University of the Negev v Beer-Sheva Municipality* District Court Decisions 353 (1992(3)).

⁵⁹ Civil Appeal 654/82, *Mediterranean Car Agency Ltd v C D Chayut, Adv* 39(3) PD 80 (1985); Civil Appeal 3829/91, *Wallace v Gat* 48(1) PD 808 (1994); Civil Appeal 8068/01, *Ayalon Insurance Corporation Ltd v Executor of the Late Chaya Ofelger* 59(2) PD 349 (2005); Civil Appeal 9225/01, *Zayman v Komeran* (decided 13 December 2006, published online). This last decision was a draw rather than a fudge. Procaccia J chose the broader, 'shapeless' view, writing that 'the trust is a duty imposed on a person given control over an asset, so that he may use that control in order to achieve a certain purpose' (para [9] of her opinion). Barak CJ adhered to the common law trust model, identifying the trustee's ownership of the trust assets as a sine qua non of trusts and sharply distinguishing trusts from other fiduciary relations (paras [3]–[4] of his opinion, repeating a view he expressed in Aharon Barak, *The Agency Act, 5725–1965*, 2nd edn (Srigim-Leon, Nevo, 1996) 1121–22). Grunis J refused to join either of his colleagues on the point of principle, ensuring the draw.

⁶⁰ Application (Tel Aviv) 12844/86, *El Al v Balas*, District Court Decisions 45, 50 (1989(1)); Civil Appeal 4660/94, *Attorney-General v Moshe Lishitzki* 55(1) PD 88 (1999) 108, 124–25, 129 (both the majority and minority opinions seem to reject the restriction of trusteeship to scenarios where title in the trust assets is in the trustee, with Cheshin J emphasising in his majority opinion both that the Israeli courts should be wary of adopting the details of foreign trust regimes and that there was in the instant

Two District Court decisions of 2009 and one Supreme Court decision of 2011 seem to represent a watershed in Israeli decisional law on express private trusts, regarding both its depth and its fully conscious endorsement of the 1979 Act's shapeless trust regime. The three contain by far the longest, most elaborate discussions of this legal institution and the law governing it yet penned by Israel's judiciary.⁶¹ All three decisions enforced beneficiaries' rights—one vis-a-vis the breaching trustee,⁶² the other two, addressing the same case at the trial and appellate levels, vis-a-vis the trustee's personal creditors, annulling an attachment of what was proven to be a trust asset.⁶³ All three conceived of the trust quite independently of common law trust orthodoxy. The first District Court decision followed the literal meaning of the 1979 definition, noting that trustees can be given the necessary control over trust assets either by receiving title in those assets or by being permitted to act thereon.⁶⁴ The other District Court decision identified beneficiaries as the sole owners of trust property, describing even trustees registered as titleholders as mere nominees.⁶⁵ Interestingly, this understanding of the 1979 Act, though not obvious on the face of the statutory text, is reminiscent of at least one Chinese court's understanding of the 2001 Chinese Trust Act, this court positing that even where ownership of the trust assets has been transferred to a trustee, either the settlor, the beneficiary or both were those assets' substantive owners.⁶⁶ Both the Chinese and Israeli courts gave shape to what the statutes they applied left shapeless. They assimilated their systems' trust regimes into those systems' general—civilian—frameworks of private law by reading the former as a type of agency, nomineehip or, in the Israeli case, a Dutch or South African *bewind*; the Chinese court was excused from choosing between the settlor and the beneficiary by their being one and the same in the case before it. The recent Israeli Supreme Court decision followed both the letter of the 1979 Act and the majority of earlier decisions in holding that Israeli law does not currently require, as a condition for the constitution of a trust, that trustees be given title in the trust property.⁶⁷

case no need to formally decide the question whether the Israeli trust concept was so restricted); Civil Appeal 1631/02, *Gorban et al v Tshuva Yitzchak Association for Solving the Housing Shortage* (decided 31 July 2003, published online); Civil Appeal 6406/03, *Endowment Trustees of the Sephardi Community in the Holy City of Sephad and Meiron v Kamus* (decided 16 June 2005, published online) (deciding, in para [6], that trusts created by an instrument of endowment could leave the settlor as the registered owner of the trust property); Application (Tel Aviv) 548/06, *Yigal Arnon v Shlomo Pyotrkovski* (decided 1 March 2009, published online); Bankruptcy (Jerusalem) 4044/07, *Hoffmann v The Official Receiver—Jerusalem District* (decided 24 June 2009, published online); Civil Appeal 5955/09, *Ya'acov Amster, Receiver v Marsha Tauber Tov* (decided 19 July 2011, published online).

⁶¹ The three are *Arnon*, *Hoffman* and *Amster* respectively (ibid). *Arnon* involved a celebrated dispute between two of Israel's top lawyers, one of whom, Pyotrkovski, held stock on bare trust for Arnon, so that the stock would not be included in the wealth pool Arnon was then dividing between himself and the wife he was in the process of divorcing. When large dividends beckoned, Pyotrkovski forgot that he held some of his stock on trust.

⁶² *Arnon* (n 60) [36]–[39].

⁶³ *Hoffmann* (n 60) [42]–[43].

⁶⁴ *Arnon* (n 60) [18].

⁶⁵ *Hoffmann* (n 60) [13], [28].

⁶⁶ *Beijing Haidian* (n 7), discussed by Ho (n 7) 126.

⁶⁷ *Amster* (n 60) [6]. Even while consolidating Israeli law's independent approach to trustees' rights in the trust property, however, *Hoffmann* and *Amster* drew the local system into closer conformity with common law trust orthodoxy regarding the vulnerability of trusts to trustees' non-trust creditors.

Trustees', accountants' and legal practitioners' responses to the Act's innovations, including the shapelessness of its fundamental framework, have been lukewarm. Until 1979, Israeli lawyers were uncertain regarding the express private trust's very availability under Israeli law. This uncertainty made local practitioners, who were nevertheless acting as trustees in myriad factual contexts, subject some of the express trusts they created to foreign legal systems under which private trusts were clearly available. Sometimes foreign trustees were used. While the 1979 Act removed all doubt regarding the existence of the express private trust as part of the local legal system, practitioners continued and continue to use foreign legal systems' trust regimes side by side with the local regime. The local trust regime is used in contexts such as nominee arrangements and trusts for disabled family members, while foreign trust regimes continue to be used for more complex family trusts, as well as where practitioners and their clients are interested in bypassing elements of Israel's fiscal or regulatory regime, such as taxation and (until 2003) exchange control.⁶⁸ Alon Kaplan, a leading Israeli trust practitioner and President of the local branch of the Society of Trusts and Estates Practitioners (STEP), explained why Israeli professionals prefer foreign trust regimes to the 1979 Act when creating elaborate family and business trusts:

Israeli professionals tend to use foreign law trust structures for organizing private and business affairs where an Anglo-Saxon type of trust is required. Sometimes, the continental foundation entity is also used. One can identify several reasons for the above usage:

... The legal structures available under the Trust Law 1979 are mostly insufficient. The establishment of a trust which would 'skip' generations, often available under foreign trust structures, is not available in Israel. Therefore there is a need for probate of the will in order to achieve the settlor's goal of creating a trust that will exist for a number of generations.⁶⁹

Israeli practitioners have thus found that despite the existence of the 1979 Act, the 'Anglo-Saxon type of trust' is still sometimes 'required'. In private communication, Kaplan made clear that the key difficulty in local law, which results in the continuing

Rejecting earlier case law, which construed the 1979 Act to say that where the existence of a trust was not noted on a public register, third parties having no actual or constructive knowledge of the trust could acquire the trust property free of trust (*Mediterranean Car Agency* (n 59); Civil Appeal 371/89, *Orit (Shechter) Ford v Chaim Shechter* 46(1) PD 149 (1992)), the two recent decisions held that even in such a scenario, trustees' non-trust creditors could not reach trust property (*Hoffmann* (n 60) [28]; *Amster* (n 60) [7]–[13]). See discussion, prior to the recent decisions, in N Cohen, 'A Minor's Contract for Purchasing a Flat, Confronted by a Creditor of the Seller's' (1993) 41 *HaPraklit* 161, 176–79; M Deutsch, *Property*, vol 4 (Tel Aviv, Bursi, 2007) §§25.20–25.

⁶⁸ This paragraph is based on interviews with three experienced Israeli trust practitioners active in the trusts field since the 1960s: interview with Shlomo Kerem, 1 May 2011; interviews with Advocate Alon Kaplan, 10 January 2010 and 11 May 2011; interview with Meir Minervi, 5 May 2011. For Israeli exchange control and its end on 1 January 2003, see M Michaely, 'Liberalization of the Israeli Foreign Currency Market, 1950–2002' in N Levitan and H Barkai (eds), *The Bank of Israel: Fifty Years' Striving for Monetary Control*, vol 2 (Jerusalem, Bank of Israel, 2004) 79–110.

⁶⁹ A Kaplan, 'The Use of Trusts and Offshore Structures in Israel and Major Changes in Israeli International Taxation' (2002) 8 *Trusts & Trustees* 14. See the similar language in A Kaplan, L Eyal and L Harris, 'Israel Launches Trust Tax Amnesty' (2004) 10 *Trusts & Trustees* 21. Similar sentiments were expressed by another leading Israeli trusts practitioner, Michael Shine, in an interview held on 12 May 2011.

use of foreign trust regimes, is not the shapelessness of Israel's trust regime, but rather Israel's anti-perpetuity policy, which is apparently both strict and effective, despite the absence of an explicit rule against perpetuities from the 1979 Act.⁷⁰ The nub of this policy lies in the provision of the Succession Act that gifts which are to reach their recipients on or after the donor's death are void unless made by will under that Act.⁷¹ Multi-generational family trusts must thus be testamentary to be valid. Wills must be probated, however, and the personnel of the Israeli Public Custodian, who are involved in the administration of every estate,⁷² have been known to be unsympathetic towards attempts to create trusts.⁷³ The Succession Act places strict limits on multi-generational bequests: testators may only bequeath their property to persons alive at their death or born within 300 days afterwards.⁷⁴ Though subject to this restriction, one may bequeath one's property to a series of successive donees, the same Act provides that each donee may consume the full value of the inherited asset, thereby eliminating the value the donor meant later donees of the same asset to receive.⁷⁵ These restrictions are strictly enforced by Public Custodian personnel. Israeli practitioners creating complex family trusts thus seem to avoid Israel's *trust* regime due to the perpetuity-unfriendly character of its *succession* regime, which prevents even the extent of perpetuity permitted under the traditional rule against perpetuities, not to mention the boundless extent now permitted by perpetuity-friendly jurisdictions.⁷⁶ These practitioners do not generally object to the local trust regime permitting title to the trust assets to be elsewhere than in the trustee.

Academic criticism of the 1979 Act started before its enactment. Ze'ev Zeltner, a judge and contract law professor at Tel Aviv University, attacked the 1974 bill which preceded the Act in a scathing article of 1976. As the bill did not require that trust property be transferred to the trustee, the institution it introduced, wrote Zeltner, would seem to 'have nothing in common with the English trust'.⁷⁷ Believing the split ownership trust model to be the only trust model properly so called, Zeltner wrote that where such transfer is not required, 'the trustee would simply appear to be an administrator of the settlor's property'.⁷⁸ Zeltner's identification of common law trust law as the only true trust model made him doubt the wisdom of receiving the

⁷⁰ Communication with the author, 22 May 2011. For Joshua Weisman's criticism of the absence of an explicit rule against perpetuities from the 1979 Act, see his 'Shortcomings in the Trust Law, 1979' (1980) 15 *Israel Law Review* 372, 381–89.

⁷¹ Succession Act, 5725-1965, 446 *Statutes*, 10 February 1965, p 65, s 8(b).

⁷² Following reform of the Succession Act in 1998 (s 65A, inserted in the Succession Act (Amendment No 7), 5758-1998, 1670 *Statutes*, June 30, 1998, p 240), probate is now granted by Succession Registrars, who are appointed from among Public Custodian personnel. Additionally, executors, where appointed, must submit an inventory of the estate (Succession Act, last note, s 84) as well as periodical accounts (s 86) to the Public Custodian.

⁷³ Alon Kaplan, communication with the author, 22 May 2011.

⁷⁴ Succession Act, s 3.

⁷⁵ *Ibid*, s 42(a), (b) and (d).

⁷⁶ For the classical rule against perpetuities, see JC Gray, *The Rule Against Perpetuities* 4th edn (Roland Gray (ed), Boston, Little, Brown, 1942) § 201; for its recent decline in many US and offshore jurisdictions, see J Dukeminier and JE Krier, 'The Rise of the Perpetual Trust' (2003) 50 *UCLA Law Review* 1303; RH Sitkoff and MM Schanzenbach, 'Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes' (2005) 115 *Yale Law Journal* 356.

⁷⁷ Z Zeltner, 'The Trusts Bill, 1974' (1976) 2 *Tel Aviv University Studies in Law* 88–97, 88, n 3.

⁷⁸ *Ibid*.

trust at all, considering the modeling of Israel's private law legislation of the 1960s and 1970s on civil law models, having, for example, abolished equitable rights in property and granted beneficiaries of contracts to which they were not parties standing to sue for their entitlements.⁷⁹ He preferred an approximation of the trust by way of contract, agency, gifts and succession mechanisms to the bill's departure from the hegemonic trust model.

The next to critique the bill in print was a banker, Ze'ev Brochstein of the Bank Union, who expressed that body's reaction to the bill.⁸⁰ Brochstein focused on the bill's omission of a requirement that title in the trust assets be transferred to the trustee. Noting that the legislature emphasised the managerial aspects of the trust relationship, ignoring its temporal aspects and their consequences regarding the distribution of property rights in the trust assets, Brochstein suggested that this single-minded focus be reconsidered.⁸¹ Though his criticism of the draft Act was far milder than Zeltner's, Brochstein's outlook too was based on an identification of the trust with its hegemonic, common law version. Puzzling over the causes of the Israeli legislature's unconventional approach, he noted the local system's then-recent turn to a civilian, unitary ownership outlook, adding that unitary ownership systems such as those of Japan, South Africa, Quebec and Louisiana did manage to fully import the English trust model.⁸²

Enacted amid such inauspicious augurs, the Act was met, almost immediately on its entry into force, with further critical scholarship. Joshua Weisman, the Hebrew University of Jerusalem's distinguished property law expert, entitled his article on the new statute 'Shortcomings in the Trust Law, 1979'.⁸³ Joining Zeltner and Brochstein in his belief that the traditional common law split ownership trust model was the crux of the trust, Weisman, who acquired a part of his legal education in King's College, London, rejected the possibility of a looser model such as that envisaged in the Act. A loose definition of the trust having nevertheless entered the statute book, Weisman suggested that it be read to require that title in the trust assets be transferred to the trustee.⁸⁴ Less critical of the Act, but no less attached to the hegemonic trust model, was Nili Cohen of Tel Aviv University. Identifying split ownership as 'the most significant characteristic of the trust',⁸⁵ she noted that beneficiaries' rights under the Act can, despite their having been left undefined, be presumed to have in rem characteristics, as there was no particular point in its enactment where those rights were merely in personam.⁸⁶ Cohen's strict distinction between trusts, meaning split ownership trusts, on the one hand, and other fiduciary relationships involving property on the other, made her strain to conclude that the Act applies to the latter

⁷⁹ *Ibid.*, 88, 95–96.

⁸⁰ Z Brochstein, 'The Trust Bill, 5735-1974 and its Influence on the Israeli Banking System' (1977) 18 *Banking Quarterly* 63.

⁸¹ *Ibid.*, 71.

⁸² *Ibid.*, 66.

⁸³ Weisman (n 70).

⁸⁴ *Ibid.*, 378–81.

⁸⁵ N Cohen, *Interference in Contractual Relations* (Tel Aviv, Ramot, 1982) 34.

⁸⁶ *Ibid.*, 56, n 49.

as well as to the former.⁸⁷ This conclusion would have been easier to attain had she adopted the more relaxed approach to the trust concept evident in the Act itself.

Other academics proved less attached to the hegemonic trust model: Gualtiero Procaccia and Daniel Friedman of Tel Aviv University both read the Act as permitting the creation of trusts where title in the trust assets was not in the trustee.⁸⁸ Friedman rejoiced in the Act's liberal approach, noting that the protection it extends to beneficiaries of all fiduciary relationships involving property will remedy the difficulties created by the abolition of equitable rights in land in the Land Act of 1969.⁸⁹ Most partial to the wider reading of the Act was Shlomo Kerem, who, though a practitioner rather than an academic, published a *Kommentar* on the Act.⁹⁰ In each of four editions, Kerem insisted that the term 'trust', as used in the Act, means any fiduciary relationship involving property;⁹¹ that every trustee, in that wider sense, is subject both to the Act and to a more specific, often statutory, legal framework, such as the law regulating executors, guardians or corporate directors;⁹² and that beneficiaries under the Act have no rights in the trust property, such rights having been rendered superfluous by the Act's granting beneficiaries a right of action vis-a-vis their trustees.⁹³ Taking an intermediate position between the two camps, Avraham Alter acknowledged, in an extensive doctoral thesis largely concerned with the taxation of trusts, that the Act applies both to trusts on the common law model and to other fiduciary relationships concerning property, insisting, however, that the Act did grant beneficiaries of both common law and other trusts rights in the trust property.⁹⁴ Alter's dissertation having remained unpublished and Kerem's treatise being practitioner-oriented, Weisman's scathing attack of 1980 remained the most extensive purely academic treatment of the Act in print.

C. Shapelessness Abolished? The Draft Civil Code of Israel

Just as Israel's courts have finally started to more thoroughly apply and interpret the 1979 Act, fully acknowledging its non-committal approach to the location of title in the trust assets, Israel's shapeless trust may be about to be swept away. June 2011 saw the publication in formal 'blue book' form, following more than 25 years

⁸⁷ *Ibid.*, 102–03.

⁸⁸ G Procaccia, 'The Agent as Trustee' (1982) 34 *HaPraklit* 479, 482; D Friedman, *The Law of Unjust Enrichment* (Jerusalem, Bursi, 1982) 332–33.

⁸⁹ Land Act, 5729-1969, 575 *Statutes*, 27 July 1969, s 161; Friedman (n 88) 334. By his next edition of 1998, he retreated to a less distinct position, noting that it is unclear whether the Act requires, as a precondition for the creation of a trust, that title in the trust assets be transferred to the trustee: Friedman, *The Law of Unjust Enrichment* 2nd edn (Tel Aviv, Aviram, 1998) 535–36. He still hinted, however, that the wider reading of the Act is preferable: 154, n 60.

⁹⁰ S Kerem, *Trusts*, 1st edn (Gad Tedeschi (ed) Jerusalem, Sacher Institute, 1983); 4th edn—Kerem (n 37).

⁹¹ *Ibid.*, 1st edn, 20; 4th edn, 37–39.

⁹² *Ibid.*, 1st edn, 28, 61; 4th edn, 42.

⁹³ *Ibid.*, 1st edn, 26, 50; 4th edn, 80–84; see also S Kerem, 'Guaranteeing Trust Assets and the Beneficiary's Rights' (1984) 35 *HaPraklit* 52.

⁹⁴ Alter (n 40) 22–62; A Alter, 'The Cestui Que Trust's Right in the Trust Property' (1984) 35 *HaPraklit* 307. Following Alter's unpublished dissertation and his article of 1984, the quantity of Israeli academic treatments of trust law questions started declining rapidly, excepting Kerem's later editions. For a few later treatments, see Cohen (n 67) and Deutsch (n 67); Rabinovich-Brun (n 36).

of drafting, of the Israeli Draft Civil Code, which, if enacted, will replace the private law legislation of the 1960s, 1970s and 1980s, including the Trust Act of 1979.⁹⁵ The trusts chapter of the Draft Code⁹⁶ moves Israeli trust law much closer to common law orthodoxy: it redefines a trustee as ‘the owner of property, who must act regarding it for the benefit of a person or another purpose’⁹⁷ and unifies the two trust regimes of the 1979 Act into one, applying to every trust provisions the current Act applies only to trusts created by an instrument of endowment.⁹⁸ If and when the Draft Code is enacted, Israel will have retreated from its shapeless trust model to a more traditional model.⁹⁹

Responses to the Israeli shapeless trust seem, then, to have followed the same pattern that responses to the Chinese shapeless trust seem to be following: the courts have largely accepted the local trust regime’s deviation from common law trust orthodoxy,¹⁰⁰ while many academics¹⁰¹ have remained attached to the hegemonic trust model, which requires, in both its English, American, Commonwealth and civilian versions, that title in the trust assets be vested in the trustees.¹⁰² The Israeli Draft Civil Code’s return to the hegemonic trust model is another expression of this continuing attachment: it was composed by a committee of (mostly) professors, who, during the very first committee meeting dedicated to the trusts chapter of the Code, expressed their unanimous opinion that trustees must be clearly declared to own the trust assets.¹⁰³ The 1979 Act, contrastingly, was largely composed by Ministry of Justice personnel, with later interventions by Bar representatives and politicians.

III. SHOULD SHAPELESS TRUSTS HAVE A FUTURE?

What are the lessons of Israel’s experience with the world’s first shapeless trust regime for the efficacy of such trust regimes elsewhere?¹⁰⁴ The key lesson seems to

⁹⁵ Civil Law Act, 5771-2011, 595 *Bills*, 15 June 2011, 699.

⁹⁶ Consisting of ss 563–93.

⁹⁷ *Ibid*, s 563.

⁹⁸ See the explanatory remarks to the bill: introductory remarks to the trusts chapter and remarks to s 564. See also, on the trusts chapter of the draft code, M Deutsch, *The Civil Code Interpreted*, vol 1 (Tel Aviv, Bursi, 2005) 138–40.

⁹⁹ The trusts chapter of the Draft Code still bears some signs of its civil law environment: the common law split ownership trust model is absent and, as in the 1979 Act (s 3(b)), trust creditors have direct access to the trust assets (s 568).

¹⁰⁰ See, for the Chinese courts, Ho (n 7) 126–27. For the Israeli courts, see text to nn 57–67 above.

¹⁰¹ And academics-turned-judges, such as Professor (later Chief Justice) Barak; see his position in *Zayman* (n 59). For China, see especially the position of Ho in her publications cited in nn 7–8 above; for Israel, see my discussion of the academic response at text to nn 77–94 above.

¹⁰² For civilian versions of the dominant trust model, see, eg, the Scottish regime (Reid (n 36)) and the French (Barrière (n 1) and Crocq (n 1)).

¹⁰³ Protocol of Codification Committee Meeting no 81, held on 27 January 1994 (Ministry of Justice archives). At the second committee meeting dedicated to trusts, held on 8 February 1994, Shlomo Kerem made a last stand for the looser trust model evident in the 1979 Act, to little avail. See Protocol of Meeting no 82 (Ministry of Justice archives).

¹⁰⁴ One commentator believed that ‘the lesson to be drawn ... is that in today’s increasingly integrated international system, it is ever more difficult to insulate one’s legal system. We can define legal institutions as we wish for internal purposes, but if we want them to be recognised on the international level, it is best to bring into account the customary international definitions and requirements. In the case of the trust,

be that such regimes are workable, for Israel's courts have, at length, come to accept and apply the 1979 Act's shapeless trust regime, without reading the hegemonic trust model into the Act.¹⁰⁵ The Israeli shapeless trust was born as a result of two phenomena, one socio-legal, the other doctrinal. The former was Israeli legal professionals' casual use of the term 'trust', extending to any fiduciary situation involving property, a use facilitated by the absence, until the 1979 Act, of any positive source of Israeli law delineating the limits of the trust label. The latter was a conscious attempt on the part of some of the Act's many drafters to domesticate the trust into Israel's then-recent system of private law, which has been modelled on the civil law systems of continental Europe. Many of the views and preferences of the Israeli shapeless trust's most persistent advocate, practitioner Shlomo Kerem, make a notably snug fit with civilian trust regimes such as those of Luxembourg or France. Like the latter regimes, which both post-date the 1979 Act, Kerem focused on the trust's functions as a commercial and investment vehicle; like them, he disregarded the constructive trust.¹⁰⁶ A similar domestication effort may be apparent in the Chinese Trust Act of 2001. Some Israeli and Chinese courts have reinforced this effort by effectively absorbing even trusts where title to the trust assets is in the trustee into their respective systems' regimes governing agency, nomineehip and mandate. This was achieved by declaring the settlor or beneficiary, who may be one and the same, to be the substantive owner of the assets of such trusts.¹⁰⁷

As noted above, the habit of some Israeli practitioners of using foreign trust regimes adhering to common law trust orthodoxy rather than the Israeli regime appears not to be a product of any distaste for the local regime not mandating that title in the trust assets vest in the trustee. This habit, born decades ago as a result of Israel's not having formally received, until 1979, any private trust regime of general application, was, rather, sustained largely as a result of Israel's highly effective perpetuities regime. As the Draft Civil Code softens the perpetuities regime applicable to inter vivos trusts, exempting them from probate and merely positing a 100-year perpetuities period,¹⁰⁸ we may expect the local trust regime—no longer 'shapeless'—to be increasingly used by practitioners if and when the Draft Code is enacted into law. It may well be a mistake, however, to attribute such an increase,

this does not mean that Israel must adopt the customary concept of trust lock, stock and barrel, but it does mean that the internal debate on this issue should take it into account': Rabinovich-Brun (n 36) 689–90. The 'customary concept of trust' was brought into account by the drafters of both the Israeli and Chinese Acts, and again by the drafters of the Draft Civil Code of Israel, with various results. The international recognition of shapeless—or other—local trust regimes is beyond the ambit of the present chapter.

¹⁰⁵ Barak CJ attempted such a reading in his brief remarks in *Zayman* (n 59). Most recent case law reads the 1979 Act literally, recognising the shapelessness of its definition of the trust (n 60).

¹⁰⁶ For Kerem's views, see his 'Trust Law in Israel' (1977) 31 *HaPraklit* 233, 238–39. For the French *fiducie* of 2007, see sources cited in n 1 above. For the Luxembourgish *fiducie* regime, installed in 1983 and improved in 2003, see *Règlement grand-ducal du 19 juillet 1983*, *Mém* 29.7.1983 (n 59) 2; *Law of 27 July 2003*; and see discussion in André Prüm, 'National Report for Luxembourg' in Kortmann et al (n 1) 239–55.

¹⁰⁷ *Beijing Haidian* (n 7); *Yanxin Co Ltd v Huabao Trust and Investment Co Ltd*, Shanghai High People's Court, 16 March 2005, Decision No 226 of 2004; both discussed in Ho, 'Trust Laws in China' (n 8) 203–06; *Hoffmann* (n 60); and see discussion at nn 65–67 above.

¹⁰⁸ Section 702(b) of the Draft Code excepts trusts from the rule, stated in sub-s (a), that undertakings to transfer one's property on or after one's death are void; the 100-year perpetuity period is stated, as regards trusts, in s 588(b).

if it materialises, to the Code's adhering to common law trust orthodoxy regarding the location of title in the trust assets.

Given that neither the Israeli courts nor practitioners now generally object to the Israeli trust regime's shapelessness, its coming demise in the Draft Code is striking. The protocols of the codification committee reveal the change of course to have been a result of academic opinion. Academic lawyers appear to have disapproved of the shapelessness of Israel's 1979 trust regime more than their practising and adjudicating brethren. Such disapproval is evident, for example, in the similar suggestions of Joshua Weisman and Lusina Ho, each of them a key academic trusts expert in his or her respective jurisdiction, that the Trust Acts of 1979 and 2001 respectively be construed so as to require the vesting of title to the trust assets in the trustee. Both Weisman and Ho disapproved of the shapelessness of their respective jurisdictions' trust regimes.¹⁰⁹

Considering the state of academic opinion on shapeless trust regimes, it is appropriate to close the present study with a preliminary examination of their advantages and disadvantages. Let me begin with the latter. As noted in Part I above, recent literature on the Chinese Trust Act has exposed three difficulties raised by the Act's facilitation of trusts where the settlor, despite his having appointed a trustee, retains title in the trust assets. One such difficulty is non-owner trustees' 'tiresome burden of proving [their] powers to the satisfaction of third parties',¹¹⁰ a difficulty applicable to *bewind*-type arrangements, whose beneficiaries own the assets, as well. It appears to the present writer that shouldering the burden of obtaining and brandishing a power of attorney should not be impossible, given that American law, for example, provides, by statute, both rules protecting persons who in good faith accept and rely upon acknowledged powers of attorney and rules mandating the acceptance of such powers.¹¹¹

The second difficulty, or group of difficulties, which has been raised is what happens to the assets when owner-settlors or owner-beneficiaries die or are dissolved, when the identity of all or some owner-beneficiaries is disputed, or when trusts the assets of which are owned by their beneficiaries go through periods when no living, identified or identifiable beneficiaries exist.¹¹² These difficulties too do not appear insurmountable, at least if one's trust model is 'shapeless', that is, if one allows the trust assets to be owned by any one of the trust triangle's three points. The workability of trusts the assets of which are owned by their settlors or beneficiaries would require that arrangements governing several aspects of these trusts' functioning be supplied, either by statute law, case law or the trust instrument. The workability of trusts where trustees own the assets requires no less. While rules requisite for the smooth operation of trusts on the conventional model have already been developed, the extension of the trust concept to trusts the assets of which are owned by their settlors or beneficiaries would require that new rules be supplied. Some preliminary propositions governing the issues raised follow.

¹⁰⁹ Weisman (n 70) 378–81; Ho, 'Trust Laws in China' (n 8) 200–01.

¹¹⁰ See the text to n 22 above.

¹¹¹ See Uniform Power of Attorney Act 2006, §§119 and 120 respectively.

¹¹² See the text to nn 23–25 above.

The problem of owner-settlors and owner-beneficiaries passing away or being dissolved is less likely to arise in shorter-term trusts, such as many commercial and investment trusts. In cases where it is more likely to arise, settlors' or beneficiaries' ownership of the trust assets could presumably pass according to the rules of law usually applicable to the devolution of a deceased or dissolved rightholder's property, namely the law of inheritance and company liquidation. Unless otherwise provided in the trust instrument, the segregated trust fund would survive the settlor or beneficiary's death or dissolution: his, her or its executor, administrator, heirs or liquidator would hold the trust fund on trust for the relevant beneficiaries or purpose, trust assets being answerable to trust debts alone. Or ownership of the trust assets could be vested in a fluctuating group of beneficiaries: much as the law provides a means for the appointment of new trustees when none remain, the law or trust instrument could similarly provide for the appointment of new owner-beneficiaries in a manner tracking the settlor's express or implied intentions. Where the primary motivation behind the creation of a trust is avoiding probate or minimising a settlor's exposure to creditors (assuming that 'asset protection trusts' are allowed), trustees, a beneficiary other than the settlor, or beneficiaries as a class, could serve as owner of the trust assets. Where the inexistence, for a time, of any beneficiaries, or disputes as to their identity are realistic possibilities, title in the trust assets could be granted to either the settlor, the trustee or, again, 'the beneficiaries of X trust' as a class, which could have zero members for a while. It thus appears that all three points of the trust triangle could have their uses as owners of the trust assets, depending on the type of trust envisioned, its goals, its lifespan and the circumstances likely to occur during its existence.

The final difficulty raised in recent literature regarding the retention of title in the trust assets by their settlors is that under current Chinese law, such settlors owe no fiduciary duties and could thus act in breach of trust, leaving the beneficiaries largely defenceless.¹¹³ While the current Chinese Act may not be perfect and could require amendment, including the imposition of fiduciary or other duties on settlors retaining ownership of the trust assets, its current imperfections could hardly serve as arguments for rejecting the very idea of trusts the settlors of which retain title in the trust assets. Unlike settlors who have declared that they themselves hold assets on trust, settlors who merely retain title in the trust assets, having appointed another as trustee, could be subjected to duties sufficient to protect the trust and its assets without being granted powers to either manage or dispose of the trust assets. The very lack of such powers could provide some of the necessary protection.

It seems, then, that the difficulties raised in recent literature do not suffice for trusts the settlors or beneficiaries of which hold title in the trust assets, without also serving as trustees, to be estimated as definitely inferior to trusts on the traditional model. Nor do they suffice for similarly condemning the Chinese-Israeli shapeless trust model. Trusts are created for various purposes. Different trust models could suit different circumstances. Property held on revocable trusts, for example, is already seen by American law as if it was still held by its settlor, at least as regards

¹¹³ See the text to n 26 above.

the rights of that settlor's spouse, relatives and creditors.¹¹⁴ The step from such a presumption to facilitating settlors' actual retention of title in trust property does not appear to be impossible. It may be that holding the trust assets to be retained by the settlor would frustrate the purpose of trusts created in order to avoid probate or minimise the burden of estate taxation. That such trust designs defeat the purpose of *some* trusts does not imply that they would never be useful.

Indeed, shapeless trust regimes may also have some advantages over the traditional trust model. One is their making the duties that the law of trusts imposes on trustees and the effective remedies that it gives beneficiaries applicable in fiduciary situations involving non-owner asset managers, which are conventionally analysed as agency, nomineehip or, under civil law systems, mandate situations. The application to such asset managers of the trustee's duties, such as the duties of prudence, loyalty, impartiality, full and prompt accounting and reporting, and refraining from conflicts of interest and duty,¹¹⁵ seems desirable, considering the significant risk of such managers succumbing to the temptation of preferring self-interest over their clients' interests. Such an application may not, however, bring about a significant transformation in the duties and liabilities to which such managers are in fact subject, since legislation has already in many jurisdictions applied similar duties to such managers, independently of their being subjected to trustees' duties, as such.¹¹⁶ Further, insofar as some or all of these duties may be disapplied by contract or trust deed, and are so disapplied in practice by way of exemption clauses, their extension to additional classes of asset managers is likely to be even less consequential.

A further advantage, which is perhaps of more consequence, is that shapeless trusts may help to introduce the trust mechanism to potential settlors unaccustomed to it, who may be deterred by the prospect of giving away title in their property. Many property owners outside the traditional Anglo-Saxon sphere of trust practice would be very much deterred by such a prospect. Ho wrote that the Chinese Act's not requiring that trust assets vest in the trustee might be a result of its drafters' fear of such a deterrent effect,¹¹⁷ and Kaplan has told me that such deterrence is very much a fact among potential Israeli and Jewish settlors.¹¹⁸ The adaptation of imported legal institutions to local circumstances in the importing jurisdiction, such as the fears and expectations of potential users, has been shown to be an important condition for the imported institution being successfully received.¹¹⁹ Offshore jurisdictions, purportedly adhering to the traditional common law trust model, have developed 'settlor-reserved powers' so as to successfully market trust services to potential settlors fearful of or uninterested in letting go of their property. Some such jurisdictions, while vesting title to the trust assets in the trustee, permit the settlor to retain a vast panoply of both administrative and dispositive powers, providing

¹¹⁴ Restatement of Trusts, 3rd, §25(2) and cmt a.

¹¹⁵ *Ibid*, §§77, 78, 79, 82, 83.

¹¹⁶ See, eg, the Investment Advisers Act of 1940, 15 USC §80b-1 to 21 (US); An Act for the Regulation of Investment Advice, Marketing and Management, 5755-1995, 1539 *Statutes*, 10 August 1995, p 416, ss 11–27C (Israel).

¹¹⁷ Ho, 'Trust Laws in China' (n 8) 201.

¹¹⁸ Alon Kaplan, communication with the author, 22 May 2011.

¹¹⁹ D Berkowitz, K Pistor and J-F Richard, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163, 167–68.

explicitly by statute that such reservation shall not invalidate a trust.¹²⁰ The Chinese and Israeli ‘shapeless trusts’, by leaving actual power to administer and dispose of trust assets in the hands of trustees, stick rather closer, in functional terms, to the traditional trust model than do those offshore regimes. So long as adequate means are in place to ensure that settlors do not use their retained ownership to interfere in trustees’ execution of their functions, the ‘settlor title retention trust’ can be seen as a relatively direct means of making trusts palatable for a wider circle of potential settlors, involving less real injury to the separation of enjoyment and control, one of the foundational ideas behind trusts, than do the alternative means developed, for the same purpose, by offshore jurisdictions.

To conclude, the schematic division of labour envisioned by the traditional trust model, with the settlor having nothing to do with the trust once constituted, the trustee serving as its exclusive manager and beneficiaries passively enjoying their entitlements, has for hundreds of years been and is now being challenged by both the real-life functioning of actual trusts and innovative trust regimes developed by various jurisdictions. Settlors can, if they wish, find ways to influence their trustees’ conduct, whether that influence is formalised in the trust instrument or not, and whether or not it is in keeping with the trust’s governing law or other relevant legal frameworks. Beneficiaries, similarly, sometimes try to influence trustees’ decisions. Given the fundamentally facilitative nature of trust law and the increasing variety of trust regimes worldwide, many of which apply to populations unfamiliar with traditional Anglo-Saxon trust culture, it may be that there are few reasons to insist on the continuing exclusivity of the traditional trust paradigm, granting title in the trust assets to the trustees. Other models, including ‘settlor title retention trusts’, may have their uses. Though such models, contradicting the traditional common law trust paradigm, raise doctrinal challenges—how, for example, are trusts the beneficiaries of which own their assets to cope with the traditional doctrine of merger?¹²¹—it seems that the cautious, permissive Chinese and Israeli approach, ‘shapeless’ though it may be, could, if each of the trust models it permits is allowed to develop according to its internal logic, have some potential after all.

¹²⁰ See, eg, s 9A of the Trusts (Jersey) Law 1984, inserted by the Trusts (Amendment No 4) (Jersey) Law 2006, which provides, inter alia, that the reservation by a settlor of powers to revoke, vary or amend the trust, of powers to pay trust income or capital, or of powers to give the trustee binding directions regarding management of the trust assets, ‘shall not affect the validity of the trust nor delay the trust taking effect’. Section 15(1) of the Trusts (Guernsey) Law 2007 improves on the Jersey model by providing that even should a settlor reserve powers of all those types, the trust shall not thereby be invalidated. See discussion in Panico (n 39) 63–77.

¹²¹ See Restatement of Trusts, 3rd, §69.

