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THE UNIQUE GOVERNANCE STRUCTURE OF CHINESE CHARITABLE TRUSTS

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ABSTRACT

This thesis explores the governance structure of Chinese charitable trusts and their distinctive characteristics. Its central concern is to investigate the legislative changes that legislators have made to the governance framework for charitable trusts and the ways in which legislated governance rules are given effect in practice. The thesis assesses the governance structure of charitable trusts from the perspective of China's particular political, social and economic conditions. It discovers three aspects that are relevant to understanding the governance of Chinese charitable trusts; law, administrative practice and private action.

In contrast to the public law model of public welfare trusts, legislators introduced a public law-private law hybrid model for charitable trusts. Despite increasing autonomy of trust parties to an extent, the charitable trust model continues to privilege the state's control over the use of charitable resources. This hybrid nature permeates and informs the design of the governance structure of charitable trusts. The public law aspects connect the analysis of charitable trust governance to the role of regulators. In the Chinese bureaucratic system, regulators suffer under policy pressures and are thus strongly responsive to extra-legal concerns in their implementation of the law. Practice shows that administrative factors supplement or even prevail over legal rules to guide the supervisory work of regulators. Administrative practice is therefore essential in the governance framework. The private law aspects connect the analysis of charitable trust governance to the roles of trust parties. The law sets up the internal relationship between settlors and trustees, but it is vague in how their roles should be performed. Due to the risks posed by administrative practice and the vagueness of the law, settlors and trustees have incentives to use contracts to guide their management of charitable assets. Private action is thus a significant part in the governance framework for charitable trusts.

The thesis identifies the norms of public law and private law in the legal structure of charitable trusts, and examines the ways in which China's policy and social conditions influence the interaction of these two types of norms. It argues that the governance framework for charitable trusts may only be understood fully in light of relevant law, administrative practice and private action. The three aspects are interrelated and taken together to constitute the particular mode of governance of Chinese charitable trusts.

DECLARATION

This is to certify that:

- (a) this thesis comprises only my original work towards the degree of Doctor of Philosophy;
- (b) due acknowledgement has been made in the text to all other material used; and
- (c) the thesis is less than 100,000 words in length, exclusive of bibliographies and appendices.

Signed:

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CHAPTER ONE INTRODUCTION

I BACKGROUND

A Development of Social Welfare System in China Over the Past Six Decades

In China, charitable activities played a critical role in social welfare delivery both in the Imperial Era¹ and the Republican Era (1911 to 1949).² Nevertheless, after the establishment of the People's Republic of China (hereinafter 'PRC') by the Chinese Communist Party (hereinafter 'CCP' or 'party'), due to the leadership's socialist ideology, charity itself was considered a tool used by the ruling class to 'control, denigrate, and mark off as different the poorer classes of society'.³ Consequently, after the establishment of a planned economy (*jihua jingji* 计划经济), the central government set up a socialist welfare system for the general public.⁴ All independent charities were either prohibited as unlawful organizations or incorporated into the government, for example the Red Cross Society of China.⁵ After the implementation of the 'Reform and Opening Up' (*gaige kaifang* 改革开放) policy in 1978, China was under intense pressure to provide social welfare services to hundreds of millions of the needy and disenfranchised. The Chinese government struggled to satisfy the general welfare needs of the majority of its citizens, as its public financial expenditure could not meet the growing demand for public welfare in society.

In face of these problems, the Chinese government came to realize the significance of establishing a supportive public welfare system alongside its market economy,⁶ and that this public welfare system should be distinguishable from the traditional welfare model under a planned economy.⁷ Thus, a new

¹ Karla W Simon, *Civil Society in China: The Legal Framework from Ancient Times to the 'New Reform Era'* (Oxford University Press, 2013) 77; Yu-Yue Tsu, 'The Spirit of Chinese Philanthropy: A Study in Mutual Aid' (PhD Thesis, The Faculty of Political Science, Columbia University, 1912) 23; Thomas David Dubois, 'Before the NGO: China Charities in Historical Perspective' (2015) 39(4) *Asian Studies Review* 541, 542; Elizabeth Z Lang, 'Some Reflections on Charity Law in the People's Republic of China' (2003) 15(2) *Bond Law Review* 358, 358.

² Xin Huang et al, 'Charity Development in China: An Overview' (2007) 17(1) *Asia Pacific Journal of Social Work and Development* 79, 80; Thomas David Dubois (n 1) 542.

³ Xin Huang et al (n 2) 80.

⁴ Deborah Davis, 'Chinese Social Welfare: Policies and Outcomes' (1989) 119 *China Quarterly* 577, 578; Ruby C M Chau and Sam W K Yu, 'Social Welfare and Economic Development in China and Hong Kong' (1999) 19(1) *Critical Social Policy* 87, 94–5.

⁵ 徐卫 [Xu Wei], 《慈善宣言信托制度构建研究》 [Research on the Construction of Charitable Declaration Trusts] (法律出版社 [Law Press], 2012) 16.

⁶ Qiusa Ma, 'The Governance of NGOs in China since 1978: How Much Autonomy?' (2002) 31(3) *Nonprofit and Voluntary Sector Quarterly* 305, 306; Rebecca Lee, 'Modernize Charity Law in China' (2009) 18 *Pacific Rim Law & Policy Journal* 347, 354; 韩丽欣 [Han Lixin], 《中国慈善组织治理法治化研究》 [Research on the Governance of Chinese Charities] (法律出版社 [Law Press], 2015) 4; 徐卫 [Xu Wei] (n 5) 13–16.

⁷ 徐卫 [Xu Wei] (n 5) 14–16.

multi-level system involving the market, government and non-profit organizations was established.⁸ Although the government was still responsible for delivering the majority of social welfare services, the non-government sector was expected under this new system to finance and play a vital role in public welfare provision.⁹ In the 2000s, the Chinese government launched a series of initiatives at different levels to stimulate the potential of NGOs in addressing severe social needs.¹⁰ The basic public welfare service model in China was thus established: the state would commit to increased spending on public welfare to improve the well-being of its citizens, while engaging charitable organizations and other social entities in social welfare provision.¹¹ This model has provided a channel for charities to participate in the provision of public welfare to those in need in society.

B Tight Governmental Control and the Lack of Public Trust

The loosening of control over the charity sector has contributed to the growth and development of charitable organizations. Official data shows that by the end of 2015 there were around 662,000 registered social organizations (*shehui zuzhi* 社会组织), which conducted activities mainly in areas such as social services, healthcare, culture, sports, and environmental protection.¹² It is, however, worth noting that under the legal framework before 2016, the Chinese government monopolized the use of charitable resources. The majority of charities were denied registration and therefore considered illegal. The government's tight control over the charitable sector is achieved through a strict registration procedure (*dengji zhi* 登记制). This procedure is specified in the law regulating charities,¹³ which

⁸ Zhenyao Wang and Yanhui Zhao, 'The Collapse and Reemergence of Private Philanthropy in China, 1949-2012' in Jennifer Ryan, Lincoln C Chen and Tony Saich (eds), *Philanthropy for Health in China* (Indiana University Press, 2014) 28-9.

⁹ Ying Xu and Ngan-Pun Ngai, 'Moral Resources and Political Capital: Theorizing the Relationship Between Voluntary Service Organizations and the Development of Civil Society in China' (2011) 40(2) *Nonprofit and Voluntary Sector Quarterly* 247, 248; Xin Huang et al (n 2) 83; Rebecca Lee (n 6) 354.

¹⁰ Adam S Chodorow, 'Charity with Chinese Characteristics' (2012) 30 *UCLA Pacific Basin Law Journal* 1, 4.

¹¹ Yijia Jing and E S Savas, 'Managing Collaborative Service Delivery: Comparing China and the United States' (2009) 69 *Public Administration Review* 101, 102.

¹² 中国信托业协会 [China Trustee Association] (ed), 《慈善信托研究》 [Research on the Charitable Trust] (中国金融出版社 [China Financial Publishing House], 2016) 74.

¹³ 《社会团体登记管理条例》 [Regulations on Registration Administration of Associations] (People's Republic of China) State Council, 6 February 2016, art 3; 《民办非企业单位登记管理暂行条例》 [Interim Regulations on the Administration of the Registration of Privately-Operated Non-Enterprise Organizations] (People's Republic of China) State Council, 25 October 1998, art 5; 《基金会管理条例》 [Regulations on Administration of Foundations] (People's Republic of China) State Council, 3 August 2004, art 6. Registration requirement gives the government the power to manipulate what types of charities can be established and what types of public welfare services they can provide, see Feng Xiaoming, 'China's Charitable Foundations: Development and Policy-Related Issues' (2015) 48(2) *The Chinese Economy* 130, 144; Anna Jane High, 'Grassroots NGO Regulations and China's Local Legal Culture' (2013) 9 *Socio-Legal Review* 1, 22; Ying Xu and Ngan-Pun Ngai (n 9) 249; Adam S Chodorow (n 10) 10; 马金芳 [Ma Jinfang], 《我国社会组织立法的困境与出路》 [The Dilemma and Outlet of the Social Organization Legislation in China] (2016) 6 *法商研究 Study of Law and Business* 3, 7; 杨思斌 [Yang Sibing], 《我国慈善事业发展的法治困境及路径选择》 [The Plight of the Rule of Law and the Path Choice for the Development of the Philanthropy in China] (2012) 3 *法学杂志 Law Science Magazine* 106, 108; 戴长征 [Dai Changzheng] and 黄金铮 [Huang Jinzheng], 《比较视野下中美慈善

empowers regulators to conduct a substantive examination of the documents submitted by relevant parties seeking to establish a charitable entity. Regulators are thus empowered to use their administrative discretion to decline the establishment of certain charitable entities whose operation is deemed to pose risks, or to require changes be made to the scope and activities of the proposed charitable entity before approval will be granted. According to this procedure, approval by regulators is essential to the valid establishment of a charity. Over the past two decades, this legislative arrangement has impeded the willingness of the general public to establish charities and engage in charitable undertakings.

Along with tight government control over charitable resources, the public is also dissatisfied with the charitable sector in China in respect of transparency and accountability. Because of ill-defined governance mechanisms in law, and inefficient internal governance rules in charities, scandals involving misuse of funds have frequently been exposed by the media or the general public, which has greatly damaged the charitable sector's credibility and public trust.¹⁴ For example, in 2013, Song Qingling Foundation of Henan Province was exposed by the media as having spent more than 120 million yuan (16.99 million USD dollars) on building a 27-meter-tall sculpture, but this sculpture was immediately demolished after construction.¹⁵ Another well-known scandal involving misappropriation of charitable funds was the case of Guo Meimei, a young woman whose social media posts showed her posing in front of a luxury car and wearing expensive gifts of jewelry. The car and the majority of the jewelry were funded by Wang Jun, the former Vice Chairman of the China Red Cross.¹⁶ A third scandal was related to the Red Cross Society of Sichuan Province. Its former executive vice president Wen Jiabi was sentenced to 16 years imprisonment for accepting bribes of 550.09 million yuan (77.88 million USD dollars) and embezzling public funds amounting to 295.342 million yuan (41.82 million USD dollars).¹⁷ These scandals have, to a large extent, discouraged the public from participating in charitable

组织治理研究》[Research on Charitable Organization Governance between the US and China — A Comparative Perspective] (2015) 2 中国行政管理 *Chinese Public Administration* 141, 142.

¹⁴ Lin Nie, Helen K Liu and Wenhao Cheng, 'Exploring Factors That Influence Voluntary Disclosure by Chinese Foundations' (2016) 27(5) *International Journal of Voluntary and Nonprofit Organizations* 2374, 2380; Guosheng Deng, Shuang Lu and Chien-Chung Huang, 'Transparency of Grassroots Human Service Organizations in China: Does Transparency Affect Donation and Grants?' (2015) 39(5) *Human Service Organizations: Management, Leadership & Governance* 475, 476; Yijia Jing and E S Savas (n 11) 105; 韩丽欣 [Han Lixin] (n 6) 1.

¹⁵ Li Raymond, 'Unexplained Destruction of Statue in Henan Raises Suspicion', *South China Morning Post* (7 July 2013) <<https://www.scmp.com/comment/insight-opinion/article/1276973/unexplained-destruction-statue-henan-raises-suspicion>>.

¹⁶ 樊小玲 [Fan Xiaoling], 《机构形象传播中主体意识的缺失与重建——“郭美美”事件引发的“红会”危机案例分析》[Absence of Subject Consciousness in the Communication of Institutional Image and Its Reconstruction: A Case Study on the “Red Cross” Crisis in the “Guo Meimei Scandal”] (2013) 5 华东师范大学学报 (哲学社会科学版) *Journal of East China Normal University (Humanities and Social Sciences)* 118, 119–20; 陈先红 [Chen Xianhong], 《郭美美事件：微博江湖“真”“假”困局》[Guo Meimei Scandal: Dilemmas of “True” and “False” in Weibo] (2011) 21 人民论坛 *People's Forum* 60, 60–1.

¹⁷ 'Former Executive Vice President of Sichuan Provincial Red Cross Was Sued for Corruption', *Best China News* (20 August 2016) <<http://www.bestchinanews.com/Domestic/7092.html>>.

causes. As a result of frequent charity-related scandals, charitable donations in China fell by more than 80 percent between June and August 2011.¹⁸ Likewise, private individuals refrained from proactively making charitable donations: currently 80 percent of donations are from enterprises. There are two main reasons why enterprises are willing to make charitable donations. One is that enterprises can receive a tax deduction, as charitable donations are tax-deductible for legal entities but not individuals according to Chinese tax policies.¹⁹ The other reason is that enterprises can employ charitable donations as an instrument to enhance their reputation, so as to pursue higher financial profits.²⁰

C Establishment of a New Legal Framework for Charity Operation

In light of the above problems, legislators and policymakers have held a great number of conferences and forums since the late 1980s to discuss what legislative reforms can be taken to promote the development of charitable causes in China. The discussion about legal reform has revolved around two objectives, which are formally articulated in central government policies.²¹ The first objective is to strengthen the autonomy of benevolent property owners and minimize the influence of political forces on the development of the charitable sector. The second objective is to adopt modernized facilitative regimes to buttress the development of the sector and facilitate the management and use of charitable resources generally. From a legal perspective, at the heart of these two objectives is the question of how a sensible balance can be struck between the autonomy of private individuals in determining how their resources should be used in promoting the state's public welfare goals, and the central government's need to ensure that charitable resources are used in a way that benefits the legitimate interests of the broader society and does not lead to or facilitate illegal and improper practices. Private individuals are not allowed to use charitable resources for private use — they have the autonomy to determine how their management rights can be exercised, but only to the extent that such exercise is in line with the public welfare policy of the state.

¹⁸ Adam S Chodorow (n 10) 49.

¹⁹ 《关于公益性捐赠税前扣除有关问题的通知》 [Notice Concerning the Relevant Issues of Pre-Tax Deduction of Public Welfare Donations] (People's Republic of China) Ministry of Finance; State Administration of Taxation; Ministry of Civil Affairs, 31 December 2018, arts 1-2.

²⁰ Xiufeng Chen and Li Li, 'The Rise of Corporate Social Responsibility and Charitable Foundations in China' in Chien-Chung Huang et al (eds), *China's Nonprofit Sector: Progress and Challenges* (Transaction Publishers, 2014) 23-4.

²¹ 《中国慈善事业发展指导纲要（2011—2015 年）》 [Guidelines for the Development of China's Charitable Causes (2011-2015)] (People's Republic of China) Ministry of Civil Affairs, 15 July 2011, ss 2, 3; 《全国人民代表大会关于国民经济和社会发展第十二个五年规划纲要的决议》 [Resolution of the National People's Congress on the Outline of the Twelfth Five-Year Plan for National Economic and Social Development] (People's Republic of China) National People's Congress, 14 March 2011, ch 33; 《中共中央关于全面深化改革若干重大问题的决定》 [Decision of the Central Committee of the Communist Party of China on Several Major Issues on Comprehensively Deepening Reforms] (People's Republic of China) Central Committee of the Communist Party of China, 12 November 2018, s 13; 《中国农村扶贫开发纲要（2011-2020 年）》 [Outline of Poverty Alleviation and Development in China Rural Areas (2011-2020)] (People's Republic of China) Central Committee of the Communist Party of China and State Council, 27 May 2011, ss 6, 8.

Alongside the discussion of legislative reforms, a growing number of academics and practitioners have turned their attention to the possibility of adopting trusts to develop charitable causes. There have been three major institutional forms for establishing charities over the last two decades; namely, foundations (*jijin hui* 基金会), social associations (*shehui tuanti* 社会团体), and privately-operated non-enterprise organizations (*minban feiqiye danwei* 民办非企业单位). They have high establishment thresholds²² and are subject to the requirement that they do not engage in commercial activities. These forms are generally used by government organs or private companies with large-scale assets. It is financially difficult for an individual person to establish a charity through these forms. In contrast, as will be discussed further in Chapter 3, trusts are seen as having three main institutional advantages in comparison to foundations, social associations, and privately-operated non-enterprise organizations. First, the creation of trusts has no threshold for initial start-up funds. Secondly, the *cy-près* doctrine can be applied in certain situations to save a trust from failure and thus preserve the trust assets in the public domain on an ongoing basis. Thirdly, trusts can carry out commercial activities on the condition that the profits obtained therefrom are exclusively used for charitable purposes.

To encourage the general public to play a proactive role in developing charitable undertakings, legislators, drawing on the experience of public welfare trusts in Japan²³ and South Korea,²⁴ introduced public welfare trusts to the Chinese legal system in 2001 with the promulgation of the *Chinese Trust Law*.²⁵ However, public welfare trusts have been unsuccessful over the last twenty years: no more than twenty public welfare trusts have been successfully established. The reason for the failure of public welfare trusts is essentially attributable to two factors. The first is the difficulty that benevolent property owners have in identifying public welfare administration authorities (regulators). The law makes no mention of who the regulators for public welfare trusts are and how they can be identified. The parties to public welfare trusts find it difficult to determine to whom a registration application can be submitted.²⁶ The second reason relates to the conservative attitude taken by regulators towards

²² For example, for the purpose of establishment, a foundation should have an initial capital of not less than RMB 8,000,000 yuan in the case of a national public foundation; not less RMB 4,000,000 yuan in the case of a local public foundation; and not less than RMB 2,000,000 yuan in the case of a non-public foundation. The initial capital should be currency capital deposited in a bank account. See 《基金会管理条例》 [Regulations on Administration of Foundations] (People's Republic of China) State Council, 3 August 2004, (n 13) art 8.

²³ Makoto Arai, 'Trust Law in Japan: Inspiring Changes in Asia, 1922 and 2006' in Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 44–5.

²⁴ Wu Ying-Chieh, 'Trust Law in South Korea: Developments and Challenges' in Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 47; 王建军 [Wang Jianjun], 燕翀 [Yan Chong] and 张时飞 [Zhang Shifei], 《慈善信托法律制度运行机理及其在我国发展的障碍》 [The Operational Mechanism and Theories Related to the Charitable Trust and Its Development Obstacles in Mainland China] (2011) 4 环球法律评论 *Global Law Review* 108, 109.

²⁵ 《中华人民共和国信托法》 [Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001, ch 6.

²⁶ See analysis in Section II of Chapter 3.

registration.²⁷ Regulators have in practice been unwilling to approve the establishment of public welfare trusts, due to the concern that their supervision over public welfare trusts might attract public scrutiny and that any regulatory failure or scandal will result in irrevocable reputational damage.²⁸ The aforesaid two reasons contribute to the gap between the advantages that public welfare trusts were supposed to have in developing charities, and the limited role that they play in practice.

Drawing on the failure of public welfare trusts, Chinese legislators introduced the charitable trust in 2016, with a view to unlocking the potential of trust institutions to further and develop charitable causes. They constructed a new legal framework for this model. For example, greater scope was given to the civil capacity of legal actors,²⁹ and special regulators (i.e. civil affairs departments and banking regulatory authorities)³⁰ were introduced to supervise charitable trust affairs. Legislative reforms have facilitated the use of charitable trusts and made their establishment and regulation easier than for public welfare trusts. On the other hand, it is nevertheless unclear to what extent, and in what way, charitable trusts relate to the old model of public welfare trusts. Do legislators expect charitable trusts to replace public welfare trusts in the furtherance of charitable causes? Or do legislators expect the two models to operate in parallel? The law makes no mention of these issues. Rather, it uses the expression ‘trusts belong to (*shuyu* 属于) public welfare trusts’³¹ to describe the relationship between the two models. This legislative language has given rise to intense debate: some writings and commentaries opine that the two models are identical and thus share the same legal meaning;³² whereas others propose that public welfare trusts are in nature distinguishable from charitable trusts.³³ As the charitable trust model is fairly newly established, there exists a great deal of uncertainty in its operation, and the design of the laws and regulations to promote and regulate it is likewise continually developing.

²⁷ 中国信托业协会 [China Trustee Association] (n 12) 65; 赵廉慧 [Zhao Lianhui], 《信托法解释论》 [Interpretative Theory of Trust Law] (中国法制出版社 [China Legal Publishing House], 2015) 542.

²⁸ See analysis in Section III of Chapter 4.

²⁹ Siyi Lin, ‘China’s New Charity Law: A New Era of Charitable Trusts’ (2018) 24(8) *Trusts & Trustees* 768, 770–1.

³⁰ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, arts 47–51.

³¹ 《中华人民共和国慈善法》 [Charity Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 16 March 2016, art 44; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 30) art 2.

³² 倪受彬 [Ni Shoubin], 《现代慈善信托的组织法特征及其功能优势 — 与慈善基金会法人的比较》 [The Advantage and Character of Modern Charitable Trust as Organization — In Comparison of Charity Foundation] (2014) 46(7) 学术月刊 *Academic Monthly* 86, 87; 朱志峰 [Zhu Zhifeng], 《公益信托的法律特征及我国模式的探索》 [Legal Nature of the Charitable Trust and Exploration of a Chinese Model] (2008) 22(6) 当代法学 *Contemporary Law Review* 112, 112; 王建军 [Wang Jianjun], 燕翀 [Yan Chong] and 张时飞 [Zhang Shifei] (n 24) 110.

³³ 中国信托业协会 [China Trustee Association] (n 12) 62–6; 李文华 [Li Wenhua], 《完善我国慈善信托制度若干问题的思考》 [Thoughts on Several Issues of Perfecting the Charitable Trust System in China] (2017) 7 法学杂志 *Law Science Magazine* 89, 91; 刘迎霜 [Liu Yingshuang], 《我国公益信托法律移植及其本土化：一种正本清源与直面当下的思考》 [The Transplantation and Localization of Charitable Trusts in China: A Thought of Radical Reform and Facing up to the Present] (2015) 27(1) 中外法学 *Peking University Law Journal* 151, 154–5.

In this context, important questions arise about how charitable trusts function in China remains to be explored. This thesis focuses on a central question about charitable trusts, that is how they are governed in both law and practice. The charitable trust model was introduced in a context where public welfare trusts had failed, and legislators sought to use this new model to encourage the public to participate in charitable undertakings. The thesis will examine the similarities and differences between charitable trusts and public welfare trusts to identify the legislative changes that the new charity law has made to the governance framework for charitable trusts. This analysis may serve to illuminate the role that legislators expect charitable trusts to play in the Chinese legal system, as well as the changes in the relationship between the state and private individuals in the provision of social welfare goods to the public.

Besides the law, the second aspect that this thesis will critically examine is the ways in which the legislated governance framework is given effect in practice. The Chinese bureaucratic system indicates that government control over charitable trusts and the charitable sector is not going to change any time soon.³⁴ The establishment and development of charitable trusts bear the mark of China's political and social environmental norms. Within this context, the thesis will study the ways in which trust parties and regulators engage with the law, so as to evaluate the strengths and weaknesses of the current legal governance framework and identify the factors that influence the behavioral patterns of each actor.

II LITERATURE REVIEW

The review in this section gives an overview of the existing literature on Chinese charitable trusts, especially works relating to two specific aspects that pertain to the governance of charitable trusts reflected in the research questions in this thesis: first, the policy and social context in which Chinese charitable trusts operate; and secondly, the legal rules governing Chinese charitable trusts. After examining these two aspects, the section then locates the thesis in relation to the literature.

A *The Policy and Social Context for Charitable Trusts*

The institutional context in which the charitable trust model has evolved and is evolving has been extensively explored by Chinese legal scholars, economists and social scientists and likewise by their English-speaking counterparts. In substance, the two bodies of literature overlap considerably with each other, in that they both touch upon the development and reform of Chinese charity laws.

The literature on the relevance of China's social, political, legal and economic conditions to the evolution of Chinese charities and the laws governing them is extensive and diverse, both in Chinese and in English. This literature essentially reflects the insight of legal realists. That is, the application of

³⁴ Li Dejian, 'Reform of Charity Governance in China: From Economic and Comparative Perspectives' (PhD Thesis, Faculty of Law, The University of Liverpool, 2017) 270.

law is not simply ‘a mechanical exercise in deductive reasoning’.³⁵ To understand better how written laws are given effect in practice, one needs to attend to the ‘reactions of [relevant actors] to [specific] facts and to the life around them’.³⁶ As Hanoch Dagan suggests in his book *Reconstructing American Legal Realism & Rethinking Private Law Theory*: ‘law cannot be understood merely by reference to its static elements (its existing rules); understanding the doctrinal materials at any given moment as the things to be classified misses the inherent dynamism of the law’.³⁷ This kind of thinking is prevalent in the literature relating to Chinese charities. Application of realist thinking in the Chinese situation requires a consideration of the Chinese political and economic environment, government developmental policies, and important party policies. According to Ying Xu and Ngan-Pun Ngai, ‘[a]s the government wants to maintain political stability, the current administrative rules and regulations that concern these [charities] do not aim to expand their social rights and freedoms, but rather give various officials the legal right to intervene in, interfere with, or control [charitable] activities.’³⁸ In contrast to the Western democratic model, China’s party and state make political and social stability the priority of their policy—‘maintaining economic growth with social stability has been and will continue to be the central leadership’s political priority’;³⁹ China’s party and state will prohibit any action directly threatening political or social stability or challenging the authority of the fundamental political system.⁴⁰ On the other hand, so long as one new institution does not adversely affect, but instead contributes to, political stability and societal control, the CCP and state often allow for, or even promote, its development, and accordingly take initiatives to clear obstacles that their previous policies have created.⁴¹ The current

³⁵ Brian Leiter, ‘Legal Formalism and Legal Realism: What Is the Issue’ (2010) 16(2) *Legal Theory* 111, 122. See also Oliver Wendell Holmes, ‘The Path of the Law’ (1997) 110(5) *Harvard Law Review* 991, 998; Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012) 48; Kristen Rundle, ‘Opening the Doors of Inquiry: Lon Fuller and the Natural Law Tradition’ in George Duke and Robert P George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017) 452; Charles C Goetsch, ‘The Future of Legal Formalism’ (1980) 24(3) *American Journal of Legal History* 221, 222–3; Jude Wallace and John Fiocco, ‘Recent Criticisms of Formalism in Legal Theory and Legal Education’ (1980) 7(3) *Adelaide Law Review* 309, 311; Gerard McMeel, ‘What Kind of Jurist Was Peter Binks’ (2011) 19 *Restitution Law Review* 15, 33; Christine B Harrington and Barbara Yngvesson, ‘Interpretive Sociolegal Research’ (1990) 15(1) *Law & Social Inquiry* 135, 140–1; G Edward White, ‘From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America’ (1972) 58(6) *Virginia Law Review* 999, 1004; Grant Gilmore, ‘Legal Realism: Its Cause and Cure’ (1961) 70(7) *The Yale Law Journal* 1037, 1038.

³⁶ Brian Z Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2010) 80.

³⁷ Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, 2013) 131. See also Hanoch Dagan, ‘Doctrinal Categories, Legal Realism, and the Rule of Law’ (2015) 163 *University of Pennsylvania Law Review* 1889, 1916; Brian Leiter, ‘Rethinking Legal Realism: Toward a Naturalized Jurisprudence’ (1997) 76(2) *Texas Law Review* 267, 267; Brian Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (2001) 111(2) *Ethics* 278, 281; Allan Beever and Charles Rickett, ‘Interpretive Legal Theory and the Academic Lawyer’ (2005) 68(2) *The Modern Law Review* 320, 336; Carlos E Gonzalez, ‘Statutory Interpretation: Looking Back — Looking Forward’ (2006) 58(3) *Rutgers Law Review* 703, 717; Ilene H Nagel, ‘The Legal/Extra-Legal Controversy: Judicial Decisions in Pretrial Release’ (1983) 17(3) *Law & Society Review* 481, 512.

³⁸ Ying Xu and Ngan-Pun Ngai (n 9) 248.

³⁹ Xian Huang, ‘The Politics of Social Welfare Reform in Urban China: Social Welfare Preferences and Reform Policies’ (2013) 18 *Journal of Chinese Political Science* 61, 79.

⁴⁰ Li Dejian (n 34) 265; Anna Jane High (n 13) 29; Ying Xu and Ngan-Pun Ngai (n 9) 253.

⁴¹ Li Dejian (n 34) 265.

charity-promoting policy is a good example. As Lincoln Chen, Jennifer Ryan and Tony Saich have stated, ‘as China continues to allow nonprofits to expand their role, the government has begun to shift the balance, opening space for [charities] to solve social problems while maintaining control over the growth and development of civil organizations that could become a threat to [political and social] stability’.⁴²

The tight political control over the charitable sector by the CCP and government has significantly impeded the development of civil organizations in China over the last three decades. There are also intense discussions on what legislative reforms can be taken to empower and spur charities to develop charitable undertakings. These legislative reform suggestions can be divided into two categories. The first is based on micro-analysis, focusing on identifying the challenges facing the charity law system and its possible solutions. For example, Feng Xiaoming suggests that there should be a clear legal definition of the relationship between government, enterprises and civil society; and that the registration procedures for charities should be simplified and the dual management requirements (i.e. charities are required to have a sponsor organization to assist the civil affair departments in the creation and oversight of all charities) should be dismantled.⁴³ Similarly, Rebecca Lee opines that modernizing the facilitative regimes for charity operation depends on ‘minimizing government influence over the establishment and management of charitable organization[s]; developing a coherent legal definition of charity to standardize charitable operation; providing more support to small, grassroots charitable organizations so as to promote diversity in charity operation; and enhancing fiscal incentives for charitable organizations to buttress development of the sector generally’.⁴⁴ The second category of suggestion is based on macro-analysis, focusing on how to coordinate the relationship between civil society and government, and how to foster a vibrant and autonomous civil society in light of China’s political and social culture. For instance, Pitman Potter holds that to create an environment favorable to the growth and prosperity of charities, the government should minimize its bureaucratic control over the charitable sector and secure the autonomy of charities in delivering public welfare.⁴⁵ Recognizing the importance of China’s policy and social traditions, Adam Chodorow advocates that legal reform alone is not enough to engender an autonomous civil society; rather, policymakers and legislators should change both China’s legal rules and its social and political conditions.⁴⁶

Studying the links between China’s social and policy conditions and its law-making process and law enforcement is not exclusive to the charity sector. The English and Chinese literatures have also engaged extensively with these links when examining corporate governance, Chinese judges’ decision-

⁴² Lincoln C Chen, Jennifer Ryan and Tony Saich, ‘Introduction: Philanthropy for Health in China: Distinctive Roots and Future Prospects’ in Jennifer Ryan, Lincoln C Chen and Tony Saich (eds), *Philanthropy for Health in China* (Indiana University Press, 2014) 8.

⁴³ Feng Xiaoming (n 13) 152.

⁴⁴ Rebecca Lee (n 6) 353.

⁴⁵ Pitman B Potter, ‘Belief in Control: Regulation of Religion in China’ (2003) 174 *China Quarterly* 317, 337.

⁴⁶ Adam S Chodorow (n 10) 54. See also C David Lee, ‘Legal Reform in China: A Role for Nongovernmental Organizations’ (2000) 25 *Yale Journal of International Law* 363, 429.

making, and enforcement campaigns in China.⁴⁷ In relation to corporate governance, one view is that due to the increasing forces of economic competition and globalization, it is difficult for national governments to maintain their own policies or regulatory systems.⁴⁸ Many scholars have therefore argued that economic globalization will lead to a convergence across nations in corporate governance practice.⁴⁹ Chenxia Shi rejects this argument. By identifying political factors as the key determinant of corporate governance development in China, she states that globalization of markets and China's integration into the world economy will not lead to the convergence of its corporate governance with international models. China's social, political and legal traditions are essential in shaping the corporate governance model in China. The significant factors include China's long-time preoccupation with state ownership of property; China's top-down regulatory system and weak enforcement; and its distinctive business regulatory culture.⁵⁰

This social and policy context also plays a vital role in influencing the decision-making of Chinese judges. Xin He and Kwai Hang Ng, in their book *Embedded Courts: Judicial Decision-Making in China*, suggest that the behaviors of Chinese courts are shaped by different social forces, including administrative embeddedness, political embeddedness, social embeddedness and economic embeddedness.⁵¹ Because of these social forces, Chinese judges often behave in a way different from

⁴⁷ See, eg, Virginia Harper Ho, 'Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China' (2013) 46 *Vanderbilt Journal of Transnational Law* 375; Xin He and Kwai Hang Ng, 'In the Name of Harmony: The Erasure of Domestic Violence in China's Judicial Mediation' (2013) 27(1) *International Journal of Law, Policy and the Family* 97; Xin He and Kwai Hang Ng, 'Inquisitorial Adjudication and Institutional Constraints in Chinese Civil Justice' (2013) 35(4) *Law & Policy* 290; Sarah Biddulph, Sean Cooney and Ying Zhu, 'Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking' (2012) 34(4) *Law & Policy* 373; Carlos Wing-Hung Lo et al, 'Explaining the Enforcement Gap in China: Local Government Support and Internal Agency Obstacles as Predictors of Enforcement Actions in Guangzhou' (2012) 111 *Journal of Environmental Management* 227; Jie Gao, 'Governing by Goals and Numbers: A Case Study in the Use of Performance Measurement to Build State Capacity in China' (2009) 29(1) *Public Administration and Development* 21.

⁴⁸ David Brady, Jason Beckfield and Wei Zhao, 'The Consequences of Economic Globalization for Affluent Democracies' (2007) 33 *Annual Review of Sociology* 313, 318; William Sites, 'Primitive Globalization? State and Locale in Neoliberal Global Engagement' (2000) 18(1) *Sociological Theory* 121, 121–2.

⁴⁹ David Brady, Jason Beckfield and Wei Zhao (n 48) 313, 318.

⁵⁰ Chenxia Shi, *Political Determinants of Corporate Governance in China* (Routledge, 2012) 18. See also Virginia Harper Ho, 'Corporate Governance as Risk Regulation in China: A Comparative View of Risk Oversight, Risk Management, and Accountability' (2012) 3(4) *European Journal of Risk Regulation* 463, 475; Virginia Harper Ho (n 47) 427.

⁵¹ Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-Making in China* (Cambridge University Press, 2017) 191. The policy goals of the central government have been internalized into the institutional constraints of the courts. Extra-legal factors permeate into the decision-making process of Chinese courts. See Yuqing Feng and Xin He, 'From Law to Politics: Petitioners' Framing of Disputes in Chinese Courts' (2018) 80 *The China Journal* 130, 131; Kwai Hang Ng and Xin He, 'The Institutional and Cultural Logics of Legal Commensuration: Blood Money and Negotiated Justice in China' (2017) 122(4) *American Journal of Sociology* 1104, 1138; Xin He and Fen Lin, 'The Losing Media? An Empirical Study of Defamation Litigation in China' (2017) 230 *China Quarterly* 371, 373; Xin He, 'No Malicious Incidents: The Concern for Stability in China's Divorce Law Practice' (2017) 26(4) *Social & Legal Studies* 467, 467–8; Xin He, 'Administrative Reconsideration's Erosion of Administrative Litigation in China' (2014) 2(2) *The Chinese Journal of Comparative Law* 252, 252; Xin He and Kwai Hang Ng, 'Inquisitorial Adjudication and Institutional Constraints in Chinese Civil Justice' (n 47) 290; Xin He and Kwai Hang Ng, 'In the Name of Harmony: The Erasure of Domestic Violence in China's Judicial Mediation' (n 47) 113.

what the law expects. The conclusion drawn by Xin He and Kwai Hang Ng is consistent with what Brian Tamanaha observes in his book *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*. That is, judges do not follow legal rules and precedents strictly; instead, they make choices in consideration of practice-related, social and institutional factors, as well as their moral views and personal biases.⁵² The final perspective is the enforcement campaign in China. China responds to enforcement failures in areas such as food safety, environment pollution and working conditions in different ways from other nations, which indicates that ‘extralegal forms of political intervention’⁵³ in law enforcement are heavily preferred by China’s party and state. As Sarah Biddulph, Sean Cooney and Ying Zhu hold, ‘[i]t is the strong planned nature of the campaign and its emphasis on state leadership of lawmaking and enforcement that continues to shape the development of China’s particular version of the rule of law’.⁵⁴

Although the literature noted above is not directly linked to Chinese charitable trusts, it is still useful for two reasons in this thesis. First, it identifies and explores the social, economic, political and legal factors that are relevant to law-making and law enforcement in China more generally. These factors can in turn shed light on identifying what factors are related to the governance of charitable trusts and how each of them interacts in the design and development of legislative governance rules for charitable trusts. Secondly, as discussed below, the hypothesis of this thesis is that the governance framework for Chinese charitable trusts may only be assessed with China’s particular circumstances and understood fully in light of relevant law, administrative practice, and private action taken by trust parties. Notwithstanding the rich literature on the institutional context within which charitable trusts operate, the various policy and social factors are often discussed and identified in a highly abstract and generalized manner. Furthermore, the current literature does not provide a detailed analysis of whether these policy and social factors are related to the governance of charitable trusts and if so, how they impact on the creation and administration of charitable trusts. In this regard, the above literature review can help enlighten the understanding of the challenges and complexities confronted in the governance

⁵² Brian Z Tamanaha (n 36) 6. See also Alexander Green, ‘Expanding Law’s Empire: Interpretivism, Morality and the Value of Legality’ (2011) 4(1) *European Journal of Legal Studies* 122, 132; Gerard McMeel (n 35) 33; G Edward White (n 35) 1004; Grant Gilmore (n 35) 1038; Brian Leiter, ‘Rethinking Legal Realism: Toward a Naturalized Jurisprudence’ (n 37) 267; Brian Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (n 37) 281.

⁵³ Sarah Biddulph, Sean Cooney and Ying Zhu (n 47) 374.

⁵⁴ Ibid 373. See also Sarah Biddulph, ‘The Production of Legal Norms: A Case Study of Administrative Detention in China’ (2003) 20 *UCLA Pacific Basin Law Journal* 217, 240; Benjamin van Rooij, ‘China’s War on Graft: Politico-Legal Campaigns against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the US’ (2005) 14(2) *Pacific Rim Law & Political Journal* 289, 289; Benjamin van Rooij, Rachel E Stern and Kathinka Fürst, ‘The Authoritarian Logic of Regulatory Pluralism: Understanding China’s New Environmental Actors’ (2016) 10(1) *Regulation & Governance* 1, 4–5; Virginia E Harper Ho, ‘From Contracts to Compliance: An Early Look at Implementation under China’s New Labor Legislation’ (2009) 23 *Columbia Journal of Asian Law* 35, 45; Virginia Harper Ho (n 47) 427; Young Nam Cho, ‘The Politics of Lawmaking in Chinese Local People’s Congresses’ (2006) 187 *China Quarterly* 592, 594; Benjamin Van Rooij et al, ‘From Support to Pressure: The Dynamics of Social and Governmental Influences on Environmental Law Enforcement in Guangzhou City, China’ (2013) 7(3) *Regulation & Governance* 321, 341; Carlos Wing-Hung Lo et al (n 47) 235; Gao (n 47) 21.

of charitable trusts. Two specific questions are particularly relevant in this regard: (a) how the Chinese institutional setting affects the way in which trust parties and regulatory officials behave; and (b) to what extent legislated governance goals are given effect in practice.

B Legal Rules Governing Chinese Charitable Trusts

There is a substantial body of literature in Chinese analyzing specific questions about the legal rules governing Chinese charitable trusts. These rules and the related literature are explored in detail in Chapters 3 and 4 of this thesis. The Chinese literature mainly concentrates on a textual analysis of the law with a focus on three aspects of the governance of charitable trusts: (a) the dominant role of settlors in the administration of charitable trust affairs; (b) the negative role that regulators play in supervising charitable trusts; and (c) the undetermined legal nature of beneficiaries.

The works dealing with the first aspect recognize that a tension between settlors and trustees plays a central role in the governance structure of Chinese charitable trusts. This tension can be understood in three respects: (a) the legal title of charitable trust assets; (b) the allocation of powers between settlors and trustees; and (c) the legal character of the Chinese charitable trust — namely, whether it is more like an agency relationship than a trust. The three respects are not separable but rather interrelated. First, the *Chinese Trust Law* stipulates that to create a trust, the settlor needs to entrust his property rights to the trustee and to allow the trustee to administer or dispose of such property rights in the interests of a beneficiary or for any intended purposes.⁵⁵ The legal term ‘entrust’ suggests that settlors are entitled to retain the legal title to charitable trust assets.⁵⁶ This legislative approach illustrates that protecting the

⁵⁵ 《中华人民共和国信托法》 [Trust Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 28 April 2001, (n 25) art 2.

⁵⁶ Lusina Ho, *Trust Law in China* (Sweet & Maxwell Asia, 2003) 41; Lusina Ho, Rebecca Lee and 金锦萍 [Jin Jinping], ‘Trust Law in China: A Critical Evaluation of Its Conceptual Foundation’ in Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 86; Lusina Ho, ‘Trust Laws in China: History, Ambiguity and Beneficiary’s Rights’ in Lionel Smith (ed), *Re-Imaging the Trust: Trusts in Civil Law* (Cambridge University Press, 2012) 195–6; Rebecca Lee, ‘Conceptualizing the Chinese Trust’ (2009) 58(3) *International & Comparative Law Quarterly* 655, 660; 何宝玉 [He Baoyu], 《信托法原理研究》 [Research on the Jurisprudence of Trust Law] (中国政法大学出版社 [China University of Political Science and Law Press], 2005) 10–11; 张淳 [Zhang Chun], 《〈中华人民共和国信托法〉中的创造性规定及其评析》 [The Creative Provisions in the Trust Law of the People’s Republic of China and Its Evaluation] (2002) 2 *法律科学 Law Science* 110, 112–13. The term ‘entrust’ contemplates the transfer of legal title for the creation of a valid Chinese trust. See Charles Zhen Qu, ‘The Doctrinal Basis of the Trust Principles in China’s Trust Law’ (2003) 38 *Real Property, Probate and Trust Journal* 345, 357–8; Kai Lyu, ‘Re-Clarifying China’s Trust Law: Characteristics and New Conceptual Basis’ (2015) 36 *Loyola of Los Angeles International and Comparative Law Review* 447, 455; 周小明 [Zhou Xiaoming], 《信托制度：法理与实务》 [Trust System: Theory and Practice] (中国法制出版社 [China Legal Publishing House], 2012) 41–2; 陈向聪 [Chen Xiangcong], 《信托法律制度研究》 [Research on Trust Law System] (中国检察出版社 [China People’s Procuratorate Press], 2007) 6; 谭振亭 [Tan Zhenting], 《信托法》 [Trust Law] (中国政法大学出版社 [China University of Political Science and Law Press], 2010) 7; 赵廉慧 [Zhao Lianhui] (n 27) 183–5. The *Chinese Trust Law* is modeled on the Trust Act of Taiwan, of Japan, and of South Korea, but in the three jurisdictions the transfer of legal title is required for the creation of a valid trust. See Wang Wen-Yeu, Wang Chih-Cheng and Shieh Jer-Sheng, ‘Trust Law in Taiwan: History, Current Features and Future Prospects’ in Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 70–1; Makoto Arai (n 23) 29; Masayuki Tamaruya, ‘Japanese Law and the Global Diffusion of Trust and Fiduciary Law’ (2017)

autonomous interests of settlors is critical to the creation and ongoing operation of charitable trusts. Secondly, according to the legal framework, the settlor is endowed by law with extensive powers while the trustee is burdened by law with broad duties. This legislative approach is deeply rooted in the background against which the *Chinese Trust Law* was enacted.⁵⁷ Meanwhile, due to the silence of the law on what these powers and duties entail, some scholars argue that this approach enables the settlor to intervene easily and creates a great deal of uncertainty around the performance of the trustee's duties.⁵⁸ Thirdly, once the aforesaid two respects are viewed together, it becomes clear that charitable trusts closely resemble agency relationships.⁵⁹ But in what ways and to what extent are Chinese charitable trusts similar to and distinguishable from Chinese agency relationships? This question has not yet been thoroughly investigated in the existing literature. What is more, the literature does not consider the significance of the answer to this question for understanding the governance of Chinese charitable trusts.

The literature in Chinese has also engaged extensively with the narrow issue of the significance of the changing role and powers of the government regulator in establishment of Chinese charitable trusts; from registration (*dengji* 登记) to recording (*bei'an* 备案).⁶⁰ Many works argue that, through recording as opposed to registration, regulators are legally allowed to engage in only a formal⁶¹ examination over

103 *Iowa Law Review* 2229, 2238; Wu Ying-Chieh (n 24) 48–9; 谢哲胜 [Xie Zhesheng], 《信托法》 [Trust Law] (元照出版公司 [Angle Publishing], 2009) 45, 110–11.

⁵⁷ Ruiqiao Zhang, 'Trust Law of China and Its Uncertainties: Examination of the Rights and Obligations of Trust and Ownership of Trust Property' (2015) 10 *National Taiwan University Law Review* 45, 69; 何宝玉 [He Baoyu], 《信托法原理研究 (第二版)》 [Research on the Jurisprudence of Trust Law (Second Edition)] (中国法制出版社 [China Legal Publishing House], 2015) 171; 何宝玉 [He Baoyu] (n 56) 11; 《关于〈中华人民共和国信托法(草案)〉的说明》 [Explanations on the Trust Law of the People's Republic of China (Draft)] (People's Republic of China) Standing Committee of the People's Congress, 24 December 1996, ss 1-3; 《全国人大法律委员会关于〈中华人民共和国信托法(草案)〉修改情况的汇报》 [Report of the Law Committee of the National People's Congress on the Revision of Trust Law of the People's Republic of China (Draft)] (People's Republic of China) National People's Congress, 3 July 2000, ss 1-3; Lyu (n 56) 456; 赵廉慧 [Zhao Lianhui] (n 27) 268.

⁵⁸ 何宝玉 [He Baoyu] (n 57) 171–2; 赵廉慧 [Zhao Lianhui] (n 27) 266.

⁵⁹ 高凌云 [Gao Lingyun], 《被误读的信托——信托法原论》 [A Misreading of Trust: Discussion on the Origin of Trust] (复旦大学出版社 [Fudan University Press], 2010) 261; 王众 [Wang Zhong], 《中国信托法原理与实例精要》 [Principles and Examples of the Chinese Trust Law] (中国政法大学出版社 [China University of Political Science and Law Press], 2017) 8; 何宝玉 [He Baoyu] (n 57) 15–19; Lee (n 56) 660; Lusina Ho, *Trust Law in China* (n 56) 41–2.

⁶⁰ See 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 30) ch 3; 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016, (n 31) art 47.

⁶¹ 吕鑫 [Lyu Xin], 《从公益信托到慈善信托：跨国移植及其本土建构》 [From Public Welfare Trusts to Charitable Trusts: Transnational Transplantation and Local Construction] (2019) 10 社会科学战线 *Social Science Front* 199, 203; 魏艳 [Wei Yan], 《慈善信托政府监管权配置研究》 [Research on Allocation of Administrative Regulatory Powers for Charitable Trusts] (2018) 6 国家行政学院学报 *Journal of Chinese Academy of Governance* 103, 104; 楼秋然 [Lou Qiuran], 《理解慈善信托中的“近似原则”：美国经验与中国借鉴》 [Understanding Cy Pres in Charitable Trusts: American Experience and Its Adoption in China] (2019) 3 中国政法大学学报 *Journal of CUPL* 49, 61; 王涛 [Wang Tao], 《慈善法的立法理念、制度创新和完善路径》

these trust documents and have no discretion to decline recording applications where the trust documents in question meet the formal requirements of the law. Consistent with the textual interpretation of the term ‘recording’, some scholars observe that policymakers have given more scope to the civil capacity of legal actors.⁶² Furthermore, regulators for charitable trusts are clearly tasked to educate and support charity participants on what the best practices are in the carrying out of charitable activities;⁶³ and the law has adopted numerous collaborative measures to encourage the public to play an active role in raising awareness about charitable trusts. In this light, many scholars suggest that the current favorable regulatory environment reflects the increasing level of autonomy and capacity of private parties and reflects the fact that regulators have attributed great value to the role of individuals in the advancement of the state-society relationships.⁶⁴ While this conclusion has been drawn from an analysis of the changed legal provisions, the literature does not go on to explore whether this textual change has been reflected in regulatory practice, or to consider the factors, in addition to law, that may influence regulatory practice.

There is also an extensive Chinese literature on the legal nature and role of beneficiaries in the context of Chinese charitable trusts. A striking debate prevails among legal scholars with respect to the legal nature of the object. That is, are the objects who receive benefits from charitable trusts beneficiaries or merely recipients? The distinction between beneficiaries and recipients is not theoretically significant in the context of common law charitable trusts. However, this distinction is particularly meaningful in understanding the nature of Chinese charitable trusts and the role of the objects receiving charitable trust benefits. If these objects are beneficiaries, it means that they have interest in the proper distribution of charitable assets and are therefore entitled to claim distribution. If these objects are only recipients, it means that they have no interest in the proper distribution of charitable assets and hence play no role at all in the governance structure of charitable trusts. The distinction between ‘beneficiary’ and ‘recipient’ is not clear in the area of Chinese charitable trusts. In law, the term ‘beneficiary’ is used extensively, suggesting that the objects who receive benefits are

[Research on the Legislative Idea, System Innovation and Development Path of the Chinese Charity Law] (2018) 33(1) 法学论坛 *Legal Forum* 143, 146.

⁶² Siyi Lin (n 29) 770–2.

⁶³ See 《国务院关于促进慈善事业健康发展的指导意见》 [Guiding Opinions of the State Council on Promoting Healthy Development of Charitable Causes] (People’s Republic of China) State Council, 24 November 2014, chs 4-5; 《中国慈善事业发展指导纲要（2011-2015 年）》 [Guidelines for the Development of China’s Charitable Causes (2011-2015)] (People’s Republic of China) Ministry of Civil Affairs, 15 July 2011, (n 21) s 3; 《中共中央关于全面深化改革若干重大问题的决定》 [Decision of the Central Committee of the Communist Party of China on Several Major Issues on Comprehensively Deepening Reforms] (People’s Republic of China) Central Committee of the Communist Party of China, 12 November 2018, (n 21) s 13; 《中华人民共和国慈善法》 [Charity Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 16 March 2016, (n 31) ch 9; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 30) ch 6.

⁶⁴ 楼秋然 [Lou Qiuran] (n 61) 62; 王涛 [Wang Tao] (n 61) 144.

beneficiaries in the trust law sense.⁶⁵ In contrast, many academic papers or commentaries regard the term ‘beneficiary’ as speculative and argue that this term can be interpreted as either beneficiary or recipient.⁶⁶

The focus of current academic debates is mainly on the conceptual distinction between ‘beneficiary’ and ‘recipient’. While scholars recognize that how an object’s nature is interpreted has important bearing on our understanding of its capacity to exercise supervisory roles,⁶⁷ they fall short of pointing out the relevance of the distinction between ‘beneficiary’ and ‘recipient’ to the rights or powers that the objects may have in the governance of charitable trusts. The answer to the question of which term (‘beneficiary’ or ‘recipient’) best describes the objects receiving trust benefits has not been directly related in the literature to the analysis of the governance of charitable trusts. The real question that needs to be explored here is what powers or rights the objects of a charitable trust may have.

Existing literature concerning the unique features of Chinese charitable trusts has identified the efforts that lawmakers have made towards the construction of a legal framework for charitable trusts and contributed to the discussion regarding the underlying objectives of charitable trusts in terms of promoting charitable undertakings and strengthening the settlor’s autonomy. On the other hand, this literature has not considered the relevance of each objective to the design of the governance structure of charitable trusts, the way in which the two objectives interact and the implication of this for the understanding of the legal nature of charitable trusts.

In the area of charitable trusts, published literature has examined the legislative provisions governing the internal relationship between trust parties and the role of regulators, but has not considered how trust parties interact with regulators in the day-to-day governance of charitable trusts, what uncertainties trust parties and regulators may encounter when performing their legal roles, and what strategies they have adopted to mitigate the risk that may arise out of the implementation of the law. The thought from legal realists is that application of law is not an ‘exercise in mechanical deduction’,⁶⁸ and thus it is possible that actual practices may look different from the law.⁶⁹

In terms of the ambiguities in the current legal framework and the legal uncertainties that arise from these ambiguities, much of the Chinese literature recites the problems and proposes solutions based on textual interpretation of legal rules without undertaking a comprehensive analysis of the broader social

⁶⁵ See 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 30) arts 10-11; 《民政部、中国银行业监督管理委员会关于做好慈善信托备案有关工作的通知》 [Notice of Civil Affairs Department and China Banking Regulatory Commission on the Recordation Work for Charitable Trusts] (People’s Republic of China) Civil Affairs Department and China Banking Regulatory Commission, 25 August 2016, s 2.

⁶⁶ 谭振亨 [Tan Zhenting] (n 56) 199–200; 中国信托业协会 [China Trustee Association] (n 12) 62, 84; 谢哲胜 [Xie Zhesheng] (n 56) 219; 陈向聪 [Chen Xiangcong] (n 56) 278–9; 赵廉慧 [Zhao Lianhui] (n 27) 555.

⁶⁷ 赵廉慧 [Zhao Lianhui] (n 27) 554–5.

⁶⁸ Brian Leiter, ‘Legal Formalism and Legal Realism: What Is the Issue’ (n 35) 116.

⁶⁹ Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 13.

and policy context within which the rules were developed and operate. In particular, the literature does not consider what specific ambiguities the current legal framework has created, and how policy and social factors affected the way in which trust parties and regulators address these ambiguities. This is anomalous as there is little point in proposing reform solutions to the challenges and legal uncertainties of today without an understanding of the ways in which the law relevant to charitable trusts is given effect in practice, and the extra-legal factors that affect the way in which charitable trusts might be governed or administered.

In contrast to the abundant Chinese literature on charitable trusts, there is very little literature in English that examines their introduction and development in mainland China. An exception is the analysis concerning the advantages and problems of the Chinese charitable trust system by Lin Siyi.⁷⁰ The dearth of English literature is scarcely surprising due to the fact that the charitable trust model was just introduced into the Chinese legal system in 2016. However, although the public welfare trust, an institution that serves the same function of encouraging charitable causes, has been present in the Chinese legal system for two decades, there is still nonetheless a dearth of English literature on this topic. This is surprising and suggests either that it has been discounted or discussed without exhaustive analysis or that the significance of the topic has not been fully appreciated by writers in English.

C Locating this Thesis in Relation to Existing Literature

The current study of the governance of charitable trusts contributes to the literature by locating charitable trusts within the legal, policy and social context in China and by examining the ways in which the legislated governance rules regarding charitable trusts are given effect in practice. This thesis, written in English, engages with both the Chinese and English language literature in three ways.

First, it engages in a detailed analysis of the legal regulatory framework and identifies the gaps in the current laws governing charitable trusts. Such an analysis reveals the continuities and discontinuities between public welfare trusts and charitable trusts in terms of the checks-and-balances mechanisms between trust parties and identifies the ways in which regulators interact with trust parties in the governance of charitable trusts. At a macro level, this analysis also identifies the progress that legislators have made to strengthen the autonomy of private individuals in participating in charitable undertakings.

Secondly, this thesis analyses the regulation of charitable trusts in practice. The comparison between law and practice reveals the social and policy norms that underpin the traditional legal system for charities and continue to inform the regulatory system of charitable trusts today. To carry out this comparison, semi-structured qualitative interviews with regulatory officials were conducted in both eastern developed areas and western undeveloped areas in China. The regional differences⁷¹ in the regulatory practice of charitable trusts — a supportive regulatory environment in the east and a conservative one in the west — suggest that the policy and social context is relevant to the performance

⁷⁰ Siyi Lin (n 29) 771–5.

⁷¹ See analysis in Section III of Chapter 4.

of regulators' roles in practice. The law and its institutional context should be examined together in order to identify how legal actors engage with the law and in what way the law is carried out in practice.⁷² In this light, this thesis explores the social and policy factors that regulators have taken into account when implementing the law.

Thirdly, this study extends the literature that examines the checks-and-balances mechanisms between settlors and trustees by exploring how contracts are used to redistribute each party's powers and duties. The settlor is endowed by law with extensive powers while the trustee is burdened by law with onerous duties. Charity law does not define clearly what these powers or duties entail and how the role of each party could be discharged. For this purpose, this thesis examines the contracts collected from practice and the interviews of relevant actors (i.e. trustee managers and settlors) to identify how contracts are used by trust parties in the governance of charitable trusts and the reasons behind these uses.⁷³ It is acknowledged by contract theorists that contracts are widely used as tools to allocate risks between relevant parties.⁷⁴ In the Chinese charitable trust setting, trust parties tend to use contractual

⁷² Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 4(4) *Law & Society Review* 719, 719. There is a vast literature that examines the correlation between law and its institutional context. The book *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* suggests that 'far from community dissolving as law becomes more prominent, the growing complexity and bulk of law reflects the increasing complexity, intricacy and richness of communal social relationships in their various networks'. See Roger Cotterrell and Austin D Sarat, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing Ltd, 2006) 161. In the journal article *Legal Culture and Social Development*, Lawrence M Friedman states that 'legal institutions are responsive to social change; moreover, they have a definite role, rather poorly understood, as instruments that set off, monitor, or otherwise regulate the fact or pace of social change'. See Lawrence M Friedman, 'Legal Culture and Social Development' (1969) 4(1) *Law & Society Review* 29, 29. In the journal article *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, Mathias Reimann holds that 'comparative law has come to look at the world in terms of coexisting legal cultures, i.e., as parts of large social structures consisting of economies, religions, and social habits'. See Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50(4) *The American Journal of Comparative Law* 671, 677. For works devoted exclusively to the correlation between law and its institutional context, see Roger Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities' in Andrew Harding and Esin Örüçü (eds), *Comparative Law in the 21st Century* (Kluwer Academic Publishers, 2002) 35–54; David Nelken, 'Legal Transplants and Beyond: Of Disciplines and Metaphors' in Andrew Harding and Esin Örüçü (eds), *Comparative Law in the 21st Century* (Kluwer Academic Publishers, 2002) 19–34; 杜健荣 [Du Jianrong], 《法律与社会的共同演化 — 基于卢曼的社会系统理论反思转型时期法律与社会的关系》 [Co-Evolution of Law and Society Reflection: On the Relationship between Law and Society in Transition Period by Luhmann's Social System Theory] (2009) 2 法制与社会发展 *Law and Social Development* 109, 109–17; 范愉 [Fan Yu], 《新法律现实主义的勃兴与当代中国法学反思》 [The Rising of New Legal Realism and a Reflection on Current Chinese Law] (2006) 4 中国法学 *China Legal Science* 38, 38–51; 季卫东 [Ji Weidong], 《法律议论的社会科学研究新范式》 [New Method of Social Scientific Study in Legal Discussion] (2015) 6 中国法学 *China Legal Science* 25, 25–41.

⁷³ See analysis in Section III of Chapter 5.

⁷⁴ See, eg, Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) 308; Jeannie Marie Paterson, Andrew Robertson and Arlen Duke, *Contract: Cases and Materials* (Thomson Reuters, 2016) 540; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing, 3rd ed, 2016) 131; Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55, 63; Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21(1) *The Journal of Legal Studies* 115, 130; Stewart Macaulay, 'An Empirical View of Contract Law' (1985) 1985 *Wisconsin Law Review* 465, 475; Albert Choi and George Triantis, 'The Effect of Bargaining Power on Contract Design' (2012) 98(8) *Virginia Law Review* 1665, 1670; Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113(3) *The Yale Law Journal* 541, 555.

tools to vary the legal framework of charitable trusts so as to mitigate risks posed by regulatory practice and the vagueness of the law. The present study enriches the contract law scholarship and legal realist scholarship by examining how trust parties use contract to distribute their powers and duties and what role extra-legal factors have played in the planning and development of relevant contract clauses. It shows that the vagueness of the law creates risk for trust parties and motivates them to use contractual tools to guide the management of charitable trusts. This observation, along with the analysis of the regulatory practice, provides insights for trust practitioners and academics to understand how newly recorded charitable trusts are actually governed in China.

By examining charitable trusts with reference to the legal rules governing them, locating their governance practice within a policy and social context, and synthesizing the three perspectives as outlined above, the thesis seeks to make an original contribution concerning the governance of Chinese charitable trusts.’

III LEGAL DEFINITION OF CHARITABLE TRUST GOVERNANCE

A *Semantic Meaning of Governance*

This thesis examines the governance of Chinese charitable trusts, and therefore how the term ‘charitable trust governance’ is defined is the basis on which the analysis in this thesis rests. From a semantic perspective, there is no uniform answer as to how ‘governance’ should be interpreted.⁷⁵ Context plays a vital role in unraveling the meaning of governance.⁷⁶ The etymology of governance comes from the Latin words ‘*gubernare*’ and ‘*gubernator*’, which refer to ‘steering a ship and to the steerer or captain of a ship’.⁷⁷ The term ‘governance’ originates from the old French word ‘*gouvernance*’, which means ‘control and the state of being governed’.⁷⁸ This term is not a ‘precise one and its meaning is affected by cultural variables’.⁷⁹ As scholars David O Renz and Fredrik O Andersson observed, ‘the concept of governance has been defined less clearly than is necessary to advance research in this field’.⁸⁰ Legal words, in essence, ‘are best understood and investigated by reference to the content

⁷⁵ The term ‘governance’ refers to the ‘set of practices and procedures in place to ensure that an entity operates to achieve its objectives in an effective and transparent manner’. See The Treasury, The Australian Government, *Development of Governance Standards — Consultation Paper* (December 2012) 5. The term ‘governance’ refers to ‘the systems and processes concerned with ensuring the overall direction, control, and accountability of an organization’. See Chris Cornforth and William A Brown (eds), *Nonprofit Governance: Innovative Perspectives and Approaches* (Routledge, 2014) 18.

⁷⁶ See analysis in Section II A of this Chapter.

⁷⁷ John H Farrar, *Corporate Governance in Australia and New Zealand* (Oxford University Press, 2001) 3; Chenxia Shi (n 50) 26; 韩丽欣 [Han Lixin] (n 6) 105.

⁷⁸ Farrar (n 77) 3; Chenxia Shi (n 50) 26; 韩丽欣 [Han Lixin] (n 6) 105.

⁷⁹ Roman Tomasic, ‘Good Corporate Governance: The International Challenge’ (2000) 12 *Australian Journal of Corporate Law* 142, 143.

⁸⁰ Chris Cornforth and William A Brown (n 75) 18.

of the doctrines that create the concepts rather than by reference to dictionary definitions,⁸¹ but nevertheless a dictionary definition is a good starting point. Examining how ‘governance’ is defined in dictionaries can shed light on subsequent discussions of charitable trust governance in China. According to *Modern Chinese Dictionary*, *Oxford English Dictionary*, and *New Shorter Oxford English Dictionary on Historical Principles*, the term ‘governance’ denotes a system of procedures, methods, or rules by which something is regulated,⁸² or a method of management.⁸³

B Governance in Context

Existing scholarly writings have engaged extensively with the analysis of the meanings of corporate governance and charity governance. Exploring how the concepts ‘corporate governance’ and ‘charity governance’ are understood can illuminate to what extent and in what way the dictionary meaning of governance is given effect in particular contexts. This analysis in turn can provide insights into how governance can be understood in the Chinese charitable trust setting. Although the meaning of governance varies in these three legal contexts, comparisons between charity governance and corporate governance may shed light on the interpretation of charitable trust governance — particularly given that the language used in describing charitable trust governance suggests similar conceptual characteristics and origins.

1 Corporate Governance and Charity Governance

Critical writings or commentaries have studied the meaning of corporate governance from a wide range of disciplines.⁸⁴ Examination of these scholarly works illustrates that a standard definition is

⁸¹ Matthew Conaglen, *Fiduciary Loyalty-Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010) 77.

⁸² The term ‘regulate’ means ‘to control, govern, or direct by rules or regulations’. See J A Simpson and E S C Weiner (eds), *The Oxford English Dictionary (XIII)* (Clarendon Press, 2nd ed, 1989) 524; Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles (Volume 2 N-Z)* (Clarendon Press, 4th ed, 1993) 2530. See also 汉语大字典编纂处 [Office of Chinese Dictionary Compilation], 《现代汉语词典》 [Modern Chinese Dictionary] (四川辞书出版社 Sichuan Dictionary Press, 2014) 276; 中国社会科学院语言研究所 [Institute of Language Studies, Chinese Academy of Social Sciences], 《现代汉语词典》 [Modern Chinese Dictionary] (商务印书馆 The Commercial Press, 7th ed, 2016) 482.

⁸³ See J A Simpson and E S C Weiner (eds), *The Oxford English Dictionary (VI)* (Clarendon Press, 2nd ed, 1989) 710; Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles (Volume 1 A-M)*, vol 2 (Clarendon Press, 4th ed, 1993) 1123. See also Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009) 722; Ray Finkelstein et al (eds), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 5th ed, 2015) 285; Raymond Antony Finkelstein et al (eds), *LexisNexis Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 2016) 689; 中国社会科学院语言研究所 [Institute of Language Studies, Chinese Academy of Social Sciences] (n 82) 1690; 汉语大字典编纂处 [Office of Chinese Dictionary Compilation] (n 82) 1021.

⁸⁴ In finance, corporate governance relates to the methods in which suppliers of finance to corporations assure themselves of getting a return on their investments. See Andrei Shleifer and Robert W Vishny, ‘A Survey of Corporate Governance’ (1997) 52(2) *The Journal of Finance* 737, 737; Paul Ali et al (eds), *Corporations Law: A Custom Publication for Melbourne Law School* (LexisNexis Butterworths, 2016) 290. In management, corporate governance deals with the control, management and administration of a corporation, and ensuring the rational expectations of accountability. See Organization for Economic Co-operation and Development (ed), *G20/OECD Principles of Corporate Governance* (OECD, 2015) 13; Corporate Governance Council of Australian Securities Exchange (ASX), *Corporate Governance Principles and Recommendations with 2010 Amendments* (2nd ed, 2007)

lacking in terms of the meaning of corporate governance. Some academic treaties opine that corporate governance relates to the set of procedures and practices by which companies are regulated, managed, or controlled,⁸⁵ while others emphasize the fulfillment of institutional objectives⁸⁶ in the definition of corporate governance.⁸⁷ For example, the *China Security Regulatory Commission* in the *Governance Codes for Listed Companies in China*⁸⁸ states that corporate governance deals with the methods by which the corporation is controlled and directed, and the way in which its objective is achieved by internal management.

Likewise, the term ‘charity governance’ is also open to interpretation. In some scholarly writings, the term ‘charity governance’ is defined in accordance with the internal management of charities. In the book *Fundamental Issues of the Non-Profit Organization Law in China*, ‘charity governance’ is defined as a set of rules, standards, and procedures through which a charitable organization is managed, controlled, or regulated.⁸⁹ In contradistinction, some works incorporate the values underlying the creation and operation of charities into the definition of charity governance. An illustrative example is

3; Corporate Governance Council of Australian Securities Exchange (ASX), *Corporate Governance Principles and Recommendations* (3rd ed, 2014) 3.

⁸⁵ See Chenxia Shi (n 50) 25; John H Farrar, ‘Developing Corporate Governance in Greater China’ (2002) 25(2) *University of New South Wales Law Journal* 462, 463. See also Cadbury Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance* (Burgess Science Press, 1992) para 2.5; Corporate Governance Council of Australian Securities Exchange (ASX), *Corporate Governance Principles and Recommendations with 2010 Amendments* (n 84) 3; Ian M Ramsay, ‘The Corporate Governance Debate and the Role of Directors’ Duties’ in Ian M Ramsay (ed), *Corporate Governance and the Duties of Company Directors* (Centre for Corporate Law and Securities Regulation, 1997) 2; Daniel Greenberg (ed), *Jowitt’s Dictionary of English Law (Volume 1: A-I)* (Sweet & Maxwell, 4th ed, 2015) 586; Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2nd ed, 2013) 188.

⁸⁶ There is no agreement as to what a company’s objective is. The objective of a company can be classified into three types: prioritizing the shareholders’ interest, prioritizing the shareholders’ interest while at the same time considering the interests of other stakeholders, and prioritizing the stakeholders’ interest. See Reegan Grayson Morison and Ian Ramsay, ‘An Analysis of Companies’ Business Objectives’ (2014) (6) *Company and Security Law Journal* 438, 438; Donald C Clarke, ‘Corporate Governance in China: An Overview’ (2003) 14(4) *China Economic Review* 494, 498–9.

⁸⁷ Yuwa Wei, ‘An Overview of Corporate Governance in China’ (2003) 30(1) *Syracuse Journal of International Law and Commerce* 23, 24; 《上市公司治理准则》 [Governance Codes for Listed Companies in China] (People’s Republic of China) China Security Regulatory Commission, 30 September 2018, art 3; 范健 [Fan Jian], 《资本泛滥时期的公司治理与金融监管》 [Corporate Governance and Financial Regulation During the Period of Capital Flooding] (2019) 2 法学杂志 *Law Science* 11, 19.

⁸⁸ 《上市公司治理准则》 [Governance Codes for Listed Companies in China] (People’s Republic of China) China Security Regulatory Commission, 30 September 2018, (n 87) art 3. The *LexisNexis Australian Legal Dictionary (Second Edition)* adopts the similar definition on corporate governance. See Raymond Antony Finkelstein et al (n 83) 373.

⁸⁹ 北京大学非营利法组织研究中心 [Peking University Law School Nonprofit Organization Law Research Center], 《中国非营利组织法的基本问题》 [Fundamental Issues of the Non-Profit Organization Law in China] (中国方正出版社 [China Fangzheng Press], 2006) 126. For scholarly writings that endorse this definition, see, eg, 王涛 [Wang Tao] (n 61) 145; 李德健 [Li Dejian], 《公共利益与法人自治的平衡 — 中国慈善法人制度变革的进路选择》 [The Balance of Public Interest and Legal Person Autonomy — Selection of Approaches for Reform of the Chinese Charity Legal Person System] (2016) 31(163) 法学论坛 *Legal Forum* 54, 58; 董蕾红 [Dong Leihong] and 李宝军 [Li Baojun], 《论慈善组织的政府监管》 [On the Government Supervision over Charitable Organizations] (2015) 6 山东大学学报 (哲学社会科学版) *Journal of Shandong University (Philosophy and Social Sciences)* 77, 78–9.

the definition given by the book *Research on the Governance of Chinese Charities* — namely, charity governance refers to a set of principles or rules that enable charities to be managed in a way that achieves their public benefit objectives in an effective and transparent manner.⁹⁰

2 Charitable Trust Governance

In contrast to the abundant discussions on the definitions of corporate governance and charity governance, the literature that examines how the governance of charitable trusts should be understood is sparse.⁹¹ The dearth of literature is hardly surprising due to the fact that the charitable trust model was introduced into the Chinese legal system in 2016. Based on the understanding of corporate governance and charity governance previously discussed, one can identify two elements that are most relevant to the definition of governance. The first deals with the rules or procedures by which an entity (corporation or charity) is managed or administered. The second relates to the purpose of governance, namely an entity is governed in a way that achieves its institutional objectives in an effective and transparent manner. When these two elements are viewed together, it can be said that ‘governance’ is concerned with the rules or practices by which the objective of an entity is achieved through management. In this light, the author defines the governance of charitable trusts as a set of mechanisms that ensure the trustee of a charitable trust complies with its duties, in order to effectively realize the charitable purpose, or the public benefit pursued by the charitable trust. Following on from the above definition, the focus of charitable trust governance lies in how charitable trusts should be administered. The focus of how charitable trusts should be administered in turn lies in how a trustee’s exercise of power should be controlled and what measures can be taken to ensure its accountability for that exercise.

⁹⁰ 韩丽欣 [Han Lixin] (n 6) 122. For other works that endorse this definition, see, eg, 马金芳 [Ma Jinfang] (n 13) 10; 高静华 [Gao Jinghua], 《慈善透明的困境与治理策略》 [Dilemmas of the Transparency of Charities and Governance Strategies] (2018) 15 中国社会组织 *China Social Organization* 53, 55; 谢琼 [Xie Qiong], 《立体监管：我国慈善事业发展的理性选择》 [Stereoscopic Supervision: Rational Choice for the Development of Charitable Causes in China] (2015) 4 国家行政学院学报 *Journal of Chinese Academy of Governance* 73, 75. In Australia, the consultation paper (*Review of Not-for-profit Governance Arrangement*), issued by the Department of the Treasury (Australia) in 2011, is important in understanding the meaning of governance. This paper provides charities with a wide range of suggestions for the practice of good governance. In this paper, charity governance is defined as the practices and procedures within and by which the charity is run in such a way that it achieves its objectives in a transparent and effective manner. See The Treasury, The Australian Government, *Review of Not-for-Profit Governance Arrangement — Consultation Paper* (2011) 5. See also The Treasury, The Australian Government (n 75) 5. This definition has been endorsed by the governance guide (*Governance for Good — The ACNC’s Guide for Charity Board Members*) issued by the Australian Charities and Not-for-profits Commission in 2013. See Australian Charities and Not-for-profits Commission, *Governance for Good — the ACNC’s Guide for Charity Board Members* (July 2013) 3.

⁹¹ The focus of charitable trust governance is on the governing of trustees. See Evelyn Brody, ‘Charity Governance: What’s Trust Law Got to Do with It?’ (2005) 80 *Chicago-Kent Law Review* 641, 686.

IV HYPOTHESIS AND RESEARCH QUESTIONS

A Hypothesis

The focus of this thesis is on the governance structure of Chinese charitable trusts, assessed from the perspective of China's particular political, social and economic conditions. The hypothesis that it tests is that the governance framework for Chinese charitable trusts may only be understood fully in light of relevant law, administrative practice, and private action taken by trust parties. This hypothesis comprises three interrelated aspects. First, the law sets up a governance framework for charitable trusts but is vague and underdetermined in various respects. Secondly, administrative practice is a significant component of the governance framework as regulators in China are subject to intense administrative and policy pressures and thus strongly responsive to extra-legal concerns. Thirdly, private action is essential in the governance framework as trust parties vary the framework of the law to mitigate risks posed by administrative practice and the vagueness of the law.

As discussed in Section III, 'Legal Definition of Charitable Trust Governance', the term 'charitable trust governance' denotes any governance mechanisms ensuring that the trustee of a charitable trust complies with its duties in order to effectively realize the charitable purpose, or the public benefit pursued by the charitable trust. This definition indicates that the focus of charitable trust governance is on how a trustee's exercise of power should be controlled. Based on this understanding, there are four types of actors relevant to the governance of charitable trusts. They are the actors who can play a role in exerting pressure on trustees to ensure they comply with their duties. Settlers can exercise their statutory or contractual powers to supervise the trustee's administration of charitable trust affairs. Beneficiaries may have the standing to bring proceedings to remedy the misuse of charitable trust assets where they have particularized (or individualized) interests in the proper distribution of trust assets after receiving notice. Regulators can exercise their regulatory powers to interfere with the management of charitable trusts and to punish trustees for non-compliant behaviors. Finally, the general public can access information disclosed by charitable trust trustees and report the misuse of charitable funds to the relevant regulators. The subsequent discussions on charitable trust governance in this thesis will therefore focus on the roles of these four actors and the way in which they interact both in law and in practice.

This thesis identifies the factors that shape the governance framework for charitable trusts; legal, administrative and contractual. It examines the way in which these factors take effect under the creation and ongoing administration of charitable trusts. The thesis examines the rules governing the creation and administration of charitable trusts and how these rules are put into effect in practice. A closer scrutiny of the *Chinese Charity Law* suggests that, in contrast to public welfare trusts, legislators have constructed a public-private hybrid model for charitable trusts. On the one hand, the state has given greater scope to the civil capacity of legal actors. Private actors are allowed to define the way in which their private funds are used for the charitable purposes defined by the state. On the other hand, the state

is unwilling to relinquish its control over the use of charitable trusts as it grants regulators wide powers to oversee whether charitable assets are used in alignment with its policy welfare goals.⁹² This public-private hybrid is reflected in the vagueness of legal rules governing charitable trusts which has created risks for both trust parties and regulators. Furthermore, the social and policy environment in which charitable trusts are established and operate plays a vital role in determining how the legal governance framework is given effect in practice. Regulators have long been subject to intense policy and administrative pressures and have greater incentives to consider extra-legal factors when implementing the law. Trust parties are willing to take private action to define the way in which they interact so as to mitigate risks posed by regulatory practice and the vagueness of the law.⁹³

The literature reviewed in Section II indicates that political objectives very much dictate the development of the charitable sector in China. Although the *Chinese Charity Law* has been implemented to mediate the relationship between civil society and the state, the balance leans more in favour of the state's public welfare goals at the outset. In fact, the state uses the new charity law as a tool to guide the public's charitable activities, so as to advance its own public welfare goals as much as possible. The government has had strict control over the charitable sector for a long period of time, and therefore it is difficult to change its traditional methods and ideas within a short time.⁹⁴ Following this line of thought, in what way does this policy and social context influence the actual implementation of the legislated governance framework? The answer to this question can shed light on how trust parties engage with the law in practice, and further illuminate the continuities and discontinuities between regulators' behavioral patterns before and after the new charity law was introduced.

For the purpose of testing the above hypothesis, the thesis does the following. First, the legal governance framework for Chinese charitable trusts is examined across a range of issues in the thesis. Chapter 2 discusses the public law-private law hybrid model that legislators have created for charitable trusts. Chapter 3 traces the legislative process of the *Chinese Charity Law* and the *Measures for Charitable Trusts* and investigates what legal rules have been constructed for the governance of charitable trusts.⁹⁵ Such an examination draws a comparison between charitable trusts and public welfare trusts, and the rules underpinning both. Chapter 3 goes on to explore the nature and scope of the autonomy that trust parties have in determining what types of benefits the trust will create, and which sectors of the community can receive such benefits. Chapter 4 analyzes the ways in which regulators control the establishment and development of trusts for the purpose of promoting public benefit.

Secondly, by examining charitable trust contracts and interviewing persons with charitable trust experience, Chapters 4 and 5 analyze the ways in which trust parties and regulators perform their roles

⁹² See analysis in Section II of Chapter 4.

⁹³ See analysis in Section III of Chapter 5.

⁹⁴ Li Dejian (n 34) 270.

⁹⁵ See analysis in Sections III and IV of Chapter 3.

or responsibilities in practice. This analysis locates the governance of Chinese charitable trusts within their institutional context in order to identify what political and social factors are relevant to governance practice and how they operate under the implementation of legislated governance rules.⁹⁶

B Research Questions

The analyses above raise three questions to answer in this thesis. The first is: how has the charity law shaped the governance structure of charitable trusts? To answer this question, Chapters 2 and 3 will study the laws and regulations relevant to public welfare trusts and charitable trusts respectively; the practice in respect of public welfare trusts over the last two decades; and legislative changes that the new charity law has made to the governance framework for charitable trusts. It is revealed that, whilst charitable trusts are tasked with a similar legislated objective (i.e. promoting charitable undertakings) as public welfare trusts, there are some fundamental differences in terms of the legislated governance rules. The rules governing charitable trusts have elevated the scope of autonomy of private parties and in theory limited the extent to which the creation and ongoing operation of a charitable trust is subject to state intervention.⁹⁷ These differences tend towards the conclusion that, in contrast to the public law model of public welfare trusts, legislators have constructed a public-private hybrid model for Chinese charitable trusts.⁹⁸

The hybrid model evidences the state's desire to motivate private philanthropy but, at the same time, its unwillingness to relinquish control over charitable undertakings.⁹⁹ Chapter 2 will explore the particular mixture of public law and private law norms that coexist in the Chinese charitable trust, and the implications that this hybrid nature has for the governance of charitable trusts. Based on the analysis of the charitable trust's hybrid nature, Chapter 3 will discuss the legal regulation of trust parties, which covers the assignment of statutory powers and duties to settlors and trustees, the ways in which the checks-and-balances mechanisms between them are established, and the roles that beneficiaries under a charitable trust may play in the governance framework. Chapter 4 will explore the new regulatory framework for charitable trusts, which includes a textual analysis of the law relevant to the assignment of statutory powers to each regulator (i.e. civil affairs departments and banking regulatory authorities), how the two regulators interact in law, and what regulatory measures they can undertake.

The second question that arises from the author's observation of regulatory practice is: how have regulators implemented the legal regulatory regime in practice? Chapter 4 will explore this question by drawing upon empirical findings from the regulatory practice of charitable trusts. Under the legal framework, regulators are granted wide powers to oversee whether trust assets are managed in compliance with the state's broader interest. On the other hand, the regulatory framework is vague and incomplete in what these regulatory powers and duties entail in substance and how they should be

⁹⁶ See analysis in Chapters 4 and 5.

⁹⁷ See analysis in Section III of Chapter 3.

⁹⁸ See analysis in Section II of Chapter 2.

⁹⁹ See analysis in Section II of Chapter 2.

performed. The vagueness in the law has created substantive risks for regulators and motivated them to adopt strategies to protect their interests from being adversely affected when engaging with the law.¹⁰⁰ Chapter 4 will identify the deficiencies of the current regulatory framework, the legal uncertainties that these deficiencies have created, and the strategies that regulators have taken in the performance of their powers or responsibilities.

Apart from the law, China's particular circumstances under which charitable trusts are introduced and operate are also vital in shaping the decision-making of regulatory officials.¹⁰¹ In the Chinese bureaucratic system, regulators are strongly responsive to extra-legal factors in their implementation of the law.¹⁰² This approach can help regulators strictly control the use of charitable trusts for public welfare purposes and minimize risks that may arise out of the performance of their responsibilities.¹⁰³ Based on the empirical findings from regulatory practice, Chapter 4 will identify the extra-legal factors that shape the regulatory framework and the ways in which these factors take effect under the administration and supervision of charitable trusts.

The above two questions lead to a third question which this thesis will also consider. That is, what private actions have trust parties taken when engaging with the law? Chapter 5 will explore this question through the examination of charitable contracts collected for this research. Under the public-private hybrid model, trust parties are granted greater autonomy to determine distribution of rights and responsibilities between them in the daily management of charitable trusts.¹⁰⁴ The law has established check-and-balance mechanisms between trust parties. However, it does not define clearly how these mechanisms should operate, and what measures can be taken by trust parties when these mechanisms fall short in regulating their relationships.¹⁰⁵ In view of the risk posed by regulatory practice and the vagueness of the law, the parties to charitable trusts have strong desires to use contracts to clarify their powers and duties and to define the way in which they interact with regulators. Similar to regulators, practice shows that trust parties have also considered a wide range of extra-legal factors in the planning and development of contract clauses. They seek to use these clauses to mitigate risks in the performance of their legal roles.¹⁰⁶

To explore how contractual tools are used by trust parties, Chapter 5 will examine three subsidiary questions. In what ways are contracts used in the management of charitable trusts? What types of relationships are regulated by charitable trust contracts? How do extra-legal factors affect the planning of contract terms between trust parties? To address these questions, Chapter 5 will consider areas where the law governing the relationship between trust parties is vague, the risk that trust parties may confront

¹⁰⁰ See analysis in Section II of Chapter 4.

¹⁰¹ See analysis in Section III of Chapter 4.

¹⁰² See analysis in Section III of Chapter 4.

¹⁰³ See analysis in Section III of Chapter 4.

¹⁰⁴ See analysis in Section III of Chapter 3.

¹⁰⁵ See analysis in Section III of Chapter 3.

¹⁰⁶ See analysis in Section III of Chapter 5.

when implementing the law, as well as the policy and social norms underlying the creation and ongoing administration of charitable trusts.

C Questions Beyond the Scope of this Thesis

Although this thesis examines the governance structure of charitable trusts both in law and in practice, its focus is on how legislated rules are given effect in practice in the governance of charitable trust. Examination of such governance practice can help to identify problems or deficiencies within the current legislative framework. For example, the current law makes no mention of what role beneficiaries could play in the governance of charitable trusts;¹⁰⁷ and it does not evaluate to what extent a more restrictive approach regarding the settlor's role in charitable trust governance may adversely affect their willingness to make donations.¹⁰⁸ It neither details the rules governing information disclosure, nor does it require trustees to explain in their financial and annual work reports how well they have realized the public benefit goals that the trust was set up to deliver in the first place.¹⁰⁹ This makes it more difficult for settlors, regulators and the general public to understand and further evaluate the performance of charitable trusts and their trustees. This thesis will discuss these problems, alongside its analysis of the governance of charitable trusts, but it will not propose or articulate a detailed pathway for the reform of governance rules concerning Chinese charitable trusts, as this would require an examination of these problems from a more comprehensive perspective, encompassing the law, sociology and politics.

Furthermore, this thesis does not attempt to provide an in-depth analysis of the different theories concerning the governance of charitable trusts, or issues relating to how an appropriate balance could be struck between the needs of the state in using trusts to promote charitable undertakings and the needs of benevolent owners in having more autonomy to deal with their own properties. Instead, it will focus on the legal construction of the current system and the challenges that it has created. The author will also evaluate the legislated governance structure of charitable trusts against the policy and social context in which they operate and identify factors that affect the way in which each actor engages with the law.

V RESEARCH METHODS

This thesis is an in-depth study of the legal rules governing Chinese charitable trusts and how the legislated governance goals are given effect in practice. For this purpose, the methods that the thesis adopts are textual analysis of the legal rules and other legal mechanisms such as charitable trust contracts, translation of Chinese sources, and semi-structured qualitative interviews with persons who have charitable trust experience.

¹⁰⁷ See analysis in Section IV of Chapter 3.

¹⁰⁸ See analysis in Section III of Chapter 3.

¹⁰⁹ See analysis in Section II of Chapter 4.

A Textual Analysis

Documentary sources include legislation, explanatory memoranda, official speeches, public information concerning recorded charitable trusts, academic treatises, and comparative works. These sources relate to the analysis of this thesis in different ways. Legislation and explanatory memoranda provide information for legal rules that have been constructed for the governance of charitable trusts, and the core values that charitable trusts serve to pursue. Official speeches provide information for policy reasons that underlie the legislative reform for charitable trusts, and the interaction between the state and the general public in promoting charitable undertakings. Public information concerning recorded charitable trusts provides information for the charitable trust practice, including what type of charitable trusts have been created, what their charitable purposes are, and how they have been administered and regulated. Academic treaties provide information for areas where current research can be continued or expanded and areas where this thesis can make further contributions. Comparative works provide information for continuities and discontinuities between charitable trusts and public welfare trusts in terms of governance, as well as measures that lawmakers have taken to unlock the potential of trusts to develop and further charitable causes.

The subject matter of the textual analysis is divided into two parts. The first part is an interpretation of Chinese charitable trusts, which includes a critical analysis of legislative provisions, the nature and function of Chinese charitable trusts, and the threshold for establishing Chinese charitable trusts. In contrast to the deep historical roots of charitable trusts at common law, charitable trusts are new to the Chinese legal system. Successful establishment of Chinese charitable trusts still faces many problems. In this regard, the textual analysis here involves clarification and comparison¹¹⁰ of analogous domestic institutions, such as Chinese public welfare trusts and Chinese agency. Comparison with the law of the aforesaid two institutions provides a framework for understanding how Chinese charitable trusts operate and helps identify three issues in the model of governance set out by legislation: (a) the ways in which settlors and trustees perform their roles in law; (b) the relationship between Chinese charitable trusts and Chinese agency; and (c) the role and function of the regulatory authority in the governance of Chinese charitable trusts.

The second part involves an examination of the legal nature of Chinese charitable trusts. As already noted in 'Introductory Background', because of the onerous requirement to obtain regulatory approval,

¹¹⁰ At present there is no uniform agreement as to the nature of comparative law. Some academics opine that comparative law is a research method, while others suggest that comparative law is a research methodology, a discipline or a science. For works devoted exclusively to the nature of comparative law, see J Michael Rainer, *Introduction to Comparative Law* (Manz, 2010) 19–25; Mathias Reimann (n 72) 683–7; H Patrick Glenn, 'Against Method' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford University Press, 2014) 177; Jaakko Husa, 'Research Designs of Comparative Law — Methodology or Heuristics?' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford University Press, 2014) 53–5; Jaap Hage, 'Comparative Law as Method and the Method of Comparative Law' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart Publishing Ltd, 2014) 44–5; A Kh Saidov, *Comparative Law*, tr William Elliott Butler (Wildy, Simmonds & Hill, 2003) 28–31.

only twenty public welfare trusts have been successfully established over the last twenty years. Drawing on the failure of public welfare trusts, lawmakers have established a new governance model for charitable trusts and created a public law-private law nature for this newly established institution. In this context, studying the way in which public law norms interact with private law norms can help understand why lawmakers chose to legislate a whole new regime (the charitable trust) rather than fixing the model of public welfare trusts. Further, this study can shed light on how the checks-and-balances mechanisms between trust parties are established, and at a macro level, assess what efforts lawmakers have made in advancing ‘state-society relationships’.¹¹¹ Legislative history offers an understanding of, and an explanation for, the development of the law.¹¹² Charitable trusts are introduced in a context in which the large number of the poor, the disabled, and the unemployed have created a huge social demand for developing charitable causes. In this light, to explore the legal nature of charitable trusts, the author will also examine the policy and social context within which charitable trust rules operate and develop.

B Semi-Structured Qualitative Interviews

The governance model of the Chinese charitable trust has not been studied at all by Chinese scholars, let alone by the application of empirical research methods. An analysis of the law suggests that there exists a tension between the settlor and the trustee, which are both given wide discretionary powers, and suggests that the regulatory agencies play a passive role in supervising the administration of Chinese charitable trusts. As the law concerning Chinese charitable trusts has only been in place for three years, many aspects of the practice of governance are still in the formative stage, and published literature does not examine these questions. Given this, gaining insights into the ways in which the legislative scheme of the charitable trust has been given effect in practice is significant to evaluating the strengths and weaknesses of the current governance structure for Chinese charitable trusts. Law is an aspect of society, so it is necessary to examine the law and its institutional context together to identify the way in which the law is given effect in practice. To explore how each of these powerful actors interacts in the day-to-day governance of charitable trusts and to clarify the ways in which regulators exercise their roles and responsibilities of oversight of charitable trusts, this thesis engages in direct contact with human participants through the method of semi-structured qualitative interviews.

Thirty-one interviews were conducted in Beijing, Shanghai, Shenzhen, Hangzhou, and Guangzhou from October 2018 to January 2019, where most of the charitable trusts are established and

¹¹¹ Rebecca Lee (n 6) 372.

¹¹² Legislative history can offer an understanding of, and an explanation for, the development of the law. See Esin Örüçü, ‘Unde Venit, Quo Tendit Comparative Law’ in Andrew Harding and Esin Örüçü (eds), *Comparative Law in the 21st Century* (Kluwer Academic Publishers, 2002) 3; Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited, 2007) 193; Martin Löhnig, ‘Comparative Law and Legal History: A Few Words about Comparative Legal History’ in *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford University Press, 2014) 114.

where the main regulators and legislators are located. Ethics approval (attached as Appendix IV) was granted before commencement of this empirical study. Interviews were carried out to obtain insights from participants on the basis that their responses would be anonymous. Two categories of interviewees were involved, and all interviewees had expertise and experience in the area of Chinese charitable trusts. The first category of interviewees contained private actors, including lawyers, academics, and trustee managers. Interviews with this category of actor elicited their opinions respecting the ways in which the settlor and the trustee perform their roles, issues of day-to-day governance, and measures taken to comply with legislated governance goals. The second category of interviewees comprised public actors; namely officials working in regulatory agencies. Interviews of these actors enabled the author to investigate the interaction between the two institutional objectives (promoting charitable undertaking and securing the autonomy of trust parties) of Chinese charitable trusts, the standing of the beneficiary, and the attitude of regulatory authorities towards the regulation of Chinese charitable trusts. To ensure anonymity, the identity information of these interviewees have been concealed and replaced with selected codes in the thesis: ‘L’ for lawyers, ‘A’ for academics, ‘T’ for trustee managers, and ‘R’ for regulatory officials.

Qualitative analysis of empirical data gathered through interviews enriches the observation of the governance practice of Chinese charitable trusts. Two significant findings can be summarized through this observation: first, there is a considerable gap between theoretical analysis and practice with respect to the governance of Chinese charitable trusts; and secondly, the policy and social context plays an important role in giving effect to the governance goals set out by legislation; regulators and trust parties do not respond to the legal governance model perfectly, and their behaviors are significantly affected by factors transcending the law.

C Translation of Chinese Sources

This thesis draws on both English and Chinese sources, and therefore the author’s translation of relevant legal rules and concepts into English is essential to the analysis in this thesis. The translation of Chinese legal concepts into English can be problematic where there are no close equivalents in English. This is particularly so in the case of Chinese charitable trusts that are the subject of this thesis. Accordingly, each of the chapters that examine the governance of Chinese charitable trusts — for example, Chapter 2 in the case of public welfare trusts (*gongyi xintuo* 公益信托) and Chapter 4 in the case of recording (*bei'an* 备案) and supervisory conversation (*jianguan tanhua* 监管谈话) — devotes the space to an explanation of the Chinese terms and the basis on which they are best understood in English. Except as otherwise indicated, all English translations of Chinese text and materials are the author’s own and are based on the following three principles. First, in relation to the translation of Chinese legal concepts into English, accuracy in meaning has been preferred over a literal translation. Take the concept *jing zhun fu pin* (精准扶贫) for example. This concept often occurs in connection to policy documents or official speeches. Its literal meaning is ‘precise poverty alleviation’ but has been

translated into English as ‘taking targeted measures to ensure that assistance reaches poverty-stricken villages and households’. Secondly, in relation to the interview data, preference has been given to meaning over a literal word by word translation. A literal, or technical translation focuses on the precise meaning of individual words and terms and thus cannot accurately convey the actual meaning of the interview respondents. Thirdly, semi-official English translations — namely English translations that are available on official websites such as the websites of PKU law or Westlaw China but do not have any official status — have been modified where the translation is considered to be suboptimal or deficient. Fourthly, where it assists in understanding, the original Chinese text has been included in parenthesis after the English translation to identify the relevant concepts. An illustrative example is the three major institutional forms for establishing charities in China, namely foundations (*jijin hui* 基金会), social associations (*shehui tuanti* 社会团体) and privately-operated non-enterprise organizations (*minban feiqiye danwei* 民办非企业单位).

CHAPTER TWO CHINESE CHARITABLE TRUSTS AS PUBLIC LAW-PRIVATE LAW HYBRIDS

I INTRODUCTION

This chapter analyzes the legal nature of the charitable trust model and implications that this analysis has for the governance of charitable trusts. The charitable trust model was introduced in a context where public welfare trusts had failed, and legislators sought to use this new model to encourage the public to participate in charitable undertakings. Drawing on lessons learnt from the failure of public welfare trusts, legislators created a public-private hybrid model for charitable trusts. On the one hand, the state gives trust parties greater autonomy to decide what types of benefits the charitable trust will create and what sectors of the public can receive that benefit. On the other hand, the state still maintains a high level of control over charitable trusts to ensure that they are used in alignment with the state's public welfare policy. This hybrid nature demonstrates how the state understands the role and function of charitable trusts and shows what core values legislators expect charitable trusts to pursue.

Section II of this chapter analyzes the hybrid nature of the charitable trust model by examining its legislative provisions. This analysis serves two aims: first, to identify the conflicts and contradictions that may arise between the autonomy of trust parties and the broader interests of the state in the implementation of the policies pertaining to charitable trusts; and secondly, to explore how these conflicts and contradictions are addressed in light of the hybrid nature of charitable trusts.

After considering the hybrid nature of charitable trusts, Section III discusses implications for the governance of charitable trusts from the analysis of the public-private hybrid. The hybrid nature of charitable trusts is intentionally created by legislators. It permeates and informs the design of the governance framework for charitable trusts. In the analysis in Chapter 1, the governance of charitable trusts was defined as a set of mechanisms that ensure the trustee of a charitable trust complies with its duties in order to effectively realize the charitable purpose or the public benefit pursued by the charitable trust. This definition suggests that the focus of charitable trust governance is on how a trustee's exercise of power should be exercised and what measures can be taken to ensure its accountability for that exercise.

Following from this definition, Section III-A identifies the actors that are related to the control of trustees' exercise of power in light of the hybrid nature of charitable trusts and how these actors are connected to the analysis of charitable trust governance. As implementation of the law is influenced by legal and extra-legal factors, it is therefore possible that actual practice may diverge from the law. The past four years' practice shows that trust parties and regulators proactively engage with the law as well as being strongly responsive to extra-legal concerns when performing their legal roles. Section III-B

looks at the practice and analyzes implications that this practice has for the governance of charitable trusts.

II PUBLIC-PRIVATE HYBRID NATURE

As already analyzed in Chapter 1, with the mass transfer of wealth into private hands, China possesses enormous social-economic resources that can be mobilized to develop charitable undertakings. Nevertheless, the available channels by which private actors can participate in charitable causes are extremely limited.¹ Still worse are the obstacles for the establishment of foundations, social groups and private non-enterprise units, the three major legal forms for establishing charities. In this context, legislators introduced the model of public welfare trusts to the Chinese domestic legal system in 2001. However, the public welfare trust model was not successful as no more than 20 public welfare trusts have been established over the last two decades. To unlock the potential of the trust institution to develop charitable causes, legislators introduced the model of charitable trusts in 2016.

In contrast to public welfare trusts, a model sitting entirely within the sphere of public law,² the model of charitable trusts is a mixture of both public law and private law norms. There is a distinction between private law and public law: private law deals with actions in which legal actors protect their autonomous interests, whereas public law deals with approaches by which the whole society is administered or governed.³ In light of this distinction, in the charitable trust setting, private law norms indicate that the state has given trust parties greater control over the exercise of their management rights.

¹ Siyi Lin, 'China's New Charity Law: A New Era of Charitable Trusts' (2018) 24(8) *Trusts & Trustees* 768, 768–9; 徐卫 [Xu Wei], 《慈善宣言信托制度构建研究》 [Research on the Construction of Charitable Declaration Trust] (法律出版社 [Law Press], 2012) 52; 朱志峰 [Zhu Zhifeng], 《公益信托的法律特征及我国模式的探索》 [Legal Nature of the Charitable Trust and the Exploration of a Chinese Mode] (2008) 22(6) 当代法学 *Contemporary Law Review* 112, 112; 薛智胜 [Xue Zhisheng] and 王海涛 [Wang Haitao], 《论我国公益信托监察人法律制度的完善》 [Perfecting the Institution of the Trust Supervisor in the Chinese Charitable Trust System] (2009) 11(2) 天津大学学报 (社会科学版) *Journal of Tianjin University (Social Science)* 123, 123; 王建军 [Wang Jianjun], 燕翀 [Yan Chong] and 张时飞 [Zhang Shifei], 《慈善信托法律制度运行机理及其在我国发展的障碍》 [The Operational Mechanism and Theories Related to the Charitable Trust and Its Development Obstacles in Mainland China] (2011) 4 环球法律评论 *Global Law Review* 108, 111.

² 赵廉慧 [Zhao Lianhui], 《信托法解释论》 [Interpretative Theory of Trust Law] (中国法制出版社 [China Legal Publishing House], 2015) 523; 金锦萍 [Jin Jinping], 《论公益信托之界定及其规范意义》 [Research on the Definition of the Public Welfare Trust and Its Normative Significance] (2015) 6 华东政法大学学报 *Journal of East China University of Political Science and Law* 72, 83; 李子顺 [Li Zishun], 《公益信托的性质与税收优惠》 [The Nature of the Public Welfare Trust and Its Tax Privileges] (2009) 2 法律适用 *Journal of Law Application* 91, 92; 朱志峰 [Zhu Zhifeng] (n 1) 112.

³ Jody Freeman, 'Extending Public Law Norms Through Privatization' (2003) 116(5) *Harvard Law Review* 1285, 1303–4; Janet McLean, 'Convergence in Public and Private Law Doctrines — the Case of Public Contracts' (2016) 2016(1) *New Zealand Law Review* 5, 9; Justin Friedrich Krahe, 'The Impact of Public Law Norms on Private Law Relationships' (2015) 2 *European Journal of Comparative Law and Governance* 124, 126; 张家慧 [Zhang Jiahui], 《诉权意义的回复 — 诉讼法与实体法关系的理论基点》 [Responses to the Meaning of Appealing Right — Theoretical Basis of the Relationship between Procedural Law and Substantive Law] (2000) 2 法律评论 *Law Review* 58, 60; 王锡三 [Wang Xisan], 《近代诉权理论的探讨》 [On the Theory of Modern Appealing Right] (1989) 6 现代法学 *Modern Law Science* 16, 17.

For example, settlors have the autonomy to determine in what ways their private funds are used for charitable purposes defined by the state. In comparison, public law norms indicate that the state is reluctant to relinquish its control over charitable trusts and has a strong desire to guide the public to use trusts to serve its own public welfare goals. For example, the state defines the scope of charitable purposes, and trust parties are not allowed to consider different purposes that might for example promote political advocacy in areas not welcomed by the state, or to take into account ancillary or subsidiary private benefits when disposing of charitable assets. There is a tension between these two types of norms in both substantial and procedural aspects of charitable trusts. Take the role of settlors for instance. The granting of wide powers to settlors enables them to proactively engage with the management of charitable trusts. At the same time, a settlor's autonomy is strictly constrained in that its power can only be exercised in alignment with the public welfare policy of the state.

The institution of the charitable trust at common law has a long history and can also be described as a public law-private law hybrid. However, the ways in which its norms of public law and private law interact differ considerably from Chinese charitable trusts. This divergence is attributable to China's particular political, economic and social environment in which charitable trusts are established and operate. By making a comparison with charitable trusts at common law, this section discusses questions about the public-private nature of Chinese charitable trusts and the unique characteristics this hybrid model has. The chapter explores this model in two steps. First, it compares Chinese public welfare trusts and Chinese charitable trusts to identify how legislators understand the relationship between these two models, and the extent to which the public law nature of public welfare trusts may enlighten the understanding of the nature of charitable trusts. Secondly, it compares Chinese charitable trusts and charitable trusts at common law to investigate how the two models distinguish from each other and what type of hybrid the Chinese charitable trust model is.

A *The Relationship between Public Welfare Trusts and Charitable Trusts*

The public welfare trust is clearly understood to be a matter of public law, although one may draw on private law concepts of personhood to give it substance. Presently, the consensus amongst scholars and practitioners is that the institution of the public welfare trust primarily belongs to the sphere of public law.⁴ In light of the historical background in which charitable trusts were introduced, there is no debate that charitable trusts were constructed by drawing on experiences and lessons of public welfare trusts over the last twenty years. Nonetheless, it is unclear to what extent, and in what way, the two institutions relate to each other. Clarification of the relationship between the two institutions can provide insights into the legal nature of charitable trusts.

Let us first consider what the law says about the relation between the two institutions. Pursuant to article 44 of the *Chinese Charity Law* and article 2 of the *Measures for Charitable Trusts*, 'charitable

⁴ 金锦萍 [Jin Jinping] (n 2) 83; 李子顺 [Li Zishun] (n 2) 92; 赵廉慧 [Zhao Lianhui] (n 2) 523.

trusts belong to (*shuyu* 属于) public welfare trusts'.⁵ This legislative language has given rise to intense debate as to the relationship between the two institutions. Some scholarly writings and commentaries opine that the two institutions are identical and thus share the same legal meaning,⁶ whereas others propose that public welfare trusts are in nature distinguishable from charitable trusts.⁷ Aside from the semantic difference between the terms 'charitable'⁸ and 'public welfare',⁹ examining what 'belong to' means in the context of charitable trusts is the key here. This examination concerns a textual interpretation of the legal term and offers useful insights for further constructive discussion about the relationship between the two institutions.

In Chinese dictionaries, the term 'belong to' entails two types of meaning — 'be part of the ownership of' or 'fall under the category of'.¹⁰ To what extent and in what way does the dictionary meaning of 'belong to' relate to its legal meaning? Since the laws relevant to charitable trusts make no mention of the meaning of 'belong to', it is helpful to have a look at the usage of 'belong to' in related areas of laws. Considering the kinds of relationships that the charitable trust regulates, the author has

⁵ 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016, art 44; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, art 2.

⁶ 倪受彬 [Ni Shoubin], 《现代慈善信托的组织法特征及其功能优势 — 与慈善基金会法人的比较》 [The Advantage and Character of Modern Charitable Trust as Organization — In Comparison of Charity Foundation] (2014) 46(7) 学术月刊 *Academic Monthly* 86, 87; 朱志峰 [Zhu Zhifeng] (n 1) 112; 王建军 [Wang Jianjun], 燕翀 [Yan Chong] and 张时飞 [Zhang Shifei] (n 1) 110.

⁷ 中国信托业协会 [China Trustee Association] (ed), 《慈善信托研究》 [Research on the Charitable Trust] (中国金融出版社 [China Financial Publishing House], 2016) 62–6; 吕鑫 [Lyu Xin], 《从公益信托到慈善信托: 跨国移植及其本土建构》 [From Public Welfare Trusts to Charitable Trusts: Transnational Transplantation and Local Construction] (2019) 10 社会科学战线 *Social Science Front* 199, 200; 李文华 [Li Wenhua], 《完善我国慈善信托制度若干问题的思考》 [Thoughts on Several Issues of Perfecting the Charitable Trust System in China] (2017) 7 法学杂志 *Law Science Magazine* 89, 91; 刘迎霜 [Liu Yingshuang], 《我国公益信托法律移植及其本土化: 一种正本清源与直面当下的思考》 [The Transplantation and Localization of Charitable Trusts in China: A Thought of Radical Reform and Facing up to the Present] (2015) 27(1) 中外法学 *Peking University Law Journal* 151, 154–5.

⁸ In Chinese language, the concept of charity represents benevolence, sympathy and compassion, which serves to offer relief for people who are destitute. See 马剑银 [Ma Jianyin], 《中国慈善法立法观察》 [Legislative Observations on the Chinese Charity Law] in 杨团 [Yang Tuan] (ed), 《中国慈善发展报告 (2016)》 [Annual Report on China's Philanthropy Development (2016)] (社会科学文献出版社 [Social Science Academic Press], 2016) 28–30; 薛宁兰 [Xue Ninglan] and 邓丽 [Deng Li], 《中国慈善法研究与立法建议稿》 [Research on Chinese Charity Law and Relevant Legislative Proposals] (中国社会科学出版社 [China Social Science Press], 2014) 125; 阮建芳 [Ruan Jianfang], 《慈善与公益》 [Charity and Public Welfare] (同心出版社 [Tongxin Publishing House], 2013) 53; 金锦萍 [Jin Jinping] (n 2) 74; 刘迎霜 [Liu Yingshuang] (n 7) 155; 李文华 [Li Wenhua] (n 7) 91.

⁹ In Chinese language, the concept of public welfare relates to providing benefits for the whole community or solving fundamental problems in relation to human beings, such as fairness, justice and equality. See 刘迎霜 [Liu Yingshuang] (n 7) 155; 金锦萍 [Jin Jinping] (n 2) 74–5; 王建军 [Wang Jianjun], 燕翀 [Yan Chong] and 张时飞 [Zhang Shifei] (n 1) 109; 李文华 [Li Wenhua] (n 7) 91.

¹⁰ 汉语大字典编纂处 [Office of Chinese Dictionary Compilation], 《现代汉语词典》 [Modern Chinese Dictionary] (四川辞书出版社 Sichuan Dictionary Press, 2014) 723; 中国社会科学院语言研究所 [Institute of Language Studies, Chinese Academy of Social Sciences], 《现代汉语词典》 [Modern Chinese Dictionary] (商务印书馆 The Commercial Press, 7th ed, 2016) 1215.

chosen trust laws, contract laws, and property laws here for the purpose of demonstration. Examining how ‘belong to’ has been used in these three legal areas has suggested that its legal meaning sits comfortably within its dictionary meaning. In other words, consistent with the dictionary meaning, two types of legal meaning can also be extrapolated here. First, to say that A belongs to B means that B has ownership over A. This kind of meaning is evident in article 41 of the *Chinese Property Law*¹¹ and article 16 of the *Chinese Trust Law*.¹² Secondly, A belongs to B could also stand for how A falls under the scope or category of B. Two examples are evidenced in the application of article 242 of the *Chinese Contract Law*¹³ and article 60 of the *Chinese Trust Law*.¹⁴ Based on the analysis mentioned above, the next question to be considered is: how much can one refer to these three areas of laws when investigating the legal meaning of ‘belong to’ for charitable trusts?

Two observations are drawn here from the author’s point of view. First, it is clear that the legal usage of ‘belong to’ in trust laws, contract laws and property laws do not entail the meaning that A is the same as B in terms of its nature or scope. Does this conclusion also apply to charitable trusts? The answer is unclear. Since each law has its unique characteristics and concerns, the experience of related areas of laws is informative but cannot be applied directly without having a closer review of the unique characteristics of charitable trusts and the extent to which these unique characteristics may distinguish charitable trusts from contracts or private trusts. In this regard, before analyzing the characteristics of charitable trusts in the next section, it is at least safe to conclude that the legal meanings of ‘belong to’ in contract, property and trust laws have certain guiding significance, but it is unclear as to the extent to which this guiding significance may illuminate the way in which charitable trusts relate to public welfare trusts. The second observation is based on the first one: one can assume that, based on the institutional similarities between charitable trusts, property and contracts, as well as the applicability of trust laws in the area of charitable trusts, the legal meaning of ‘belong to’ in the three areas of laws can be referenced when studying the relationship between charitable trusts and public welfare trusts. If this assumption stands, a possible conclusion is that charitable trusts fall under the scope of public welfare trusts, which means that public welfare trust doctrines may be applicable to charitable trusts. In this sense, charitable trusts also may comprise a considerable public element in their legal structure.

¹¹ 《物权法》第四十一条：法律规定专属于国家所有的不动产和动产，任何单位和个人不能取得所有权。The author’s English translation is: ‘No units or individuals shall be allowed to acquire ownership of the immovables and movables which are exclusively owned by the State as are provided for by law’.

¹² 《信托法》第十六条：信托财产与属于受托人所有的财产相区别，不得归入受托人的固有财产或者成为固有财产的一部分。The author’s English translation is: ‘The trust property is different from the property belonging to the trustee, and may not be included in, or made part of the trustee’s own property’.

¹³ 《合同法》第二百四十二条：出租人享有租赁物的所有权。承租人破产的，租赁物不属于破产财产。The author’s English translation is: ‘The lessor enjoys ownership of the leased item. In the event that the lessee goes bankrupt, the leased item does not belong to the category of bankruptcy property’.

¹⁴ 《信托法》第六十条：为了下列公共利益目的之一而设立的信托，属于公益信托...（7）发展其他社会公益事业。The author’s English translation is: ‘A trust created for one of the following public welfare purposes belongs to the scope of public welfare trusts ... (7) developing other public welfare causes’.

B The Legislative Arrangement of Chinese Charitable Trusts

As discussed above, the semantic analysis of ‘belong to’ is limited when examining how charitable trusts interact with public welfare trusts. This semantic interpretation can show that charitable trusts may relate to public welfare trusts to a certain degree, but it cannot illustrate how public-law thinking takes effect in charitable trusts; whether private law norms exist in the structure of the charitable trust; and if so, in what ways the two norms interact with each other. Based on the analysis in Section II-A, this section examines the legal nature of charitable trusts from their legislative arrangements.

The legislative arrangements of charitable trusts provide information about the roles of trust parties and regulators in the governance structure of charitable trusts and the ways in which they interact. This examination can shed light on how the state understands the institutional nature of charitable trusts. Where appropriate, comparisons with charitable trusts at common law will be conducted in this part, with a view to delineating the unique characteristics of the governance framework for Chinese charitable trusts. Although the development of charitable trusts varies in China and common law, comparisons with charitable trusts in common law jurisdictions may shed light on the interpretation of Chinese charitable trusts — particularly given that the language describing Chinese charitable trusts suggests similar conceptual characteristics and origins.

1 The Mixture of Both Public Law and Private Law Norms

In contrast to the flourishing development of charitable trusts at common law,¹⁵ almost 95 percent of the trusts created in China over the last two decades have been commercial trusts; namely, trusts that are established for commercial purposes.¹⁶ In line with the experiences of commercial trust businesses, a great number of regulations (*guizhang* 规章) stipulate that the key objective of commercial trusts lies in protecting the rights and interests of parties to commercial trusts.¹⁷ Despite the rapid development of commercial trust businesses in post-reform China, the large numbers of poor, disabled, and unemployed people have created a huge social demand for developing charitable causes.¹⁸ Regulators and legislators

¹⁵ Alison Dunn, ‘As Cold as Charity: Poverty, Equity and the Charitable Trust’ (2000) 20 *Legal Studies* 222, 223; Allan D Vestal, ‘Critical Evaluation of the Charitable Trust as a Giving Device’ (1957) 1957(3) *Washington University Law Review* 195, 195–6; John H Langbein, ‘The Secret Life of the Trust: The Trust as an Instrument of Commerce’ (1997) 107 *Yale Law Journal* 165, 188.

¹⁶ 中国人民大学信托与基金研究所 [Institute of Trust and Fund of Renmin University of China], 《中国信托业发展报告（2018）》 [The Development Report of Chinese Trust Business (2018)] (中国经济出版社 [China Economic Publishing House], 2018) 112–3; 中国人民大学信托与基金研究所 [Institute of Trust and Fund of Renmin University of China], 《中国信托业发展报告（2016）》 [The Development Report of Chinese Trust Business (2016)] (中国经济出版社 [China Economic Publishing House], 2018) 106–7.

¹⁷ See, eg, 《信托公司集合资金信托计划管理办法》 [Administrative Measures for Collective Investment Trust Schemes of Trust Companies] (People’s Republic of China) China Banking Regulatory Commission, 4 February 2009, art 1; 《信托投资公司信息披露管理暂行办法》 [Interim Measures for the Administration of Information Disclosure by Trust Companies] (People’s Republic of China) China Banking Regulatory Commission, 18 January 2015, s 1.

¹⁸ Adam S Chodorow, ‘Charity with Chinese Characteristics’ (2012) 30 *UCLA Pacific Basin Law Journal* 1, 34–5; Xin Huang et al, ‘Charity Development in China: An Overview’ (2007) 17(1) *Asia Pacific Journal of Social Work and Development* 79, 80–1; Anthony J Spires, ‘Contingent Symbiosis and Civil Society in an Authoritarian

have held a wide range of conferences and forums to discuss what legislative reforms can be taken to empower trusts in developing charities. Considering the gap between the advantages that public welfare trusts supposedly have in developing charities, and the limited role that they have played in practice, legislators introduced the charitable trust model in 2016 with the enactment of the *Chinese Charity Law*. The reason why charitable trusts were introduced reveals the main role that legislators expect this new model to play; namely, encouraging the public to use trusts to further and develop the public welfare goals of the state.¹⁹ This role is implicated in the legislative arrangements of charitable trusts, indicating that this model is a public law-private law hybrid.

(a) Public Law Norms

The charitable trust model was introduced in a context where charity development was a crucial concern of the state. This fact evidences that one of the core roles of this model is to encourage the general public to participate in the promotion of charitable undertakings. Article 1 of the *Measures for Charitable Trusts* proves this line of thought. It stipulates that the primary purpose of enacting this *Measure* is to provide guidelines for the creation and administration of charitable trusts, so as to unlock the potential of this new model to further and develop charitable causes in China. This new model's public law role can be seen through three types of legislative arrangements: the requirement of public benefit, the rule of all charitable use, and the granting of wide supervisory powers to regulators.

(i) The Public Benefit Doctrine

The public benefit doctrine is stipulated in article 7 of the *Measures for Charitable Trusts*. Pursuant to this article, a trust established for the purpose of carrying out public benefit activities (*gongyi huodong* 公益活动) is considered to be a charitable trust. The 'public benefit test' is also crucial to the creation of charitable trusts in common law jurisdictions. It is in public benefit, not the interests of private individuals, that the valid status of a common law charitable trust can be acknowledged.²⁰ There is a considerable divergence between common law charitable trusts and Chinese charitable trusts in the understanding of 'public benefit'. In Chinese law, charitable trusts are required to serve the interest of the whole political community. Article 7 of the *Measures for Charitable Trusts* provides a list of legitimate charitable purposes in China, including alleviating poverty, protecting and improving the ecological environment, and providing relief for the damage caused by natural disasters. These purposes

State: Understanding the Survival of China's Grassroots NGOs' (2011) 117(1) *American Journal of Sociology* 1, 12; Qiusha Ma, 'The Governance of NGOs in China since 1978: How Much Autonomy?' (2002) 31(3) *Nonprofit and Voluntary Sector Quarterly* 305, 318; 徐卫 [Xu Wei] (n 1) 27–8, 33–5; 王振耀 [Wang Zhenyao], 《现代慈善与社会治理：2013 年度中国公益事业发展报告》 [Modern Charity and Social Governance: the 2013 Annual Report of the Charity Sector in China] (社会科学文献出版社 [Social Science Academic Press], 2014) 9–10.

¹⁹ 中国信托业协会 [China Trustee Association] (n 7) 73–4; 《关于〈中华人民共和国慈善法（草案）〉的说明》 [Explanations on the Charity Law of the People's Republic of China (Draft)] (People's Republic of China) Standing Committee of the People's Congress, 9 March 2016, pt 1.

²⁰ Jonathan Garton, *Public Benefit in Charity Law* (Oxford, Oxford University Press, 2013) [6.05].

are consistent with the state's public welfare goals and show that legislators expect to use charitable trusts to further and develop the broader interest of the state. Trust purposes that are outside the scope of 'legitimate charitable purposes' are not 'charitable' under Chinese law. This list evidences the control of the state over the use of charitable resources. Following from this understanding, private actors have the autonomy to define what types of public benefits the charitable trust may create and what sectors of the public can receive those benefits. However, this autonomy is highly constrained — it can only be exercised to the extent that charitable resources are used in a way that complies with the public welfare policy of the state.²¹

In contrast, the public benefit doctrine in common law jurisdictions operates in a different way. Take the charity law in England and Wales for instance. In England and Wales, the public benefit doctrine does not require charitable trusts to benefit the whole political community²² or to bear in mind the interests of the state as a whole.²³ For political purposes, the general rule is that trusts for political purposes are not of a charitable nature.²⁴ To be for the public benefit, a charitable trust is not required to further the state's public goals. Instead, it need only further an altruistic or other-regarding interest that the charitable trust defines with some constraints.²⁵ The public benefit doctrine in England and Wales normally requires charitable trusts to be public in 'only the altruistic, and not the public-welfare-compliant sense'.²⁶ Accordingly, key elements of this doctrine — the numerical negligibility test, the personal nexus rule, and the concern with the exclusion of the poor — are primarily concerned to preserve the altruistic quality of charitable trusts,²⁷ rather than to promote the state's public welfare goals.

²¹ 赵廉慧 [Zhao Lianhui] (n 2) 533–4; 刘迎霜 [Liu Yingshuang] (n 7) 155; 《关于〈中华人民共和国慈善法（草案）〉的说明》 [Explanations on the Charity Law of the People's Republic of China (Draft)] (People's Republic of China) Standing Committee of the People's Congress, 9 March 2016, (n 19) s 1; 朱志峰 [Zhu Zhifeng] (n 1) 113; 金锦萍 [Jin Jinping] (n 2) 82.

²² Hubert Picarda and Richard Orme Wilberforce, Baron Wilberforce, *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4th ed, 2010) 225.

²³ Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart Publishing, 2016) 62.

²⁴ Hubert Picarda and Richard Orme Wilberforce, Baron Wilberforce (n 22) 225; Jonathan Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013) [8.03]–[8.05]; *National Anti-vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 49–52. In Australia, there is no general rule against trusts for political purposes. It is debatable whether a political purpose is charitable or not, and this question should be assessed on a case-by-case basis. See *Charities Act 2013* (Cth) ss 11, 12(1)(1) and (2); *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 272 ALR 417, 429–30; *Public Trustee v Attorney-General (NSW)* (1997) 42 NSWLR 600, 608; Joyce Chia, Matthew Harding and Ann O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*' (2011) 35 *Melbourne University Law Review* 353, 383–4.

²⁵ Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014) 88–9; Juliet Chevalier-Watts, *Charity Law: International Perspectives* (Routledge, 2018) 73; Mary Synge, *The 'New' Public Benefit Requirement: Making Sense of Charity Law?* (Hart Publishing, 2015) 79; F H Newark, 'Public Benefit and Religious Trusts' (1946) 62(3) *Law Quarterly Review* 284, 240; Paul Harpur, 'Charity Law's Public Benefit Test: Is Legislative Reform in the Public Interest' (2003) 3(2) *Queensland University of Technology Law and Justice Journal* 1, 12.

²⁶ Chan (n 23) 80.

²⁷ Jonathan Garton (n 24) [5.25]; Hilary Delany, 'The Law Relating to Charitable Trusts — Judicial Guidance and Statutory Intervention' (2011) 33 *Dublin University Law Journal* 196, 208; Linda Sugin, 'Rhetoric and Reality in the Tax Law of Charity' (2016) 84(6) *Fordham Law Review* 2607, 2632; Paul Harpur (n 25) 433.

(ii) The Rule of All Charitable Use

The second aspect that demonstrates the charitable trust's public law role is the legislative requirement of 'all charitable use'. Article 23 of the *Measures for Charitable Trusts* stipulates that charitable trust assets and the proceeds thereof shall all be used for charitable purposes.²⁸ The effect of this rule is to prevent charitable trusts from becoming vehicles for corruption or unregulated flow of funds. The rationale of this rule can be understood in two dimensions. The first relates to the charity-promoting goal of charitable trusts. The charitable trust model is designed to further the state's public welfare goals, and therefore any use of charitable trusts for private purposes is not allowable. The second dimension relates to legislators' perception of the risk that charitable assets may be misappropriated by trust parties.²⁹ Over the last two decades, the media have exposed a series of scandals involving misuse of charity funds. Legislators are therefore fully aware of the misappropriation risks that may arise from the day-to-day administration of charitable trusts. Moreover, as the establishment of charitable trusts is in its formative stage, it is not yet fully clear in what ways the legislative framework for this institution will be given practical effect and what challenges the regulatory framework may face. To minimize misappropriation risks associated with the use of charitable assets, the law strictly requires that charitable trusts should be operated solely for the furtherance of charitable purposes. Any use of charitable assets for non-charitable purposes will be invalid and attract legal liabilities on the part of the trustee directly in charge.³⁰ Similar to the public benefit doctrine, this rule is consistent with the idea that charitable trusts should be used in alignment with the public welfare goals of the state.

At common law, charitable trusts must also be exclusively charitable. The charitable status will be lost if there exist any purposes that are not charitable on their own.³¹ In a long line of cases, English and Australian courts have upheld that there are two exceptions to the rule of exclusivity; that is, ancillary purposes and severance.³² A charitable trust will not fail where the non-charitable purpose authorized by the trust instrument is merely incidental or subsidiary to a charitable purpose.³³ Meanwhile, the charitable status can be upheld where charitable purposes can be severed from non-charitable

²⁸ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 5) arts 23, 59; 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016, (n 5) art 105.

²⁹ See interviews with R2, A1, A4 and A5.

³⁰ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 5) art 59.

³¹ G E Dal Pont and Stefan Petrow, *Law of Charity* (LexisNexis Butterworths, 2010) [13.2]; *Ofrex (George Drexler) Foundation (Trustees) v IRC* (1965) 3 All ER 529, 530.

³² See, eg, *Trustees Executors & Agency Co Ltd v Zelman Memorial Symphony Orchestra Ltd* [1958] VR 523, 526; *Radmanovich v Nedeljkovic* [2001] NSWSC 492 (15 June 2001), [189]; *Public Trustee v Attorney-General (NSW)* (n 24) 621; *Bath and North East Somerset Council v HM Attorney General* [2002] EWHC 1623(Ch), [25]. See also Jonathan Garton (n 24) [2.19].

³³ G E Dal Pont and Stefan Petrow (n 31) [3.29].

purposes.³⁴ In contrast to Chinese charitable trusts, these exceptions give rise to two implications. First, the common law approach avoids the risk of striking down the validity of the whole trust and allows charitable elements to take effect, thereby retaining charitable resources in the public domain to the largest extent. Secondly, the common law approach gives more weight to the autonomy of private actors in determining to what extent and in what ways their private funds can be used for charitable purposes.

(iii) The Regulator's Wide Powers

In both Chinese law and common law, regulators are granted wide powers to supervise the administration of charitable trusts. For example, in Australia, the *Australian Charities and Not-for-profits Commission* (hereinafter the 'ACNC') has powers to suspend and remove the trustee of a charitable trust and to direct application of charitable trust assets.³⁵ In England and Wales, the Charity Commission has powers to restrict transactions a charity trustee may enter into, appoint trustees and freeze a charitable trust's bank account.³⁶ In Chinese law, regulators also have wide powers to supervise a trustee's performance of its duties. Two illustrative examples are the powers to revoke the trustee's registration license and to conduct supervisory conversations (*jianguan tanhua* 监管谈话).³⁷ Exercise of these two powers enables regulators to intervene easily in the trustee's ongoing management of charitable trusts.

The power to revoke in the Chinese charitable trust is a type of ex-post supervision. Regulators can exercise this power when trust parties severely contravene the laws or regulations relevant to charitable trusts. The legal consequences associated with the exercise of this power have a strong deterrent effect, as the revocation of a registration license effectively bans trustees from engaging in trust businesses for a long period of time.³⁸ In comparison, the application of supervisory conversations is a type of ex-ante supervision. It is a phase which is part of the ongoing administrative decision-making process.³⁹ The conducting of supervisory conversations includes both educative and disciplinary elements.⁴⁰ These two types of powers are in line with the objectives of deterring the wrongful conduct of trustees and protecting the public interest in the proper administration of charitable assets.

³⁴ G E Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 1999) 223.

³⁵ *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) ch 4 pt 4-2 div 100.

³⁶ *Charities Act 2011* (England and Wales) pt 6. See also Hubert Picarda and Richard Orme Wilberforce, Baron Wilberforce (n 22) 768–9.

³⁷ 《信托公司管理办法》 [Measures for Administration of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 23 January 2007, art 53; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 5) art 51.

³⁸ On detailed account of this power, see analysis in Section II of Chapter 4.

³⁹ 孟强龙 [Meng Qianglong], 《行政约谈法治化研究》 [Study on Legalization of Administrative Interviews] (2015) 6 行政法学研究 *Administrative Law Review* 99, 105–6; 王虎 [Wang Hu], 《风险社会中的行政约谈制度: 因应、反思与完善》 [The System of Administrative Interviews in Risk Society: Response, Reflection, and Improvement] (2018) 1 法商研究 *Study of Law and Business* 22, 26.

⁴⁰ See analysis in Section II of Chapter 4.

The procedure for exercising these two regulatory powers provides insights into the public law norms of the regulatory framework for charitable trusts. The charity law imposes very few restrictions on the exercise of these two powers, and therefore the gateway through which regulators intervene in the management of charitable trust affairs is largely relaxed. The law does not specify the procedure by which the power to revoke registration licenses can be exercised and makes no mention of the factors that should be taken into account when revoking the registration license of a trustee.⁴¹ Likewise, there are massive ambiguities in respect of the nature of the supervisory conversation and its scope of application.⁴² The vagueness in the law grants regulators a high degree of discretion in the performance of their responsibilities. It is unclear whether this wide discretion was deliberately intended by legislators. It is certain that this discretion creates a great deal of uncertainty for trustees to manage charitable trusts. Regulators can intervene in the management of charitable trusts easily in order to meet the dual purposes of satisfying the public's demand for accountability and preventing dishonest trustees in such employments from committing fraud.

(b) Private Law Norms

The legal structure of charitable trusts contains a number of private law norms, in addition to the public law norms analyzed in the section above. Article 44 of the *Chinese Charity Law* and article 2 of the *Measures for Charitable Trusts* prescribe that charitable activities should be carried out in conformity with settlors' wishes. What does the phrase 'in conformity with settlors' wishes' mean? Questions relating to the understanding of this phrase include: how do the settlor's wishes manifest in the administration of charitable trust affairs? In what way are the settlors' wishes given effect? Is there scope for conflict to arise between the furtherance of charitable purposes and the protection of the settlor's wishes? Although the law does not address these questions, *prima facie*, it can be said that the phrase mentioned above embodies a strong private law-leaning tendency as it provides scope for settlors to exercise their management rights. It is the settlor who places a certain amount of assets in charitable trusts. Therefore, the settlor may have a strong desire to see how its assets are going to be used.

In view of the experience from public welfare trusts, legislators chose to establish a public-private hybrid model for charitable trusts in which private actors are granted greater control over the use of their private funds. The section below explores the private law norms of charitable trusts. Two purposes are served behind this analysis: (a) to identify these private law norms and the ways in which they take

⁴¹ Section 35-10 of the *ACNC Act* prescribes the factors that the Commissioner should take into account when determining whether the registration of a charity should be revoked. These factors include the nature, significance and persistence of any contravention of the *ACNC Act* and the extent to which the charity conducts its affairs in a way that may cause harm to the public trust and confidence. See *Australian Charities and Not-for-Profits Commission Act* (n 35) s 35-10 (2); *Waubra Foundation and Commissioner of Australian Charities and Not-for-profits Commission* [2017] AATA 2424 (4 December 2017), [27].

⁴² 朱新力 [Zhu Xinli] and 李芹 [Li Qin], 《行政约谈的功能定位与制度建构》 [The Functional Orientation and Institutional Design of Administrative Interviews] (2018) 4 国家行政学院学报 *Journal of Chinese Academy of Governance* 91, 92; 王虎 [Wang Hu] (n 39) 26-7.

effect; and (b) to provide a basis of discussions about the interaction between public law norms and private law norms in the legal structure of charitable trusts in Section II B-2.

(i) The Settlor's Wide Powers

At common law, settlors generally drop out of the picture⁴³ where charitable trusts are legally established. If settlors seek to maintain certain role in the ongoing management of charitable trusts, they tend to adopt two mechanisms: the letter of wishes⁴⁴ and the trust protector.⁴⁵ It is rare for settlors to reserve wide powers to themselves in the trust instrument. In contrast, settlors under Chinese charitable trusts are endowed by law with extensive powers. This legislative approach enables settlors not only to define the way in which charitable assets are managed but also to be proactive in supervising the performance of trustees' duties. In the Chinese charitable trust setting, settlors are legally allowed to intervene in the management of trust affairs thoroughly and consistently. Two explicit examples are the settlor's powers to consent and to appoint trust supervisors.

Article 38 of the *Measures for Charitable Trust* prescribes that settlors are empowered to grant or withhold consent on certain matters, such as adding new settlors, increasing trust assets or changing the scope of beneficiaries. The granting of the power to consent is derived from the notion that owners are provided with maximal freedom in disposing of their assets.⁴⁶ The goal of protecting settlors' autonomy can also be seen through the protection provided by statute when settlors exercise this power. For example, settlors are allowed to issue consent to relieve trustees from fiduciary liabilities in transactions

⁴³ Kai Lyu, 'Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis' (2015) 36 *Loyola of Los Angeles International and Comparative Law Review* 447, 458; Tey Tsun Hang, 'Reservation of Settlor's Powers' (2009) 21(2) *Singapore Academy of Law Journal* 517, 524.

⁴⁴ On the letter of wishes, see, eg, Arthur Underhill et al, *Underhill and Hayton Law Relating to Trusts and Trustees* (LexisNexis Butterworths, 17th ed, 2007) 835, 943; Alexander A Jr Bove, 'The Letter of Wishes: Can We Influence Discretion in Discretionary Trusts' (2009) 35 *ACTEC Journal* 38, 39; Deborah S Gordon, 'Letters Non-Testamentary' (2013) 62 *University of Kansas Law Review* 585, 629; Tey Tsun Hang, 'Letters of Wishes' (2009) 21 *Singapore Academy of Law Journal* 193, 194–5; David Hayton, 'English Fiduciary Standards and Trust Law' (1999) 32 *Vanderbilt Journal of Transnational Law* 555, 574–5; *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998) 1 WLR 896, 903; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 420, 424; *Re Rabiott's Settlement* [2000] WTLR 953, 968; *Breakspear v Ackland* (2008) 3 WLR 698, 711; *Re Londonderry's Settlement* [1965] Ch 918, 936; *Hartigan Nominees Pty Ltd v Rydge* 419, 437, 447.

⁴⁵ On the trust protector, see, eg, Richard C Ausness, 'The Role of Trust Protectors in American Trust Law' (2010) 45(2) *Real Property, Trust and Estate Law Journal* 319, 321–2, 348; Stewart E Sterk, 'Trust Protectors, Agency Costs, and Fiduciary Duty' (2005) 27 *Cardozo Law Review* 2761, 2763, 2768; Philip J Ruce, 'The Trustee and the Trust Protector: A Question of Fiduciary Power — Should a Trust Protector Be Held to a Fiduciary Standard?' (2011) 59 *Drake Law Review* 67, 68. The courts in common law jurisdictions have power to remove a protector in accordance with their inherent jurisdiction of facilitating and supervising the administration of a trust. See Lynton Tucker et al (eds), *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2015) 1266; *Pope v Drp Nominees Pty Ltd* (1999) 337 (13 August 1999) SASC [26], [34], [45]; *Blenkinsop v Blenkinsop Nominees Pty Ltd (as trustee for Blenkinsop Family Trust (No 2))* [2016] WASC 61 (4 March 2016), [47]; *Blenkinsop v Herbert* [2017] WASC 87 (8 June 2017), [72]–[74], [76].

⁴⁶ Simon Gardner, *An Introduction to The Law of Trusts* (Oxford University Press, 2011) 296; John D Morley and Robert H Sitkoff, 'Making Directed Trusts Work: The Uniform Directed Trust Act' (2019) 44(1) *ACTEC Law Journal* 3, 8; Robert H Sitkoff, 'Trusts and Estates: Implementing Freedom of Disposition' (2014) 58 *Saint Louis University Law Journal* 643, 651; John H Langbein, 'Mandatory Rules in the Law of Trusts' (2004) 98(3) *Northwestern University Law Review* 1105, 1121; Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *Law Quarterly Review* 452, 164.

involving conflicts of duty and duty (or of duty and interest). Aside from the granting of fully informed consent by settlors, there still exists one strict requirement before a trustee's no conflict liabilities can be exempted; namely the transactions concerned should be carried out at a fair market price. This requirement in substance is consistent with the protection of the will and autonomous interest of the settlor. After all, without truly understanding the risk that the transactions in question might carry, settlors cannot be placed in a position to freely determine whether to take the risks arising out of waiving that protection. Allowing the no conflict principle to be relaxed can help balance its protective function and the value of ensuring the autonomy of settlors. Autonomous decisions outweigh that protective function, but only on condition that settlors fully understand the consequence of their decisions.

Besides the power to consent, the settlor under a charitable trust also has the power to appoint trust supervisors. By appointing a trust supervisor, the settlor can keep a close eye on the performance of the trustee's duties.⁴⁷ In contrast to public welfare trusts, the appointment of trust supervisors is not mandatory in the context of charitable trusts.⁴⁸ Whether a trust supervisor is appointed depends primarily on settlors' wishes. Furthermore, the law does not specify the trust supervisor's powers and its obligations around the exercise of these powers. Thus, the extent to which trust supervisors may play a supervisory role varies significantly, depending on the contractual arrangements between settlors, trustees and trust supervisors. This wide discretion vested in trust parties again demonstrates that giving effect to settlors' wishes is an important goal underlying the operation charitable trusts.

(ii) The Rule of Standing

The rule of standing also reflects the private law norms in the legal structure of charitable trusts. There is a distinction between public law and private law in terms of who can sue. Private law integrates the question of standing into its causes of action while public law considers standing separately. Private law grants standing as a matter of right on the basis of plaintiffs' personal interests; public law considers the determination of standing as a discretionary judicial task involving the weighing or balancing of multiple concerns.⁴⁹ This divergence is primarily attributable to the different types of relationships regulated by private law and public law as outlined at the outset of Section II.

This procedural dimension offers a number of critical insights into the substantive dimension of Chinese charitable trusts. The rule of standing illuminates the understanding of private law aspects of

⁴⁷ 张淳 [Zhang Chun], 《〈中华人民共和国信托法〉中的创造性规定及其评析》 [The Creative Provisions in the Trust Law of the People's Republic of China and Its Evaluation] (2002) 2 法律科学 *Law Science* 110, 119; 中国信托业协会 [China Trustee Association] (n 7) 85–6; Frances H Foster, 'American Trust Law in a Chinese Mirror' (2010) 94 *Minnesota Law Review* 602, 645; Stewart E Sterk (n 45) 2763.

⁴⁸ 《中华人民共和国信托法》 [Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001, art 64; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 5) art 11.

⁴⁹ 相庆梅 [Xiang Qingmei], 《民事诉权论》 [Research on the Right of Civil Suits] (PhD Thesis, China University of Political Science and Law) 9–10; Chan (n 23) 98; 王锡三 [Wang Xisan] (n 3) 16–7; 张家慧 [Zhang Jiahui] (n 3) 59–60.

Chinese charitable trusts. In the legal framework, regulators are not allowed to bring proceedings to remedy the misuse of charitable assets on behalf of the public.⁵⁰ Although promoting charitable undertakings is one of the objectives of charitable trusts, the law of standing puts a limitation on courts' jurisdiction to adjudicate charitable trust lawsuits initiated by regulators. Limiting the parties entitled to file lawsuits against defaulting trustees to only settlors and trust supervisors indirectly promotes the autonomy of private actors. That is, the trustee can follow a settlor's instructions without worrying that these instructions are not in what a regulator determines to be the best interest of the trust's charitable purpose. This legislative approach, in substance, is in line with the private law-leaning tendency of charitable trusts and responsive to the goal of giving effect to the settlor's wishes.

In contrast, charitable trust laws in common law jurisdictions show a strong public law-leaning tendency with respect to who can sue and what the scope of the standing is. Charitable trusts are trusts for purposes and not for persons,⁵¹ and therefore there are no beneficiaries as understood in the laws of express private trusts. The Attorney-General, acting as the guardian and protector of the public interest,⁵² is granted standing to supervise whether a trust is administered in alignment with its charitable purposes.⁵³ Aside from the Attorney-General, any persons who have 'greater-than-public'⁵⁴ interest may also be entitled to launch charitable trust lawsuits. In Australia and the UK, the statutes and common law show that 'any person interested in the charity' can be granted standing to bring charity proceedings.⁵⁵ The 'person interested' rule is a 'practical rule of justice'⁵⁶ that endows the courts with

⁵⁰ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 5) art 49; 《中华人民共和国信托法》 [Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001, (n 48) art 22.

⁵¹ *BSH Holding Pty Ltd v Commissioner of State Revenue* [2000] VSC 302 (2 August 2000), [9].

⁵² Fiona Hanlon, 'An Analysis of the Office of Attorney General in Australia and Directions for the Future' (PhD Thesis, Faculty of Law, The University of Melbourne, 2007) 23; G E Dal Pont (n 34) 266–7; Hubert Picarda and Richard Orme Wilberforce, Baron Wilberforce (n 22) 727–9; *Perpetual Trustees Victoria Limited v Barns & Anor* [2012] VSCA 77 (2 May 2012), [42]; Luis Kutner and Henry H Koven, 'Charitable Trust Legislation in the Several States' (1966) 61 *Northwestern University Law Review* 411, 422.

⁵³ As Lord Macnaghten observed in *Wallis v Solicitor-General for New Zealand*, '[i]t is the province of the Crown as parens patriae to enforce the execution of charitable trusts, and it has been always recognized as the duty of the [Attorney-General] to intervene for the purpose of protecting charities and affording advice and assistance to the court in the administration of charitable trusts'. See *Wills v Solicitor-General for New Zealand* [1903] AC 173, 181–2. See also *Radmanovich v Nedeljkovic* (n 32) [14]; *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59 (30 September 1998), [39], [54], [67]; *Ngarluma Aboriginal Corp RNTBC v Attorney General (WA)* [2014] WASC 245 (7 July 2014), [55]; *Laura & Alfred West Cottage Homes Inc v Attorney-General (SA)* [2018] SASA 19 (26 February 2018), [4]; *Perpetual Trustees Victoria Limited v Barns & Anor* (n 52) [42]; *Attorney General (NSW) v Homeland Community Ltd* [2015] NSWCA 15 (16 February 2015), [3].

⁵⁴ Chan (n 23) 100.

⁵⁵ On Australian statutes, see *Trustee Act 1925 (ACT)* s 94A(3)(g); *Trustee Act 1936 (SA)* s 36(1c)(e); *Trusts Act 1973 (Qld)* s 106(2)(c); *Supreme Court Civil Procedure Act 1932 (Tas)* s 57(2). On Australian case law, see, eg, *Ngarluma Aboriginal Corp RNTBC v Attorney General (WA)* (n 53) [47], [52]; *Thorn v Bettens* [2006] SASC 59 (3 March 2006), [12]; *Metropolitan Petar v Mitreski* [2001] NSWSC 976 (31 October 2001), [16]. On statutes in England and Wales, see *Charities Act 2011* (n 36) s 115. On English case law, see, eg, *Haslemere Estates Ltd v Baker* (1982) 1 WLR 1109, 1122D; *Bradshaw v University College of Wales* (1988) 1 WLR 190, 194E; *Re Hampton Fuel Allotment Charity* (1988) 3 WLR 513, 520.

⁵⁶ Chan (n 23) 100.

a measure of discretion in determining how charitable trust disputes can be dealt with. This rule substantively expands the scope of persons who may have the standing to sue and facilitates the role of the courts in controlling a trustee's exercise of power.

2 The Relationship between Public Law Norms and Private Law Norms

The above analysis⁵⁷ illustrates how the norms of public law and private law manifest themselves in different dimensions of charitable trusts. Based on this analysis, one new question arises: how do the two types of norms interact with each other? Answering this question can enlighten the understanding of the relationship between the autonomy interest of settlors and the public interest in the proper management of charitable assets. Examination of the charitable trust's legislative arrangement suggests that public law norms are prevailing as the hybrid model continues to privilege state control over the autonomy of private parties.

Although the law does not provide an explicit answer to the above question, a closer look at article 59 of the *Measures for Charitable Trusts* and article 105 of the *Chinese Charity Law* may provide insights here. The two articles stipulate that any use of charitable trust assets for non-charitable purposes will attract administrative liabilities on the part of the trustee. A textual interpretation of these two articles leads to two observations. First, settlors have the autonomy to determine what types of benefits the charitable trust will create and how charitable assets should be distributed.⁵⁸ It is the settlor who places a certain amount of assets in charitable trusts. Therefore, the settlor is entitled to decide how its assets should be used for the furtherance of charitable causes. Moreover, the state is also willing to uphold a settlor's decision in respect of the management of charitable assets. This approach seeks to encourage the wide use of charitable trusts in the public and reflects the idea that benevolent property owners are granted maximal liberty to use their assets.⁵⁹

Secondly, where a charitable trust is validly established, the parties to charitable trusts are prohibited by law from advancing their private interests when disposing of charitable assets. Charitable resources can only be used to further and promote the state's public welfare goals. Settlors have greater control over the use of charitable assets, but on the condition that this use complies with the legitimate interest of the state as a whole. Regulators represent the interest of the state. They are granted wide powers by law so that they are able to control the use of charitable trusts in alignment with the state's requirements.⁶⁰ Consistent with this analysis, it is arguable that, in the Chinese charitable trust setting, private law norms are subordinated to public law norms, in the sense that a settlor's exercise of autonomy should be aligned with the advancement of the state's public welfare goals.

⁵⁷ See analysis in Section II B-1 of this Chapter.

⁵⁸ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 5) arts 14, 38.

⁵⁹ See also analysis in Section II B 1 (b) of this Chapter.

⁶⁰ See analysis in Section II B 1 (a) of this Chapter.

C Observations on the Hybrid Nature of Chinese Charitable Trusts

Analysis of the charitable trust's legislative arrangements⁶¹ enlightens the understanding of its public-private hybrid nature. Three observations can be offered here. First, public law norms are predominant in the legal structure of Chinese charitable trusts. In contrast to charitable trusts at common law, charitable trusts in China are required to further the state's legitimate interest. The charitable trust model is tasked to develop and promote the state's public welfare goals from its very inception. The state clearly defines the scope of 'charitable purposes' to guide the use of charitable resources by the public. The state's strict control over the use of charitable trusts is secured through the granting of wide supervisory powers to regulators. These powers allow regulators to easily intervene in the trustee's management of charitable trusts. For example, they can advise trust parties on how charitable trusts should be administered and issue notices or letters to trustees to direct the use of charitable assets.⁶²

Secondly, in view of the experience of public welfare trusts, legislators have incorporated the norms of private law in both substantial and procedural aspects of the legal framework of charitable trusts. The law grants parties greater autonomy in determining the scope of the charitable trust and in allocation of rights and responsibilities between settlor and trustee in the day-to-day operation of charitable trusts.⁶³ The charity law enables settlors not only to define the ways in which charitable trusts are managed but also to be proactive in supervising trustees' performance of their responsibilities. This approach is in stark contrast to that under common law charitable trusts, where settlors tend to use the letter of wishes or trust protectors to secure some role in the ongoing management of charitable assets. Article 2 of the *Chinese Measures for Charitable Trusts* and article 44 of the *Chinese Charity Law* require a trustee to manage and dispose of charitable assets in alignment with the settlor's wishes. The scope of the 'wishes' here is strictly limited. Settlors can choose the method by which charitable trusts are managed and select a way in which charitable assets are distributed to selected beneficiaries. A trustee is obliged to follow the settlor's wishes, but only to the extent that such wishes are capable of facilitating the use of charitable resources for public welfare goals defined by the state. Accordingly, settlors are not allowed to use charitable trusts to further their personal interests or to advance private goals.

Thirdly, the ways in which each of these two types of norms interacts is informed by China's particular policy and social context. The charitable trust model is introduced in an environment where China faces huge charity needs whilst the public welfare trust does not work very well. The state seeks to use charitable trusts to encourage the public to participate in the development of charitable

⁶¹ See analysis in Section II B of this Chapter.

⁶² See analysis in Section II B of Chapter 4.

⁶³ 楼秋然 [Lou Qiuran], 《理解慈善信托中的“近似原则”：美国经验与中国借鉴》 [Understanding Cy Pres in Charitable Trusts: American Experience and Its Adoption in China] (2019) 3 中国政法大学学报 *Journal of CUPL* 49, 62; 王涛 [Wang Tao], 《慈善法的立法理念、制度创新和完善路径》 [Research on the Legislative Idea, System Innovation and Development Path of the Chinese Charity Law] (2018) 33(1) 法学论坛 *Legal Forum* 143, 144.

undertakings. Consistent with this understanding, the state provides private actors with autonomy in determining how their private funds can be used for charitable purposes. At the same time, the state grants regulators wide powers to ensure that charitable trusts are used in compliance with its public welfare goals. The allocation of rights and obligations between trust parties and regulators in the creation and ongoing administration of charitable trusts shows that private interests of trust parties continue to be subordinated to the interests of the broad community and, ultimately, to the interests of the state.

The understanding of the hybrid nature of charitable trusts connects us back to the analysis of the relationship between charitable trusts and public welfare trusts. As analyzed previously,⁶⁴ the semantic interpretation of ‘belong to’ suggests that charitable trusts may relate to public welfare trusts to a certain extent, but it cannot illustrate the way in which the two institutions interact. This gap in analysis can be supplemented by a closer review of the legal nature of charitable trusts, which involves an interpretation and examination of the legislative arrangements relevant to charitable trusts. The analysis in this section shows that charitable trusts are distinguishable from public welfare trusts. Specifically, in contrast to the public law nature of public welfare trusts, the legal nature of charitable trusts is a hybrid in which a certain amount of weight has been given to the promotion of the autonomy interest of benevolent property owners. The legal nature of a particular institution informs how its legislative framework should be put into effect. In consideration of the private law norms of charitable trusts, it thus follows that the extent to which the experiences of public welfare trusts apply to charitable trusts may be strictly limited, and charitable trusts and public welfare trust are in nature not synonymous.

III IMPLICATIONS FOR CHARITABLE TRUST GOVERNANCE

Examination of the legislative provisions of charitable trusts demonstrates that the hybrid nature of charitable trusts is distinctive because of China’s particular political, economic and social conditions. In view of the failure of public welfare trusts, legislators have introduced the hybrid model for charitable trusts and seek to use this model to encourage the public to participate in charitable undertakings. In the Chinese charitable trust setting, the tension between public law and private law is seen through the tension between the social welfare goals that charitable trusts serve to pursue and the autonomy that private parties have in deciding how their private funds are used for charitable purposes. The charitable trust’s hybrid nature is intentionally created by legislators. It permeates and informs the design of the governance framework for charitable trusts. Based on the analysis of the hybrid nature of charitable trusts in Section II, this section discusses implications that analysis of the public-private hybrid has for the governance of charitable trusts.

⁶⁴ See analysis in Section II A of this Chapter.

A Parties Relevant to Charitable Trust Governance

Building upon the dictionary definition of governance, and the understanding of governance in specific context such as charity and corporation, the analysis in Chapter I has defined the governance of Chinese charitable trusts as a set of mechanisms that ensure the trustee of a charitable trust complies with its duties, in order to effectively realize the charitable purpose, or the public benefit pursued by the charitable trust. This definition illustrates that the focus of charitable trust governance lies in how charitable trusts should be administered, and the focus of how charitable trusts should be administered in turn lies in how a trustee's exercise of power should be supervised and controlled and what measures can be taken to ensure its accountability for that exercise.

Following on from the definition of charitable trust governance, there are four types of parties relevant to the governance of charitable trust. These are the persons who are capable of playing a role in exerting pressure on trustees to ensure they comply with their duties. The first are the settlors: they can exercise their statutory or contractual powers to oversee whether charitable trusts are administered in alignment with their charitable purposes. The second are the beneficiaries: they have the incentive to supervise whether trust properties are distributed in alignment with the notice of distribution of charitable assets issued by the trustee, and they may have the standing to bring proceedings to remedy the misuse of charitable trust assets. The third are the regulators: they can exercise their regulatory powers to oversee whether charitable trusts are administered in alignment with the public welfare policy of the state and to punish trustees when their management of charitable trusts contravenes the law or is incompliant with regulatory measures. The final party is the general public: they can access the information disclosed by charitable trust trustees, report the misuse of charity funds to the relevant regulators, and participate in charity-promoting activities to improve public awareness of charitable trusts. The definition of the concept 'charitable trust governance' can shed light on what types of parties may be relevant to the governance of charitable trusts, and what potential roles they may play. However, this definition cannot explain in what ways these four parties interact with each other and to what extent these four parties can in fact hold trustees accountable for their exercise of power.

The public-private nature of the charitable trust model lays the foundation on which its governance framework rests. Analysis of the public-private hybrid not only explains how these four parties are connected to the control of the trustee's exercise of power, but also provides insights into how these parties interact with each other in the governance structure of charitable trusts. The norms of private law in the legal structure of charitable trusts mainly relate to the internal relationship between the parties to charitable trusts (i.e. settlors, trustees and beneficiaries). The way in which these parties interact can clarify how a trustee exercises its powers in the management of charitable trust affairs. This line of thought leads to two types of questions to consider here. The first type relates to the tension between settlors and trustees. That is, what are the mechanisms by which checks and balances between settlors and trustees are established? What are the powers and duties that the law has assigned to settlors and

trustees? How could these powers and duties be performed by each party?⁶⁵ The second type of question relates to the role of beneficiaries. That is, are beneficiaries entitled to file lawsuits in respect of trustees' maladministration of charitable trusts? If so, how could the scope and nature of their standing be defined? Is their standing limited to the individualized interest they have in the trust assets? Or can their standing extend to the general administration of charitable trusts, irrespective of how much and what kind of interest they have in the trust assets?⁶⁶

The norms of public law in the legal structure of charitable trusts mainly relate to the role of regulators. In the legal framework of charitable trusts, regulators are granted wide supervisory powers by law, such as the powers to assess (*pinggu* 评估) whether charitable trusts are administered in alignment with their charitable purposes,⁶⁷ and to conduct supervisory conversations to compel trustees to explain the charitable trust business,⁶⁸ and to revoke the registration license of a trustee.⁶⁹ The granting of wide powers to regulators enables them to play a proactive role in the administration of charitable trust affairs. For example, they can issue letters or notices to inspect whether the information required by law has been disclosed in a timely and adequate manner; and take charity-promoting measures (e.g. educational and training programs) to encourage the public to play a supervisory role in trustees' performance of their duties. The extent to which and the way in which regulators regulate the operation of charitable trusts may impact heavily on the way in which trustees discharge their management roles. Consistent with this understanding, these public law norms connect analysis of charitable trust governance to the role of regulators and the interaction between regulators and trust parties.

B Governance in Practice

Application of law is not an 'exercise in mechanical deduction',⁷⁰ and thus it is possible that the practice of charitable trusts may look different from their legislative framework.⁷¹ The law related to charitable trusts is vague and underdetermined. This vagueness motivates trust parties and regulators to

⁶⁵ See analysis in Section III of Chapter 3.

⁶⁶ See analysis in Section IV B of Chapter 3.

⁶⁷ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 5) art 50. See also analysis in Section II of Chapter 4.

⁶⁸ 《信托公司管理办法》 [Measures for Administration of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 23 January 2007, (n 37) art 53; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 5) art 51. See also analysis in Section II of Chapter 4.

⁶⁹ 《信托公司管理办法》 [Measures for Administration of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 23 January 2007, (n 37) art 59; 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016, (n 5) art 98.

⁷⁰ Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue' (2010) 16(2) *Legal Theory* 111, 116.

⁷¹ All jurisdictions have some gap between aspirational rules and their practical enforcement. See Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 13.

take strategies to protect their interests from being adversely affected in the implementation of the law.⁷² The implementation of the policies pertaining to charitable trusts involves contradictions and conflicts between the autonomy of trust parties and the broader interests of the state. These include giving trust parties greater control over the exercise of their management rights and ensuring that charitable resources are to be used in a way that benefits the legitimate interests of the broader society.⁷³ The regulatory practice and the allocation of powers between regulators and trust parties show that these conflicts are dealt with in favor of the protection of public interest: the interests of the broad community and the interests of the state itself as interpreted and enforced by the regulator are prioritized over the private interests of trust parties.⁷⁴ The way in which these contradictions and conflicts are addressed demonstrates how the state understands the public-private nature of charitable trusts, which in turn influences how trust parties and regulators engage with the law in practice.

In practice, regulators and trust parties engage proactively with the law as well as being responsive to extra-legal considerations when performing their legal roles.⁷⁵ As noted in Section II-B above, regulators are granted wide supervisory powers by law. How should these powers be exercised? To what extent may regulators play a supervisory role? Regulators often consider these questions in light of the state's social needs and the policy challenges that the state articulates.⁷⁶ The critical social and policy environment in which charitable trusts are established and operate is essential to determining how regulators discharge their supervisory roles. The willingness of regulators to take into account extra-legal factors exhibits public law-leaning tendencies and facilitates the state's control over the use of charitable resources. These issues are explored in more detail in Chapter 4.

In relation to the role of settlors, Section II-B showed that the law endows settlors with broad powers in the management of charitable trusts. Settlors have the power to determine in what way charitable assets are distributed and how trust affairs should be administered. This legislative approach reveals the state's desire to motivate private philosophy and demonstrates the private law norms in the legal structure of Chinese charitable trusts. However, the law does not define clearly how settlors' powers should be exercised and in what ways settlors should interact with trustees in the day-to-day governance of charitable trusts. This vagueness poses a great deal of uncertainty in the trustee's management of charitable trusts and produces legal uncertainty in some aspects of the relationship between settlors and trustees.⁷⁷ To mitigate risks posed by the vagueness of the law, the parties to charitable trusts have strong desires to use contractual tools to vary the framework of the law.⁷⁸ These issues are explored in more detail in Chapter 5.

⁷² See analysis in Section IV of Chapter 1.

⁷³ See analysis in Section I of Chapter 1.

⁷⁴ See analysis in Section II C of this Chapter.

⁷⁵ See analysis in Section III of Chapter 4.

⁷⁶ See analysis in Section III of Chapter 4.

⁷⁷ See analysis in Section III of Chapter 3.

⁷⁸ See analysis in Section III of Chapter 5.

The fact that trust parties and regulators adopt strategies to guide the performance of their legal roles underlines the importance of examining the governance of charitable trusts from the perspective of both law and practice. In relation to law, analysis of charitable trust governance includes the relationship between trust parties, the nature and scope of the powers that regulators have, and the interaction between trustees and regulators. In relation to practice, analysis of charitable trust governance includes private actions taken by trust parties, and the way in which regulators perform their responsibilities.

From the perspective of the public law and private law divide, public law norms indicate that analysis of charitable trust governance should include the role of regulators and the way in which they interact with trust parties. Private law norms indicate that analysis of charitable trust governance should engage with the roles of trustees, settlors and beneficiaries and the way in which these parties interact with each other. In light of the hybrid nature of the charitable trust model, and the way in which its legal governance framework is given effect, the author proposes three perspectives in this thesis from which the governance structure of charitable trusts can be analyzed — namely, the legal regulation of trust parties in law, the regulatory practice of charitable trusts, and the use of contractual tools between trust parties.

IV CONCLUSION

As with all charitable trusts, Chinese charitable trusts are a type of public-private hybrid. This chapter has explored the particular mixture of public law and private law norms that coexist in the Chinese charitable trust. Regardless of the weight that has been assigned to each of the two norms, in the Chinese charitable trust private law norms are always subordinated and subject to public law norms, in that the operation of charitable trusts should always be aligned with the public welfare policy of the state. This chapter has explored how this hybrid nature permeates and informs the design of the governance structure of charitable trusts and the relationships it establishes between parties interested in governance of the trust; settlors, trustees, beneficiaries, regulators and the general public.

Legislators have sought to use charitable trusts to encourage the public to participate in the development of charitable undertakings. However, in creating this particular form of public-private hybrid, the legislative regime governing the charitable trust has created a number of ambiguities in the governance framework of charitable trusts. These ambiguities motivate trust parties and regulators to adopt strategies to guide the performance of their legal roles.

In light of the ways in which trust parties and regulators engage with the law and the public-private nature of charitable trusts, this chapter has highlighted three perspectives that are relevant to understanding the governance structure of charitable trusts: the legal regulation of trust parties in law, the regulatory practice of charitable trusts, and the use of contractual tools between trust parties. Chapter 3 examines the legal regulation of the trust parties. Chapter 4 examines regulatory practice. Chapter 5

examines the use of contractual tools in shaping governance. Together they provide an in-depth analysis of the different perspectives required to identify what is the particular governance structure of Chinese charitable trusts and then to elucidate its distinctive characteristics.

CHAPTER THREE THE LEGAL REGULATION OF TRUST PARTIES IN LAW

I INTRODUCTION

Chapter 2 analyzed the public law-private law nature of China's charitable trust model. It went on to explore the implications for governance of the particular model of public law-private law hybridity. The analysis in Chapter 2 showed how this hybrid nature of the charitable trust model permeates and informs the design of its governance structure, and constitutes the foundation on which analysis of charitable trust governance rests. From this analysis the author has proposed three perspectives from which to understand governance of charitable trusts: the legal regulation of trust parties in law, the regulatory practice of charitable trusts, and the use of contractual tools between trust parties. This chapter discusses the internal relationship between trust parties in law. The latter two perspectives are addressed in Chapters 4 and 5.

As discussed in Chapter 1, in China, charitable trusts are in substance modeled on public welfare trusts but have a number of significant differences. Drawing on lessons from the failure of public welfare trusts, legislators established a new legal framework for charitable trusts. This new framework shows how legislators expect each actor (i.e. settlors, trustees and beneficiaries) to act in the creation and ongoing administration of charitable trusts. Examination of this legal framework leads to two main observations. First, the settlor is endowed by law with extensive powers while the trustee is burdened by law with onerous duties. However, the law does not define clearly what these powers and duties entail and how they could be discharged. This vagueness poses risks to the trustee's management of charitable trusts and produces legal uncertainty in some aspects of the relationship between settlors and trustees. Secondly, the law makes no mention of the role and legal nature of charitable trust beneficiaries. This vagueness has resulted in intense debate among scholars and practitioners on the legal nature of Chinese charitable trusts and the role that beneficiaries can play in the governance setting. This chapter examines these two aspects of governance through an examination of the legislative provisions relating to the parties to charitable trusts. This discussion serves two purposes: first, to identify the extent to which, and the way in which, the new charity law has shaped the governance structure of Chinese charitable trusts; and second, to identify areas where the legal governance framework provides clear guidelines and where it is vague, has gaps or creates risks for parties in terms of lawful performance of their roles and responsibilities.

II ESTABLISHMENT OF THE NEW LEGAL GOVERNANCE FRAMEWORK

As discussed in Chapter 2, the charitable trust model was introduced to overcome the shortcomings of the earlier legal framework for carrying out charitable undertakings. Over the past two decades, legislators

have created four legal forms for doing charitable causes: foundations (*jijin hui* 基金会),¹ social associations (*shehui tuanti* 社会团体),² privately-operated non-enterprise organizations (*minban feiqiye danwei* or *minfei* 民办非企业单位或者民非),³ and public welfare trusts (*gongyi xintuo* 公益信托).⁴ Different forms have different strengths and weaknesses in the conducting of charitable activities.

The public law model of public welfare trusts was introduced with the enactment of the *Chinese Trust Law* in 2001. This public law model did not work very well, and the last twenty years' practice shows that there is a considerable gap between the advantages that public welfare trusts were supposed to have in developing charitable causes, and the limited role that they play in practice. The fragmented system of regulation is responsible for the failure of public welfare trusts, particularly in discouraging establishment of a public welfare trust.⁵ This is reflected in two respects. First, private actors have difficulty in identifying administration authorities (regulators) responsible for establishment of public welfare trusts. The law requires private actors to submit documents to regulators for registration but makes no mention of who these regulators are and how they can be identified. Private actors need to consult various possible government organs to determine to whom a registration application can be submitted.⁶ Secondly, regulators in practice are unwilling to approve the establishment of public welfare trusts. In contrast to the charity-promoting role of public welfare trusts, regulators are more concerned about the risk that may arise from the supervision and management of public welfare trusts.⁷

Over the past decade, academic institutions, law firms and regulators have hosted numerous conferences and forums to discuss what legislative reforms might be adopted to trusts to strengthen their potential to promote the development of charitable causes. In this context, a new model — the Chinese charitable trust — was introduced with the promulgation of the *Chinese Charity Law* and the *Measures for Charitable Trusts* in 2016 and 2017 respectively. Legislators created a public-private hybrid model for charitable trusts in which more scope has been given to the civil capacity of legal actors. The checks and balances between settlors and trustees are essential to this new legal governance model. The law grants settlors wide powers, including the powers to appoint trust supervisors and to change the management method of charitable assets. This legislative approach enables settlors not only to define the way in which

¹ 《基金会管理条例》 [Regulations on Administration of Foundations] (People's Republic of China) State Council, 3 August 2004.

² 《社会团体登记管理条例》 [Regulations on Registration Administration of Associations] (People's Republic of China) State Council, 6 February 2016.

³ 《民办非企业单位登记管理暂行条例》 [Interim Regulations on the Administration of the Registration of Privately-Operated Non-Enterprise Organizations] (People's Republic of China) State Council, 25 October 1998.

⁴ 《中华人民共和国信托法》 [Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001, ch 6.

⁵ See analysis in Section II of Chapter 4.

⁶ See analysis in Section I of Chapter 1.

⁷ See analysis in Section I of Chapter 1.

charitable trusts are managed but also to be proactive in supervising the performance of trustees' duties. At the same time, trustees are burdened by law with onerous duties, including the duty to act in the best interest of the charitable purposes and the duty to avoid profits. These duties constrain the way in which trustees discharge their roles and motivate them to align the management of trust assets with the charitable purposes defined by the state.

The law sets up the governance framework for charitable trusts but is also vague and incomplete in various aspects. As regards the internal relationship between settlors and trustees, the law does not define clearly in what way the two parties should interact. To what extent can a settlor intervene in the disposition of charitable assets? How can the performance of a trustee's duty be assessed? In what way can disputes between trust parties be dealt with in the ongoing management of charitable trusts? The vagueness of the law on these questions poses risks to a trustee in its administration of charitable trusts and also produces legal uncertainty in some aspects of the relationship between trust parties.

The law is also underdetermined in terms of the role and legal status of beneficiaries under a charitable trust. The charity law uses the term 'beneficiary' but does not address the question of what powers or rights a beneficiary may have. The vagueness in the law leads to legal uncertainty as to in what way and to what extent beneficiaries may play a supervisory role in the governance setting. Questions relating to the role of beneficiaries include: can beneficiaries have standing to petition the court for redress in relation to trustees' maladministration of charitable assets? If so, what is the scope of their standing? Is their standing limited to the individualized interest they have in the trust assets? Or can their standing extend to the general administration of charitable trusts, irrespective of how much and what type of interest they have in the trust assets? The law makes no mention of these questions, and currently there are no judicial interpretations or case law that elaborate how they should be answered.

By examining the law relevant to charitable trusts, Sections III and IV in this chapter explore the ways in which trust parties interact with each other. This examination can help to identify the areas where the legal governance framework is vague and the legal uncertainties that arise from this vagueness. The focus of this chapter is on the internal relationship between trust parties. The question of how trust parties interact with regulators is addressed in Chapter 4.

III TENSION BETWEEN SETTLORS AND TRUSTEES

The discussion in Section II indicated that one of the key features of the legal governance model is the tension between settlors and trustees. This tension is explored in more detail here. The 'tension' can be observed in two matters: the legal title to charitable trust assets and the allocation of powers and duties between settlors and trustees. The law grants settlors the discretion to determine who can retain the legal

title to charitable assets. This approach is favorable to protecting a settlor's autonomy interest in the creation of charitable trusts. After a charitable trust is legally established, settlors are empowered to intervene intensively in the management of charitable trusts, including how charitable trusts should be managed and in what way charitable assets can be distributed. The section below analyzes these two matters for two purposes: first, to investigate how trustees interact with settlors in the internal governance structure of charitable trusts; and second, to identify the legal uncertainties that settlors and trustees may face in the management of charitable trusts.

A Legal Title to Charitable Trust Assets

1 Terminology of Entrust

Under Chinese law, settlors are not required to transfer the legal title to trust assets to trustees for the creation of a valid trust. Article 2 of the *Measures for Charitable Trusts* and article 44 of the *Chinese Charity Law* use the term 'entrust' to describe the creation of charitable trust relationships. The term 'entrust' is not unique to Chinese charitable trusts. Instead, it is widely used in agency relationships⁸ where the transfer of legal title is not necessarily contemplated. The wording 'entrust' raises a years-long debate about what 'entrust' means in the charitable trust setting. The majority view of Chinese academics and commentators is that the meaning of 'entrust' in charitable trusts is akin to that of agency relationships.⁹ That is, a relationship of entrustment does not entail the compulsory transfer of legal title to assets from principals to agents. Following from this understanding, the next question that requires examination is 'Does the current law prohibit such a transfer?'. The answer is negative in current law — whether or not the transfer of legal title is made depends entirely on the settlor's own wishes.

2 Legislative Reasons

Failure to give a clear answer as to the vesting of trust assets is not an oversight by Chinese legislators. Rather, it is a deliberate and conscious legal arrangement, which can be traced back to the promulgation of the *Chinese Trust Law* in 2001.¹⁰ Existing literature shows that, in the enactment of the *Chinese Trust Law*,

⁸ 《中华人民共和国民法总则》 [General Rules on the Civil Law of the People's Republic of China] (People's Republic of China) National People's Congress, 15 March 2017, s 2.

⁹ On academic works in favor of this argument, see, eg, 张淳 [Zhang Chun], 《〈中华人民共和国信托法〉中的创造性规定及其评析》 [The Creative Provisions in the Trust Law of the People's Republic of China and Its Evaluation] (2002) 2 法律科学 *Law Science* 110, 112–13; Lusina Ho, *Trust Law in China* (Sweet & Maxell Asia, 2003) 41; Lusina Ho, Rebecca Lee and 金锦萍 [Jin Jinping], 'Trust Law in China: A Critical Evaluation of Its Conceptual Foundation' in Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 86; Lusina Ho, 'Trust Laws in China: History, Ambiguity and Beneficiary's Rights' in Lionel Smith (ed), *Re-Imaging the Trust: Trusts in Civil Law* (Cambridge University Press, 2012) 195–6.

¹⁰ Article 2 of the *Chinese Trust Law* stipulates that 'trust refers to the act in which the settlor, on the basis of confidence on the trustee, entrusts certain property rights it owns to the trustee and the trustee manages or disposes of

drafters and experts had carefully examined foreign precedents, commentaries, statutes and legal practices.¹¹ Legislators in China fully understood the legal elements of common law trusts, as well as the adjustments and efforts that had been made by their Japanese and South Korean counterparts when transplanting common law trusts into their indigenous civil law systems. It is noteworthy that adopting the term ‘entrust’ is the consequence of ‘a last-minute change’¹² made by politicians. All the earlier drafts proposed by drafters and scholars contemplated the transfer of legal title in the creation of a Chinese trust.¹³

There are three main reasons for this legislative arrangement. First, because of the *numerus clauses* principle in Chinese law,¹⁴ Chinese scholars find it difficult to embrace the concept of split of legal title of trust assets. Moreover, trust companies in practice have several problems such as poor risk management ability and lack of internal governance rules.¹⁵ In this light, vesting trust assets in the trustee will pose a great risk to the protection of the beneficiary’s interest.¹⁶ Secondly, prior to the introduction of the *Chinese Trust Law*, the institution of agency was widely used in asset management. The concept ‘trust’ is strange to both practitioners and academics in China. They don’t have a clear understanding of how trust works and what its constituent elements are. In the eyes of settlors, it is unacceptable to relinquish legal title to trust assets solely for the purpose of asset management.¹⁷ The third reason relates to the practice of Chinese trusts. Most of the trusts established in the late 1980s were designed to be collective investment schemes where investors transferred their investment (cash) to the trustee anyway. In this regard, legislators considered that it was not urgent to provide a clear answer on the vesting of trust assets.¹⁸

The above three reasons are closely associated with the historical background against which the *Chinese Trust Law* was enacted. Societal and cultural circumstances have undergone drastic changes in the past fifteen years. Nevertheless, legislative arrangements relating to the vesting of charitable trust assets

the property rights in its own name in accordance with the intentions of the settlor and for the benefit of the beneficiary or for specific purposes’.

¹¹ Frances H Foster, ‘American Trust Law in a Chinese Mirror’ (2010) 94 *Minnesota Law Review* 602, 627–31.

¹² Ruiqiao Zhang, ‘Trust Law of China and Its Uncertainties: Examination of the Rights and Obligations of Trust and Ownership of Trust Property’ (2015) 10 *National Taiwan University Law Review* 45, 69.

¹³ 闫荣涛 [Yan Rongtao], 《中国信托财产所有权归属分析与建构》 [Analysis and Reconstruction on the Internal Structure of Trust Ownership in China] (2009) 9 昆明理工大学学报 (社会科学版) *Journal of Kunming University of Science and Technology (Social Sciences)* 60, 62; Lusina Ho, ‘Trust Laws in China: History, Ambiguity and Beneficiary’s Rights’ (n 9) 201.

¹⁴ Lusina Ho, ‘Trust Laws in China: History, Ambiguity and Beneficiary’s Rights’ (n 9) 207.

¹⁵ 《关于〈中华人民共和国信托法（草案）〉的说明》 [Explanations on the Trust Law of the People’s Republic of China (Draft)] (People’s Republic of China) Standing Committee of the People’s Congress, 24 December 1996; 《全国人大法律委员会关于〈中华人民共和国信托法(草案)〉修改情况的汇报》 [Report of the Law Committee of the National People’s Congress on the Revision of Trust Law of the People’s Republic of China (Draft)] (People’s Republic of China) National People’s Congress, 3 July 2000.

¹⁶ Lusina Ho, ‘Trust Laws in China: History, Ambiguity and Beneficiary’s Rights’ (n 9) 201.

¹⁷ Kai Lyu, ‘Re-Clarifying China’s Trust Law: Characteristics and New Conceptual Basis’ (2015) 36 *Loyola of Los Angeles International and Comparative Law Review* 447, 456.

¹⁸ Zhang (n 12) 69.

remain the same. Scholars and practitioners often consult explanatory memoranda when exploring the reason behind specific legislative arrangements. However, the memorandum for the *Chinese Charity Law* makes no mention of the arrangements relating to the legal title to charitable trust assets. Interviews with scholars and trust lawyers show that there are two reasons behind this ‘entrust’ approach. First, there have been many scandals involving misuse of charity funds in the past two decades, and therefore the public lacks trust and confidence in charity trustees.¹⁹ In this context, a mandatory requirement of the transfer of legal title to trust assets may discourage the public from using the model of charitable trusts, since settlors can stay away from a legal model that conflicts with their needs.²⁰ Secondly, the *Chinese Trust Law* has the highest legal binding effect on the regulation of trust affairs in China. The *Measures for Charitable Trusts*, as an administrative regulation, is subordinated to the regulatory framework set out in the *Chinese Trust Law*. In view of the consistency and coherence between superior and subordinate laws, legislators tend to take the same approach on the vesting of trust assets in the charitable trust setting.²¹

B Assignment of Powers and Duties to the Settlor and the Trustee

The idea of entrustment is mirrored in the assignment of powers and duties to settlors and trustees. In the legal governance framework, settlors are able to play a proactive role due to the granting of wide powers to them, such as the powers to define the types of benefits the charitable trust will create and the way in which trust parties interact with each other. In contrast, trustees are burdened by law with broad duties, such as the duties to avoid profits, to avoid conflicts, and to act in the best interest of charitable purposes. Behind this legal governance framework is the existence of numerous ambiguities. The law sets up the internal relationship between settlors and trustees, but does not define clearly what the scope of their powers and duties is and how their roles should be performed. This vagueness creates a great deal of uncertainty in the way in which settlors interact with trustees. This section will identify the areas where this vagueness lies and how the vagueness affects the way in which settlors and trustees discharge their roles.

1 The Settlor’s Wide Powers

Instead of dropping out of the picture, the settlor in Chinese law is granted wide powers,²² including the powers to change the trust management method, to appoint trust supervisors, to require the trustee to

¹⁹ See analysis in Part II B of Chapter 2.

²⁰ See interviews with A1, A7, A8, L2, L8 and T1.

²¹ See interviews with A6, A7, L1 and L5.

²² At common law, settlors will use the letter of wishes or the mechanism of protector to play a certain role in the management of charitable trusts. For works that are devoted exclusively to the use of letter of wishes, see, eg, Alexander A Jr Bove, ‘The Letter of Wishes: Can We Influence Discretion in Discretionary Trusts’ (2009) 35 *ACTEC Journal* 38, 39; Deborah S Gordon, ‘Letters Non-Testamentary’ (2013) 62 *University of Kansas Law Review* 585, 629; Tey Tsun Hang, ‘Letters of Wishes’ (2009) 21 *Singapore Academy of Law Journal* 193, 194–5; David Hayton, ‘English Fiduciary Standards and Trust Law’ (1999) 32 *Vanderbilt Journal of Transnational Law* 555, 574–5. See also *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998) 1 WLR 896, 903; *Hartigan*

explain its decisions, to know the administration and disposition of trust assets, to check and duplicate the trust accounts. This section discusses the two most important powers that settlors under a charitable trust have: the powers to require the trustee to change the management method and to appoint trust supervisors.

(a) Power to Require the Trustee to Change the Management Method

Pursuant to article 20 of the *Chinese Trust Law*, the settlor has the power to request the trustee to give explanations for its decisions.²³ These explanations allow the settlor to assess whether the trustee's management method is favorable to the realization of the trust purpose. If the answer is 'no' from the settlor's perspective, it can ask the trustee to modify such method according to article 21 of the *Chinese Trust Law*. Article 21 of the *Chinese Trust Law* stipulates that the settlor, due to special causes that are not foreseen when the trust was established, has the power to ask the trustee to change the methods of management of trust assets if the methods are not favorable to the realization of trust purposes or do not conform to the interest of the beneficiary. The power to require the trustee to change management methods allows the settlor to perform its supervisory role in the ongoing administration of charitable trust affairs. Nevertheless, the law does not define clearly in what situation a management method is deemed to be unfavorable to the realization of trust purposes. Nor does it define the phrase 'special causes that are not foreseen when the trust was established'. Because of these ambiguities, the widest possible discretion that is vested in the settlor may produce a great deal of uncertainty to the trustee's administration of charitable trusts. For example, is there really a gap in current management methods that prevents the charitable trust purpose from being met? How should risks associated with the change of management methods be appropriately addressed? In the absence of a clear definition of these questions, it is foreseeable that the vagueness of article 21 will easily lead to controversy between settlors and trustees if trustees disagree with settlors on the management of charitable trusts.²⁴

Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405, 420–4; *Re Rabaiott's Settlement* [2000] WTLR 953, 968; *Breakspear v Ackland* (2008) 3 WLR 698, 711; *Re Londonderry's Settlement* [1965] Ch 918, 936.

²³ In the UK and Australia, there is significant conflict within cases about the extent to which trustees' reasons shall be disclosed. The traditional position is that trustees have an immunity from having the court examine their reasons. See *Breakspear v Ackland* (n 22) [54]–[58]; *Re Londonderry's Settlement* (n 22) 928, 936–7; *Re Rabaiott's Settlement* (n 22) 933; *Hartigan Nominees Pty Ltd v Rydge* (n 22) 436, 442; Mark Pawlowski, 'Confidentiality or Disclosure?' (2008) 96 *Trusts and Estates Law & Tax Journal* 12, 12; Alec Samuels, 'Disclosure of Trust Documents' (1965) 28(2) *The Modern Law Review* 220, 222; Tsun Hang Tey, 'Trustee's Duty of Disclosure' (2012) 24 *Singapore Academy of Law Journal* 191, 216; David A Steele, 'Disclosure of Trust Documents Revisited' (1995) 15 *Estates and Trusts Journal* 218, 226. In contrast, a later set of cases have suggested that trustees would need to disclose reasons to prevent adverse inferences being drawn from silence in the face of a case with prima facie evidence. See *Knudsen v Kara Kar Holdings Pty Ltd* [2000] NSWSC 715 (21 July 2000), [112]; *Sharp v Maritime Super Pty Ltd* [2012] NSWSC 1350 (7 November 2012), [176]; *Scott v National Trust for Places of Historical Interest or Natural Beauty* (1998) 2 All ER 705, 718–9; *Edge v Pensions Ombudsman* [2000] Ch 602, 633.

²⁴ Contractual practice suggests that the parties to charitable trusts tend to use contractual tools to clarify their powers and duties, so as to minimize risks that may arise from the settlor's exercise of power. See analysis in Section III of Chapter 5.

The uncertainty in a trustee's autonomous management power is further exacerbated by the fact that settlors are empowered to change trustees in accordance with article 20 of the *Measures for Charitable Trusts*. This article allows settlors to change trustees if trustees breach their duties or have difficulty in performing their duties. When viewed together with article 21 of the *Chinese Trust Law*, the wording of article 20 creates several difficulties. For example, what does the phrase 'trustees have difficulty in performing their duties' mean? From whose perspective should this phrase be understood — the trustee's or the settlor's? If trustees decline to adopt the management method suggested by settlors, can settlors change trustees on the basis that trustees breach their duties? The law relevant to charitable trusts does not provide clear answers to these questions. The vagueness of the ways in which article 20 of the *Measures for Charitable Trusts* and article 21 of the *Chinese Trust Law* work creates a high level of uncertainty for trustees.

(b) Power to Appoint Trust Supervisors

The charity law allows settlors to appoint trust supervisors. By appointing trust supervisors, settlors can keep a close eye on how trustees exercise their powers and on whether trust assets are managed in alignment with the trust's charitable purpose.²⁵ In contrast to public welfare trusts, a trust supervisor is not mandatory in the charitable trust model:²⁶ whether a trust supervisor is appointed depends heavily on the settlor's own wishes. At the same time, the law does not provide any detailed criteria for how the powers and obligations of a trust supervisor should be determined.²⁷ Are supervisors fiduciaries? To whom do supervisors owe their duties? How should supervisors interact with settlors and trustees? The law provides no answers to these questions.

²⁵ 张淳 [Zhang Chun] (n 9) 119; 中国信托业协会 [China Trustee Association] (ed), 《慈善信托研究》 [Research on the Charitable Trust] (中国金融出版社 [China Financial Publishing House], 2016) 85–6; Foster (n 11) 645; Stewart E Sterk, 'Trust Protectors, Agency Costs, and Fiduciary Duty' (2005) 27 *Cardozo Law Review* 2761, 2763.

²⁶ 《中华人民共和国信托法》 [Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001, (n 4) art 64; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, art 11.

²⁷ At common law, protectors can be granted various administrative and dispositive powers, such as the powers to appoint and remove the trustee; to consent to the trustee's exercise of power; and to consent to a distribution plan. On the other hand, there is no uniform answer as to the nature of the protector's powers, since the purpose of the power and the factual context out of which the power is conferred vary considerably in each case. See *LGSS v Egan* [2002] NSWSC 1171 (12 April 2002), [113]; *Blenkinsop v Herbert* [2017] WASC 87 (8 June 2017), [106]–[110]; Lynton Tucker et al (eds), *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2015) 1266; Jeffrey Evans Stake, 'A Brief Comment on Trust Protectors' (2006) 27 *Cardozo Law Review* 2813, 2814–5; Gregory S Alexander, 'Trust Protectors: Who Will Watch the Watchmen' (2006) 27 *Cardozo Law Review* 2807, 2809–10; Stewart E Sterk (n 25) 2775–6; Philip J Ruce, 'The Trustee and the Trust Protector: A Question of Fiduciary Power — Should a Trust Protector Be Held to a Fiduciary Standard?' (2011) 59 *Drake Law Review* 67, 95.

Interviews with trust lawyers and trustee managers indicate that in practice the extent to which supervisors can play a supervisory role varies considerably, depending on the way in which supervisors participate in the management of trust affairs. Two ways are summarized here from practice. The first is the establishment of charitable trust committees,²⁸ on which trust supervisors serve as committee members and have the power to vote on any matters associated with the administration of charitable trusts. On this approach, trust supervisors can play a crucial role, as trust instruments often provide that all decisions relating to the handling of trust affairs shall come into force on condition that all committee members have reached a unanimous consent.²⁹ Regarding the second approach, the role of trust supervisors is weak and akin to that of a consultant. On this approach, trust supervisors just give advice on how trust assets can be managed and how beneficiaries can be selected. Trust supervisors' suggestions are not legally binding for trustees.³⁰ Instead, trustees have unfettered discretion in determining how charitable trusts should be managed.³¹

2 *The Trustee's Onerous Duties*

Under Chinese law, the trustee is burdened with onerous duties, including the duty to act in good faith, the duty to avoid profits, the duty to avoid conflicts, the duty to act in the best interest of the charitable trust purpose, and the duty to act personally. These duties acknowledge a trustee's powers to make decisions about the management and distribution of charitable assets, but the way in which these powers are exercised creates a risk of deviating from the purpose of the trust or undermining the interests of potential beneficiaries. At the same time, the new legal framework for charitable trusts also creates a number of ambiguities in the ways in which trustees perform their duties. It is unclear what the scope of these duties is and how they can be properly discharged. This vagueness makes it difficult to determine whether a trustee's management of charitable trusts is compliant with the requirements of the law. This section discusses the two most important duties that trustees under a charitable trust are burdened with: the duty to avoid profits and the duty to act in the best interest of the charitable trust purpose.

²⁸ See analysis in Section III C of Chapter 5.

²⁹ See interviews with T1, L1, L5 and L9.

³⁰ See interviews with L1, L2 and L5.

³¹ Trust parties have strong desires to specify the role of trust supervisors and the way in which trust supervisors engage with the management of charitable trusts in contract. See analysis in Section III of Chapter 5.

(a) Duty to Avoid Profits

Consensus has been achieved in Chinese academia that article 26³² of the *Chinese Trust Law* articulates the no profit rule in China.³³ In the circumstances specified in article 26, there is a risk that a trustee's temptation to acquire personal benefits may 'impede the faithful performance'³⁴ of its duty as trustee to duly administer trust assets. The object³⁵ that this article seeks to achieve is analogous to the purpose in common law jurisdictions under which trustees are precluded 'from being swayed by considerations of personal interest',³⁶ thereby misusing trust assets for personal gains.

Due to the legal terms used by article 26, the scope of application of the no profit rule is extremely narrow in the context of the *Chinese Trust Law*. Its application is confined to personal profits that arise from the use of trust assets by a trustee. Gains that are generated without any connection to the use of trust assets or to the personal interests of a trustee do not give rise to the intervention of article 26. Therefore, situations like a trustee receiving commissions or bribes from taking advantage of its trustee position,³⁷ a trustee utilizing information and opportunities³⁸ that it has access to by virtue of its position as a trustee; or

³² According to article 26 of the *Chinese Trust Law*, 'except obtaining remuneration according to the provisions of this Law, the trustee may not seek interests for itself by using the trust property. Where the trustee, in violation of the provisions of the preceding paragraph, seeks interests for itself by using the trust property, the interests gained therefrom shall be integrated into the trust property'.

³³ See, eg, Charles Zhen Qu, 'The Doctrinal Basis of the Trust Principles in China's Trust Law' (2003) 38 *Real Property, Probate and Trust Journal* 345, 369; Lusina Ho, Rebecca Lee and 金锦萍 [Jin Jinping] (n 9) 90; 陈向聪 [Chen Xiangcong], 《信托法律制度研究》 [Research on Trust Law System] (中国检察出版社 [China People's Procuratorate Press], 2007) 206–8; 赵廉慧 [Zhao Lianhui], 《信托法解释论》 [Interpretative Theory of Trust Law] (中国法制出版社 [China Legal Publishing House], 2015) 310; 谭振亭 [Tan Zhenting], 《信托法》 [Trust Law] (中国政法大学出版社 [China University of Political Science and Law Press], 2010) 124.

³⁴ *Clay v Clay* (2001) 178 ALR 193, [15].

³⁵ See 卞耀武 [Bian Yaowu], 《中华人民共和国信托法释义》 [Interpretation of the Trust Law of the People's Republic of China] (法律出版社 [Law Press], 2002) 97; 赵廉慧 [Zhao Lianhui] (n 33) 310–12, 316; 周小明 [Zhou Xiaoming], 《信托制度：法理与实务》 [Trust System: Theory and Practice] (中国法制出版社 [China Legal Publishing House], 2012) 277; 谭振亭 [Tan Zhenting] (n 33) 124–5; 陈向聪 [Chen Xiangcong] (n 33) 206, 208; 高凌云 [Gao Lingyun], 《被误读的信托——信托法原论》 [A Misreading of Trust: Discussion on the Origin of Trust] (复旦大学出版社 [Fudan University Press], 2010) 114, 116.

³⁶ *Warman International Ltd v Dwyer* (1995) 128 ALR 201, 209.

³⁷ The difficulty of applying article 26 here is that the trustee's receipt of commission or bribe is not directly related to the use of trust properties.

³⁸ Although trustees obtain business opportunities in the course of exploring investment possibilities for beneficiaries, article 26 may not be applied where trustees use their own money rather than trust properties to exploit opportunities for themselves. The answer to whether article 26 applies to this scenario turns on whether 'information and opportunity' can be conceptualized as trust assets. On account of the relationship between opportunity and property, see 冯果 [Feng Guo], 《“禁止篡夺公司机会”规则探究》 [Research on the Doctrine of Prohibiting the Usurpation of Corporate Opportunities] (2010) 1 *中国法学 China Legal Science* 96, 98–9; Lusina Ho and Rebecca Lee (eds), 'Case 3: Protecting Ring-Fenced Assets against Disloyalty of the Asset Manager' in *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 163; *Farah Construction Pty Ltd v Say-Dee Pty Ltd* (2007) 236 ALR 209, [119].

a trustee using trust assets to offer guarantees for its affiliated party, seem to be outside the scope of article 26.

The *Chinese Company Law* also defines the duty to avoid profits, but the scope of the duty to avoid profits in the *Chinese Company Law* is broader than that in the *Chinese Trust Law*. Article 147 of the *Chinese Company Law* clearly stipulates that no director, supervisor or senior manager may take any bribe or illegal gains by abusing his or her powers.³⁹ At the same time, pursuant to articles 148(3) and 148(5) of the *Chinese Company Law*, without the consent of the shareholders' meeting or the general meeting, a director or senior manager is prohibited from using company assets to provide a guarantee for others or from using his or her powers to usurp any business opportunities that belong to the company.⁴⁰

Currently, China has built up a relatively comprehensive framework of trust regulations. Subordinated legal instruments provided by the *China Banking and Insurance Regulatory Commission* (hereinafter 'CBIRC')⁴¹ are tasked with defining details about specific requirements or components of the *Chinese Trust Law*. The *Measures for Administration of Trust Companies* (hereinafter 'MTC')⁴² is one example here. Article 34(1) of the *MTC* relates to the no profit rule in the *Chinese Trust Law*. This article stipulates that 'the trustee ought not to seek illegitimate interests by taking advantage of its trustee position'. In contrast to article 26 of the *Chinese Trust Law*, the scope of article 34(1) of the *MTC* is broader to cover situations in respect of bribery or commissions in the transaction. However, the key phrase 'illegitimate interest' is left unelaborated in the *MTC*, and currently no cases have clearly defined its meaning and scope. It is still unclear whether trustees are eligible to enter into transactions where they make use of the 'knowledge

³⁹ See also 王军 [Wang Jun], 《中国公司法》 [Corporation Law of China] (高等教育出版社 [Higher Education Press], 2015) 330; 金晓文 [Jin Xiaowen], 《中国公司法原理与适用》 [Principles and Application of Chinese Corporation Law] (中国法制出版社 [China Legal Publishing House], 2017) 350; 孔祥俊 [Kong Xiangjun], 《公司法要论》 [Key Discussions on Chinese Company Law] (最高人民法院出版社 [Supreme People's Court Press], 1997) 333–5; 甘培忠 [Gan Peizhong], 《企业与公司法学》 [Enterprise and Company Law] (北京大学出版社 [Peking University Press], 2014) 264.

⁴⁰ There is an intense debate as to what constitutes the usurpation of corporate opportunities, see 朱锦清 [Zhu Jinqing], 《公司法学（下）》 [Company Law (II)] (清华大学出版社 [Tsinghua University Press], 2017) 150–3; 王军 [Wang Jun] (n 39) 329–30; 金晓文 [Jin Xiaowen] (n 39) 352–3; 孔祥俊 [Kong Xiangjun] (n 39) 335; 《林承恩、李江山、涂雅雅侵占公司机会纠纷案》 [Lin Chengen and Li Jiangshen v Tu Yaya — Company Opportunity Dispute], 最高人民法院 [Supreme People's Court], 民四终字第 15 号 [Civil Fourth Division, Appealing Ruling, Case No 15], 6 September 2012; 《刘彬与李占军监事损害公司利益纠纷上诉案》 [Lin Bin v Li Zhanjun — Company Interest Dispute], 北京市第一中级人民法院 [Beijing First Intermediate People's Court], 民终字第 1099 号 [Civil Division, Appealing Ruling, Case No 1099], 9 March 2010; 《冯锦等诉高育新公司利益纠纷案》 [Feng Jin v Gao Yuxin — Company Interest Dispute], 北京市第一中级人民法院 [Beijing First Intermediate People's Court], 民终字第 7378 号 [Civil Division, Appealing Ruling, Case No 7378], 31 October 2017.

⁴¹ This Commission is also one of the regulators for Chinese charitable trusts. Its former is the *China Banking Regulatory Commission*. On the powers and duties of this Commission, see analysis in Section II B of Chapter 4.

⁴² 《信托公司管理办法》 [Measures for Administration of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 23 January 2007.

possessed by them in virtue of their office as’⁴³ trustees. Furthermore, the *MIT* is, in nature, an administrative regulation. Regulators thus have wide discretion in interpreting the scope and nature of the phrase ‘illegitimate interest’. This discretion allows regulators to easily control a trustee’s exercise of power, thereby posing risks to the trustee’s management of charitable trusts.⁴⁴

(b) Duty to Act in the Best Interest of the Charitable Purpose

In contrast to the express reference to the duty of loyalty in the *Chinese Company Law*,⁴⁵ Chinese trust laws do not adopt the term ‘duty of loyalty’ in their legal provisions, whether in the *Chinese Trust Law* or in its subsidiary regulations. Article 25(1) of the *Chinese Trust Law* only provides that ‘the trustee shall abide by the provisions of trust documents and handle trust affairs in the best interest of the beneficiary’.⁴⁶ Because of the way this article is expressed, numerous scholarly writings have suggested that the basic elements accompanying the duty of loyalty have already been recognized by the *Chinese Trust Law*.⁴⁷ In the area of charitable trusts, this duty has been expressed as ‘the duty to act in the best interest of the charitable purpose’.⁴⁸

This duty is ambiguous in two respects. First, the wording of the phrase ‘in the best interest of the charitable purpose’ seems to ‘mandate positive actions’⁴⁹ to be taken by a trustee, but it is unclear what a trustee ought to do under this heading. One may draw reference with article 25(2) of the *Chinese Trust Law* to address this question. However, it is still unclear to what extent and in what way article 25(2) may illuminate the understanding of this phrase. Pursuant to article 25(2) of the *Chinese Trust Law*, ‘the trustee shall be careful in performing his duties and fulfill his obligations with honesty, prudence, good faith and efficiency’. Do articles 25(2) and 25(1) run in parallel to each other and thus there is no intersection?⁵⁰ Can

⁴³ *Regal (Hastings) Ltd v Gulliver* (1967) 2 AC 134, 153, 159.

⁴⁴ To mitigate risks arising from regulatory scrutiny, trust parties are willing to use contracts to specify the way in which they interact with regulators. See analysis in Section III of Chapter 5.

⁴⁵ 《中华人民共和国公司法》 [Company Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 26 October 2018, art 147.

⁴⁶ 《中华人民共和国信托法》 [Trust Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 28 April 2001, (n 4) art 25.

⁴⁷ Lusina Ho, *Trust Law in China* (n 9) 144; Lusina Ho, Rebecca Lee and 金锦萍 [Jin Jinping] (n 9) 90; Zhang (n 12) 57; Lyu (n 17) 482; 谭振亭 [Tan Zhenting] (n 33) 123.

⁴⁸ 赵廉慧 [Zhao Lianhui] (n 33) 310.

⁴⁹ Rosemary Teele Langford, ‘High Court of Australia on Fiduciary Theory’ in Ken Coghill, Charles Sampford and Tim Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Routledge, 2016) 196.

⁵⁰ The object of article 25(2) is to provide a legal basis for other duties that are imposed on the trustee, such as the duty of care and the duty of honesty, to name two. See Zhang (n 12) 57; Lyu (n 17) 482; Charles Zhen Qu (n 33) 369; Zhenting Tan, ‘Perfecting the Chinese Law of Trusts: A Critical and Comparative Study of the Australian and the Chinese Law of Trusts’ (PhD Thesis, Bond University, 2005) 180; 陈向聪 [Chen Xiangcong] (n 33) 202; 赵廉慧 [Zhao Lianhui] (n 33) 329; 周小明 [Zhou Xiaoming] (n 35) 279; 谭振亭 [Tan Zhenting] (n 33) 124. The duty of prudence and diligence in the *Chinese Trust Law* is akin to the duty of care in common law jurisdictions. See Lusina Ho, ‘The Reception of Trust in Asia: Emerging Asian Principles of Trust?’ [2004] *Singapore Journal of Legal Studies* 287, 290; Antonio Cappiello, ‘Using Trusts to Manage Private and Charitable Patrimony: An Overview and

the duty to handle affairs in the best interest of the purpose be understood as a composite of the duty to act in honesty and the duty to perform tasks with the requisite degree of prudence and care? Or are the terms of honesty, prudence and care only used as references for assessing whether the performance of a trustee is in the best interest of the purpose? The law does not elaborate on these questions. Because of these ambiguities, the trustee will face numerous problems in the performance of its duties. For example, what factors are relevant to the determination of the performance of ‘in the best interest of the charitable purpose’? What acts are mandated and prohibited by the concepts of honesty and prudence in the context of ‘in the best interest of the charitable purpose’? What is the connection between acting in the best interest of the charitable purpose and acting in good faith?

The second type of ambiguity relates to the nature of this duty. The majority view of Chinese academics and commentators holds that article 25(1)⁵¹ of the *Chinese Trust Law* is the clause prescribing the general rule of the duty of loyalty. It is nevertheless worth reconsidering whether this view accords with what the law says. The *Chinese Trust Law* does not merely say that the trustee ought to handle trust affairs in the best interest of the charitable purpose. Instead, there is a qualifier in front of the description of this duty — that is, the trustee shall abide by the provisions of the trust documents. A textual interpretation of this qualifier suggests that how to protect the best interest of the charitable purpose shall be defined by the trust documents.

The legal duty as to undertaking to perform a task can arise outside as well as within a loyalty relationship. A case in point is where a lessor agrees to lease his or her own property to a lessee. According to contract provisions, the lessor is obliged to deliver the house keys on time, and likewise the lessee ought to pay the rent on schedule. It is beyond doubt that the terms of this lease are hugely different from those of a trust contract. Nevertheless, the duty of a trustee to act in the best interest of the charitable purpose pursuant to the provisions of the trust is, in nature, the same as the duty of a lessor or a lessee under a lease — namely, a contractual duty to perform tasks that have been mutually agreed on. A trustee is obliged to pursue the best interest of the charitable purpose but merely to the extent necessary to execute the terms in the trust instrument. Applying this train of logic, ‘acting in the best interest of the charitable purpose’ can be understood as a particular way in which the trustee ought to fulfill its duties under the trust instrument, and the meaning of ‘the best interest of the charitable purpose’ ought to be ascertained by reference to specific terms in the trust instrument. Based on this understanding, a claim relating to failure to act in the

Comparison of U.S., EU, and Chinese Law’ (2014) 22 *National Italian American Bar Association Law Journal* 13, 17.

⁵¹ Article 25(1) of the *Chinese Trust Law* stipulates that the trustee shall abide by the provisions of trust documents and handle trust affairs in the best interest of the beneficiary.

best interest of the charitable purpose is simply a claim for breach of an undertaking to act in a specific manner.⁵²

C Comparison between Charitable Trusts and Agency Relationships

The above analysis⁵³ relating to the assignment of powers and duties to the settlor and the trustee suggests that, in the Chinese legal system, there is a close relationship between charitable trusts and agency relationships. On the one hand, both settlors and principals are endowed by law with wide powers to interfere in the disposition of entrusted assets. The two types of parties are all allowed to be proactive in supervising how entrusted affairs are managed. On the other hand, trustees have autonomous powers to make decisions about the management and distribution of charitable assets. In contrast, an agent is obliged to follow the principal's instructions strictly, and the discretion that an agent has in determining how entrusted affairs are managed is heavily constrained. Consistent with this analysis, in what way and to what extent are charitable trusts similar to, or different from, agency relationships? Published literature has examined the differences and similarities between express private trusts and agency relationships,⁵⁴ but has not examined the question outlined above. The section below analyzes this question to shed light on how trustees interact with settlors in the legal framework for charitable trusts.

1 Similarities to Agency

In light of the analysis outlined in Sections A and B, one can identify the similarity between charitable trusts and agency relationships in three aspects. First, both settlors and principals are entitled to reserve the legal title to entrusted assets.⁵⁵ Secondly, both settlors and principals are granted a wide range of statutory powers to influence the management of entrusted assets.⁵⁶ Thirdly, both trustees and agents are subject to

⁵² The duty as to undertaking to perform a task is analogous to strict contract duties and not exclusive to the trustee, for anyone who has assumed legally enforceable obligations ought to act in a specific way, whether based on contract or by virtue of a trust. See Lusina Ho, *Trust Law in China* (n 9) 144. At an international level, it accords with the common trust practice where the duty to abide by the directions of trust instruments is the most important of all the rules relating to the duties of trustees. See Arthur Underhill et al, *Underhill and Hayton Law Relating to Trusts and Trustees* (LexisNexis Butterworths, 17th ed, 2007) [47.2]; Michael Bryan et al, *A Sourcebook on Equity and Trusts in Australia* (Cambridge University Press, 2016) 369.

⁵³ See analysis in Section III B of this Chapter.

⁵⁴ See, eg, Lusina Ho, *Trust Law in China* (n 9) 55–6; 赵廉慧 [Zhao Lianhui] (n 33) 62–6; 高凌云 [Gao Lingyun] (n 35) 32–3; 周小明 [Zhou Xiaoming] (n 35) 96–100; 陈向聪 [Chen Xiangcong] (n 33) 33–6.

⁵⁵ Rebecca Lee, 'Conceptualizing the Chinese Trust' (2009) 58(3) *International & Comparative Law Quarterly* 655, 659; Charles Zhen Qu (n 33) 356; Lyu (n 17) 471; Ho (n 50) 294; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 26) art 2; 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016, art 44.

⁵⁶ 《中华人民共和国民法总则》 [General Rules on the Civil Law of the People's Republic of China] (People's Republic of China) National People's Congress, 15 March 2017, (n 8) arts 168–9; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 26) arts 11, 20, 33, 38.

onerous duties, including the duty to avoid self-dealing, the duty of care, the duty not to delegate their duties or powers unless authorized, and the duty to obey the directions of the documents (i.e. trust documents or entrusted documents).⁵⁷

There are two reasons for these similarities. The first relates to the background for the enactment of the *Chinese Trust Law*.⁵⁸ Different from the development path of common law trusts, the discussions of ‘why the trust system should be transplanted’ and ‘how a trust system should be established so that the logical coherence of the existing Chinese legal system will not be greatly and adversely affected’ were carried out in a period in which Chinese agency theories had already been well-developed. Accordingly, Chinese lawmakers tended to draw references from agency theories when designing the legal system for Chinese trusts, so that any adverse impact that trust laws may have on the Chinese domestic legal system could be minimized to the largest extent.⁵⁹ As already analyzed in Section III-A ‘Legislative Reasons’, there is a legal hierarchy between the *Chinese Trust Law* and the *Measures for Charitable Trusts*: the latter, as an administrative regulation, is subordinated to the former. For the purpose of maintaining consistency and coherence between superior and subordinate laws, lawmakers tend to follow the approach adopted in the *Chinese Trust Law* when determining how settlors should interact with trustees in the governance of charitable trusts. Aside from the consideration of legislative hierarchy, another reason relates to charity practice in China. The analysis in Chapter 1 shows that the media has exposed a series of scandals involving misuse of charity funds over the past two decades.⁶⁰ The general public, therefore, lacks trust and

⁵⁷ 《中华人民共和国民法总则》 [General Rules on the Civil Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 15 March 2017, (n 8) arts 164, 168-9; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 26) arts 29, 31.

⁵⁸ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 26) art 2; 王萍 [Wang Ping], 《大陆法代理制度与英美法信托制度之比较》 [Comparison between the Agency System of Mainland Law and Anglo-American Trust Law System] (1998) 3 甘肃政法学院学报 *Journal of Gansu Political Science and Law Institute* 49, 53.

⁵⁹ A large number of trust cases from the early 2000s were addressed by recharacterizing trust relationships into a contractual or agency relationship. See 《上海岩鑫实业投资有限公司诉华宝信托投资有限责任公司信托合同纠纷案》 [Shanghai Yanxin Industrial Investment Co Ltd v Huabao Trust Investment Co Ltd — Dispute over Trust Contract], 上海市第一中级人民法院 [Shanghai First Intermediate People’s Court], 沪一中民三（商）初字第 201 号 [Civil Division, Initial Ruling, Case No 201], 25 August 2004; 《健桥证券股份有限公司与宝鸡钛业股份有限公司委托理财合同纠纷上诉案》 [Jianqiao Securities Co Ltd v Baoji Titanium Industry Co Ltd — Dispute over Entrusted Financial Management Contract], 最高人民法院 [Supreme People’s Court], 民二终字第 29 号 [Civil Division, Appeal Ruling, Case No 29], 29 April 2005; 《北京海淀科技发展有限公司诉深圳市新华锦源投资发展有限公司财产权属纠纷案》 [Beijing Haidian Technology Development Co Ltd v Shenzhen Xinhua Jinyuan Investment Development Co Ltd — Dispute over the Plaintiff’s Property Ownership], 重庆市高级人民法院 [Chongqing High People’s Court], 渝高法民初字第 14 号 [Civil Division, Initial Ruling, Case No 14], 19 March 2007.

⁶⁰ See analysis in Part II B of Chapter 2.

confidence in charity trustees' performance of their roles. In this light, allowing settlors to retain legal title to trust assets and granting settlors extensive supervisory powers may play a role in motivating the public to use trusts to develop charitable causes.⁶¹

2 Differences from Agency

Agency theories have heavily impacted the construction of the Chinese charitable trust system. Despite this, charitable trusts are, in substance, still distinguishable from agency relationships in three respects. These respects demonstrate the unique characteristics of the structure of charitable trusts and make them in certain scenarios institutionally more advantageous than agency when developing charitable causes. To start with, pursuant to articles 15 and 16 of the *Chinese Trust Law*, where settlors or trustees become insolvent, charitable trust assets are not subject to the claims of trustees' or settlors' general creditors. In comparison, according to article 71 of the *Provisions of the Supreme People's Court on Certain Issues Concerning the Trial of Enterprise Bankruptcy Cases*,⁶² entrusted assets in an agency relationship will fall into the purview of a principal's liquidation assets upon his insolvency. This means the creditors of a principal are entitled to sue for proper distribution of the entrusted assets in accordance with the *pari passu* principle.

Secondly, after charitable trusts have been validly established, trustees have the autonomy to determine how charitable trusts should be managed and when charitable trust assets should be distributed. Allowing trustees to make decisions on their own initiative is an inherent need for trust management.⁶³ In a formal sense, unless otherwise stipulated in the trust instruments, settlors should leave trustees to make decisions about the management of charitable trusts independently. The question about to whom trustees' duties are owed is still subject to debate.⁶⁴ Some interviewees in this research propose that trustees' duties are owed to the charitable trust purpose,⁶⁵ while others opine that trustees owe their duties to the general public.⁶⁶ Despite the lack of a standard answer to this question, scholars and practitioners generally agree⁶⁷ that trustees' duties are not owed to settlors. In contrast, it is unquestionable that agents owe strict duties to principals. In the eyes of the agents, answering the question of what steps can be taken to comply with the principals' requirements is crucial to the day-to-day management of entrusted affairs.

⁶¹ See interviews with L1, L2, A4 and A5.

⁶² 《最高人民法院关于审理企业破产案件若干问题的规定》 [Provisions of the Supreme People's Court on Certain Issues Concerning the Trial of Enterprise Bankruptcy Cases] (People's Republic of China) Supreme People's Court, 9 January 2002, art 71.

⁶³ See interviews with T1, T5 and L5.

⁶⁴ A trustee shall perform its duties for the best fulfillment of the charitable purpose expressed in the trust documents. See interviews with L3, L8 and A6.

⁶⁵ See interviews with L1 and L8.

⁶⁶ See interviews with A1, A2, T1 and T7.

⁶⁷ See interviews with A1, A3, A6, A7, L1, L2 and L5.

Finally, protecting public benefits in the carrying out of charitable purposes is a common thread running through the entire life cycle of a charitable trust. The valid status of charitable trusts would not be adversely affected even in special circumstances, such as when trustees are dissolved or have lost their statutory qualifications, or when settlors are dead.⁶⁸ In comparison, agency relationships are automatically terminated when the agents in question lose their capacity for civil conduct, or the agents or their principals are dead.⁶⁹

IV UNCERTAIN ROLE OF BENEFICIARIES

Section III discussed the internal relationship between settlors and trustees in law. The analysis showed that, in law, the settlor is granted extensive powers while the trustee is subject to broad duties. The vagueness of the law on what the scopes of these powers and duties are and how the roles of the settlor and the trustee should be performed creates a great deal of uncertainty to the administration of charitable trusts. This section will analyze the role of beneficiaries. As already mentioned in Section II, the law makes no mention of the role and legal nature of charitable trust beneficiaries. The silence of the law has resulted in an intense debate among scholars and practitioners on whether the concept ‘beneficiary’ truly exists in the context of Chinese charitable trusts. This debate focuses on three interrelated questions. First, are the objects who receive charitable trust benefits ‘beneficiaries’ or merely ‘recipients’? Secondly, is there any difference between ‘beneficiaries’ and ‘recipients’ in terms of standing to sue in respect of trustees’ maladministration of charitable trusts? Thirdly, what is the scope of an object’s standing? Is their standing limited to the individualized interest they have in the trust assets? Or can their standing extend to the general administration of charitable trusts, irrespective of how much and what kind of interest they have in the trust assets? This section examines these questions to identify in what way and to what extent beneficiaries may play a supervisory role in trustees’ performance of their duties.

A *Exception to the Requirement of Certainty of Object*

Since the introduction of the *Chinese Trust Law* in 2001, the legal status of purpose trusts has been the subject of much academic and judicial writing. Pursuant to article 2 of the *Chinese Trust Law*, ‘the trustee is allowed to administer or dispose of trust property in the interest of a beneficiary or for any intended

⁶⁸ 王萍 [Wang Ping] (n 58) 53; 《中华人民共和国信托法》 [Trust Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 28 April 2001, (n 4) art 52; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 26) art 37.

⁶⁹ 朱庆育 [Zhu Qingyu], 《民法总论》 [The General Theory of Civil Law] (北京大学出版社 [Peking University Press], 2016) 356–7; 《中华人民共和国民法总则》 [General Rules on the Civil Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 15 March 2017, (n 8) art 173.

purposes'. An initial glance at this provision suggests that the *Chinese Trust Law* permits a purpose trust to be created. However, one reaches a strikingly different conclusion when the law is read and construed as a whole: a trust, pursuant to Clause 5 of article 11 of the *Chinese Trust Law*, is by itself invalid in the absence of identifiable beneficiaries.⁷⁰ So far as the two irreconcilable provisions are concerned, to what extent can trusts for abstract purposes (e.g. purposes for maintenance of one's tomb or for promoting charitable causes) be legally established in China? This question cannot be answered until judicial interpretations or new laws are issued for clarification. In Chinese law, an exception to the uncertainty of legal status of purpose trusts⁷¹ is the institution of charitable trust, the validity of which has been established by the *Chinese Charity Law* and the *Measures for Charitable Trusts*.

Inherent in the valid status of a charitable trust is the notion that it is in the public interest that the validity of charitable trusts should be acknowledged. To prevent trusts from becoming channels for crimes or unregulated flow of funds, article 10 of the *Measures for Charitable Trusts* takes a negative approach in defining who the beneficiaries could be. That is, settlors cannot designate, overtly or covertly, persons or entities who have *any interest* in the settlors themselves or the trustees as beneficiaries.⁷² This approach serves to discourage settlors or trustees from taking advantage of an affiliated relationship to damage the interest of a charitable trust. Article 10 uses the term 'any interest', but it makes no mention of how this

⁷⁰ Lusina Ho, Rebecca Lee and 金锦萍 [Jin Jinping] (n 9) 82; Foster (n 11) 627, 629; Lee (n 55) 656; 赵廉慧 [Zhao Lianhui] (n 33) 96–7; 江平 [Jiang Ping] and 周小明 [Zhou Xiaoming], 《建构大陆的信托法制的若干设想》 [Several Thoughts on the Construction of Trust System in Mainland China] (1993) 6 政法论坛 *Tribune of Political Science and Law* 5, 8; 江平 [Jiang Ping] and 周小明 [Zhou Xiaoming], 《论中国的信托立法》 [Research on the Legislation of Chinese Trust Law] (1994) 6 中国法学 *China Legal Science* 53, 55–6.

⁷¹ At common law, there is an intense debate as to how the legal status of non-charitable purpose trusts ('NCPTs') could be understood. One argument holds that NCPTs are void due to the absence of ascertainable individuals in whose favor the court can decree performance. See *Bowman v Secular Society Ltd* [1917] AC 406, 441; *Re Wood* [1949] Ch 498, 501. In contrast, another argument holds that the certainty of object is not a legal necessity, 'but it is reasonable, equitable, and in accordance with the analogies of the law'. See John Chipman Gray, 'Gifts for a Non-Charitable Purpose' (1902) 15(7) *Harvard Law Review* 509, 515. Clauson J expressed the similar view in *Re Thompson* [1934] Ch 342 at 344, 'the object of the gift has been defined with sufficient clearness and is of a nature to which effect can be given'. The center of the above debate lies in the enforceability of NCPTs. See *Re Astor's Settlement Trusts* (1952) 1 All ER 1067, 1071; *Radmanovich v Nedeljkovic* [2001] NSWSC 492 (15 June 2001), [102], [113]; *Re Denley's Trust Deed* (1969) 1 Ch 373, 377; *Re Hummeltenberg* [1923] All ER Rep 49, 51; Matteo Ho, 'Time to Allow Non-Charitable Purpose Trusts in Hong Kong?' 44 *Hong Kong Law Journal* 519, 522–3; Adam J Hirsch, 'Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws' (1998) 26 *Florida State University Law Review* 913, 914; Adam J Hirsch, 'Bequests for Purposes: A Unified Theory' (1999) 56 *Washington and Lee Law Review* 33, 45; Philip Jamleson, 'Trusts for the Maintenance of Particular Animals' (1985) 14(2) *The University of Queensland Law Journal* 175, 175. The case law developed over the last century has upheld a limited, though well-recognized, number of NCPTs. See, eg, *Bourne v Keane* [1919] AC 815; *Pedulla v Nasti* (1990) 20 NSWLR 720; *Re Thompson* [1934] Ch 342; *Re Pearce* [1946] SASR 118 (24 October 1946); *Chesterman v Mitchell* (1923) 24 SR (NSW) 108; *Carson v Presbyterian Church of Queensland* [1956] St R Qd 466 (15 December 1955). Nevertheless, the basis on which these exceptional and anomalous trusts are recognized falls short of consistency, and it is doubtful whether these instances can be followed in light of the recent case law. See David B Parker and Anthony R Mellows, *The Modern Law of Trusts* (Sweet and Maxwell, 5th ed, 1983) 177.

⁷² 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 26) art 10.

term should be defined. For example, what is the legal nature of the ‘interest’ here: pecuniary or non-pecuniary? Can altruistic or moral interest fall into the purview of the term ‘any interest’ here? The statute provides no answers to these questions. Nor does there exist case law that deals with this matter. The vagueness of the law in understanding the term ‘any interest’ makes it difficult for trustees to select beneficiaries.

B Role of Beneficiaries in the Governance Framework

There are two fundamental questions relevant to the arrangement of a trust. First, what is the analytical nature of this arrangement, i.e. trust for purposes or trust for persons? Secondly, who has the standing to enforce the duties of the trustee? In express private trusts, the two questions are answered in the same way since the beneficiary is the person to whom the trustee should be accountable. Nevertheless, in the common law world, when it comes to charitable trusts, the two questions are answered in a different way. As a matter of public policy, an object’s entitlement to bring proceedings is granted by legislation or case law,⁷³ independent of the analytical nature of the trust.⁷⁴

It is widely acknowledged that charitable trusts are purpose trusts and thus the conceptual distinction between beneficiaries and recipients is not theoretically significant at common law. In contrast, this distinction is particularly meaningful in understanding the nature of Chinese charitable trusts. There is a

⁷³ The case law in the UK and Australia takes the ‘special interest’ rule to assess whether individuals have standing to file lawsuits against a trustee’s maladministration of charitable trusts. See *Re Hampton Fuel Allotment Charity* (1988) 3 WLR 513, 520; *Haslemere Estates Ltd v Baker* (1982) 1 WLR 1109, 1122; *Royal Society for the Prevention of Cruelty to Animals v Attorney General* (2001) 3 All ER 530, 540; *Scott v National Trust for Places of Historical Interest or Natural Beauty* (n 23) 713–14; *Metropolitan Petar v Mitreski* [2001] NSWSC 976 (31 October 2001), [6]; *Ngarluma Aboriginal Corp RNTBC v Attorney General (WA)* [2014] WASC 245 (7 July 2014), [46]–[50]; *Laura & Alfred West Cottage Homes Inc v Attorney-General (SA)* [2018] SASA 19 (26 February 2018), [8]–[11].

⁷⁴ Take Anglo-Australian charitable trusts for example. A number of cases, albeit a small number, in the course of last century have held that there are no beneficiaries in Anglo-Australian charitable trusts. A well-known reference is the judgment of Dixon and Evatt JJ in *Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209, where their honors compared the relationship between charitable trusts and private trusts at page 222, ‘a charitable trust is a trust for a purpose, not for a person...to dispose of property for the fulfilment of ends considered beneficiary to the community is an entirely different thing from creating equitable estates and interests and limiting them to beneficiaries’. This statement has been quoted or followed in several subsequent cases. See, eg, *Ngarluma Aboriginal Corp RNTBC v Attorney General (WA)* (n 73) [49]; *Re Cooper Street Property Trust (No 2)* [2017] VSC 291 (26 May 2017), [29]; *Wright v Stevens* [2018] NSWSC 548 (3 May 2018), [218]; *The Salvation Army (New South Wales) Property Trust v Chief Commissioner of State Revenue* [2018] NSWSC 128 (16 February 2018), [79]; *Metropolitan Petar v Mitreski* [2012] NSWSC 16 (3 February 2012), [33]; *Bropho v City of Perth* [2016] FCA 1098 (8 September 2016), [60]; *James Cook University v Townsville City Council & Anor* [2011] QSC 209 (23 June 2011), [11]; *Public Trustee of Queensland v Neale & Ors* [2008] QSC 343 (23 December 2008); *Melbourne Jewish Orphan and Children’s Aid Society Inc & Anor v ANZ Executors and Trustee Company Ltd & Anor* [2007] VSC 26 (20 February 2007), [63]; *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* [1998] HCA 49 (6 August 1998), [28]; *Bropho v State of Western Australia* [2007] FCA 519 (13 April 2007), [345]. Hansen J summarized the understanding of ‘beneficiary’ in a well-known passage of his judgment: ‘[i]n such a case there is no person who is a beneficiary. That is for the fundamental reason that a charitable trust is a trust for a purpose and not for a person. A charitable trust does not have a beneficiary’. See *BSH Holding Pty Ltd v Commissioner of State Revenue* [2000] VSC 302 (2 August 2000), [9].

debate as to how the legal nature of objects can be understood: are the objects who receive benefits from charitable trusts ‘beneficiaries’ or merely ‘recipients’? In law, the term ‘beneficiary’ is used extensively, suggesting that the objects who receive benefits are beneficiaries in the trust law sense.⁷⁵ In contrast, many academic papers or commentaries regard the term ‘beneficiary’ as speculative and argue that this term can be interpreted as either beneficiary or recipient.⁷⁶ This debate focuses on two arguments. The first is the beneficiary argument. That is, the concept ‘beneficiary’ does not exist as a general proposition — it is only in the phase of trust asset distribution that beneficiaries can be identified.⁷⁷ The beneficiary status of an object starts from the date of its being selected and ends upon its receipt of trust benefits. During the period where the beneficiary title exists, objects have standing to sue for proper distribution of a certain part of trust assets. The second is the recipient argument. That is, objects who receive trust benefits are considered as recipients, rather than beneficiaries as understood in the law of express private trusts.⁷⁸ In this argument, recipients have no role to play at all in the governance structure of charitable trusts, notwithstanding they may have a particularized interest in trust assets after receiving the notice of distribution from trustees.

1 The Beneficiary Argument

The object with the title of beneficiary is entitled to sue as of right. Several pieces of legislation make provisions on this point. The question about how these different legislative provisions should be read and interpreted together is: pursuant to article 50 of the *Chinese Charity Law*⁷⁹ and article 63 of the *Measures for Charitable Trusts*,⁸⁰ the *Measures for Charitable Trusts* is applied first. In the absence of relevant provisions in those *Measures*, the *Chinese Charity Law* and the *Chinese Trust Law* are respectively applied in the second and third order. So, one may refer to the *Chinese Trust Law* to investigate whether the object

⁷⁵ See 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 26) arts 10-11; 《民政部、中国银行业监督管理委员会关于做好慈善信托备案有关工作的通知》 [Notice of Civil Affairs Department and China Banking Regulatory Commission on the Recordation Work for Charitable Trusts] (People’s Republic of China) Civil Affairs Department and China Banking Regulatory Commission, 25 August 2016, s 2.

⁷⁶ 谭振亭 [Tan Zhenting] (n 33) 199–200; 中国信托业协会 [China Trustee Association] (n 25) 62, 84; 谢哲胜 [Xie Zhesheng], 《信托法》 [Trust Law] (元照出版公司 [Angle Publishing], 2009) 219; 陈向聪 [Chen Xiangcong] (n 33) 278–9; 赵廉慧 [Zhao Lianhui] (n 33) 555.

⁷⁷ 谭振亭 [Tan Zhenting] (n 33) 199–200; 中国信托业协会 [China Trustee Association] (n 25) 62, 84.

⁷⁸ 谢哲胜 [Xie Zhesheng] (n 76) 219; 陈向聪 [Chen Xiangcong] (n 33) 278–9; 赵廉慧 [Zhao Lianhui] (n 33) 555.

⁷⁹ ‘The establishment of a charitable trust, the management of trust assets, the parties to a trust, the termination and liquidation of a trust, etc., shall be governed by other relevant provisions herein in the absence of relevant provisions in this Chapter, and shall be governed by the Trust Law of the People’s Republic of China in the absence of relevant provisions herein.’ See 《中华人民共和国慈善法》 [Charity Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 16 March 2016, (n 55) art 50.

⁸⁰ ‘In the event of any discrepancy between these Measures and relevant prior provisions on charitable trusts, these Measures shall prevail.’ See 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 26) art 63.

has standing and if so, what the scope of its standing is, for the *Measures for Charitable Trusts* and the *Chinese Charity Law* have no provisions at all spelling out the standing of an object.

The beneficiary's right to sue is stipulated in articles 49 and 22 of the *Chinese Trust Law*. The two articles, when read and construed as a whole, prescribe that 'where (a) trustees dispose of trust assets in breach of trust purposes or (b) causes losses to trust assets due to violation of their administrative duties or improper handling of trust affairs, beneficiaries have the right to petition the court to rescind such disposition or ask the trustee to restore trust assets to their former state'.⁸¹ In light of these provisions, a beneficiary's right to sue is confined to a specific focus that solely deals with situations (a) and (b). Therefore, scenarios like trustees receiving commissions or bribes by taking advantage of their position; trustees utilizing information and opportunities that they have access to by virtue of their position as trustees; or trustees using trust assets to offer guarantees for their affiliated parties, seem to be outside the scope of the beneficiary's right to sue as defined in articles 49 and 22 of the *Chinese Trust Law*. Two questions arise when charitable trust beneficiaries receive notice of distribution of charitable assets from trustees. First, aside from the claim of proper distribution of a certain part of trust assets, can a beneficiary's standing extend to the general administration of charitable trust affairs? Secondly, if the answer to this question is affirmative, would the constraints concerning actionable situations (a) and (b) equally apply to proceedings launched by charitable trusts beneficiaries? Published literature does not examine these questions. Nor do there exist any legislative provisions or case law that deal with this matter.

⁸¹ Article 22 of the *Chinese Trust Law* is vague. It is unclear whether the expression 'causing losses to the trust property' is connected to 'disposition in breach of trust purpose'. One argument suggests that the availability of the remedy of rescission is premised on the fulfillment of two conditions: causing losses to the trust property and disposition in breach of trust purposes. See 赵廉慧 [Zhao Lianhui] (n 33) 476; 卞耀武 [Bian Yaowu] (n 35) 92; 周小明 [Zhou Xiaoming] (n 35) 236; Lusina Ho, Rebecca Lee and 金锦萍 [Jin Jinping] (n 9) 95. Another argument suggests that breach of the trust purpose alone is sufficient to trigger the remedy of rescission under article 22 of the *Trust Law*. See Lusina Ho, *Trust Law in China* (n 9) 149; 何宝玉 [He Baoyu], 《信托法原理研究》 [Research on the Jurisprudence of Trust Law] (中国政法大学出版社 [China University of Political Science and Law Press], 2005) 183; 《吉林省建苑设计集团有限公司与四川信托有限公司信托纠纷案》 [Jilin Jianyuan Design Company v Sichuan Trust Company — Trust Dispute], 四川省成都市中级人民法院 [Chengdu Intermediate People's Court of Sichuan Province], 成民初字第2449号 [Civil Division, Initial Ruling, Case No 2449], 20 October 2016. The *Chinese Trust Law* is modelled on the Trust Act of Taiwan, of Japan, and of South Korea, but in the three jurisdictions the exercise of rescission is not conditioned on any loss incurred to trust properties. See 谢哲胜 [Xie Zhesheng] (n 76) 176; Wu Ying-Chieh, 'Trust Law in South Korea: Developments and Challenges' in Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 59–60; Makoto Arai, 'Trust Law in Japan: Inspiring Changes in Asia, 1922 and 2006' in Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 37–8; Masayuki Tamaruya, 'Japanese Law and the Global Diffusion of Trust and Fiduciary Law' (2017) 103 *Iowa Law Review* 2229, 2242, 2250.

2 The Recipient Argument

The recipient argument holds that objects who receive trust benefits are recipients, as opposed to beneficiaries as understood in the law of express private trusts. On this view, recipients have no standing to sue, as they are not trust parties and therefore have no right to interfere with trustees' management of charitable trusts.⁸² While it appears that a recipient has no standing to sue in the charity law, this does not completely resolve the question. As discussed further below, there is an argument that even without express granting of standing, a recipient may be able to rely on other general provisions in the law that give standing where a person can show harm to a 'direct interest'. As the argument below shows, provisions of *Civil Procedure Law of the People's Republic of China* (hereinafter '*Civil Procedure Law*')⁸³ and environmental public interest litigations (hereinafter '*EPIL*') give plaintiffs standing where they can show harm to a direct interest.

This section analyses the interpretation given to 'direct interest' in the two types of cases and considers whether that reasoning may be applied by analogy to the position of a recipient under a charitable trust. While not definitive of the question about independent standing of a recipient in a charitable trust to sue, analysis of the two types of cases does provide some indication of the current scope of the 'direct interest' as may be applied to determine the standing of a recipient who cannot otherwise demonstrate a separate right to standing to sue in relation to trustees' administration of charitable assets.

Article 119 of the *Civil Procedure Law* stipulates that 'to bring a lawsuit, the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case'. The phrase 'direct interest in the case' already has twenty-six years of history.⁸⁴ An interpretation of this phrase may provide basis to grant recipients standing to sue if they can show harm to a direct interest. On the other hand, this phrase itself is riddled with a great deal of uncertainty that may create impediments to its application on the charitable trust. For example, how should the term 'direct interest' be understood? What criterion or criteria should be adopted when determining whether an interest is direct or not? In what way and to what extent can a person be said to have a direct interest in the case?⁸⁵ The *Civil Procedure Law* does not elaborate on these questions, and presently no judicial interpretations are issued for clarification.

⁸² 谢哲胜 [Xie Zhesheng] (n 76) 219; 陈向聪 [Chen Xiangcong] (n 33) 278–9; 赵廉慧 [Zhao Lianhui] (n 33) 555.

⁸³ 《中华人民共和国民事诉讼法》[Civil Procedure Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 27 June 2017, art 119.

⁸⁴ This phrase was first appeared in article 108 of the *Civil Procedure Law* (1991). The *Civil Procedure Law* has been revised twice over the past twenty-six years. The wording of 'direct interest' has been incorporated in article 119 of the *Civil Procedure Law* (2012) and article 119 of the *Civil Procedure Law* (2017) respectively.

⁸⁵ Academics have different views on the legal meaning of direct interest. Some scholarly writings propose that 'persons having direct interest' solely refer to persons who have personal or property interest in the subject matter of the lawsuit. Others suggest that procedural laws are separated from substantial laws. Therefore, the term 'direct interest' can be interpreted flexibly according to different case facts; for example, allowing certain persons (i.e. agencies and custodians) to sue on behalf of others with a personal or property interest in the subject matter of the lawsuit. See 肖

(a) Lessons from Private Interest Litigation

By using article 119 of the *Civil Procedure Law* as a search item, the author examined 72 cases adjudicated by the Chinese Supreme Court and discovered that the interpretation of ‘direct interest’ was subject to considerable uncertainty. The key question that these cases are mainly concerned with is whether plaintiffs have a direct interest in the subject matter of the lawsuit. Judgments examined in this research show that Chinese judges are conservative in interpreting the term ‘direct interest’. In their interpretation, ‘direct interest’ requires that the plaintiff’s civil rights or interests are, or may be, adversely affected by the action of the defendant being sued.⁸⁶ This interpretation can provide insights into two scenarios with regard to the standing of a recipient.

In the first scenario, recipients have been notified of distribution of a certain part of charitable assets. However, this distribution did not occur within the agreed time, or within the agreed time but was inconsistent with the amount or form notified by charity trustees. In this scenario, it can be argued that recipients have been notified by charity trustees and therefore already have a particularized proprietary interest in the proper distribution of a certain part of charitable assets. Failure to distribute trust assets in compliance with the notice will result in a particularized loss to these recipients, thereby entitling them to bring proceedings according to the *Civil Procedure Law*. In the second scenario, recipients have already

建华 [Xiao Jianhua], 《正当当事人理论的现代阐释》 [Modern Interpretation of the Theory of Qualified Party] (2000) 4 比较法研究 *Journal of Comparative Law* 337, 346–7; 黄忠顺 [Huang Zhongshun], 《论公益诉讼与私益诉讼的融合——兼论中国特色团体诉讼制度的构建》 [Integration of Public Interest Litigation and Private Interest Litigation: Discussion of Construction of Group Litigation System with Chinese Characteristics] (2015) 1 法学家 *The Jurist* 19, 26; 董伟威 [Dong Weiwei], 《民事公益诉讼人的法律问题》 [Legal Issues of Civil Public Interest Litigants] (2002) 12 人民司法 *People’s Jurisprudence* 44, 44; 潘申明 [Pan Shenming], 《比较法视野下的民事公益诉讼》 [Civil Public Interest Litigation in the Perspective of Comparative Law] (PhD Thesis, East China University of Political Science and Law, 2009) 15–18.

⁸⁶ See 《中银投资有限公司与太原市北辰综合开发有限责任公司一般借款合同纠纷二审民事裁定书》 [Civil Order of the Second Instance of the General Loan Contract Dispute between Bank of China Investment Co Ltd and Taiyuan Beichen Comprehensive Development Co Ltd], 最高人民法院 [Supreme People’s Court], 民二终字第 38 号 [Civil Division, Appeal Ruling, Case No 38], 15 June 2014; 《吴振庆与哈尔滨现代房地产开发有限公司不当得利纠纷二审民事裁定书》 [Civil Order of the Second Instance of the Unjust Enrichment Dispute between Wu Zhenqing and Harbin Modern Real Estate Development Co Ltd], 最高人民法院 [Supreme People’s Court], 最高法民终 149 号 [Civil Division, Appeal Ruling, Case No 149], 1 March 2017; 《河北省直纪元房地产开发有限公司、河北省西山迎宾馆有限公司物权保护纠纷二审民事裁定书》 [Civil Order of the Second Instance of the Property Protection Dispute between Hebei Province Zhiji Yuan Real Estate Development Co Ltd and Hebei Province Xi Shanying Hotel Co Ltd], 最高人民法院 [Supreme People’s Court], 最高法民终 764 号 [Civil Division, Appeal Ruling, Case No 764], 16 December 2016; 《盘县鸡场坪金龙煤业有限公司、管彦华合同纠纷再审审查与审判监督民事裁定书》 [Civil Order of the Retrial Review and Trial Supervision of the Contract Dispute between Guan Yanhua and Pan County Chicken Ping Jinlong Coal Industry Co Ltd], 最高人民法院 [Supreme People’s Court], 最高法民申 4746 号 [Civil Division, Retrial Ruling, Case No 4746], 29 November 2017; 《胡云河与云南鑫潮融和置业有限公司民间借贷纠纷二审民事裁定书》 [Civil Order of the Second Instance of the Private Lending Dispute between Hu Yunhe and Yunnan Xinchao Ronghe Real Estate Co Ltd], 最高人民法院 [Supreme People’s Court], 民一终字第 139 号 [Civil Division, Appeal Ruling, Case No 139], 16 October 2013.

received notice from charity trustees. However, prior to distribution, they have discovered the trustee's maladministration and honestly believe that this mismanagement may threaten the proper distribution of trust assets to them. In this scenario, the proprietary loss of informed recipients seems imminently likely to occur, not merely speculative or possible, and their interest in the proper distribution of trust assets has already materialized upon receiving the notice. Although the law does not mention whether recipients have standing in the second scenario, it is arguable that a flexible approach can be taken to grant them standing to sue in relation to trustees' maladministration of charitable assets. There are two reasons for this approach. First, it can serve the purposes of deterring the wrongful conduct of the trustee and protecting public benefits in carrying out of charitable trust purposes. Secondly, this approach facilitates invocation of a court's jurisdiction over the supervision of charitable trusts, so as to protect public interests in the administration of charitable assets as much as possible.

(b) Lessons from Environmental Public Interest Litigation

Based on the above analysis, the next question to consider is how the scope of a recipient's standing could be defined. Is their standing limited to the individualized interest they have in trust assets? Or can their standing extend to the general administration of charitable trusts, irrespective of how much and what kind of interest they have in trust assets? For example, if recipients discover that trust assets are poorly managed even though such mismanagement would not threaten the distribution of a certain portion of trust assets to them, could they still bring proceedings in respect of trustees' improper management of charitable trusts? The key issue behind this question is whether recipients can act as a 'private procurator acting for the public interest',⁸⁷ on the condition that they have no substantial interest in the outcome of trustees' mismanagement. The case of *EPIL* may provide insights into the ways in which recipients play a supervisory role. First, *EPIL* reflects public policies that share similar concerns (i.e. protecting public interest) as those of charitable trusts. Secondly, the criterion for the standing of recipients is expressed in the same terms (i.e. having a direct interest in the subject matter of the litigation) as that of *EPIL*. The way in which the courts have interpreted its scope and meaning in *EPIL* can provide some indication to determine the standing of recipients under a charitable trust.

The institution of *EPIL* can be understood in three dimensions. First, in court practice, the question of whether individuals are entitled to voice complaints about environmental damage through *EPIL* is still addressed through interpreting the term 'direct interest'; namely, whether individuals have 'direct interest'

⁸⁷ Matthew D Zinn, 'Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits' (2002) 21 *Stanford Environmental Law Journal* 81, 131; James M Hecker, 'The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both' (1994) 8(4) *Natural Resources & Environment* 31, 32; Harold Feld, 'Saving the Citizen Suit: The Effect of *Lujan v Defenders of Wildlife* and the Role of Citizen Suits in Environmental Enforcement' (1994) 19 *Columbia Journal of Environmental Law* 141, 144.

in the outcome of the acts undermining the environment.⁸⁸ The judgment in *No 2 of Ten Guiding Cases Regarding Environmental Public Interest Litigations*⁸⁹ proposes that there are no specific individuals who have a direct interest in the subject matter of *EPIL*. In this light, individuals cannot file *EPILs* due to their failure to satisfy the direct interest test. Secondly, *EPIL* serves to protect the interest of the entire community: protecting public, not private interests lies at the heart of *EPIL*.⁹⁰ Thirdly, the courts need to consider a wide range of policy and social factors when adjudicating environment public interest cases. For instance, numerous construction projects are initiated by local governments, suggesting that their execution could benefit the public or society in general. Do citizens have a direct interest in these government-related projects? Answering this question needs to consider the nature and purpose of the government-related projects, the substance of the interest that citizens have, and the detriments and benefits of these lawsuits against those of the projects.

EPIL raises three questions in relation to a citizen's standing to sue. First, can citizen suits contribute to the monitoring of environmental pollution and entities' compliance with regulations? Secondly, would natural persons harass the courts with frivolous and hopeless lawsuits? Thirdly, at a macro level, what role

⁸⁸ Rachel E Stern, *Environmental Litigation in China: A Study in Political Ambivalence* (Cambridge University Press, 2013) 218; 巩固 [Gong Gu], 《大同小异抑或貌合神离? 中美环境公益诉讼比较研究》 [Looking Like Twins: Comparative Research on Environmental Public Interest Litigation between China and United States] (2017) 2 比较法研究 *Journal of Comparative Law* 105, 115, 117; 高雁 [Gao Yan] and 高桂林 [Gao Guilin], 《环境公益诉讼原告资格的扩展与限制》 [The Extension and Limitation of the Plaintiff's Standing in Environmental Public Interest Litigation] (2011) 3 河北法学 *Hebei Law Science* 153, 154, 156.

⁸⁹ 最高人民法院审判委员会 [Judicial Committee of the Supreme People's Court], 《最高法发布十起环境公益诉讼典型案例之二: 中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案》 (2016 年 12 月 28 日) [No 2 of Ten Guiding Cases Regarding Environmental Public Interest Litigations Published by the Supreme People's Court: China Biodiversity Conservation and Green Development Foundation v Ningxia Ruitai Science and Technology Co Ltd] (28 December 2016).

⁹⁰ 最高人民法院审判委员会 [Judicial Committee of the Supreme People's Court], 《最高法发布十起环境公益诉讼典型案例之九: 贵州省六盘水市六枝特区人民检察院诉贵州省镇宁布依族苗族自治县丁旗镇人民政府环境行政公益诉讼案》 (2016 年 12 月 28 日) [No 9 of Ten Guiding Cases Regarding Environmental Public Interest Litigations Published by the Supreme People's Court: People's Procuratorate of Liuzhi Special District of Liupanshui City, Guizhou Province v People's Government of Dingqi Township, Zhenning Buyi and Miao Autonomous County, Guizhou Province — Environmental Administrative Public Interest Litigation] (28 December 2016); 最高人民法院审判委员会 [Judicial Committee of the Supreme People's Court], 《最高法发布十起环境公益诉讼典型案例之四: 重庆市绿色志愿者联合会诉湖北恩施自治州建始磷厂坪矿业有限责任公司水库污染民事公益诉讼案》 (2016 年 12 月 28 日) [No 4 of Ten Model Cases Regarding Environmental Public Interest Litigations Published by the Supreme People's Court: Chongqing Green Volunteer League v Huang Changping Mining Co Ltd in Jianshi County, Enshi Tujia and Miao Autonomous Prefecture, Hubei Province — Civil Public Interest Litigation Regarding Reservoir Pollution] (28 December 2016). Aside from the case law, article 10 of the *Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Environmental Civil Public Interest Lawsuits* also indicates the public interest thinking of *EPILs* — that is, 'citizens, legal persons and other organizations that apply to participate in the proceedings on the ground of suffering personal or property damage shall be informed to file separate lawsuits'. See 《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》 [Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Environmental Civil Public Interest Lawsuits] (People's Republic of China) Supreme People's Court, 7 January 2015, art 10.

do citizen suits play in generating democratic benefits for society as a whole?⁹¹ The significance of each consideration varies, much depending upon the nature and importance of the defendant's action being litigated. In view of these considerations, the current approach that legislators in China take in *EPIL* is: qualified social organizations⁹² and the people's procuratorate can file lawsuits against activities that pollute the environment, cause ecological damage and harm the public interest.⁹³ If natural persons initiate lawsuits to vindicate the interest of the entire community rather than their individual interest, the courts will decline to confer standing to them.

Following from the above analysis, the next question to consider is 'How much reference can be drawn from *EPIL* when discussing a recipient's standing to sue under the charitable trust?'. This question can be answered by exploring two aspects. First, charitable trusts are in nature distinguishable from *EPILs*. In contrast to the public-leaning tendency of *EPIL*, the charitable trust is a public law-private law hybrid⁹⁴ that has private law norms in its legal structure. The checks and balances between trust parties are essential to the day-to-day governance of charitable trusts. In comparison, *EPIL* stands entirely within the public law sphere and the initiation of *EPIL* is heavily reliant on public organs. This analysis indicates that the experience of *EPIL* cannot be applied to charitable trust litigation directly without taking into account the differences between the two institutions. Secondly, in *EPIL*, environmental injuries are frequently probabilistic — for instance, the increased possibility of getting a serious disease owing to continuous

⁹¹ See Harold Feld (n 87); Mark Seidenfeld and Janna Satz Nugent, 'The Friendship of the People: Citizen Participation in Environmental Enforcement' (2005) 73 *The George Washington Law Review* 269, 299; Barton H Thompson, 'The Continuing Innovations of Citizen Enforcement' (2000) 2000 *University of Illinois Law Review* 185, 193, 199–200; Stephen M Johnson, 'Sue and Settle: Demonizing the Environmental Citizen Suit' (2014) 37 *Seattle University Law Review* 891, 910–11; Matthew D Zinn (n 87) 118–19; Karl S Coplan, 'Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law' (2014) 25 *Colorado Natural Resources, Energy & Environmental Law Review* 61, 85, 121; 巩固 [Gong Gu], 《2015 年中国环境民事公益诉讼的实证分析》 [An Empirical Analysis of China's Environmental Civil Public Interest Litigation in 2015] (2016) 9 *法学 Law Science* 16, 17–18; 王丽萍 [Wang Liping], 《突破环境公益诉讼启动的瓶颈: 适格原告扩张与激励机制构建》 [Breaking the Bottleneck of Initiating Environmental Public Interest Litigation: Expansion of Standing and Construction of Incentive Mechanisms] (2017) 3 *法学论坛 Legal Forum* 89, 93.

⁹² The qualified organizations should meet two conditions: first, being registered with the civil affairs department of the people's government at or above the level of city with districts in accordance with the law; and secondly, engaging specially in the public service activities in environmental protection for five consecutive years without any record of violation of laws. See 《中华人民共和国环境保护法》 [Environmental Protection Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 24 April 2014, art 58.

⁹³ 《中华人民共和国民事诉讼法》 [Civil Procedure Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 27 June 2017, (n 83) art 55; 《中华人民共和国环境保护法》 [Environmental Protection Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 24 April 2014, (n 92) art 58; 《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》 [Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Environmental Civil Public Interest Lawsuits] (People's Republic of China) Supreme People's Court, 7 January 2015, (n 90) art 11.

⁹⁴ See analysis in Section II of Chapter II.

exposure to toxic materials in the air.⁹⁵ Therefore, it is difficult to narrow down the scope of practical or potential victims in *EPIL*. In comparison, in a charitable trust where the charitable purpose and the selection criteria are clearly specified, it is not hard for a trustee to ascertain the list of potential recipients for distribution.

In light of the similarities and differences between charitable trusts and *EPIL*, the experience of *EPIL* may provide insights into the standing of recipients in two respects. First, in theory, if recipients can show harm to a direct interest, it is possible to grant them standing in accordance with article 119 of the *Civil Procedure Law*. However, do they have standing to sue in practice? If so, to what extent? These questions should be answered on a case-by-case basis, with regard to the substance of the interest that recipients have, the relationship of the interest to the furtherance of charitable trust purposes, and the factual context out of which such interest arises. Secondly, it is unclear whether recipients can sue where they have no direct interest in the outcome of a trustee's mismanagement. The denial of a citizen's standing in *EPIL* does not necessarily exclude the possibility of granting standing to recipients. The charitable trust model is a public law-private law hybrid, and this hybrid nature may limit the extent to which the experience of *EPIL* can be referenced. The current law suggests that the principles or rules in relation to a recipient's standing are not settled. In this light, can recipients under a charitable trust file lawsuit? If so, what is the scope of their standing? The two questions cannot be answered until new laws or judicial interpretations are issued for clarification.

V CONCLUSION

This chapter has analyzed the internal relationship between trust parties in the legal governance framework for charitable trusts. This analysis raised two key observations. The first relates to the tension between settlors and trustees in the legal governance framework. The settlor is granted extensive powers by law while the trustee is burdened by law with onerous duties. This legislative approach allows settlors not only to define the ways in which charitable trusts are administered but also to be proactive in supervising the performance of trustees' duties or responsibilities. This approach is consistent with the private law norms in the legal structure of charitable trusts.

On the other hand, the legislative regime governing charitable trusts is also incomplete and vague in various respects. This chapter has explored the areas where the legal governance is vague and the legal uncertainties that arise from this vagueness. It showed that the vagueness of the law may pose two types of risk to a trustee's management of charitable trusts. First, settlors are empowered to intervene intensively in the administration of charitable trust affairs. The vagueness of the law on the scope of settlors' powers and

⁹⁵ Harold Feld (n 87) 163.

how they should be exercised can lead to disputes between settlors and trustees in respect of the management of charitable trusts. Secondly, trustees are obliged to perform their duties in alignment with the trust's charitable purposes. However, the law does not elaborate the scope of trustees' duties and how settlors should interact with trustees. This ambiguity makes it difficult for trustees to assess whether their management is compliant with the requirements of the law and regulatory measures. Furthermore, the lack of clear criteria for assessing a trustee's performance makes it easy for the public to criticize its management of charitable trusts. The two types of risk together motivate settlors and trustees to take actions to clarify their powers and duties and to define the ways in which they should interact. These private actions will be discussed in more detail in Chapter 5.

The second observation raised by the analysis of this chapter relates to the role of beneficiaries in the governance framework of charitable trusts. The charity law adopts the term 'beneficiary' but makes no mention of what powers or rights a beneficiary may have in the governance setting. Academics and practitioners proposed two arguments about the nature of charitable trust beneficiaries; the beneficiary argument and the recipient argument. This chapter has examined the ways in which and the extent to which beneficiaries may play a supervisory role under each argument. The beneficiary argument indicates that the object with title of beneficiary is entitled to sue where trustees cause losses to trust assets due to violation of their duties or improper handling of trust affairs. But this argument does not address the question of what the scope of a beneficiary's standing is. In comparison, the recipient argument suggests that recipients have no standing to sue as they are not trust parties and thus have no right to interfere with a trustee's management of charitable trusts.

It appears that a recipient has no standing to sue in the charity law, but this does not entirely resolve the question. Under the recipient argument, this chapter has examined the *Civil Procedure Law* and *EPIL* and considered whether the reasoning of 'direct interest' in these two cases may be applied by analogy to the position of recipients under a charitable trust. This examination showed that a recipient may be able to sue if he can show harm to a direct interest. If recipients have already received notice from charity trustees, it can be argued that their proprietary interest in the proper distribution of a certain part of charitable assets has materialized. Therefore, recipients may be entitled to bring proceedings if the distribution of trust assets does not comply with the notice.

On the other hand, under the direct interest analysis, it is still unclear whether recipients have standing to sue where they have no substantial interest in the outcome of a trustee's mismanagement. The experience of *EPIL* showed that a wide range of policy and social factors will be considered when determining who can file a lawsuit under *EPIL*, and damage to a direct interest is only one of the factors to be considered. This chapter has examined the similarities and differences between charitable trusts and *EPIL*. It showed that the experience of *EPIL* has certain guiding significance in the charitable trust setting but the extent to

which this experience can be referenced is uncertain. Following from this analysis, this chapter concluded that due to the lack of clear rules or principles, there exists considerable uncertainty as to whether recipients can sue in respect of trustees' mismanagement of charitable trusts.

CHAPTER FOUR THE ADMINISTRATIVE REGULATION OF CHINESE CHARITABLE TRUSTS

I INTRODUCTION

Chapter 2 engaged in an analysis of the public law-private law nature of Chinese charitable trusts and argued that this hybrid nature permeates and informs the design of the governance framework for such trusts. Chapter 3 analyzed legal provisions in relation to the relationship between trust parties and argued that the vagueness of the law has created multifaceted uncertainty in the scope of settlors' powers and how they should be exercised, the scope of trustees' duties, the relationship between settlors and trustees, and the legal nature and role of beneficiaries under a charitable trust. Chapter 4 turns to analyze the practice of regulatory oversight of charitable trusts. The key questions that are examined in this chapter include what powers are granted to regulators and how they are exercised in practice. In Chinese law, it is unclear how regulatory powers should be exercised over charitable trusts and what obligations regulators have when performing their supervisory roles. Interviews with actors who have experience with charitable trusts suggest that regulators in practice tend to take a proactive role in the creation and ongoing administration of charitable trusts. In this chapter the author further explores how the vagueness in the law has motivated regulators to adopt strategies to implement the law in a way that minimizes risks to themselves.

Meanwhile, regulators are government organs and required to follow directives of the central government in China. Legislators introduced the charitable trust model to further and develop charitable undertakings defined by the state. The social and policy environment in which charitable trusts are established and operate is significant in determining how regulators engage with the law. This chapter examines both the legislative framework and regulatory practice. It considers the degree to which regulators are responsive to extra-legal concerns in the exercise of their powers. Three are examined in this chapter: the regional development agenda, the tension between regulatory capacity and regulatory objectives, and regulators' perceptions of risk. This analysis finds that extra-legal concerns supplement, or even sometimes prevail over, legal rules to guide the supervisory work of regulators.

Drawing on the interview data collected, this chapter analyzes the regulation of Chinese charitable trusts by exploring three questions. Firstly, what are the statutory powers assigned to regulators? Secondly, how have these powers been exercised by regulators? Thirdly, what are the measures undertaken by regulators? Legislators were influenced by public welfare trusts when introducing the charitable trust model. Therefore, comparisons with public welfare trusts will be conducted where appropriate in order to delineate the unique characteristics of the regulatory framework for charitable trusts. Based on the examination of

the above three questions, this chapter then discusses the administrative style of regulation of charitable trusts. The strategies that regulators have adopted to guide the performance of their responsibilities are examined. This examination serves to identify the factors that shape the regulatory framework and the way in which these factors take effect under the administration and supervision of charitable trusts.

II THE STRUCTURE OF THE REGULATORY FRAMEWORK

As already analyzed in Chapter 2, prior to the promulgation of the *Chinese Charity Law* in 2016, there was another institution playing the same function as the charitable trust, namely the public welfare trust. In contrast to charitable trusts, responsibilities for the regulation of public welfare trusts had been shared by civil affairs departments, bureaus of public security, and a wide range of government organs or agencies at provincial, municipal and county levels. This fragmented system for governance of the public welfare trust¹ contributed to the rise of compliance costs on the part of trust parties and dissuaded people from establishing public welfare trusts, and at the same time gave rise to the recommendation for the establishment of an independent regulator for charitable trusts.²

This thinking materialized into reality with the enactment of article 6 of the *Chinese Charity Law*³ and article 6 of the *Measures for Charitable Trusts*.⁴ Under these two articles, the *Banking Regulatory Authority* ('BRA') and the *Civil Affairs Department* ('CAD') are empowered to regulate the creation and day-to-day administration of charitable trusts. The law endows the two regulators with extensive powers, such as the powers to assess charitable trusts and to revoke trustees' registration licenses. These powers enable regulators to intervene intensively in the creation and ongoing administration of charitable trusts. However, similar to the vagueness of the law on the internal relationship between settlors and trustees, the law is also vague on the role of regulators and the relationship between regulators and trust parties. The law does not define clearly what these regulatory powers entail and how they should be exercised. Nor does the law define clearly the liability of regulators for unlawful performance of their powers and responsibilities. This vagueness creates scope for regulators to take into account extra-legal factors when determining how they can engage with the law.

¹ See analysis in Section II A of Chapter 2.

² 吕鑫 [Lyu Xin], 《从公益信托到慈善信托：跨国移植及其本土建构》 [From Public Welfare Trusts to Charitable Trusts: Transnational Transplantation and Local Construction] (2019) 10 社会科学战线 *Social Science Front* 199, 203–4; 金锦萍 [Jin Jinping], 《慈善信托的规制之道 — 兼评<慈善信托管理办法>》 [Regulation of Charitable Trusts — Comment on <Administrative Measures for Charitable Trusts>] (2017) 16 中国社会组织 *China Social Organization* 23, 24–5.

³ 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016.

⁴ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2007.

The section below discusses the structure of the regulatory framework for charitable trusts. This discussion includes three parts. The first relates to the relationship between the two regulators both in law and in practice. The second relates to the legal powers that these regulators can exercise in the creation and ongoing administration of charitable trusts and how these regulatory powers are exercised in practice. The third part relates to the educative measures that the two regulators have taken to encourage the development of charitable trusts and to exercise their supervisory powers in China.

A The Relationship between CADs and BRAs

1 In Law

Article 6 of the *Measures for Charitable Trusts* stipulates that the CADs and BRAs are responsible for regulating the creation and administration of charitable trusts. However, the law and explanatory memoranda do not clearly define the relationship between the two regulators. A possible clue to their relationship, however, may be drawn from article 48 of the *Measures for Charitable Trusts* — that is, the CADs and BRAs ‘shall establish a regular regulatory cooperation mechanism to strengthen an interim and ex post regulation, and effectively improve the effectiveness of regulatory operations’. The wording of article 48 indicates that there is, or should be, a cooperative relationship between the two regulators, but the key question article 48 leaves unanswered is what this cooperation mechanism looks like in law or practice.

Articles 47, 49 and 51 of the *Measures for Charitable Trusts* may provide insights into this cooperative mechanism. Two observations are drawn here. Firstly, the law prescribes that there is a collaboration between BRAs and CADs in supervising the administration of charitable trusts — the BRAs are ‘responsible for the supervision of charitable trust businesses of trust companies and the custody of funds in charitable trust accounts by commercial banks’;⁵ the CADs ‘at and above the county level are responsible for the recording of charitable trusts and their related supervision and administration’.⁶ A good illustration of this cooperation mechanism is the exercise of the power to revoke registration licenses. The current law says that where trustees commit violations in administering trust affairs, depending on the identity and nature of the trustee in question, the BRAs are empowered to revoke the registration licenses of trust companies,⁷ and the CADs are empowered to revoke the registration licenses of charitable organizations.⁸

The second observation relates to the considerable overlap between the CADs and BRAs in the exercise of statutory powers. In law, both the CADs and BRAs are empowered to inspect trustees’ performance of

⁵ Ibid art 47.

⁶ Ibid.

⁷ 《信托公司管理办法》 [Measures for Administration of Trust Companies] (People’s Republic of China) China Banking Regulatory Commission, 23 January 2007, art 59.

⁸ 《中华人民共和国慈善法》 [Charity Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 16 March 2016, (n 3) art 98.

their duties;⁹ to entrust third-party agencies to assess the management of charitable trusts;¹⁰ and to conduct supervisory conversations (*jianguan tanhua* 监管谈话) with the principal persons in charge of charitable trusts.¹¹ However, the law is silent on how the two regulators should cooperate with each other in exercising these overlapping powers. Would they communicate and reach consensus before issuing regulatory decisions? Would they exercise powers separately without any communication? These questions are unclear at present and need to be clarified in future judicial interpretation or legislation.

2 In Practice

What the law says is not necessarily consistent with the actual practice, for ‘all jurisdictions have some gap between aspirational rules and their practical enforcement’.¹² The relationship between the two regulators is illustrative of this point. The law stipulates that *CADs* should cooperate with *BRAs* in the regulation of charitable trusts.¹³ Based on this understanding, the next question to ask is: how does this cooperation mechanism operate in practice? Answering this question is helpful to re-examine the legislative arrangements for the assignment of powers to the two regulators. Examination of interview data suggests two findings on this question. Firstly, there exist no streamlined means of data exchange between the two regulators. Without clear data-sharing processes between the *CADs* and *BRAs*, it is highly likely that the current regulatory framework will impose ‘reporting red tape’¹⁴ on recorded charitable trusts. Among the actors interviewed, three trustee managers¹⁵ expressed that they had been asked to submit similar or duplicate report documents to different regulators.

Secondly, it is questionable whether the *BRAs* are appropriate regulator for charitable trusts. As opposed to the flourishing development of charitable trusts at common law,¹⁶ nearly 95 percent of the trusts created in China are commercial trusts. The *Chinese Trust Law* and its subordinated legal instruments are all centered on the regulation of commercial businesses operated by trust companies. Regulatory practice over the last two decades has enabled the *BRAs* to gain extensive experience in supervising commercial

⁹ 《慈善信托管理办法》[Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 4) art 49.

¹⁰ Ibid art 50.

¹¹ Ibid art 51.

¹² Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 13.

¹³ 《慈善信托管理办法》[Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 4) art 48.

¹⁴ Australian Charities and Not-for-profits Commission, *Strengthening for Purpose: Australian Charities and Not-for-Profits Commission Legislative Review* (2018) 106.

¹⁵ See interviews with T1, T5 and T7.

¹⁶ Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart Publishing, 2016) 22; Alison Dunn, ‘As Cold as Charity: Poverty, Equity and the Charitable Trust’ (2000) 20 *Legal Studies* 222, 223; Allan D Vestal, ‘Critical Evaluation of the Charitable Trust as a Giving Device’ (1957) 1957(3) *Washington University Law Review* 195, 195–6; John H Langbein, ‘The Secret Life of the Trust: The Trust as an Instrument of Commerce’ (1997) 107 *Yale Law Journal* 165, 188.

trust businesses. These commercial trust businesses focus on providing private benefits to individuals (e.g. settlors and trust companies), whose objectives are fundamentally different from those of charitable trust businesses. A series of notices (*tongzhi* 通知) or opinions (*yijian* 意见) have been issued by the *BRAs* to assist trust companies in controlling or preventing risks (e.g. liquidity risk, credit risk or market risk) arising from the operation of commercial trust businesses.¹⁷ However, to what extent are the *BRAs* capable of supervising the administration of charitable trusts? There is no answer to this question yet.

Regulatory practice shows that currently the *CADs* play a dominant role in the supervision of charitable trusts when compared to the *BRAs*.¹⁸ The *CADs* face greater policy pressure in the regulation of charitable trusts.¹⁹ Although the law does not elaborate on how the two regulators should cooperate with each other in the exercise of their powers, the *CADs* have tended to take measures to specify what the law says about their roles and how their powers can be exercised in practice. The *CADs* are willing to issue letters or notices to inspect whether charitable trusts are administered in alignment with the state's public welfare policy.²⁰ In contrast, the *BRAs* have not played a proactive role in supervising the trustee's performance of its roles. Different from the *CADs*, the *BRAs* do not suffer under intense policy and administrative pressures in the regulation of charitable trusts. The regulation of charitable trusts is outside the focus of the *BRAs'* supervisory work. Thus, the *BRAs* do not have strong incentives to specify what procedures they should follow to exercise their powers and how they should interact with charity trustees in the day-to-day management of charitable trusts. Where risks in relation to the administration of charitable trusts arise, the *BRAs* may consult relevant *CADs* to determine what measures should be taken and what administrative punishments (if any) could be imposed on trustees.²¹

B The Content and Scope of Regulatory Powers

With the existence of numerous policies on intensive supervision over charitable activities,²² the *CADs* and *BRAs*, as specialized regulators of Chinese charitable trusts, are endowed by law with wide regulatory

¹⁷ 《中国银监会办公厅关于进一步加强信托公司风险监管工作的意见》 [Opinions of the General Office of the China Banking Regulatory Commission on Further Strengthening the Work of Supervising the Risks of Trust Companies] China Banking Regulatory Commission, 18 March 2016, s 2; 《中国银行业监督管理委员会办公厅关于信托公司房地产信托业务风险提示的通知》 [Notice of the General Office of the China Banking Regulatory Commission on Risk Reminders for the Real Estate Trust Business of Trust Companies] (People's Republic of China) General Office of the China Banking Regulatory Commission, 12 November 2010; 《中国银监会办公厅关于进一步明确信托公司风险监管责任的通知》 [Notice by the General Office of the China Insurance Regulatory Commission of Further Clarifying the Risk Supervision Responsibilities of Trust Companies] China Banking Regulatory Commission, 25 June 2013.

¹⁸ See interviews with R1, R2 and R3.

¹⁹ See analysis in Section III B of this Chapter.

²⁰ See interviews with R1, R2, L1 and L2.

²¹ See interviews with L1, L2, L3, L5, L9, T5 and A6.

²² 《国务院关于促进慈善事业健康发展的指导意见》 [Guiding Opinions of the State Council on Promoting Healthy Development of Charitable Causes] (People's Republic of China) State Council, 24 November 2014, ch 4;

and supervisory powers to approve establishment and supervise the ongoing administration of charitable trusts. In the creation phase, the CADs are empowered to determine whether a charitable trust can be recorded or not. Where a charitable trust is legally established, the two regulators have the powers to ask trustees to submit annual reports, to revoke the registration licenses of trustees, to assess the operation of charitable trusts, and to conduct supervisory conversations. This legislative arrangement allows regulators to maintain a high degree of control over the creation and ongoing administration of charitable trusts. This section discusses the content and scope of these regulatory powers and the way in which the two regulators exercise these powers in practice.

1 *In the Creation of Charitable Trusts*

Pursuant to article 15 of the *Measures for Charitable Trusts*, the CADs at or above the county level have the power to determine whether a charitable trust can be recorded (*bei'an* 备案) or not. Before the enactment of the *Chinese Charity Law*, a public welfare trust came into existence only where the settlors or trustees obtained approval from public welfare administration authorities.²³ This approval requirement endowed relevant authorities with a high level of discretion to reject applications where, according to their judgement, the purpose of a trust was considered inconsistent with the public welfare purposes prescribed by law. Secondly, the *Chinese Trust Law* provides no criteria for the identification of relevant administration authorities for establishment of public welfare trusts. Responsibilities for the registration of public welfare trusts may be shared by civil affairs departments, bureaus of public security, and a wide range of government organs or agencies, depending on the nature of the trust purpose, the identity of relevant trust parties, and the activities that the trust intends to carry out.²⁴ The parties to public welfare trusts thus need to consult various possible government organs to determine to whom a registration application can be submitted. Due to these two reasons, no more than twenty public welfare trusts have been successfully established over the last two decades. In view of the experience of public welfare trusts, the charity law stipulates that the CADs and BRAs are specialized regulators and puts into effect recording (*bei'an* 备案) as the measure for the creation of charitable trusts.²⁵

《民政部关于贯彻落实<国务院关于促进慈善事业健康发展的指导意见>的通知》 [Notice of the Ministry of Civil Affairs on Implementing the ‘Guiding Opinions of the State Council on Promoting the Healthy Development of Charitable Causes’] (People’s Republic of China) Ministry of Civil Affairs of People’s Republic of China, 15 December 2014, ch 2-3; 《中国慈善事业发展指导纲要（2011—2015 年）》 [Guidelines for the Development of China’s Charitable Causes (2011-2015)] (People’s Republic of China) Ministry of Civil Affairs, 15 July 2011, ch 3.

²³ 《中华人民共和国信托法》 [Trust Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 28 April 2001, art 62.

²⁴ See also analysis in Section II of Chapter 3.

²⁵ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 4) ch 3; 《中华人民共和国慈善法》 [Charity Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 16 March 2016, (n 3) art 45.

The law makes no mention of the legal nature of recording or the distinction between recording and registration (*dengji* 登记). Interviewees have different views on these two issues. Seven interviewees²⁶ reported that the examination conducted by regulators over the creation of a charitable trust should be formal rather than substantial. However, the majority of the interviewees²⁷ held that the examination in practice is substantial as opposed to formal. There have been cases in which applications for recording were declined by the CADs in Beijing and Shanghai, although the documents submitted fully met the requirements specified by law and so were entitled to be recorded. Four of the nine lawyers with charitable trust experience stressed that the CADs in Beijing, Shanghai, Shenzhen, and Guangzhou have in practice a high degree of discretion in the recording of charitable trusts. For example, three lawyers²⁸ said that in Beijing the regulatory officials have refused to record open-ended charitable trusts (the term ‘open-ended’ means the trust properties can be increased and the criteria for selecting beneficiaries can be changed during the ongoing operation of a charitable trust), and more importantly, there has been no legal recourse against the refusal of such applications. In contrast, the CADs in Guangzhou and Shanghai are more positive in the recording of open-ended charitable trusts, for the recording information in the platform *Charity in China* shows that three open-ended charitable trusts have been successfully recorded in these two cities.

The three regulatory officials interviewed held that recording for charitable trusts was in fact a substantive, not formal, examination.²⁹ The interviewees give two reasons for this. Firstly, since the law does not define clearly the legal nature of recording and what the relationship between recording and registration is, regulators in practice have the discretion to determine what type of examination is conducted. Secondly, charitable trusts are still in their infancy, and therefore regulators wish to exercise substantive examination of the trust documents to determine whether there exist risks³⁰ in relation to the creation of charitable trusts. Pre-communication practice in Shanghai, Beijing, and Guangzhou is evidence of this thinking. Before submitting documents to the CADs for recording, trustees often talk to relevant officials first on certain issues, including the nature and scope of the charitable purpose, the criteria for selecting beneficiaries, the scale and type of trust assets, and the identity of each trust party. In this process, the regulatory officials concerned often advise trust parties on what terms of the trust documents are ambiguous and how they should be modified.³¹ From the trustee’s perspective, submitting recording applications is futile and a waste of both parties’ time, unless the terms of the trust documents already meet all of the regulators’ requirements.³²

²⁶ See interviews with L8, L9, A1, A2, A3, A6 and A7.

²⁷ See interviews with R1, R2, R3, T1, T2, T3, T6, T7, L1, L2 and L5.

²⁸ See interviews with L1, L2 and L3.

²⁹ See interviews with R1, R2 and R3.

³⁰ See analysis in Section III of this Chapter.

³¹ See analysis in Section III of Chapter 5.

³² See interviews with L1, L2, L5, L8, T1, T3, T5, T6 and T7.

2 *In the Ongoing Administration of Charitable Trusts*

In the ongoing administration of charitable trusts, both the *CADs* and *BRAs* are empowered to assess the operation of charitable trusts, to conduct supervisory conversations, and to require information disclosure. The law grants these two regulators wide supervisory powers but does not define clearly what these powers entail and how they should be exercised.

(a) *Power to Assess Charitable Trusts*

The law stipulates that the *CADs* and *BRAs* can entrust third-party agencies³³ to assess (*pinggu* 评估) whether charitable trust affairs are managed in alignment with regulatory measures, and whether charitable trust assets are used in compliance with the charitable purposes.³⁴ Assessment is not unique to charitable trusts. The Ministry of Civil Affairs of the People's Republic of China issued the *Administrative Measures for the Assessment of Social Organizations* (hereinafter the '*Measures for Assessment*')³⁵ on 20 December 2010, with the objective of regulating the assessment of social associations, foundations and private non-enterprise entities registered at the *CADs* of the people's governments at all levels.³⁶ In response to this national law, subnational *CADs* have issued local guides and administrative measures concerning the assessment of social organizations in their own jurisdictions.³⁷ Pursuant to articles 9 and 10 of the *Measures for Assessment*, assessment committees for social organizations have been set up by *CADs* at each level, which are responsible for developing assessment plans, forming assessment expert teams, organizing assessments, and announcing assessment results.³⁸

³³ The agencies here mainly refer to accounting firms and legal firms. See interviews with R2, A1, A2 and A6.

³⁴ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 4) art 50.

³⁵ 《社会组织评估管理办法》 [Administrative Measures for the Assessment of Social Organizations] (People's Republic of China) Ministry of Civil Affairs, 20 December 2010.

³⁶ Ibid arts 1-3.

³⁷ See 《天津市社会组织评估管理办法》 [Administrative Measures for the Assessment and Management of Social Organizations in Tianjin] (People's Republic of China) Tianjin Civil Affairs Bureau, 28 May 2012; 《深圳市社会组织评估管理办法（试行）》 [Administrative Measures for the Assessment and Management of Social Organizations in Shenzhen (Trial)] (People's Republic of China) Shenzhen Civil Affairs Bureau, 21 September 2011; 《广州市社会组织评估管理办法》 [Administrative Measures for the Assessment and Management of Social Organizations in Guangzhou] (People's Republic of China) Guangzhou Civil Affairs Bureau, 2 December 2013; 《潮州市全市性社会组织评估实施办法》 [Implementation Measures for the Assessment of Social Organizations in Chaozhou] (People's Republic of China) Chaozhou Civil Affairs Bureau, 8 July 2011; 《惠州市民政局关于社会组织评估管理的实施办法》 [Implementation Measures of Huizhou Civil Affairs Bureau on the Assessment and Management of Social Organizations] (People's Republic of China) Huizhou Civil Affairs Bureau, 12 October 2011; 《无锡市社会组织评估管理办法》 [Measures for the Assessment and Management of Social Organizations in Wuxi] (People's Republic of China) Wuxi Civil Affairs Bureau, 28 April 2013.

³⁸ 《社会组织评估管理办法》 [Administrative Measures for the Assessment of Social Organizations] (People's Republic of China) Ministry of Civil Affairs, 20 December 2010, (n 35) art 11.

Two questions arise when looking at the assessment of charitable trusts. What is the working system or mechanism for assessing charitable trusts? What is the identity of the third-party assessment agency? These two questions are not answerable at present, for no government documents or laws have been issued for reference. Over the last three years, the CADs at both central and local levels have carried out numerous collaborative research projects around the assessment of charitable trusts with independent research institutes or Chinese universities. The main topics of these research projects include: the specification of assessment indices for charitable trusts,³⁹ the criteria for appointing assessment agencies, the powers of these agencies, and the way they receive remuneration.⁴⁰ Before these issues are clarified, the CADs in Beijing, Shanghai, Guangzhou and Hangzhou are disinclined to conduct assessment work over the operation of charitable trusts,⁴¹ as evidenced by the complete absence of assessment work conducted in any of the four cities since the enactment of the *Chinese Charity Law* in 2016.

(b) Power to Conduct Supervisory Conversations

Where trustees are suspected of violating the law, the two regulators can initiate supervisory conversations separately with the persons in charge of trustee companies, compelling them to explain the management decisions they have made.⁴² This also includes the power to conduct on-site inspections of the trustees' domiciles and the places where charitable trust affairs are carried out,⁴³ and to inspect and duplicate materials relevant to the administration of charitable trusts.⁴⁴ In practice, there are two situations that may motivate regulators to conduct supervisory conversations: one, regulators receive complaints or accusations in relation to charity trustees' maladministration from public report complaint hotlines; or two, regulators

³⁹ Based on extensive solicitation of public opinions, the Ministry of Civil Affairs has formulated assessment indicators for national industry associations, foundations, and private non-enterprise entities in 2011. See 《民政部关于印发各类社会组织评估指标的通知》 [Notice of the Ministry of Civil Affairs on Printing and Distributing the Assessment Indicators of Various Social Organizations] (People's Republic of China) Ministry of Civil Affairs, 23 August 2011.

⁴⁰ See interviews with L1, L2, L8, L9, T1 and A8.

⁴¹ See interviews with R1, R2, R3, A1, A4, A7 and A8.

⁴² 《信托公司管理办法》 [Measures for Administration of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 23 January 2007, (n 7) art 53; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 4) art 51.

⁴³ 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016, (n 3) art 93; 《信托公司管理办法》 [Measures for Administration of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 23 January 2007, (n 7) art 47. In the area of labor law enforcement, the effectiveness of on-site inspection measures remains to be seen. See Sean Cooney, 'Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1066. When regulators conduct on-site inspections, because of the short inspection time and the small number of supervisors involved in on-site inspections, it is difficult to judge the authenticity of the documents submitted by trustees. See interviews with L1, L2 and T5.

⁴⁴ 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016, (n 3) art 93.

themselves identify non-compliance risks when carrying out on-site inspections. The interview data⁴⁵ suggest that the supervisory conversation is, in essence, a type of administrative investigation (*xingzheng diaocha* 行政调查) carried out by government organs. It is part of the ongoing administrative decision-making process. The supervisory conversation includes both educative and disciplinary elements. It is educative in the sense that regulators seek to advise trustees on how their minor violations of law can be rectified and what steps can be taken to comply with the requirement of regulatory measures through supervisory conversation.⁴⁶ On the other hand, it is disciplinary in the sense that regulators have wide discretion in the process of conducting supervisory conversations and thus may issue administrative punishments to trustees where their management of charitable trusts severely contravenes the laws or regulations. In this scenario, the conduct of supervisory conversation will lead to change or elimination of rights or obligations on the actor being interviewed.⁴⁷

Supervisory conversations have been extensively used by environmental regulators and food safety regulators over the past ten years. Where private parties engage in minor infringements of the law, the regulators concerned will employ means such as conversations, guidance, and warnings to advise private parties to rectify in time, so as to prevent serious legal liabilities from emerging as a result of the perpetuation of these illegal acts.⁴⁸ However, there exist several problems alongside the broad application of supervisory conversations. Much of the criticism from academics focuses on the ambiguity of the legal nature of these supervisory conversations, the ambiguity of their scope of application, and the ambiguity of procedures for conducting them.⁴⁹ Because of these ambiguities, regulators have a high degree of discretion in exercising their power to conduct supervisory conversations. Also because of this broad discretion, regulators have great incentives to carry out supervisory conversations when investigating violations.⁵⁰

⁴⁵ See interviews with R2, A1, A3, A6, A7, A8, T1, L1 and L8.

⁴⁶ 孟强龙 [Meng Qianglong], 《行政约谈法治化研究》 [Study on Legalization of Administrative Interviews] (2015) 6 行政法学研究 *Administrative Law Review* 99, 105–6; 王虎 [Wang Hu], 《风险社会中的行政约谈制度: 因应、反思与完善》 [The System of Administrative Interviews in Risk Society: Response, Reflection, and Improvement] (2018) 1 法商研究 *Study of Law and Business* 22, 26; 邓禾 [Deng He], 鲁颖然 [Lu Yingran] and 孙凌佼 [Sun Lingjiao], 《环境行政约谈的实践考察及制度完善》 [The Practice and Perfection of Environmental Administrative Interview System] (2018) 4 重庆大学学报 (社会科学版) *Journal of Chongqing University (Social Sciences)* 156, 158–9.

⁴⁷ 朱新力 [Zhu Xinli] and 李芹 [Li Qin], 《行政约谈的功能定位与制度建构》 [The Functional Orientation and Institutional Design of Administrative Interviews] (2018) 4 国家行政学院学报 *Journal of Chinese Academy of Governance* 91, 93–4; 孟强龙 [Meng Qianglong] (n 46) 105.

⁴⁸ See interviews with A3, A7, L1 and L2.

⁴⁹ 朱新力 [Zhu Xinli] and 李芹 [Li Qin] (n 47) 92; 王利 [Wang Li], 《我国环保行政执法约谈制度探析》 [Analysis of Chinese Interview System of Administrative Enforcement in Environmental Protection] (2014) 5 河南大学学报 (社会科学版) *Journal of Henan University (Social Sciences)* 62, 64–6; 邓禾 [Deng He], 鲁颖然 [Lu Yingran] and 孙凌佼 [Sun Lingjiao] (n 46) 160–2; 王虎 [Wang Hu] (n 46) 26–7.

⁵⁰ See interviews with L2, A1 and A4.

As the *Chinese Charity Law* was enacted only in 2016, the CADs and BRAs in Beijing, Shanghai and Guangzhou to date have not yet conducted any supervisory conversations with charity trustees.⁵¹ Nevertheless, it is foreseeable that supervisory conversations for charitable trusts that will one day be conducted will face the same ambiguities as those mentioned above. So far, the Beijing Civil Affairs Bureau has promulgated the *Measures of Administrative Interviews for Social Organizations in Beijing*⁵² on 25 October 2015. At the central government level, the *Provisions on the Interview Works in the Administrative Law Enforcement by Social Organization Registration and Administration Organs (for Trial Implementation)*⁵³ has been issued by the Ministry of Civil Affairs on 16 March 2016. These two government documents stipulate the procedure for conducting supervisory conversations with persons in charge of social organizations.⁵⁴ These two documents may provide insights into the conducting of supervisory conversations in the area of charitable trusts. In the eyes of the parties to charitable trusts, clarification of the procedure and content of supervisory conversations by those who regulate charitable trusts is of great practical significance. It matters not only for assessing the potential liabilities of the persons in charge of charitable trusts, but also for the availability of remedial relief in response to administrative punishments that may arise from the carrying out of supervisory conversations.

(c) Power to Require Information Disclosure

The CADs and BRAs are empowered to require charity trustees to disclose relevant information to the public. Regulatory practice over the past three years shows that the two regulators wish to exercise this power strictly.⁵⁵ There are two reasons for this. Firstly, the misuse of charity funds over the past two decades has led to a significant reduction in public trust in the charity sector.⁵⁶ To increase public trust and confidence in how charitable trusts are created and operated, regulators wish to keep a close eye on the ongoing administration of charitable trusts. Information disclosure is a good way for them to learn about the management of charitable trust affairs. Secondly, since the promulgation of the *Chinese Charity Law* three years ago, governments at all levels have continued to increase their policy support for the

⁵¹ See interviews with R1, R2, A1, A3, A4 and A7.

⁵² 《北京市社会组织行政约谈办法》 [Measures of Administrative Interviews for Social Organizations in Beijing] (People's Republic of China) Beijing Civil Affairs Bureau, 25 October 2015.

⁵³ 《社会组织登记管理机关行政执法约谈工作规定（试行）》 [Provisions on the Interview Works in the Administrative Law Enforcement by Social Organization Registration and Administration Organs — for Trial Implementation] Ministry of Civil Affairs, 16 March 2016.

⁵⁴ 《北京市社会组织行政约谈办法》 [Measures of Administrative Interviews for Social Organizations in Beijing] (People's Republic of China) Beijing Civil Affairs Bureau, 25 October 2015, (n 52) arts 2-18; 《社会组织登记管理机关行政执法约谈工作规定（试行）》 [Provisions on the Interview Works in the Administrative Law Enforcement by Social Organization Registration and Administration Organs — for Trial Implementation] (People's Republic of China) Ministry of Civil Affairs, 16 March 2016, (n 53) arts 2-15.

⁵⁵ See interviews with R1, R2, L1, T1 and T5.

⁵⁶ See analysis in Section II B of Chapter 2.

development of charitable trusts. To ensure that these policy privileges are not abused by trust parties, the CADs wish to issue letters or notices to inspect whether the information required by law has been disclosed in a timely and adequate manner.

Article 56 of the *Measures for Charitable Trusts* stipulates that trustees are obliged to disclose four types of information: (a) details of the establishment of charitable trusts; (b) reports on asset conditions and the handling of trust affairs; (c) reasons for the change and termination of charitable trusts; and (d) other information required to be disclosed by the CADs that process the recording of charitable trusts. Failure to make public the handling of charitable trust affairs and the financial conditions of charitable trust assets may raise legal liabilities on the part of the trustees.⁵⁷ Interviews with trust lawyers⁵⁸ and trustee managers⁵⁹ suggest that the fourth type of information mainly relates to the assessment and administrative punishment of a particular charitable trust. The officials⁶⁰ serving in CADs interviewed held that disclosure of disciplinary action is essential to maintaining public trust and confidence, for the general public needs to be assured that CADs and BRAs are effective regulators doing their jobs well. On the other hand, given that a charitable trust's reputation is critical to its ability to carry out its work, the three officials also stated that considerable caution was required in terms of issuing any punishments with respect to potential or actual offences.

The law stipulates that charity trustees should disclose the above four types of information to the public, but it does not define clearly what each type of information entails. The vagueness of the law creates a number of ambiguities that impede the proper operation of this information disclosure system in China. For example, should the level of transparency required of a charitable trust be differentiated by the scale and the type of its assets, or by the nature of its charitable purpose? To what extent should the information regarding trust asset conditions be disclosed? At a macro level, some of the unanswered questions include, for example, what factors should be taken into account when determining the extent and scope of information disclosure? How should the tension between private parties' right to privacy and the public's interest in the disclosure of information regarding charity activities be dealt with? In what way could the public's trust and confidence be protected, maintained and enhanced in the carrying out of charitable trust purposes? In the absence of clarification, it is difficult to determine whether there is sufficient transparency to inform regulators and the public broadly that trust assets are being used for appropriate purposes.

⁵⁷ The legal liabilities include warning, make corrections by the prescribed deadline, or a fine of not less than RMB 20,000 yuan but not more than RMB 200,000 yuan. See 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016, (n 3) art 105; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 4) art 59.

⁵⁸ See interviews with L1 and L2.

⁵⁹ See interviews with T1 and T5.

⁶⁰ See interviews with R1, R2 and R3.

C The Regulatory Approach of Public Education

In the past four years, the CADs and BRAs have undertaken numerous educative and consultative measures to promote public awareness about charitable trusts. Regulators seek to use these measures to educate private actors and encourage them to use charitable trusts to promote the public welfare goals defined by the state. Pursuant to the *Guiding Opinions of the State Council on Promoting Healthy Development of Charitable Causes* (hereinafter ‘*Opinions on Development of Charitable Causes*’), regulators are given the clear administrative task to educate and support charity participants on what the best practices are in the carrying out of charitable activities.⁶¹ Similarly, at local levels, according to the *Key Work Points of Civil Affairs Bureaus*, the CADs in several areas⁶² are required to organize training or educational programs in relation to the recording of charitable trusts, the management of charitable trust affairs, and the disposition of charitable assets. Consistent with such policy rhetoric, the CADs have taken a wide range of educative and consultative programs to help the public understand what charitable trusts are and how they can be used to further the development of charitable undertakings in China.

More specifically, the CAD at the central-government level has initiated various research projects and training programs around charitable trusts, some of which are conducted in cooperation with local trust associations and academic institutions. At the same time, local-level CADs in the last three years have held a great number of forums and conferences for leading trustees, including trust companies and charitable organizations, to share best practices around the administration of trust affairs. Regulatory agencies at the forefront of the charitable trust sector have increasingly focused on creating partnerships with private charitable actors when framing or setting up their regulatory goals. For example, *Notice of the Shanghai Bureau of Civil Affairs on the Implementation of the Chinese Charity Law* and *Implementation Plan for Promoting the Development of Charitable Causes in Haidian District of Beijing* stress that ‘the public plays a positive role in the implementation of charity-related policies’.⁶³ The strategy around charitable trusts in Zhejiang and Jiangsu envisions a collaborative mechanism in which the government enacts charity-

⁶¹ 《国务院关于促进慈善事业健康发展的指导意见》 [Guiding Opinions of the State Council on Promoting Healthy Development of Charitable Causes] (People’s Republic of China) State Council, 24 November 2014, (n 22) chs 4-5.

⁶² See, eg, 《2019 年上海民政工作要点》 [Key Work Points of Shanghai Civil Affairs Bureau in 2019] (People’s Republic of China) Shanghai Civil Affairs Bureau, 22 January 2019, s 1; 《杭州市民政系统 2017 年工作总结和 2018 年工作要点》 [Work Summary of Hangzhou Civil Affair System in 2017 and Key Work Points in 2018] (People’s Republic of China) Hangzhou Civil Affairs Bureau, 13 February 2018, s 2.

⁶³ 《上海市民政局关于贯彻落实<中华人民共和国慈善法>的通知》 [Notice of the Shanghai Bureau of Civil Affairs on the Implementation of the Charity Law of the People’s Republic of China] (People’s Republic of China) Shanghai Bureau of Civil Affairs, 26 August 2016, pt 1; 《北京市海淀区关于促进慈善事业发展的实施方案》 [Implementation Plan for Promoting the Development of Charitable Causes in Haidian District of Beijing] (People’s Republic of China) Haidian District Government of Beijing, 14 March 2017, s 7.

promoting policies and the public oversees how these policies are implemented in practice.⁶⁴ In addition, the CADs in eastern coastal areas, like Guangzhou and Zhejiang, have issued charity progress reports for their jurisdictions or awarded and praised leaders with outstanding charitable trust performance.⁶⁵ In such a favorable environment, an increasing number of actors outside the CADs and BRAs are seeking to improve the understanding and administration of charitable trusts. Such efforts include establishing free-standing research and training institutes, advisory services associated with Chinese universities,⁶⁶ and sometimes individual legal and accountancy firms. One illustrative instance is the research cooperation between the CAD and the Public Welfare Institute of Beijing Normal University (hereinafter the ‘PWI’). In this collaborative program, the PWI has devoted a large number of research resources to designing and constructing key performance indicators for measuring the operation of charitable trusts. Overall, the collaborative and research-based approach taken on by CADs reflects the latest changes in the regulatory environment of the charitable trust sector.

The wide application of educative measures shows that charity sector regulators have transitioned from control to cooperation in terms of regulatory philosophy. Yet, drawing on experiences from environment and labour law enforcement, such a transition raises an important concern: is it too easy for trust parties to negotiate compliance with regulators? The six interviewees⁶⁷ who answered this question expressed a common experience: unlike environment and labour law regulation,⁶⁸ the regulators for charitable trusts are

⁶⁴ 《浙江省实施<中华人民共和国慈善法>办法》 [Measures for the Implementation of the Chinese Charity Law in Zhejiang Province] (People’s Republic of China) Standing Committee of Zhejiang Provincial People’s Congress, 30 November 2018, arts 5-6, 35; 《江苏省慈善信托备案管理暂行办法》 [Interim Measures for the Administration of Recording of Charitable Trusts in Jiangsu Province] (People’s Republic of China) Jiangsu Provincial Civil Affairs Department and Jiangsu Office of the China Banking Regulatory Commission, 23 October 2017, arts 51, 57-8.

⁶⁵ Individuals and enterprises that have made outstanding contributions to the development of charity in China are entitled to participate in the selection of *China Charity Awards* (*zhonghua cishan jiang* 中华慈善奖). See 《“中华慈善奖”评选表彰办法》 [Method for the Selection and Commendation of ‘China Charity Award’] (People’s Republic of China) Ministry of Civil Affairs, 3 June 2014, art 2; 《民政部关于表彰第十届“中华慈善奖”获得者的决定》 [Decision of the Ministry of Civil Affairs on Commending the Winners of the 10th China Charity Award] (People’s Republic of China) Ministry of Civil Affairs, 10 September 2018. At local level, the CADs in Jiangsu and Zhejiang Provinces have also set up the *Jiangsu Charity Award* and *Zhejiang Charity Award* respectively. See 《2019年江苏省民政工作要点》 [Key Points of Civil Affairs Work in Jiangsu Province in 2019] (People’s Republic of China) Jiangsu Civil Affairs Department, 19 February 2019, s 8; 《浙江省实施<中华人民共和国慈善法>办法》 [Measures for the Implementation of the Chinese Charity Law in Zhejiang Province] (People’s Republic of China) Standing Committee of Zhejiang Provincial People’s Congress, 30 November 2018, (n 64) art 25.

⁶⁶ For example, Peking University, Shanghai Jiao Tong University, Beijing Normal University, and Zhejiang University of Technology have respectively established public welfare research centers.

⁶⁷ See interviews with R1, R2, T1, T5, T6 and T7.

⁶⁸ For scholar writings that discuss the enforcement gap in environment and labor law regulation, see, eg, Carlos Wing-Hung Lo et al, ‘Explaining the Enforcement Gap in China: Local Government Support and Internal Agency Obstacles as Predictors of Enforcement Actions in Guangzhou’ (2012) 111 *Journal of Environmental Management* 227, 234–5; Virginia E Harper Ho, ‘From Contracts to Compliance: An Early Look at Implementation under China’s New Labor Legislation’ (2009) 23 *Columbia Journal of Asian Law* 35, 101–2; Benjamin van Rooij, Rachel E Stern

powerful and are unlikely to be easily influenced by trustees in practice. This conclusion was founded on the consideration of two factors. Firstly, the *CADs* and *BRAs* are conferred with broad powers in law.⁶⁹ This allows them to play a proactive role in addressing non-compliance issues. Secondly, as explained in Chapter 1, regulators over the last two decades have seen a large number of scandals involving misuse of charity funds. Therefore, it is not difficult for regulators to identify risks that may arise out of the administration of charitable trusts. Moreover, regulatory officials themselves are fully aware that any regulatory failure or scandal would result in irrevocable reputational damage and serious administrative punishments for them. In this light, regulators have greater incentives to exercise their powers strictly in dealing with violations of the law and also tend to disclose their disciplinary decisions so as to show the public that they are performing their jobs properly.

III REGULATORY STYLE IN PRACTICE

Section II has examined the regulatory framework for charitable trusts. This examination shows that the *CADs* and *BRAs* are endowed by law with extensive powers and broad discretion as to how to exercise them. These powers enable regulators to interfere intensively in the creation and day-to-day management of charitable trusts. However, the law is vague and does not define clearly how these powers should be exercised. This vagueness motivates regulators to take strategies to protect their interests from being adversely affected in the implementation of the law. Meanwhile, in view of the Chinese administrative system, regulators have long been subject to policy and administrative pressures and thus tend to be responsive to extra-legal concerns when discharging their supervisory roles. These concerns are influential and affect the decision-making of regulatory officials considerably. This section analyzes these strategies and extra-legal factors to show how the *CADs* and *BRAs* perform their responsibilities in practice.

A The Existence of Administrative Considerations

The analysis in section II has already shown that regulators do in fact carry out substantive examination of the documents submitted by trust parties.⁷⁰ There are two reasons for this regulatory practice. First, the law does not elaborate clearly the legal nature of recording and the difference between recording and registration. The *CADs* and *BRAs* therefore have the discretion to determine what type of examination they can conduct. Secondly, to identify risks in relation to the creation of charitable trusts and to ensure that charitable trusts are used to advance the state's public welfare goals, the *CADs* and *BRAs* wish to exercise

and Kathinka Fürst, 'The Authoritarian Logic of Regulatory Pluralism: Understanding China's New Environmental Actors' (2016) 10(1) *Regulation & Governance* 1, 4–6; Sean Cooney (n 43) 1065–6.

⁶⁹ See analysis in Section II B of this Chapter.

⁷⁰ See analysis in Section II B of this Chapter.

substantive examination of the trust documents in the recording phase.⁷¹ Interviews with trust managers and lawyers with charitable trust experience show that whether a charitable trust in practice could be successfully recorded depends heavily upon two considerations.⁷² The first relates to the purpose of a charitable trust — the more politically or socially sensitive the purpose of a charitable trust is, the more difficult its review and approval process. The second concerns the identity of the trust parties — allowing influential government organs to participate in the creation of charitable trusts makes it easier for the trusts to be approved. The two considerations above are consistent with the fact that regulators in China have long been subject to direct and intense administrative and policy influences. Extra-legal factors supplement legal rules and play an important role in the decision-making of regulatory officials.

B The Application of Administrative Factors

Administrative and policy considerations run through the regulatory practice of charitable trusts from western China to the east. The interview data shows that regulators mainly consider three types of administrative factors when performing their legal roles: the regional development agenda, the tension between regulatory capacity and regulatory objectives, and regulators' perceptions of risk. These administrative factors affect the way in which regulators engage with the law. In addition, the application of these administrative factors has led to regional differences: a supportive regulatory environment in the east; a conservative one in the west. The following section closely analyzes the three factors, so as to examine how they interact with each other in the regulatory practice of charitable trusts, and the ways they each contribute to the emergence of regional differences in regulation.

1 Regional Development Agenda

In the Chinese administrative system, the central government establishes overall policy objectives to guide administrative work in all parts of China. Local governments at various levels are required to translate these policy objectives into more specific, concrete and measurable performance targets and put great emphasis on achieving these targets.⁷³ The central policies, in this 'translation' process, are interpreted and applied in varying degrees — promoted heavily in some regions while followed loosely in others.⁷⁴ Application of the central policies relevant to charitable trusts is a typical example — these policies find enthusiastic adoption in eastern coastal areas, but far less spirited engagement in western undeveloped areas.

⁷¹ See analysis in Section II B of this Chapter.

⁷² See interviews with T1, T3, T7, L1, L2, L7, L8 and L9.

⁷³ Jie Gao, 'Governing by Goals and Numbers: A Case Study in the Use of Performance Measurement to Build State Capacity in China' (2009) 29(1) *Public Administration and Development* 21, 22; Hon S Chan and Jie Gao, 'Performance Measurement in Chinese Local Governments' (2008) 41 *Chinese Law & Government* 4, 5.

⁷⁴ Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-Making in China* (Cambridge University Press, 2017) 124.

Let us first consider the situation in western undeveloped areas. As analyzed in Chapter 1, there indeed exist a substantial number of central government policies in relation to the development of charitable trusts. Nevertheless, these policies are in most cases vague, poorly defined, abstract and hard to measure in an objective and fair way. Detailed guides are lacking in relation to the evaluation standards of policy accomplishment, the weight to be given for each criterion, the procedures for carrying out appraisal work, and the mechanisms for punishment or reward. Since it is difficult to measure the work around charity development objectively, local government officials in western undeveloped areas may have the inclination to apply the limited resources they have to achieving objectives that are more practical in nature, and more easily quantified and assessed.⁷⁵ In such areas, policy priority is mainly given to alleviating poverty or helping the needy.⁷⁶ This approach is in line with the central government's policy in the region⁷⁷ — namely, poverty remains the most prominent problem in China's economic and social development, and the western undeveloped areas still have a large number of destitute people who live below the poverty line. Improving the living conditions of the poor is, pursuant to the *13th Five-Year Plan for Poverty Alleviation*,⁷⁸ a clear task assigned to the governments of western China. Under this logic, it is hardly surprising that local governments in western undeveloped areas tend to focus their limited resources on poverty alleviation. When it comes to charitable trusts, the vagueness of the law on recording creates scope for regulators to consider development agendas when determining what types of charitable trusts can and cannot be established. In this light, in western provinces like Gansu and Qinghai, almost 95 percent of the recorded

⁷⁵ See interviews with A1, A2, A3 and A6.

⁷⁶ The national performance evaluation system (the *kaohe* 考核 mechanism for government officials) guides the work priorities of government servants at both central and local levels. See Benjamin van Rooij, Rachel E Stern and Kathinka Fürst (n 68) 4; Maria Edin, 'State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective' (2003) 173 *The China Quarterly* 35, 39; Alex L Wang, 'The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China' (2013) 37 *Harvard Environmental Law Review* 365, 382–3; Carl F Minzner, 'Riots and Cover-Ups: Counterproductive Control of Local Agents in China' (2014) 31 *University of Pennsylvania Journal of International Law* 53, 57–8; Hon S Chan and Jie Gao (n 73) 5; Gao (n 73) 29.

⁷⁷ 《中共中央、国务院关于打赢脱贫攻坚战的决定》 [Decision of the Central Committee of the Communist Party of China and the State Council on Winning the Battle Against Poverty] (People's Republic of China) Central Committee of the Communist Party of China and the State Council, 29 November 2015, chs 1-2; 《全国人民代表大会关于国民经济和社会发展第十三个五年规划纲要的决议》 [Resolution of the National People's Congress on the Outline of the Thirteenth Five-Year Plan for National Economic and Social Development] (People's Republic of China) National People's Congress, 16 March 2016, chs 56-8; 《民政部关于推进深度贫困地区民政领域脱贫攻坚工作的意见》 [Opinions of the Ministry of Civil Affairs on Promoting Poverty Alleviation in the Field of Civil Affairs in Deep Poverty Stricken Areas] (People's Republic of China) Ministry of Civil Affairs, 7 April 2018, ch 1; 《中国农村扶贫开发纲要（2011-2020年）》 [Outline of Poverty Alleviation and Development in China Rural Areas (2011-2020)] (People's Republic of China) Central Committee of the Communist Party of China and State Council, 27 May 2011, chs 2-3.

⁷⁸ 《“十三五”脱贫攻坚规划》 ['13th Five-Year Plan' for Poverty Alleviation] (People's Republic of China) State Council, 23 November 2016.

charitable trusts are related to poverty alleviation. This recording practice is consistent with the needs of local governments and the complex policy challenges that they face.⁷⁹

In contrast to western undeveloped areas, the economic conditions in eastern coastal areas are relatively stable. Due to the rapid rate of economic development, eastern CADs face greater policy pressures in the development of charitable trusts than their western counterparts.⁸⁰ This national policy pressure sets the prevailing agenda for regulators in eastern China. In response to this pressure, the CADs in eastern regions such as Beijing, Shanghai and Guangzhou wish to remedy the vagueness in law by developing clear guidelines and criteria for the implementation of legislated governance goals. A representative example of these coastal regulators' efforts is the flurry of administrative measures or guides being enacted at both municipal and provincial levels.⁸¹ One common theme can be discerned upon investigation of these local laws, namely encouraging the general public and the media to supervise the operations of charitable trusts and to expose the violations of parties to charitable trusts.⁸² Besides the enactment of laws,⁸³ other regulatory innovations⁸⁴ in the facilitation of charitable trusts include incorporating the objective of

⁷⁹ See interviews with L1, L2, T1 and T7.

⁸⁰ See interviews with A3, A6, A7, T1 and L9.

⁸¹ From 2016 to 2019, the *Beijing Administrative Measures for Charitable Trusts* ('*Beijing Measures for CT*'), the *Regulations on the Management of Charitable Trusts in Guangdong Province* ('*Guangdong Regulation of CT*'), the *Interim Measures for the Administration of the Recording of Charitable Trusts in Jiangsu Province* ('*Jiangsu Measures of CT*'), and the *Measures for the Implementation of the Chinese Charity Law in Zhejiang Province* ('*Zhejiang Measures for Charity Law*') were respectively enacted. See 《北京慈善信托管理办法》 [Beijing Administrative Measures for Charitable Trusts] (People's Republic of China) Beijing Bureau of Civil Affairs, 21 September 2016, art 1; 《关于慈善信托管理工作的实施细则》 [Regulations on the Management of Charitable Trusts] (People's Republic of China) Guangdong Provincial Civil Affairs Department and Guangdong Office of the China Banking Insurance Regulatory Commission, 21 February 2019, art 1; 《江苏省慈善信托备案管理暂行办法》 [Interim Measures for the Administration of Recording of Charitable Trusts in Jiangsu Province] (People's Republic of China) Jiangsu Provincial Civil Affairs Department and Jiangsu Office of the China Banking Regulatory Commission, 23 October 2017, (n 64) art 1; 《浙江省实施〈中华人民共和国慈善法〉办法》 [Measures for the Implementation of the Chinese Charity Law in Zhejiang Province] (People's Republic of China) Standing Committee of Zhejiang Provincial People's Congress, 30 November 2018, (n 64) art 1.

⁸² 《北京慈善信托管理办法》 [Beijing Administrative Measures for Charitable Trusts] (People's Republic of China) Beijing Bureau of Civil Affairs, 21 September 2016, (n 81) art 37; 《关于慈善信托管理工作的实施细则》 [Regulations on the Management of Charitable Trusts] (People's Republic of China) Guangdong Provincial Civil Affairs Department and Guangdong Office of the China Banking Insurance Regulatory Commission, 21 February 2019, (n 81) art 63; 《江苏省慈善信托备案管理暂行办法》 [Interim Measures for the Administration of Recording of Charitable Trusts in Jiangsu Province] (People's Republic of China) Jiangsu Provincial Civil Affairs Department and Jiangsu Office of the China Banking Regulatory Commission, 23 October 2017, (n 64) art 58.

⁸³ The concept of charitable trust has become a regular focus of policy roundtables and conferences, many involving provincial and local regulatory authority leaders. Social organizations and the public are encouraged to actively participate in the drafting and deliberation of charity-related laws. Legislative hearings and soliciting public opinions by publicizing legislative drafts are two essential institutions. Several legislative hearings were carried out in the process of the enactment of the *Measures for CT in Beijing*, the *Measures of CT in Jiangsu*, and the *Measures for Charity Law in Zhejiang*. See interviews with R2, L1, A1, A4 and A7.

⁸⁴ The decentralization policy in respect of legislative powers has been implemented in China since the late 1970s. See Sarah Biddulph, Sean Cooney and Ying Zhu, 'Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking' (2012) 34(4) *Law & Policy* 373, 394; Young Nam Cho, 'The Politics of Lawmaking in Chinese Local

developing charitable trusts as part of the performance appraisal system (the *kaohe* 考核 mechanism in the Chinese bureaucratic system) of local officials;⁸⁵ awarding and praising leaders with outstanding charitable trust performance;⁸⁶ and holding forums or educational programs around the development of charitable trusts.⁸⁷ With such a supportive environment created by eastern coastal regulators, the development of charitable trusts has shown an enormous growth in the last three years: for all of the charitable trusts recorded to date, almost 75 percent have been established in eastern developed areas, covering a wide range of charitable purposes, including science, culture, education and health.

2 *Tension Between Regulatory Capacity and Regulatory Objectives*

The second factor that affects regulatory practice in relation to charitable trusts is the tension between regulatory capacity and regulatory objectives. In order to carry out legal rules effectively, regulators must ensure that a certain level of budget and staff resources be available.⁸⁸ The CADs and BRAs do wish to carry out substantive examination of trust documents, and regulatory officials in the coastal areas have a more open and positive attitude towards the creation of charitable trusts than those in western undeveloped areas. Examination of the interview data shows that one of the key reasons lies in the allocation of budgets and personnel (in terms of incentive, quantity and quality) in the CAD of each area.

In eastern coastal regions, on average, the CADs at the municipal level have three or four full-time staff in charge of the regulation of charitable trusts — for example, three in Beijing, four in Guangzhou and three in Shanghai. Notwithstanding almost 75 percent of charitable trusts having been established in these

People's Congresses' (2006) 187 *The China Quarterly* 592, 594–5; SEN LIN, 'A New Pattern of Decentralization in China: The Increase of Provincial Powers in Economic Legislation' (1992) 7(3) *China Information* 27, 28; Virginia E Harper Ho (n 68) 50; Gao (n 73) 23. With the implementation of this decentralization policy, many municipal and provincial CADs play a lead role in the innovation of regulatory practice in their respective jurisdictions. See interviews with A1, A3 and A6.

⁸⁵ Regional regulators following this initiative include Jiangsu Provincial Civil Affairs Department and Guangdong Provincial Civil Affairs Department. See 《江苏省慈善信托备案管理暂行办法》 [Interim Measures for the Administration of Recording of Charitable Trusts in Jiangsu Province] (People's Republic of China) Jiangsu Provincial Civil Affairs Department and Jiangsu Office of the China Banking Regulatory Commission, 23 October 2017, (n 64) art 52; 《关于慈善信托管理工作的实施细则》 [Regulations on the Management of Charitable Trusts] (People's Republic of China) Guangdong Provincial Civil Affairs Department and Guangdong Office of the China Banking Insurance Regulatory Commission, 21 February 2019, (n 81) art 55.

⁸⁶ See analysis in Section II C of this Chapter.

⁸⁷ A number of regulatory authorities, including the Shandong and Guangdong provincial CADs and Shanghai municipal CAD, have held various forums and educational programs in which professionals like charity lawyers and trust academics, representatives of trustee companies and charitable organizations, government officials and members of the local legislative committee have been invited to discuss what role the charitable trust should play in developing local charitable causes and what measures can be taken to effectively regulate the charitable trust. See interviews with A4, A5, A7, L1 and L9.

⁸⁸ Lesley K Mcallister, 'Dimensions of Enforcement Style: Factoring in Regulatory Autonomy and Capacity' (2010) 32(1) *Law & Policy* 61, 65; Benjamin Van Rooij, 'Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns' (2006) 37(1) *Development and Change* 57, 64; Benjamin Van Rooij et al, 'From Support to Pressure: The Dynamics of Social and Governmental Influences on Environmental Law Enforcement in Guangzhou City, China' (2013) 7(3) *Regulation & Governance* 321, 324.

developed areas, each area receives no more than 50 charitable trust applications every year. Regulatory practice suggests that, at present, the *CADs* in Shanghai, Beijing and Guangzhou have adequate staff and budget resources to maintain consistent communication and interaction with the trustees being regulated.⁸⁹ Examining no more than 50 annual charitable trust reports per year is not very difficult in practice. As regards charitable trusts that are related to the material interests of the local government, which are too politically or socially sensitive for *CADs* to cope with, regulatory officials will conduct consultations with local government leaders. Where non-compliance arises in the operation of charitable trusts, regulators in eastern China can in practice flexibly adjust their enforcement measures to best ensure compliance — for some regulated trustees, a punitive response to the violation is necessary; for others, a persuasive and educational approach may be preferred.⁹⁰ Because the regulatory resources in eastern China could handle the number of charitable trusts requiring inspection, regulators in these areas have incentives to make concerted efforts in creating a favorable environment for carrying out legislated governance goals.

In comparison, regulators in western undeveloped areas do not have enough employees⁹¹ to carry out legal enforcement work thoroughly and consistently, especially in Gansu, Inner Mongolia and Qinghai, where a limited number of regulatory officials have to cover a large geographical area. Whether regulatory officials in western China have the capacity to detect violations of regulatory law is yet to be further tested. In addition to the shortage of staff, a certain number of lawyers⁹² and scholars⁹³ interviewed also complained that regulatory officials in western areas may not have been properly trained and lack adequate knowledge of charitable trusts.⁹⁴ Officials' levels of expertise vary considerably across different regions — certain applications for recording are being declined only because, from the perspective of the regulatory officials, the internal governance arrangements for these charitable trusts are too innovative.⁹⁵ Due to this constraint in resources, regulators in western China are not active in raising awareness about charitable trusts. Rather, they adopt a conservative attitude on trust applications that are not associated with poverty alleviation.

⁸⁹ See interviews with A1, A2, A4, A5, R1 and R2.

⁹⁰ Lesley K Mcallister (n 88) 66.

⁹¹ The *CADs* in Qinghai and Gansu have two full-time staff members responsible for the regulation of charitable trusts. See interview with A5.

⁹² See interviews with L1, L2, L3 and L4.

⁹³ See interviews with A3 and A4.

⁹⁴ In contrast, government documents indicate that the recruitment and training of regulatory officials in eastern China have become more professionalized in recent years. See 《2019 年上海民政工作要点》 [Key Work Points of Shanghai Civil Affairs Bureau in 2019] (People's Republic of China) Shanghai Civil Affairs Bureau, 22 January 2019, (n 62) s 6; 《杭州市民政系统 2017 年工作总结和 2018 年工作要点》 [Work Summary of Hangzhou Civil Affairs System in 2017 and Key Work Points in 2018] (People's Republic of China) Hangzhou Civil Affairs Bureau, 13 February 2018, (n 62) s 1; 《2019 年江苏省民政工作要点》 [Key Points of Civil Affairs Work in Jiangsu Province in 2019] (People's Republic of China) Jiangsu Civil Affairs Department, 19 February 2019, (n 65) s 10.

⁹⁵ See interviews with L1 and L2.

3 *Regulators' Perceptions of Risk*

The final factor to be analysed here is regulators' perceptions of risk associated with the supervision of charitable trusts. As discussed above,⁹⁶ regulators in western undeveloped areas, funded by local governments, often suffer from resource constraints that render them unable to carry out proactive and consistent enforcement work, and their inspections are generally prompted by public complaints. Due to a shortage in funding and staff, these regulators have the tendency to avoid making decisions on matters that may expose them to administrative punishment.⁹⁷ At the same time, charitable trusts are a newly emerging institution, and so there are numerous uncertainties in regulation that have yet to be tested. Regulatory officials may also lack sufficient knowledge regarding the regulation of charitable trusts. In light of these two reasons, regulatory officials in western undeveloped areas tend to decline the recording of charitable trusts, as any critiques of their work from the public may lead to local CADs suffering from irrecoverable reputational damage and serious administrative punishments. Over the last twenty years, a large number of scandals around the misuse of charity funds have been exposed by the general public, so regulatory officials are clearly aware of the reputational risks that may arise from the day-to-day supervision of charitable trusts. This thinking has been further reinforced by the unspoken rules of Chinese bureaucracy: media exposure of regulatory scandals or failures brings about rapid governmental intervention to redress the wrong,⁹⁸ and an official may be demoted or, in extreme situations, dismissed from their position once a public incident has caught the attention of higher-level authorities.⁹⁹ Due to these reasons, the CADs in western regions take a conservative attitude towards the recording of charitable trusts.¹⁰⁰

When reviewing recording documents, the CADs from eastern developed areas also consider the same legal and reputational risks as western CADs. However, eastern CADs take a supportive and open approach that is considerably different from their western counterparts. There are two key reasons for this regional difference. The first relates to the fact that regulators in eastern areas have adequate resources to carry out inspections thoroughly and consistently.¹⁰¹ Given the increasing policy pressure in eastern China, CADs with a high degree of regulatory capacity are willing to invest resources in promoting the development of charitable trusts. The second reason concerns a reciprocal relationship between the level of public participation and the performance of regulators. As analyzed before,¹⁰² regulators in coastal areas have taken a series of measures to encourage the public to actively participate in the development of charitable trusts. The growing level of public participation, in turn, motivates regulators to play a proactive role in

⁹⁶ See analysis in Section III B 2 of this Chapter.

⁹⁷ Lesley K Mcallister (n 88) 66.

⁹⁸ Sean Cooney (n 43) 1095.

⁹⁹ Hon S Chan and Jie Gao (n 73) 8; Kwai Hang Ng and Xin He (n 74) 130.

¹⁰⁰ See interviews with A1, A4, A5, A8, L1, L2, T1 and T7.

¹⁰¹ See analysis in Section III B 2 of this Chapter.

¹⁰² See analysis in Section III B 1 of this Chapter.

developing and overseeing charitable trusts within their own jurisdictions. A certain number of government officials¹⁰³ and scholars¹⁰⁴ interviewed reported that, in areas where the public is deeply interested in charity, the regulators concerned are more motivated to promote the development of charitable trusts. The reason is not difficult to understand: the higher the level of public participation, the higher the public's expectation that regulators will perform their duties and roles properly. In this regard, the increasing degree of public participation in charitable trusts may create external pressure that encourages regulators to proactively perform their supervisory and educational roles.

IV CONCLUSION

This chapter has discussed two aspects of the practice of regulatory oversight of charitable trusts. The first is an analysis of legal allocation of powers and responsibilities to the regulators and the relationship between them. The second considers the administrative and policy pressures on regulators that combine with vagueness in the law to influence the ways in which they perform their responsibilities.

Drawing on the experience of public welfare trusts, the law tasks the *CADs* and *BRAs* to regulate the creation and ongoing administration of charitable trusts. This chapter first examined this new regulatory framework and discovered that the law does not clearly define the relationship of the two regulators. The law stipulates that the *CADs* and *BRAs* should cooperate with each other in the performance of their powers and responsibilities. But the law makes no mention of what this cooperation mechanism looks like. Regulatory practice suggests that the *CADs* play a proactive role in the regulation of charitable trusts in comparison to the *BRAs*. The *CADs* face greater policy pressure in the supervision of charitable trusts and thus have greater incentives to take measures to inspect the management of charitable trusts. The *BRAs*, in contrast, do not suffer under intense policy pressures in the regulation of charitable trusts and thus lack strong desires to maintain consistent interaction with the trustees being regulated. There is no clear cooperation mechanism between the two regulators in practice. They tend to exercise their regulatory powers individually. If risks related to the management of charitable trusts occur, the *BRAs* may consult relevant *CADs* to determine the measures to be taken and whether administrative penalties should be imposed on the trustees.

This chapter then analyzed the assignment of powers to each regulator. The analysis showed that the *CADs* and *BRAs* are granted extensive powers and broad discretion on how to exercise them. However, the law does not elaborate clearly what these powers entail in substance and how they should be exercised. The law puts into effect recording as the measure for the creation of charitable trusts. However, the vagueness

¹⁰³ See interviews with R1 and R2.

¹⁰⁴ See interviews with A3, A4 and A6.

of the law on the meaning of recording creates scope for *CADs* to conduct substantive examination of the trust documents and to advise trust parties on how these documents should be amended. In the ongoing administration of charitable trusts, both of the regulators are empowered to assess the operation of charitable trusts, to conduct supervisory conversations and to require information disclosure separately. However, the law makes no mention of the mechanism for assessing charitable trusts, the procedure for conducting supervisory conversations and the level of transparency required of a charitable trust. This vagueness motivates regulators to take strategies to protect their own institutional interests from being adversely affected in the implementation of the law. For example, the two regulators are disinclined to conduct assessment work; they have greater incentives to initiate supervisory conversations when investigating violations; and they wish to advise trust parties on what types of information should be disclosed.

Based on the analysis of the law, this chapter finally examined the regulatory practice in light of China's particular political, social and economic conditions. In the Chinese administrative system, regulators are strongly responsive to extra-legal factors when implementing the law. Meanwhile, the vagueness of the law also creates scope for regulators to take into account extra-legal factors when discharging their supervisory roles. Regulatory practice showed that the *CADs* and *BRAs* mainly consider three administrative factors in the performance of their responsibilities: the regional development agenda, the tension between regulatory capacity and regulatory objectives, and regulators' perceptions of risk. The three extra-legal factors are interrelated and affect the decision-making of regulatory officials considerably.

The regional development agenda differs between eastern developed areas and western undeveloped areas. The central government's policy in western China is poverty alleviation and so local regulators tend to focus their limited resources on alleviating poverty or helping the needy. It is difficult to establish trusts in these areas whose purposes have no connection to poverty alleviation. In contrast, eastern *CADs* face greater policy pressure in the development of charitable trusts. In response to this pressure, the *CADs* in eastern China create a supportive regulatory environment and encourage the public to establish charitable trusts with diverse purposes.

The second factor is the tension between regulatory capacity and regulatory objectives. The regulatory resources in eastern China can handle the number of charitable trusts requiring inspection. Regulators in these areas are therefore willing to intervene in the creation and ongoing administration of charitable trusts intensively. In comparison, regulators in western undeveloped areas do not have sufficient budgets and personnel in the carrying out of supervisory work, and therefore they are unwilling to take measures to promote public awareness about charitable trusts.

The final factor is the regulators' perceptions of risk. Regulators in both areas are clearly aware of the legal and reputational risks that may arise from the day-to-day supervision of charitable trusts. Together with the shortage of regulatory resources, the perception of risk motivates regulators in western China to

adopt a conservative attitude towards the recording of charitable trusts. In comparison, because of the high degree of regulatory capacity and the increasing level of policy pressure, the perception of risk alone does not dissuade eastern regulators from playing a proactive role in the supervision of charitable trusts.

CHAPTER FIVE THE USE OF CONTRACTUAL TOOLS BETWEEN TRUST PARTIES

I INTRODUCTION

In Chapter 3, the analysis showed that the law is underdetermined and does not define clearly how settlors should interact with trustees in the governance of charitable trusts. This vagueness creates a great deal of uncertainty in relation to trustees' management of charitable trusts. In Chapter 4, the analysis showed that the law is also vague on the relationship between the *CADs* and *BRAs* and on the scope and content of the powers that each of the two regulators exercises. Chapter 4 explored the correlation between the vagueness in the law and the consideration of extra-legal factors by regulators when performing their legal roles. It showed that, in view of China's particular environment, regulators have great incentives to intensively intervene in the creation and ongoing administration of charitable trusts.

This chapter turns to analyze the use of contractual tools by trust parties. Due to the vagueness of the law and administrative practice, trust parties tend to use contract to clarify their powers and duties and to define the ways in which they should interact. It is widely acknowledged by contract theorists that contracts are widely used as tools to guide the performance of relevant parties and to allocate powers and risks between them. In the Chinese charitable trust setting, the way in which contracts are used is nevertheless distinctive. There are two reasons for this.

The first relates to the perceptions of risk by trust parties. Due to the vagueness of the law, trust parties have difficulty in knowing how their performance will be assessed and whether their management is compliant with the requirements of the law. This chapter explores three types of risk that might be perceived by trust parties: the risk of vagueness of the law, the risk of public scrutiny, and the risk of regulatory scrutiny. It examines the ways in which the perception of these risks influences distribution of powers and duties of the trust parties in the contract.

The second reason relates to the regulatory practice of charitable trusts. As discussed in Chapter 4, the law sets up the regulatory framework for charitable trusts, but it is incomplete and vague on how regulators should exercise their powers. To mitigate risks in respect of the use of charitable assets, the author has examined how the regulators are willing to intervene intensively in the creation and ongoing administration of charitable trusts. They tend to advise trust parties on what clauses should be incorporated in trust documents, when clauses of trust documents are ambiguous and how they might be modified. This regulatory strategy is consistent with the administrative style of regulation of charitable trusts, discussed in Chapter 4.

Based on the twenty-eight charitable trust contracts for this research, this chapter offers an in-depth analysis of contractual practice. This analysis serves two purposes: one, to better understand the main uses of the contract and the reasons behind them; and two, to identify the extent to which the function and scope of the legal governance framework of charitable trusts are shaped by the contractual arrangement between trust parties.

II PERCEPTIONS OF RISK BY TRUST PARTIES

This section introduces three types of risk that might be perceived by the parties to charitable trusts: the risk of vagueness of the law, the risk of public scrutiny, and the risk of regulatory scrutiny. These three types of risks may also involve different levels of reputational, legal, or management risk. For example, failure to comply with regulatory measures may give rise to reputational and legal risks for trust parties. Likewise, when a trustee's misconduct is made known to the relevant regulators, this will also bring reputational and legal risks to the charitable trust. When disagreement occurs between trust parties, management risks will arise, in that disputes over the disposal of trust assets or the selection of beneficiaries may not be effectively resolved.

Driven by the imperative of risk allocation, trust parties tend to use contractual tools in different ways. For example, settlors and trustees wish to use contract clauses to clarify the powers and duties they have and the way in which they interact. In comparison, regulators wish to use their regulatory powers to influence contractual planning between trust parties, so as to mitigate risks that they may face in the discharge of their legal roles. This section gives an overview of the three types of risk perceived by trust parties. Section III below discusses specific risks and how trust parties use contracts to address these risks.

A *The Risk of Vagueness of the Law*

The first risk stems from the vagueness of the law. As analyzed in Chapter 3, the law sets up the internal relationship between settlors and trustees but is vague and incomplete on how they should interact and in what ways their legal roles should be performed. This vagueness enables settlors to easily interfere in the management of charitable trusts and creates a great deal of uncertainty in relation to trustees' performance of their duties. An illustrative example is article 28 of the *Chinese Trust Law*. According to this article, settlors are empowered to check or duplicate trust accounts, and request trustees to give explanations of their management decisions.¹ Exercise of this power enables settlors to assess whether trustees manage trust

¹ See also 卞耀武[Bian Yaowu], 《中华人民共和国信托法释义》[Interpretation of the Trust Law of the People's Republic of China] (法律出版社 [Law Press], 2002) 88–91; 周小明 [Zhou Xiaoming], 《信托制度：理论与实务》[Trust System: Theory and Practice] (中国法制出版社 [China Legal Publishing House], 2012) 229–30; 陈向聪 [Chen Xiangcong], 《信托法律制度研究》[Research on Trust Law System] (中国检察出版社 [China

affairs in compliance with charitable trust purposes, and whether trustees breach administrative duties or improperly handle trust affairs. If the answer is negative in the settlors' view, pursuant to article 22 of the *Chinese Trust Law*, they can apply to the court to annul such disposition and ask trustees to restore trust assets to their former state or make compensation.² The vagueness of the ways in which articles 22 and 28 work together raises three questions. First, in what situations can the management be considered to be inconsistent with a charitable trust purpose? Secondly, in what way can the handling of trust affairs be thought to be 'improper'? Thirdly, to what extent may a trustee's performance be recognized as deviating from its administrative duties? In the absence of detailed contract terms clarifying how these three questions should be dealt with, the interview data suggests that disputes are seen as likely to arise between settlors and trustees in relation to the management of charitable trusts.³

Seven trust managers with charitable trust practice were interviewed. When asked the question, 'Under what circumstances will there be disputes between trust parties?', they all said that disputes arise when trust parties have different understandings of their duties and powers.⁴ When such disputes are settled through litigation, the information about the litigation will quickly become public knowledge, and the trustees against whom legal judgments are entered will suffer severe reputational damage. This concern is increasingly apparent when government organs act in the capacity of settlors, and the trust purposes are related to administrative tasks that local governments are obliged to undertake. In the eyes of both settlors and trustees, an entity's reputation is highly important in business relationships. Based on this understanding, settlors and trustees have strong incentives to specify what the powers held by each party entail, and how the performance of each party's duties is assessed, so as to mitigate risks that may arise from the management of charitable trusts.

People's Procuratorate Press], 2007) 172–3; 高凌云 [Gao Lingyun], 《被误读的信托——信托法原论》 [A Misreading of Trust: Discussion on the Origin of Trust] (复旦大学出版社 [Fudan University Press], 2010) 267; Zhenting Tan, 'The Chinese Law of Trusts — A Compromise between Two Legal Systems' (2001) 13(1) *Bond Law Review* 224, 228; Rebecca Lee, 'Conceptualizing the Chinese Trust' (2009) 58(3) *International & Comparative Law Quarterly* 655, 661; Lusina Ho, 'The Reception of Trust in Asia: Emerging Asian Principles of Trust?' [2004] *Singapore Journal of Legal Studies* 287, 297; Ruiqiao Zhang, 'Trust Law of China and Its Uncertainties: Examination of the Rights and Obligations of Trust and Ownership of Trust Property' (2015) 10 *National Taiwan University Law Review* 45, 57.

² 《中华人民共和国信托法》 [Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001, art 22; Kai Lyu, 'Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis' (2015) 36 *Loyola of Los Angeles International and Comparative Law Review* 447, 460; 赵廉慧 [Zhao Lianhui], 《信托法解释论》 [Interpretative Theory of Trust Law] (中国法制出版社 [China Legal Publishing House], 2015) 476–8; Tan (n 1) 236; Zhang (n 1) 64; 高凌云 [Gao Lingyun] (n 1) 267; 卞耀武 [Bian Yaowu] (n 1) 91–3; 周小明 [Zhou Xiaoming] (n 1) 234–6.

³ Examination of charitable trust contracts suggests that trust parties wish to use contractual instruments to minimize the risks that may arise out of the exercise of settlors' powers. On detailed account of this aspect, see Section III A of this Chapter.

⁴ See interviews with T1, T2, T3, T4, T5, T6 and T7.

B The Risk of Public Scrutiny

The second type of risk derives from public supervision. Public scrutiny can be understood in two dimensions. The first concerns the factors that motivate the public to play a supervisory role. Aside from charity-promoting policies,⁵ another factor lies in the fact that the public lacks trust and confidence in the management of charities. The past two decades have seen a number of scandals involving misuse of charity funds. In the area of charitable trusts, it is hardly surprising that the public also lacks confidence in the performance of trustees' duties.⁶ When a charitable trust is created for politically or socially sensitive purposes, the public, echoing a distrustful sentiment, may wish to check whether the charitable trust concerned benefits the community as a whole or merely benefits a particular section of the public, and whether charitable trust assets are distributed in alignment with charitable purposes. On the other hand, as analyzed above,⁷ the law is vague on the internal relationship between settlors and trustees. This vagueness has created a high level of uncertainty in relation to trustees' management of charitable trusts. The lack of clear criteria for assessing a trustee's performance makes it easy for the public to criticize the trustee's management of charitable trusts. This concern has imposed pressure on trust parties and incentivized them to distribute such risk through the contract.⁸

The second dimension relates to the potential role of stakeholders in supervising the management of charitable trusts. The past three years have witnessed a rising level of stakeholder participation in the development of charitable trusts.⁹ The establishment of public supervision channels (i.e. hotline and complaint mailbox) at provincial, municipal and county levels allows stakeholders to voice complaints or report violations.¹⁰ This regulatory practice is consistent with the policy that a tough and stringent environment should be created for regulating charitable trusts. Reporting does not require the disclosure of reporters' identity information (e.g. name, domicile and means of communication). It is, therefore, effective in challenging violations since reporters are able to act without regard to political or institutional pressures.¹¹

⁵ See analysis in Section II C of Chapter 4.

⁶ See analysis in Section II A of Chapter 2.

⁷ See analysis in Section II A-1 of this Chapter.

⁸ See interviews with L1, L2, T1 and T5.

⁹ Chinese governments encourage social organizations and the public to actively participate in the drafting and deliberation of charity-related laws. See interviews with R2, A1, A3, A5, A7, L1, L8 and L9.

¹⁰ The *Chinese Charity Law* and the *Measures for Charitable Trusts* both prescribe that 'any individuals uncovering violations of laws and regulations of charitable trusts may lodge complaints or tip-offs to civil affairs departments, banking regulatory authorities, or other regulatory departments. See 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016, art 97; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, art 54.

¹¹ On scholarly writings discussing the active role of private enforcers or citizen supervisors in challenging violations, see Barton H Thompson, 'The Continuing Innovations of Citizen Enforcement' (2000) 2000 *University of Illinois Law Review* 185, 187; Karl S Coplan, 'Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law' (2014) 25 *Colorado Natural Resources, Energy & Environmental Law*

In the last four years, regulators in Shanghai, Guangzhou, Hangzhou and Shenzhen received no fewer than fifteen public calls or emails per day. These calls or emails covered a wide range of topics, such as clues about on-site inspections of trustees' domiciles, recommendations for expanding the extent and scope of disclosures, and delays in issuing annual reports by trustees.¹² The growing level of stakeholder participation has affected the way in which trust parties perform their legal roles. In an environment where regulators are proactive in raising awareness about charitable trusts and stakeholders are willing to play a supervisory role, trust parties have greater incentives to take strategies to deal with the vagueness of the law, such as using contractual tools to clarify their powers and duties and to define the way in which they interact.

C The Risk of Regulatory Scrutiny

The third type of risk comes from trust parties' violation of regulatory measures. This risk is related to the second type of risk, as public scrutiny may expose infringements of law by trust parties and thus bring regulatory scrutiny with it. Prior to the enactment of the *Chinese Charity Law* in 2016, there were no uniform laws at the national level governing foundations,¹³ social associations,¹⁴ and privately-operated non-enterprise organizations,¹⁵ the three major organizational forms for conducting charitable causes. Key elements for regulating charitable organizations are contained in myriad regulations (*xingzheng fagui* 行政法规), notices (*tongzhi* 通知),¹⁶ opinions (*yijian* 意见),¹⁷ and subnational laws of varying consistency and

Review 61, 119; Jody Freeman, 'The Private Role in the Public Governance' (2000) 75 *New York University Law Review* 543, 662–3.

¹² See interviews with R1, R2, R3, A3, A5 and A8.

¹³ 《基金会管理条例》 [Regulations on Administration of Foundations] (People's Republic of China) State Council, 3 August 2004.

¹⁴ 《社会团体登记管理条例》 [Regulations on Registration Administration of Associations] (People's Republic of China) State Council, 6 February 2016.

¹⁵ 《民办非企业单位登记管理暂行条例》 [Interim Regulations on the Administration of the Registration of Privately-Operated Non-Enterprise Organizations] (People's Republic of China) State Council, 25 October 1998.

¹⁶ 《民政部关于贯彻落实<国务院关于促进慈善事业健康发展的指导意见>的通知》 [Notice of the Ministry of Civil Affairs on Implementing the 'Guiding Opinions of the State Council on Promoting the Healthy Development of Charitable Causes'] (People's Republic of China) Ministry of Civil Affairs, 15 December 2014, ch 2.

¹⁷ See, eg, 《国务院关于促进慈善事业健康发展的指导意见》 [Guiding Opinions of the State Council on Promoting Healthy Development of Charitable Causes] (People's Republic of China) State Council, 24 November 2014, ch 3; 《中国慈善事业发展指导纲要（2011—2015 年）》 [Guidelines for the Development of China's Charitable Causes (2011-2015)] (People's Republic of China) Ministry of Civil Affairs, 15 July 2011, ch 3; 《民政部、国资委关于支持中央企业积极投身公益慈善事业的意见》 [Opinions of the Ministry of Civil Affairs and the State-Owned Assets Supervision and Administration Commission on Supporting the Central Enterprises to Actively Participate in Charitable Causes] (People's Republic of China) Ministry of Civil Affairs and State-Owned Assets Supervision and Administration Commission, 19 May 2015, ch 3; 《民政部关于加强和创新慈善超市建设的意见》 [Opinions of the Ministry of Civil Affairs on Strengthening and Innovating the Construction of Charity Supermarkets] (People's Republic of China) Ministry of Civil Affairs, 31 December 2013, ch 2.

authority.¹⁸ Under this fragmented legal system, the regulatory framework for charitable organizations also has two problems. First, there is a gap between enforcement rhetoric and local realities in the regulatory practice of charities. At the local level, governments are reluctant to spend funds on developing charitable causes.¹⁹ Regulators, as part of local governments, tend to decline applications for registration of charities.²⁰ Secondly, regulators of charitable organizations are not powerful. There is a lack of clear procedures to promote good or punish poor inspection work.²¹ Those in charge of charitable organizations are willing to negotiate compliance with regulators, and the deterrent effect of administrative measures has been heavily moderated in practice.

By drawing on experiences from regulatory practice in respect of charitable organizations, the *Chinese Charity Law* has established a new regulatory framework for the charitable trust model: the CADs and BRAs are granted by law broad supervisory powers and wide discretion on how to exercise them. In practice, as analyzed in Chapter 4, vagueness in the law and the political objectives underlying charitable trusts create scope for regulators to consider extra-legal factors when performing their responsibilities. Administrative and policy pressures impact substantially on the implementation of the law.²² As a result, regulators in both

¹⁸ See, eg, 《北京市促进慈善事业若干规定》 [Several Regulations for Developing Charity in Beijing] (People's Republic of China) Beijing Municipal People's Government, 1 January 2014; 《江苏省慈善事业促进条例》 [Regulations of Charity Promotion in Jiangsu Province] (People's Republic of China) Standing Committee of the People's Congress of Jiangsu Province, 1 May 2010; 《甘肃省慈善捐助管理办法》 [Measures for the Management of Charitable Donations in Gansu Province] (People's Republic of China) The People's Government in Gansu Province, 1 May 2006; 《长沙市慈善事业促进条例》 [Regulations of Charity Promotion in Changsha City] (People's Republic of China) Standing Committee of the People's Congress of Changsha City, 1 September 2012; 《宁波市慈善事业促进条例》 [Regulations of Charity Promotion in Ningbo City] (People's Republic of China) Standing Committee of the People's Congress of Ningbo City, 1 October 2011; 《宁夏回族自治区慈善事业促进条例》 [Regulations of Charity Promotion in Ningxia Hui Autonomous Region] (People's Republic of China) Standing Committee of the People's Congress of Ningxia Hui Autonomous Region, 1 November 2011; 《宝鸡市慈善爱心基金管理暂行办法》 [Interim Measures for the Administration of Charity Love Fund in Baoji City] (People's Republic of China) The People's Government of Baoji City, 10 January 2008.

¹⁹ Virginia E Harper Ho, 'From Contracts to Compliance: An Early Look at Implementation under China's New Labor Legislation' (2009) 23 *Columbia Journal of Asian Law* 35, 50; Benjamin Van Rooij, 'Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns' (2006) 37(1) *Development and Change* 57, 59; Benjamin Van Rooij et al, 'From Support to Pressure: The Dynamics of Social and Governmental Influences on Environmental Law Enforcement in Guangzhou City, China' (2013) 7(3) *Regulation & Governance* 321, 324.

²⁰ See interviews with L8, L9, A1, A6 and A7.

²¹ 谢琼 [Xie Qiong], 《立体监管：我国慈善事业发展的理性选择》 [Stereoscopic Supervision: Rational Choice for the Development of Charitable Causes in China] (2015) 4 国家行政学院学报 *Journal of Chinese Academy of Governance* 73, 74. See also interviews with A1, A3, A4, A6, A7 and T1.

²² Karla W Simon, 'Regulation of Civil Society in China: Necessary Changes after the Olympic Games and the Sichuan Earthquake' (2008) 32 *Fordham International Law Journal* 943, 972, 986; Sarah Biddulph, 'The Production of Legal Norms: A Case Study of Administrative Detention in China' (2003) 20 *UCLA Pacific Basin Law Journal* 217, 277; Rooij (n 19) 66; Virginia E Harper Ho (n 19) 98. It is common that Chinese governments use short-term political pressures to achieve the implementation of laws. One illustrative example is the conducting of political campaigns in China. On detailed account of anti-crime campaigns, see Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* (Cambridge University Press, 2007) 123–38; Murray Scot Tanner, 'State Coercion and the Balance of Awe: The 1983–1986 "Stern Blows" Anti-Crime Campaign' (2000) 44 *The China Journal*

eastern developed areas and western undeveloped areas tend to exercise their legal powers strictly in dealing with violations of the law. Among the actors interviewed, seven interviewees²³ had experience dealing with regulators. They stressed that regulatory officials were proactive in issuing letters or notices to inspect whether the disposal of trust assets was compliant with charitable purposes, and whether information on trust management had been properly disclosed. The interview data shows that regulatory officials in practice have greater incentives to interfere intensively with the creation and ongoing administration of charitable trusts. In order to simplify their supervisory work, regulators tend to require trust parties to incorporate or amend certain contract clauses in the recording phase. At the same time, for the purpose of mitigating risks from regulatory scrutiny, trust parties also tend to consult regulators on when contract clauses are ambiguous and how they might be modified.

III CONTRACTUAL ARRANGEMENTS FOR RISK ALLOCATION

Section II has analyzed the types of risk perceived by trust parties. This section will now discuss the way in which trust parties use contracts to allocate these risks. This discussion is based on the analysis of the twenty-eight charitable trust contracts collected as part of this study. At present, charitable trust contracts are not available on the uniform platform *Charity in China* and are therefore inaccessible to the general public. Given this limitation, the author was able to collect twenty-eight contracts for this research: eleven were collected through interviews in the author's five fieldwork sites (i.e. Beijing, Shanghai, Guangzhou, Hangzhou and Shenzhen), and another seventeen were collected from trust lawyers and trustee managers who had personal relationships with the author prior to the commencement of the interviews. These contracts cover charitable trusts established in both eastern developed areas and western undeveloped areas in China, and involve a wide range of charitable trust purposes, such as the promotion of education, environmental protection, and poverty alleviation.

To minimize the possibility that these contracts are unique and case-sensitive, the author liaised with the relevant interviewees to verify how widely these contracts were used and to what extent these contracts

93, 107–8; Susan Trevaskes, 'Yanda 2001: Form and Strategy in a Chinese Anti-Crime Campaign' (2003) 36(3) *Australian & New Zealand Journal of Criminology* 272, 272–84. On account of anti-corruption campaigns, see Benjamin van Rooij, 'China's War on Graft: Politico-Legal Campaigns against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the US' (2005) 14(2) *Pacific Rim Law & Political Journal* 289, 309. On account of environmental pollution campaigns, see Carlos Wing-Hung Lo et al, 'Explaining the Enforcement Gap in China: Local Government Support and Internal Agency Obstacles as Predictors of Enforcement Actions in Guangzhou' (2012) 111 *Journal of Environmental Management* 227, 228; Rooij (n 19) 66; Benjamin Van Rooij et al (n 19) 325. On account of wage arrears campaigns, see Sarah Biddulph, Sean Cooney and Ying Zhu, 'Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking' (2012) 34(4) *Law & Policy* 373, 382–90; Sean Cooney, 'Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1094–5.

²³ See interviews with L1, L5, L9, T1, T3, T5 and T7.

represent contractual practice. Through these efforts, the author confirmed that of the twenty-eight contracts, twenty-five were standard contracts widely used in charitable trust practice, and the other three (two recorded in Xi'an and one recorded in Qinghai) were unique and their clauses were separately planned based on the special requirements of trust parties. Examination of these contracts suggests that charity trustees prefer to use standardized precedent documents and negotiate contract terms on the basis of these precedent documents.

The author examines these twenty-eight contracts here to explore two specific questions: first, how trust parties use contracts to guide the performance of their legal roles; and second, how the contractual arrangement between trust parties shapes the function and scope of the legal governance framework of charitable trusts.

A The Use of Contract

The Chinese law stipulates that the establishment of charitable trusts shall be conducted in written form; and 'written form' includes trust contracts, wills or other written documents prescribed by laws and administrative regulations.²⁴ The law itself indicates that trust parties have the freedom to determine what type of written form to use for creating charitable trusts. Nevertheless, interviews with trustee managers and regulatory officials suggest that the contract form is generally used in practice. The three officials²⁵ interviewed provided two reasons for this practice: one, charitable trusts are still in their infancy, and the use of trust contracts can help to clarify the powers and duties between trust parties; and secondly, by advising trust parties on how to modify contract terms, regulators can direct the management of charitable trusts and the use of charitable assets in light of the state's public welfare policy. These two reasons show that regulators have played an active role in the establishment of charitable trusts. This active role is consistent with the administrative style of regulation of charitable trusts.²⁶

Compared to commercial trust contracts, the contract terms of charitable trusts have unique characteristics. The parties to charitable trusts often spend large amounts of time on negotiating how perceived risks could be allocated and how their powers and duties could be discharged. In creating contractual relationships, the relevant parties may plan for specific issues.²⁷ From the perspective of trust parties, the degree to which the relevant issues are planned for depends heavily on what type of risks may

²⁴ See 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 10) art 13; 《中华人民共和国信托法》 [Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001, (n 2) art 8; 卞耀武[Bian Yaowu] (n 1) art 59.

²⁵ See interviews with R1, R2 and R3.

²⁶ See analysis in Section III of Chapter 4.

²⁷ Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55, 56.

arise in each given case, to what extent this risk could be minimized through contractual planning, and how the relative powers between trust parties are distributed. For example, when settlors wish to play a proactive role in the management of trust affairs, trustees may wish to specify the way and extent in which settlors exercise their legal powers through the contract. However, the extent to which the trustee's desire can be given effect depends on how large it perceives the risks associated with a settlor's intervention to be and how powerful the trustee is when trying to impose constraints on the settlor. Similarly, when trustees wish to minimize the reputational risk flowing from the disposition of charitable trust assets, they may wish to use collective decision-making mechanisms to share and dilute the potential responsibilities. However, the extent to which the trustee's desire takes effect depends on its perception of the complexity of the management of charitable trusts and the extent to which a settlor is willing to participate in the decision-making process. In these two examples, although the focus of the planned contract clauses is different, the logic behind them is the same; that is, using contract tools to distribute risks between trust parties. To analyse in-depth the ways in which contractual planning responds to trust parties' perceptions of risk, the section below will examine the factors that are relevant to contractual planning, and the way in which each factor affects trust parties' decision-making.

B Planning for the Risk of Vagueness of the Law

Contractual practice suggests that trust parties tend to use contract tools to allocate risks associated with the vagueness of the law. It is acknowledged by contract theorists that contracts are widely used as tools to allocate risks between relevant parties.²⁸ In light of the ambiguities in the legislative framework, trust parties tend to use contractual tools to clarify how they should interact in the ongoing management of charitable trust affairs, how the performance of their duties can be assessed, and how disputes between them can be dealt with. As analyzed in Chapter 3, under the legislative framework for charitable trusts, the role of the trustee is more akin to an agent of the settlor, rather than to a trustee as understood in common law jurisdictions. Settlors have extensive statutory powers and therefore are able to play a proactive role in the administration of charitable trusts.²⁹ The gateway through which settlors intervene in the management of charitable trusts is largely relaxed when looking at the fact that there are very few restrictions imposed on the exercise of their powers and that there exists uncertainty as to how the performance of trustees' duties should be assessed. Recognizing this, for the purpose of mitigating disputes associated with the administration of trust affairs, trustees may wish to specify in what scenario and to what extent settlors can

²⁸ See Jeannie Marie Paterson, Andrew Robertson and Arlen Duke, *Contract: Cases and Materials* (Thomson Reuters, 2016) 540; Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) 308; Stewart Macaulay (n 27) 63; Stewart Macaulay, 'An Empirical View of Contract Law' (1985) 1985 *Wisconsin Law Review* 465, 475; Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113(3) *The Yale Law Journal* 541, 555.

²⁹ See analysis in Section III B of Chapter 3.

intervene, and settlors may wish to clarify how trustees' duties work and what each duty entails. Following from this logic, trust parties in practice often specifically design contract clauses to guide how they interact in the day-to-day governance of charitable trusts.

1 *On the Part of the Settlor*

Where consensus is reached that settlors will play a role in the ongoing management of charitable trusts, the discussion that follows is to what extent and in what way the settlors will play their roles. In the fieldwork, all trustee managers interviewed were asked, 'Under what circumstances are you willing to use contractual tools to limit the exercise of settlors' powers?'. Five people answered this question.³⁰ They said that their motivation to create contractual constraints was primarily related to the vagueness of article 21 of the *Chinese Trust Law*. Pursuant to this article, where there exist special reasons unanticipated at the time trusts are created, settlors are entitled to ask trustees to modify management methods where the methods in question are not favorable to realizing charitable purposes. The current law does not define 'In which situation can a management method be said to be unfavorable to the realization of trust purposes?' and 'What are the special reasons in the context of article 21?'. This vagueness creates a great deal of uncertainty to the trustee's administration of trust affairs. For example, to what extent does the current management method impede the carrying out of charitable trust purposes? How should risks associated with the modification of management methods be appropriately addressed? How would regulators look at the modification of management methods? If there are no contractual clauses defining the way in which article 21 works, it is foreseeable that these questions will lead to controversy between the trust parties. Consistent with this analysis, among the twenty-eight charitable trust contracts collected, twenty-two have incorporated one similar provision³¹ to limit the potential application of article 21; that is, 'because of situations unexpected at the time trusts are created, any suggestions on changing management methods must be submitted to regulatory agencies for approval'.³² It is not difficult to understand the reason behind this provision; namely, a layer of protection could be attached to trust parties if regulatory agencies are involved in the decision-making process.³³

On the other hand, contractual practice also raises a new question to consider: how should the legal effect of these contractual constraints be understood? Although these constraints are imposed on the basis of trust parties' mutual assent, it is unclear whether such constraints are legally valid or not. The actors interviewed have different views on this issue. Some proposed that these contractual constraints should be

³⁰ See interviews with T1, T2, T3, T5 and T6.

³¹ Whether contractual constraints can be imposed turns upon the balancing of various factors, including the relative bargaining power between trust parties, and whether the constraint imposed is consistent with the interest of each party. See interviews with A1, A6 and R1.

³² See interviews with L2, L3, L8, A2 and T1.

³³ See interviews with T1, T3, T5, L1, L2 and L9.

legally valid, provided that their imposition did not involve fraud, duress or undue influence on the part of the trustee; whereas others were of the view that the settlors' powers in article 21 of the *Chinese Trust Law* were granted by statute, the exercise of which could not be burdened with contractual constraints.³⁴ It is unclear as to the legality of these constraints, and this issue is not answerable until judicial interpretations or new laws are issued for clarification.

2 On the Part of the Trustee

The charitable trust, a business with low commercial profits but high reputational risks, is not welcomed by trustees in practice. Analysis of the interview data shows that there are two reasons why managers are reluctant to handle charitable trust affairs. The first is the lack of specific indicators to assess the performance of managers who are responsible for charitable trusts.³⁵ The second is the high risk associated with the administration of charitable trusts. On the other hand, the interview data shows that trust companies may be willing to engage in charitable trust business if the potential benefits are thought to outweigh the costs and risks. In the eyes of the trustees, the benefits of conducting charitable trust business mainly include two aspects. The first is the benefit that trust companies can receive in respect of industry rating. The China Trustee Association evaluates and grades the performance of trust companies annually. Although the grade issued by this Association is not official, it has been considered a de facto authority for the ranking of trust companies in China. Conducting charitable trust businesses can help trust companies score well under the column 'Social Responsibility'.³⁶ The second benefit relates to the positive effect that trust companies can achieve for image building.³⁷ Conducting charitable trust business can bring certain promotional benefits to trust companies, for example demonstrating that they are fulfilling their social responsibilities and have good social ethics. In consideration of such benefits, and the possibility of allocating potential risks through the use of contractual tools, trust companies in practice have engaged in much charitable trust business. The information disclosed in *Charity in China* shows that of the 118 charitable trusts recorded over the past three years, trust companies have accepted the office of trust for 72.

³⁴ See interviews with A6, A7 and R1.

³⁵ Most trust companies do not have specific indicators to assess the performance of managers responsible for charitable trust affairs. These companies use indicators for commercial trusts (i.e. the rate of return on investment) to assess the performance of charitable trusts. However, pursuant to article 30 of the *Measures for Charitable Trusts*, charitable trust properties can only be invested in low-risk assets such as bank deposits, government bond, central bank bills, or money market funds. In contrast, the investment areas for commercial trust assets are wide, including infrastructure industry, the security market, the real estate industry, and commercial enterprises. According to the assessment indicators for commercial trusts, no matter how diligent the managers are, it is extremely difficult to achieve good performance when handling charitable trust affairs. See interviews with L1, L8, T1, T2, T3 and T5.

³⁶ See 《信托公司行业评级指引（试行）》 [Guidelines for Industry Rating of Trust Companies (Trial)] (People's Republic of China) China Trustee Association, 14 September 2017, arts 7, 11. See also interviews with T1, T3, T7, L1 and L8.

³⁷ See interviews with T1, T5, L1, L5, L9 and A1.

When trust companies have already participated in charitable trust business, the next question that trustees have considered is: what measures can be taken to prevent their reputation from being damaged when managing charitable trust affairs? The law does not delineate the scope and content of the managerial or distributive powers held by trustees. Rather, it stipulates that trustees shall practice due diligence and perform the duties of integrity and prudence when disposing of trust assets.³⁸ Given the vagueness in how the trustee's duties and powers are defined, the twenty-eight charitable trust contracts show that trustees in practice often employ three types of contractual planning for managing trust affairs: one, specifying the way in which the investment power is exercised; two, clarifying the way in which the statutory duties are performed; and three, establishing charitable trust committees for collective decision-making.

(a) The Investment Power

Most trustees are willing to develop detailed and complete contractual terms for managing trust affairs. Pursuant to article 30 of the *Measures for Charitable Trusts*, charitable trust assets must be invested in low-risk assets such as bank deposits or government bonds. However, settlors and trust companies can, by agreement, make exceptions³⁹ to the investment of trust assets.⁴⁰ Five of the seven trustee managers

³⁸ 《慈善信托管理办法》[Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 10) art 24; 《中华人民共和国信托法》[Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001, (n 2) art 25.

³⁹ The *Interim Measures for the Management of Value-Added and Investment Activities of Charitable Organization* (hereinafter '*Measures for Charitable Organizations*') was issued on 30 October 2018. A conflict is raised between the *Measures for Charitable Organizations* and the *Measures for Charitable Trusts*. The *Measures for Charitable Trusts* stipulates that charitable trust assets shall be used for low-risk assets, but an exception can be made where agreements are concluded between trust companies and settlors. See 《慈善信托管理办法》[Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 10) art 30. Given this, when charitable organizations take the office of trust, they cannot invest high-risk assets by making special agreements with settlors. In contrast, the *Measures for Charitable Organizations* releases this limitation, saying that charitable organizations can invest in asset management products issued by financial institutions. See 《慈善组织保值增值投资活动管理暂行办法》[Interim Measures for the Management of Value-Added and Investment Activities of Charitable Organizations] (People's Republic of China) Ministry of Civil Affairs, 30 October 2018, art 4. One question arises as to which *Measure* should be followed when charitable organizations invest charitable trust assets. If we follow the principle 'new law superior to old law', it is said that the *Measures for Charitable Organization* should be applied first and therefore the investment power of charitable organizations is expanded. On the other hand, if we follow the principle 'special law superior to general law', the *Measures for Charitable Trusts* should be applied first where charitable organizations act as trustees. In this light, the investment power of charitable organizations is strictly limited. See 金锦萍 [Jin Jinping], 《慈善信托的规制之道——兼评<慈善信托管理办法>》[Regulation of Charitable Trusts — Comment on <Administrative Measures for Charitable Trusts>] (2017) 16 中国社会组织 *China Social Organization* 23, 26.

⁴⁰ In contrast to the investment of charitable trust properties, the trustees of public welfare trusts have no freedom in making investments, and trust parties cannot use contractual agreement to exclude this investment restriction. See 《中国银监会办公厅关于鼓励信托公司开展公益信托业务支持灾后重建工作的通知》[Notice of the General Office of China Banking Regulatory Commission on the Encouragement of Charitable Trust Business of Trust Companies to Support Post-Earthquake Reconstruction] (People's Republic of China) General Office of China Banking Regulatory Commission, 6 February 2008, s 6(3).

interviewed said that they were reluctant to retain broad investment power when managing charitable trust assets;⁴¹ whereas the other two expressed that it made no difference whether flexible investment power is reserved or not, for all investment decisions must be approved by the settlor.⁴² Different from commercial trusts where managers are entrusted to invest in pursuit of profitable gains, stability and low risk are the crucial concerns when investing charitable trust assets. In this light, trustees of charitable trusts wish to plan in detail how trust assets could be invested and what the procedure for making investment decisions is in the contract. Among the twenty-eight charitable trust contracts, twenty-three contained a similar clause that narrows the investment scope to limited types of assets, such as bank deposits, central bank bills, and financial bonds. As to the other five contracts in which trustees are authorized to make flexible investment decisions, the decision-making procedure is set forth clearly in the contract. Finally, even more significantly, all twenty-eight trust contracts are written with a clear investment disclaimer marked in bold. Under the disclaimer is a series of warnings that serve to outline the risks (e.g. market risks and policy risks) that may arise from the investment of charitable trust assets.

(b) The Statutory Duty

Trustees of charitable trusts must not only abide by the *Chinese Charity Law*, but also comply with the regulations applicable to trust companies⁴³ or charitable organizations.⁴⁴ Nevertheless, these legal instruments all lack clear guidance on how the trustee's duties are defined and how the performance of these duties should be assessed. Meanwhile, because of intense administrative and policy influences, regulators are inclined to exercise their powers strictly in dealing with non-compliance with regulatory measures or violations of the law.⁴⁵ Given these two concerns, when designing contract terms, trustees are

⁴¹ See interviews with T1, T2, T3, T5 and T6.

⁴² See interviews with T4 and T7.

⁴³ For regulations that apply to trust companies, see, eg, 《信托公司管理办法》 [Measures for Administration of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 23 January 2007; 《信托公司集合资金信托计划管理办法》 [Administrative Measures for Collective Investment Trust Schemes of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 4 February 2009; 《信托公司净资本管理办法》 [Measures for the Administration of Net Capital of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 24 August 2010; 《信托投资公司信息披露管理暂行办法》 [Interim Measures for the Administration of Information Disclosure by Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 18 January 2015.

⁴⁴ For regulations that apply to charitable organizations, see, eg, 《社会团体登记管理条例》 [Regulations on Registration Administration of Associations] (People's Republic of China) State Council, 6 February 2016 (n 14); 《基金会管理条例》 [Regulations on Administration of Foundations] (People's Republic of China) State Council, 3 August 2004 (n 13); 《民办非企业单位登记管理暂行条例》 [Interim Regulations on the Administration of the Registration of Privately-Operated Non-Enterprise Organizations] (People's Republic of China) State Council, 25 October 1998 (n 15); 《慈善组织保值增值投资活动管理暂行办法》 [Interim Measures for the Management of Value-Added and Investment Activities of Charitable Organizations] (People's Republic of China) Ministry of Civil Affairs, 30 October 2018 (n 39).

⁴⁵ See analysis in Section II C of Chapter 4.

concerned less about how to acquire more powers vis-à-vis the other party, but more about what clauses can be used to guide the discharge of their legal roles.

Two duties are carefully planned in twenty-five contracts: the duty to segregate and the duty to disclose. The duty to segregate is stipulated in article 27 of the *Measures for Charitable Trusts*: the assets of a charitable trust must be separated from the assets of the charitable trust trustee. This article does not elaborate two issues. First, to what extent and in what way can the duty to segregate be performed? Secondly, how may the trustee separately manage and compile separate accounts for the assets of different charitable trusts? In practice, trustees have taken a variety of approaches to address the above two questions, and the one used most is to specify the way in which this duty works through the contract. This approach has been evidenced by contractual practice. A common clause dealing with the duty to segregate was incorporated in all of the twenty-eight contracts collected. That is, ‘The trustee is responsible for setting up a special bank account for each charitable trust it handles, and signing a contract with professional custodians (commercial bank) to safeguard charitable trust assets and review the net asset value of the assets; different charitable trusts shall be independent of each other in terms of account setup, bookkeeping record and fund allocation’.⁴⁶

Clarification of disclosure duties through the contract serves the same purpose of facilitating the management of trust affairs. Two observations can be offered here. To begin with, the current law on information disclosure is too vague and incomplete. The law stipulates that trustees are obliged to disclose charity-related information in an adequate and timely manner. However, little guidance has been given on how this duty could be performed.⁴⁷ In the eyes of the trustees, two questions remain to be addressed: a) to what extent the information regarding trust asset conditions should be disclosed; and b) whether the level of transparency required of a charitable trust should be differentiated by the scale and the type of its assets, or the nature of its charitable purposes.⁴⁸ In the eyes of the regulators, the crucial concern is whether there is sufficient transparency to inform regulators and stakeholders that trust assets are being used for

⁴⁶ See interviews with L1, L2, L5, L9, T1, T3, T5 and T7. Compared to the *Measures for Charitable Trusts*, the *Administrative Measures for Collective Investment Trust Schemes of Trust Companies* prescribes that, after the establishment of a trust scheme, the trust company shall deposit assets under the trust scheme into a special bank account; meanwhile, during the term of a trust scheme, the trust company shall select a commercial bank with stable operations as the custodian. See 《信托公司集合资金信托计划管理办法》 [Administrative Measures for Collective Investment Trust Schemes of Trust Companies] (People’s Republic of China) China Banking Regulatory Commission, 4 February 2009, (n 43) arts 18-9. Although the *Measures for Collective Investment Trusts Schemes* does not apply to charitable trusts, trust companies often draw reference from the experience of collective investment trusts when engaging in charitable trust business.

⁴⁷ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 10) arts 14, 56; 《中华人民共和国慈善法》 [Charity Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 16 March 2016, (n 10) art 71.

⁴⁸ See also analysis in Section II C of Chapter 4.

appropriate purposes. In order to simplify the supervisory work and mitigate the risks associated with the supervision of charitable trusts, regulators often require trust parties to specify how the information disclosure in the contract works, and what information is involved. The regulatory officials in Guangzhou and Beijing even said that the degree of specificity of the information disclosure clause was essential to determining whether a charitable trust would be recorded or not.⁴⁹ Among the trustee managers and trust lawyers interviewed, four interviewees⁵⁰ had the experience of modifying contract clauses in accordance with the regulators' suggestions. They stated that, on the one hand, the regulators' interference with their contractual planning was beyond their expectations; on the other hand, the regulators' suggestions on how the information disclosure clause should be modified were insightful, since they could discern the regulators' concerns and use this experience to continually update and modify standard contract terms for future use.

(c) The Charitable Trust Committee

The charitable trust committee mechanism is widely used in practice to guide the management of charitable trust affairs. The charitable trust committee generally comprises the trustee, the settlor, and the trust supervisor (if any). In this committee, the members agree in advance that any decision relating to the selection of beneficiaries or the distribution of trust assets can only come into force when unanimous consent is achieved between members.⁵¹ The committee, a mechanism unique to Chinese charitable trusts, is rarely used in commercial trusts. What is the rationale behind the establishment of this committee? Why do trustees wish to involve settlors and trust supervisors in the decision-making process? By interviewing trust lawyers and trustee managers, the author identifies two reasons. First, trustees must abide by the duty of care, the duty of skill, and the duty of prudence when managing and distributing charitable trust assets. However, the current law is entirely silent on how these duties should be defined. In the eyes of the trustees, it may become easier to meet the requirements of 'due care', 'skill' and 'prudence' if the charitable trust committee is involved in the decision-making process.⁵² Secondly, compared to the asset scale of the individual collective investment trust (amounting to RMB 0.135 billion yuan / 1.88 million USD dollars on average),⁵³ the asset scale of the individual charitable trust is not large, ranging approximately from RMB

⁴⁹ See interviews with R1 and R2.

⁵⁰ See interviews with L1, L2, L3 and T5.

⁵¹ In charitable trusts where local governments act in the capacity as settlors, the relevant governments use the mechanism of the charitable trust committee. For the purpose of protecting reputation, these governments tend to be proactive in supervising the management of trust affairs. Meanwhile, because these governments have resources and experience in selecting beneficiaries, they advise trustees on how to choose beneficiaries and how to distribute trust assets. See interviews with L1 and T1.

⁵² Interviewees in favor of this opinion include A1, A6, A4, L1, L3 and T7.

⁵³ 中国人民大学信托与基金研究所 [Institute of Trust and Fund of Renmin University of China], 《中国信托业发展报告 (2016)》 [The Development Report of Chinese Trust Business (2016)] (中国经济出版社 [China Economic Publishing House], 2018) 127.

10,000 yuan to RMB 10 million yuan (from 1,396.65 USD dollars to 1.39 million USD dollars).⁵⁴ Charitable trusts are not the core business of trust companies. However, trustees are exposed to different levels of legal and reputational risks when managing charitable trusts. In view of these two reasons, most of the trustees interviewed are inclined to use the committee mechanism to administer trust affairs — by allowing settlors and trust supervisors to participate in the decision-making process, the responsibilities associated with the management of charitable trusts can be shared and diluted.

On the other hand, it is worth noting that among the twenty-eight contracts, the three contracts from western China make no mention of how charitable trust affairs should be managed and how the responsibilities and duties of each party should be performed. On its surface, this phenomenon suggests that there may exist a regional variation in terms of contractual planning. Nevertheless, interviews with trust lawyers and trustee managers⁵⁵ in charge of the creation and management of the three trusts, suggest that this phenomenon is not contrary to this chapter's argument that contracts are highly planned for risk allocation. According to the interview data, the charitable purposes of the three trusts were all related to poverty alleviation. They all lasted less than six months; the distribution was one-off; and the trustee had no discretion as to how trust assets should be distributed and how beneficiaries should be selected. The parties to these three trusts had previously reached a consensus with regard to all managerial and distribution affairs. Thus, they were of the view that the perceived risks mentioned earlier were less likely to materialize, and therefore the need to highly plan contract terms for risk allocation was not imperative and urgent.

C Planning for the Risk of Public Scrutiny

As already analyzed in Chapter 3, settlors in law are empowered to play a proactive role in the day-to-day governance of Chinese charitable trusts. The granting of wide powers to settlors is consistent with the objective of securing settlors' autonomy and serves to encourage the public to take advantage of trusts to develop charitable causes.⁵⁶ In practice, there is no uniform answer as to the extent to which, and the way in which, settlors intervene in the management of charitable trusts. Among the actors interviewed, a certain number expressed a view that settlors should play a dominant role in the administration of charitable trusts.⁵⁷ In contrast, other interviewees suggested that it was not proper to simply say that settlors play a proactive or conservative role. The extent to which a settlor intervenes in each trust varies considerably. This depends on the balancing or weighing of multiple factors, including the settlor's wishes and identity, the scale of trust assets, the nature of the charitable purpose, and the duration of the charitable trust.⁵⁸ The weight allocated to each factor noted above varies, and two factors are especially important in settlors' decision-

⁵⁴ This data is accessible through the uniform information platform *Charity in China*.

⁵⁵ See interviews with L1, L2 and T1.

⁵⁶ See analysis in Section III B of Chapter 3.

⁵⁷ See interviews with L2, L8 and A2.

⁵⁸ See interviews with A1, A3, A4, A6, R2, L1, L3, T1 and T7.

making process: the scale of trust assets and the nature of charitable purposes. The larger the scale of trust assets, or the more politically or socially sensitive the charitable trust purpose, the greater the likelihood that the settlor will play an active role. A common pattern can be discerned from this observation: the degree of likelihood to which settlors will bear legal or reputational risk determines how willing they are to play supervisory roles.

1 *The Nature of the Charitable Purpose*

The first factor that affects a settlor's decision making is the nature of the charitable purpose. This does not mean that the charitable purposes themselves are closely related to settlors' interests, and therefore settlors are inclined to keep a close eye on carrying them out. Instead, what motivates settlors to play a proactive role is the degree of likelihood that they will bear legal or reputational risks when the purposes to be carried out are politically or socially sensitive. Three illustrative examples are the Charitable Trust of Precision Poverty (*jingzhun fupin* 精准扶贫) — Zhejin Wulanchabu City Chahar Right Back Banner (the 'Back Banner Charitable Trust');⁵⁹ the China Credit Trust — 2018 Annual Charitable Trust of Poverty Alleviation (the 'Credit Charitable Trust');⁶⁰ and the SDIC Taikang Trust — 2018 Gansu Lintao Industry Charitable Trust of Poverty Alleviation (the 'SDIC Charitable Trust').⁶¹ In these three trusts, local poverty alleviation and development offices (government agencies) act in the capacity of settlors.⁶² Interviews with trustees and trust lawyers, responsible for creating and managing the three trusts, indicate that there are two reasons why government agencies wish to play a proactive role.⁶³ First, the task of alleviating poverty is a

⁵⁹ Relevant information on the platform *Charity in China* includes: (a) this trust was recorded by the Hangzhou Bureau of Civil Affairs on 14 December 2018; (b) the settlor was the Poverty Alleviation and Development Office of Charhar Right Back Banner; (c) the trustee was Zheshang Jinhui Trust Company; (d) the trust supervisor was JINGTIAN & GONGCHENG Law Firm; and (e) the charitable purpose was to alleviate poverty and help the poor, and engage in other charitable activities that are compliant with the *Chinese Charity Law*, the *Chinese Trust Law* and the *Measures for Charitable Trusts*.

⁶⁰ Relevant information on the platform *Charity in China* includes: (a) this trust was recorded by the Beijing Bureau of Civil Affairs on 9 July 2018; (b) the settlor was the Poverty Alleviation and Development Office of Lintao County; (c) the trustee was China Credit Trust Company; (d) the trust supervisor was Beijing ZHONGSHENG Law Firm; and (e) the charitable purpose was to alleviate poverty and help the poor, support the development of characteristic industries in poverty-stricken areas of Gansu Province, and provide educational and cultural assistance for local people who are destitute.

⁶¹ Relevant information on the platform *Charity in China* includes: (a) this trust was recorded by the Beijing Bureau of Civil Affairs on 26 March 2018; (b) the settlor was the Poverty Alleviation and Development Office of Lintao County; (c) the trustee was SDIC Taikang Trust Company; (d) the trust supervisor was Beijing ZHONGSHENG Law Firm; and (e) the charitable purpose was to alleviate poverty and help the poor, and to provide educational and living assistance for local poor people by supporting the development of characteristic industries in poverty-stricken areas of Gansu.

⁶² Three aspects require attention. First, the trust assets of the three trusts come from private donors rather than government funds. Secondly, in the three trusts, private actors donate assets to government agencies and reach an agreement with relevant agencies that these assets shall be used for charitable purposes. Thirdly, the reason government agencies use charitable trusts is that trust companies have expertise in investing and managing trust assets. See interviews with T1 and L2.

⁶³ See interviews with T1 and L2.

crucial policy objective of both central and local governments.⁶⁴ Media exposure of scandals will bring about rapid governmental intervention to redress the wrong,⁶⁵ and an official may be demoted or, in extreme situations, dismissed from their current position once a public incident has caught the attention of higher-level authorities.⁶⁶ Secondly, the task of alleviating poverty is closely related to the interests of the public. In this regard, the public is willing to pay close attention to the administration of charitable trusts that are relevant to poverty alleviation. As we all know, any public speculation about the use of charitable assets may result in irrevocable reputational damage to the governments concerned. In consideration of this reputational risk, trust parties have a strong incentive to plan in detail what role settlors play in the management of trust affairs.

2 *The Scale of Trust Assets*

The second factor that affects a settlor's decision making is the scale of trust assets. Where the scale of trust assets is large in the eyes of settlors, it is highly likely that they will play a proactive role in the management of trust affairs. Two explanations are available here. The first relates to the settlor's wishes. Settlors, as benevolent property owners, place a certain amount of their assets in charitable trusts. In this sense, it is understandable that they have the desire to see how the money is going to be used. Meanwhile, the courts are also willing to uphold such wishes, in consideration of the notion that owners are provided with maximal freedom in disposing of their assets.⁶⁷ The second explanation derives from the settlors' perceptions of risk. Over the last two decades, settlors in China have seen enormous unstable and unsuccessful charities. They are aware of the misappropriation risk that may arise from the day-to-day

⁶⁴ For policy documents on poverty alleviation, see, eg, 《中共中央、国务院关于打赢脱贫攻坚战的决定》 [Decision of the Central Committee of the Communist Party of China and the State Council on Winning the Battle Against Poverty] (People's Republic of China) Central Committee of the Communist Party of China and the State Council, 29 November 2015, chs 1-2; 《全国人民代表大会关于国民经济和社会发展第十三个五年规划纲要的决议》 [Resolution of the National People's Congress on the Outline of the Thirteenth Five-Year Plan for National Economic and Social Development] (People's Republic of China) National People's Congress, 16 March 2016, chs 56-8; 《民政部关于推进深度贫困地区民政领域脱贫攻坚工作的意见》 [Opinions of the Ministry of Civil Affairs on Promoting Poverty Alleviation in the Field of Civil Affairs in Deep Poverty Stricken Areas] (People's Republic of China) Ministry of Civil Affairs, 7 April 2018, ch 1; 《中国农村扶贫开发纲要（2011-2020年）》 [Outline of Poverty Alleviation and Development in China Rural Areas (2011-2020)] (People's Republic of China) Central Committee of the Communist Party of China and State Council, 27 May 2011, chs 2-3; 《“十三五”脱贫攻坚规划》 ['13th Five-Year Plan' for Poverty Alleviation] (People's Republic of China) State Council, 23 November 2016.

⁶⁵ Sean Cooney (n 22) 1095.

⁶⁶ Hon S Chan and Jie Gao, 'Performance Measurement in Chinese Local Governments' (2008) 41 *Chinese Law & Government* 4, 8; Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-Making in China* (Cambridge University Press, 2017) 130.

⁶⁷ Simon Gardner, *An Introduction to The Law of Trusts* (Oxford University Press, 2011) 296; John D Morley and Robert H Sitkoff, 'Making Directed Trusts Work: The Uniform Directed Trust Act' (2019) 44(1) *ACTEC Law Journal* 3, 8; Robert H Sitkoff, 'Trusts and Estates: Implementing Freedom of Disposition' (2014) 58 *Saint Louis University Law Journal* 643, 651; John H Langbein, 'Mandatory Rules in the Law of Trusts' (2004) 98(3) *Northwestern University Law Review* 1105, 1121.

operation of charitable trusts. Interviews with trust lawyers suggest that the reputation of a charitable trust is critical to its ability to carry on its purpose. Scandals exposed by media or the public at large may send a signal that settlors are largely responsible for the misuse of charitable assets, even if the misuse itself is not related to the conduct of settlors.⁶⁸ In view of these reputational and legal risks, settlors are willing to keep a close eye on the discharge of trustees' duties.

D Planning for the Risk of Regulatory Scrutiny

After considering contractual plans for the risk of public scrutiny, and for the risk of vagueness of the law, this section will examine how contractual tools are used to allocate risks of regulatory scrutiny. As already noted in Section II, the *Chinese Charity Law* provides a new, significant regulatory framework that applies to charitable trusts. The parties to charitable trusts are fully aware of the policy objectives that this new framework is designed to achieve and the possible negative consequences of violating these objectives. As a result, the parties involved in charitable trust business often use contracts to guide how they discharge their legal duties, so that their behaviours or activities could be aligned with the public welfare policy of the regulatory authority. A close study of the twenty-eight contracts shows that, for the purpose of allocating risks of regulatory scrutiny, trust parties often use contractual tools to plan three aspects: the dispute resolution clauses, the termination of charitable trusts, and the defective performance of trust parties.

1 The Dispute Resolution Clause

Pursuant to article 23 of the *Measures for Charitable Trusts*, charitable trust assets and the proceeds thereof must be used for charitable purposes.⁶⁹ Failure to comply with this 'all charitable use' requirement will attract serious administrative liabilities on the part of the trustees (violators), which may include warning, disgorgement of illegal gains, and fines.⁷⁰ Since trustees fully understand that they may be forced to pay penalties in the event of non-compliance, their motivation to breach in the first place will be greatly reduced. Moreover, punishments can become public knowledge very quickly, and it is difficult for defaulters to stay away from such controversies. The damage to a trustee's reputation is, in this sense, not likely to be constrained.

⁶⁸ See interviews with L1, L2 and L3.

⁶⁹ See 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 10) art 23. According to this legislative requirement, the inclusion of commercial or private purposes that are incidental or ancillary to charitable purposes will render the whole charitable trust invalid in China. This kind of legislative arrangement is in stark contrast to the legislative arrangement for Anglo-Australian charitable trusts. In Australia, a charitable trust is not invalid by reason only that a non-charitable purpose is included in any of the purposes to, or for which, an application of any of the trust funds is directed or allowed by the trust. See *Charitable Trusts Act 1993* (NSW) pt 5 s 23 sub-s (1); *Charities Act 1978* (Vic) pt IB s 7M sub-s (1); *Trustees Act 1962* (WA) pt VIII s 102 sub-s (3); *Variation of Trusts Act 1994* (Tas) pt 2 s 4 sub-s (2); *Trustee Act 1936* (SA) pt 4 s 69A sub-s (1); *Trusts Act 1973* (Qld) pt 8 s 104 sub-s (1).

⁷⁰ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 10) art 59.

The perceived risk is influential on trustees' conduct; for example, trustees may have no incentives to take high-risk actions. Recognizing this, the next question to consider is: if settlors ask trustees to take certain actions that are in violation of legislative or regulatory requirements (e.g. prioritizing settlors' private interests when distributing charitable assets), what should a trustee do? A certain number of trustee managers and lawyers were asked about this question, and seven people answered. They pointed out that one of the main reasons for detailed contractual arrangements was to guide the performance of trustees' legal duties when disagreement occurs.⁷¹ The vagueness of the law creates a high level of uncertainty to trustees' management of charitable trusts. Trustees do not know how their performance could be assessed and whether their management is compliant with the requirements of regulatory measures. This uncertainty creates a greater scope for settlors to interfere with the management of charitable trusts. In this regard, charitable trust contracts often incorporate a long and clear clause articulating the process to be followed in the event of disputes between settlors and trustees. Pursuant to this clause, where disputes arise as to whether settlors' private interest can be prioritized, the trustees will first communicate with settlors, explaining that any consideration of a trust party's personal interest is not allowed by regulators. If a deadlock occurs, the parties to charitable trusts have agreed in advance that these disputes can be submitted to regulators for resolution. This observation has been evidenced by contractual practice. Eighteen of the twenty-eight charitable trust contracts have been planned carefully with one provision; namely, settlors are obliged not to require trustees to manage trust assets in illegal ways and not to seek illegal benefits through the operation of charitable trusts. In response to this contractual duty, a large group of trustees, at the same time, have reserved themselves with the power to resign.⁷² This power is favourable to protecting the trustees' interest, in that it often takes the form of a contractual clause that allows trustees to terminate the contract without fault of either party. Where the appearance of a conflict between trust parties is so great, and the settlors' intervention demonstrates a high possibility to cause risks of non-compliance, trustees would expect to exercise this power in such dilemmas.

On the other hand, settlors also often reserve themselves the contractual power to replace trustees. This practice points to two implications. First, the power to replace trustees could facilitate the settlors' supervision over charitable trusts, in that their exercise of this power can protect the interests of charitable trusts if the trustees misappropriate trust assets or administer trust affairs contrary to charitable trust purposes. Secondly, this power may pose risks to trustees' management of charitable trusts, in that settlors'

⁷¹ See interviews with T1, T2, T3, T4, L1, L2 and L3.

⁷² It is possible for trustees to reserve the power to resign in trust contracts. Article 39 of the *Measures for Charitable Trusts* allows this contractual power to be reserved by trustees — the trustees of charitable trusts may not resign on their own, unless otherwise prescribed in trust documents. In contrast, the power to resign is not allowed to be reserved by trustees of Chinese public welfare trusts. Article 66 of the *Chinese Trust Law* prescribes that 'no trustee of a public welfare trust may resign without the approval of the public welfare administration authority'.

arbitrary exercise of this power could create uncertainty to trustees' decision-making and motivate them to act negatively on trust affairs. Considering these two concerns side by side, it would seem that in actual contractual practice, a settlor's exercise of a replacement power is often burdened with strict conditions. For example, among the twenty-eight contracts collected, ten have clearly incorporated the provision that 'the settlor can replace or change the trustee only if the trustee disposes of trust assets in breach of the trust purpose or causes losses to the trust assets due to violation of its management duties or improper handling of the trust affairs'.

2 *The Termination of Charitable Trusts*

The second area where trust parties wish to plan in detail is the termination of charitable trusts. Two observations can be drawn upon the investigation of the trust contracts collected. First, all of the contracts examined required that the assets of a charitable trust and the proceeds thereof must be used for charitable purposes; where trustees use trust assets and the proceeds thereof for non-charitable purposes, settlors have the power to ask trustees to restore the assets to their former state or make compensation.⁷³ Secondly, twenty-three contracts provided a detailed description of how charitable trust assets shall be dealt with in the event of termination. Interviews with regulatory officials and trustee managers suggest that this planning is closely related to the perceptions of risk by both regulators and trust parties.

First, regulators have no expertise in exercising the *cy-près* power. Pursuant to article 43 of the *Measures for Charitable Trusts*, where a charitable trust is terminated, and the trustee assets have no owner or the owner of the trust assets is the unspecified general public, the CAD that processes the record-filing of the charitable trust is empowered to guide the trustee to use the trust assets for purposes similar to the original charitable purposes. This *cy-près* mechanism aims to strike a balance between securing the settlor's autonomy and preserving charitable resources in the public domain to the largest extent.⁷⁴ However, charitable trusts in China are still in their infancy, and there are ambiguities with this mechanism. How should the *cy-près* use of charitable trust assets be controlled? To what extent can the purposes be considered similar to the original charitable purposes? Since no government documents or laws have been issued for reference, these two questions are not answerable at present. The government officials and scholars interviewed stated that it was still unclear how the *cy-près* mechanism should work in practice and what role regulators could play in the *cy-près* use of charitable trust assets.⁷⁵ Before clarifying these two questions, the CADs in Beijing, Shanghai, Hangzhou, Gansu and Qinghai are disinclined to exercise their

⁷³ This practice is consistent with the requirement of article 23 of the *Measures for Charitable Trusts*.

⁷⁴ Edith L Fisch, 'Changing Concepts and Cy Pres' (1959) 44(3) *Cornell Law Review* 382, 382; W Barton Leach, 'Perpetuities: Cy Pres on the March' (1964) 4 *Vanderbilt Law Review* 1381, 1385-6; Mercia Chapman, 'Larger Charitable Trusts & the Operation of the Trustee Act' in *Charitable Trusts: In Victoria* (Legal and Accounting Management Seminars Pty Ltd, 1996) 2.

⁷⁵ See interviews with R1, R2, A1, A3, A4, A5 and A6.

cy-près power over the operation of charitable trusts, as evidenced by the complete absence of *cy-près* work conducted in any of the five cities since the enactment of the *Chinese Charity Law* in 2016. Furthermore, the interview data shows that regulators tend to require trust parties to incorporate detailed contractual provisions specifying how trust assets should be used when charitable trusts are terminated.⁷⁶ This practice is consistent with the regulatory strategy noted in Section III-B; namely, regulators use their regulatory powers to influence the contractual planning between trust parties, so as to mitigate risks that regulators may encounter in the discharge of their roles.

Secondly, the *cy-près* use of charitable assets is also of primary concern to trust parties. Aside from the *cy-près* scheme implemented by regulators, trustees also have the power to direct charitable assets *cy-près* to a similar purpose, provided that this use is approved by relevant regulators.⁷⁷ In the eyes of the trustees, how can the *cy-près* use of charitable trust assets be compliant with regulatory measures? And, even more importantly, in what way could the *cy-près* use of charitable trust assets avoid public criticism? The two questions significantly affect trustees' decision-making, especially considering that the public at large lacks trust in the performance of their duties and administrative liabilities would arise on their part when any improper use of trust assets is made known to relevant regulators. In view of the legal and reputational risks, the parties to charitable trusts wish to describe clearly how the trust assets should be dealt with in the trust contract, and also wish to consult regulators on how the clauses concerning the *cy-près* use of charitable trust assets should be designed or modified. Among the twenty-eight charitable trusts collected, twenty incorporated one similar provision describing the *cy-près* use of charitable assets upon the termination of charitable trusts. That is, where a charitable trust is terminated, upon approval by the relevant regulators, the trustee of a charitable trust should use the trust assets for purposes similar to the original charitable purposes.

3 The Defective Performance of Trust Parties

It is common for contract parties to use 'actual or potential sanctions to induce performance of the contract or to compensate for non-performance'.⁷⁸ Upon a careful study of the twenty-eight charitable trust contracts, one can discover that trust parties tend to plan in detail how the defective performance of each party should be dealt with, especially those that are likely to attract the attention of regulators. In the twenty-

⁷⁶ See interviews with L1, L2, T5 and T7.

⁷⁷ 《慈善信托管理办法》[Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, (n 10) art 43.

⁷⁸ Stewart Macaulay (n 27) 56. See also *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618, 630, 636; *Beaton v McDivitt* (1987) 13 NSWLR 162, 168; Jeannie Marie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters (Professional) Australia Limited, 5th ed, 2016) 6; Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 *Journal of Contract Law* 197, 211; Geoffrey K Flint, 'Enforce Them All: A Battle Cry for the Beleaguered Agreement to Negotiate' (1995) 13 *Australian Bar Review* 262, 270–1.

eight charitable trusts, there are two clauses commonly incorporated. The first relates to the unlawful creation of charitable trusts — that is, settlors create charitable trusts for illegal purposes.⁷⁹ This unlawful practice, pursuant to article 54 of the *Measures for Charitable Trust* and article 11 of the *Chinese Trust Law*, will strike down the legality of the whole trust scheme and attract investigation from relevant regulators. In the eyes of the trustees, it is cumbersome and difficult to identify the source of trust assets and to discern the true purpose behind the establishment of a trust. More significantly, regulatory investigations of such illegal behaviors might easily become public knowledge and attract media coverage. Because of this concern, trustees have the incentive to write a clause to deal with the illegal creation of charitable trusts. This thinking has been demonstrated by the contractual practice: among the twenty-eight contracts examined, twenty-one have incorporated a clause stipulating that settlors should not create trusts for illegal purposes; if trustees suffer losses due to the illegal creation of charitable trusts, the losses in question shall all be compensated by settlors.

A second clause commonly found in charitable trust contracts relates to the guarantees and statements made by trust parties. In practice, the most common guarantee made by trust parties is the one that settlors or trustees have no direct or indirect interest with the selected beneficiaries. This guarantee is in line with the requirement of the no-interest rule as stipulated in article 10 of the *Measures for Charitable Trusts*. There is a strong policy consideration bearing upon the operation of this no-interest rule; namely, to prevent charitable trusts from becoming channels for corruption or crimes.⁸⁰ Consistent with the trend to create a strict regulatory environment for charitable trusts,⁸¹ regulators tend to exercise their powers strictly in dealing with violations of the no-interest rule and also tend to disclose their disciplinary decisions so as to show the public that they are performing their jobs properly. The parties to charitable trusts have a clear understanding as to the legal consequences of violating the no-interest rule. Contractual practice evidences the above thinking. Interviewees with experience of selecting beneficiaries stated that bargaining on the terms of the no-interest rule was a key part of contract negotiations.⁸² Among the twenty-eight charitable trust contracts collected, twenty-four include this clause: ‘If trustees (or settlors) find that the selected beneficiaries have an interest in settlors (or trustees), trustees (or settlors) have the power to request the beneficiaries to return all benefits within the prescribed time period. Failing that deadline, settlors (or trustees) shall compensate these benefits to the trust assets’. As regards contracts that make no mention of the no-interest rule, the author interviewed the relevant trustee manager to ask about the reason. The data shows that the trust in question was not complicated: trust parties had agreed in advance that all trust funds

⁷⁹ 《中华人民共和国信托法》 [Trust Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 28 April 2001, (n 2) arts 11, 14.

⁸⁰ See interviews with R2, L3, A1, A3, A4 and A7.

⁸¹ See analysis in Section II of Chapter 4.

⁸² See interviews with T1, L2, L1 and L5.

should be donated to a designated national public hospital to support medical research, and the trustee had previously identified that the settlor had no interest in this designated hospital.

IV CONCLUSION

Chapter 3 analyzed the legislative regime governing the internal relationship between trust parties (i.e. settlors, trustees and beneficiaries). The analysis showed that the law sets up the internal governance framework but that it is incomplete and vague in the role of each party and the ways in which these parties should interact. Chapter 4 analyzed administrative practice and discovered that regulators in China are subject to intense policy and administrative pressures and thus strongly responsive to extra-legal factors in their implementation of the law. Due to the risk posed by the vagueness of the law and administrative practice, trust parties have perceived three types of risk in the creation and ongoing management of charitable trusts; namely, the risk of vagueness of the law, the risk of public scrutiny, and the risk of regulatory scrutiny. This chapter has examined these risks and the ways in which these risks affect the use of contractual tools by trust parties. It showed that contract clauses are widely used by trust parties to distribute risk and that two levels of relationship are regulated in this contract practice.

The first level of relationship is the horizontal relationship between settlors and trustees. For the purpose of mitigating risks, trust parties in practice often use contract to plan how trust affairs should be managed and how the performance of each party's role should be assessed. The analysis in this chapter showed that contractual arrangements between trust parties are closely related to risk allocation.

In relation to the risk of vagueness of the law, trust parties have strong desires to clarify the scope of their powers and duties and the ways in which trust assets are managed. Trustees wish to use contract to limit the extent to which settlors can interfere with the management of trust affairs. In comparison, settlors wish to use contract to specify what types of duties trustees are responsible for and how these duties should be discharged.

As regards the risk of public scrutiny, the lack of clear criteria for assessing a trustee's performance makes it easy for the public to criticize its management of charitable trusts. This concern has imposed pressure on trust parties and incentivized them to distribute such risk through contract. Practice showed that settlors and trustees are willing to specify the ways in which their legal roles are performed when charitable purposes in question are closely related to people's lives.

In terms of regulatory scrutiny, analysis in Chapter 4 has shown that regulators tend to intervene in the creation and ongoing management of charitable trusts intensively and to exercise their powers strictly when dealing with violations of the law. In light of the risk of regulatory scrutiny, trust parties are willing to plan in detail how to handle disputes between trust parties, how to use trust assets at the time of termination, and

how to deal with the defective performance of each party. The focus of contract arrangements on these aspects demonstrated the willingness of trust parties to comply with the requirements of regulatory measures.

The second level of relationship is the hierarchical relationship between regulators and trust parties. This chapter has examined the role of regulators in the design of contract clauses between trust parties. It has shown that regulators are willing to advise trust parties on which contract clauses are ambiguous and how they might be modified. This practice derives from regulators' own perceptions of risk, which connects us back to the analysis in Chapter 4. For the purpose of mitigating regulatory risk, regulators in practice often require trust parties to incorporate or amend certain clauses in the trust contract, such as specifying how information disclosure in the contract works and what information is involved. Whether contract clauses are compliant with regulators' requirements is essential to determining whether a charitable trust can be recorded or not. These regulatory suggestions or recommendations have also been incorporated into precedent contracts in the form of standard contract clauses and are then used to guide future negotiation between trust parties on contractual arrangements. On the other hand, in response to the risk of regulatory scrutiny, trust parties are also willing to consult regulators on when contract clauses are vague and how they should be amended. By closely reviewing the clauses of trust contracts and advising trust parties on what clauses should be incorporated in the contract, regulators have had systematic impacts on the ways in which charitable trusts are constructed and operate in China.

CHAPTER SIX ANALYSIS AND CONCLUSION

I INTRODUCTION

This chapter reflects back on the research questions proposed in Chapter 1. It presents the key research findings and discusses the broader implications for future research. The hypothesis that this thesis has tested is that the governance framework for Chinese charitable trusts may only be understood fully in light of relevant law, administrative practice, and private action taken by trust parties, considered together. This hypothesis has required examination of three interrelated factors that shape the governance framework for charitable trusts. First, the law sets up a governance framework for charitable trusts but the law is vague and underdetermined in various respects. Secondly, administrative practice is a significant part in the governance framework as regulators in China are subject to intense administrative and policy pressures and thus strongly responsive to extra-legal concerns. Thirdly, private action is essential in the governance framework as trust parties vary the framework of the law to mitigate risks posed by administrative practice and the vagueness of the law. The interrelationship between these three facets of governance of charitable trusts was explored through three research questions. First, how has the charity law shaped the governance structure of charitable trusts? Secondly, how have regulators implemented the legal regulatory regime in practice? Thirdly, what private actions have trust parties taken when engaging with the law?

II SUMMARY OF KEY FINDINGS

This thesis has examined the governance structure of Chinese charitable trusts from the perspectives of both law and practice. Three key findings can be summarized. First, in contrast to the public law nature of public welfare trusts, legislators have incorporated a number of private law norms in the legal structure of charitable trusts. Despite the increasing autonomy of trust parties to an extent, the predominant role of public law norms indicates that the charitable trust model continues to privilege the state's desire to maintain control over charitable undertakings.¹ Secondly, the governance framework for Chinese charitable trusts comprises three aspects: law,² administrative practice,³ and private action taken by trust parties.⁴ The three aspects are interrelated and taken together to constitute the particular mode of governance of Chinese charitable trusts. Thirdly, in view of the vagueness of the law and the political environment in which

¹ See analysis in Section III of Chapter 3.

² See analysis in Section III of Chapter 3.

³ See analysis in Section III of Chapter 4.

⁴ See analysis in Section III of Chapter 5.

charitable trusts are introduced and operate, trust parties⁵ and regulators⁶ have perceived different types of risk in the performance of their responsibilities. Adopting risk mitigation strategies has accordingly become an important driver in shaping the governance framework for Chinese charitable trusts.

A The Establishment of a Public-Private Hybrid Model

As analyzed in Chapter 2, legislators have created a public law-private law hybrid model for Chinese charitable trusts. The private law norms indicate the willingness of the state to use charitable trusts to spur the potential of the general public in the development of charitable causes.⁷ Under these private law norms, settlors are granted wide powers by law, such as the powers to change the trust management method and to appoint trust supervisors. This legislative approach allows settlors to play a proactive role in the creation and ongoing administration of charitable trusts. On the other hand, the state is reluctant to relinquish its control over the use of charitable resources. Legislators have endowed regulators with wide supervisor powers to facilitate their supervision over the use of charitable assets.⁸ The allocation of powers and responsibilities between trust parties and regulators suggests that private law norms continue to be subordinated to public law norms in the legal structure of charitable trusts. Private parties are not allowed to use charitable resources for personal purposes. They have the autonomy to determine how their management rights can be exercised, but only to the extent that such exercise is in line with the state's public welfare policy.⁹

B Three Inter-related Aspects of Charitable Trust Governance

The second key finding relates to the three facets of governance of Chinese charitable trusts. As noted in Chapter 2, the charity law sets up the public law-private law divide in the governance framework for charitable trusts but it is vague in various respects. The vagueness of the law has motivated trust parties and regulators to adopt strategies to guide the performance of their legal roles, and also created scope for them to take into account extra-legal factors when determining what strategies are available and how they can be applied. In this light, law is only part of the picture in understanding the governance of Chinese charitable trusts.

The public law aspects of the charitable trust relate to regulation and thus connect the analysis of charitable trust governance to the role of regulators.¹⁰ In the Chinese administrative system, regulators have long been subject to policy pressures and are thus strongly responsive to extra-legal concerns in their implementation of the law. Chapter 4 has identified three extra-legal factors that are influential in the

⁵ See analysis in Section III of Chapter 5.

⁶ See analysis in Section III of Chapter 4.

⁷ See analysis in Section II of Chapter 2.

⁸ See analysis in Section II of Chapter 4.

⁹ See analysis in Section II of Chapter 2.

¹⁰ See analysis in Section III of Chapter 2.

decision-making of regulatory officials: the regional development agenda, the tension between regulatory capacity and regulatory objectives, and the perceptions of risk by regulators. Examination of regulatory practice has shown that administrative factors supplement, or even prevail over, legal rules to guide the supervisory work of regulators. Administrative practice is therefore a significant part of the governance framework.

The private law aspects of the charitable trust relate to the internal relationship between trust parties and thus connect the analysis of charitable trust governance to the roles of settlors, trustees and beneficiaries.¹¹ The law sets up the internal relationship between trust parties but it does not clearly elaborate how each of these parties should interact and in what ways they should perform their legal roles.¹² The vagueness in the law has created a great deal of uncertainty in their management of charitable assets. The thesis has examined the areas where the law relevant to trust parties is vague,¹³ the types of risk that trust parties have perceived,¹⁴ and the strategies that they have taken to mitigate risks.¹⁵ It showed that settlors and trustees are willing to use contract tools to mitigate risks posed by administrative practice and the vagueness of the law. Contract practice is thus essential in the governance framework of charitable trusts.

C Mitigation of Risks by Trust Parties and Regulators

A third finding has emerged through the examination of the three interrelated aspects of governance. That is, adopting risk mitigation strategies is an important driver in shaping the behavioral patterns of regulators and trust parties.

In relation to the regulatory framework of charitable trusts, the charity law has established the powers and obligations associated with regulators. However, it does not clearly define the scope of these powers and obligations and how they should be performed, as noted in Chapter 4. This vagueness has posed risks to regulators in the discharge of their oversight roles.¹⁶ In addition to law, regulators under the Chinese bureaucratic system suffer under intense policy and administrative pressures. Regulators failing to meet the political goals of the state will be subject to severe administrative penalties.¹⁷ Due to the vagueness of the law and perception of administrative risks, regulators tend to take into account extra-legal factors when implementing the law.¹⁸

¹¹ See analysis in Section III of Chapter 2.

¹² See analysis in Section III of Chapter 3.

¹³ See analysis in Section III of Chapter 3.

¹⁴ See analysis in Section III of Chapter 5.

¹⁵ See analysis in Section III of Chapter 5.

¹⁶ See analysis in Section III of Chapter 4.

¹⁷ See analysis in Section III of Chapter 4.

¹⁸ See analysis in Section III of Chapter 4.

In relation to the internal governance structure of charitable trusts, the law has set up the checks-and-balances mechanisms between trust parties. However, it does not define clearly the scope of settlors' powers and how they should be exercised, the scope of trustees' duties, and the ways in which settlors interact with trustees. In view of the regulatory practice and the vagueness of the law, the parties to charitable trusts have perceived different kinds of risk in practice, as discussed in Chapter 5. The perception of risks has considerably influenced distribution of powers and duties of trust parties. For the purpose of mitigating risks associated with the management of charitable trusts, settlors and trustees have incentives to use contract tools to allocate their powers and obligations and to define the ways in which they should interact.¹⁹

III ANSWERS TO RESEARCH QUESTIONS

A How has the charity law shaped the governance structure of charitable trusts?

This thesis has analyzed the legal governance framework for the Chinese charitable trust and its distinctive characteristics. This analysis raised five key observations. First, legislators introduced a public law-private law hybrid model for Chinese charitable trusts that continues to privilege state control over the autonomy of private parties.²⁰ This hybrid nature permeates and informs the design of the governance structure of charitable trusts, as discussed in Chapter 2. Secondly, the law has established the checks-and-balances mechanisms between settlors and trustees.²¹ The legal framework enables settlors to be proactive in the use and management of charitable assets, as discussed in Chapter 3. Thirdly, legislators do not clearly contemplate beneficiaries playing a role in governance. The law does not define the legal nature of beneficiaries in the Chinese charitable trust setting. Nor does the law mention the rights or powers that beneficiaries under a charitable trust may have.²² Fourthly, the law grants regulators wide powers so that they can oversee whether charitable assets are used in alignment with the state's public welfare goals.²³ This approach demonstrates the state's willingness to maintain strict control over the use of charitable resources, as noted in Chapter 4. Fifthly, the law is vague in defining relationship and responsibilities of trust parties and regulators, and this vagueness has created substantive risks for each of these parties. The perception of these risks has incentivized regulators to use administrative mechanisms in the performance of their supervisory roles (discussed in research question 2), and motivated trust parties to take private actions to guide their management of charitable assets (discussed in research question 3).

¹⁹ See analysis in Section III of Chapter 5.

²⁰ See analysis in Section III of Chapter 2.

²¹ See analysis in Section III of Chapter 3.

²² See analysis in Section IV of Chapter 3.

²³ See analysis in Section II of Chapter 4.

1 *The Internal Relationship between Trust Parties*

In contrast to the public law model of public welfare trusts, the hybrid model of charitable trusts has elevated the scope of autonomy of trust parties and in theory limited the extent to which the creation and ongoing operation of a charitable trust is subject to state intervention.²⁴ In the post-2016 legal framework, this legislative change is reflected in the vesting of wide supervisory powers in the hands of settlors and the appointment of trust supervisors.

As discussed in Chapter 3, the settlor under a charitable trust is granted wide powers by law, including the powers to change the management method of charitable assets and to appoint trust supervisors. This legislative approach is in striking contrast to that in common law jurisdictions, as settlors at common law generally drop out of the picture where charitable trusts are legally established.²⁵ In the Chinese charitable trust setting, the granting of wide powers enables settlors not only to define the way in which charitable assets are managed but also to be proactive in supervising the performance of trustees' duties.²⁶ However, the law is incomplete and has created a number of ambiguities in the relationship between settlors and trustees. For example, the vagueness of the law in defining the scope of settlors' power has produced a great deal of uncertainty in the exercise of trustee's autonomous management powers, and the ways in which settlors interact with trustees in the day-to-day governance of charitable trusts.²⁷ In addition, the law is vague in defining the ways in which trustees perform their duties. In the absence of clear criteria for the discharge of trustees' roles, it is difficult for trustees to assess whether their management of charitable assets is compliant with the requirements of the law and the state's public welfare goals.²⁸ The vagueness in the law has created risks for settlors and trustees and motivated them to take private actions to guide the performance of their legal roles in practice, as discussed in the third research question.

The second aspect that illustrates the charitable trust's private law norms is the settlor's power to appoint trust supervisors, as discussed in Chapter 2. In contrast to public welfare trusts, the appointment of a trust supervisor is not mandatory in the charitable trust setting: settlors under a charitable trust have the discretion to determine whether or not a trust supervisor is appointed. This legislative approach has demonstrated the state's willingness to grant benevolent property owners greater autonomy in determining how charitable trusts can be managed.²⁹ At the same time, the law is underdetermined and does not provide any detailed criteria for how the powers and obligations of a trust supervisor should be determined.³⁰ In this

²⁴ See analysis in Section III of Chapter 3.

²⁵ See analysis in Section II of Chapter 2.

²⁶ See analysis in Section III of Chapter 3.

²⁷ See analysis in Section III of Chapter 3.

²⁸ See analysis in Section III of Chapter 3.

²⁹ See analysis in Section III of Chapter 3.

³⁰ See analysis in Section III of Chapter 3.

regard, in theory it is unclear in what ways trust supervisors may perform their responsibilities and to what extent trust supervisors will be able to fulfil the purpose of supervising the performance of trustees' duties.³¹

Aside from the vagueness of the law in the relationship between settlors, trustees and trust supervisors, the law is also vague in the role of beneficiaries in the governance framework. As analyzed in Chapter 3, the charity law adopts the term 'beneficiary' but makes no mention of what powers or rights a beneficiary may have in the governance setting. There are two arguments in relation to the nature of charitable trust beneficiaries in the Chinese literature: the beneficiary argument and the recipient argument. Chapter 3 has examined the ways in which and the extent to which beneficiaries may play a supervisory role under each argument. Under the beneficiary argument, the object with title of beneficiary may be entitled to sue where trustees cause losses to trust assets due to violation of their duties or improper handling of trust affairs. But this argument cannot provide a clear answer to the scope of a beneficiary's standing.³² In contrast, drawing an analogy with the interpretation of 'direct interest' in the *Civil Procedure Law* and *EPIL*, an object may be able to sue if he can show harm to a direct interest under the recipient argument. However, as the rules or principles around the role and nature of beneficiaries have not been settled, it is unclear whether theoretical analysis of the standing of beneficiaries under a charitable trust can be endorsed in practice and if so, in what ways and to what extent.³³

2 The Establishment of a New Regulatory Framework

Before the introduction of charitable trusts, legislators sought to use the model of public welfare trusts to encourage the public to participate in charitable undertakings.³⁴ However, as discussed in Chapter 3, the public welfare trust did not work very well, and the last twenty years' practice shows that there is a considerable gap between the advantages that public welfare trusts were supposed to have in developing charitable causes, and the limited role that they play in practice. The fragmented system of regulation is responsible for the failure of public welfare trusts, particularly in discouraging establishment of a public welfare trust.³⁵ This is reflected in two respects. The first is the difficulty that benevolent property owners have in identifying relevant administration authorities (regulators) for establishment of public welfare trusts. The law requires private actors to submit documents to regulators for registration but makes no mention of who these regulators are and how they can be identified. It is therefore difficult for private actors to identify to whom a registration application can be submitted.³⁶ The second reason relates to the unwillingness of regulators to approve the establishment of public welfare trusts. Regulators take a conservative attitude

³¹ See analysis in Section III of Chapter 3.

³² See analysis in Section IV of Chapter 3.

³³ See analysis in Section IV of Chapter 3.

³⁴ See analysis in Section I of Chapter 1.

³⁵ See analysis in Section II of Chapter 4.

³⁶ See analysis in Section II of Chapter 3.

towards the registration of public welfare trusts and are more concerned about the risk that may arise from their supervision of public welfare trusts.³⁷

Drawing on the failure of public welfare trusts, legislators established a new regulatory framework for charitable trusts. The design of this new regulatory framework has incorporated two policy objectives formulated by the central government: one, to control the use of charitable resources for public welfare purposes; and two, to stimulate the potential of the public to promote the development of charitable causes.³⁸ Under this new regulatory framework, two specialized regulators (i.e. the *BRAs* and *CADs*) are tasked to regulate the creation and day-to-day administration of charitable trusts.³⁹ They represent the interest of the state and are granted wide supervisory powers to control the use of charitable assets.

As observed in Chapter 4, regulators are empowered to determine whether a charitable trust is entitled to be recorded. Where a charitable trust is legally established, regulators have the powers to ask trustees to submit annual reports, to revoke the registration licenses of trustees, and to conduct supervisory conversations. This legislative arrangement allows regulators to maintain a high degree of control over the use of charitable trust resources.⁴⁰ Aside from the granting of regulatory powers, the law also requires regulators to take educative and consultative measures in the performance of their oversight roles. Regulators are endowed by law with high discretion in determining what forms these educative measures may take and how often the relevant consultative programs or training can be carried out. The regulatory approach of public education reflects the public law norms in the legal structure of charitable trusts.⁴¹

On the other hand, the regulatory framework for charitable trusts also entails a number of ambiguities. As noted in Chapter 4, the charity law does not clearly define the relationship of the two regulators. It is unclear how the two regulators should cooperate with each other in the exercise of their overlapping powers, such as the powers to assess charitable trusts and to conduct supervisory conversations. Nor does the charity law define clearly the role of regulators in the creation and ongoing administration of charitable trusts.⁴² There exists considerable uncertainty as to the nature of recording, the scope of regulators' powers and

³⁷ See analysis in Section I of Chapter 1.

³⁸ See 《中国慈善事业发展指导纲要（2011—2015 年）》 [Guidelines for the Development of China's Charitable Causes (2011-2015)] (People's Republic of China) Ministry of Civil Affairs, 15 July 2011, chs 2-3; 《国务院关于促进慈善事业健康发展的指导意见》 [Guiding Opinions of the State Council on Promoting Healthy Development of Charitable Causes] (People's Republic of China) State Council, 24 November 2014, chs 2-5; 《民政部关于贯彻落实<国务院关于促进慈善事业健康发展的指导意见>的通知》 [Notice of the Ministry of Civil Affairs on Implementing the 'Guiding Opinions of the State Council on Promoting the Healthy Development of Charitable Causes'] (People's Republic of China) Ministry of Civil Affairs of People's Republic of China, 15 December 2014, ch 2.

³⁹ See analysis in Section II of Chapter 4.

⁴⁰ See analysis in Section II of Chapter 2.

⁴¹ See analysis in Section II of Chapter 2.

⁴² See analysis in Section II of Chapter 4.

responsibilities, and the ways in which regulators should interact with trustees.⁴³ These ambiguities have created substantive risks for regulators and incentivized them to adopt administrative mechanisms in the discharge of their supervisory roles. The use of administrative mechanisms has been discussed in more detail in the second research question.

3 *The Predominant Role of Public Law Norms*

The hybrid nature of charitable trusts indicates that the implementation of the policies concerning charitable trusts inevitably involves contradictions and conflicts between the autonomous interests of trust parties and the broader interests of the state. These include giving trust parties greater control over the exercise of their management rights and ensuring that charitable resources are to be used in a way that benefits the legitimate interests of the broader society as defined by the state. The allocation of rights and responsibilities between trust parties and regulators in the creation and ongoing administration of charitable trusts shows that private interests of trust parties continue to be subordinated to the interests of the broad community and, ultimately, to the interests of the state.⁴⁴

In this public-private hybrid model, trust parties are granted greater autonomy in determining the ways in which charitable assets are managed. However, this autonomy can only take effect where the management of charitable trusts is in line with the state's public welfare goals.⁴⁵ As illustrated in Chapter 2, the state defines the scope of charitable purposes, and trust parties are not allowed to consider different purposes that might for example promote political advocacy in areas not welcomed by the state, or to take into account ancillary or subsidiary private benefits when disposing of charitable assets. The subordinated role of the trust party's autonomy is ensured through the application of public benefit doctrine as discussed in Chapter 2, the strict control of regulators over the use of charitable resources as discussed in Chapter 4, and the legal requirement that charitable trust assets and the proceeds thereof shall all be used for charitable purposes as discussed in Chapter 2. The legislative reforms pertaining to charitable trusts reflect the historical tension between private individuals and control by the state in China and the ongoing tension between the social welfare goals that charitable trusts serve to pursue and the autonomy that private actors have in deciding how their assets can be used for charitable purposes.⁴⁶

B *How have regulators implemented the legal regulatory regime in practice?*

This thesis has studied the regulatory practice by interviewing persons who have experience in the establishment and regulation of charitable trusts. This study has shown that understanding regulatory practice must take account of both legal framework and the political environment in which law is

⁴³ See analysis in Section II of Chapter 4.

⁴⁴ See analysis in Section II of Chapter 2.

⁴⁵ See analysis in Section II of Chapter 2.

⁴⁶ See analysis in Section I of Chapter 1.

implemented and the interaction between them. First, the law sets up a regulatory framework for charitable trusts that is vague and underdetermined in various respects.⁴⁷ This vagueness has created risks for regulators to discharge their supervisory roles and motivated them to adopt risk mitigation strategies in practice. Secondly, political objectives have very much dictated the development of the charitable sector in China. Therefore, ensuring conformity to overarching policy objectives becomes an important driver in shaping the function and scope of the regulatory framework.⁴⁸ The vagueness of the law and the political objectives underlying the regulation of charitable trusts have prompted regulators to consider extra-legal factors in the performance of their responsibilities.⁴⁹

Chapter 4 has given a detailed analysis of the extra-legal factors that are influential in regulatory practice and the strategies that regulators have adopted to mitigate risks. Chapter 5 has discussed the roles that regulators have played in the use of contractual tools by trust parties and the reasons behind this regulatory approach. This analysis enables the governance of charitable trusts to be understood not only from the perspective of what regulators say they are doing, but also by what they actually do in the day-to-day governance of charitable trusts.

1 *The Vagueness in the Legal Regulatory Framework*

With the promulgation of the *Chinese Charity Law* in 2016, legislators established a new regulatory framework for the charitable trust model. The law governing charitable trusts expressly requires *CADs* and *BRAs* to oversee whether charitable assets are used in compliance with the state's public welfare policy. The two regulators are endowed by law with extensive powers so that they can strictly control the use of charitable trusts. On the other hand, the legal governance framework is vague and incomplete in the role of the two regulators. The law does not clearly define the relationship between the two regulators, what their regulatory powers entail in substance and how they should be exercised.⁵⁰

The wording of the charity law suggests that there is, or should be, a cooperative relationship between the *CADs* and *BRAs*.⁵¹ Both regulators are empowered to take measures to inspect the performance of trustees' duties and to entrust third-party agencies to assess the management of charitable assets.⁵² However, the law makes no mention of how these two regulators should cooperate with each other in exercising these overlapping powers. It is unclear whether they should communicate and reach consensus before issuing regulatory decisions or whether they can exercise powers individually without any communication.⁵³

⁴⁷ See analysis in Section II of Chapter 4.

⁴⁸ See analysis in Section III of Chapter 4.

⁴⁹ See analysis in Section III of Chapter 4.

⁵⁰ See analysis in Section II of Chapter 4.

⁵¹ See analysis in Section II of Chapter 4.

⁵² See analysis in Section II of Chapter 4.

⁵³ See analysis in Section II of Chapter 4.

Confronted with the vagueness in the law, the *CADs* and *BRAs* have adopted different approaches in the performance of their supervisory roles.

In China, the *CADs* have long been subject to greater policy and administrative pressures in the regulation of charitable trusts. Therefore, they are willing to take positive measures to specify what the law says and what they should do. As shown in Chapter 4, the *CADs* in practice tend to exercise substantive examination of the trust documents and to issue letters or notices to inspect whether trust assets are used in alignment with the trust's charitable purposes. Chapter 5 has highlighted the active role of *CADs* in the design of contract clauses between trust parties. To direct the use of charitable assets, the *CADs* wish to advise trust parties on what clauses should be incorporated in trust documents, what clauses of trust documents are ambiguous and how they might be modified. A specific example is the information disclosure clause. The *CADs* often require trust parties to specify how information disclosure in the contract works and what information is involved.⁵⁴ By requiring trustees to disclose the required information in a timely and adequate manner, the *CADs* can learn about whether trust assets are used for appropriate purposes and whether beneficiaries are selected in consistent with the criteria specified in the trust documents.

In contrast, the *BRAs* have not played a proactive role in supervising the day-to-day governance of charitable trusts. There are two reasons for this. First, it is questionable whether *BRAs* are appropriate regulators for charitable trusts, as discussed in Chapter 4. The *BRAs* have gained extensive experience in supervising commercial trust business in the past twenty years. Commercial trust business relates to providing private benefits to individuals such as settlors and trust companies, whose objectives are substantively different from those of charitable trust business. The regulatory experience relating to commercial trusts promoted *BRAs* to focus their work on the supervision of trustee companies themselves; for example, whether trustee companies have good corporate governance structure, sound risk management systems and effective internal control mechanisms. Secondly, in contrast to *CADs*, the *BRAs* do not suffer under intense policy and administrative pressures in monitoring the management of charitable trust assets.⁵⁵ Since charitable trusts are outside the focus of their supervisory work, the *BRAs* lack strong desires to clarify the scope and content of their powers and the procedures they should take when interacting with the *CADs*. Over the past four years, the *BRAs* have not yet conducted any assessment work or regulatory conversations. If risks related to the oversight of charitable trusts arise in practice, the *BRAs* wish to consult relevant *CADs* to determine the measures to be taken and whether administrative penalties should be imposed on the trustees.⁵⁶

⁵⁴ See analysis in Section III of Chapter 5.

⁵⁵ See analysis in Section II of Chapter 4.

⁵⁶ See analysis in Section II of Chapter 4.

2 *Consideration of Extra-Legal Factors in Regulatory Practice*

Apart from the law, China's policy and social environment in which charitable trusts are introduced and operate is also vital in shaping the decision-making of regulatory officials.⁵⁷ As noted in Chapter 2, regulators in China have long been subject to policy and administrative pressures. Regulators represent the interest of the state and are obliged to follow the directives of the central government strictly. Following from this understanding, the two regulators for charitable trusts have greater incentives to consider extra-legal factors in their implementation of law. This regulatory approach can help them align their supervisory work with the public welfare policy of the state and minimize risks that may arise from the performance of their supervisory roles.⁵⁸ Chapter 4 has identified three extra-legal factors that are influential in regulatory practice: the regional development agenda, the tension between regulatory capacity and regulatory objectives, and regulators' perceptions of risks.⁵⁹ These three factors are interrelated and affect the ways in which regulatory officials implement the law considerably.⁶⁰

The regional development agenda differs between eastern developed areas and western undeveloped areas. As shown in Chapter 1, the central government has formulated a substantial number of policies pertaining to charitable trusts. Nevertheless, these policies are in most cases vague, poorly defined, abstract and hard to measure in an objective and fair way.⁶¹ Due to the rapid rate of economic development, the CADs in eastern areas face greater policy pressures in the development of charitable trusts. In response to this national policy, the CADs created a favorable environment for charitable trusts, developed guidelines to remedy the vagueness in charity policies, and encouraged the public to create charitable trusts for diverse purposes. In contrast, the central government's policy in western China is poverty alleviation, and therefore local regulators wish to focus their limited resources on alleviating poverty or helping the needy. Practice showed that almost 95% of the charitable trusts recorded in western undeveloped areas are connected to poverty alleviation.⁶²

The second extra-legal factor is the tension between regulatory capacity and regulatory objectives. Regulatory resources in eastern China are able to deal with the number of charitable trusts requiring inspection. Regulators in these areas are therefore willing to maintain consistent communication and interaction with the trustees being regulated. In comparison, regulators in western undeveloped areas do not have sufficient budgets and personnel in the carrying out of supervisory work. In response to the lack

⁵⁷ See analysis in Section III of Chapter 2.

⁵⁸ See analysis in Section III of Chapter 4.

⁵⁹ See analysis in Section III of Chapter 4.

⁶⁰ See analysis in Section III of Chapter 4.

⁶¹ See analysis in Section II of Chapter 1.

⁶² See analysis in Section III of Chapter 4.

of regulatory resources, regulators in these areas have taken a conservative attitude towards the recording of charitable trusts.⁶³

The final extra-legal factor relates to the regulators' perceptions of risk. Regulators over the past twenty years have seen a large number of scandals involving misuse of charity funds, as discussed in Chapter 1. Regulators in both areas are thus clearly aware of the legal and reputational risks that may arise from the day-to-day supervision of charitable trusts. They know that any regulatory failure or scandal would lead to irrevocable reputational damage and serious administrative punishments on their part. In this light, regulators in eastern China are willing to exercise their powers strictly in dealing with violations, and to disclose their disciplinary decisions so as to show the public that they are performing their jobs properly.⁶⁴ In contrast, coupled with the shortage of regulatory resources, the perception of risks dissuades regulators in western undeveloped areas from playing a proactive supervisory role. The CADs in western China rarely take educative measures to promote public awareness about charitable trusts. Instead, they have strong desires to decline the recording of charitable trusts whose purposes are not directly related to poverty alleviation.⁶⁵

C What private actions have trust parties taken when engaging with the law?

This thesis has examined the contract practice and discovered that contracts are widely used in two ways in the charitable trust setting. First, due to the risk posed by the vagueness of the law and administrative practice, trust parties have perceived three types of risk in the creation and ongoing management of charitable trusts: the risk of vagueness of the law, the risk of public scrutiny, and the risk of regulatory scrutiny.⁶⁶ For the purpose of mitigating risks, the parties to charitable trusts are willing to use contracts to clarify their powers and duties and the ways in which charitable assets are managed.⁶⁷ Secondly, contract is also an important tool for regulators to entrench their own regulatory preferences, as discussed in Chapter 5. Practice showed that regulators have incentives to advise trust parties on what contractual clauses should be incorporated and how they should be modified. This approach enables regulators to incorporate their preferences into the contractual arrangements between trusts parties so that charitable trusts can be managed in alignment with the expectation of regulators.⁶⁸

1 Perceptions of Risk by Trust Parties

Trust parties have perceived three types of risk in relation to the management of charitable trusts: the risk of vagueness of the law, the risk of public scrutiny, and the risk of regulatory scrutiny, discussed in

⁶³ See analysis in Section III of Chapter 4.

⁶⁴ See analysis in Section III of Chapter 4.

⁶⁵ See analysis in Section III of Chapter 4.

⁶⁶ See analysis in Section II of Chapter 5.

⁶⁷ See analysis in Section III of Chapter 5.

⁶⁸ See analysis in Section III of Chapter 5.

Chapter 5. The first risk stems from the vagueness of the law. The law sets up the internal relationship between trust parties. But the law is incomplete and its incompleteness has created multifaceted uncertainty in the scope of settlors' powers and how they should be exercised, the scope of trustees' duties, and the legal nature and role of beneficiaries under a charitable trust.⁶⁹ The vagueness in the law enables settlors to intervene intensively in the daily management of charitable trusts and produces a great deal of uncertainty for trustees to perform their powers or responsibilities.

The second type of risk derives from public scrutiny. As noted in Chapter 1, due to a large number of scandals involving misuse of charity funds over the last two decades, the general public lacks trust and confidence in the performance of trustees' duties. Accordingly, the general public has strong desires to inspect whether charitable trusts are managed properly and whether charitable assets are distributed in alignment with the trust's charitable purposes. Meanwhile, the lack of clear criteria for assessing the performance of a trustee's duty makes it easy for the public to criticize its management of charitable trusts. Such criticism can lead to trustees suffering reputational damage and more importantly, the career advancement of relevant trustee managers may be threatened.⁷⁰

The third type of risk derives from regulatory scrutiny. As discussed in Chapter 4, the law does not clearly define the relationship between the two regulators, the ways in which regulators exercise their powers, and the content of these regulatory measures. The parties to charitable trusts are thus uncertain about whether their administration of charitable trusts is compliant with the requirement of regulatory measures and if not, what they should do.⁷¹ On the other hand, in order to show the public that they are performing their supervisory roles properly and to minimize risks that may arise from the discharge of their regulatory duties, regulators tend to interfere with the management of charitable trusts intensively. This administrative practice poses risks to a trustee's management of charitable trusts.⁷²

2 *The Use of Contractual Tools for Risk Allocation*

It is widely acknowledged by contract theorists that contracts are widely used as tools to guide the performance of relevant parties and to allocate powers and risks between them. Driven by the imperative of risk allocation, settlors and trustees are inclined to use contractual tools to vary the framework of the law in relation to charitable trusts. In response to the vagueness of the law, trust parties wish to use contract to clarify how they should interact in the ongoing management of charitable trust affairs, how the performance of their duties can be assessed, and how disputes between them can be dealt with.⁷³ For example, when settlors wish to play a role in the management of trust affairs, trustees may have incentives to specify the

⁶⁹ See analysis in Section III of Chapter 3.

⁷⁰ See analysis in Section II of Chapter 5.

⁷¹ See analysis in Section III of Chapter 5.

⁷² See analysis in Section II of Chapter 5.

⁷³ See analysis in Section III of Chapter 5.

ways in which settlors can intervene through contract. However, the extent to which the trustee's desire can be given effect depends on how large it perceives the risks associated with a settlor's intervention to be and how powerful the trustee is when trying to impose constraints on the settlor. Likewise, when trustees wish to minimize legal or reputational risks flowing from the disposition of charitable assets, they may wish to use collective decision-making mechanisms. An illustrative example is the wide use of charitable trust committees, as discussed in Chapter 5. By allowing settlors and trust supervisors to participate in the decision-making process, the responsibilities relating to the administration of charitable trusts can be shared and diluted between different parties.⁷⁴

Where there is a high risk of public scrutiny, settlors may wish to play a proactive role in the ongoing management of charitable trusts.⁷⁵ Practice showed that the extent to which settlors intervene in each trust varies considerably. This depends on the balancing or weighing of multiple factors, including the settlor's wishes and identity, the scale of trust assets, the nature of charitable purposes, and the duration for charitable trusts, discussed in Chapter 5. The nature of charitable purposes is the most important factor in determining whether settlors wish to actively participate in the management of trust assets. The more politically or socially sensitive the charitable trust purpose, the greater the likelihood that a settlor will play an active role.⁷⁶ Where charitable purposes are related to poverty alleviation, stakeholders are willing to play an active supervisory role as the completion of these purposes is closely related to their interest.⁷⁷ In this case, settlors will be motivated to keep a close eye on the performance of trustees' duties. Accordingly, trustees have desires to define clearly the scope of settlors' powers and the ways in which their performance can be assessed.⁷⁸

3 *The Role of Regulators in Contract Practice*

Aside from the interaction between settlors and trustees, regulators have also played an important role in contract practice. In the recording stage, regulators tend to advise trust parties on which contract clauses are ambiguous and how they might be modified.⁷⁹ This practice stems from regulators' perceptions of risk, discussed in Chapter 4. Over the last two decades, regulators have seen a large number of scandals involving misuse of charity funds. Therefore, it is not difficult for them to identify the risks that may arise from the day-to-day operation of charitable trusts.⁸⁰ For the purpose of mitigating risk, regulators in practice often require trust parties to incorporate or amend certain clauses in the trust contract; for example, how to handle

⁷⁴ See analysis in Section III of Chapter 5.

⁷⁵ See analysis in Section III of Chapter 5.

⁷⁶ See analysis in Section III of Chapter 5.

⁷⁷ See analysis in Section III of Chapter 5.

⁷⁸ See analysis in Section III of Chapter 5.

⁷⁹ See analysis in Section III of Chapter 5.

⁸⁰ See analysis in Section III of Chapter 4.

disputes between trust parties, how to use trust assets at the time of termination, and how to deal with the defective performance of each party. The primary purpose of this approach is to make it easier for regulators to learn about the administration of charitable trusts, so that they can identify risks and take corresponding measures in a timely manner.⁸¹

An illustrative example is the design of information disclosure clauses by trust parties, as discussed in Chapter 5. When trust parties submit documents for recording, regulators often require them to specify how information disclosure in the contract works, and what information is involved. The degree of specificity of the information disclosure clause is essential to determining whether a charitable trust would be recorded or not.⁸² These regulatory suggestions or recommendations have also been incorporated into precedent contracts in the form of standard contract clauses and are then used to guide future negotiation between trust parties on contractual arrangements. On the other hand, in response to the risk of regulatory scrutiny, contract practice showed that trust parties are also willing to consult regulators on when contract clauses are ambiguous and how they should be modified. By closely reviewing the clauses of trust contracts and advising trust parties on how they might be amended, regulators have systematic impacts on the ways in which charitable trusts are constructed and operate in China.⁸³

IV FURTHER RESEARCH

This thesis has placed its focus on the relevance of the policy and social context to the implementation of the law relevant to charitable trusts. This thesis has identified the norms of public law and private law in the legal structure of charitable trusts, and it has examined the ways in which China's policy and social conditions influence the interaction of these two types of norms. However, it does not propose or articulate a detailed pathway for the reform of governance rules concerning Chinese charitable trusts, as this would require an examination of the gaps in the current legal framework from a more comprehensive perspective, encompassing the law, sociology and politics. In this regard, future research can be conducted into the relationship between China's particular institutional structures, politics, economy, and society and the potential reform models for the governance of charitable trusts.

As analyzed in Chapters 3 and 4, the current legal framework entails a number of deficiencies, and it is not difficult to identify the legal uncertainties that these deficiencies have created. Four problems can be summarized alongside the analysis of the governance practice of charitable trusts. First, the law does not define clearly the scope of settlors' powers and how they should be exercised, the scope of trustees' duties,

⁸¹ See analysis in Section III of Chapter 5.

⁸² See analysis in Section III of Chapter 5.

⁸³ See analysis in Section III of Chapter 5.

the relationship between settlors and trustees,⁸⁴ and the legal nature and role of beneficiaries under a charitable trust.⁸⁵ Secondly, the law does not elaborate clearly the role of regulators, the scope of regulators' powers and how they should be exercised, the relationship between regulators and trust parties.⁸⁶ Thirdly, the law does not clarify the ways in which the two types of norms (i.e. public law norms and private law norms) for charitable trusts interact. It is unclear whether a balance can be struck between the social welfare goals that charitable trusts serve to pursue and the autonomy that private actors have in deciding how their assets can be used for charitable purposes.⁸⁷ Fourthly, with respect to the accounting and reporting system, the law does not perform well in promoting the relevance, comparability, and understandability of information concerning financial reports and annual work reports, all of which primarily serve to better satisfy the information needs of the general public and relevant trust parties.⁸⁸

In view of these four problems, future research can be conducted in at least three areas. First, in order to address the problems or deficiencies within the current legislative framework, future research will be required into the reform of governance rules concerning Chinese charitable trusts. China needs a charitable trust governance model and supplementary governance mechanisms that best suit the social and particular political conditions under which Chinese charitable trusts are established and operate. Government control over charitable trusts and the charitable sector is not going to change any time soon. Therefore, any future reforms for the governance framework of charitable trusts must be developed within this reality. Secondly, besides charitable trusts, there are three other institutional forms for doing charitable causes in China: foundations, social associations, and privately-operated non-enterprise organizations.⁸⁹ These forms are tasked with a similar legislated objective (i.e. promoting charitable undertakings) as charitable trusts. More notably, the development of these forms also bears the mark of China's political and social environmental norms. In this regard, future research can be conducted on the impact of reforms for charitable trusts in a broader area. For example, to what extent may the experience of charitable trust governance provide insights into the governance of charitable organizations? In what ways can the governance of charitable trusts illuminate the relationship between the state and civil society in the delivery of public welfare services, and social welfare system reform? Thirdly, the charitable trust model has been part of the Chinese legal system for only four years. It is unclear whether the charitable trust model will be able to fulfill the purpose of the state in encouraging the development of charitable causes. As more charitable trusts are established in the next few years, this issue can be studied based on the empirical evidence received.

⁸⁴ See analysis in Section III of Chapter 3.

⁸⁵ See analysis in Section IV of Chapter 3.

⁸⁶ See analysis in Section II of Chapter 4.

⁸⁷ See analysis in Section II of Chapter 2.

⁸⁸ See analysis in Section II of Chapter 4.

⁸⁹ See analysis in Section I of Chapter 1.

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《民政部关于贯彻落实<国务院关于促进慈善事业健康发展的指导意见>的通知》 [Notice of the Ministry of Civil Affairs on Implementing the ‘Guiding Opinions of the State Council on Promoting the Healthy Development of Charitable Causes’] (People’s Republic of China) Ministry of Civil Affairs of People’s Republic of China, 15 December 2014

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APPENDICES

Appendix I

Translation of Important Terms Used in this Thesis

English	Chinese Characters
planned economy	计划经济
reform and opening up	改革开放
annual work report	年度工作报告
charitable organization	慈善组织
social organization	社会组织
charitable purpose	慈善目的
charitable sector	慈善行业
governance	治理
agency	代理
governance mechanism	治理机制
governance rule	治理规则
governance goal	治理目标
private law norm	私法规范
public law norm	公法规范
regulation	规章
notice	通知
opinion	意见
department of civil affairs	民政部门
banking regulatory authority	银保监部门
Ministry of Civil Affairs	民政部
foundation	基金会
social association	社会团体
privately-operated non-enterprise organization	民办非企业单位
public welfare trust	公益信托
charitable trust	慈善信托

commercial trust	商事信托
public benefit	公共利益/公益
social welfare	社会福利
public welfare	公共福利
charitable undertaking	慈善事业
public benefit activity	公益活动
trust supervisor	信托监察人
trust asset	信托财产
check-and-balance mechanism	监督与制约机制
registration	登记
recording	备案
assess	评估
supervisory conversation	监管谈话
administrative investigation	行政调查
registration license	登记许可
administrative punishment	行政处罚
regulatory measure	监管措施
charity-promoting measure	慈善促进措施
interview	访谈
performance target	绩效目标
performance appraisal system	绩效考核机制
poverty alleviation	扶贫
<i>cy-près</i> doctrine	近似原则
belong to	属于
standing	诉讼地位
public scrutiny	公众监督
charitable trust committee	慈善委员会
China Trustee Association	中国信托业协会

Appendix II
Abbreviations of Important Terms Used in this Thesis

Term	Abbreviation
People's Republic of China	PRC
Chinese Communist Party	CCP or party
Australian Charities and Not-for-profits Commission	ACNC
Non-Governmental Organization	NGO
Environmental Public Interest Litigation	EPIL
Civil Affairs Department	CAD
Banking Regulatory Authority	BRA
China Banking and Insurance Regulatory Commission	CBIRC
Public Welfare Institute of Beijing Normal University	PWI
Non-Charitable Purpose Trust	NCPT

Appendix III
Abbreviations for Statutes, Regulations and Opinions Cited in this Thesis

Year	Title	Abbreviation
Statutes		
2001	Trust Law of the People's Republic of China	Chinese Trust Law
2016	Charity Law of the People's Republic of China	Chinese Charity Law
2018	Company Law of the People's Republic of China	Chinese Company Law
1999	Contract Law of the People's Republic of China	Chinese Contract Law
2007	Property Law of the People's Republic of China	Chinese Property Law
2017	Civil Procedure Law of the People's Republic of China	Civil Procedure Law
2017	General Rules on the Civil Law of the People's Republic of China	Chinese Civil Law
Regulations		
2017	Administrative Measures for Charitable Trusts	Measures for Charitable Trusts
2007	Measures for Administration of Trust Companies	Measures for Trust Companies
2011	Administrative Measures for the Assessment of Social Organizations	Measures for Assessment
2018	Interim Measures for the Management of Value-Added and Investment Activities of Charitable Organizations	Measures for Charitable Organizations
2009	Administrative Measures for Collective Investment Trust Schemes of Trust Companies	Measures for Collective Investment Trust Schemes
2016	Beijing Administrative Measures for Charitable Trust	Beijing Measures for CT
2019	Regulations on the Management of Charitable Trusts in Guangdong Province	Guangdong Regulations of CT
2017	Interim Measures for the Administration of the Recording of Charitable Trusts in Jiangsu Province	Jiangsu Measures of CT
2018	Measures for the Implementation of the Chinese Charity Law in Zhejiang Province	Zhejiang Measures for Charity Law
Opinions		
2014	Guiding Opinions of the State Council on Promoting Healthy Development of Charitable Causes	Opinions on Development of Charitable Causes

Appendix IV

Ethics Approval

19 October 2018

Professor M Harding
Melbourne Law School
The University of Melbourne

Dear Professor Harding

I am pleased to advise that the Law Human Ethics Advisory Group has approved the following Minimal Risk Project.

Project title: **Unique Governance Structure of Chinese Charitable Trust – Compare to Anglo-Australian Charitable Trust**
Researchers: **Professor M Harding, Professor S Biddulph, H Jing**
Ethics ID: **1852569**

The Project has been approved for the period: **19-Oct-2018 to 31-Dec-2018.**

It is your responsibility to ensure that all people associated with the Project are made aware of what has actually been approved.

Research projects are normally approved to 31 December of the year of approval. Projects may be renewed yearly for up to a total of five years upon receipt of a satisfactory annual report. If a project is to continue beyond five years a new application will normally need to be submitted.

Please note that the following conditions apply to your approval. Failure to abide by these conditions may result in suspension or discontinuation of approval and/or disciplinary action.

- (a) **Limit of Approval:** Approval is limited strictly to the research as submitted in your Project application.
- (b) **Amendments to Project:** Any subsequent variations or modifications you might wish to make to the Project must be notified formally to the Human Ethics Advisory Group for further consideration and approval before the revised Project can commence. If the Human Ethics Advisory Group considers that the proposed amendments are significant, you may be required to submit a new application for approval of the revised Project.
- (c) **Incidents or adverse effects:** Researchers must report immediately to the Advisory Group and the relevant Sub-Committee anything which might affect the ethical acceptance of the protocol including adverse effects on participants or unforeseen events that might affect continued ethical acceptability of the Project. Failure to do so may result in suspension or cancellation of approval.
- (d) **Monitoring:** All projects are subject to monitoring at any time by the Human Research Ethics Committee.
- (e) **Annual Report:** Please be aware that the Human Research Ethics Committee requires that researchers submit an annual report on each of their projects at the end of the year, or at the conclusion of a project if it continues for less than this time. Failure to submit an annual report will mean that ethics approval will lapse.
- (f) **Auditing:** All projects may be subject to audit by members of the Sub-Committee.

Please quote the ethics registration number and the name of the Project in any future correspondence.

On behalf of the Ethics Committee I wish you well in your research.

Yours sincerely



Associate Professor Amanda Whiting - Chair
Law Human Ethics Advisory Group

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