Analysing the Thai trusts for Capital Market Transactions Act 2007: two different approaches to understanding the curious case of trusts in Thai law

Analysing the Thai Trusts for Capital Market Transactions Act 2007: two different approaches to understanding the curious case of trusts in Thai law.

Nadtara Bott (Siriaraya)

1231111

Birkbeck College

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Abstract

As the Thai legal system is based on the civil law model, trusts created in Thai law were "void" under the Civil and Commercial Code prior to the enactment of the Trusts for Capital Market Transactions Act 2007 (TCMT). The TCMT amended those provisions to allow trusts in Thai law for the first time. Its scope was limited to creating trusts as legal mechanisms for investment. However, no trusts were established under its provisions for almost a decade after its' enactment. Only after 6 years, a limited number was established under the legislation, only for the purpose of real estate investment.

The main research question for this study is whether existing laws or practices were preferred to creating trusts under the TCMT. Answers were sought for why it took 6 years for the first trust to be established. The initial hypothesis was that trusts, as an instrument of common law origin, may be incompatible with the Thai civil law-oriented legal system, and therefore that there was a reluctance to move away from existing practices. Based on this hypothesis, the first approach taken was to use the theory of legal transplants to analyse the TCMT. This was done in accordance with the 'official' representation of the TCMT to introduce trusts into Thai law. When applied, it was found that trusts did exist outside of the legislation, as evidenced in Thai High Court judgments and in the form of informal practices and arrangements which gave effect to trust-like ownership structures.

The study then adapted the method of research to try and understand this contradiction between the initial lack of trusts under the TCMT and the existence of trust-like mechanisms outside the legislation. An analysis was made of secondary sources of data and semi-structured interviews were conducted to both understand and paint a picture of the "mentality towards trusts in Thai law" of the judiciary, legal academics and stakeholders. In doing so, it was found that no trusts had been established under the act because of a preference for other, existing legal practices, and those directly involved with the use of trusts have a certain "Thai mentality towards trusts and trust-like mechanisms"

Even though trusts were eventually established in limited numbers under the TCMT, the findings of this research still remain relevant in understanding why there was an initial reluctance in establishing trusts. In looking into the Thai mentality, it provides an insight into an informal system of relationships based formed by culture and religion that cannot be found from a literal reading of academic text. In analysing the TCMT as a legal transplant, the research contributes to the comparative law study of legal transplants in the use of cultural analysis of the conditions of transplants. In conducting a comparative analysis of trust-like laws in the Thai legal system, this research constitutes an unprecedented attempt to consolidate Thai laws and cases on the subject of trusts in Thai law. It is hoped that this research will provide a comparative perspective on well-known accounts of Thai legal practice to depict existing similarities between Thai law and English trusts. On a broader scale, it is hoped that the knowledge

gathered from this research will provide an insight into Thai values and perspectives, which is to be taken into account for future law drafting, especially in light of the trusts for private transactions Bill that came to be proposed by the Thai Financial Policy Office in 2018.

Part I: Introduction to Thailand's Trusts for Capital Market Transactions Act 2007. (TCMT 2007)

Chapter 1: The Trusts for Capital Market Transactions Act 2007.

The concept of trusts was officially introduced for the first time in modern Thai law by the Trusts for Capital Market Transactions Act 2007 (TCMT Act). Previously, trusts could not exist for two main reasons. Firstly, the Thai Civil and Commercial Code (CCC) expressly prohibited the use of trusts in Thai law. It is to be noted that prior to the promulgation of the TMCT Act, the term 'trusts' was mentioned only in the context that the creation of one would render it null and void; Section 1686 of the Thai Civil and Commercial Code (CCC) stated that "under Thai law, a trust would have no effect whatsoever". This provision has since been amended to allow for the use of trusts in capital market transactions. The second reason why trusts could not previously exist lies in the incompatibility of the nature of property and proprietary interests created according to the concept of Equity with the fundamental prescriptions of a Civil Legal system. In brief, the *Numerus Clausus* principle of rights underlying the concept of property in the Thai civil legal system stipulates that the right of ownership exists only as an indivisible whole and that any competing right may only be created by virtue of law or legislative enactment. This principle is set out in sections 141 and 142 of the CCC. According to the Thai legal system, 'Things' are divisible and indivisible. Section 141 states that "Divisible things are those which can be separated into real and distinct portions, each forming a perfect whole," whereas "Indivisible things" are those which cannot be separated without alteration in its substance as well as those which are considered indivisible by law" (s.142). In contrast, in the case of English common law trusts, Equity recognises and creates a competing right over property in addition to legal ownership and, as such, does not pose an inherent prohibition on the existence of equitable rights or interests (Patton, 1945; Béraudo, 1992). The TMCT Act was promulgated to allow for the use of trusts despite this inherent limitation arising from the nature of civil legal principles on property and ownership. This first chapter sets out the legislative scheme, drawing attention to the particular features of the reform that bring into being a trust in Thai law.

1.1 Trusts; what has been introduced in to Thai law? A comparative analysis of Thai and English trusts.

In the present analysis of what elements could affect the introduction of trusts into the Thai legal system, the first step is to establish the scope of the inquiry. The question is what did the 2007 Trusts for Transactions in the Capital Market intend to introduce? This section will also seek to answer the questions "What is being analysed?" and "What it will be analysed against?". In order to conduct a literature review for the task of analysing the trusts that have been introduced by the Thai Trusts legislation, it is crucial to set out the scope of what will be examined. This chapter examines the concept of trusts in the traditional English common law sense. The aim of this brief overview is to set out the definition of the legal concept

of trusts in English law to enable a more accurate analysis of the legal concept in a comparative law context, which forms one of the two methods of research in this dissertation.

The analysis of English trust law will focus on the stage of development in the Courts of Equity. This will reveal the equitable principles that form the logic and reasoning of modern trust law and elaborate on what the introduction of trusts aimed to achieve. From my own personal and academic view that is accustomed to trusts in English common law, a brief explanation of the definition and types of trusts found in English common law will provide a starting point in defining the trusts that have been introduced into the Thai Legal system.

1.2 Trusts and their essential components.

In English law, trusts can be created expressly, by a settlor, by statute, or imposed by courts. In order to be valid, trusts must comply with some requirements regarding formality and enforceability, contained in rules and principles that have been historically created and developed by the judiciary.

There has yet to be a universally accepted, official definition of trusts. The difficulty in conceiving a comprehensive definition of trusts at an international, comparative level has been illustrated in the experience of drawing up the Hague Convention on the Recognition of Trusts 1985. The 1985 Convention was an attempt to provide an internationally accepted legal treaty governing the validity of trusts across signatory jurisdictions which met much criticism regarding its definition of trusts.[1] The lack of a unified definition of trusts resonates equally for trusts in the English common law sense. As Pettit (2009, p.31) puts it, trusts in English law are a "notoriously difficult term to define". An example of a definition of trusts in English law may be drawn from Underhill. He refers to trusts in English common law as:

> "an equitable obligation binding a person who is called a trustee to deal with property which is called the trust property for the benefit of persons who are called beneficiaries".

There are hence four main elements: the existence of a binding obligation, the property held under trust, the nominal owner, and persons for the benefit of whom the property is being held. To be valid, these elements fall within certain rules and principles governing the circumstances of ownership, the nature of the property, as well as the purpose for which the arrangement is created. The said qualifications are often referred to as the "Three Certainties". In brief, certainty of intent requires a clear intention to create a trust, which may be conveyed expressly in writing, or be implied by the court.[2]

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[1] The primary objective of the Treaty was to allow for the legal recognition of trusts in by jurisdictions which normally do not. In the process, a crucial goal of the Treaty was to enable a common definition and understanding of the concept of trusts, for the two major legal systems of Common Law and Civil Law.

[2] *Re Kayford* (1975) 1 All ER 604

Second, there must be certainty as to the object of the trust. That is, the beneficiaries for whom or the purpose for which the trust has been created must be sufficiently identifiable.[3] Lastly, the subject, or property that is to be held on trust, must be identifiable.[4] The three certainties ensure there is an existing equitable 'duty' on the person who is in the position of the trustee to act according to the best interests of the beneficiaries and that such a duty is clear enough to be enforced by the courts.

These requirements of formality, as well as the trusts concept itself, are based on an underlying rationale that has been developed by the judiciary. The initial purpose for the creation of trusts was for the Courts of Equity to provide justice where common law could not offer a just outcome (Maitland, 1894). The then-Court of Chancery would create a trust where, on the circumstances of the case, there was held to be unconscionable conduct which led to the detriment of another. In order to justify a deviation from the result that would have been reached under common law, these rules and principles were developed and consistently enforced over time and form part of the substance of the Law of Trusts. Another formal requirement created by the judiciary is the rule against perpetuities.[5] Created in the 18th century, the rule was to protect against the use of trusts to accumulate wealth within a concentrated group of individuals and originally required that property be vested "within a life or lives in being plus 21 years."[6] Current legislation prescribes the maximum period as 125 years.[7]

1.3 The typology of trusts.

In the English legal system, trusts are most commonly categorised by reference to how they are created. Express trusts, for instance, are trusts which are voluntarily and unequivocally created, often in writing, stating clear terms as to how the trustee should deal with the trust property for the benefit of the beneficiaries that are also specified at the time the express trust is created. (Petitt, 2009, p.67; Wilson, 2013, p. 302). The nature of the terms set out by the settlor also refer to a sub-category of executory trusts; trusts subject to the fulfillment of a further condition[8] and discretionary trusts which do not specify in strict terms how the trust assets are to be distributed.[9]

There is disagreement among academics as to the definition of the second type of trusts, implied trusts,[10] which can include both constructive trusts and resulting trusts (Petitt, 2009, p.67; Atkins, 2013,

[3] *Knight v Knight* (1840) 3 Beav 148; *Re Baden's Deed Trusts (no 2)* [1973]
[4] *Re Adams and Kensington Vestry* [1884] Ch D 394
[5] *Bristow v Warde*, [1775-1802] All ER Rep 369
[6] *Bristow v Warde*, [1775-1802] All ER Rep 369
[7] Section 5: Perpetuities and Accumulations Act 2009
[8] *Stanley v. Lennard*. (Reg. Lib. b. 1757, foL 273, nom. Stanley v. Burrell.)
[9] *McPhail v Doulton* [1970] 2 WLR 1110
[10] Megarry (1974) *Re Vandervell's Trusts (No.2)* Cj 269 at 272

p.35; Davis, 1989, p.55). It essentially connotes trusts which arise by operation of law. For instance, where a trust fails to meet all of the requirements of the principles of three certainties, a trust may be implied by the court where the intention to establish a trust is inferred from the words or actions of the settlor.[11]

As classed by some academics to fall within the category of implied trusts, the 'Resulting Trust' is established by the court where property is transferred to a third party for whom the benefit was not intended (Chambers, 2002, p.42). Resulting trusts give rise to a legal presumption on voluntary transfers and purchases made in the name of a third party, that the property transferred or purchased property is held on trust to the transferor/purchaser.[12] Additionally, where the terms of a valid trust lead to an incomplete disposal of the trust assets, a resulting trust will be imposed over the remaining trust assets.[13]

Similarly, constructive trusts may be recognised by the court in absence of an expressed direction of the settlor. Constructive trusts arise by operation of the law, where it is considered that the person to whom the property is transferred has acted unconscionably, although there is much contention among both judges and academics as to the rationale underlying its imposition[14] (Burn and Virgo, 2008, p. 279; Petitt, 2009; Etherton, 2008; Stenger, 1988).[15]One clear example of this contention is where companies who are financially unstable transfer customer's payments for goods to a different account to protect themselves against insolvency. In such a case, it is difficult to compare the conscience aspect behind such action when considering the principles of the law of insolvency where the rights of unsecured creditors cannot take priority of those of secured creditors. (Hudson, 2009, p.515; Etherton, 2008, p.270)

A constructive trust may be imposed on a trustee over profits generated out of existing trust assets.[16] Constructive trusteeship may also be imposed on a person in possession of trust assets, other than a purchaser for value in good faith without notice, and the beneficiaries may trace and recover the property in equity.[17] Additionally, in a contract to sell land, the seller becomes by operation of law a constructive trustee with a duty to transfer the land.[18] The purpose for the imposition of a trust is due to the unique nature of land, so that buyers are able to claim for the exact plot they have contracted for through the remedy of specific performance, which is only available in equity. These trusts have been

[11] *Parkin v Thorold* (1852) 16 Beav 59
[12] *Tinsley v Milligan* (1993) 3 All ER 65
[13] *Rayner v Preston* (1881) 18 Ch D 1
[14] See Lord Millet, *Paragon Fiannce v D B Thakerar & Co* [1999] 1 All ER 400
[15] Per Lord Millet, *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 at 1412 and originally, per Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705
[16] *A-G for Hong Kong v Reid* [1994] 1 All ER 1, PC
[17] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996]
[18] *Lysagt v. Edwards* (1876) 2 Ch D 499

referred to as institutional constructive trusts by academics and the judiciary,[19] and the scope of their application continues to be developed.

Within the category of constructive trusts, other jurisdictions, particularly Canada and New Zealand, have adopted remedial constructive trusts as distinct from the English institutional constructive trusts mentioned. Constructive trusts are formed where the facts of the case compel the judiciary to expressly declare a trust with the objective of providing the wronged party with a remedy.[20] The use of constructive trusts has been rejected by the English judiciary,[21] with the main objection being that imposing such an order would have far-reaching effects on the rights of third parties, as well as allowing the court to vary proprietary rights without Parliamentary authority.[22]

Finally, trusts may be created by virtue of legislative enactments. The Trusts of Land and Appointment of Trustees Act 1996, for instance, was enacted to phase out the use of settled land and trusts for sale. As such, it changed trusts for the sale of land[23] and 'settled land' created under previous legislation[24] to 'trusts of land'. Another example is the Married Women's Property Act 1882, which created a trust in favour of objects on life assurance policies at a time when property was not usually vested in women.

To summarize, although there is no official definition of the English common law concept of 'trusts', they can be characterised as an arrangement where a trustee holds property that has been designated as the trust assets for the benefit of another party, the beneficiary, as specified according to the terms of the trust. The judiciary has played an integral part in the development of trusts. It is also from these rules that the categorisation of English trusts may be made. It has been suggested that the nature of trusts implied by courts remain flexible in scope and definition for the purpose that it should remain adjustable to accommodate future ways to manage assets in both the private and public domains. As will be seen, the body of law governing trusts is inherently grounded within the principles of Equity and continues to evolve according to the contemporary demands of society.

[19] *Re: Metall and Rohstoff* (1990) 1 QB 391; Deane J in Muschinski v Dodds (1985) 160 CLR 583 at 614, Lord Browne-Wilkinson in Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 at 714

[20] Canada: *Muschinski v Dodds* (1985) 160 CLR 583; New Zealand: *Powell v Thompson* [1991] 1 NZLR 597

[21] *Re Polly Peck International (No 2)* [1998] 3 All ER 812

[22] Cornish et al (eds.) (1998) Restitution Past, Present and Future OUP at p238

[23] Section 1 Trusts of Land and Appointment of Trustees Act 1996

[24] Settled Land Act 1925

1.4 The Definition and Characteristics of Trusts under the Trusts for Transactions in the Capital Market Act 2007.

The goal of this section is to set out the legislative scheme of trusts in Thai law. In particular, it intends to introduce the particular features of the reform that bring trusts into existence in the Thai legal system. Firstly, in terms of definition, Section 3 of the TCMT Act defines trusts as "a legal relationship arising from a trust instrument". The qualifying 'instrument' is then defined as:

> ... a contract whereby a person, called a settlor, transfers or creates real right or any right appertaining to property to or for another person, called a trustee, with trust and confidence in order that the trustee shall manage such property for the benefit of beneficiaries...
>
> ... trust property" means any property as specified in a trust instrument, including any property, interest, debt and liability arising from management of a trust in compliance with a trust instrument or this act.

According to the act, trusts can only be made by way of a written contract, i.e. the "Trust Instrument". The trust instrument effectively creates a binding agreement that is contractual in nature, to the effect that the legal title to the trust's assets are transferred from the settlor to be held and managed by a stipulated trustee. Secondly, Thai trusts can only be made for specific purposes. Section 4 of the 2007 act lists these as "the issuance of securities, the securitisation of special purpose vehicles and capital market development". While no definition of 'capital market development' is given in the act, the definition and scope of securitization-related activities are separately defined in the Royal Enactment on Special Purpose Juristic Persons for Securitization 1997, Section 3 of which states:

> ...securitization" means the acceptance of transfer of assets or acceptance of assets as a security and issuance of securities for sale to investors with the requirement that returns to holders of the securities will depend on the flow of proceeds generated from the transferred assets or the assets accepted as a security.

The lack of a specifically prescriptive definition of the context in which trusts may be used allows for future expansion (SEC 2007, 3). However, it could be assumed that the potential use of trusts would be limited in scope to the facilitation of capital investments, judging from the objective subsequently added to the preamble of the act to provide "alternative of methods of transactions for foreign inward investment," and due to the fact that the previous prohibition contained in the Civil and Commercial Code still voids trusts made outside this particular context.

1.5 Parties to the Thai trust.

A. The Settlor.

The TCMT Act 2007 sets out to define the settlor of the trust in section 12. It states:

A settlor shall be any of the following juristic persons:

(1) company issuing securities under the Securities and Exchange Act;

(2) originator under the Royal Enactment on Special Purpose Juristic Persons for Securitization;

(3) juristic person having the qualifications specified in the notification of the SEC.

The act allows only for "juristic persons" to be the settlor of a trust, limiting the ability to create a trust to companies issuing securities, special purpose vehicles and companies approved by the Securities Exchange Commission who are parties seeking to attract capital. The intention behind this drafting is for investment organisations such as banks or other financial institutions to become trustees, while an organisation seeking to attract capital may become a settlor of a trust, as Sections 3 and 13 state that a settlor may also act as the trustee, so long as he or she is not the sole beneficiary and does not receive monetary interest which exceeds those of other beneficiaries. (TCMT Act 2007; s.3 and s.13) In excess of such a proportion, the interest would be allocated to the other beneficiaries. Section 11 further qualifies this by requiring that the trust instrument specifying the settlor as a trustee is to be made in writing and submitted to the SEC (TCMT Act 2007; s.11). Once a valid Trust Instrument is created, the settlor ceases to have legal rights over the trust's assets. All such rights over the trust's assets are then transferred to the trustee.

B. The Trustee.

The duties of the trustee are to manage the trust's assets for the interest of the beneficiaries in accordance with the terms set out in the Trust Instrument and the 2007 act. The act does not alter the law on the ownership of property, and it remains the case that there is no separation of legal and beneficial title under the Thai civil law system. As such, the legal ownership of the trust's assets would be vested in the name of the trustees, who are referred to as trust-companies under the Trusts Act. Those allowed to operate as trustees are similarly limited to commercial banks, financial institutions or legal persons

specified by the SEC (TCMT Act 2007; s.55). In addition to incorporation, trustees are required to obtain a license in order to act as a trustee as part of the 2007 act's legal regulation of duties and responsibilities.

The Legal Regulation of Trustees' Duties and Responsibilities.

The TCMT Act 2007 sets up two stages of control and supervision of trustees. Firstly, the act requires that an organisation acting as a trustee be licensed by the Securities Exchange Commission (SEC) prior to its operation. In order to qualify for a license, eligible organisations have to be deemed "fit and proper", conforming to certain standards set out by the SEC with regard to its financial position and its "operating system" (TCMT Act 2007; ss.54).

This feature of the TCMT Act effectively appoints the Securities Exchange Commission as a body of regulatory oversight for trustees and their administration of the trust, with the stage of licensing and approval being the first stage of regulation.

The requirement for the maintenance of a register of trustees by the Securities Exchange Commission is similar to the registration by potential charities required in section 30 of the UK Charities Act 2011. The UK Charity Commission maintains a register of charities' purpose and administration. Only certain charities are required by law to be registered in accordance with the provisions of section 30 (2) and (3) of the 2011 Act. Exempted charities include those which are exempt from registration by virtue of other legislation or those listed in Schedule 3 of the 2011 Act. Nonetheless, all charities remain subject to regulation by the UK Commission.

Whereas the preliminary stage of approval and licensing in the TCMT Act seeks to ensure the financial stability of potential trustees, the UK Charities Act's preliminary vetting requirements serve to ensure that charities are set up in accordance with the objectives, principles and formalities originally developed in the historical Law of Equity. As a method of monitoring the acts of trustees of charitable trusts, the UK Commission also maintains a Register of Removed Persons.

The second and third stages of control and supervision over trustees impose fiduciary-like duties and general management responsibilities. The latter are contained in the act's guidance of the 'Operating System,' which lays out the general management duties for trustees. These include the separation of the trust fund accounts from the personal accounts of the trustee, the allocation of interest in the trust fund among beneficiaries, and the maintenance and monitoring of records of ownership and the status of the trust fund. A separate financial statement for the trust fund is also required to be filed with the SEC. (TCMT Act 2007: s.56) Other requirements seem to enunciate the duties arising out of the fiduciary nature of the relationship between the trustee and the beneficiaries and are set out in the act, presumably since there is a lack of precedential guidance from the courts on which a body of law can be built. These include the

duty not to delegate and the duty to prevent conflicts of interest (TCMT Act 2007: ss.57, 59), as well as other requirements set out in the part of the act concerning the trustee's standard of conduct.

The trustee's standard of conduct.

The TCMT Act lays out a standard of conduct in the performance of the trustee's duties under which they must "manage a trust with integrity and prudence as a professional with expertise by providing fair treatment to beneficiaries" (TCMT Act 2007; s.30). The act has yet to define whether this amounts to a subjective or objective standard. For the fact that the act is aimed to regulate the conduct of trustees that are pre-vetted organisations, it might be said that the highest level of professional competency in the relevant financial field would be required. It remains to be seen how this clause will be interpreted by the SEC and the courts, as such requirements are unprecedented in Thai law. As for accountability, the trustee is also personally liable to indemnify the trust and jointly liable where he acts in contravention of the act or the terms of the trust (TCMT Act 2007: s.43).

There are similarities which can be seen in the TCMT 2007 to the UK Trustees Act 2000. To compare, the UK legislation was enacted to better define the duty of care imposed on trustees. Section 1of the 2000 Act states that trustees:

"must exercise such care and skill as is reasonable in the circumstances, having regard in particular -

(a) to any special knowledge or experience that he has or holds himself out as having, and
(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

The UK legislation therefore provides that professional trustees should act with a higher standard than that of a layperson. As is the case provided for by the TCMT 2007, section 30 of which states that a trustee is to manage a trust "as a professional with expertise." Moreover, the UK Trustees Act 2000 also provides specifically for investment powers that is wider than the preceding legislation.

This comparison shows that Thai legislators have adapted the duty of care provided for by the TCMT 2007 to be higher than that which is usually applied in the context of laypersons and agents outside of the context of trusts for the capital market, and that these duties have been adapted especially for the context of trustees of trusts in the Thai capital market. This higher threshold is similar to the provisions above in the UK Trustees Act 2000

C. Beneficiaries.

In the previous case of trustees, the TCMT was written in terms of requirements for trustees to fulfil. In the part concerning beneficiaries however, Chapter 4 of the act focuses on the rights of the beneficiary and the protection of the beneficiary. The general rights of the beneficiaries of a Thai trust against the trustee are summarised in Chapter 4 of the act, with section 44 stating that a beneficiary has the right to demand a trustee to manage a trust in accordance with the trust instrument or this Act and to claim compensation for the benefit of the trust, in cases where the trustee fails to manage the trust in accordance with the trust instrument or this Act.

This provision provides a remedy for persons who, under the traditional Thai civil law regime, would have been limited to compensation under the terms of an existing contact or agency agreement. Prior to the 2007 act, the disadvantages were firstly that acts which would otherwise be deemed a breach of trustee's duties or the trust terms rarely amounted to a breach of an existing contract or agency agreement. The act provides a standard of practice with which a trustee must comply and a course of action for the beneficiary when those standards are breached.

The second limitation under the previous regime was that, since Thai law does not recognise the separation between legal title and equitable rights, most transactions undertaken by a broker would be deemed solely under his name. Therefore, the bankruptcy of a fund containing any mixed assets belonging both to the broker and his or her clients could be used to offset the broker's private debts. As protection against third parties, the TCMT Act grants beneficiaries the right to "trace" or "recover" sums passed on to a third party in bad faith, or where that third party had reasonable grounds to know of a breach of trust. This applies:

> regardless of whether such person directly acquired such property from the trustee and whether the trust property was transformed into a different form or state, unless the acquisition of the property was done in good faith and for value, providing further that the person acquired that property did not know or should not have known that the acquired property has been disposed or transferred in breach of trust (TCMT Act 2007: s.44).

The recoverable amount is set by the court. The right to trace property also applies:

> ...For any person who acquired property from a trust or assisted in transferring of the trust property, if he or she knew or should have known that a trustee had transferred property in contravention to the trust instrument or this Act and such transferring has caused damage to the trust, shall jointly with the trustee under section 44 be liable as joint debtors. A beneficiary shall be entitled to claim compensation from such person for the benefit of the trust

To conclude, a comparative analysis between the trust mechanism in the TCMT Act and the concept of trusts in English law shows that the TCMT Act intended to introduce a mechanism that is similar

in function to the English trust. It overcomes the limitation due to the *Numerus Clausus* principle in Thai law, which effectively did not recognise a beneficiary's equitable ownership of trust assets. The provisions of the TCMT Act allow the beneficiary to benefit from the protection of assets that have been vested in a trust under the legal ownership of trustees and allows the ability to trace property transferred from that pool of assets, which was not possible under the Thai civil legal system which only recognised the legal ownership of the trust assets by the trustees. A trust under the TCMT is therefore akin to an express trust in English common law, in the way that there needs to be a specific trust instrument to make it valid, or more specifically, a trust created by legislation. The requirement for a trustee to be licensed is also similar to the preliminary vetting requirements of the UK Charities Act 2011. To note, there is a difference that in the context of the UK 2013 Act, it is required that charities must have a specific charitable purpose, whereas under the TCMT, trusts are required to register for investment in the Thai Stock Exchange. Additionally, it will later be seen that the conditions and rules for tracing trust assets in the event of a breach of fiduciary duties is provided for in the legislation to a much more limited extent.

1.6 Stated aim of the TCMT 2007.

The 2007 act simply states in the 'remarks' section at the end of the legislation that:

> The reasons for the promulgation of this Act are as follows: At present, the forms and methods of fund raising to undertake transactions in the capital market in Thailand are restricted. Such condition is an obstacle to the development of the capital market. It is, therefore, expedient to use the legal principle of trust as another instrument to make fund raising efficient and avoid problems that may arise from such action. It is thus necessary to enact this Act.

The TCMT Act aims to improve the existing regime for investment in the Thai capital market in four main aspects. Firstly, as the national requirements under the Foreign Business Act 1999 limit foreign ownership, foreign persons and companies were limited to the smaller Thai Market for Alternative Investments (MAI) as a forum of investment. Now that the 2007 act allows for established and licensed juristic persons to operate in their capacity as trustees, investors deemed 'foreign' could appoint trustees, who under the 2007 act are required to be Thai by majority, to invest on their behalf. Secondly, it is intended to simplify the procedures for both the security providers, e.g. bond issuers, and for investors who buy the bonds. In place of the requirement for a security agent to act on behalf of bond issuers, the issuers themselves may, provided they are registered as trustees under the 2007 act, hold securities on trust for the benefit of bond holders who would, under such an arrangement, become a beneficiary. Thirdly, in this alternative arrangement, the trustee, having been both pre-approved and subject to constant monitoring and regulation, will be of a reliable financial standing and comply with a level of professional operational standards. Finally, the creation of a trust protects trust assets, in this case invested funds, from creditors in case of the bankruptcy of the trustee

This Chapter intended to introduce the concept of trusts as introduced into Thai law via the Thai Trusts for Capital Transactions Act 2007. A brief elaboration on the definition and typology of trusts in the English legal system has been provided as a basis against which the newly created Thai trusts may be analysed and compared. However, as of the completion of the research, it was found that only 22 trusts have been created under the legislation, with the first having been put up for public offering (IPO) in August 2013, 6 years after the enactment of the TCMT. All of the trusts currently established under the legislation are real estate investment trusts (REITs). [25] The next chapter will provide some insight into the use of the TCMT exploring the particular nature of the trusts that have been created, reflecting on why it took 6 years for the first trust to be established under Thai law. The chapter will also set out the limits of existing knowledge on the use and limits of the legislation and thereby on the introduction of trusts into Thai law.

[25] Information as of 20th January 2019 obtained from www.sec.or.th database on initial public offerings (IPO)

Chapter 2: Current gaps in the knowledge on trusts in Thai Law.

This chapter sets out the development and background to the first approach used to analyse the import of trusts into the Thai civil law legal system via the TCMT 2007: the comparative law theory of legal transplants. First, some preliminary insights are provided into why in the first 6 years after the enactment of the legislation, only one trust was established.[26] The insight provided here was gathered from initial pilot interviews and serves to establish why and how the study should proceed in order to make sense of the lack of trusts under the legislation. The second part of the chapter will establish the existing gaps in the data and set out the hypotheses for the research. It will seek to illustrate that two different approaches have been used for this study. The first approach uses the legal transplant theory to analyse the TCMT 2007 act and its import of trusts into the Thai legal system, while the second approach used for the study is an empirical study of data from semi-structured interviews to further address the findings which the first method fails to explain. The methodology used for the second approach will be addressed in greater depth in Part III of the dissertation.

2.1 Some initial insights into why such few trusts have been made: the novel nature of the Capital Market Act 2007.

At the commencement of the dissertation in 2009, no trusts had been created under the TMCT 2007 act. The first trusts, [1] Impact Growth Real Estate Investment Trust was created in 2013,[27] 6 years after the enactment of the legislation. At the time of writing, a total number of 22 trust have been created. All the trust created so far take a particular form;[28] real estate investment trusts (REITs) This type of trusts involves a trustee that is a juristic person authorized by the Thai Stock Exchange Commission under the legislation who own assets which are to be invested in by an authorized REIT manager. Trust units are then sold to the public and unit holders then receive profits earned by the investment. The trustee is authorized to invest only in the real estate sector.

This part of the Chapter summarises the reasons for this state of affairs. The initial survey of literature on the TMCT Act contains little data about either the initial apparent lack of interest in the trusts

[26] Information as of 20 January 2019 from the SEC website database of IPOs: http://market.sec.or.th/public/idisc/en/ViewMore/filing-equity?SecuTypeCode=RT&OfferType=IP&FilingData=0

[27] Impact Growth Real Estate Investment Trust first applied for IPO on 8 August 2018:www.sec.or.th (accessed 20th January 2019)

[28] Information as of 20 January 2019 from the SEC website database of IPOs: http://market.sec.or.th/public/idisc/en/ViewMore/filing-equity?SecuTypeCode=RT&OfferType=IP&FilingData=0

introduced in that reform (Kasemsap, 2011; Sucheewa, 2006) or the more recent interest in the power to create a trust for particular purposes. This was the same in the case of the advice of professional and practitioner advice given by Thai legal practitioners (Suchiva, 2008; Poomsan-Becker, 2008). A number of pilot interviews were undertaken by myself at the beginning of the research, prior to the creation of any trusts under the TCMT. The overriding sentiment on the matter appears only to be that trusts were not created because they are considered 'inherently foreign' to Thai law. The general Thai view of trusts according to Thai academics was (and still remains) that a trust is a concept that is foreign to the Thai legal system. The view of the 'foreign' nature of trusts can also be evidenced from the judiciary's comments in a Thai Court of Appeal case regarding the legality of trusts created before their official ban by the Civil and Commercial Code that read to the effect that trusts had been omitted from Thai law in the course of the consolidation of the Thai Civil and Criminal Code because, unlike other 'traditionally Thai' legal concepts of family law, they were not of Thai origin (CA136/2481: 1938).

In the initial pilot interviews performed at the commencement of this research at a time when no trusts had been created under the new law, a number of brokers, legal academics and government officials were approached as prospective candidates for the semi-structured interviews. The details of these semi-structured interviews are discussed in the research structure and design chapter. Pilot interviewees were asked why in their view trusts have yet to be set up under the act. One pilot interviewee, a Government official working as part of the legislative team who were responsible for the enactment of the TCMT Act, replied that she thought the lack of use was due to the fact that the legislation had been enacted as a platform to further allow for the Islamic financial instrument, Sukuk, and that as the act allowing for the use of Sukuk at the time of the interview had yet to be enacted, the TCMT Act remained untouched (Pilot interviewee No.1). On the other hand, another pilot interviewee, a financial broker, thought that trusts were yet to be set up as "the provisions do not seem to have yet 'crystallized'. He explains that:

> "by crystallized, I mean stable. Sure, the act says you can now have trusts, but I don't think banks, not mine anyway, have any idea how or what to do with such a privilege just yet. In terms of policy, I think we just don't know enough about the whole scheme to be able to list it as a financial service offered by our bank" (Pilot interviewee No.2)

A legal academic interviewee suggested the reason for the lack of trusts created under the act was that the mechanism provided by the enactment "lacked Thai-ness." He explained that trusts are legal mechanisms that would 'never take' in Thai law because, "for Thai people, if you can entrust the care of property to a family member... there is no reason for them to resort to letting a complete stranger handle property" (Pilot interviewee No.3).

In pointing out that no trusts had been established under the act by the time I did my interviews in (add the year) a number of reasons were given for why this was the case by pilot interview participants. These included firstly that the legislation had been enacted as a platform to further allow for the Islamic

financial instrument, Sukuk, and as the act allowing for the use of Sukuk at the time of the interview had yet to be enacted, the TCMT Act remained untouched. Secondly, the Trusts Act was unfamiliar and had yet to be "crystallized", and thirdly that the mechanism itself "lacked Thai-ness."

As a reflection on the reasons provided and the reasons given by the legislators of the TCMT Act, it appears that even though no detail is given of the exact sources of inspiration or the specific model used for the enactment of trust legislation, the Thai trusts for Capital Market Transactions Act 2007 is, in its very nature, a legal transplant of a foreign legal concept into Thai law, both in the eyes of the writer and the opinion of the persons involved in the promulgation and the application of the act. Firstly, the 'foreign' nature of trusts is evidenced from the initial prohibition of trusts in the Thai Civil and Commercial Code and secondly from the incompatibility of the existence of equitable rights and interests with the legal principle of *Numerus Clausus* which underlies the Thai civil legal system of rights and interests in property.

The TCMT Act is therefore considered here to be a legal transplant of a foreign legal mechanism into the Thai legal system. It is to be pointed out that after more than half a decade after the law came into force, the only type of trusts which were eventually created under the TCMT were real estate investment trusts (REITs). These trusts were characteristically similar to existing mutual trusts for investment in real estate. Information from the SEC website database for IPO showed that the first trust under the TCMT 2007 was established in 2013. Additional information gathered from representatives of the SEC on trusts in existence as of January 2019 showed that currently, there are a total of 22 trusts that have been established under the TCMT and that there has yet to be any other types of trusts set up under the TCMT 2007 other than REITs.[29] It will be seen in the later parts of this thesis that real estate investment was one of the main areas in which it was predicted based on the interview data that trusts under the TCMT would be used.[30] This study will now seek to understand why it took so long for a trust to be established under the TCMT. It will firstly proceed taking the initial approach that the TCMT is a legal transplant and use the theory of legal transplant as a tool for analysis.

[29] SET Thailand website database www.set.or.th accessed 19 January 2019.
[30] See below, heading 10.2

2.2 Gaps in research data.

In the course of this research, four main areas of data necessary for a comparative analysis of trusts in Thai law were found to be lacking. These areas were academic literature on the Law of Trusts, official records of legislative intent and the citation of origins, critical analysis of transplanted law and the repository system for archiving historical legal materials and artefacts.

In the initial stages of the research, one of the main challenges encountered was the lack of Thai literature on the Law of Trusts. This seemed to be the case both before the 2007 act as well as after its implementation. Available literature appears not to go beyond a descriptive comparison between the legal roles and functions of certain aspects within Thai civil law to those of common law trusts (Eoseewong, 2002; Jory, 2003). Yet after trusts had been formally introduced into Thai law by the Thai Trusts Act 2007, there was no marked acknowledgement of its existence in Thai academic legal literature (Wiriyatakul, 2007; Kasemsap, 2011). Chulalongkorn University only included a small extract mentioning the legislation in the syllabus of an optional undergraduate course in financial law, and Sukhothai Thammathirat Open University introduced the subject as an elective course for its postgraduate degree in 2009. This invisibility is aggravated by the fact that there has yet to be a trust set up by virtue of the 2007 act, with little available by way of critical analysis on why this is the case. This lack of critical discussion on trusts by Thai academics means that it is difficult to ascertain a Thai perspective on the subject of trusts, much less an overall 'Thai' view of the legal concept of trusts itself, both in terms of trusts that were previously banned by the Thai Civil and Commercial Code and the trust mechanism made available by the enactment of the Thai Trusts Act. The most recent material on trusts in Thai law appears to be promotional brochures from banking institutions seeking to offer trust-related services under the TCMT Act, giving assurances of the protection of trust assets under the legislation and the professionalism offered by the institutions (Bangkok Bank, 2016).

Not only was there limited availability of material on the subject of trusts in Thai law, little was published on the intention behind the enactment of the Thai Trusts Act itself. The documentation of Parliamentary sessions in Thailand does little to describe the points of view of those involved in the procedures of enacting legislation. The only available source for the reasoning behind the intention of an individual act is published as a short paragraph at the end of the legislation as part of a formal requirement for publication in the Government Gazette (the "Remarks"). Thailand has a long tradition of importing its laws from other legal systems. Several of these imports, like the Trusts Act 2007, have either had little or no implementation. Other examples of Thai law that incorporated foreign legal concepts and have had little response range from provisions in the Civil and Commercial Code that makes it possible to instigate court proceedings against a director acting in breach of fiduciary duties (Chotisingha, 2001; Montreevat, 2006), the lack of public appeals to the Anti-Corruption Committee for cases of wrongdoing by government officials (Narkasan, 2005) and the statutory prescription for public hearings that did little to publish public

opinions in their final reports prior to the enactment of regulatory anti-competition measures (Hiranyasiri, 1996; Nilpraphan, 2014).

The limitation of information on the reasoning and intention behind a legislation means that it is not possible to analyse the success of a legal transplant simply in terms of whether transplanted laws are implemented according to the intentions of the legislators (Matson, 1993; Harding, 2001; Nelken, 2002a). In addition, little is available in terms of a critical analysis of the process of legal transplants, or their implications and effects on Thai society. Even in the period of modernization of the Thai state, when wholesale reforms were made to the Thai legal system (1908-1932), it was not common practice for Thai legislators to make a record of the sources of influence from which legal ideals were drawn to make up the newly-written Thai Civil and Commercial Code (Eoseewong, 2002; Huusa, 2007; Boonchalermvipas, 2009). The effect of the lack of reference and citation of sources was that, despite the rich history of having modelled its legislation on foreign imports, little is available to explain the process of, justification for, or the actual sources of inspiration of Thai laws from foreign legal systems (Kingsley, 2004; Huusa, 2007; Waters, 2007).

It is an unfortunate and well-documented fact that there is generally little available by way of documented accounts of the study of the historical development of Thai law (Eoseewong, 2002; Jory, 2003), despite the fact that the largely civil law-influenced Thai legal system prioritises written Codes of Law and legislation. This was made evident from the lack of official records of primary sources of law, as observed from the initial research for documentation from the National Archive of Thailand and the Thai Bar Association. Academic studies in the field of archaeology and a Marxist interpretation of Thai history suggest that the rarity of legal documents and records was due to a general cultural view that law and legal documents, having divine or sacred origins, should be guarded and handled only by those of higher societal classes (McDonald, 1871; Poomisakdi, 1957; Granaham, 1971; Reynolds and Hong, 1983), the result of which meant that few copies of main legal texts were ever circulated to those outside of the said social circle. Not only were there few copies of legal material in existence, many were a main target of destruction by invading enemy forces and burnt by foreign militia who succeeded in capturing Thai city-states as they were perceived to have ideological and sentimental value to the defeated Thai rulers, as well as being symbolic of their identity and existence. The lack of circulation due to the guarded treatment of legal texts combined with their sacredness also meant that there was a lack of socio-legal commentary from the viewpoint of a Marxist analysis of Thai legal history (Reynolds and Lysa, 1983). Existing records were written by people of the higher societal classes (Padoux, 1908; Eoseewong, 2002). The effect is that most of the available material which shows historical perceptions of law consist of those written up by royal scholars in praise of the ruling classes and the monarchy. Therefore, this research acknowledges the lack of availability of historical material and recognises the tendency for such texts to be weighted in favour of recording royal accomplishments (McDonald, 1871; Poomisakdi, 1957).

As the Civil and Commercial Code of Thailand itself contains legal concepts from both civil and common law origins, it is therefore confusing to make a comparative analysis of Thai civil and commercial

law from the dimensional viewpoint of either the civil legal system or common law legal system alone. Among the few pieces available, it is observed in the initial part of the thesis that Thai legal academics still tend to approach the comparative analysis of trusts in Thai law by discussing only the functional similarities between common law trusts and certain civil law legal mechanisms (Eoseewong, 2002; Jory, 2003). Based on the review of international academic literature on the subject of comparative trust law, in the part of the thesis on the review of literature on the legal transplant theory, it appears that Thai legal academics have followed in the footsteps of most civil law comparativists that common law trusts are innately 'unique' in origin and therefore distinguishable from indigenous civil law legal mechanisms on a doctrinal level. This results in the alienation of the common law trust in comparative accounts by civil law academics, especially for those seeking to import the legal mechanism (Trubek & Galanter, 1974; Huusa, 2007; Kingsley, 2004; Waters, 2007).

2.3 Initial research hypothesis and objectives.

Thailand has a rich tradition of legislating its own laws and acts by taking inspiration from various Western legal sources. The modern Thai legal system was itself modeled upon a mixture of the French, Swiss and German civil law systems (Lingat, 1983; Na Thalang, Kasetsiri and La-Ongsri, 1998), while some of its legislation drew inspiration from English common law sources such as the Provisions on Company Law and Agency in the Thai Civil and Commercial Code (Eoseewong, 2002; Jory, 2003). The rationale for the legislation of the Thai Trusts Act 2007 was noted at the end of the legislation as being to introduce trusts for the first time into the Thai legal system as mechanisms for investment in the Thai capital markets. Upon the enactment of the legislation, the provision in the Thai Civil and Commercial Code which initially prescribed that any trust created under Thai law was invalid was amended to accommodate for this use. However, the issue is that 7 years after the act was promulgated no trusts have been created under the legislation.

The objective of the research is to find out why, in the initial 7 years after the enactment of the Thai Trusts for Capital Transactions Act 2007, no trusts were formed under the legislation. The main questions in deciding what methods were to be used to understand the lack of trusts in Thai law are what is the best approach for the analysis of the introduction of a concept of law that is of non-civil law origin, such as trusts, into the Thai civil law-oriented legal system? And, what is the method of research best-suited to understanding the place of the concept of trusts in Thai law from a comparative law perspective? Based on the initial fact that the legislation was intended to introduce trusts as a foreign common law concept into the Thai civil law system for the first time, the research proceeded with the following initial hypotheses:

(a) The Thai Trusts for Capital Transactions Act 2007 was a legislation intended to transplant trusts into the Thai legal system for the first time.

(b) Trusts, as an instrument of common law origin, may be incompatible with the Thai civil law-oriented legal system.

2.4 Development of initial and alternatives to the research structure and design.

The initial approach used in this research was to analyze the TCMT 2007 using the comparative law theory of legal transplants. This was done in order to assess the legislation against its stated aim, this being the introduction of trusts into Thai law for the first time. As part of this methodology, the research first analyses the definition, scope and typology of legal transplants, followed by a review of the literature on legal transplants in Chapter 3. Chapter 4 provides an analysis of the study of trusts in a comparative context, to show the uniqueness of the nature of common law trusts means there is a paradox in the way trusts are compared and that the historical and cultural setting from which trusts originate must be considered. Chapter 5 then goes on to apply the theory of legal transplants to the Thai context. Application of the initial methodology showed that the initial presumption based on the stated aims of the TCMT, the vehicle through which the legal mechanism of trusts was introduced into the Thai legal system for the first time, was at odds with certain findings. The application of the legal transplant theory in the analysis of existing Thai law and judgments revealed that legal and non-legal mechanisms that were trust-like in nature had in fact existed in the Thai legal system prior to and after the enactment of the TCMT. It was found that application of the theory of legal transplants to the case of trusts in Thai law is flawed as it fails to take into account certain legal, social and cultural aspects of the Thai legal system and Thai society. Most importantly, the approach fails to explain the existence of informal, trust-like arrangements mentioned in this thesis as the "micro-systems of trusts in Thai law".

Gaps in the existing knowledge on using the legal transplant theory as a tool for the analysis of trusts in Thai law were identified. It was established that the use of the theoretical approach was insufficient to explain the Thai 'mentality' behind the lack of trusts in Thai law, and an entirely new research approach was taken. The research then changed the method of analysis to accommodate these newly-found trust-like measures and laws, as detailed in Parts III and IV of the dissertation. This entailed an analysis of academic sources and the use of semi-structured interview data to paint a more realistic picture of the Thai 'mentality' towards trusts and trust-like mechanisms. As an alternative way of thinking about trusts in Thai law, this research was then adapted to test the following hypotheses:

c) Trusts are not used because potential users prefer to use existing legal mechanisms or informal practice;

d) Those directly involved with the use of trusts have a certain "Thai mentality" towards trusts and trust-like mechanisms that has been influenced by social and cultural attributes formed by political history and religion.

This thesis challenges the analytical ability and the fundamental premise of the theory of legal transplant, in particular how its analysis of the TCMT as an enactment which introduces trusts into Thai law is theoretically and factually incorrect. In doing so, this research intends to show that trust-like concepts, rules and outcomes were features of Thai law long before the 2007 act claimed to have introduced them into Thai law. The objective of the challenge is to make sense of the resistance to the TCMT and the legal mechanism of trusts which it claims to import.

2.5 Sources of Data.

In order to provide a comparative perspective on well-known uses of trust-like mechanisms and practices and to depict the existing similarities between ancient Thai law and aspects of English trusts, the first hypothesis was tested by extracting accounts of existing Thai laws that provide trust-like mechanisms based on the characteristics and functions of trusts. Semi-structured interviews were then conducted to provide data for critical analysis, with a particular focus on the characteristics and effectiveness of existing laws and practices that are trust-like in function.

In the second set of adapted hypotheses, the 'Thai mentality' in the context of this particular research denotes the general views and thoughts on the concept of trusts and trust-like mechanisms as expressed by Thai people whose experiences or professions are concerned with the concept of the traditional English trust, that is to say, those who are in the positions of trustees and beneficiaries, as well as those of legislators, regulators and the judiciary. For this research, the scope of the sample from whom to extract interview data on the Thai mentality is intentionally limited, as findings from the preliminary pilot interviews show that outside of the mentioned groups of people, trusts in Thai law are virtually unknown.

Although information on a Thai mentality may be drawn from academic and theoretical texts on law and legal practice, this research expands the sources to traditional folklore and religious (Buddhist) texts, as well as sources of historical data. In Thai society, Buddhism is historically central to the lives of most, if not all, of the non-ruling classes of Thais (Huxley, 1996; Boonchalermvipas, 2009), and folklore is one of the ways in which Buddhist precepts and teachings are communicated and are part of what form the Thai interpretations of everyday life (Huxley, 1996). This wider range was searched in order to counter the aforementioned lack of historical records of law, legal practice and objective legal commentary. The historical narrative is also accompanied by contemporary data generated using the empirical method of

semi-structured interviews of the specific groups of individuals pre-selected for their professional role or expertise.

The second method used to test the hypotheses above was the qualitative analysis of two types of data. This consisted firstly of documents and commentaries on existing law and secondly data that was generated through empirical research methods. This was so that the research may provide an approach that is more holistic for the analysis of trusts in Thai law and of the wider picture of transplanted legal concepts via the enactment of legislation. In doing so, this research is designed to look beyond the traditional linguistic and conceptual divide of civil law and common law legal systems. This second methodology will be discussed in depth in Part IV of the research. The next part of the dissertation will now set out the scope of the legal transplant theory to be applied for the first approach towards understanding the import of trusts via the Thai Trusts for Capital Market Transactions Act 2007 into the Thai legal system. The next part of the dissertation will discuss the findings based on the first approach using the theory of legal transplants as a tool for analysis.

Part II The first methodological approach: the comparative law theory of legal transplants.

Introduction.

This part of the dissertation contains the findings from the initial approach where the theory of legal transplants was used as a tool for the analysis of the TCMT 2007. It will highlight how this approach proved to be problematic in its application and help to explain why in the period of 6 years after the entry into force of the TCMT, only one trust came to be established under the legislation for the purpose of real estate investment, and why at the time of the conclusion of the study in January 2019, a total of only 22 trusts were established, and only for real estate investment. This part will contain three chapters. Chapter 3 will analyse trusts under the TCMT 2007 as a legal transplant. In doing so, a literature review of the theory of legal transplants is presented. An analysis was also made of the application of the legal transplant theory in the context of transplanting trusts. This will establish that trusts are unique due to their common law origin and nature and that there are some precautions to be taken when applying the theory of legal transplants as a tool for analysis. Chapter 4 will then look at trusts in the context of comparative law to investigate more specific issues to take into account when analysing trusts in a comparative context. Finally, Chapter 5 will apply the theory of legal transplants to the case of trusts in Thai law. It will examine the history of Thai law to analyse how past and present Thai legislation evolved around the use of legal mechanisms and traditions that are foreign in origin. This will show how major a role foreign legal mechanisms, ideas and concepts have played in the development of Thai law. However, upon closer examination of Thai legal history, these provisional findings show that there were indeed a number of cases where trusts were upheld in Thai courts under Thai law before the promulgation and entry into force of the TCMT 2007. These findings call for a reconsideration of the appropriateness and relevance of the theory of legal transplants as a suitable theoretical tool for the analysis of the TCMT 2007 and the understanding of trusts in Thai law.

Chapter 3. Looking at trusts under the Thai Trusts for Capital Market Transactions Act 2007 as a legal transplant.

3.1 Definition and Scope of the legal transplant theory.

In identifying the gaps in the knowledge about trusts in Thai law in the previous part of the dissertation, it was proposed that the first and foremost method in trying to understand the lack of trusts created under the TCMT 2007 was to use the legal transplant theory. The underlying reason for this approach was that the initial literature and pilot interview data showed that trusts are a legal mechanism that was brought into Thai law from a foreign source. This chapter will first set out the fundamental scope of the theory of legal transplants.

A. Defining legal transplants.

The TCMT 2007 will be analysed here as legal transplant. The meaning of legal transplants as used in this context will regard the conceptual clarification by Nelken (2001b), as his definition of legal transplants anticipated a variation of consequences from the input of foreign laws, regardless of whether the transplanted laws "succeed" or "fail". Nelken's definition has therefore been chosen here as it is seen that the transplant of trusts into Thai law via the TCMT has yet to be proven either way. Legal transplants in this research shall include the imitation or transfer of laws, as well as legal norms, practices and institutions, from one or several countries to another. The agents of transfer include the legislator as well as international organisations, NGOs and individuals, and transplants can occur voluntarily, as in the case of most modern transplants, or be imposed, as in the past during the period of colonization. The expression was first coined by Watson (1974, p.21) who, in his theory of legal transplants, defines legal transplantation as the "Moving of a rule or system of law from one country to another or one people to another". The subject of the transfer may include rules, entire legal systems or single legal principles, structures, and institutions. Recent variants of the term include "legal borrowing," (Friedman, 1996) "legal transfer" (Nelken, 2002a) and "legal irritant" (Teubner, 1998). Other terms, such as harmonization or unification, are also used to describe the extent and intended effect of the transfer, with the former connoting the assimilation of laws of different jurisdictions through importation and the latter being the global convergence of national signed treaties (Smits, 1998; Garoupa & Ogus, 2006, p.339).

B. The typology of legal transplants.

The typology of legal transplants is considered in this research to show how the theory of legal transplants can be applied in the analysis of the various laws that have been imported into the Thai legal system in the past. Legal transplants are typified by the reason for which they have been transferred, i.e. what compelled one country to emulate laws from another and what the motive was for doing so. In the initial theory of legal transplants, Watson (1974) identified the "Need for legal authority", the necessity of citing logical references to justify the decisions of judges and jurors, as one of the main reasons for legal transplants. Örücü (2002, p.9) believes that transplants take place because of chance or necessity as opposed to choice, for instance where signatory states to multilateral organizations such as the European Union become bound as members to gradually implement regulations and directives. While these assumptions may offer a general insight into why transplants occur, it will be seen that later bodies of work benefit more in the next step of the analysis of legal transplants, the evaluation of the effects created by laws already transplanted, or aim towards the compatibility of transplants. Since the goals of legal transplants largely depend upon the initial intentions of the parties, the typology of transplants devised by Miller (2003) will contribute to the present analysis of the TCMT 2007.

Miller (2003) devised a typology of legal transplants based on Weber's pure types of authorities. Weber ([1922] 1978) identified different types of transplants according to the motive of the importing state. The first form is the cost-saving transplant, whereby a state imports legislation or standards from another or others to solve a given problem with a functionalist view that it would save time and costs. Miller (2003, p.846) raises as an example of cost-saving transplants the adoption of well-established and workable laws and regulatory standards from developed countries, such as the importation of Argentina's law on hazardous waste from US legislation or Colombia's transplant of the French Legal Code (Berkowitz in Walsh, 2000). Miller's (2003) theory that legal transplants are based purely or primarily on the need for efficiency does not therefore entirely fit with the reason for the enactment of the Thai 2007 Trusts Act. Other prominent classifications of legal transplants include externally-dictated transplants, entrepreneurial transplants and legitimacy-generating transplants.

According to Miller (2006), externally-dictated transplants are conditional for the exchange of funds, political autonomy, or as a step towards joining a regime promoting legal unification. Entrepreneurial transplants are a type modeled on the work of Dezelay and Garth's (2002) theory whereby transplants are made through individuals or groups who seek to import laws and norms through human capital for economic or political gains. Expertise and knowledge of law is subsequently turned into enacted law, which may also be used for wider, idealistic motives. In focusing on the gains anticipated by the importers, this particular typology seems to be at odds with creating a neutral theory to apply for legal transplants, and moreover it is difficult to formulate a measure for success. While the founding fathers of

Thai legal education and the most influential reformers of Thai law had initially been princes sent for education abroad in anticipation of state reform (Lingat, 1983, p.43), and despite Thailand now offering an official government program awarding scholarships for students to study abroad and return as civil servants, there has been no indication of such a reason for the 2007 act.

Legitimacy-generating transplants are sought after by states that have a weak legislative and governmental infrastructure as well as a general lack of faith in the rule of law. Such states look outwards to procure a model of law that possesses prestige in order to emulate those laws and create a sense of legitimacy. A model viewed as prestigious is in some instances believed to have a "talismanic" influence (Miller, 2003, p.856), as well as an institutional value of maintaining social peace. The incorporation of ten Human Rights treaties into the Argentinian Constitutional Convention in 1994 has been cited as an example. This typology corresponds to the primary motives hypothesized by Watson (1983), Sacco (1998, p.398) and Schauer (2000). It might be said that the choice in the adoption of the laws of various Western countries during the modernization of the Kingdom of Siam was determined to a great extent by the prestige of legal systems. Laws from France, England and Belgium were chosen as models for what was to later become the Civil and Commercial Code of Thailand, as well as legislation in many other areas, because of their esteem and prestige (Boonchalermvipas, 2009, p.68).

In his particular typology, however, Miller adds that the motive behind such transplants also carries with it a willingness to surrender future autonomy to the model (Miller, 2003, p.859); the adopting country would be prepared to accept future developments and interpretation by the donor country. The main motive for the modernization of Thai law was in fact contradictory to these terms, especially in reference to the reform of the Criminal Code, where the reason for change was so that Thai legal sovereignty would not be conceded. As applied to the TCMT 2007, the model of which lies mainly in English law, it is not possible for Thai courts, as a civil law system, to regard future judgments with any precedential value.

From an initial application of the typology devised by Miller (2003), it can be seen that the 2007 act does not fall under any one heading. Other academics have also proposed that there could be more than one pure motive-based category for legal transplants (Ajani, 1995; Valderrama, 2003), and this is certainly the case for the TCMT 2007. This typology might considered when formulating the types of goals to be achieved by transplanted legislation, but as is to be seen, when each typology is applied to the references to the previous transfers of law in Thailand, they may not be able to provide a mutually exclusive categorization.

3.2 Literature analysis of the application of the legal transplant theory to the TCMT 2007.

The initial contradiction among academics surrounding the theory of legal transplants lies in the disputed relationship between law and society. That is, the autonomous nature of law vs. the contextual view of law. In the former camp, Watson's original theory suggests that the laws of most modern legal systems may be traced back to laws of older civilizations, and most changes of laws in the Western legal system have been brought into existence by way of legal transplants (Watson, 1974). He attempted to show that the portability of law is evidence that law is autonomous in its nature and somewhat insulated from the demands of society. His view of law stood in stark contrast to those of the traditional comparative law scholars such as Friedman (1996), who coined the "Mirror Theory" based on the works of Montesquieu (1748), Savigny (1814) and Marx (1894), in which the development of law mirrors the demands of society and may be used as an instrument to shape society. Following this school of thought, Kahn Freund (1974), having published his studies on the uses of comparative law in the same year, contended that law is 'organically' linked to the purpose and environment in which it is made. He posits that the ability to transplant law is dependent on how law is embedded in its original environment, and political factors play a role in the viability of more 'organic' laws.

A. The abundance of laws by transplant in history as Watson's logical deduction as proof of the autonomous nature of law.

Friedman (1996, p.595) argues that the development of law is not a static process and, even in absence of borrowing, law will adapt to suit present political and economic demands. Nelken (2002, p.26) states that Watson's proof is "selective and semantic" and too "microscopic" to provide a generally applicable theory on legal transplants. It is agreed that Watson's examples of legal transplants are limited to indicating a historical link between Roman and Western law. As noted by Harding (2001) in the review of literature on legal transplants in Southeast Asia, it also follows the overall critique of the Western-centrism of comparative law in general. Watson's examples might be defended by the fact that the presentation of historical links as evidence of the occurrence of legal transplants is valid if it were to be viewed as a part of the initial stages of formulating a theory, just as it is widely accepted as evidence of the diffusion theory in the context of cultural anthropology and sociology (Bohannan, 1969; Latour, 1996). As opposed to formulating a general theory, it is intended to apply to all the different forms of transplants that have developed over time. It might be suggested that historical transfers of laws may still be of empirical value for the analysis of specific transplants, especially with regards to the analysis of legal transplants in Thai law.

However, it might be suggested that the analysis of legal transplants from historical evidence should not only be limited to depicting the circumstances leading to their success, but should equally

include instances where transplanted law becomes redefined, or where the outcome is not as predicted. This is the logic suggested by Teubner (1998, p.12), who refers to legal transplants as "irritants", as the effect is unpredictable and dependent on the degree to which legal rules are "coupled" with social processes. Other academics following the contextual view also seem to produce a less optimistic view on the possibility of legal transplants. Legrand (1997) for instance, associates transplants between legal systems of different families with a sense of "impossibility". Any legal rule from one system carries with it the "mentalité", or its epistemological meaning, which was determined in its original context and when transferred could be subject to changes in interpretation. The reason for this less-than-enthusiastic approach, if viewed in the context against which the writers attempt to argue, can ironically be found in the history of the literature on legal transplants (which in the case of both Legrand and Teubner is legal convergence). History provides not only the possible cause and effect towards a compatible or a failed transplant, but could also provide a caution as to the context, by which past literature could be influenced.

B. Ewald's interpretation of the Watsonian legal transplant theory and the emphasis on the role of the elites.

While it is primarily agreed that Watson's original position on the autonomous nature of the development of law from social and political forces is extreme, Ewald (1995) attempts to offer an interpretation of Watson's writing on legal transplants to mediate the orthodox comparative law approach. In a "weaker" form of Watson's assertion of legal autonomy, it is suggested that Watson's view on the development of law is not entirely insulated from societal influence. As per Ewald, Watson was merely focusing on the role of legal elites responsible for the transplant of laws, whose primary concern in importing a rule was often the prestige and authority of the imported law (Ewald, 1995, p.494). In this sense, law is autonomous in that its development is dictated from the top down, without much need for societal input.

This weaker version of Watson's autonomous nature of law is limited to the analysis of legal transplants at the 'macro' level, i.e. only assessing the motives and aims of colonizers, organizations, donor states or the legislators in the importing state, and it has been criticized as narrow and state-centric[31] (Nelken, 2001b, p.351). Such a view omits the consideration of other factors that have a bearing on how the transplanted law will be used in society. Most analyses and evidence of legal transplants in Thailand, being sourced from sovereign-centric accounts of legal history or Government Papers in preparation of the 2007 act, also bear this state-centric bias. In order to overcome this limitation and determine the underlying values of other participants at the 'micro' level of the process of legal transplantation, which

[31] The term macro is used in this context to refer to the view point of the larger aggregate, to denote the superior governing bodies and policy makers, in contrast to the micro view of the individuals.

can influence its ultimate outcome, an inquiry will be made into the perceptions and attitudes towards the new laws from the bottom up. As noted by Friedman (1996, p.69), an increase in the volume of transactions at a global level often induces legal change at the micro level, with individual actors such as businessmen and lawyers who have vested interests being the agents of change. Furthermore, it is suggested that concepts inherent in the legal transplants, if also intended to be transferred, must be managed within the "living law" of the importing country. This applies especially with regards to laws regulating modes of business (Teubner, 1998, p.24). Nichols (1997) also urges consideration of the values implicit in the law itself, i.e. a transplanted law embodying values that are not culturally invasive is less likely to conflict with the values of the importing country and be rejected, as a factor in determining the compatibility of legal transplants. It is therefore necessary to investigate the interconnection between the law, society and culture of the importing state.

C. Reductionism in the comparative law and economic approach.

The wider field of comparative law uses economic theories from its interdisciplinary counterpart to construct an idealized model built on a cost-benefit analysis of the legal systems to compare and contrast with those which exist in different countries, with the aim of making actual legal systems provide for a more efficient economy (Mattei, 1994, p.3). For instance, economic theories are used to determine the most favorable landscape for investors, comparisons are made of the variations in different legal systems' shareholder rights or creditor and investor protection, which become variables in lowering agency costs, resulting in an amenable environment for investment. This approach focuses on traits unique to legal systems and suggests that investment laws belonging to the common law family generate lower agency costs, as noted by La Porta, Lopez-de-Silanes, Shleifer and Vishny (LLSV, 1998), as well as higher dividends (LLSV, 2000). This model of analysis contributed to the creation of the 'Legal Origins Theory,' which asserts that the legal family from which a state's laws are derived has a bearing on the efficiency of its financial market. In the study of legal transplants, LLSV's Legal Origins Theory was applied in a study by Levine (1999), and it was concluded that the choice to transplant laws from a particular family was influential on economic development. The economic approach to legal transplants uses theories in an attempt to analyze how and why transplants occur and predict the factors which may influence the latter's "success".

From this interdisciplinary approach, the occurrence of legal transplants can be explained through the economic hypothetical existence of an "international market" of competitive legal systems, the most efficient of which is to be adopted by individual states, eventually resulting in a convergence of laws. To determine how and why legal transplants occur under the economic approach, Mattei suggests, in the same vein of thought as Watson's original theory on legal transplants, that the 'prestige' of a legal system is analogous to economic efficiency as the main motive for importing law when applied in the context of

lesser-developed states (Mattei, 1994, p.38). In an attempt to find favorable factors for a successful transplant, economic analysis has been used to determine which types of law would be more compatible when transplanted. Ogus (1999) used transaction costs as a variable to predict the compatibility of legal transplants. It was suggested that laws generating less transaction costs, those which are facilitative or "homogenous" in nature such as contract or corporate law, are more likely to be compatible. Berkowitz, Pistor & Richard (BPR) conducted a study to establish elements that contribute to the legality of a legal system which has received legal transplants (BPR, 2003a) using an econometric analysis based on the earlier research by LLSV on the Legal Origins Theory. The study concluded that the way in which a law was transplanted was a more influential indicator of the receptivity of the transplanted law than the choice of legal family. Factors signifying a strong 'demand' for the transplant include the voluntary choice of transplant and the familiarity of the locals towards the legal principles. On the contrary, transplants imposed on populations without similar ideals or understanding give rise to the "transplant effect", which indirectly effects economic development via its negative impact on legality (LLSV, 1998; BPR, 2003a).

The result from BPR's (2003a) study might be seen as the beginning of a welcome shift away from the traditional comparative law classification of legal families which, as mentioned, has been subject to much criticism (Harding, 2001; Örücü, 2002). However, it might be noted that the two most influential studies in comparative law and economics still proceeded on the assumed nature and origin of the Thai legal system. BPR's research was conducted from the perspective that Thai law uses French and Belgian law as a model, conclusively allocating it within the civil law tradition (BPR, 2003a), whereas English common law was recorded as the origin and model for transplant in the research of LLSV (1998). This implies that Thai law still cannot be conclusively classified according to the traditional comparative law distinction of legal families, which in turn indicates that an analysis based on this classic distinction will be unable to give conclusive or accurate results.

The main criticism of the economic approach to the analysis of legal transplants is that it reduces to numerical constants important factors and values which could at times be immeasurable. Mattei's hypothesis on the competitive market of legal systems, for instance, does not take into account legal transplants that have been made out of necessity, or those that have been imposed. It could be said that, as applied to Thai legal transplants, the hypothesized market of legal systems is imperfect (Örücü, 2002, p.10); transplants in the past have mainly been politically motivated and necessary, with the main example being the reform of the Thai criminal legal system in the 1800's. The documented aim of the said reforms was to modernize the primitive court procedures and punishment, with the ultimate aim borne out of the necessity to "preserve sovereignty of the Siamese courts and ultimately, to avoid being colonized." (Lingat 1983, p.43) The sources of the new Criminal Code were selected for their prestige, so that foreign colonial powers would view the Siamese nation as sufficiently civilized, as opposed to being selected as the most efficient model for transplant. Not until later was law intended to assume a more functional role as a tool to reform society and culture (Wyatt, 2003, p.142). Here, it is Watson's analysis of legal transplants that better captures the elements that were influential for its occurrence (Watson, 1974). It is suggested that

national pride and identity are also tied to the prestige of legal sources as the main motives for legal transplants (Lingat, 1983). It will be seen that this same pride, which when attached to legal sovereignty was the motive for reform, is still influential in the way Thai culture is conservative towards foreign intrusion and ownership.[32]

The inability of the economic analysis of legal transplants to take into account some incomputable factors leads to another, general critique of the functional approach to the analysis of legal transplants: it is overly simplistic in its straight-forward assumption that law could provide a ready solution for the problems that the importing or imposing state or organization is seeking to address. The attached discipline or school of thought, be it politics, history, anthropology, or economics, tends to assume a pre-established link between law and society in their framework of reference. Within each framework, theories applied in the analysis can discount elements that fall outside its discourse. Nelken criticizes Zweigert and Kotz's (1987) view of law's role to serve social purposes (Nelken, 2002, p.22), and this dismissive attitude towards legal transplants is because the functionalist approach could override the utility of research; the debate as to what success entails could be endless. In practice, the effect of legal transplants cannot, and at most times is not, seen as a success or failure. Therefore, the validity of the findings is disputed, as the actual nature or extent of what is considered to be a success is dependent on the aim of the transplant, and each school of thought is subject to its own standards.

D. The Contextual approach's concept of Legal Culture.

The leading scholars in the field of legal culture as applied to the context of legal transplants were Friedman and Nelken. Friedman, from as early as 1969 in his historical review of law reforms by way of voluntary legal transplants, suggested that law forms a part of culture that is made up of and shaped by interests and values. Initially, his views on culture served to emphasize the contextual approach from which law should be viewed and that the transferability of law demanded a sociological and empirical analysis (Friedman, 1978, p.30-31). Later, Friedman (1994) developed a theory of distinct modern legal culture, identified as the evidence and cause of changes, whereby society is seen to converge in response to the economic, social and technologic changes brought on by globalization. In this theory, legal culture was defined to include "ideas, values, attitudes, and opinions people hold, with regard to law and the legal system" (Friedman, 1994, p.118). He distinguished legal culture from the outside, by individuals or groups who bring pressure for legal change as "external legal culture", from the internalized values of judges and legal professionals, the "internal legal culture". It is the former that may act as a guideline for the application of the "micro" approach to the analysis of the TCMT 2007.

[32] "Becoming civilized was a self-serving desire of the Thai royal elite to earn recognition of themselves among the world's elites" Lingat (1983, p.23)

Scholars of the general field of legal culture have amassed a wide range of literature, generally falling into the fields of law and sociology, with the scope of the subject of study encompassing four components identified by Blankenburg and Bruinsma (1995). These are law in legal texts, law in action, patterns of legal behavior, and legal consciousness. Nelken defines more generally the concept of legal culture and its relevance to the analysis of legal transplants as patterns of relatively stable, legally-orientated social behaviours and attitudes. Legal culture in critical analysis can be approached in two ways. Firstly, an explanatory approach to legal culture, focusing on linking changes in law or culture as a phenomenon of cause and effect. The interpretative approach, on the other hand, seeks to understand how individual legal cultural aspects operate with one another to project or pressure law as a whole and how law and legal culture are intrinsically interrelated (Nelken, 2004). It is this latter approach which is thought to have been more adequate in expressing the normative facets of law and social policy and thus the importance of legal culture as a whole.

From an interpretive approach, law, when viewed as culturally dependent, differs according to each society (Friedman, 1994), and it is the examination of the different cultural responses to similar social, political and economic problems that enables a framework of analysis to take into account not only the way with which problems are dealt indigenously, but also the normative nature of law, i.e. what other kinds of mechanisms besides legislation have been used in that country. As applied to the study, prior to the 2007 Act, legal culture alerts us to the differences in perception of the role of law and legal institutions. For individuals, Thai official law is a source of unpredictability which tends to disrupt everyday normative patterns. This can be seen from how, despite having already been illegal according to the Thai Civil and Commercial Code, it was the norm to make use of loophole agreements, nominees and other types of legal arrangements to formulate trust-like mechanisms prior to the highly-publicised judgment by the courts against the use of nominees in the case of the former Prime Minister. Only after was the use of nominees ostracized, and it later became one of the reasons which led to the enactment of the TCMT 2007 to provide a legal, regulated alternative. Hence a micro-level inquiry will be made into the patterns of use of these alternative forms of investment in existence prior to the enactment of the 2007 act, as well as the aims and attitudes of the individuals towards the act, to determine the factors that may contribute to or undermine its future compatibility.

E. Criticism on the broadness of the concept of Legal Culture.

The main criticism of the legal culture approach is that academics have failed to agree on a definition of legal culture that is able to limit the scope to a workable framework of analysis. Cotterrell, for instance, criticizes Friedman's all-encompassing definition of legal culture to provide a single, explanatory mechanism tool for the analysis of legal transplants (Cotterrell, 2007, p.82). Legal culture, as a factor in analysis, could only be feasible if it were based on detailed ethnographic records of behaviour within a specifically defined social context (Friedman, 1969; Cotterrell, 2007). In agreement with this

critique, when compared to ethnography, a scientific method of the description of customs, beliefs, attitudes and traditions made by cultural anthropologists (Geertz, 1973, p.3), there seems to be no such equivalent tool for the concept of legal culture. Additionally, Ross (1993) and Webber (2004) suggest that the ambiguous nature of the concept opens up the opportunity to create patterns and theories by connecting occurrences in the past to present ones otherwise bearing little resemblance.

In its defence, Friedman argues that the concept of legal culture has been conceived to provide a "conceptual foundation from which to operate", within the field of social sciences. This opinion is backed by Kingsley's analysis on the intentionally broad definition and boundaries of the study of culture in the field of cultural anthropology (Ember & Ember, 1990, p.510). As culture is a constantly changing and adaptive concept, specificity, were it imposed, would delimit the range of factors to be taken into account in the analysis of the potential effects of legal transplants (Kingsley, 2004, p.519).

F. Epistemological challenges to Legal Culture.

On the one hand, the concept of legal culture arms the analysis of legal transplants with factors that are not confined to the text of the law, or as Friedman describes, the view of law that is not "a collection of doctrines, rules, terms and phrases" (Friedman, 1990, p.49) that are usually produced by the legal elites. On the other, it can also be used to argue to the contrary, that it is due to differences embedded in culture, that law cannot be transplanted from one country to another. In reification of his views, Legrand suggests that it is also culture that stands in the way of comparison. Building on the principles in the field of epistemology, he suggests that the process of comparison of legal systems can never be truly objective due to an inherent cultural prejudice (Legrand, 1995, p. 266), due to the "impenetrability of the otherness of the other" (Gadamer, 1989, p.26) of the analyzer. To illustrate, 'legal culture' can be used to rationalize corruption as patterns of behaviour, which be labelled as justification for the failure of a legal transplant, this would ultimately result in a diversion from an impartial and thorough analysis of other possible causes (Lindsey, 2002, p.1). While this assertion can be seen as proof of the ability to use legal culture as a justified excuse, it might be said that there is a thin line to be drawn as to the impartiality in assessing 'legal culture', especially from the point of view of a Western comparative analyst. It is a paradox observed from Kingsley's precaution (Kingsley, 2004, p.516), where he mentions that the concept of "Asian Values", as a pattern of behaviour falling within the concept of legal culture, could be used to justify nepotism and cronyism. While such types of behaviour might be labelled negatively in according to the Western view of morality, it does constitute given elements of Asian culture that bears account for the paternalistic nature of industries that is the foundation for the development of most South East Asian economies, including that of Thailand (Jayasuriya, 2002; White, 2006).

G. Flaws of the Contextual Approach to Legal Transplants: Euro-centricity.

Despite the broadening of factors to consider in formulating a theory for legal transplants, the contextual approach is not without further limitations when applied to Thai legal transplants. For instance, Mattei (1997) suggests, as an alternative to the traditional classification of legal families in comparative legal study, three patterns of law defined by their sources of social incentives and norms affecting behavior: the rules of Professional, Political and Traditional laws. Where the legal system is characterized as one being of "the Rule of Politics", it is suggested that the political will of the elites of the importing state plays a highly influential role in the motive for transplants. Harding (2002, p.264) notes that Mattei's classification of legal systems still falls short of being able to capture the truly mixed characteristics of Southeast-Asian law, the analysis of which still remains limited to the Western-centric, broader field of comparative law, which stands equally true for the Thai legal system.

The West-centric nature is not only applicable to the contextual approaches of legal transplant analysis, but is also pervasive in the broader field of comparative law (Harding, 2002). Combined with the lack of research in legal transplants in Southeast-Asian law, critics of the law and development movement have attributed this insensitivity as one of the reasons leading to the transplantation of market-competitive legal models for legal reform which are ill-adapted to the political and social context of Thailand (Harding, 2001; Boonchalermvipas, 2009). In an attempt to construct a verifiable, calculable formula to legal transplants the interdisciplinary approach of law and economics became a leading field following the 1990's boom of the law and governance assistance programs.

H. Cotterrell's legal communities as an addition to the method of analysis of legal culture.

In order to maintain insofar as possible, an objective, nationality-free observation and analysis of cultural factors that may be relevant to the compatibility of the TCMT 2007, it is suggested that regard be had to an alternative view found in Cotterrell's objections to the broadness and vagueness of the concept of legal culture. In his analysis, instead of attempting to analyze and classify patterns of behaviour that is to constitute legal culture, it is instead suggested that the focus be shifted on to its ideological components, "on the power of the state legal system to produce structures of social understandings, attitudes and values among lay citizens" (Cotterrell, 2007, p.94).

This urge to shift the focus stems from Cotterrell's suggestion that socio-legal inquiries should no longer be centered on the concept of a monolithic, sovereign-made law, but on how law serves and maintains social relationships of ideal type of communities existing within it, in order to accommodate the pluralistic nature of comparative law (Cotterrell, 2007, p.55). Cotterrell suggests that the contents of culture are expressed in social relations of four figurative types of communities, based on Weber's ideal-

types of social action (Weber, 1968, p.24). For instance, where the aggregate elements of culture can be found in a shared tradition, environment, locality, language group, historical experience, it is expressed as a traditional community, whereas elements that center on religion and fundamental values compose a community of belief and values. Cultural elements based on affection or a shared discrimination of those considered outsiders are in effect, communities of affection and where the defining elements of culture are those arising out of a shared project or venture, it is expressed as an instrumental community (Cotterrell, 1997, p.80).

It is noted that in practice, each of these communities rarely exist mutually exclusive of one another, but intersect and combine as networks of communities. The practical utility in separating them conceptually is to understand the varying characteristics and consequences of each community (Cotterrell, 2007, p.124). In the examination and analysis of factors that could be relevant to the effects of the transplanted TCMT 2007, Cotterrell's four ideal types of communities can be applied to the analysis of the views of interested individuals. The four ideal types will define interests to be considered with reference to the values, beliefs, aims and concerns central to the definition of each community and how each community expects the transplanted law to protect their interests. For instance, as applied to the aforementioned cultural traits of "Asian Values", fostered, paternalistic economies may equally be expressed in terms of affective as well as instrumental communities, therefore limiting a Western-biased view that would otherwise dismiss the traits as excuses or justifications.

While I personally agree that the concept of legal culture may be too broad from which to select a specific set of integer to apply to a theory on legal transplants, it provides a range of factors; attitudes and beliefs, which may be taken into consideration of the compatibility of the trust as a proposed mechanism, as well as the potential to codify common law -based principles of fiduciary duties, as an additional alternative in discouraging the illegal use of nominees and other loophole methods. The cultural approach also acknowledges the actual effects of the normative dimensions of law and legal plurality. Additionally, Friedman's external culture aids the validation of a "micro" approach to the analysis of the TCMT 2007, and in order to avoid Legrand's strong contests against epistemological validity of legal culture as data for analysis and the issue of inherent bias, Cotterrell's legal concept of community and his four ideal types will also assist in identifying each group within the "micro" system with their interests in an approach which seeks to mediate between the East-West polemic bias arising out of the traditional comparative law assessment.

Conclusion.

To conclude, the discursive dichotomy between the contextual vs. autonomous nature of law in legal transplant scholarship seems to be of limited value in the formulation of a workable legal transplant

theory. While Watson's autonomous approach indirectly contributes to providing valuable insight into the origins and the effects of transplants from historical proof, it is too limited and selective to be convincingly applied to modern, non-Western transplants. On the other hand, the contextual approach broadens the range of disciplines with which to examine factors influential to legal transplants, nonetheless, some theories fail to consider those not falling within their established framework of analysis. As it has been seen, the ultimate aim of both approaches seems to be the construction of a generally applicable theory of legal transplant to ensure its "success", which is a variant and is subject to the aims of the approach. In order to avoid this futility, the effect of the transplant will be defined not in a polemic spectrum of success and failure, but as "changes" envisioned by interested participants. As applied to the analysis of the TCMT 2007, the contextual approach would help provide factors to form a structured framework to be taken into account in assessing the potential of the Trusts Act as a transplanted law.

Chapter 4. Analysing trusts in a comparative context.

The main flaw that has been highlighted in the review of academic analysis of legal transplants theory is the lack of a standard of measurement of a successful legal transplant. According to the intention behind the TCMT 2007 to allow for the creation of trusts in Thai law for the first time, the said transplantation has been far from successful. However, the application of the legal transplant theory to the case of the TCMT 2007 in such a way fails to reveal exactly why this is the case. As the analysis of literature on the theory of legal transplant also suggests that regard should be had to other considerations surrounding transplanted law such as culture, politics, economics and socio-legal aspects, it is asked whether there are some other considerations to be taken into account where the transplant consists of trusts. This chapter therefore provides a review of how the Law of Trusts and trust-related concepts are regarded in a comparative context.

The Law of Trusts and its underlying principles have been the subject of four main themes of analyses in the wider field of comparative law, of which the discourse on legal transplants is part. The earliest period in the comparative study of the Law of Trusts concerned mostly the discussion of the nature and origins of trusts. Later literature focuses on the analysis of trusts as an instrument in complex financial and commercial transactions and the analysis of trusts for the purpose of harmonization, which stems from the third theme of the economic analysis of trust law.

It appears that within the earliest theme of comparative legal analyses of English trust law, there is a pattern in the way trusts have been analyzed which paradoxically demands for future studies of trusts at a comparative level to reconsider its historical background and primary formative principles. This paradox lies in the conclusions drawn by foreign comparative academics of the historical origins of English trusts that they are 'unique' in nature. The result of this is the view that English trusts are merely an antiquated, superfluous set of institutionalized rules, which would contribute little to existing civil law regimes. Existing studies of Thai academics have equally followed this trend (Poomisakdi, 1957; Pramote, 2004).

Paradoxically however, I suggest that it continues to be necessary to look at the development of trusts in its unique, historical context. The reason for this is that such an approach will ultimately reveal some of the advantages provided by the English Law of Trusts over the equivalent solutions provided in civil law that are especially relevant to the use of trusts as a mechanism in protecting the interests of parties to highly complex financial transactions. In the analysis of what elements might affect the transplant of trusts into Thai law via the 2007 act, this paradox draws us to reflect on whether enough consideration has been given to the integral principles that underlie the concept of trusts in English law, especially given the process of adopting a civil law solution of importing a legal mechanism that is distinctly of common law origins through the use of a legislative act. Ultimately it leads to the question of whether the importing legislation is logically sound and sufficiently provides for the effects which would otherwise be absent without the principles underlying English trusts. This chapter seeks to elaborate on this paradox,

as well as what the focal points are and have been, in the study of trusts the wider field of comparative law. This will additionally provide an insight into why there appears to be reluctance in adopting the English model of trusts by civil law jurisdictions and in the Thai legal system.

4.1 Literature analysis of the early stages of the study of English trusts in comparative law.

The earliest works in comparative law focused mainly on the determination of the sources and origins of the concept of trusts. Such studies proceeded on the works of Maitland (1894). Known as the "Father" of English trusts history (Mattei, 2005, p.11), Maitland compiled an analysis of the use of trusts in English history and declared it to be "unique" in nature and a legal mechanism with origins deeply entwined in Medieval-English society. The discourses around the concept of trusts in the initial period presented English trusts along with its founding principles, by differentiating them from other, similar legal mechanisms provided in other jurisdictions. As Goodrich described, the works of Maitland featured a "negative construction of national identity" whereby the characteristics of English law are generally defined by what other laws aren't (Goodrich, 1995, p.98).

It is suggested that the initial declaration of the exclusively English origin of trusts and the consequent trend in subsequent foreign analyses of trusts leads to a paradoxical way in which trusts are considered in the academic literature in the field of comparative law, whereby this initial premise ultimately led to the approach that encouraged the pursuant literature to merely focus on the functions of trusts and to proceed on the analyses of trusts in a process of equating its features with local solutions provided by Civil legal systems in their laws of Obligation, Agency and Contract. Examples include those such as Holmes' (1885) comparison of the German Salmann to the English Feeoffee. Other comparative approaches to English trusts sought to compare them with institutions having similar functions found in Continental Europe, such as the German Treuhand (Kotz, 1963) and the Roman law-based notion of Patrimoine (Lepaulle, 1926; Lupoi, 2000, p.10). The main questions posed regarding the nature of English trusts in comparative law at the time was whether or not its functions are compatible with local (mainly civil law) doctrines. Much academic debate focused on whether the nature of dual ownership under the English Law of Trusts, where in addition to legal ownership, the jurisdiction of Equity recognised and created a competing right over property (Patton, 1945; Béraudo, 1992). The main question was whether such a concept was compatible to the *Numerus Clausus* principle of rights in Roman law, as enshrined in Article 543 and 544 of the French Civil Code, which stipulates that the right of ownership exists only as indivisible whole.

It might be said that in there was a lack of focus on the doctrinal intricacies of English trusts and how these doctrines make English trusts different. As Hansmann and Mattei observe, this often led to restrict the scope of inquiry of the English Law of Trusts to asking what English trusts could do, although not going so far as to consider what can civil law not accommodate without trusts (Hansmann & Mattei,

1998, p.435). This also resonates in the way Thai academics had approached the analysis of English trust law, as one of the earliest Thai literature referencing English trusts was aimed at preparing sources of reference for the drafting of the Civil and Commercial Code of Thailand in 1925, selecting between the English Law of Trusts and the French civil law regime (Tingsapat, 1921). Ultimately, as the latter regime became the choice of legislators, successive literature on trusts are generally dealt with by Thai academic analysis of the sections on Ownership in the Thai Civil and Commercial Code (Poomisakdi, 1957). Another question to ask from the observation drawn from the flaws in this approach is whether, this ingrained sense of dogmatic reluctance of civil law academics to compare underlying principles forming the English model of trusts, could in some way effect the adoption of the concept of trusts. It will later be seen that there is often a negative stance taken by Thai academic literature on trusts that is seemingly similar to the vein of the French hostility to the concept of separation of legal and beneficial titles in property (Lepaulle, 1926; Béraudo, 1992).

As a precaution, this research prioritises the origin and development of trusts as an important concept, as the body of trust law and the logical principles in which trusts are grounded can only be fully understood within a more historical context. Hence, the suggested paradox in the nature of comparative trust studies is how English trusts have been observed and should be observed. Even though the element of historical development of trusts has the tendency to shift the focal point of analysis away from advantages provided by English trusts, it remains necessary to future comparative analyses. This is because the analysis of the historical development of trusts will ultimately reveal some of the advantages provided by the English Law of trusts over the equivalent solutions provided in civil law that are especially relevant to the use of trusts as a mechanism in protecting the interests of parties to highly complex financial transactions.

4.2 The economic-legal analysis of the transplant of English trusts.

Academics have also engaged in the functional analysis of trusts through economic models. Stikoff (2003) has engaged in the 'functional' study of trust law, focusing on the unique nature of trusts which blends together property lawlike and contract law-like features. In summary, by using the agency costs approach, Stikoff observed that the nature and function of trusts poses agency costs as the managerial power lies with the trustee and the right to the assets lies with the beneficiaries, and suggests that regard should be had by legislators to reduce agency costs. (Stikoff, 2003, p.12)

Posner (2013) gives an economic analysis of trusts and trusts law in the modern context of trusts as an instrument of investment in the stock market. Posner criticizes the development of modern trusts legislation for the purpose of regulating stock market investment for being outdated and unable to accommodate modern economic implications. However, he observes that modern drafting of trusts legislation has waived the strict and archaic requirements in the traditional common law sense of trusts and given a broader range of discretion to trustees. In modern trusts for financial investment, there has

additionally been a shift of elements of fiduciary duties to accommodate economic realities such as the standard of care of the prudent investor rather than the prudent man.

In terms of the economic-legal analysis of the transplant of English trusts, economic efficiency was noted as one of the main reasons for what the field of comparative law refers to as a stage of "Legal Change" (Watson, 1978). According to this theory, in the wake of decolonization, newly established states became free from the legal products installed by colonizing powers and new laws were enacted and promulgated by new Governments. In their liberty to choose the new legal content, one of the main impetus for electing laws from another jurisdiction as a model to be transferred, or transplanted was the perceived 'efficiency'. It was observed that in the process of law making, there was a trend for countries to adopt the most 'efficient' legal rules (Epstien, 1980; Mattei, 1994). Economic analysis of trusts involved the consideration of trusts as a way of arranging property rights so as to reduce transaction costs. In doing so, it generally proceeded on the hypothesis that there is a competitive model of the sources and models of laws and legislative principles. Mattei (1994) observes that the choice in adopting the model of trusts was an area to which this theory applies, especially for civil law jurisdictions. Where it is perceived that the use of trusts would be seen to generate lower transaction costs than the existing legal structures provided by civil law alternatives in existing laws of Contract and Obligation, it was within that jurisdiction's interest therefore worthy of adoption, or at least to recognise trusts as an alien legal mechanism (Rudden, 1987; Ogus, 1986; Mattei, 1994).

In practice however, it has been observed that even where the English model of trusts were considered more cost-effective, wholesale transplant of law was often avoided. The academic focus of analysis of trusts in comparative law became divided into polemic discourses, between those actively objecting the use of Anglo-American trusts on the grounds of incompatibility with principles inherent in the civil law of Property and other civil law jurisdictions. In reality, the concept of trusts was adopted in varying degrees. Civil law jurisdictions that chose not to import the conceptually-defined features of Anglo-American trusts, such as the separation of legal and beneficial title, accommodated the essential legal effects of trusts through the introduction of hybrid legal constructs. For instance, trust-like arrangements were alternatively accommodated through the use of the existing laws of Contracts, (Langbein, 1995) powers of attorney, or principles of Agency as a tool to enforce the rights under the arrangement (Graziadei, Mattei & Smith 2005, p.12). Other jurisdictions that voluntarily imported the English model of trusts did so not by adapting existing laws or practices, but by allowing trusts for specific uses, usually through legislation. Lupoi (2001) noted Mauritius and Japan as some other examples where trusts had been introduced by way of legislation. In fact, Thailand's Trusts for Transactions in the Capital Market Act 2007 falls within this category. Nonetheless, it will be seen that initially Thailand had like France, actively been against the implications of allowing the use of Anglo-American trusts. However, Thailand's decision to adopt the use of trusts as an investment vehicle can be seen to be influenced by cost-effective considerations. One of the main reasons for lifting its existing ban on the use and validity of trusts in the Commercial Code, as stated in the preamble of the 2007 act, was to increase foreign investment, as well as to enable the development of innovative products" (SEC, 2007, p.3).

As the number of jurisdictions welcoming the use of trusts grew, the question arose whether or not trusts founded validly under the jurisdiction of another state would be enforceable against persons found in breach of trusts under its national laws, in which the concept of trusts was not accommodated (Oakley, 1996). As will be seen, this led to collective international efforts to set out a common parlance of trusts for both common law and civil law jurisdictions.

4.3 The comparative law -focus on the harmonization of trust laws.

After the advancement of the economic analysis of trusts approach for determining whether or not and to what extent, the Anglo-American concept of trusts should be adopted, there was a rise of effort among international organizations and sovereign states to harmonize rules and regulations to promote economic efficiency. At a comparative level of analysis, the Law of Trusts was discussed in terms of how best to promote a general understanding, acceptance and enforcement of trusts for the jurisdictions that do not originally recognize the concept. This objective was pursued through international alliance of different degrees, through economic policies from Common tariffs, economic policies and currencies (Davies et al., 1997; Wantanabe, 2000; Dicey et al., 2007). In the field of international private law, a Working Group pioneered by Hayton established in 1999 the "Principles of European Trust Law", comprised of eight minimum principles. These were recommendations aimed to unify the core aspects of the various types of trust in existing European law to " maximize opportunities for wealth preservation and wealth generation" (Hayton, 1998, p. 8) . Prior to the principles in 1999, The Hague Conference on Private International Law was the main focal point of trusts in an international context. In 1985, the Draft Convention on the Law Applicable to Trusts and on Their Recognition was adopted and later came to be ratified before taking effect in 1992.

In terms of the procedure and substance of trusts, the Hague Convention on the Recognition of Trusts 1985 primarily aims to encourage signatories to recognize the validity of trusts and to grant protection to the rights and privileges unique to trusts in their national courts (Article 11). In effect, the Convention enabled signatories to recognize trusts created by other jurisdictions, by applying the law of the place of settlement (Lupoi, 2000, p.311). Conversely, it seeks to provide a solution to conflicts in private international law, by means of provision of choice of law applicable to a trust (Article 1). Thailand is not a party to the Convention, nor was it a signatory. Nonetheless, according to their reference to the preparation of the Draft Act (SEC, 2009, p.12) in proposing the Trusts for Capital Markets Act 2007, the Securities Exchange Commission had in fact, given consideration to the Convention as a guideline in 'defining' the component elements of Trusts. Article 2 states:

legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose

The term 'defining' has been used loosely to denote a widely-voiced critique of the overall impact of the Hague Convention (Lupoi, 2007, p.81). Instead of a comprehensive definition of trusts, it seems to list out characteristics of trusts based on its functions in the second part of Article 2. These are (a) assets constitute a separate fund (b) the trust assets held in the name of a third party and (c) the trustee's special duty. From the common law perspective, the characteristics specified in the Treaty omit most of the essential components of a trust under traditional common law. There is no mention of a division between legal and equitable titles, and there is an additional requirement that trusts be evidenced in writing. It might be said, that the definition provided is a clarification on the minimum requirements of what constitutes a trust, so as to provide a more acceptable set of requirements for civil law jurisdictions. As suggested by Mattei, it "starts a conversation of the possibility of introducing a trusts legislation that is suitably tailored for a Civil Law" (Graziadei, Mattei & Smith, 2005, p.12). Conversely, academics have criticised the attempt to unify trust laws as "selective and uncoordinated" (Dicey et al., 2007, p.22).

4.4 The modern discussion of trusts as a highly complex financial instrument.

A review of the more recent scholarship on trusts in the comparative studies of law refers to trusts mostly in their use as a highly complex financial instrument. Contributions on the subject approached trusts similarly to the way economic-legal analysts had, mainly in terms of their economic role of maximizing efficiency (Mattei, 1994, p.436). Consequently, the objective in analyzing trusts was to determine how best to attract foreign funds through offering tax incentives or havens (Gothard & Shah, 2009; Panico, 2010), and the separation of legal title and equitable title was one of the key attractions in the use of trusts as a form of convenient risk-minimization for investment (Langbein, 1997). As such, the most recent works show the analysis of trusts implemented in offshore legal systems by way of statutes. Jurisdictions such as New Zealand, the Cayman Islands, the Bahamas, the Isle of Man Jersey and Guernsey were some of those which received academic attention.

The Thai Securities Exchange Commission's change to the wording in their Annual Policy Statement (SEC, 2011) equally implies a strong interest in trend. It added as another aim in introducing trusts in Thai law as to "enable the development of innovative products" (SEC, 2007, p.3). From the point of view of investors, the concept of trusts is referred to in its role mainly as a mechanism or legal form for the purpose of carrying out highly complex financial transactions for use in tax havens and for financial and estate planning (Lau, 2011). Topical interest was shown in the functional aspects of different types of investment mechanisms provided by purpose trusts, trading trusts and trusts for asset protection. On the other side of the coin, matters on the regulation, taxation and disclosure of information came to be of interest in the prevention of money laundering for those advocating a regulatory approach (Glasson & Thomas, 2006).

Following the rise in attention on the international efforts in the harmonization of trust laws to pursue economic efficiency, which became manifested in the Hague Convention, there was a revival of interest in civil law jurisdictions that had begun to adopt Anglo-American trusts by way of legislation. Issues in this area included whether and to what extent the importation of trusts would work, and the more recently-enacted laws introducing trusts in jurisdictions such as China became subjects of academic scrutiny, especially for those who had intended to approach the question of law importation (Glasson & Thomas, 2006).

Additionally, criticism was once again voiced in the way trusts were analysed at comparative law level. The main objection was that many of the approaches taken by civil law academics were predisposed to view English trusts as alien and unable to be accommodated in civil law principles, especially those concerning the Law of Property (Lupoi, 2000, p. 301). Another observation was a tendency among academics to focus on fiduciary duties instead of other features such as the ordering of creditors, which according to some academics provided the best advantage English law trusts had to offer to its civil law equivalents (Mattei, 1998).

As it was earlier suggested in 4.1, the study of trusts in a comparative sense often focused on the historical origins of trusts based on Maitland's (1894) description of trusts as an exclusively English object, which led to academics comparing only the functional aspects of trusts. Another point which could be brought to attention from the analysis of trusts law in a comparative perspective is the lack of attention to the postcolonial dimension to the use of trusts as an investment mechanism. In particular, trusts were used to expand businesses in colonial trade. (Bullock, 1999; McKendrick and Newlands, 1999) The Foreign and Colonial Government Trust which was set up in 1868 for example, was thought to have been a "pioneering" mechanism for the capital investment in foreign trade. (Bullock, 1999, p. 21) The TCMT 2007 was also established to provide a mechanism for investment. It is suggested that there could be a form of postcolonial resistance to the very idea of capitalist expansion that is embedded in the use of trusts as an investment mechanism. As it will be seen from the analysis of interview data and Thai Buddhist literature, there are elements in the Thai mentality that is made up of Thai culture and the Buddhist religion that does not stand well with neoliberal capitalist expansion, and therefore Maitland's (1894) description of the functional aspects of trusts alone is insufficient for a theoretical comparative analysis of trusts to understand why there was such a delay in the eventual establishment of trusts under the TCMT 2007.

To conclude, there is a paradox in the landscape of comparative law, against which the Law of Trusts is examined. In declaring the unique nature of the English concept of trusts, foreign scholars thought it practical to analyse the function and utility of the trust. This focus on searching for functionally-equivalent legal instruments in other jurisdictions reveals only that trusts in English law are granted a higher degree of protection, as opposed to how and why, historically and culturally, that is the case. This analysis suggests that it is imperative that trusts be explained with reference to how it came into existence, along with the historical, political background in which it has developed (Maitland, 1894; Worthington, 2006, p.31). In order to better understand the phenomenon of the TCMT 2007 and the lack of trusts created thereunder, this research will therefore examine the history of the development of trusts

in the Thai legal system as recorded in court judgments and legislation, to discover how and in what contexts trusts have been mentioned in Thai law prior to the enactment of TCMT 2007.

Chapter 5. Findings from the application of the first approach in analysing the TCMT 2007 as a legal transplant.

The Theory of legal transplants will be used as a tool for analysis of trusts in Thai law firstly in accordance with the stated aim of the Thai Trusts for Capital Market Transactions Act 2007 (TCMT 2007) which was intended to introduce trusts into Thai law for the first time. Additionally, the Legal Transplant Theory was chosen as a tool of analysis on the basis of the answers given by the initial pilot interview participants who were generally of the view that the TCMT 2007 was 'foreign' to the Thai legal system. This chapter documents the initial attempt to understand why years after the TCMT 2007 came into force, no trust has ever been set up using the provisions in this legislation.

The first part of this chapter will examine the history of foreign influences in Thai law and legislation. An analysis of the history of Thai legislation shows how fundamental foreign legal concepts, mechanisms and traditions are, and continues to be in the development of Thai law from the earliest recorded developments of Thai legal history to the present-day context. The prevalence of foreign legal influences in Thai legal history firmly establishes why the theory of legal transplants was a good starting point in the attempt to analyse the TCMT 2007.

The second part of this chapter will be formed of a critical analysis of trusts in Thai law using the Comparative Law theory of legal transplants. However, upon closer examination of Thai legal history, these provisional findings show that there were indeed, a number of cases where trusts were upheld in Thai courts in existence under Thai law before the promulgation and entry into force of the said legislation.

5.1 The history of foreign influences in Thai legislation.

The history of Thai law is divided into three main periods. The earliest (1238-1583) begins at the dawn of the Thai nation-state, with Sukhothai as the main cite of the Kingdom. A main feature of the laws in the period was the legal ideals behind the system of governance, i.e. paternalistic rule. The second period of the Kingdom of Ayutthaya saw a shift in the status of the ruler, from a father-King to a demi-theistic King. Modern law makers have used laws from this second period to reference Thai cultural practices that were to remain valid in the reform of laws in the process of modernisation of the Thai legal system, which forms the third period.

The etymological roots of the Thai word for 'Law' draw attention to the importance of writing. *Kod-mai* (Thai word for Law) is composed of "*Kod*": (v.) to write down; to note down; to prescribe and "*mai*": (n.) writing; letters. This is a testament as to how written Law was always the preferred choice of Thai

legislators. The founding fathers of the modern Thai legal system had insisted that the fundamental laws of the realm be written into, and referred to from a text form, and the modern Thai legal system follows the Civil (written) Law model. The current Thai legal system is thereby composed of a written Constitution as its highest source of Legal authority, legal Codes, statutes and bye-laws. This chapter will examine how Thai law has been influenced and shaped by legal transplantation throughout these three periods.

5.2 Foreign influences in the Sukhothai period: *Mon* influences.

The earliest record of Thai written Law is found in the *Silajaruk*, a stone inscription dated from the period of the reign of King Ramkamhaeng in 1279-1299 A.D. The Stone is known as one of the first records of Thai script, and on it is inscribed what is referred to as the Four laws. (Bradley 1909; Terwiel 1983) The inscription included provisions on inheritance law, land law, a general code of legal procedure, and provisions on procedures for appeal. According to historians, the legal, political and administrative system at the time was influenced by *Mon* principles of *Mungrayasastra*. (Tingsap 1959; Boonchalermvipas 2009) The main characteristics of the legal development that took place in that era were the formation of political and administrative laws based on a paternalistic ideal of governance. As leader of the country, the King would send out members of the Royal family to rule over the nation's constituent counties. The King, as father of the nation-state would also act as father to his children subjects. The ideas of a paternalistic system of Law and Governance were found during the reign of King Ramkamhaeng. This model of governance was based in turn, on the model governance of Mungrayasastra that was initially developed by the *Mon*. The latter model was one in which the King ruled as a warrior as well as a father, and was originated from the concept of Dhamasastra laws which were built on principles in the Buddhist religion. (Terwiel 1983) Although there are no formal records to show an active transplantation of laws, there were proven records of migration of the *Mon* peoples into the various parts of the Sukhothai Kingdom. (Terwiel 1983; Cœdès 1921; Boonchalermvipas 2009) It was also suggested by historians that the relaxed system of governance in the Sukhothai period (1238-1583) which permitted freedom of religion had meant that *Mon* migrants were able to retain their culture and identity after they had settled. (Terwiel 1983; Suchiwa 2008; Boonchalermvipas 2009) Based on these facts and the later assimilation of the laws and ideals of Thai and *Mon*[33], historical academics have postulated that the concepts of Law and governance of the *Mon* were one of the main sources of influence in the development of the Thai system of Law and governance in the Sukhothai period. (Terwiel 1983; Cœdès1921)

[33] See *Mungrayasastra*, below, at 5.3.

5.3 Foreign influences during the Ayutthaya era: influences from *Khmer* and *Brahmin* Law, religion and culture.

One of the main features of the historical development of Thai law and the Thai legal system in the following period of Ayutthaya was the complete change of core principles on which the prior system of governance had been based. The paternalistic style of governance developed into a model that featured rule by absolutist monarchy. No longer were Kings seen as a 'father' to his subject, but as a reincarnation of deity, a semi-divine ruler who was to be worshipped and revered by mortal subjects. The ideas underlying the philosophy behind this style of governance came chiefly from Khmer *Dhevaraja* concept of rule. (Suchiwa 2008; Boonchalermvipas 2009) The philosophy behind this model was that a King derived his right to rule over a Kingdom by birth, being the reincarnation of a Hindu God.

Throughout the Ayutthaya era, many a war had erupted with the neighbouring kingdoms of Khmer and Myanmar. At times of war, the rulers of Ayutthaya maintained a keen interest in the battle strategies of the Kingdom of Khmer as the opposing side, an essential part of which included the rituals and ceremonies performed by Bhramin priests at the Royal Khmer court. These rituals were based on superstition and religious belief that was deeply rooted in the Hindu-Khmer culture. After the many battles that took place, Hindu priests were brought over from Khmer Kingdoms into Ayutthaya as prisoners of war and were eventually reinstated to serve the royal Court of the Kingdom of Ayutthaya. It was therefore one of the ways through which the concept of Dhevaraja rule came to be instilled in Thai law and culture. (Khanittanan 2004; Boonchalermvipas 2009)

We are also able to see the influence of Khmer culture and tradition in other areas of legal culture. As one example, practice and conduct within the royal court became more regulated so as to further solidify the status of the monarch as a demi-god. Subjects were required to use an entirely new set of vocabulary, the *Rajasapta* when speaking to and of the King, or any members of the royal family. Therefore, the law of royal succession was another area which became heavily influenced by Khmer beliefs. In truth, Khmer influence had reached almost all aspects of Ayutthaya life, from birth to burial. (Suchiwa 2008) Khmer socio-political influences were carried over via the human vehicles alongside Brahmin rituals of Hindu-Khmer origins which came to be developed into legal practice and culture. Evidence of the interrelated and simultaneous import of Law and culture can be found in the literature from the period, *Lilit Ongkarn Cheng Nam,* chapters of prose detailing a ritualistic ceremony practiced from the period of Ayutthaya. The verses provide a narrative of the creation of the world according to Hindu beliefs and depicts the King as a reincarnation of a Hindu God. It invites sacred Hindu deities and other sacred beings to bear witness to the ceremony then goes on to curse those who break the oath, prescribing punishment for disloyalty in typically Buddhist-influenced descriptions of the afterlife in hell. The text is read out at a ceremony that was staged by subjects of the Kingdom as a procedure to pledge an oath of loyalty to the monarch. The oath of allegiance came to be regarded as a procedural rite of entry into the civil service system, and was performed annually until as recent as the change of the model of

government from an absolutist monarchy to constitutional monarchy in 1932. (Tingsap 1959; Boonchalermvipas 2008)

Historical analyses show that the Khmer philosophy had been adapted to better suit local ideals and culture of the Ayutthaya people. As the precedent norms were drawn from the Mon Dhammasastra laws derived from Buddhist teachings and as the predominant religion of the Kingdom was Buddhism, the Hindu-influenced Khmer traditions became adapted in such a way that the two were combined and Hindu Gods are worshipped alongside Buddhist beliefs. (Harris 2007) A piece of literature that shows the localization of imported Brahman concepts is the *Mungrayasastra*. Originally a prose of edicts composed during the precedent *Sukhothai* period, the *Mungrayasastra* is regarded to be a piece of literary evidence of laws used in the neighbouring kingdom of *Lanna*. (Wongsutthitham 1991; Harris 2007) Originally, the text contained 12 fundamental edicts governing matters from royal succession and war, which was the first part of the text. In the Ayutthaya period, the text expanded into 3 parts, to include in its' second part, rules on the administrative structure of towns to land ownership and in its' final part, the settlement of disputes. The text featured the five core edicts of Buddhism and the core set of Brahman religious principles as the fundamental rules used to govern the society at the time. The final part of the text contained various examples of disputes and the application of rules based on Brahman and Buddhist principles for their resolution. Historians are of the view that the text was at times used as a guide to the peaceful resolution of disputes in the later Ayutthaya period. (Wongsutthitham 1991) Such use of the text bears similarity to the English Common Law principle of *ratio decidendi*.

In the late Ayutthaya period (1448-1498) the adaptation of foreign legal concepts to suit the predominantly-Buddhist Thai society may be found in the various laws and legal enactments. The two types of legal enactments containing the highest degree of authority at the time included the *Rajasastra* and the *Khod Monthianban* or Palace laws. The latter concerned the regulation of royal court customs and was dated from around 1450, (Kruangarm 2000) whereas the *Rajasastra*, or 'proclamations by the reincarnate'. that contained in essence, declarations by the King "as was used as standards on which cases are decided." on matters of dispute. (Khanittanan 2004) Legal proclamations are arranged in the text according to the particular facts of how they are the source of dispute in each case into categories within the body of *Monthienbarn* laws, each category being called "*Ayyakarn*". Other royal proclamations that do not logically fit into the category of the sources of disputes are prescribed in the *Rajanitisastra*, most of which concern the government and administration of the Buddhist clergy. (Kruangarm 2000). It is to note that these laws, like the third part of the Mungrayasastra text, bear great similarity to the use of *ratio decidendi* by Courts in the English Common Law system.

5.4 Development of laws and the legal system in the Rattanakosin period.

The development of laws and the Thai legal system in the following period of the Rattanakosain dynasty can be divided into two main parts. The early Rattanakosin period (1782-1932) featured the continuance of Khmer-influenced system of laws and the late Rattanakosin period (1932-present) when the most prominent use of legal transplants occurred in the effort to modernise the Thai legal system.

A. Development of laws through legal transplantation in the early Rattakosin era: continued influence by Khmer Law and culture.

The first King of the Rattanakosin era, Rama I ordered a wholesale consolidation of the existing *Kod Monthienban* (palace) laws and other Rules in the effort to reinstate Bangkok as the new capital of the Tai people in 1804. The end product of the endeavour was the Book of Three Seals, which came to be the main source of law prior to the most recent changes to the façade of the Thai legal system. The contents of the Book were derived from provisions of the earlier *Kod Monthienban* (palace) laws used during the late Ayutthaya period. The Book of Three Seals contained a total of 26 chapters, beginning with an introductory part stating the necessities for the consolidation of laws as well as the procedural requirements for the proclamation of laws of the Land, this being the requirement of three official seals of the contemporary versions of the ministry of interior, the ministry of defence and the treasury to be valid and binding. Evidence of legal transplant can clearly be found in the second chapter of the Book. The text is a restatement of the Dhamasastra from the previous Mungrayasastra Law. It provides a narrative of the creation of the world according to Brahmin belief. According to academics of Thai literature, the contents of the text remain largely unchanged from the version used in the Ayutthaya period. (Ruanglikit 1998) The rest of the Book of Three Seals is arranged as follows: Chapters 2-14 set out the core structure of the departments of State as well as the structure of the Court, the public prosecutors and the judicial procedures. Also stated in chapter 3 are the *Intapasa* principles which set out the fundamental rules of conduct for those who are appointed as judges. The principles include the duty of the judges to remain impartial, as well as four different types of potential causes for bias: greed, anger, fear and lust. The name of the principles themselves lends a clue to their foreign origin, with *Intapasa* meaning the word of the Hindu God Indus. (Khanittanan 2004) The principles have been referenced by literary academics as having originated from the text of the original *Dhammasastra*. (Kasetsiri 1997; Ruanglikit 1998) Chapters 15-25 contain provisions detailing laws on slaves, family law and inheritance and property and land ownership. Chapter 22 set out criminal offences and procedures for trial. Methods of punishment of convicted

criminals are prescribed in Chapter 12. It was this very set of laws that were generally perceived by western nations to be inefficient in the adjudication of justice. (Lingat 1983; Coeds 1921; Pongsathia 1996) This and the threat of barbaric punishments fuelled representatives of foreign states having diplomatic ties with Thailand to request extrajudicial powers to try their nationals for crimes committed within the Thai jurisdiction. (Lingat 1983; Coeds 1921) Firstly, requests were submitted by the British and French embassies for their nationals and later requests were made to extend extraterritorial powers to try their subjects. (Lingat 1983) In effect, this meant that foreign persons who lived in Thailand could ask to be tried in an ambassadorial court under English or French Law and avoid the arcane, barbaric court procedures if they were able to establish a link to those embassies. With the influx of immigrants at the time from neighbouring Laos, Cambodian and Burmese workers who often argued their statuses as subjects of the French and British representatives through colonization, Thailand considered this to be usurpation of its' sovereign powers. (Na Thalang, Kasetsiri, La-Ongsri 1998; Lingat 1983)

Between the reign of Kings Rama IV- Rama V, Siam had effectively lost most of its' neighbouring vassal states between 1867-1909 to France and Britain.[34] (Kasetsiri 1997; Na Thalang, Kasetsiri, La-Ongsri 1998). As colonialist powers became an increasingly greater threat to the political sovereignty of countries within the Southeast Asian region throughout the Reign of King Mokut (Rama IV), the Objection against the loss of territorial sovereignty became one of the main stimuli for the reform of Thai laws. (Lingat 1983; Na Thalang, Kasetsiri, La-Ongsri 1998) Given the stimulus of nationalist self-preservation, there was a move for the reform and consolidation of existing Thai laws. The ultimate objective behind the endeavour was to abrogate existing international treaties that granted extraterritorial jurisdiction to foreign presence in trying their own nationals. (Pongsathia 1996) In order to do so, it was thought necessary to modernize the existing laws, court structure and procedures so as to make local courts more acceptable. Evidence of this may be seen from as early as the reign of King Rama IV. In particular, the journal of King Rama IV provides a record of the political sentiments towards the occasions in which force was used by France and English presence to secure territories that had been vassal states of Siam. In one entry, King Rama IV expressed that there was a "pressing need to show that we are as civilized and worthy a people as they".[35] This statement is seen by academics to reflect the general intentions of the legislators behind the use of laws from Western legal systems as models for the reform of Thai laws. (Lingat 1983; Na Thalang, Kasetsiri, La-Ongsri 1998) On that basis, it might be said that laws transplanted in the course of the reform of the Thai legal system in the Rattanakosin era falls within the typology of legal transplants in which Watson (1974) cited the "Need for legal authority".

[34] Siam lost Cambodia pursuant to the Siam-France Treaty of 1867; parts of Burma to Britain and Laos to France in 1893 and Malay territories via the Anglo- Siamese Treaty in 1909 to Britain

[35] King Mongkut Klao Chao yoo Hua, Journals of Siam, Siam Society, Historical Archive.(2008)

B. Development of laws through legal transplantation in the late Rattakosin era: Western influences.

In the bid to modernize and consolidate Thai laws, evidence of legal transplant of laws into the Thai legal system can clearly be seen in the later Rattanakosin era. A reform of the Thai legal system officially began during the reign of King Vajiravudh (King Rama VI). A National Legislative Drafting Committee came to be established in 1932 with the purposes of revising the existing laws which were mainly to be found in the Book of Three Seals. (Na Thalang, Kasetsiri La-Ongsri 1998) The Committee consisted of distinguished individuals who were mainly of royal descent, as it was the foresight of King Rama IV to send the royal princes abroad to study the language and arts of the western powers. (Lingat 1983, p.43; Na Thalang, Kasetsiri La-Ongsri 1998) The return of these princes to serve in the Legislative Drafting Committee, with their knowledge of English, German, French and Swiss Law can in itself, be regarded as a form of legal transplantation. Evidence of this is recorded in the procedural documentation of the reform and consolidation of the Thai Civil and Commercial Code, which lists out in register form, the sources of inspiration for each legal provision. However, there is an absence of an entry for the provision invalidating the legal effect of trusts (Section 1678). While Thailand still offers an official government program awarding scholarships for students to study and return as civil servants, there has been no indication of such a reason for the 2007 Act itself.

5.5 Development of laws and foreign influences in the modern era.

The development of the Thai legal system after the late Ratanakosin period where the bid to consolidate and modernize Thai laws took place may be characterized as being the period in which laws were influenced most directly by foreign legal mechanisms. In the earlier years of this period, the drafting records of the Thai Civil and Commercial Code documented the use of the English Companies Act as one of the main legislative models for the provisions on the formation of companies as well as the provisions relating to the fiduciary duties of company directors. Additionally, the Thai Civil and Commercial Code provisions relating to agency and the fiduciary duties of agents had also received influence from of English law.

Another example from the earlier years of this period is the legislation enacted to allow the use of Checks. The enabling legislation was first promulgated in 1954. (The Act on Criminal Offences relating to the Use of Checks B.E. 2497 (1954)) The provisions were drafted shortly after the Civil and Commercial Code of Thailand in 1951 and were modeled on the French *Lois du 2 avril 1917 et du 12 août 1926: pénalisation de l'émission de chèque sans provision*. The contents of the Thai Act provided for the general use of checks as legal tender and prescribed penalties for the fraudulent use of checks and the issuance

of checks where there was not enough money to be paid from the payer's checking account.[36] As applied to the relevant Sections 3 and 9 which are the relevant provisions prescribing the penalties for fraud in the Thai Penal Code, this in practice meant that the payer of a check could be held liable to a fine of up to 60,000 Baht and imprisonment of a term not exceeding one year[37]. Such penalties were generally perceived to be overly harsh. (Thanawut 2004; Tangkijwanitch *et al* 2011) and when it was found that the use of checks was not widely spread (Wattanasathian 1981; Tangkijwanich *et al* 2011) in 1991, the Act was revised to change the legalities of the use of checks to accommodate the present realities and economic circumstances. (Tangwanwibul 1992) The 1997 version of the legislation became promulgated and its provisions stated that a crime committed under the Act (the use of checks for payment without sufficient funds to be drawn from a checking account) was from then on, able to be settled between the payer and the bank outside of Court. The 1991 Act stated that its intended purpose was to make liable, persons who uses checks as a form of payment where there are insufficient funds in his checking account, and to ensure and accommodate the use of checks as legal tender to repay debt in practice, instead of solely focusing on the criminalization of those who use checks as a form of payment. (Tangwanwibul 1992) For these intended purposes, the 1991 Act prescribed a new element of intention in the commission of an offence under the Act, that such an offence may be committed intentionally or negligently of the knowledge of the amount available in the checking account.[38] The two pieces of legislation are examples of how the concept and use of checks that are not of Thai origin have been introduced from abroad. It is also an example of how, subsequent to its implementation and initial lack of popularity, these originally foreign mechanisms needed to be adapted to Thai economic and social circumstances.

In the later modern period, particular regard is to be had to the influences of globalization and initiation of international organizations and the laws and mechanisms in the financial sector. Direct examples of transplanting foreign legislative provisions into the Thai legal system may be found in the context of treaty making. Under Thai law, the prerogative power to conclude international treaties lies with the King as head of state. (Article 23, the Interim Constitution of the Kingdom of Thailand, B.E. 2557) In practice, it is the executive who approves or obtains approval to ratify the treaty from the electorate, depending on the nature of the treaty.[39] Where it is necessary for there to be local legislation to allow for the implementation of the contents of the international treaty, or where, for instance an international organ is set up to operate within the Thai jurisdiction and thereby needs to be accorded the relevant institutional or diplomatic immunities, legislation must be drawn up and passed in accordance with the legislative process under the Thai Constitution. Examples of such legislation is the Act establishing the International Labour Organisation Representation in Thailand, B.E. 2509 (1966) and the Act protecting the operation of the representation of the European Commission in Thailand, B.E. 2522 (1979). It is often the

[36] Chapter 2, The Act on Criminal Offences relating to the Use of Checks B.E. 2497 (1954))
[37] Section 8 Offences relating to checks Act B.E. 2497 (1954)
[38] Section 4, Offences relating to checks Act B.E. 2534 (1991)
[39] Section 23 paragraphs two and three, if the nature of the treaty is one which alters sovereign Thai territories, its national security or where it significantly affects Thailand's economic or social interests, must be presented to Parliament for vote of approval.

case for the provisions of an international treaty to be translated into Thai and formally passed as legislation. Some examples include the The Vienna Convention on Diplomatic Relations (1961) that was implemented into Thai law via the Act on Diplomatic Privileges and Immunities B.E. 2527 (1984) and the Vienna Convention on Consular Relations (1961) that was implemented through the Consular Privileges and Immunities Act B.E. 2541 (1998).

The Thai Trusts Act itself forms one of the examples of legal mechanisms in the field of financial laws and mechanisms that were brought into Thai law from foreign legal sources, albeit without a specific indication of the exact origin. In the field of financial laws and mechanisms, other examples include a mass of complex financial instruments that are mainly found in the Provident Funds Act B.E. 2530 (1987). These include long-term equity funds (LTFs), Retirement Mutual Funds (RMFs) and Provident Funds. The provisions of the Act provide a legal framework upon which funds may be pooled, invested and managed,[40] as well as a legal framework for the regulation of fund management through a requirement to register as fund operators and to provide financial records.[41] The provisions also make it possible for an investing consumer to be able to access channels of redress, without which investing consumers would have to follow the legal procedures under the Civil Procedure Code of Thailand. In practice, the procedures in the Civil Procedure Code stipulates for a more onerous burden of proof on part of the claimant,[42]and a shorter time limit. Moreover, there is no course of action in Civil Court for certain offences relating to the acts of the fund managers, as funds are not registered companies under the Thai Civil and Commercial Code.[43]

Although this brief analysis does not point directly to 'legal transplants' it shows that Thai legal history reveals a rich history of influences from foreign legal sources. It reveals that foreign legal mechanisms, traditions and ideas played a fundamental role in the development of Thai law. In the earlier periods of Thai legal history (Sukhotai- Ayutthaya) legal influence was received from the neighbouring nation states via the spread of religion and transfer of culture. In the later periods, (Rattanakosin) inspiration was taken from foreign laws for political aims of nationalist self-preservation and as a way to legitimise the consolidation and enactment of laws. Finally, in the modern period, many legal mechanisms were brought into the Thai legal system via legislation, especially in the field of financial and investment law. As the receipt of foreign influences can fall within the scope of analysis of the legal transplant theory, the first method of analysis chosen for the TCMT 2007 will be through the comparative law theory of legal transplants. The next part of the chapter will look specifically into the transplant of trusts into Thai law via the Thai Trusts for Capital Transactions Act using the Legal Transplant Theory as a tool for analysis.

[40] Sections 3-15 Provident Fund Act 1987
[41] Section 12 *bis*, Provident Fund Act 1987
[42] Section 116 Thai Civil and Commercial Code 1951 states that an action for compensation from a fraudulent act may be bought no more than 6 years after the commission of the Act
[43] Section 1096, Thai Civil and Commercial Code 1951

5.6 The position of Thai law on trusts prior to the 2007 Act.

Section 1686 of the Thai Civil and Commercial Code (CCC) is generally understood to prohibit the use of trusts in Thai law prior to the promulgation of the TCMT 2007. This prohibitory interpretation is voiced among legal academics, expressing that "trusts have no place in the Thai land law regime" (Wiriyatakul 2007) and most modern legal manuals on the Civil and Commercial Code only mention trusts made in Thailand are "void *ab initio*". (Kasemsap 2011) One point to note is that trusts are seemingly only ever mentioned in the context of their illegality. The prohibitory view is however, shared by Government departments administering Thai land law, (Department of Land 2006) and especially by property law advisors in English language articles that are directed at potential foreign buyers. (Poomsan-Becker 2008, p.12) In the latter situation, it was found that potential foreign buyers are commonly advised that the creation of trusts over property as a mechanism to overcome the limitation of foreign ownership of Thai property (Thai Land Code 1951) is illegal in light of Section 1686 CCC.

However, now that the provision has been amended to allow for the creation of trusts under the 2007 Act, the interpretation of the s.1686 has been further clarified. The current position regarding the legality of trusts is that Thai law merely invalidates, as opposed to prohibits the creation of trusts for purposes outside the 2007 Act. This leads to the question of when and why the legality of trusts was denied. A thorough inquiry of Thai court case judgments, secondary legislation, practices and academic writing reveals that, contrary to the 'myths' created by the general view of academics, administrators of property law and legal practitioners, trusts *did* exist in Thai law. Additionally, trusts made before the use of the Thai Commercial and Civil Code were upheld by the Thai courts who in effect, administered a micro-system of trusts law based on English Common Law trusts, instead of actively disallowing and curbing their use. As it will be seen, this shows not only that they are capable of deciding on cases that concerned the legalities of trusts in accordance to English Common Law principles, but also that trusts of a defined charitable purpose are more likely to be found valid in the exercise of the judicial discretion of Thai judges.

5.7 Trusts in Thai legislation prior to the modernisation of the Thai legal system.

The earliest mention of trusts can be found in Section 8 of the Deed Issuance Regulations, No.2: 2457 (1914), a byelaw enactment of the Land Department. The purpose of the byelaw was to allow for existing trustees to be able to register their legal interests on a title deed of ownership of land. However, during the legislative reform in which Thai laws were consolidated into the Civil and Commercial Code, the Penal and the Land Code, the ability to register legal interests under such terms became regarded as no longer legal, as it was declared in an official advisory opinion from the Council of State regarding the

effect of the Deed Issuance Regulations, No.2: 2457 (1914). The advisory opinions were made in response of a query by the Supreme Court in regards to the ability to register trustee's name on the official title deed of ownership in land. (Council of State 1929 56/2479) The Council of State concluded that Section 1686 invalidated any further creation of trusts in Thai law. It had based its decision on the state of Thai law prior to the promulgation firstly, that no direct or implied intention had been shown by the legislators to import the use of trusts and trustees at the time that the trusts were made. Secondly, it observed that trusts were not included in the Book of Three Seals, which was the primary and central source of Thai law prior to the legal reform, and that most trusts known to exist in Thailand (then, Siam) had been created by members of foreign consuls to deal with property amongst their community. (Council of State 1929 56/2479) As such, it concluded that trusts could no longer be created under Thai law, and that the provisions on Succession in the Thai Civil and Commercial Code had been enacted to provide a solution based on traditional Thai family law to fill any gaps in disputes on testamentary affairs.

5.8 The "Micro-System" of trusts in Thai law: trusts after the Thai Civil and Commercial Code.

Thai legal academics have regarded the Council of State's advice of 1929 as effectively banning any future creation of trusts under Thai law. (Tingsap 1959; Suchiwa 2008) While this is accurate in regards to trusts created after the promulgation of the Thai Civil and Commercial Code (CCC) in 1925, there appears to have been a number of cases that do concern trusts as a matter of dispute that was considered by Thai courts. At the time of writing, an archival research of Thai Civil Court case docks revealed several cases dated from 1938 to 1997 concerning the validity of trusts and the effect of Section 1686 CCC. The main judicial stance in these cases was that trusts created validly under English trust law principles prior to the CCC were valid and binding on the rights of third parties in Thai law. Trusts that were the subject of dispute mainly concerned testamentary gifts and inheritance. The applicable Thai law on this subject area is that where the gift consists of personal property, there must be a written document signed by the testator and two witnesses. (CCC: s.1656) Where the testator purports to give real property, or registrable beneficial interests attached to property, such as leases of more than three years' duration, usufructs and servitudes (CCC: Ss. 537, 1410, 1387) the will must be registered at the Land Department, to specify the future rights of the heirs on the back of the title deed document. (CCC: s.1658)

The Title Deed Issuance Regulations No.2 (1914) was held to still be applicable to trusts of land made prior to the promulgation of the Civil and Commercial Code. Hence, it was held by the Thai Court of Appeal in one case that the property held under a validly created trusts made prior to the CCC for benefit of heirs, cannot be used to satisfy the debtors of the estate. (CA 176/2483 (1940)) As another example, a trust created and registered under the Title Deed Issuance Regulations No.2 (1914) in 1919 in a case

decided by the Court of Appeal in 1997 was held to be validly created. (CA 3477/2540 (1997)) The case concerned the Land Department's refusal to release the title deed document of a Chinese burial ground in Bangkok to the great-grandson of the title deed owner. The complainant had sought to compel the court to transfer the title deed as the legal heir of the owner. The Land Department had refused on the ground that the title deed had stipulated that the land was registered in the great-grandfather's name as a trustee of a trust made in 1919, as opposed to having full ownership. Additionally, the registration of trusteeship had been validly made under a repealed legislation, the Title Deed Issuance Regulations No.2 (1914). The Court of Appeal held that the trust was valid, as it was settled before the promulgation of the Thai Civil and Commercial Code in 1935.In addition, an examination of Thai legal history in the period between the past 10-20 years show several modern uses of Thai laws and adaptation of legal practices as mechanisms in place of trusts. These initial findings show that, contrary to the official representation of the TCMT 2007 as being the introductory gateway for trusts into the Thai legal system, it appears that trusts, or trust-like mechanisms had existed prior to its' enactment. It also requires a different approach to the analysis of the TMCT that is not a purely theoretical analysis of the Act based on its' stated aims.

Conclusion.

These preliminary findings from the application of the legal transplant theory to the case of trusts in Thai law challenge the initial view that the concept of trusts is in fact, a legal transplant. Given the constraints imposed in the form of s.1686 CCC, application of the legal transplant theory shows that contrary to initial assumption that trusts were a concept transplanted by the TCMT, the Thai judiciary was capable of using English principles of trusts law to decide Thai cases, and of accommodating trusts in Thai law. Of course, it remains to be seen how the judiciary eventually reacts to cases brought under the 2007 Trusts Act. For now, however, it seems that the Thai judiciary's stance is not quite as negative to the reception of the concept of trusts in Thai law based on the existence of this micro-system of trusts law that was built by the Thai judiciary. The micro system of trusts in Thai law will be explored in chapter 7 under a different approach of analysis since for the time being, the theory of legal transplant fails to explain this phenomenon.

Any Comparative Lawyer can set out the similarities and differences in law, what is lacking is the ability to penetrate the law and its perception at the micro level, from the eyes of the individuals in the society receiving the transplant. As this research is conducted from the views of a comparative analyst informed of Thai culture and attitude, the data gathered from empirical methods that is to be used in the research will be subject to a conscious attempt to avoid inherent cultural bias. The method to be used is an alternative approach to Comparative Law which seeks to acknowledge the subjects' phenomenological interests as a network of communities, as opposed to nationals of the compared State. It is intended to

provide a balanced analysis of a transplanted English law concept through the method of comparative analysis. This study is to be conducted with attention to the plurality of factors thought of as influential, to determine the potential extent of change anticipated from the transplant of the foreign concept of Trusts to Thai law, as well as to analyze the potential of the codification of director's fiduciary duties into Thai law, as an alternative or addition to the prohibition on the use of nominees and other loophole arrangements. The next part of the dissertation will now offer a different approach to the analysis of the TCMT 2007 which aims to address the findings of these trusts existing prior to, and outside of the TCMT 2007, with a view to making sense of the phenomenon of trusts in Thai law.

Part III
Methodology for an alternative approach to analysing the TCMT 2007

Introduction.

The aim of this project was to understand why 6 years had passed from the enactment of the TCMT until the first trust came to be established under the legislation, and why up to the completion of the study in January 2019, only 22 trusts were created under the TCMT, all of them being for the purpose of real estate investment.[44] In doing so, the research design first used a theoretical approach for analysis. This initial approach was taken in accordance with the descriptive characteristics of the rationale for the said enactment, to introduce the mechanism of trusts for the first time into the Thai legal system. However, in the previous methodology to analyse the Thai Trusts Act 2007 using the comparative law theory of legal transplants has revealed the usage of trust-like mechanisms and trust-like practices that have been informally accepted by Thai courts prior to the enactment of the legislation. The research was therefore adapted to take a different approach to understand both the lack of trusts under the legislation, as well as the existence of these informal, trust-like mechanisms. In doing so, two new methodologies were adopted. These were a documentary analysis of primary and secondary sources and semi-structured interviews of participants selected for their roles and duties relating to trusts in Thai law.

Firstly, documentary analysis of primary sources of cases decided in Thai court and Thai laws and regulation was performed in order to learn more about trusts and trust-like practices outside of the Thai Trusts Act 2007. A comparative analysis between English common law trusts were made of trust-like practices and mechanisms evidenced in these sources and the findings and secondly, analysis was made of secondary documentary sources consisting of Thai folk literature and Buddhist teachings. The aim of this analysis was to provide further information relating to certain factors mentioned by interviewees in the course of the empirical methodology used as part of the alternative approach to understand trusts in Thai law. The selection of these sources was based on pilot interview data and relate to how interviewees view certain aspects of Thai cultural attitude towards trusts and trust-like practices. Application of this alternative approach to understanding trusts and the Thai Trusts Act will be presented below, while Part IV will present the findings from the semi-structured interviews. Chapter 6 will first elaborate on the details of the second method of approach to understanding the phenomenon of trusts in Thai law.

[44] Data obtained from SEC online database, www.sec.or,th accessed 20 January 2019.

Chapter 6. Research design for the alternative approach to the analysis of trusts in Thai law.

The objective of this chapter is to introduce the methods used in this thesis explore the reception and operation of trusts in Thai law, taking into account the difficulties and inabilities to make comparisons between trusts defined by the Thai Trusts for Capital Market Transactions Act 2007 and the concept of trusts in the traditional (English common law) context.

At the commencement of this project, the focus was the TCMT 2007 and why, almost a decade after it has come into force, no trust has ever been set up using the provisions in this act. It was only in 2018, after the conclusion of the study that a total number of 22 trusts were found to have been established under the legislation for the purpose of investment in real estate.[45] The initial aim of the research was to undertake a critical analysis of the Thai Trusts Act 2007 and the preliminary approach used in this research was to analyze the TCMT 2007 using the comparative law theory of legal transplants. This was done in order to assess the legislation against its stated aim, this being the introduction of trusts into Thai law for the first time. Upon closer examination of Thai legal history, findings show that there were indeed, a number of cases where trusts were upheld in Thai courts. Additionally, an examination of Thai legal history in the period between the past 10-20 years show several modern uses of Thai laws and adaptation of legal practices as mechanisms in place of trusts. The initial findings show that, contrary to the official representation of the Thai Trusts Act as being the introductory gateway for trusts into the Thai legal system, it appears that trusts, or trust-like mechanisms had existed prior to its enactment.

In addition to the existence of trust-like mechanisms and trusts existing prior to the enactment of the TCMT 2007, the findings from the initial method of applying the legal transplant theory as a method of analysis show a tendency of both foreign and Thai academics to stringently adhere to the use of common law terminology in the comparative study of trusts, thereby limiting the ability to compare the similarities between mechanisms used in non-common law jurisdictions and those existing as trusts in common law legal systems. Having been borne under the larger academic aegis of comparative international law, the theory of legal transplants is found to be equally heavily dependent on semantic classifications of traditional trust mechanisms in the English common law system.

As a result of these inconsistencies, this thesis suggests that using the theory of legal transplants as a tool for analysing the TCMT 2007 fails to take into account these other, non-legislative forms of trust-like relationships and thereby looking at the Thai Trusts Act as a legal transplant fails to capture the full picture of trusts in Thai law. As such, this research proposes an alternative approach that looks beyond

[45] Data obtained from SEC online database, www.sec.or,th accessed 20 January 2019.

the traditional linguistic and conceptual divide of civil law and common law legal systems, to provide a tool for analysis of transplanted legal concepts via enactment, using as an example the case of trusts in Thai law.

In order to address these inconsistencies, this thesis approaches the analysis of trust in Thai law using two additional methods of research to add data that is more qualitative, as opposed to theoretical in nature. In addition to explaining the flaws and limits of analysing trusts in Thai law according to the comparative law theory of legal transplants, the research conducted a text-based analysis of Thai literature of a historical, religious, political and legal nature, alongside the third approach using empirical research methodology of semi-structured interviews. To restate, the hypotheses for this adapted method of research are:

1) That trusts are not used because potential users prefer to use existing legal mechanisms or informal practice;

2) That those directly involved with the use of trusts have a certain "Thai mentality" towards trusts and trust-like mechanisms that has been influenced by social and cultural attributes formed by political history and religion.

6.1 Justifications for an alternative approach to the use of the legal transplant theory.

The justification for adding data from documentary analysis and semi-structured interviews is to gather data that more accurately reflects the actual, as opposed to theoretical, assumptions regarding the place of and attitude towards trusts in Thai law. Data from these interviews is used as a narrative gathered from the views of members of Thai society who are directly involved in the practical use of trust-like laws and legal or cultural mechanisms, and it is subject to qualitative analysis and evaluation. The qualitative research tradition perceives reality to be constructed by the shared interpretation of society (Kuhn, 1962; Crotty, 1998). It centers on the search for 'sense', meaning, interpretation and understanding (Crotty, 1998). The 'Thai mentality' is based on the empiricist or constructivist school of thought, which advocates the view that reality is subject to the meanings and interpretations given to it by society. To avoid the dangers of semantic pigeon-holing that was so common in existing texts on the comparative analysis of legal transplants.

In the present research, semi-structured interviews were used so that particular attention is paid to the data's underlying epistemology. In brief, epistemology concerns the nature of and conditions surrounding knowledge. It creates knowledge through the careful observation of occurrences or behaviour and takes into account that the very process of gathering and interpreting data will not be completely value-free (Cicourel, 1964). In contrast, the competing school of positivist methodology insists

on neutrality and objectivity within the procedure of data collection, giving rise to the quantitative model, which owing to its positivist-led enquiry, prioritized objectivity and detachment of the researcher from the subject (Kuhn, 1962; Crotty, 1998). Applied to the research, it was thought that a strictly scientific methodology and true objectivity was not suited for the subject of analysis, which focuses mainly on human behaviour (Banister et al., 1994). This echoes the general objection to quantitative methodology: that it is often too mechanical and limiting and unable to consider sentimental and contextual details that were crucial to the outcome (Kuhn, 1962; Blumer, 1956; Cicourel, 1964; Guba, 1990).

6.2 Disadvantages of qualitative research methods and proposed solutions.

A. Ensuring the validity of data by maintaining transparency and cross-referencing research data.

To ensure the suitability of the research design and methods chosen and, ultimately, the soundness of data, an examination needs to be made of the possible disadvantages of the qualitative research methods and the proposed ways to counter these difficulties. The first objection to data from qualitative research is its validity, which concerns the accuracy in the representation of data generated from the research. Validity, or subjectivity is an issue of central concern in quantitative and qualitative measures alike. Kritzer (1996) suggested that even in quantitative methods, the processing of numerical data would inevitably require the human involvement of comprehension and interpretation. Both the interviewer and the interviewee are naturally affected by their own assumptions, thoughts and opinions, before, throughout and, for the researcher, after the interview when the data is interpreted. In most modern qualitative research designs, it is advised that the researcher maintain empathic neutrality (Flicke, 2003).

One method of ensuring data validity is for the researcher to acknowledge her own views and opinions and to make them evident in the ultimate presentation of the research data (Flicke, 2009, p.388; Hammersley, 1992, p.50). Applied to the current topic of research, validity of data from both the analysis of documents and semi-structured interviews is ensured through a detailed and thorough record of the procedures taken in the research, as well as a declaration of assumptions and implications of the questions asked the assumptions underlying the choice of participants are detailed below. In this research, to attempt so far as possible a degree of transparency in data presentation, clarification was made with the interviewer over any conflicting data. Any assumptions made by the researcher will be clearly declared, along with any influence these assumptions could have in the validation process. In the stage of data analysis in the final, concluding part of the research, assumptions underlying the questions asked will also be of significance. Accounts of trust-like occurrences from the document analysis will be treated as the 'Thai use of trusts', the set of data from the interview processes will distinguish between the Thai

understanding of trusts' and 'the prompted views on trusts' for responses from interviewees after having been informed of traditional features of English trusts.

Patton (1990) argues that qualitative analysis as a research method can reveal multiple findings, which may not be linear or clear-cut. Nonetheless, gathering a larger range of data is suitable for this research, firstly as the very nature of the research demands for a personal opinion from each of a range of individuals on the concept of trusts, as well as their opinions on more specialized points of law according to their role or profession. Another method by which to address the issue of data validity in this research is the use of triangulation and cross-referencing of data. In the final part of data analysis, this research uses the cross-referencing of the data collected from themes identified through the thematic analysis of data from the two different research procedures that have been conducted on the same topic. The objective of the procedure is the comparison and analysis of the themes generated from the data. The triangulation method allows for the textual analysis to be matched and analysed against the data generated from the interview. As Olsen (2004) suggests, as a sociological research tool, triangulation is not solely predisposed to validation, but the range of data generated from the research would enrich the understanding of ideas and concepts studied. Triangulation allows for comparison between the data set from the interviewees and that of the official representation of trusts in Thai law as found in the document analysis procedure. The final data analysis is intended to provide a modern insight into the influences underlying the Thai perception of trusts and the encouragement and deterrence of the existence of the law of trusts.

B. Data reliability: maintaining data proximity through the use of a mixed approach.

As qualitative researchers strive to gain in-depth knowledge of a chosen subject, the total cases are few in number and often only small excerpts or summaries are presented at the conclusion of the research. This raises the second of the main criticisms of qualitative methods, i.e. reliability. Reliability in research data refers to the degree of consistency in the categorization of the data, whether by the same person, on different occasions, or different persons in the same setting (Hammersley, 1992, p. 57). Qualitative research findings are non-replicable. Even should the same subjects and procedures be utilized, it is impossible to imagine generating the same data, due to the very complex nature of the contextual components. As stated by Silverman, "The issue of consistency particularly arises because shortage of space means that many qualitative studies provide readers with little more than brief, persuasive, data extracts" (2009, 36). This research used the mixed-method research design to address the concern of data reliability. The mixed approach refers to the use of a combination of research methodologies, with one to address the shortcomings of the other (Fielding & Fielding, 1986, p.12; Reichardt & Rallis, 1994). This gives the ability maintain proximity to the data collected from more than a single method, which in turn allows for a greater understanding of the sources. The mixed-method approach applied in this study refers to the

collection of qualitative data from two different sources. This generally denotes a mix of quantitative and qualitative research, either in procedure or data, to ensure a more accurate and enlightening final result where a sole approach is insufficient (Denzin, 1970; Patton, 1990; Olsen, 2004). The differing nature of two sources of information in this research, with one being from historical cultural sources and the other from individual opinions makes the mixture of data collection methods a well-suited option for each source. Moreover, a combination of document analysis and semi-structured interviews would serve to provide coherence and transitional narrative in the presentation of data.

C. Avoiding anecdotalism through the thematic analysis of data.

In qualitative methodology, there is also a fear of 'anecdotalism' (Silverman, 2001) whereby the qualitative research findings that are ultimately presented are merely representative of a few, favourably-chosen cases. As there is no definitive rule over which data should be given more weight, the research should seek to present the findings in a manner that is as accurate as possible, in the most systematic way. Bryman (2001, p.12) suggests the utilisation of computer software to record the frequency of certain significant terms mentioned by interviewees. However, the value attributed to the interview data is not the strictly numerical. In this particular research, the quality of the data gathered from the interviews depends primarily on the range of ideas expressed and the variety of gathered data itself. Relevance is attributed to the variations in perspectives of persons in each category. Hence, this research proposes the use of the mixed approach, to be followed by thematic analysis and a procedure of triangulation or cross-reference in order to generate an overall picture of all the data gathered for the research.

A method by which to ensure non-anecdotal conclusion of findings and thus provide valid findings is the thematic analysis of data. As it is an accepted principle in this research, the aim of processing interview data is to reconstruct the latent content of meaning, as opposed to testing for factual evidence (Bognor, Littig and Menz, 2009, p.6). One of the main advantages of the method of thematic analysis that is of great importance to the nature of this research is its flexibility. Thematic analysis may be used for extracting both interpretive and latent assumptions; the former being generally achievable in the research method of conversation analysis and the latter through interpretive phenomenological analysis (Braun and Wilkinson, 2003). Unlike the method of grounded theory analysis, thematic analysis is not solely aimed at finding stand-alone theoretical assumptions or sets of theories (McLoed, 2001; Braun and Clarke, 2006). This makes thematic analysis suitable for this research, as the main purpose of data collection is to provide additional and complementary information for an alternative framework for analysis of legal transplants of trusts in Thai law. Moreover, thematic analysis of the interview is used in the validation of findings to provide a sound analytical framework for processing empirical data, with the ultimate aim of generating a picture of the Thai 'mentality' which is here suggested to be influential to laws transplanted into the Thai legal system. There exists a large body of academic literature on the forms and procedures for the thematic

analysis methodology, as is the definition and scope of the method itself (Boyatzis, 1998; Braun and Wilkinson, 2003; Braun and Clarke, 2006). For this research, thematic analysis is used to ensure that data gathered from the semi-structured interviews is processed through a systematic, logical and non-biased system. Here, the procedure will consist of an analysis of the interview data and an arrangement of selected extracts into leading or inherent themes. Selected quotes will be used for elaboration of the general themes, or to express the deviational and unexpected outcomes.

6.3 Document analysis procedures: Reading against the grain.

According to the official aim of the legislation, trusts were introduced in Thai law for the first time by the TCMT 2007. Contemporary comparative works on trusts in Thai law also suggest that the notion of trusts did not exist prior to its introduction by the TCMT 2007 (Suchiva, 2008; Poomsan-Becker, 2008). In order to challenge this general view, this research incorporated the analysis of written material on the subject. The main purpose of this procedure is to extract legal provisions, practices or judicial precedents in Thai law which are equivalent in function to legal mechanisms or institutions of English trusts. As a way of critical literacy 'reading against the grain', the analysis focuses in particular, on laws and legal practice which have been in existence prior to the enactment of the Thai Trusts Act. The primary type of material included in the research is therefore Thai legal instruments, as well as regulatory guidelines and practices issued by the Government. Additionally, as the Civil and Commercial Code of Thailand had expressly prohibited the use of trusts in Thai law, this research incorporated an analysis of decisions of the Thai Court of Appeal that had previously allowed for the use of trusts despite its codified ban. The final source of data consisted of trust-like practices documented in academic texts on Thai legal and political history, as a directional guide to locating non-legal materials such as religious texts on Buddhism and Thai literature, which were used in this research as secondary sources of data.

6.4 Scope and overview of legal instruments for analysis.

The Thai legal system is primarily characterised as a civil law regime and by nature, relies heavily on the authority of written sources of law (Hooker, 1986; Hiscock, 1995; Boonchalermvipas, 2009). It was therefore imperative that the research include the examination and analysis of the primary sources of authority. The documentary analysis undertaken for the research covered firstly, Thai legal instruments. Legislation, regulations, regulatory guidelines and industry-specific directives and practices were used a primary source of material. In order to identify the level of authority of each legal instrument used as sources of data, a brief overview of the types and order of hierarchy of legal instruments in Thailand is as follows. The authoritative sources of modern Thai law include the Thai Constitution, legislative

enactments, and byelaws, such as departmental regulations and orders. The highest-ranking legal artefact is the Constitution of the Kingdom of Thailand, which contains the basic notions of rights, duties and citizenship. The laws that are ranked second highest in authority are the Penal Code, the Civil and Commercial Code, and the Thai Land Code. The main source of the laws in this analysis are found in the Civil and Commercial Code, which covers an expanse of legal concepts, from the basic laws of ownership, to succession, as well as company formation and agency. Below the codes are legislative acts, statutes and Royal Decrees. Included in this rank is the Thai Trusts Act 2007. Below them are ministerial and departmental regulations and orders, which are considered comparable in authority to statutory instruments in the legal system of England and Wales. Also sharing the last tier of hierarchy are departmental declarations, notices, and guidelines, which may not always be law in the enforcement sense, but are binding procedural guidelines and are in some instances, enforceable by statutory penalty for failure to comply. In this research, Bank of Thailand Letter on the Authorisation of Escrow Services 2002; Deed Issuance Regulations, No. 2: 2457 (1914) and the Department of Land Transport (2003) Guideline on Floating Transfers are situated within this tier of hierarchy.

6.5 The ubiquitous nature of case law in the Thai legal system.

As a legal system that is technically viewed as belonging to the civil law family, case precedents in the Thai legal system have no legally binding effect. However, it is legal practice written in the Thai Civil Procedure Code for Thai judges to use legal precedence as a reference for calculation of penalties and damages. Moreover, Thai judges may use a previously decided case as judicial reasoning to legitimize a judgment, where facts of a present case are similarly exceptional in nature to those of another decision previously made. Additionally, judicial precedents may be cited where the application of two different provisions of law renders a conflicting result. In such instances, the case is referred to the Council of State, who delivers a declaration, which is of binding force on all future court cases. Similarly, where there is conflict between a legislative provision and a Constitutional Article, it is referred to the Constitutional Court for deliberation, with the possibility of a formal legislative amendment by Parliament.

6.6 Secondary sources of data for discourses surrounding the concept of trusts: folk tales and Buddhism.

In the attempt to understand the Thai mentality surrounding the concept of trusts in Thai law, this research looked at secondary sources of data in order to examine and analyse the academic discourses surrounding the concept of trusts. The study looked at written pieces with a view to comparatively analyse both Thai and foreign texts in order to formulate a more rounded account of the

mentality towards trusts in Thai law. The secondary sources of the procedure of documentary analysis are comprised of academic texts on Thai history and politics on the one hand, and on the other of Thai literature, Buddhist texts and Thai traditional folklore. The secondary sources are used as a reference for relevant cultural and social concepts and ideas that could influence the Thai mentality surrounding trusts.

A. Why folktales? Reasons for the use of folk tales as a source of material for formulating a Thai mentality towards trusts in Thai law.

As part of the alternative approach used in this research to enable the understanding of why so many years after the enactment and promulgation of the TCMT 2007 there has yet to be a trust established under the legislation, folk tales have been used as a source of material in formulating a picture of the Thai mentality. The main reasons for using folk tales as a source from which the Thai mentality towards trusts in Thai law was to be drawn was firstly, initial pilot interview data had shown a trend expressed by a number of interviewees referencing a particular character from Thai folk tales as having personality traits that the interviewees had attached significant connotations to a person in the position of a trustee. It was this particular Thai folk tale character which the interviewees had thought embodied the characteristics of "a successful businessman who managed assets on behalf of other people" (Participants one and two).

Secondly, from an academic standpoint, the choice of using folk tale characters was to address the gap in research caused by the homogeneity in Thai historical legal documents. As it was mentioned in the chapter on research design, a lack of historical legal documents was one of the main difficulties presented to the study and research of a socio-legal nature. There was there a limited circulation of legal texts from before the modernisation of the Thai legal system, the cause of which, according legal historians, was that literacy was a skill-set that was limited to those of a higher social class (McDonald, 1871; Reynolds and Hong, 1983; Granaham, 1971; Poomisakdi, 1957). According to a Marxist analysis of Thai legal history, this was the mechanism that played part in the stratification of social classes, with nobility and royalty at one end and commoners, serfs and slaves at the other (Reynolds and Lysa, 1983). Prior to the abolition of slavery during the reign of King Rama V, only the learned members of the higher social classes were taught to read and write, and their lives were set to serve the Monarch as a nobleman in whatever posts of authority was bestowed upon them. When the said path was one of the legislators of the Kingdom, it was not difficult to see why the remaining classes of society were not encouraged to read or write. These remaining classes of commoners were, by law, only required to fulfill their responsibilities attached to indebted servitude. These responsibilities consisted of conscription for manual labour during agricultural sowing and harvesting seasons and becoming soldiers for the lords in times of war. In times of peace, it was found that the conscriptions were adapted to maximise the production of crops (Poomisakdi, 1957). Nonetheless, it was clear that such roles did not require literacy. Some analysts argued that another reason for the low rate of literacy among the lower classes of Thai society was that

the noble families of the Kingdom preferred their posts in at the Royal Thai Court, and their status in Thai society was kept among those who they considered worthy (Satawetin, 1974, p.12; Senawong, 2006). Given that there had been few who knew how to read and write, there was also few pieces of traditionally Thai literary works, with most of the subject of writing being the celebration of monarchical deeds and some texts which were translated from foreign literature that was considered to be aspired to at the time (Eoseewong, 2002). Such pieces did little to reveal the perspectives and the way of life of the ordinary person. Instead, the few that became well-circulated were those that were told from one generation to another, as folk tales. As such, unlike primary documentary sources of legislation, or other forms of secondary documentary sources such as official legislative commentary, folk tales provide a source for analysis of Thai cultural attitudes (Thai mentality) that is not propagated by an official, Government source. It provides a source of the values, beliefs and norms of the ordinary Thai people.

B. Identifying the advantages and disadvantages in using folk tales as a secondary source to draw elements of a Thai mentality towards trusts in Thai law.

Folk tales are generally defined as "stories handed down by oral tradition from mouth to ear among people generally in fact illiterate, though not necessarily so" (Dawkins, 1951). A Thai definition of a folk tale is tales passed on orally, from one generation to another (Shytov, 2005). This points out to an initial problem in the use of folk tales as a source of material for constructing the Thai mentality, i.e. the lack of a unified script for analysis. By nature, tales that are passed on without a uniform text can be subject to adaptations as they are told and in time, may result in vastly different stories that may not generally be recalled or understood in the same way. As applied to the case of Thai folk tales, upon becoming party to the United Nations Convention for the Safeguarding of the Intangible Cultural Heritage (2003), the Thai Ministry of Culture has designated the tales of Sri Thanonchai as an intangible cultural heritage under the implementing legislation, the Amendment of the Thai National Culture Act, B.E. 2553 (2010). Some of the measures involved in the safeguarding of intangible cultural heritage under this legislation involved efforts to collect and unify written versions of the said piece of literature, and this is currently an ongoing project between the Ministry of Culture and various Thai higher-education establishments (Ministry of Culture Notification of the 30th July BE. 2553 (2010)). In addition, when compared to the use of literary texts such as poems, prose or novels, the use of folk tales for analysis of the Thai mentality has a different advantage. In the former, there is but one original text that is examined and analysed. As folktales are not written down, there is no existence of a universal version of the text for analysis. Although folk tales may change in substance when passed from one generation to another, it is this very change that provides for a human narrative of the current values, norms and beliefs that are perceived to be held by the Thai people, thereby giving an insight into their world.

The disadvantage in the use of folk tales as a source of data for analysis of the Thai legal mentality is that, for a determinative answer to what specific norm, value or belief of Thai people influences their use of trusts in Thai law would require a much larger sample of the Thai society for a valid analysis. Moreover, analysis would have to be made of the psychological relationship existing between each norm and the preference for or against the use of trusts. Although this would make for an informative research, this dissertation cannot go on to fully determine the relationship of such values to the reluctance of Thai people to have their wealth looked after by another. The scope of this research is therefore to analyse what interviewees express as leading traits from the folk tale characters which could be influential to their choices in engaging with a trustee or trusts.

C. Research design: choosing which folk tales for the semi-structured interviews.

One of the initial reasons for the choice of using folktales to gather elements of a Thai mentality towards trusts in Thai law was based on the initial pilot interview data is their general awareness, knowledge and popularity among potential candidates. In the pilot interviews, candidates were asked to express their knowledge on the Thai folk tale of Sri Thanonchai. The purpose of the questions relating to folk tales was to determine their suitability and validity as research material. Candidates were asked if they had heard of the tale of Sri Thanonchai. This particular tale was used as a sample firstly since it was one that was according to literary academics, the most Thai in origin (Sriwarakan, 2005; Worawan, 1999), and therefore a folktale that portrayed distinctly Thai ideals. Secondly, Sri Thanonchai was a folktale in which the protagonist displayed the most remarkable and memorable characteristics and was thought to provide a source of material for analysis that was sufficiently well known for candidates to develop personal views and reflections on the content.

Initial pilot interviews were made informally over the telephone with 10 candidates to assess the potential pool of participants for the candidates for the main semi-structured interviews. Data from the initial pilot interviews showed that many of the potential candidates mentioned the protagonist of a well-known Thai folk tale of Sri Thanonchai as coming to their thoughts when mentioning a capable businessperson who would act as trustee. As one example, when asked whether in their view, trusts under the Thai Trusts for Capital Market Transactions Act 2007 was a workable concept in Thai law, one of the candidates of the initial pilot interviews answered: "In all due honesty, if he were as tricky as your typical Sri-Thanonchai kind of businessman, then I'd have much trouble putting all my money into his hands" (Candidate 2). Another candidate expressed that he generally distrusted "bankers and fund managers" as they always had something "Sri-Thanonchai-like" up their sleeves (Candidate 5).

In selecting folk tales to be presented to candidates of the main semi-structured interviews, three others were chosen. These were Khun Chang Khun Paen and Petch Pra Uma. The choices for these additional tales came from the initial pilot interview candidates' feedback (Pilot interviews two, three, four

and five). All of the candidates responded that they had heard of the tale of Sri Thanonchai. Although 3 out of 5 candidates expressed that they were not able to retell the stories with exact details, all of the candidates were able to express the defining characteristics of the protagonist Sri Thanonchai as being a cultural folk hero based on his "trickster" deeds. In order to remedy the perceived disadvantages of the use of folk tales, interviewees were asked if they knew about the folk tales discussed below. As the story of Sri Thanonchai consists of different, individual tales, interviewees who said they knew of the folktales were encouraged to recount the deeds they could recall. They were then asked to give a short description of the main characters or stories, in three or four descriptive words. Such words have been translated using the Thai Dictionary of the Thai Royal Institute (edition of B.E. 2542 (1999)), the official, standardised source of authority for the Thai language. This was intended to at least determine whether the selected group of interviewees had knowledge of the particular folk tales and discover their personal views of the characteristics of the much-loved Thai folk hero.

The fact that some interviewees might be reluctant to state that such traits of cunning and wit would give a bad impression to the interviewee was also taken into consideration for the analysis. However, it was found that there was no reluctance in attributing negativity towards the traits of cunning to the character of Sri Thanonchai. Interview data showed that interviewees attributed these characteristics to the protagonist as a trait that was typical to the ideal Thai folk hero that was to be celebrated.

D. Background documentary research considerations for Buddhist teachings.

i. Thai Buddhism.

Two different theories exist for the introduction of the Buddhist religion to Thailand. According to Thai historians, Buddhism was first brought to the region of Southeast Asia by missionaries who were sent by Emperor Ashoka around the time of the 3rd Century B.C. The other theory credits the introduction of Buddhism via the settlement of traders from the Indian continent (Ishii, 1986; Sucharitkul, 1998). For Thailand itself, Buddhism was first recorded in the historical records of the earlier Thai Nation State of Sukhothai between 1238 A.D., where it was documented that the religion was brought to Thailand by a monk who had traveled to the capital of Sukhothai from the southern province of Nakorn Sri Thammarat, according to the inscriptions of the Tablet of Ramkamhaeng (Na Nagara and Griswold, 1992).

ii. The predominant role of the Buddhist religion in the early Thai Kingdoms.

In the study of ancient Thai history, the resource which historians regard as one of the first and most authoritative documentation of the predecessor Nation State of modern Thailand is the stele of King Ramkamhaeng (Na Nagara and Griswold, 1992; Na Nakorn, 1991). The stele was inscribed in ancient Thai scripture and provides a general political, social and economic narrative of life at the time of the rule of King Ramkamhaeng. This showed that the Buddhist religion was already an indispensable part of physical landscape of the Kingdom of Sukhothai:

> Inside this city of Sukhothai, there are viharas, there are golden statues of the Buddha, and Phra Attharos statues; there are big statues of the Buddha and medium-sized ones, there are big viharas and medium-sized ones (Ramkhamhaeng Stele, 1219):

The scriptures also document the structure of the administrative body of the institution of the Buddhist clergymen. It mentions the ranks of monks "there are senior monks — nissayamuttakas, theras and mahatheras" (Ramkhamhaeng Stele, 1219). The scriptures also provide accounts of the King's patronage to the administrative body of the clergymen:

West of this city of Sukhothai is the Araññika, where King Ramkhamhaeng bestows alms to the Mahathera Sangharaja, the sage who has studied the Tripitaka from beginning to end, who is wiser than any other monk in the kingdom, and who has come here from Muang Sri Dhammaraja (Ramkhamhaeng Stele, 1219).

The inscriptions of the stele of Ramkamhaeng then goes on to document the administrative traditions of the Kingdom.

> King Ramkhamhaeng is sovereign over all the Thai. He is the teacher who teaches all the Thai to understand merit and Dhamma rightly. Among men who live in the lands of the Thai, there is no one to equal him in knowledge and wisdom, in bravery and courage, in strength and energy (Ramkhamhaeng Stele, 1219).

Not only do the inscriptions document the patronage of the King of Sukhothai to the Buddhist religion, they also show the teachings as influential to the administrative and political philosophies of the governance of the Kingdom. As the inscription states, "All the people who live in these lands have been reared by him in accordance with the Dhamma, every one of them" (Ramkhamhaeng Stele, 1219).

iii. The legalistic nature of Buddhist teaching and philosophies.

While rules and edicts that appear to be more legalistic in nature in the Buddhist religion are directed at monkhood and the life of the Buddhist cleric, it is found that Buddhist philosophies for the lay Buddhist are more influenced by these pre-existing indigenous beliefs (Huxley, 1996; Hinuber, 1995). Such philosophies are rarely codified and are passed on by way of practice e.g. participation in ceremonies and rituals as well as in storytelling. Buddhism in Thailand is infused with pre-existing indigenous beliefs around spirits phi and the Hindu-Brahmin edicts and beliefs (Reynolds, 1994; Kusalasaya, 2006). However, some of the essential philosophies for the lay Buddhist have been interpreted and written down by monks and academics. As will later be seen, these have been constantly adapted to contemporary society and remain relevant as ever.

The element of Buddhism which is regarded as legalistic in nature and in socio-legal analysis as law is the Vinai. The Vinai are edicts adhered to by Buddhist monks. They are sets of rules and practices originated from Buddhist teaching. In the Thevarada sect of Buddhism, the Vinai are situated in the Vinaya Pitaka, which forms the first of the three-parts of the Buddhist holy text, the Tripidaka. The text contains 227 rules including offences arranged by severity, to include breach of chastity, murder, theft and violation of a living being. The rules also contain provisions for the monastic life of the Sangha (monk) order, from the specific set of provisions for nuns to the building of monasteries. Although mainly applicable to monkhood, the influence of the Vinai has also been seen to permeate to the sphere of the lay Buddhist through the role of monks in the settlement of local disputes (Hinuber, 1995).

Not only is the content of the Vinai a set of rules and thereby legalistic in nature, it is also legalistic in the way it was composed. According to the scriptures, the objectives of the enactment of the Vinai include to establish practice that is accepted among the Sangka (clergy), to maintain order and unity among the Sangka, to prevent the decline of the Buddhist religion, both at present and in future, to convince those without the Buddhist faith and to strengthen the faith of those already having faith. The legalistic nature of the Vinai can especially be seen in way in which the edicts were enacted. It was believed that the edicts of the Vinai were enacted at a congregation of monks during and after the death of Lord Buddha. For each edict, the procedures involved firstly, the public condemnation of the monk who has committed a wrong, secondly, to honour the good deeds performed by a monk, thirdly, to verbally reprimand the wrongdoing monk, fourthly, to allow for a cross-examination of the monk who has committed a wrong and finally, to establish principles and prescribe as an edict, acts which need to be prohibited for the clergy (The Vinaya Pidaka, undated: Vin books I and II). As such, Buddhist edicts of the Vinai are a set of laws enacted in retrospect of the commission of wrongful acts to prevent future wrongdoings (The Vinaya Pidaka, undated: Vin books I and II, at Vin I 1.59.1-34). They also seem to have

incorporated an element of legal proceeding in the way a wrongdoing monk may defend himself at the Sangka Committee gathering.

In addition to being legalistic in the way they are composed, Buddhist principles are used to as a rationale for the enforcement of law and legal enactments. According to academics of Buddhism and Thai legal history, there exists an interrelationship between the law of the realm and Buddhist philosophies and beliefs contained in the scriptures (Terwiel, 1983; Visalo, 2009). It was always regarded that the King had a moral duty to teach and uphold the moral precepts of the Buddhist religion alongside the laws of the Kingdom. In doing so, Buddhist beliefs were used to reinforce the weight of the law. Some examples of this are given in an excerpt of historical analysis of Thai law from the standpoint of ordained academics (Visalo, 2009; Kusalasaya, 2006). It was noted that in the written text of the Royal Decree prohibiting sexual misconduct at the time of King Rama I, a short narrative was given to illustrate the impending consequences awaiting the wrongdoer after death: "ten thousand years of torture in the underworld" in its preamble. In the same way, the rationale for the promulgation of the law prohibiting the use of opium enacted with the consent of King Rama II was cited to be "a person who so engages in the smoking of opium shall in death, endure physical suffering in hell, as well as shall subsequently be reincarnated as a pred (a creature of Thai Buddhist mythology inhabiting Hell) (Royal Decree on Misconduct B.E. 2282, 1739). According to ordained Buddhist academics, the appearance of these excerpts in legal enactments suggest that it was viewed that one of the Kingly duties was to guide people away from a fate in hell by preventing them from wrongdoing (Visalo, 2009; de Silva, 2000). This was to be the general view until the reign of King Rama IV (1804-1868). From that point onwards, Buddhist belief was no longer formally cited as rationale for the enactment of legislation. This was due to the stance of the King to move away from a desire for Buddhist believers to individually attain nirvana through the traditional channel of following the written edicts of Buddhism (the Vinaya), but instead, to concentrate on committing acts of good karma (dhana) (Reynolds, 1994; Visalo, 2009; de Silva, 2000). In doing so, a reform was undertaken of the Buddhist clergy system under his majesty King Rama IV's supervision.

The essential changes in the reform was to separate the two sects of the Buddhist religion; one which prioritized the Vinaya (the written laws of Buddhism) from the Vipasna, which was a sect whose clergymen prioritized the practical aspects of Buddhist custom such as meditation and solitary preponderance as a way to achieve nirvana. From then on it was no longer viewed as a duty of the king as head of state to guide people to Nirvana through the enforcement of legal enactments. This coincided with a more scientific outlook towards law and legal enforcement, as the effectiveness of the prescription of Buddhist belief on reincarnation and karma in legal enactment came to be questioned (de Silva, 2000; Kusalasaya, 2006). Persuasion of citizens through abstract threats of pain and suffering in the afterlife gradually became viewed as being less convincing than stating the factual reasons for ensuring compliance with a written law. From then onwards, it could be seen that the rationale for legislation as prescribed into the legal text was concerned more with the necessity for the enactment of each specific law, rather than the abstract notions of heaven and hell (Visalo, 2009).

This move away from Buddhism as the guiding principles of the modern Thai society alongside legal enactment has been observed and criticized by ordained academics of Buddhism (Visalo, 2009). In the eyes of the Sangka monks, from the period of Rama IV (1804-1868) onwards, pursuant to the formal separation of the Vinaya and Vipasna sects, a more visible line can be seen in the government of the affairs of the non-ordained (layman) and the ordained monks (Visalo, 2009; Reynolds, 1994; Huxley, 1996). More legislation that was intended to govern specifically monkhood and Buddhist affairs became enacted.[46] Non-Buddhist legislative enactments no longer stated an underlying objective of safeguarding moral principles but became more attuned towards goals attuned to economic development and financial prosperity. "At a certain point, legislative enactments for the laymen became hollowed. An example of such concern is given by the monk Visalo (2009) "The man with a Rolex can exercise his constitutional rights to defend himself against an accusation of the murder of his wife and be bailed from incarceration pending trial, whereas the man who steals bread because he is starving is jailed for months as he is unable to afford a good lawyer or bail." Such outcome is "unjust and goes against the principles of Buddhist teachings". Although the objective of this dissertation is not to prove or disprove such views, such statements still illustrate a more extreme view held by the ordained academics of the Buddhist religion of the effects of the widening gap between the law of the realm and Buddhist principles. The separation of laws for monks from laws for the layman Buddhist has not been without problem. In recent years, the Buddhist philosophy of non-intervention in worldly affairs and anti-materialism has encountered much criticism as the Buddhist institution as it currently exists in the form of temples funded by multi-million Baht worth of faith-led donation from the layman (Visalo, 2009; Reynolds, 1994; Huxley, 1996).

iv. Buddhist philosophies for the layperson as a source for the Thai mentality.

Historically, Buddhist core principles and teachings were used as law in the community level. Prior to first set of Thai codified Law of the Three Seals in the Sukhothai era (1238-1583), the primary edicts of the Tripidaka were used as core and fundamental rules to which local citizens were to abide (Hinuber, 1995; Huxley, 1996). These were the 5 main precepts of the Buddhist faith forms the core set of rules on conduct of Buddhists. They are the main set of rules that are applicable to all walks of Buddhist life, such as the rule forbidding Buddhists from false speech, stealing, commission of adultery, from indulging in intoxicating substances and to taking the life of others. Such provisions have been incorporated into modern Thai statutory law, mainly in its modern Criminal Code (1956) and subsequent amendments. At that time in the Sukhothai era, academic texts have shown that monks had also used the Vinaya that was intended for monkhood as well as the precepts for lay persons in their settlement of disputes (Hinuber, 1995; Huxley, 1996). After the initial period of the Sukhothai era came the period of Hindu Khmere influences of Ayutthaya (1351-1767). In the main courts of law, a trial was conducted by a judge, "the

[46] Acts on the Buddhist Clergy of 1902, Act of 1941, Act of 1962

tralakan", while the duty to judge facts, merits and justiciability fell on the jury, or the lukkhun. The lukkhun at the time were composed mainly of Brahmin specialists, and this is believed to be one of the ways in which Buddhist, Brahmin, Hindu and animistic ideas came to be intertwined, forming the unique 'Thai' brand of Buddhism (Hinuber, 1995; Wyatt, 1979). Such ideas involve for example, the worship of Hindu Gods such as Brahma, Ganesh, Indra, and Shiva, and has been translated into Thai rituals that are still commonly performed alongside the Buddhist rituals today (Kusalayasa, 2006; Huxley, 1996).

There is indeed an expanse of Buddhist edicts, philosophies and teachings that cover every aspect of the life of a layperson. This research will seek to focus on two main aspects of Buddhist philosophies and teaching which based on the pilot interview data, will provide an insight to the Thai mentality that is influential to the attitude towards trust under the Thai Trusts for Capital Market Transactions Act 2007. The first is the Buddhist philosophy and teaching regarding property. Primarily, there appears to be a lack of philosophical stance on investment. The edicts point instead to a conservative stance in the management of personal assets. Such stance is very evident in the sufficiency philosophy which was wholeheartedly embraced by the Thai people as it had been re-formulated as the King's personal philosophical mandate in the Thai-Buddhist way of life, "The Sufficiency Theory" (UNDP, 2007; Essen, 2010; Sizemore and Swearer, 1990). It is also argued on the other hand, that the same set of principles does promote the expenditure of personal wealth for the welfare of family members. This may be why the Chinese Kongsi structure had been so well-received in Thailand. The second is the Thai view of karma, which has been further elaborated in the final parts of the dissertation on empirical findings. A sense of attributing wrongs to bad karma committed in a past life has led to interviewees having reluctance to pursue legal redress when they are wronged. It is argued here that this attribution of a deserved wrong plus the shame of losing face from entrusting assets to a person who is considered to have the crafty characteristics of the Thai folk hero Sri Thanonchai forms part of the Thai mentality which deters Thais from using trusts as a mechanism for investment.

We have now seen that Buddhist scriptures are laws for the ordained monks and the way in which the laws were made is in itself legalistic in nature. Additionally, Buddhist beliefs were used to reinforce the prescription of law, although the latter has come to change alongside the changes in the predominant philosophies of society, the contents of the teaching are also influential in shaping the legal ideals of Thai society.

6.7 Identifying and meeting the challenges in document analysis.

A. Using empirical data to address issues of data comparability.

The first challenge concerned the comparability of data. The comparative analysis of law and legal concepts is at the heart of this overall project. To understand trusts in Thai law, a comparative study aims to provide a framework for the in-depth understanding of specific phenomena, through the analysis of its occurrence in different settings (Hantrais & Mangen, 1998; Kennett, 2001). As applied to the present context, the 'phenomenon' consists of the law of trusts, which 'occurs', or is manifested in two settings: the English and Thai legal systems. The challenge is concerned with how comparative study usually assumes the existence of measurable aspects that are equally comparable within the two or more sources of data. This includes a comparable research site, a comparable selection of participants and a defensible method of gathering data (Kennett, 2001; Uddin et al., 2012). As applied to the particulars of this research, a methodological challenge for the document analysis procedure was that according to the hierarchy of Thai law, less weight was attributed to the main sites of data that had established the existence of validly-held trusts in Thai court. As a Civil Legal system, decided cases have no precedential value. Unlike published judicial reasoning of English court cases, Thai judicial reasoning is published in a summarised form of short paragraphs detailing only the facts and essential logical reasoning for the decision. In order to address the inequality of the research sites, data from semi-structured interviews was gathered and analysed to clarify and complement to data that is comprised of the textual analysis of historical Thai case law, Thai legislation and informal practices.

B. Categorisation of interviewees to ensure culture-specificity.

The second difficulty in document analysis concerns the influence of the role of the person conducting the research. Berry et al. (1992) suggest that there is a contradiction between the inherent characteristics comparative research. Firstly, in its purpose of analysing key themes in two different settings, means that it is usually viewing data from at least one setting, from an 'outsiders', or etic perspective (Sperring, 2001). Yet, as applied to the comparison of legal instruments and informal legal practices in Thai law, an 'emic', or the insider's view must also be taken into account in all procedures from interview design through to the collection and analysis of research data, in order to validate findings from the document analysis. The dual perspectives of the comparative research are often overlooked in comparative research (Berry, 1992; Tabane & Bouwer, 2006). Applied to the current project, the previous textual analysis of Thai law and cases are made with a mostly etic approach, as the terminology and frames of references are based on the characteristics of trusts of the English common law. To ensure the balance

of data that is culture-specific or etic, the empirical part of the research, consisting of semi-structured interviews are designed to provide a social dimension to clarify and add to the textual analysis.

6.8 The semi-structured interview design.

In this part of the chapter, the goal is to map out the semi-structured interviews conducted as part of the research. Beginning with the aims and objectives of the use of semi-structured interviews, the chapter goes on to provide a definition of the term 'Thai mentality' that is the focal point of the empirical procedures. The two main anticipated difficulties of linguistic and cultural challenges and the invisibility of trusts in Thai law are then discussed, to be followed by details and observations from two pilot interviews undertaken prior to the main set of semi-structured interviews to test out the possibility of the proposed empirical procedure. The chapter then goes on to explain the design of the semi-structured interviews, the logical reasoning behind the criteria used for the method of participant selection, and explains the procedural and technical details of data collection. The biographical details of the interviewees are then presented according to the discussed selection criterion. The final part of the chapter explains the choice of questions used in the semi-structured interviews.

A. Aims and objectives.

The semi-structured interviews were intended for gathering data that is representative of a Thai 'mentality' towards trusts in Thai law for an alternative framework of analysis of the Thai Trusts Act 2007 as a legal transplant. The purpose of the interview procedure is to observe and record the views of those who have played English trust-like roles through the use of Thai legal mechanisms or informal arrangements. As such, participants have been selected for their involvement, experience or their knowledge of Thai legislation or informal arrangements that exist as an alternative to the traditional English trust. The semi-structured model of interview was chosen for its ability to accommodate the different ways of posing questions and explaining hypothetical accounts to each interviewee according to their knowledge and expertise. However, there are challenges specific to this research to anticipate.

B. Defining the scope of the concept of the Thai mentality towards trusts in Thai law.

In order to explore how the Thai mentality influences the transplant of the Law of Trusts, the semi-structured interviews conducted as part of the research serves to add to, as well as to animate the various

different ways in which Thai professionals and academics understand both the concept of trusts that has been transplanted via the 2007 act, as well as some of the trust-like devices that exist prior to its enactment. In doing so, the interviews will be conducted, with the general aim of exploring how select representatives of Thai professionals and academics understand and interpret the trust-like roles in which they play.

In seeking to understand the perspectives of Thai law, legal mechanisms and legal traditions surrounding the concept of trusts in the Thai legal system, the second approach using semi-structured interviews was adapted to focus on the narrative of the interviewees towards the Thai trusts legislation as well as trust-like mechanisms existing outside of the legislation. In addition, the interviewees were asked on their personal thoughts and experiences on the less-formal arrangements of trusts, "trust-like mechanisms". It was found in pilot interviews that the interviewees went further to express thoughts that referenced ideas related to religion and Thai cultural references. Moreover, it was found that interviewees also at times expressed their thoughts and preferences that were not related to concepts or ideas that were citable from secondary texts such as folk tales and Buddhist teaching, but those that could merely be regarded as personal preferences towards the use of trusts and trust-like mechanisms. In this research, it is proposed that in order to take account of the vast types of data that was gathered, these thoughts and ideas are presented in this dissertation under the theme of the "Thai mentality".

A definition of "mentality" from the Cambridge Advanced Learner's Dictionary & Thesaurus (2016) is "a person's particular way of thinking about things." The English Oxford Living Dictionary (2016) defines "mentality" as "The characteristic way of thinking of a person or group." The notion of mentality in this research is based on the socio-legal premise that law cannot be considered objectively from the culture and values from the society from which it is derived (Friedman, 1975; Pound, 1943). There exists a number of academic writing that study specific mentalities based on the nationality of the society from which it is catalysed. Some have used the term in a critical sense, for example, there are studies on the Japanese mentality to resist foreign influences (Itoh, 2000; Johnson, 1945). Others have used the term to present an investigation into the formation of a cultural identity, for example, Kruijtzer (2002) studies the formation of the identity of the Brahmin group in 17th century India. At present, preliminary research on Thai academic writing reveals that there appears to be a lack of literature relating to a concept of "Thai Mentality" in the field of socio-legal studies.

In the field of social and psychological analysis, another definition of 'mentality' is given as "an integral characteristic of people living in a specific culture that makes it possible to describe the unique features of the way those people see the world around them and to explain the specifics of the way they respond to it" (Dubov, 1995, p.35). The way in which the concept of the Thai mentality is presented in this dissertation follows the development of the concept of the Russian legal mentality defined by Miroshnichenko (2014) as ideas that are formed by the collective conscious and sub-conscious memory that is unique to ethnic groups and the influences from a society's ideology, culture and values (Miroshnichenko, 2014, p.169).

While the general definition of a national mentality given above seems to imply that the 'Thai mentality' denotes a unified theme of thought among the general Thai population, this research is limited to exploring the views of a smaller group of participants, including those who have played the role of pseudo-trustees and beneficiaries, Thai legal academics and Thai legal professionals. The first reason for this is based on the responses received from potential interviewees approached for the pilot interview; those who have come into contact with trusts are limited either to legal academics or Thai Legal professionals, most of whom were keen to insist that trusts are forbidden by the Thai Civil and Commercial Code and were not a viable option for potential clients.

Furthermore, as the main aim of the empirical data is to add to the Thai legal, cultural practices and observations in Thai political history which makes up the Thai mentality, an overall quantitative-style data gathering would not be as beneficial, since numerical, statistical data would not allow the exploration into greater details on how a participant understands the law concept of trusts, nor would it be feasible identify a common theme among the number of samples required to represent the general view of the Thai populace.

6.9 Anticipated challenges in empirical research.

A. Linguistic and cultural challenges.

Studies in the field of social and anthropological empirical research have commonly shown that difference in the culture, race and language of the interviewer and the participant is likely to have effect on all procedural aspects of the research, from both the gathering of data during the interview, as well as its analysis (Tabane & Bouwer, 2006). Of marked relevance to this particular research is firstly, the effect of using a non-native language to conduct the interview. It was found that limited understanding of the language in which the interview is being conducted affected the ability of participants to express and understand the questions. Taking into account the preferential advantages that exist in using the same language to conduct the interview, this research will be conducted in Thai. However, as will be elaborated upon in the sections below on the 'invisibility' of trusts, the main challenge is that there is no translation of the term 'trusts' in the Thai language. 'Trusts' are mentioned both in the Civil and Commercial Code of Thailand, as well as in the Thai Trusts Act 2007 in verbatim form.

The second most notable challenge arising from the use of the participants' native language, as noted by Tabane & Bouwer (2006, p.556), is the effect on the participants' views of the power relations. On the one hand, participants tended to be more comfortable in expressing themselves in their own tongue and with people from their own cultural background. Having been exposed to Thai historical, social and cultural aspects through the course of my study in Thai primary and secondary levels of education,

this latter aspect seems to be less problematic. Due to my exposure and knowledge of Thai history and culture, it will also be easier for myself to identify the physical and linguistic cues in later analysis of data.

The third challenge that is expected to arise is the bias of the interviewee. Attention will particularly be paid to the possibility that participants may be responding to some questions in a way in which they think ought to be answered. For example, it is expected in this context for interviewees to attempt to answer questions in a way that shows the Thai mentality as being open and accepting to foreign legal concepts, as this has been seen in the 'Official' representation of the intentions behind the enactment of the Thai Trusts Act 2007. To lessen this possible challenge, data from interviewees belonging to the 'insider' group of legislators, regulators and academics will be considered in the final analysis of the data, subject to the caveat that such persons may feel it necessary promote or advocate the intended purpose of the Thai Trusts legislation, and responses concerning professional experiences should be considered subject to the caveat that persons in such professional roles may feel obliged to respond in a way which preserves the interests or reputation of the professional organization to which they belong.

B. The invisibility of Trusts in Thai law.

Another empirical challenge is that there is a reluctance to recognise the informal practices as having trusts like effects, i.e., How do you ask participants about trusts without mentioning trusts? This effect of this overall reluctance on the present part of the research is that most academics and legal professionals see trusts as a foreign legal concept which does not exist in Thai law. Additionally, there is a discrepancy between the validity of the official presentation of the novelty of the mechanism introduced by the 2007 Thai Trusts Act and the proof of the existence of trusts held in the past, along with informal practices creating trust-like functions currently used in Thai law. The fact that there has yet to be a trust created under its powers even after the advent of the Thai Trusts Act means that there is not much more dialogue on the concept of trusts among Thai academics, with the main literature being corporate summaries by international law firms. This presents two issues; firstly, the limited knowledge of the existence of the Thai Trusts Act 2007 and secondly, the generally perceived reluctance/ hostility towards trusts.

B. (i) The limited knowledge of the existence of the TCMT 2007; using knowledge as a criterion for participant selection.

From a series of preliminary, informal discussions among potential participants, it appears that only those directly involved through professional or academic links were aware of the existence of the Thai Trusts Act 2007. Others, including peers who had studied an undergraduate law course in Thailand,

junior lecturers in criminal law, and a public prosecutor, did not know of the legislation, or its surrounding policy details. The effect was that the pool of potential participants became limited to the group of 'involved' individuals, 11 of whom were approached and were willing to participate. While the number of available participants were sufficient to produce research results that were representative of the overall Thai mentality, data collected from participants outside of this specific group is likely to be limited in nature and substance, rendering the empirical procedure invalid. Thus, the interview will be conducted with participants who would have knowledge of trusts due to the nature of their professions that are generally viewed as being comparable to the roles of English trustees or beneficiaries, as well as Thai legal academics and professionals.

B. (ii). The perceived reluctance/ hostility towards 'trusts'; use of terminology and question formation.

The second main challenge of the research resulting from the 'invisibility' of trusts in the Thai legal system is the need for a way to extract the thoughts of Thai legal professionals without mentioning the term 'trusts'. Data from the 'outsider' group of pseudo-trustees or pseudo-beneficiaries would consist of their interpretation or understanding of trusts or personal experience which may be less indicative of the terminologies used in the analysis of traditional English trusts. Responses from academics who are opposed to the use of trusts terminology could be tainted by reluctance to discuss certain aspects using terminology which would directly equate their familiar experiences with mechanisms of traditional English trusts. This lack of equivalent Thai terminology, combined with the tendency of participants to react negatively on the mere mention of the term 'trusts' means that caution must be had with the way interview questions are worded. Preparations will also be made to provide brief clarifications of certain legal terminology translated from English to Thai that is to be used at the time of the interview. Any such information made available to participants shall be identical, so as to provide consistency throughout the interview process. Questions were designed to reference 'trusts' in such a way that does not use its original term, so as to not repel the participant. In order to do so, the type of interview questions used are open, semi-structured questions focusing on four key areas, which relate to the key conceptual themes of the questions core to the research.

In view of the anticipated challenges discussed, prior to conducting the main empirical research, two sets of pilot interviews were completed for two main reasons. Firstly, to assess the possibility of conducting semi-structured interviews in English and secondly, to find out whether it was possible to find, approach and engage the suitable number of interviewees for the empirical stage of the research.

6.10 Pilot interviews.

A. Participants.

In pilot interviews, two participants had been approached through primary sources, one family acquaintance and one former law professor. The primary sources, in an informal chat on the topic of my research in October 2011, had referred the contact details of the participants who were then contacted initially over the telephone. A brief overview of the topic of my research was given during this initial phone conversation, where they had actively volunteered to offer their opinions in future, over Skype video conferencing. The participants were contacted once again to schedule a time for the pilot interviews in early November. The interviews took place on the 22nd and 29th of December 2011. Participant One, representing the pseudo-trustee group, is a retired civil servant in the legal department of the Thai Office of Civil Servants. He was appointed as a legal guardian under s.1598 Thai Civil and Commercial Code, to manage the assets of his nephews and niece, upon the death of their mother. The Second participant is a lecturer in Thai commercial law at a Thai university. He teaches students in the undergraduate level of the Thai law degree (LLB) and he has had national publications on Thai law of agency and Thai company law. He completed his education in Thai law at a Thai university, both at undergraduate and postgraduate levels. He represents the outsider-academic group.

B. Interview questions.

Interview questions were arranged to begin with the area with which the interviewee is most familiar and in which the participant would have the most knowledge, gradually moving to draw interviewee's opinions (as opposed to knowledge) on the more foreign subject of English trust law towards the end of the interview procedure. Three main sets of questions were posed during the 50-minute session. The first set of questions focused on the participants' understanding of the concept of trusts and trust-like mechanisms in relation to their own knowledge and expertise. The second set of questions sought to capture the participants' understanding of the TCMT 2007.

C. Observations.

On the whole, the main difficulty experienced during the interview procedure was that interview questions were very difficult for the participant representing insider-academic group. The participant required a lot of translation and made a lot of effort in trying to express his opinions, sometimes using

Thai words, although he was very patient and cooperative. In view of the main difficulties in the use of English as a language for interview, the main semi-structured interviews were carried out in Thai, using certain terms that have no Thai equivalent in verbatim form, such as 'trusts', 'trustees', 'beneficiaries' and 'fiduciary'. The sessions were recorded, transcribed and translated from Thai into English by myself. The interviews were conducted out in person to avoid any technical difficulties via video conferencing, and identical copies of the Thai Trusts Act 2007 translation were provided in the interview session.

6.11 Semi-structured interview design.

A. Participant selection.

As there appeared to be a prevalent tendency to avoid the discussion of personal property and ownership among pilot interviewees, criteria for selection that was based solely or mainly on how the individual manages his or her personal assets became limiting. To counter this, participants specified were individuals selected for their professional roles, experience, and knowledge. Since the research is based on the disposition that trusts were a novel and foreign legal concept, the criterion of knowledge of trusts in this research means the participants' interpretation and understanding of trusts as he or she has been informed through education in Thailand and abroad, as well as in his or her professional capacity or informal roles. This selection is however, not a per se comprehensive representation of the general Thai mentality. While finding the 'Thai mentality' would demand a range of participants that is more inclusive to convey more closely to the all-encompassing nature of the term, the method itself would not yield data that is sufficiently in depth and too broad a range of data would be too complex to narrow down to common themes that are sufficiently meaningful for analysis.

Table 1: criteria for interviewees

What *exact criteria* will identify the people you want to exclude?	**Who do you want to exclude?**
Exclusively foreign education; Knowledge only of foreign laws.	People whose legal knowledge is not primarily or based on the Thai legal system.
Lack of related personal or professional experience.	People without related experience or knowledge of trusts or trust-like mechanisms.
Pool of participants who are exclusively academics.	Data that is based exclusively on theoretical views by academics and legislators.

Table 2: Identification of interviewees based on criteria

What *exact criteria* will identify the people you want to talk to?	**Who do you want to talk to?**
Experience, knowledge or professional role that involves Thai trusts.	People who know about Thai trusts, according to the initial theoretical analysis.
Professional roles, official rank, age and experience in field of expertise.	A mix of age and seniority.
Experience or professional role that involves managing assets on behalf of another, for the latter's benefit.	People who work as pseudo-trustees.
Experience in having entrusted the ownership of their property, or the duty of managing their property unto another.	People who have been pseudo-beneficiairies.
Knowledge in trust-like laws and mechanisms in Thai law.	Academics and Legislators
Experience or involvement in the oversight and regulation of pseudo-trustees or trust-like laws and mechanisms	Regulators

B. (i) Interviewees' defining characteristics: insiders and outsiders; professional background.

The selection of participants was made according to two defining biographical characteristics; the participant's practice or profession and their educational background. Firstly, their professional experience is of relevance to the distinction between the perspectives of the 'insider' and the 'outsider'.

The findings from initial, informal approaches for interview participants demonstrated that there were two main views of the legislation, namely, the views of the legislators, academic advisors and state actors who promoted the act and the views of those who would be using the legal device created by the law and subject to its regulation.

Participants belonging to the 'insider' group are those who have had direct engagement with the promulgation of the Thai Trusts Act 2007. Insiders are the source of a top-down, governmental view of trusts and include Thai legal academics and state officials. On the other hand, the 'outsider' group consists of participants who would governed by the Thai Trusts Act, to include those who would have played part in managing assets on behalf of another, or investors who would under the act, become a trust beneficiary.

The main limitation in using the insider-outsider view in this research is the lack of access to participants who have dealt directly with the drafting and enactment of the Thai Trusts Act. Additionally, it is difficult to categorise participants as future regulators and enforcers belonging to the 'insider' category, as there has yet to be a trust created under the legislation. This difficulty applies conversely to finding participants who are definitively representative of the 'outsider' category, as there has yet to be a trust created under the legislation. As such, and in accordance to the earlier comparative analysis of Thai laws and practices which function in place of trusts, the 'outsider' category will extend to participants who are involved in the use of selected trust-like devices. The cases to be explored are firstly, participants who have engaged in the practice of trustee-like roles, to include the legal guardian and the private asset manager. Secondly, empirical data will be gathered from those who have been involved in a trust-like arrangement as the beneficiary, such as the recipient of inheritance settlements and buyers of cars subject to floating transfers. Finally, participants who would play part in the regulation and judicial enforcement of trusts are to be included in the insider category.

B (ii) Interviewees' defining characteristics: Educational Background and Exposure to Trusts.

In order to accommodate the biographical complexity of potential interviewees, the additional characteristic to be taken into account is the participants' exposure to the concept of trusts as a legal device which deals with the ownership of property by allowing the separation of legal ownership and

enjoyment. From preliminary, informal pilot interview sessions, participants appeared to approach the questions regarding trusts differently, according to his or her own level of accustom to the term 'trusts' itself. Participants who had had legal education and knowledge of English trust law are often less reluctant and more open to engaging in discussing the concept of trusts than those who have had wholly Thai legal education and training.

It is for the reasons stated above that the second main set of attributes to be taken into account in the selection of participants is his or her educational and professional background. As for the limitations in taking into account the participants' educational background, the first would be the difficulty in questioning into such personal details as the educational background of participants. Such details are sensitive and private in nature, and to ask for them could potentially be understood by participants as questioning their credibility. In this instance, such details have been pre-determined through a series of referrals from initial pilot interview participants and questions asked within the actual interview are merely to confirm the accuracy of the biographical information. An explanation will also be given to the participant as to the relevancy of such data, both before and during the time of the actual interview. Additionally, a 'nuanced' description is applied where a participant's professional or academic experience deals with foreign elements, such as foreign clients, cases or academics specialising in foreign law. Within the same category, the presence of non-legal education outside of Thailand is also included, where the participant has encountered trusts as an investment device, outside a legal educational background.

Two main categories arise from this biographical detail. The first comprises of participants who have been directly exposed to trusts in its original, 'English trusts' utility as a legal device allowing the separation of title and ownership, whether through legal education outside of Thailand, or advising Thai or international clients on its use. The second category includes participants who have not directly been exposed to trusts through education or use, as well as those having Thai legal education, or foreign but non-legal education. The attributes discussed are to be used to categorise the participants into sub-groups within the insider and outsider categories. Core questions (structured interview questions) from the text analysis will be applied accordingly. The professional background and trust-like roles of participants will determine the set of questions to be asked in each interview, while the educational background and exposure to English trusts will be of relevance in the extent to which certain terms will be clarified in the interview process, as well as in the final analysis of the transcripts. The tables below show the interviewees categorized according to their biographical details.

Chapter 7: Reading against the grain: application of the document analysis methodology under the alternative methodology to analyse non-formal trusts in Thai law.

In the attempt to understand why after the TCMT 2007 act come into force, no trusts had been established under the legislation, the study initially used the theory of legal transplant as a first method for analysis of the said phenomenon. This approach was chosen with regard to the intention of the legislation as being the introduction of trusts into the Thai legal system for the first time. In analysing the TCMT 2007 as a legal transplant in Part II, it was revealed that there had, contrary to the intention of the TCMT 2007, been a series of cases where the Thai Court of Appeal found trusts to be valid in Thai law. Additionally, it was found that application of a theoretical approach to the analysis of the phenomenon based on the theory of legal transplants failed to take into account the uniquely common law nature of the legal concept of trusts. The methodology was therefore adapted to accommodate these revelations, to paint a picture of the Thai mentality towards trusts and trust-like mechanisms and practices in the Thai legal system which would help to understand the phenomenon of trusts in Thai law.

In chapter 5 of the dissertation, some findings from the documentary research of court records revealed that despite the ban by section 1168 of the Thai Civil and Commercial Code (CCC), there were some instances in which the Thai courts were prepared to allow for the existence of trusts. In this Chapter, the findings from a more in-depth analysis involving the application of English trust law theory to court records of decided cases in Thailand are presented. It will be seen that despite the ban of trusts 'on paper', Thai courts have in some instances, appeared to have used and adapted principles of trust law to the Thai context, with the effect of trust-like creations. Although as a civil law legal system, such cases have no binding force on later cases, it is still informative to observe how and on what basis Thai courts have decided to accept the existence of trust-like mechanisms.

7.1 Further findings of the judiciary's application and Adaptation of Procedural Rules in English Trust Law to Thai Trusts.

It was asserted in chapter 5 of the dissertation that the line of cases in which trusts were a subject of dispute can in themselves be seen as a development of a "micro-system" of judicial regulation of trusts in Thai law. In doing so, the Thai Court of Appeal specifically stated that the principles of the law of trusts of England and Wales should apply in considering the validity of trusts made before the promulgation of the CCC in 1925 (CA136/2481: 1938). The Thai courts were seen to assert its authority to decide on matters relating to the removal of trustees in its judgment of a 1948 case (CA 63/2491: 1948). It concerned an attempt by a trustee of a validly created trust to register his own name on the title deed of the trust

property under the new Title Deed Regulations No 4 of 1937, with the intention of using the land as security for a loan. The property was part of a testamentary gift that was to be held on trust for the benefit of the trustee's siblings. The rest of the trust assets constituted land and personal property situated abroad. The court held that where a trustee is found to act in breach of the duties prescribed in the terms of trusts settlement, the court has the authority to remove the trustee from his office. It also added that the authority of the court to remove trustees applies even should most of the disputed trust assets were situated abroad, as the subject of the legal action was whether the trustee had acted in breach, as opposed to a legal action over the rights of the disputed trust assets (CA 63/2491: 1948).

Within this micro-system of trust law, elements from the Thai Civil and Commercial Code (CCC) were sometimes adapted and applied, alongside the core principles of English trust law. Hence, in a 1938 judgment, the Court of Appeal ruled on the validity of a trust created before the CCC where the settlor had died prior to its promulgation. The court upheld the trust's validity since the trust was created prior to the official ban of creating trusts in Thai law in 1925. As to the period to which it remains valid, the court disregarded the Thai prescription period for civil law disputes of six years, as prescribed in s.550 CCC. Instead, it took into consideration, the English prescription period of 21 years. Taking into account that the amount of years was equal to the age of majority in English law at the time, it held that trusts were to last the lifetime of the beneficiary plus the period of twenty years, to comply with the Thai age of majority (CA136/2481: 1938).

7.2 The use of the principle of the Three Certainties in English Trust Law in considering the validity of Thai Trusts.

As a legal system belonging mainly to the tradition of the civil law family, cases decided by the Thai courts have no binding precedential value per se (Hooker, 1986; Hiscock, 1995; Boonchalermvipas, 2009). However, a court may use cases from foreign jurisdictions as a guideline in determining the case at hand, as opposed to using cases from other jurisdictions as the rationale for its final determination. Examples of the use of English trust law may be found in the reasoning used in some cases where the judges' determinations seem to replicate the common law requirements in the principle of Three Certainties. The principle prescribes for three essential components for a trust to be valid. Briefly stated, there must be a clear intention to create a trust (the certainty of intent) (*Re Kayford*, 1975, 1All ER 604); identifiable trust property (the certainty of subject) (*Re Adams and Kensington Vestry*, 1884, Ch D 394) and the certainty of trust object (*Knight v Knight* (1840) 3 Beav 148). The final rule requires that the beneficiary must be sufficiently identified in the terms of the trust or that there is a purpose for which the trust may conceivably fulfill (*Re Baden's Deed Trusts*, no 2, 1973).

In a dispute concerning the terms of a testamentary will which stated for the inheritance "to be donated for purposes to raise good karma", the Thai Court of Appeal held that no valid trust can be interpreted from the terms. Citing the principle of the certainty of object, it was ruled that as the terms of the will were too indeterminate to specify a beneficiary, or a specific charitable cause. As such, the will can merely be interpreted as a testamentary gift, subject to a condition (CA 419/2491: 1948). A similar will which stated that part of the inheritance should be "donated for the good karma of the house and that of the family" was also held not to give rise to a trust in a Court of Appeal case in 1952 (CA 862/2495: 1952). Additionally, in 1959, it was held that an heir had no right to issue proceedings as administrator to the sum of an inheritance, as the terms of the will purported to grant the largest share of inheritance to "the most loyal of all my sons" did not give rise to a valid trust for want of a specific beneficiary (CA 336/2502: 1959). A final example of where Thai courts used the principle of Three Certainties as a guide in deciding the validity of a trust in Thai law is where a will had stipulated that the property be "used for the occupancy of my wife and daughter" (CA 507 - 508/2480: 1937). It was held that no trust had been validly created from the terms of a will, where it was insufficient to imply the testator/settlor's intention to create a trust, thus falling foul of the rule of certainty of intent (*Re Kayford*, 1975, 1All ER 604).

7.3 The willingness of Thai courts to find valid, trusts of a charitable purpose and public nature.

The courts' reluctance to find a valid trust according to the terms in the cases above may be contrasted with cases where a will specifies for the distribution of inheritance for a charitable purpose of a public nature. The area of Thai law concerning the creation and regulation of charitable organisations is found in Chapters II and III of the Thai Civil and Commercial Code and in the Social Welfare Promotion Act BE 2546 (2003). Charitable organisations are generally set up in the form of associations or foundations. Associations are set up by a group of members, to carry out legitimate and specific causes for purposes other than that of sharing profit or income (CCC: s. 278). Foundations are defined as "property specially appropriated to public charity, religious, art, scientific, education or other purpose for the public benefit and not for sharing profit" (CCC: s. 115). Both are subject to registration with relevant governmental departments, listing the purpose, rules, members and duties of its committees in writing (CCC: s. 126). These bodies are deemed juristic persons and are governed by the rules submitted at the time of registration. An annual submission of financial statements listing its activities and balance is required to be sent to the registrar (CCC: ss.110, 79). The relevant government department has investigatory power to ensure that foundations act in compliance with its founding rules and objectives (CCC: s. 128). Interested persons, the Public Prosecutor or the Registrar, have the right to apply for a court order for the removal of a director who acted in wrongful performance of his duties, in breach of the founding rules, or acted illegally so as to cause injury to the foundation (CCC: s.129).

The formalities required for registration of foundations and associations specifically require the registration in writing. Section 128 of the CCC states that where a testamentary will stipulates for the establishment of a charitable foundation, the designated legatee, or the administrator is to proceed by formal application and registration. There have been cases where wills written before the CCC are sent to the judiciary, to consider whether the terms stipulating for the legacy to be given to charity could instead take effect as a trust. In considering the validity of trusts, English principles of trust law were applied. In one case, the court implied a trust from the terms of a will created in 1908, which directed for the inheritance to be "used for donations towards the development of Buddhism" (CA 866/2487: 1944). It ruled that the conditions stated in the will was sufficient to amount to the creation of a trust for charitable purpose, as during the lifetime of the deceased, the legal heirs had routinely made donations to one specific temple, at specific religious events.

Even in the more recent cases, Thai courts were seen to be more willing to interpret testamentary terms to find a valid trust, where the objective of the will concerned the administration of a charitable purpose. In 1992, the court held that a trust had been validly created over a parcel of land granted by King Rama VI to the defendant for use as a burial ground. A trust was effectively implied by the court, at the time the land was gifted, before the CCC in 1890. The King was seen as the settlor, by virtue of his expressed terms accompanying the gift of land, and the defendant as the trustee. It was held that sufficient intention could be inferred from the conditions of the gift to effectively create an implied trust of a charitable nature, thereby satisfying the principle of three certainties integral to the creation of a trust (CA 2372/2535: 1992).

Another example of the willingness of Thai courts to find validity in trusts of a charitable nature is in a Court of Appeal decision in 1997. It held that a trust created over Babah Burial Ground was validly created before the Thai CCC, despite there having been no registration under the repealed Title Deed Issuance Act 1906 (No.2). In this particular case, the court held that as the purpose of the trust stipulated for the disputed land to be used as a Hokkian burial ground for persons of Singaporean-Chinese descent and as it was common practice for the land to be used for the burial of any person of the wider community of Singaporean-Chinese Hokkian descent as opposed limiting its use to the relatives of the original settlors, it constituted a charitable trust of a public nature (CA 3148/2540: 1997). It is to note that in these cases, judges had allowed trusts to exist, despite a separate regime of law which applies to testamentary gifts of a charitable nature, as well as other legislation to govern and regulate charitable organisations (CCC: Title II-III).

7.4 Finding the use of equitable maxims in English Trust Law in considering Thai trusts.

In the same case concerning whether a valid trust was created for the maintenance of the Babah Burial Ground, it was seen that Thai courts did not limit the application of legal principles of English trust law, to the principle of the Three Certainties of trusts. Additionally, it held that as the claimant intentionally failed to reveal that use of the land was public in nature, her claim for the title deed of ownership constituted a misleading and fraudulent act and was struck down (CA 3148/2540: 1997). The judges' reasoning is comparable to the justification given by English courts in regard to its discretion in awarding equitable remedy. Petit sums this area of law as the "Clean Hands" doctrine (Petit, 1990, p.416), where equitable maxims such as "He who seeks equity must do equity" (*Haywood v. Cope*: 1858 25 Beav 140) and "He who comes to equity must come with clean hands" (*Dering v. Earl of Winchelsea*, 1787, 1 Cox 318) are used to deny a remedy, where the complainants had themselves acted in a way that was unconscionable.

To conclude, contrary to the general impression that trusts had no place in Thai law, as given from academic pieces on trusts (Kasemsap, 2011; Sucheewa, 2006), the advice of Thai legal practitioners (Suchiva, 2008; Poomsan-Becker, 2008) and even from the wording of the legislative department responsible for the drafting of the new TCMT 2007 (Council of State, 2005/k.21; NLA 2006/06), there appears to be a line of cases which make up a microsystem of trusts in Thai law. These are an exception to the general prohibition contained in the Civil and Commercial Code. The exception is marked by a temporal boundary, imposed by the date in which the CCC came into force. As such, trusts made after 1925 will have no valid effect unless they fall within the provisions of the new TCMT 2007.

Within this micro-system of trusts in Thai law, the Thai judiciary has been seen to specifically utilise the logical principles found in English trust law, sometimes supplanting particular elements with Thai legislation. Not only have they used the basic principles on the legal formalities of trusts in accordance with English law in judging the validity of Thai trusts, they also utilised equitable legal maxims underlying the concept of English Trusts as a basis for their judgment. Another trend to be taken into account is the Thai judiciary's willingness to recognise trusts made for charitable purposes of a public nature. These cases defy the generally strict requirements for registration of rights in real property, typical of civil law jurisdictions, as contained in both the Thai Civil and Commercial Code and the Thai Land Code. Moreover, the trend to allow trusts of a public and charitable nature becomes even more significant given that the Civil and Commercial Code already provides a separate body of law for the establishment and regulation of charities.

These findings challenge the initial view that the concept of trusts is novel and alien to the Thai legal system. Given the constraints imposed in the form of s.1686 CCC, this shows that the Thai judiciary were indeed capable of using English principles of trust law to decide Thai cases and accommodating

trusts in Thai law. It seems that there is proof in Thai legal history of the capability of the judiciary to decide on cases concerning trusts.

7.5 Trust-like mechanisms in Thai law.

As it has been illustrated, trusts created after 1925 have no legal effect in Thai law, except for those allowed by the Trusts for Capital Market Transactions Act 2007. Although elements of trusts have been found in cases concerning inheritance and succession, trusts are still specifically prohibited for use as a device to manage property interests. How then, has Thai law enabled transactions and the management of property without trusts as a legal mechanism from 1925? In analysing what elements inherent to Thai culture, politics and religion would affect the transplant of trusts, this part of the chapter aims to conceptually establish the place of trusts in Thai law. In doing so, this analysis involves exploring trust-like mechanisms and legal practices. Trust-like mechanisms refer firstly, to areas of Thai legislation that are used in place of trusts, to give effect to the legal structure that is created by trusts. Secondly, the analysis of trust-like legal practices focuses on legal practices that effectively enable transactions that would otherwise be constructed by the common law trust. As most of Thai law has been modelled mainly from sources in the civil law family, the first point to be aware of is the inherent differences in the definition and terminology to be used in the analysis. A set of common variables is required to compare and illustrate the characteristics of trust-like mechanisms in Thai law.

A. Defining trust-like features in the analysis of trust-like mechanisms and legal practice.

In the parlance of common law jurisdiction, one of the most distinct legal features of trust law is the detachment of equitable title from legal title. The ability to recognise the two rights of ownership separately provides a legal mechanism to enable the management of property interests and the multitude of complex transactions that form the foundation for the development of the modern economy. Hence the first distinctive feature of the common law trust to consider in this analysis is its legal form, which enables property to be held by one person, on behalf of another (Maitland, 1911; Grey and Grey, 2001).

According to this primary requirement, the laws from the Thai CCC which are used to enable this legal structure include the provisions on administrators and legal guardians. Examples in other Thai legislation are the Escrow Act B.E. 2551 (2008) and the Management of Shares and Private Assets of Members of Parliament Act B.E. 2543 (1997). The objective of the latter act is to safeguard against conflicts of interest and corruption for members of parliament while in office. Like the legal structure provided by trusts, the legislation effectively directs their personal assets to be held by a legal entity on their behalf.

However, the corollary to this segregation of assets held in the name of the 'trustee' is that such assets cannot be used to satisfy the latter's debts. Only the first two legislations make this arrangement possible, through legally requiring that assets of the 'trustee' be held separately, from those held in the 'beneficiary's' interests. The latter legislation does not provide this legal effect, only going so far as to provide a compulsory legal structure to set apart certain assets.

The second trait that is of analytical significance is the corresponding legal protection provided for the beneficiary, should the acts of the party that holds property on their behalf results in harm to the beneficiaries' interests. Thai law which accommodates this effect can be found in the CCC provisions prescribing the responsibilities and duties of administrators and legal guardians. Another main area of law providing this safeguard is the provisions on fiduciary duties of company directors, which refers in turn to agents' fiduciary duties prescribed in the Civil and Commercial Code. This part of the analysis will show how Thai civil law attempts to impose duties and responsibilities on persons acting as a fiduciary, through legislative provisions. The nature and extent of duties prescribed on in Thai civil law would provide also an insight on how legal principles specifically from the English jurisdiction, are imported via codification.

The final difference to be taken into account is the nature of the rights that are attached to the status of the beneficiary in the traditional common law trust. The existence of a trust in the common law jurisdiction sense confers exclusive nature and priority on the beneficiary's claim over the segregated assets held in the trustee's name. For trusts in the common law jurisdiction, enforcement of the right of the beneficiary and any remedial awards are conceptually justified by the equitable logic to protect the beneficiary from unconscionable acts of the trustee (*Attorney-General for Hong Kong v. Reid* [1994] 1 AC 324; *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] AC 694). It is the nature and justification of rights that is uniquely found in common law trusts. Civil-law based rights over property in Thai law do not arise by virtue of equitable principles, nor is there officially the existence of a separate body of law administered by a separate set of judiciary to safeguard against unconscionability. However, some protection is awarded in the Civil and Commercial Code, although these are justified on different conceptual principles. One such example is the CCC provisions on estoppel.

The final part examines trust-like legal practices. This final category is composed of activities that have been informally used to allow for the separation of title and enjoyment. These include the use of nominees for land holding, company share ownership and the floating transfer. A floating transfer is a practice whereby a seller of a vehicle or land gives a signed title deed or ownership papers to a middleman or a buyer, usually at the same time of handing over the vehicle or land. These papers and title deeds will usually omit the name of the buyer for ease of transaction especially in the case of selling through a middleman. An official sale of the vehicle or land is not formalised and nor does legal title pass to the buyer until such buyer completes registration at the Land Transport Department or the Land Registrar. Often, the buyer will take possession of the land or vehicle without ever completing the necessary formalities, and problems could arise where there is a dispute of legal ownership where for instance, the

rights over the land sold under the floating transfer becomes disputed, or if the vehicle is involved in an accident and the legal owner is still registered as the seller.

The floating transfer is an example where ownership and enjoyment of property has been separated by a practice that is not officially guaranteed by law however, there is technically no corollary imposition of a legal duty to act in accordance with certain stipulated standards on the property owner. As such, there are no trust-like legal practices that can officially call to account, the legal owner of the property. It will be seen that there is a varying degree of permissibility of these practices. At one end of the spectrum, the floating transfer is widely used and seemingly endorsed by the Department of Land Transport (2003). At the other end, the use of nominees to circumvent strict laws limiting foreign ownership of shares and property are regarded as highly controversial, with one case generating such political back lash that is thought to have ousted a former prime minister.

B. Functionally-equivalent laws.

Functionally-equivalent laws to be examined include laws on succession in the Thai Civil and Commercial Code (CCC) including the provisions on administrators and legal guardians. Examples of other Thai legislation are the Escrow Act B.E. 2551 (2008), the Management of Shares and Private Assets of Members of Parliament Act B.E. 2543 (1997). This section also considers law and regulations that seek to codify English common law style fiduciary duties, including provisions of the CCC, The Security Exchanges Commission's Director's Handbook (2007), the Securities and Exchange Act (No. 4) Act B.E. 2551 (2008). and provisions of the Public Companies Act B.E.2535 (1992). It finally considers the trust-like effect of the codified Law of Estoppels in s.1621 of the CCC.

B. (i) Laws on succession in the Thai Civil and Commercial Code.

As discussed, the official mention of trusts in Thai law relates mainly to its use as a mechanism to enable the distribution of inheritance. The first example of an area of Thai law providing a functional equivalent to trusts is the Civil and Commercial Code's provisions on succession. It was pronounced by the Thai Council of State that trusts are invalid if created after the promulgation of the CCC in 1925. (Council of State, 1929: 56/2479) Any arrangements made for the distribution of the estate or land of a deceased individual are still dealt with by the CCC chapter governing wills and succession. The general rules applicable to the legal formalities for a valid will is stipulated in sections 1657-1663 CCC. A valid testamentary document requires the signature of two witnesses and the legator. Without a valid will,

section 1629 CCC provides a list of six types of statutory heirs, in an order based on their relationship to the deceased, and it is the role of the courts to distribute the estate accordingly (CCC: s.1603).

In the traditional sense of the division of legal title and enjoyment, the provisions in the CCC on the appointment of property controllers, administrators, enable property to be held by defined persons, for the benefit of another. The Code also sets out how the estate is to be administered where the terms of the will fall short of a possible fulfilment, e.g. where the designated heir is a minor, or cannot be found.

In place of appointing a trustee in a situation where the assets are bequeathed to a party who is a minor or a judicially incompetent individual, a controller of property may be appointed by will under s.1687, to manage assets for the benefit of the latter. S.1577 specifies that the legal title to the legacy may be transferred to the controller of property, as left by the will-maker. The controller's duty is to manage bequeathed assets last until the minor reaches legal adulthood, or for the duration of the charge's incompetence. Additionally, where the heir of the deceased could not be located, is abroad, or is a minor, instead of creating a trust over the estate, the Civil and Commercial Code allows for the appointment of an administrator (CCC: s.1711). Where legacy is entrusted to a minor whose parents are deceased or are judicially incompetent, a legal guardian may be appointed to hold and manage the legacy for the benefit of the minor (CCC: s.1585).

B. (ii) Escrow Act B.E.2551 (2008).

The Escrow Act 2008 provides another example of Thai legislation that enables the separation of legal ownership and benefit. In this particular context however, assets are held in the name of an independent third party, pending the fulfillment of a certain condition. In real estate terms, an escrow agreement denotes the impartial holding of funds or documents relating to the sale or transfer of property (Frost, 2008, p.4). It is a legal device designed to protect consumer-purchasers from the loss of profits which could arise as a result of dishonest or unscrupulous planning of construction projects by property developers.

The act defines an escrow agreement as a contract in which a licensed escrow operator holds deposit funds paid by one party in a dedicated account, pending the completion of a specified obligation (Escrow Act 2008: s.1). Persons operating as an escrow agent must obtain a license for operation from the Escrow Regulatory Committee (Escrow Act 2008: s.7). Like the Thai Trust Act, the Escrow Act only allows for commercial banks and financial institutions to apply for an operational license (Escrow Act 2008: s.3). Escrow agents are to maintain records of client's accounts and to submit annual reports of their books to the regulatory committee (Escrow Act 2008: s.34). The regulatory committee has a power of oversight and is the receiver of complaints from customers (Escrow Act 2008: s.36). The act also gives powers for the regulatory committee to initiate a formal inquiry upon finding irregularities in annual reports and to

impose sanctions ranging from suspension and revocation of operating license or administrative fines (Escrow Act 2008: ss.40-41). The Escrow Act 2008 also grants the public prosecutor power to initiate criminal proceedings where an escrow agent is found to have acted fraudulently (Escrow Act 2008: s.48).

The escrow legislation itself was enacted shortly after the 2007 Trusts for Capital Transactions Act, but the practice of using escrows had been legally permitted on the authority of the Bank of Thailand Letter on the Authorisation of Escrow Services 2002, which was later reinforced by the Announcement of the Ministry of Finance on the Use of Escrow Services 2003 (3/12/2546). Prior to the Escrow Act, escrows were allowed by virtue of s. 805 of the Civil and Commercial Code which permits the drafting of a clause in a property transaction, to allow for the use of dual agents to hold funds, prior to a transfer of property. The drawback to this informal use was firstly, the lack of regulation and control of such agreements. It was unclear as whether dual agents established by s.805 were subject to the same duties and responsibilities as that of an agent (CCC: s.807), and there was no official body to raise complaints. This has now been amended by establishment of a regulatory committee in the 2008 Escrow Act. The second drawback, which could continue to apply to the use of escrows under the new act, is the general lack of awareness of the availability of such a legal vehicle (BOT 2002:3/12/2546, 202). According to the data by Bank of Thailand, the main users of escrows before the 2008 Escrow Act were larger property developers and law firms acting as a middleman in large-scale property transactions (BOT 2002:3/12/2546, 21). Often, it was found that such firms set up bank accounts in different jurisdictions where escrows were already common and widely used.

Although the legal structure provided by the Escrow Act 2008 is not strictly identical to the separation of interests in property in English trusts, it does enable the segregation of the ownership in civil law property for a certain, defined purpose. Moreover, escrows provide an example of how a foreign legal mechanism can be successfully transplanted, in terms of a mechanism imported from a foreign legal system that is used and accepted among practitioners and subsequently adopted and codified by legislators.

B. (iii) Management of Shares and Private Assets of Members of Parliament.

Another piece of legislation that could be said to provide an equivalent function to trusts is the Act on the Management of Shares and Private Assets of Members of Parliament B.E. 2543 (1997) (the MPSA). The purpose of the act was to prevent a conflict of interest arising during Members of Parliament's term of office. As an anti-corruption measure, MPs who held in excess of a stipulated percentage of shares were under a duty to transfer the excess to a legal entity during her time in office, as well as to submit management plans and voting rights of the legal entity, to the National Anti-Corruption Commission (NACC) for inspection. Any benefit arising out of these shares would be returned to the original owner after approval of the NACC.

The legal effect of the transfer is comparable to the legal structure provided by the traditional English trusts, with the separate legal entity acting as trustee to hold trust assets that comprise of shares, on behalf of the MP, who would be the beneficiary. The similarities are purely structural. There are no provisions in the legislation which suggests that the separation of legal ownership is 'beneficial' for the person whose legal right of ownership has been delegated to a legal entity. The act itself does not specifically prescribe an active duty on the directors of the legal entity to act in furthering the interest of the MP. The legislation only stipulates that any business plans of the MP's profit-generating assets should be submitted and voted "as per usual, according to its long-term goals" (MSPA 1997: s.21). The acts of the directors of the legal entity are subject to the CCC provisions on company directors (MSPA 1997: s.32), There has yet to be a case where the legal entity is called to account for breach of its duties.

B. (iv) Thai legislation imposing trust-like duties for the protection of the beneficiary.

Historically, as the source of wealth shifted from the inheritance and land ownership, the English law of trust gradually evolved to accommodate the shifting economic priorities. Trusts came to be used as a vital legal structure to enable the accumulation of capital for entrepreneurial ventures, which were crucial to the advancement of wealth of the English economy, up until the decision of *Salomon v Salomon* (1897) AC 22, which limited its use in an entrepreneurial context (Mattei, 1994). In common law jurisdictions, it provided a structure which legally denied creditors claims on pooled assets, through the separation of beneficial ownership from the legal title. The modern use of trusts also provides the ability to allow financial and investment experts to apply their skill and knowledge in the management of both private assets and investment capital (Schwarz, 2003). As such, there is corresponding need for the development of the law of trusts in common law jurisdictions to ensure that these experts do not act fraudulently, or at the very least, it is required for there to be a standard to which they do not fall below, resulting in a way that is detrimental to the pool of assets.

To this end, the English judiciary used the law of trusts to establish corresponding duties on the legal holder of assets, and this set of legal principles gradually developed into the body of law known as fiduciary duties. A fiduciary relationship arises where a one party is acting in a position of trust and confidence of another. Under Equitable principles, it would be unconscionable to allow the party in such a position to improperly obtain an advantage, often financial, out of the relationship (*Keech v. Sandford* [1726] EWHC Ch J76). Fiduciary duties gradually came to be applied to company directors, as they were regarded in equity as the company's "fiduciary agents" (*Mills v. Mills* (1938) 60 C.L.R. 150: *Aberdeen Rlwy. Co. v. Blaikie Bros.* (1854) 1 Macq. 461).

In terms of fiduciary duties in Thai law, in 2007 The Security Exchanges Commission published the Director's Handbook as a guideline on roles, duties and responsibilities of directors of listed companies. In

regards to the fiduciary duties of directors, the text specifically references the source of origins of fiduciary principles to the law of trusts.

> "The term "fiduciary duty" comes from trust law, which, although not part of Thai law, is essential for understanding a director's duties... When applying the principle of fiduciary duties to a company, you, as a director, are similar to a trustee having powers and duties in the management of a group of assets for the interests of others, i.e., the shareholders" (SEC 2007, p.7).

Curiously, the guidelines equate fiduciary duties to legal duties prescribed in written provisions, as opposed to equitable principles in common law jurisdictions (SEC 2007, p.7). Nonetheless, in Thai law, the fiduciary duties of company directors and executives are codified in different pieces of legislation and applicable according to the type of corporate entity. The two main components of Thai fiduciary duties are those of due care and loyalty. Fiduciary duties imposed on private company directors are written in the Civil and Commercial Code. Section 1168 states that directors are to manage the company with the diligence of a "careful businessman." As for the duty of loyalty, the law then sets out to prohibit directors from engaging in transactions that are of a competitive nature to the company's business (CCC: s.1168). This standard of care is seemingly higher than that which is imposed on directors of public companies, which is set out in the Public Companies Act B.E.2535 (1992).

The fiduciary duties of a public company director are detailed in section 85 of the Public Companies Act B.E.2535 (1992) (PCA). The provision sets out a general duty to act in accordance with law; company objectives; resolutions "in good faith and with care to maintain interests of the company." The fiduciary duty of loyalty is expressed in section 86, which forbids the director from engaging in a competing business, unless approved by shareholders. The standard of care prescribed in the act is that of "the prudent individual". However, the 1992 Act then specifically states that, in considering the relationship of the director to the company and to third persons, reference is to be had to the provisions in the Civil and Commercial Code governing the acts of agents (PCA: s.97). This provision has been interpreted to mean that the standard of care applicable to directors of public companies, should be judged in accordance with those specified in the part on agency (Kasemsap, 2011; SEC 2008). As such, the third source of fiduciary duties in Thai law can be found in the Thai Civil and Commercial Code provisions on the Law of Agency.

The duties and responsibilities of agents is written in Title XV of the Civil and Commercial Code of Thailand and the agent's fiduciary duty to act with due care is contained in two main sections. Section 807 provides for the general duty to follow expressed and implied directions of the principal, in absence of which, the agent is to "pursue the accustomed course of business in which he is employed". Where an agent has presumed authority to act in case of urgency to protect the principal's interests from loss, s.802 sets out a less onerous duty of "a person of ordinary prudence". The agent's general standard of care set out in s.807 could be interpreted to demand a more onerous duty than that prescribed for the public company director in the Thai Public Companies Act 1992.

In its proposal for amendment of the Securities Exchange Act, the SEC had called to attention the haphazard nature in the Thai court's application of the two sets of standards of care (SEC 2008, p.102). However, its call for reform gave higher priority on the fiduciary duty of loyalty. The stimulus for change was voiced in the Securities Exchange Commission (SEC) Announcement on the Conduct of Interested Transactions 23/2551 (2008). As a response to a highly controversial transaction made by the recently ousted prime minister, the SEC saw it necessary to issue guidelines to clarify the definition of "interested persons". It was alleged that the ousted Prime Minister as director, had made transfers that were in direct conflict of the interests of the company. Pursuant to a different transaction that had been under investigation for breach of nationality restrictions, shares of a different entity where the Prime Minister was an executive director were sold at a nominal price to spouse and her friends. This practice of transferring shares to overcome nationality restrictions will be analysed separately in the part on Trusts Like practices in Thai law below.

The SEC's announcement was a policy initiative leading to the Securities and Exchange Act (No. 4) Act B.E. 2551 (2008). It applies to directors, as well as executives of public companies offering newly issued shares for sale to the public (s.39/1) as well as to directors and executives of limited companies operating as a subsidiary entity. The fiduciary duty of directors defined by the act is composed of two main aspects, the duty to act with responsibility and due care and the duty to act with loyalty (s.89/7). A point of note here is that in Thai law, the duty of care under this Act is regarded as part of the fiduciary duty of executives. With regard to the level of care required, the act imposes a standard of "an ordinary person undertaking the like business under the similar circumstance" (s.89/8). Regard is to be had to the position in the company held by such person at that time; the scope of responsibility in the position of such person and; qualification, knowledge, capability, and experience, including purposes of appointment (s.89/9). In accordance with the proposals put forward by the SEC, that there should be a wider room for directors and executives to use their discretion. Paragraph two of the standard of care provides a "safe harbour" proviso, as a minimum requirement in exercising due care. These are that decisions are made with honest belief and reasonable ground that it is for the best interest of the company; in reliance of information honestly believed to be sufficient; and without consideration of personal interests, whether directly or indirectly. The 2008 amendments also embraced proposals by the SEC on the issue of conflicts of interests. In regards to the duty of loyalty, section 89/11 was added to create a presumption that the director is acting in breach of his duties if the director, or "an executive or a related person" receives "any financial benefits other than those should be ordinarily obtained or causes damages to the company." The act then goes on to include spouses and descendants within the definition of "related persons".

Additionally, there appears to be an overlap between the duties for directors of limited subsidiary companies offering shares for sale, as newly codified in the 2008 SEA amendments, and the traditional fiduciary duties of other private company directors contained in the Thai Civil and Commercial Code. This overlap could give rise to problems in judicial discretion, when considering that some acts would remain within a director's reasonable business judgment, "an ordinary person undertaking the like business under

the similar circumstance" (SEAS: s.89/8), but at the same time fall outside of the stricter ambit of due care of private company directors, with the latter being more onerous "standard of the careful businessman" (CCC: s.1168).

Another anomaly in the body of law on fiduciary duties is the referencing of the standard of care required of directors in public companies, to provisions on the duties and responsibilities of Agents in the CCC (PCA: s.85). Agents' duties are somewhat different as to the scope of discretion allowed, given the difference in the nature of the roles of these two positions. On the one hand, company directors are entrusted with the interests of a corporate entity, while the agent acts on behalf of a principle.

In sum, the law on fiduciary duties for directors as codified in Thai law provide a good example of the civil law - take on equity-related principles that is based on English trust law principles. In practice however, the codification of fiduciary principles is merely textual in nature, as there is no guidance on how to judge a breach of fiduciary duties on the basis of equitable principles. In addition, the multiplicity of authoritative sources for fiduciary duties in Thai law is at best, confusing. At worst, it suggests that it is difficult to consolidate equitable principles which, by virtue of its judge made origins, consistently continues to develop, even after codification. The addition of section 89/11 to clarify the definition of 'related persons' in potential conflicts of interest show that there is possible room for maneuver for law-makers in civil law Thailand, to accommodate for regulatory needs. Although, in this particular case the amendments might be politically motivated, given the time of its enactment and the underlying stimulus for reform being a controversial transaction by an ousted premier (SEC 2008, p.8).

B. (v) Duties prescribed for 'caretakers' in the law of succession.

Fiduciary duties in Thai civil law-based legislation has also been developed as a standard for the acts of those in the unique position of the confidante. Such laws can be codified to ensure that the entrusted party is acting in a way that does not counter the interests of the party who is the intended beneficiary. Another example is the provisions setting out the duties and liabilities of controller of property and administrators.

As it has been seen, such persons are appointed by provisions in the Civil and Commercial Code. An administrator is appointed where it is not possible to locate the legatee named in the will, where property is given to minors, the judicially incompetent, or where the heir cannot be found at the time of inheritance distribution. The duties and liabilities of a controller of property are set out in s.1692 of the CCC as "same rights and duties as the guardian within the meaning of Book V of this Code."

Unlike the provisions on the duties of a controller of property, the law prescribes more specifically that legal guardians are to use the assets held on behalf of the charge for the latter's maintenance and education (CCC: s.1598). The provision goes on to add a list of ways in which a legal guardian is permitted

to use the remainder of the funds that are being held for the benefit of his charge (CCC: s.1598/4). The source of the duties of a legal guardian in s.1598 of the CCC then states that legal guardians are subject to "the same rights and duties as a person exercising parental power as provided in section 1564 paragraph one and section 1567". An administrator, who is appointed where it is not possible to locate a legatee named in the will, is required to do "all that is necessary, to comply with orders, implied or expressed by the will" as well as "not to engage in any juristic acts having adverse interests to the estate" (CCC: s.1719). Administrators are subject to an expected level of care in relieving his duties, being in the "same level of care of a natural parent" (CCC: s.1722).

The duties prescribed by Thai law on administrators, legal guardians and controllers of property ultimately refer to the duties applicable to parents (CCC: ss.722, 1598 and 1692). These are set out in s.1571 of the Civil and Commercial Code as the duty to manage the child's property, with the standard of care applicable to that of the "ordinary prudent individual". As regards the duty of parents in Thai law, a point of note would be that there is a provision in the CCC expressly prohibiting a direct descendant from issuing legal proceeding against his or her parents for acts that breach the CCC (CCC: s.1702). The initial risk would be that the lack of a child's right to sue his parents renders the whole chain of law regarding the standard of care redundant. However, this may not be the case, since the nature of Thai civil law means that precedents have no binding rule on subsequent cases, but may only be used as a guideline for the award of remedy or for sentencing.

B. (vi) Civil law substitutes for the protection of "equitable" rights.

So far, a comparative analysis has been made between trusts in the common law system and Thai legislation, with the main theme for comparison being the functionally equivalent effects provided by Thai law. These are firstly the segregation of legal ownership and enjoyment and secondly the corresponding imposition of duties on the holder of the legal title (the pseudo-trustee). The final feature of trusts to be used as a theme for comparative analysis is the nature of the rights and remedies awarded, which differ between the two legal families.

There exists a fundamental difference in the conceptual foundation and philosophy underlying the legal structures provided for in each jurisdiction (Hansmann and Kraakman, 2002, p.34; Helmholz and Zimmermann, 1998, p.66). The common law jurisdiction of trusts evolved from a rich history of equitable rules and principles that are regarded as unique in their nature (Maitland, 1911). One of the results of the difference in conceptual rationale is the variation in the nature of legal rights of ownership in each jurisdiction. Where common law grants a higher or equal regard for proprietary rights that are of equitable origin, civil law does not recognise this priority, as it is contrary to the very nature of one of its own conceptual convention.

To explain, in civil law jurisdictions, a property right is held 'against the world', meaning that a right over property can be exercised subject only to a limit prescribed by law, or up until another person has a better claim. The principle of *Numerus Clausus* prohibits the creation of new property rights, unless through legislation. The principle of the Publicity of Rights also points out that, all property rights must be made known to others. There is an assumption that the right of possession equates to legal ownership, to contend otherwise, registration is required. It is why civil law right of possession cannot be regarded as separate from a property right over in property.

In Thai law, the principle of *Numerus Clausus* is enshrined in the Civil and Commercial Code, section 1298 states that "Real rights may be created only by virtue of this Code or other laws". In the context of real property, the principle is reaffirmed by section 1299 which states that no right over real property can be complete unless it is documented in writing and registered by a competent official. Against this generally strict requirement for registration however, there is an exception in the Civil and Commercial Code which allows for the legal recognition of unregistered ownership. This is the Law of Estoppel.

B.(vii) The codified Law of Estoppel.

Many cases in which the deceased made an *inter vivos* unwritten agreement or undertaking to allow for the use of land to another party can often result in the latter being unable to defend their right once the promisor is deceased. The strict interpretation of wills and provisions governing the distribution of legacy in the case of intestate succession (CCC: s.1621) often leads to the detriment of those who do not categorically 'fit' into the terms of the will, or the statutory class that is entitled to the legacy. In such circumstances, the English judiciary could appeal to the rules of Equity to forbid the unconscionable denial of an interest in land and imply that a trust had arisen, with the title deed owner as the trustee of the land, for the benefit of the occupants, or those using the land in reliance of a prior, informal arrangement. The notion of equitable ownership may be used to give rise to a resulting or constructive trust (*Dillwyn v. Llewelyn* [1862] EWHC Ch J67).

In Thai law, even though there is no prioritisation between the equitable and legal nature of remedies, the provisions on estoppel provide a remedy that in effect, allows what would be regarded as an equitable right in common law to have priority over legal rights. Section 1382 of the Civil and Commercial Code adopts the common law concept of estoppel, it provides:

> Where a person has, for an interrupted period of ten years in case of an immovable property, or five years in case of movable property, peacefully and openly possessed a property belonging to another, with the intention to be its owner, has acquired the ownership of it.

In effect, the provision potentially provides a right to apply for the legal validation of their right to occupy the land, as promised by the deceased. The promisee would then have to prove intent to possess the land, as well as open and peaceful occupation (CCC: s.1387). The effect of a successful application would resemble that resulting from the application of the English equitable doctrines of promissory and proprietary estoppel (*Dillwyn v. Llewelyn* [1862] EWHC Ch J67) (*Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB 130).

According to the English equitable doctrine, a beneficial right arises when it would be unconscionable for the legal owner to deny the right in property to another, when that other person has acted to their detriment, on the legal owner's assurance that they would acquire rights in the property. Three elements are necessary are firstly a promise of an unequivocal nature, secondly, an act in reliance of that promise by the promisee and finally, that it would be unconscionable to allow for the denial of that right (*Pinnel's Case*: 1602; *Hughes v. Metropolitan Rlwy*: 1877). The Doctrine of Estoppel is often confused with constructive trusts, as both are based to an extent on the operation of equity to deny unconscionability, and both give rise to a remedy that would afford the promisee a beneficial interest recognized in law. Nonetheless, it will be seen that in certain situations, some legal principles inherent to the civil law concept of rights means that the conceptual prioritisation of equitable rights over legal rights cannot be accommodated.

One such example is the Court of Appeal case in 1992[47], where the subject of dispute was the validity of a trust made in one of two testamentary wills created by a Swiss national resident in Thailand. The deceased had been estranged from the relatives from the first marriage for more than five years, and the condominium, which was part of the estate, was bought three years before his death and registered in his name, as he was the sole contributor to the deposits. However, the fact was that while his funds went towards the deposits, the widow had continuously contributed towards other every day expenses such as groceries, utility bills and even medical bills of the deceased. Moreover, the deceased and the widow had always lived with the understanding that she was to inherit the condominium in the event that he passed away, despite there not having been a formal transfer or registration in the title deeds of the condominium. The first will stipulated for the estranged son from the deceased's first marriage, residing in Switzerland, to act as the administrator and trustee of the estate. The second will stated that the son, as the administrator should hold the inheritance on trust for the deceased's surviving wife living in Thailand, as the sole recipient of the inheritance. The Thai court held that a trust set up in 1987 in the second of two testamentary wills was invalid under s.1686 of the CCC. As only the first will was valid in Thai law, the deceased's son became the sole recipient, leaving the intended beneficiary without a claim in her share. The wife of the deceased did not have a claim for estoppel under s.1382 of the CCC, as she had occupied the property for less than the prescribed ten years required by law. It might be argued that had the case been judged according to equitable principles, it would have been possible for the wife to

[47] Court of Appeal case 952/1992

obtain some form of interest in the inheritance. The intention to grant the widow rights to the deceased's inheritance was clear in the second will.

7.6 Trust-like practices.

As it has been discussed, in absence of the Equitable jurisdiction and the remedy of implied trusts, problems often arise as a consequence of the strict requirement of title deed registration characteristic of the land ownership regime in the Thai Land Code (1954). Additionally, the Land Code is worded in such a manner that it effectively prohibits the foreign ownership of land. It is in this area of law in which there has been a development of trust-like practices to allow foreigners to 'own' land and property in Thailand. The analysis of trust-like practices begins with an examination of the limitations imposed by the Thai Land Registration Regime, following which is an explanation of the ways in which legal and non-legal arrangements are made to overcome the restrictions. It will be seen that the limitations imposed on foreign ownership of land also reflects those imposed in Thai law on the ownership of company shares and the licensing of certain types of businesses. An example of the trust-like practice to overcome restrictions on foreign shareholding will be analysed in the high-profile case of the Shincorp nominees transaction, along with the criticism and protest it attracted from legal academics and Thai media. A comparison of these trust-like practices will then be made to the 'floating transfer,[48] a trust-like practice that is generally accepted and is used by Thai individuals beyond the purpose of foreign ownership. It is hoped that the analysis of the contrast between the general acceptance of the floating transfer and the stigmatisation of the use of nominees will pave the way for the extraction of what ideological values underlie a trust-like practice that is considered acceptable and one that is rejected in Thai law.

A. Trust-Like Practices Used to Overcome the Prohibition of Foreign Ownership of Land.

Despite the general view that the overall effect of the Thai Land Code (1954) prohibits foreigners from owning Thai land, there is no specific provision that states this outright. Chapter VIII of the Land Code (1954) is entitled "Limitation of Aliens' Right in Land". Section 86 provides that "Aliens may acquire land by virtue of the provisions of a treaty giving the right to own immovable properties and subject to the provisions of this Code". Up until the time of writing, no such treaty has been established and thus, no foreign individual has acquired land under the provision. The overall prohibition is endorsed by subsequent amendments to the legislation. As part of the national economic agenda to encourage economic recovery from the Asia-wide crisis which began in 1997, such amendments were made to

[48] See page 113

Chapter VIII of the 1954 Code aiming to relax the restrictions on foreign ownership of land (Land Code Amendment Act (No. 8) (1999)). Section 96 was added to extend the 'allowance' of foreign ownership of land. It states:

> The provisions prescribing the acquisition of land by foreigners by virtue of the provisions of a treaty under first paragraph of section 86 shall not apply to the foreigners who bring in the capital for investment more than forty million Baht as prescribed in the Ministerial Regulations whereas the acquisition of land for purpose of residence shall not exceed one rai and shall be approved by the Minister (Land Code Amendment (1999): s.96).

At the time of writing, there is no disclosed information on the number of approved applications for the residential ownership of land by foreigners under this section.[49] Other exemptions are aimed at larger scale investors, for instance, in industrial estates (Industrial Estate Authorities Act B.E. 2522 (1979): s.44) and in the extraction of oil and other natural resources, in s.65 Petroleum Act B.E. 2514 (1971). Thus, small-scale investors are left out of these privileges and also stand to face other limitations in the protection of their rights. Furthermore, there are no registrations of land ownership by foreign individual by virtue of the provision, and as such the overall effect remains that it is not possible under the Thai Land Code for a foreign individual to legally own land.

How then, has this been made possible? As has been mentioned, one way in which a foreign individual may 'own' land is by being granted a usufruct (CCC: ss. 1417 to 1428). Such a right is still more limited than a right recognised under English equitable principles in that the right terminates at the death of the grantee and must be registered on the title deed if intended to last over three years (Land Code (1954): s.12). A foreign national married to a Thai national would (usually) fund the purchase of property in the name of the wife, who then leases the property back to the foreign individual. Upon registration of wife's name on the title deed, the money used to purchase property must be shown to be from the wife, or the joint account (Land Code (1954): s.97). The main disadvantage in this arrangement is that such a lease is subject to 1.5% tax on the lease value (Land Tax Act B.E. 2507 (1964): s.35). Moreover, such a lease is required to be registered on the title deed of the property. Additionally, it has been practice for foreign individuals to hire a Thai nominee to purchase and register land under the name of the nominee. The legal consequence would be to the detriment of the foreign individual should the Thai nominee go back on the arrangement, as the Thai court would not recognise an arrangement that is considered to be contrary to another legal provision, that is to say, the Thai Land Code (1954). If the same situation were to occur in English law, the judiciary would deem this arrangement to give rise to a resulting or constructive trust, with the nominee regarded as the trustee, holding the property for the benefit of the foreign individual (*Gissing v. Gissing*; HL 7-Jul-1970) (*Morice v. Bishop of Durham* 1805 10 Ves 522).

[49] The Thai Land Department does not maintain a publicly accessible record for the number of approved applications made by foreign persons. A request for information was informally made to the Land Department of Thailand on 2 October 2011. No reply was given.

B. Use of Nominees in Land-Holding Companies.

Another practice that has been used to circumvent the prohibition of the foreign ownership of Thai land is the use of land-holding companies. This involves the registration of a limited company under Thai law with a structure comprised of a larger proportion of directors who are Thai nationals. The structure is to comply with the requirement in the Foreign Business Act B.E. 2542 (1999) (FBA), which deems companies to be Thai only where the proportion of foreign directors does not exceed 49% (FBA (1999): s.4(3)). As proof of ownership merely consists of shareholding certificates, there are two legal 'loopholes'. First, there is no specific requirement for the shares belonging to Thai nationals to attach to an equitably apportioned return and secondly, there is no requirement for a consequent amount of actual control by Thai nationals, for instance through votes, managerial or executive rights. Therefore, the Thai national directors will in practice have no involvement in providing money for the purchase of the property, and the management structure would be arranged so that the directors of foreign nationalities would have executive and managerial power. The use of land-holding companies was the most popular way for foreign individuals to hold Thai land, as it provided the latter with more security than the alternative of a simple, unofficial arrangement with a Thai nominee. However, such practice is illegal. Section 96 of the FBA prohibits the use of nominees by disallowing persons of Thai nationality or entities from holding land on behalf of a foreigner, with the penalty of 200,000 THB fine and/or up to two years imprisonment, and the consequent disposal of the land held (Land Code (1954): ss.96 and 113). Section 97 states that entities having more than 49% of their capital contributed by foreigners will be deemed foreign. At times, scam entities are created out of pre-signed company registration forms with the forged signatures of Thai nationals (Nikomborairak, 2006, p. 48) which would in consequence subject unscrupulous small-scale investors to criminal fines, possible imprisonment and the loss of the property (Land Code (1954): s.97).

C. Use of Nominees in Company Ownership.

The use of nominees to avoid foreign ownership restrictions is also popular in the context of avoiding restrictions imposed on the foreign ownership of Thai companies. This had become standard practice often by foreign investors who fell within the lacuna who are accustomed to the legitimate use of holding companies and complex business structures in other legal systems. As mentioned, the Thai Foreign Business Act 1999 prescribes a maximum threshold ceiling of shares that may be owned by a foreign person or entity as 49%. It also criminalises the use of Thai nominees to hold shares on behalf of foreign investors to evade the restrictions (FBA: s.36). This provision was never enforced until one politically controversial case. The scandal concerned some share transactions, which took place in early 2006, to

enable a Singaporean entity to gain a controlling interest in Shincorp, a high-profile holding company in the telecommunications sector, belonging to former Thai Prime Minister Thaksin Shinawatra. It was eventually found that two Thai nationals collectively holding 41.1% of the shares had received a loan from a Singaporean-registered company called Temasek to purchase shares in Shincorp as collateral and were therefore acting as nominees on behalf of Temasek, illegally under s. 36 FBA (Business Development Department, 2006).

The political controversy and backlash from the Shincorp transaction is documented in the eyes of the Thai media, likening the chief beneficiary of the deal, former Prime Minister Shinawatra, to "Saddam…for selling out the Thai nation" (Klampaibul and Matichol, 2006). In September 2006, shortly after the Shincorp transactions, a military coup was executed. The Junta formed the Council for Democratic Reform (CDR) and declared martial law. This led to the deposal of the PM, the dissolution of Parliament, and the abrogation of the Constitution. The CDR transformed into the Council of National Security (CNS) upon the appointment of a civilian government and a National Legislative Assembly (NLA), to perform the regular legislative functions of the House of Representative and the Senate. In November 2006, the NLA issued a Government White Paper setting out the necessary causes for the military intervention which listed out in key points the wrongdoings of the deposed Prime Minister. These ranged from allegations of corruption, human rights infringement, abuse of power and, under the heading of the infringement of ethics and moral integrity, the "selling of a satellite concession and a television station to foreigners", specifically referring to his interests in the Shincorp transaction (NLA, 2006). It included in on its legislative reform agenda, the need to address the legal loopholes in the FBA, as it was thought to be expediently in need of attention on "ethical and moral grounds" (NLA, 2006).

In summary, nomineeship that allows for trust-like arrangements to be made has been used to overcome the limits of the Thai legal system; a system which does not recognise a legal right over property or land that has not been created in accordance with legal formalities. While the floating transfer is commonly accepted and widely used, the use of nominees has sparked controversy among the Thai media and legal critics. The difference in the use of trust-like practices in these two instances is that there is stricter regulation of land and company ownership.

These trust-like practices, trust-like mechanisms in Thai law and the Thai judiciary's recognition of trusts in certain judgments that are sometimes made based on English trust law are the results of a comparative approach to looking at trusts in Thai law which reads beyond the letters of the TCMT Act as well as Thai academic writing on the subject. It reveals that prior to the enactment of the TCMT and thereafter, there is an existing, informal use of practices and mechanisms that are not based on the TCMT itself. A question to be asked is whether these alternatives are favoured over the mechanism provided by the TCMT and whether this forms part of the reason why no trusts have been established under the legislation. The question is later put to interviewees in semi-structured interviews. Additionally, these trust-like practices and mechanisms reveal that Thai people and the judiciary are already in some ways open to the possibility or the 'idea' of trusts, or at least, to certain arrangements or practices that function in the

same way English trusts do. What we can draw from the results of the comparative analysis is that there is a sense of receptiveness to the idea of trusts in the Thai mentality. The next chapter continues to explore more about the Thai mentality from the analysis of documentary data. It seeks to extract elements of the Thai mentality that is evidenced in folk tales and Buddhist teachings. The Thai mentality on trusts in Thai law itself will ultimately be drawn from the semi-structured interviews.

Chapter 8: Thai folktales and Thai Buddhist teaching: finding elements of the Thai Mentality towards trusts in Thai law.

This Chapter is intended to provide some of the data that is the background for the source of the Thai Mentality towards trusts in Thai law while elements of the Thai mentality itself is to be drawn from the semi-structured interview data. It is not intended to be a detailed analysis of literature on the areas. Although in-depth analysis of literature on both Thai folk tales and Thai Buddhist teachings would make for an insightful project, it extends beyond the scope of this research. An in-depth analysis would involve more reliance on theoretical analysis of documentary data and would go against the intentions of the adapted approach to the analysis of the TCMT 2007 and trusts in Thai law which is to focus on empirical data provided by the semi-structured interviews as opposed to a more theoretical approach used in documentary analysis.

The nature and characteristics of academic texts used in this research are self-explanatory. Buddhist texts included excerpts from the Tripidaka as well as authoritative philosophical writings explaining the core principles and teachings of the Buddhist religion published for the general Thai layman readership. As Buddhism is central to Thai culture and society, another relevant source of data for this research included Thai literary texts that were in essence, an interpretation of the core guiding principles of the Buddhist religion. Literary texts used for the research included a selection of pieces from a body of writing in the Thai language. Thai literature is based mainly on religious teachings of not only Buddhism, but also on Hindu, Brahmin and Khmer beliefs that are essential and component influences on Thai culture and traditions. As Thai literary pieces were fostered and written mainly by the higher classes of Thai society (Satawetin, 1974, p.12; Senawong, 2006), this research also looked at traditional Thai folklore. In this research, Thai Folklore denotes usually unwritten stories depicting traditional local knowledge and teachings based on moral or religious principles (Satawetin, 1974; Na Thalang, 2001).

Thai folklore was used as a source of data for analysis to enable an understanding of the influences on the Thai mentality that is not limited to the upper echelons of Thai society. Thus, the first reason for using Thai folk tales as a source of data was the reach of such tales within the Thai society. In comparison to the official publication of legislation in the Government Gazette, Thai folktales have an entertainment value and are easily understood and eagerly passed through generations (Satawetin, 1974, 15). Although the Thai societal structure was subject to significant changes in the last two decades of urban development, city-bound migrants still maintained a close bond with family members still resident in the rural areas (Aimpradit, 1996; Engel, 2001) . Migrant workers often send children to be raised by grandparents in the countryside, meaning that folk wisdom continued to be passed to all members of society, regardless of locality and changes in socio-economic status.

Secondly, the teachings of folklores are principles that are universally applicable to all levels and types of society. Stability is cited as the second main reason for using folk tales as a source of data for

analysis. As Shytov (2005) suggests, the general moral principles contained in the folktales are less likely to stray or be misinterpreted due to the fact that such principles are in essence, an expression of natural law. Folklore teachings contain the three crucial elements that under Natural Law principles, legitimise their legal authority. As Aquinas expresses, these laws should give order to the common good; law was not made in excess of power and should proportionately and equitably distribute burdens among citizens (Aquinas in Feddroso, 2009).

Finally, although folk wisdom is sufficiently stable (Satawetin, 1974), their unwritten nature means that they are also adaptable to the changing attitudes of society. This enables an analysis of how social perspectives and interpretations of moral principles change in response to shifting societal norms and practices.

It is noted that the choice of folktales used in the interviews are limited. This limitation was intentionally based on the references made in pilot interviews by a number of candidates who specifically referred to one character in the Thai folk tale of Sri Thanonchai as having characteristics that in their views relate to their perception of a middleman who would be in the position of a trustee. Both the pilot interview questions and the semi-structured interviews were set to ask candidates about other, similar Thai folk tale characters and narratives. However, they were either not as well-known to the interviewees, or the interviewees identified no other character or story as having as definitive a characteristic to be attributed as a Thai "folk hero". The use of Thai folk tales in this study is therefore aimed to explain more about the character and how Thai people identify him and his traits as being firstly, a definitive of a typical Thai folk hero and secondly, definitive of a successful middleman which in the perception of the interviewees was fundamental to their choice in using trust-like mechanisms. Despite the limitations of the variety of folk tales presented in this dissertation, it is hoped that the choice of folktale points out to the timeless nature of the Thai folk tale of Sri Thanonchai and its relevance to Thai perceptions and understanding of law and society. It is hoped that this data will contribute to painting the wider picture of the Thai cultural and social attitudes. It is suggested that these cultural and social attitudes should be taken into account by academics seeking to apply the legal transplant theory in the analysis of the import of laws into the Thai legal system, as well as by legislators and policy makers in the practice of introducing a foreign legal concept into the Thai legal context.

As the theoretical approach to analysing the Thai Trusts for Capital Market Transactions Act 2007 (TCMT 2007) was not sufficient to understand why no trusts had been enacted for almost up to a decade after the entry into force of the legislation, it was necessary to look into the more cultural and social aspects of the phenomenon. By doing so, the research was adapted to look into elements of the Thai mentality towards trusts in Thai law that could point out to what social, cultural attitudes that were specifically 'Thai' in nature, could have an effect on why trusts were not created under the new legislation. Two specific sources from which elements of the Thai mentality towards trusts in Thai law is to be drawn have been selected based on initial pilot interview data, these were firstly, Thai folk tales and secondly, Thai Buddhist teachings. The first part of the chapter will therefore provide some background to the choice

in using Thai folktales and will provide some samples of the stories of Sri Thanonchai. The second part of the chapter will provide some of the Buddhist teachings that have been adapted to the Thai audience in the specific areas that have been identified as a prevalent theme in the pilot interviews.

8.1 Thai Folk Tales.

The main folk tale used for this analysis is the stories of Sri Thanonchai. According to academics of Thai literature, there is no known official record of the dates of origin of the tales of Sri Thanonchai, with some academics roughly dating the origin of the stories as having been first told during the Ayutthaya period (1351-1767) (Ngarmlua, 2015; Sriwarakan, 2005; Worawan, 1999). The tale is composed of short stories detailing the deeds of a protagonist named Sri Thanonchai who was a commoner who later came to be favoured by an imagined King because of his main personality trait of cunning and wit. The character of Sri Thanonchai and the stories are well known in several regions of Thailand as well as its neighbouring country of Laos and is known by different names such as "Chiang Miang" or "Xiang Miang" in the Thai Northeastern provinces (Tipaya and Thongthep, 1991; Sriwarakan, 2005; Worawan 1999). The stories were originally passed on orally and were later composed as verses in several versions. They detail the life of protagonist Sri Thanonchai from birth, his rise to popularity upon becoming favoured by the King, and his eventual death when he was defeated by his own cunning deeds. The content of the stories themselves vary in detail but share a common theme of portraying the protagonist as a trickster who deals with adversaries or overcomes challenges through his use of wit. The stories told and texts contain mostly semantic word play. The 'tricks' played by Sri Thanonchai are retold in the form of linguistic manipulation by 'playing' words in their literal sense and by "a devious and unusual association of things that are commonly not related" (Ministry of Culture, 2015). The tales portray Sri Thanonchai's victories over his adversaries by way of making the "lose face" or outwitting them, as opposed to physically overpowering them. The following are some excerpts of well-known stories of Sri Thanonchai.

Sri Thanonchai, the Old Man, and the Ducks.

An old man wandered by a lake one afternoon. In the lake, there was a brace of wild ducks. At the side of the lake, he saw a grown man wailing in anguish. This man was none other than Sri Thanonchai. "What's the matter?" he asked. "What I do not want, I always receive." Sri Thanonchai replied, pointing to the ducks. The old man thought carefully, hoping to benefit from the situation, he offered Sri Thanonchai some money for the ducks. "If it pleases you, I will take them away from you." he said, offering him a small amount of money. Sri Thanonchai looked at the money and replied, "With that small a sum, I'd rather they fly back to the heavens." The old man then offered more money, which Sri Thanonchai promptly accepted

then simply left, leaving the old man to chase after the brace of wild ducks which Sri Thanonchai did not own to begin with. Sri Thanonchai had gained money from nothing.

Sri Thanonchai and the King by the Pond.

One day the King was strolling in the royal gardens. As he reached a pond, he saw the infamous Sri Thanonchai and decided to test his wit. "I will bet that you cannot persuade me to step into that filthy pond" he said. "No, your Majesty." Sri Thanonchai replied. "I can, however, certainly persuade you to remove yourself from the pond. The King, wishing to defy this, took off his royal garments and promptly stepped into the pond, to which Sri Thanonchai replied, "you see, Sire, I have succeeded in what you have said I could not". The King then stepped out of the water graciously, pleased with the wit of Sri Thanonchai.

Sri Thanonchai and the Cat.

Sri Thanonchai quickly became one of the King's favourite subjects because of his cunning and wit. One day, the King decided therefore to gift Sri Thanonchai some land. "How much land will you want, Sri Thanonchai?" asked the King. "Sire, I will take only enough land for a cat to die on." With this, the King laughed and graciously accepted Sri Thanonchai's proposal. He then proposed the measure be made using an old, dying cat. Sri Thanonchai then tied a large ball of string to the old cat and let it roam. It was after 5 Days and 3 weeks when the cat eventually died. During this time, Sri Thanonchai kept adding more string to the original ball, as the cat a roamed quite freely in the municipality. He then approached the King. "Sire, the cat has died, and with it I will please claim the 10 Rais (4,000 square meters) it has died in." The King approved.

The Fall of Sri Thanonchai.

Sri Thanonchai was a crafty man who had a good life without putting in much elbow grease. One day, he went to visit an older woman by the name of Sa. He asked Sa if he could borrow some money for a period of time, promising to pay her back interest. Sa, knowing of Sri Thanonchai's reputation as a well-off man, was surprised at this request. Sri Thanonchai explained to her that the money was to be used for an unexpected expense. He assured her that he would pay of his debt within a specific period of time. Sa asked when this was. Sri Thanonchai replied "I will give you all that I have promised when there have been two full moons". Knowing Sri Thanonchai to be a man who is capable of shrewd dealings, Sa came to the

conclusion that Sri Thanonchai must have had a great need for her sum of money and that in giving such specific terms, the arrangement was probably sound.

After the passing of two full moons, Sa went to see Sri Thanonchai to collect the money and the interest he had promised. Sri Thanonchai replied "two full moons have not yet passed, madam."

Sa was confused by this, but thought she had miscalculated, giving him the benefit of doubt and waited until another full moon had passed to return to Sri Thanonchai to collect her debt. This time she was certain that no less than two full moons had passed, and the terms for the repayment of her loaned sum were met. Upon seeing her return, Sri Thanonchai greeted her warmly. "You have come to seek repayment, I see?"

"Of course, Sa replied. Two full moons have passed in a row, I am quite sure of this." Sa said.

"How many moons did you see when you looked up at the sky?" he asked.

"One" she replied.

"You are mistaken as to the terms of repayment we have agreed. You see, I said I will repay you when there are two full moons, not when two full moons have passed consecutively." He saw that Sa looked puzzled and proceeded to assure her that if she were to bring the case to any judge, the wording of the agreement would be so clear that he would win.

Sa was dumbfounded. As she walked home, she cried. On her journey, she came across a monk who took pity on her and asked what was troubling her. Sa explained her situation, that she had no experience with such dealings and was concerned that Sri Thanonchai was probably right.

The monk then went to a court official and explained what had happened. He requested that a trial be had at the royal courts on the evening of the next full moon. Seeing that the case was strange in nature and that he wished not to decline the requests of a monk, the court official agreed.

Sri Thanonchai, Sa, the monk and a judge therefore met together in the royal courts by the pond on the evening of the full moon. Sri Thanonchai then went on to explain the case and his specific terms of repayment. He was so assured by his cleverness that he began to mock how not even a monk so learned in the principles of Dhamma could escape his terms. "An agreement is an agreement." He said. "It shall of course stand, word for word." He insisted. The judge also knew that word for word, the case could not be swayed in favour of Sa. He silently looked to the monk for help.

The monk then calmly said to Sri Thanonchai, "Look up at the sky young man, and tell me what you see."

Filled with confidence, Sri Thanonchai looked up at the evening sky and replied "I see one, bright shining full moon, sir. Just the one on its own."

"Now, young man, step up to the pond." Said the monk, "and tell me what you see."

Sri Thanonchai stepped up to the pond, peered into the water and became dumbfounded at what he saw in the reflection. "I see the moon." He quietly replied.

"Now you see." Said the monk. "Tonight, two full moons can be seen. I believe the terms of repayment of your debt has been fulfilled."

The judge, relieved, hastily agreed with what the monk had said and passed a judgment on the case. "The case has been decided. There are two full moons and, according to your terms, Sri Thanonchai, you must repay Sa in full at once with the interest promised."

Sri Thanonchai, defeated, repaid the money and the interest in full to Sa. It was the first time in his life he had been outsmarted. It was rumoured that because of the defeat that night, his heart slowly broke and never again did he try to outwit others. It was also rumoured that he later died of a broken heart, not because of his love for a woman, but because of this very defeat.

According to Thai literary academics, the stories of Sri Thanonchai are embedded with the commonly held attitudes on the important use of wit and intelligence, interpersonal conflict, social values, and the shame of "losing face" (Ngarmlua, 2015; Worawan, 1999). Thomas (2002) also suggests that Sri Thanonchai was and remains to be widely received by the Thai audience firstly because of the comic relief element of the stories. The use of linguistic puns provides a form of "relief from social tension and stress" (Thomas, 2002, p.1) Secondly, it is suggested that the popularity is partly due to the social class of the protagonist. The tales began depicting Sri Thanonchai as a lowly servant boy of a temple who later came to be popular with the King because of his cleverness and was rewarded with a role in the courts, riches and a higher position in society (Worawan, 1999; Ngarmlua, 2015).

The relevance of the stories of Sri Thanonchai for this research is that the stories provide examples of the character of Sri Thanonchai typifying a Thai hero as a person who, through cunning and wit is able to attain the most personal benefit while putting in the least effort. These traits have been identified by interviewees as typical to a person who is successful in business, such as a person who would be in the position of a trustee and therefore not worthy of their trust.

According to one social commentary regarding 'characteristics of Thai people that hold them back from development', Thai people are regarded as having certain negative traits. Among other traits of not knowing their civil roles and duties; not having a competent level of English for communication, having an inability to plan ahead, one of the main negative traits cited was "heralding those with money and power without looking at his or her background and whether such wealth was gained through honest means" (Kommadit, 2013). In terms of feedback from the interviewees on this point, when asked what characteristics she thinks a successful wealth manager has, an interviewee who is a personal asset

manager expressed. "In my experience, I think... well, my clients expect a successful asset manager to be someone who is able to come up with the highest yields... The best ones will do the least work, of course" (OT1). Another interviewee, who is an heiress of an inheritance agreement, said that in her view, "the best inheritance managers will do anything and everything in between to get the most out of what they are given and leave the rest to you" (OB2). An interviewee who is a financial brokerage advisor in the Thai Stock Exchange said, "As far as I see it, the Thai model of "cleverness" is a person who is like Sri Thanonchai: a person who makes the most amount of money from the least amount of work" (OT4).

Two points are of relevance to the portrayal of the protagonist's characteristics of cunning and wit as an attribute that is widely accepted in Thai culture. Firstly, what it is interesting to note is that little or no sympathy is given to the victim who is subject of the cunning tricks of the protagonist, as Worawan notes "Anecdotes generally portrayed a world where individuals habitually tricked each other. There was no sympathy for the duped; if he suffered, it was to his own dismay and others' amusement" (Worawan, 1999, p. 11). Interview participants expressed that in their view, this partly forms the reason why interviewees are afraid to trust a person who is regarded as a successful manager of assets to manage their personal wealth. As an interviewee who is a widow of an inheritance agreement (OB1) expresses, "If I trust a so-called star broker, and if he does away with all my money, then what am I to do? It's bad enough to let other people know I fell for his words. Would I have the face to ask a lawyer to get my money back? For me, personally, I'd feel too ashamed." Another interviewee, who is a financial investment analyst and currency trader (OT6), said he thought that "the judge would probably not have sympathy if I were to be tricked by someone who is well-known as a crafty businessman."

The second point of interest in the acceptance of the Sri Thanonchai's characteristics of cunning and wit in Thai culture is that the stories depict even the King, who is socially revered and respected, as a victim. It is argued here that portrayal of the King as a victim of Sri Thanonchai's pranks also out a sense of challenge to established sources of authority. In fact, it was found that legal academics have also expressed that this view of the use of wit and linguistic semantics is also common to the interpretation of law (Uwanno, 2015; Shytov, 2005). Uwanno (2015) commented in an interview on the problems with Thai culture in politics:

> Compared with other nations, the Thai Constitution is lengthy and detailed. But still, it leaves room for interpretation. It is lengthy because the drafters have attempted to prevent Sri Thanonchai-style interpretations. The reason why the Tales of Sri Thanonchai are so popular reflects a certain point of significance in Thai society... that Thais like to use a very literal interpretation of legal texts to make them sound in a way which benefits the reader. That is why the constitution is so lengthy... . to prohibit specifically this type of behavior. The immense popularity of the tales of Sri Thanonchai speaks volumes about how Thai people give great appreciation to the use of wit and cunning to turn what they say to make it sound as though they

> are in the right, otherwise the tales would not, even now be so well known to so many people (Uwanno interview in Ngarmlua, 2015, p.2).

As Uwanno (2015) expresses, this use of cunning and wit is generally accepted in Thai culture not only in the context of being a successful businessman, but also in using semantic wordplay in the interpretation of laws and legal rules. One interviewee who is a district attorney (IR8) expressed "The most successful lawyers, are the sneakiest ones. I think this is a common thing, is it not in England?" Another interviewee who is a retired judge of the Thai Constitutional Court (IR9) said "Lawyers will try to read the law and bend it. I cannot give you any examples of this at the moment, but I have seen this in the past, and it's childish and absurd."

To conclude, it is argued here that Thai people have a tendency to regard wit and cunning as indispensable characteristics of folk heroes, and a person who is able to use cunning and wit to their benefit is regarded as admirable. This reflects one of the values held by the ordinary people. It is argued that perceiving such a trait to be admirable consequently leads to an inner, conflicting sense that makes it difficult for Thais to entrust their personal wealth to a person who, despite being skillful in some way, would not hesitate to use their wit and cunning to take their wealth. This general adherence to the belief that successful middlemen, or people in the position of trustees, are cunning is therefore an aspect to take into account when constructing a picture of the Thai mentality towards the lack of trusts under the Thai Trusts for Capital Market Transactions Act 2007.

8.2 Buddhist teaching and philosophy as a source for the Thai mentality towards trusts in Thai law.

The first part of this section discusses Thai Buddhism as a chosen source for elements to construct a Thai mentality towards trusts in Thai law. It is the predominant religion among the Thai population and has been since the time of the earlier Thai nation-statehood and throughout its modern history (Kruangarm, 2000; Huxley, 1996; Sucharitkul, 1998). Buddhist principles play a fundamental role in the formation of Thai customs, rules and practices that are highly influential to the composition of the earlier Code of the Three Seals alongside Khmere-Hindu influences (Ruanglikit, 1998; Huxley, 1996). Buddhist philosophy and belief have also played a major role in the interpretation of Thai laws, especially for the layman (Huxley, 1996; Sucharitkul, 1998). The second part sets out the scope of the teachings and philosophies that are covered by this research. These are Buddhist teachings and philosophies on material possessions and wealth, the sufficiency economy theory, and the Buddhist philosophy on karma. The section below discusses a selection of Buddhist philosophies and teachings that are of relevance as a source for the Thai mentality influential to the lack of trusts under the TCMT 2007. The selection is based on some common suggestions and themes gathered from the initial pilot interview of participants for their views on trusts and Thai society.

A. Buddhist philosophy and teachings on possessions.

The aspects of Buddhist philosophies to be discussed under this section are those that are of relevance for this research. This includes firstly, philosophies regarding material possessions in Buddhism, which are split into the core philosophies applicable to monkhood and teachings that are followed by laypersons regarding possessions and philosophies and teachings regarding possessions and wealth. Secondly, this section discusses the adaptation of the Buddhist philosophies on possessions and wealth of the layperson to modern economic conditions, i.e. the Sufficiency Theory.

B. Core philosophies regarding material possessions in Buddhist Monkhood.

The Buddhist stance on the ownership of material possessions was one of the main focal points of the tale of Prince Sitatha in the Chavedaka Tales. These tales provide a narrative the past incarnations and life of the founder of the Buddhist religion and are intended to provide a model for the conduct of the Bhuddist (Kennard, 2014; Willemen, 2009). The last story of the set, Buddhacharita (Acts of the Buddha) consists of the biographical tale of Prince Sithatha, who is to become Lord Buddha, the founder of Buddhism. The tales depict the deeds of the prince leading up to the stage of enlightenment. Several versions of the story exist and have been written down in Sanskrit and Pali languages in the period dating from the 2nd Buddhist Century. In most versions, the first part focuses on the character of the prince, who is depicted as semi-divine. They tell of miracles and omens surrounding his deeds, after having achieved lower levels of enlightenment in his previous incarnations. The second part of the tale focuses on the teachings of Lord Buddha, who Prince Sithata transforms into after attaining the enlightened state of nirvana. It is these teachings which form the core edicts of the Buddhist religion. The version believed to influence the Thai sect of Hinayana is believed to be the one written by the Indian philosopher Asvagosa (Willemen, 2009). It tells a story of the deeds of the prince prior to reaching the state of enlightenment of Nirvana, and one of the most fundamental acts of Prince Sithatha was to abandon the privileged life of a prince to seek wisdom and solace in the woods. The tale depicts the court in which the prince grew up as one from which the elderly, ill and the dying are removed so that it would consist only of young and pleasant-looking courtiers. The result of the conditioned surroundings was that in the world in which the prince lived, he knew not of old age or illness that was but a natural part of human suffering. Even the prince's parents are not spared from banishment, and upon noticing their absence, the prince ventures outside of the palace walls to seek his missing mother. Upon finding her, he discovers human suffering for the first time. With this realisation, the prince decides to leave the facade of the court, including his title, wife and son, and all material possessions, in an attempt to find a way to end human suffering. The act of abandoning his princeship in itself is depicted to provide a model for the monastic lifestyle of the Buddhist

monk and ultimately, for monastaic edicts of the Buddhist religion, 'Vinaya'. As Kennard (2014) puts, the life of a monk is:

"one of an ascetic, devoid of all worldly attachments and property, because such things engender grasping, which is the underlying cause of all human suffering". It has also been regarded as an act to caution Buddhists against the attachment to all physical and material matters. It forms part of the principle of Buddhist principle of 'Oupathana', or attachment, to the four ills of material things, conviction, intoxicating beliefs, and the self, which are the roots of suffering (Kennard, 2014, pp.11-12).

These Religious rules of conduct contain the core teachings of the Buddhist faith. Among other Buddhist teachings, Lord Buddha had laid down the essential guidelines of how to behave when ordained into Buddhist monkhood. These are loose rules of conduct for novices[50] and monks to abide by, in order to ensure that as a representative of the Buddhist religion, the monk or novice acts in a way that inspires faith among both Buddhist and non-Buddhist people and ultimately, to achieve the state of Nirvana. In addition to the five precepts which are the core set of rules to be abided by people of the Buddhist faith, it also sets out other guides of conduct in order to help the monk or novice to refrain from worldly temptation. One of these includes: "You must not revel in the satisfaction of your hunger. Do not reject food merely because it suits the tongue. Do not be gluttonous. Waste not, and save for when you do not have food" (The Vinaya pidaka (undated): Vin books I and II).

Despite that Buddhist view on property is one of limitation and subsistence, the monks depend on Dana (giving) which creates good karma. What Kennard (2009) points out as a symbiotic relationship. By analogy, monks are by duty, encouraged to avoid possession of material goods and are heavily reliant on monastery hands who look after monastery property. Theoretically, the Vinaya rules which are the strict practices observed by monks also state that ordained monks are not to touch gold. Interpreted in the strictest sense, this has been observed as not allowing ordained monks to handle currency (Terwiel, 1979; Winzeler, 2016). In reality, only some monasteries observe this rule to the strictest sense and for those monasteries which do observe this rule, there are lay helpers who accompany monks in their day-to-day activities who carry the currency and handle it on behalf of the monk. Interestingly, interviewees have observed that this act in itself is much like a trust (IR6, OB1, OT8). As the interviewee who is a district attorney (IR6) states, "In the most theoretical sense, if a trustee is someone who handles money on behalf of another person, then, am I correct in saying that the Sittya (the layperson who accompanies the monk) who goes on errands and carries the 'monk wallet'... his trustee? I'm not sure what the formal rules are on that, though."

In addition to the Vinaya rules intended for monks, interviewees (IR7 and IR8) have also pointed out to Act on Sangha (No.2) B.E. 2535 (1992). Section 31 of the act states that a temple is a juristic person, and paragraph three states that a Rector of a temple is a representative of the temple in civil and

[50] Novice is a term for a boy of young age who is ordained into monkhood

commercial dealings of the temple. Two interviewees who are district attorneys likened the role of the rector to one of a trustee (IR7 and IR8).

Further research reveals official guidance of the Thai Land Department directed at its officials in the registration of land that has been gifted to monks and temples which states that a rector of a temple is a representative of the temple. In doing so, it states that monks who have been gifted land have a legal duty to register deeds of ownership under the name of the temple under sections 31 and 45 of the 1992 Act. The Guidance prohibits any monk, including the Rector, from personally taking ownership of land gifted to the temple (Land Department 1999, MIN 0710/c16687, at 2 and 3). Analysis of the ownership structure shows that as the monk or the Rector does not have legal ownership over gifted land, the arrangement is not one directly equal to that of a trust. However, it is interesting to note that the Guidance prescribes duties under the 1992 act that are very similar to those of a trustee. It states that as a monk is an official under the 1992 act, he would be acting in breach of his official duties if he were to hold gifted land in his own name or refrain from having gifted land registered in the name of the temple (Land Department 1999, MIN 0710/c16687 at 4 and 5). It might be said however, that such duties equate to the duties of an agent by law as opposed to a trustee as there are no definitive rules on tracing of trust assets where a monk acts in breach of his legal duties. The Guidance only states that should a monk personally benefits from land under his own name, he is liable to criminal penalties under sections 147 of the Thai Criminal Code (1956) which states a penalty of imprisonment and/or a fine.[51] Furthermore, documentary research reveals one case where the court has imposed duties of an agency on a rector under the 1992 Act, where a rector has been found to abscond funds belonging to a temple (Court of Appeal decision 3699-3739/2541 of 1998). However, the case was overturned on the facts. Due to the contestable nature of the binding force of judgments in the Thai Civil legal system, Thai legal academics have found it not to have established a definitive rule on the legal status of rectors as agents in relation to the handling of temple possessions (Chutochana (undated); Sethbunsang, 1999).

B. (i) Buddhist philosophies on material wealth and possessions.

According to fundamental Buddhist philosophy, property in itself is viewed neither negatively nor positively, as Buddhist philosophy regards all material matters as merely an illusion which will cease to accompany the spirit after death. In Buddhist philosophy, it is only the good or bad deeds committed during the lifetime which will ultimately, determine the spiritual fate. As such, ownership of possessions

[51] Thai Criminal Code (1956) Section 147. Official Misappropriation
Any official charged with purchasing, manufacturing, managing or keeping anything, dishonestly misappropriates the same for his own or the other person, or dishonestly allows the other person to misappropriate the same, shall be punished with imprisonment of five to twenty years or imprisonment for life, and fine of two thousand to forty thousand Baht.

tends to be viewed with a negative connotation for the clerics of the Buddhist religion (Sethbunsang, 1999; Sizemore and Swearer, 1990). However, for those who are not ordained, the Buddhist stance towards possession is not always typically negative. Other teachings exist for the non-ordained which provide a model on how to manage worldly possessions. These are teachings in the Utthathikashanasustra which exist in the Tripidaka and contain core philosophies for the daily life of the lay Buddhist. Three specific sets of teachings are selected based on feedback from the pilot interview sessions, these are firstly, the philosophies on the accumulation of wealth (Hua Jai Setthi), the philosophies on the management of accumulated wealth (BhokaVipaka 4) and the philosophies on the expenditure of accumulated wealth (BhokaThiya).

B. (i) a. Philosophies on the accumulation of wealth.

The Buddhist philosophy on the accumulation of wealth is also known in Thai as the Hua Jai Setthi, meaning the heart of a person of wealth. It contains four tenets that are to help guide the Buddhist layperson. The first states that one should earn money through honest means. This is said to prohibit not only gaining money through illegal means but also through immoral means even though not prohibited by Law (Niwittooratorn, 2009). The second edict specifically states that all money gained should be "saved, and not spent lavishly, without knowing the worth of the money earned". The third edict states that one should find friends of moral standing who would not persuade others into lavish expenditure. The fourth edict states that money should be managed according to the middle path, meaning that a person should find a balance in spending money earned neither lavishly or too frugally.

B. (i) b. Philosophies on the management of wealth.

Philosophies on the management of wealth (BhokaVipaka 4) contain a set of three principles to guide the Buddhist layman in the management of their earnings. The principles direct money to be segregated in to four parts and used according to the three principles. The first principle states that one part of money should be spent on subsistence of oneself, one's family and those who have raised them such as their ancestors. The second principle states that two parts of earnings should be used as capital in earning a living. Academics explain that the second principle devotes two parts of earnings to be segregated for use as capital, where the first part should be used to sustain the ability to earn wealth, and the second should be used in cases where the first part fails (Niwittooratorn, 2009; Puntasen, 2008). Niwittooratorn (2009) gives an example of segregation of the two parts for use as capital. "If the first part is used to buy seeds and the crop fails due to bad weather, a person may use the second part that is

segregated as capital. The third principle states that the other part of earnings should be saved for other necessary and unexpected circumstances.

B (i) c Philosophies on the expenditure of accumulated wealth.

The philosophies on the expenditure of accumulated wealth (BhokaThiya) contain five principles. They are intended to provide guidance on how money earned through an honest living should be expended. The first principle states that money can be spent as cost of living to maintain peace and happiness within the immediate family, including a person's mother and father. The second principle allows money to be spent to bring happiness to friends as well as colleagues who help earn money, whereas the third principle states that money can be spent to prevent harm and danger to life and to ensure welfare at work. The fourth principle states that money can be spent for charitable purposes (Dana) for relatives, to accommodate guests, to make merit for ancestors in their afterlife, to fulfill official duties such as tax, and for religious worship. Finally, the fifth principle states that money may be spent to support the Buddhist institution, such as for the welfare of monks and the maintenance of Buddhist religious structures.

B. (ii) Analysis of the Buddhist philosophies on possessions.

The core Buddhist stance on possession, property and wealth as worldly matters which will not pass onto the afterlife is reflected in one interviewee's statement. When asked what one interviewee's position on the investment of funds was, the interviewee replied:

> I don't know. There is always a part of me, I think, that feels that whatever I do while I am alive, however much money I earn, I cannot take it with me beyond death. I think... owing to that sort of reasoning, I would not worry too much about riches because maybe, in the future, I will reincarnate and have at least one more chance in my next reincarnation" (OB1).

Although not all interviewees shared this view in a literal sense, others also expressed that in their opinions, property was viewed in Buddhist belief as worldly and therefore did not ultimately contribute to the attainment of the highest point of the religious beliefs, which was the state of Nirvana (OB2, IA3). Others believed Buddhist philosophies frowned upon over-accumulation of possessions (IR9, OT4, OT2). As one interviewee who is a financial brokerage advisor (OT4) comments "Buddhism doesn't like riches. You are supposed to live moderately, like monks" (OT4). It is to note that the philosophies on the accumulation and expenditure of wealth are attuned to devoting efforts to gaining wealth in moderation and expending wealth for specific, moral needs and to satisfy personal well-being, as opposed to

indulgence. This was also the general view shared by interviewees. When asked whether they knew of any Buddhist teachings regarding personal assets, most replied that Buddhism teaches its followers to spend earnings according to the middle path (IR9, IAR4, IA3, OB2).

There is also an absence of directive to encourage profit making in the philosophies on the management of wealth. It is to note that teachings do provide a directive for using accumulated wealth as capital for making a living. As Essen (2010) puts "surplus wealth is necessary to make more merit or good karma" (Essen, 2010, p.11). Nonetheless, the second principle regarding the expenditure of accumulated wealth states that earnings should be segregated into two parts to be used as capital (Niwittooratorn, 2009) and suggests the dedication of the other part as a fail-safe points to a lack of encouragement for funds to be used for gaining more profit. Interviewees also share the view that there is a lack of directive in the Buddhist teachings to encourage the use of earnings to gain a surplus of wealth in the capitalist profiteering sense (IR9, IA3, OB2, OT8). One interviewee who is a senior judge at the Thai Constitutional Court (IR9) said "Buddhism is about being frugal with money. If I remember correctly, even the parts on investment say that earning too much is a bit of a sin because it's 'overdoing it'... not following the 'middle path' and such" (IR9). Despite a lack of directive to invest accumulated wealth to make profit, the philosophies do provide for the expenditure of wealth for the care of relatives. The first principle on the expenditure of accumulated wealth states that money can be spent as cost of living to maintain peace and happiness within the immediate family, including a person's mother and father. Interviewees are of the opinion that this may be the reason why familial trust-like arrangement such as the Chinese Kongsi was well-received in Thai society (OT8, IR8, IR10, OB3). One interviewee who is an informal investor on behalf of friends and family (OT8) said of their arrangement to invest on behalf of family members "was one that took care of the family, as opposed to a grand-scale, rampant profiteering investment that would probably not be very Buddhist."

C. Sufficiency Economy.

It is argued here that there is one other strand of thought based on Buddhist philosophy which may be a source of influence to the Thai mentality towards trusts under the Trusts for Capital Market Transactions Act 2007. The said strand of thought is the philosophy of sufficiency economy that became popular in Thailand due to the East-Asian economic crisis in the late 1990s. The philosophy is said to be founded by King Bhumibol Adulyadej of Thailand (UNDP, 2007; Puntasen, 2004; Piboolsravut, 2008; Essen, 2010). Although His Majesty had been promoting self-reliant farming since the 1950s, academics cited the idea of sufficiency economy as taking form in His Majesty the King's speeches during the 1970s (Piboolsravut, 2004; Essen, 2009; Chaipat Foundation (undated), accessed January 2015). It is a contemporary adaptation of the core Buddhist principles on moderation and the middle path. The core tenets of the philosophy of sufficiency economy are moderation, reasonableness and self-immunity.

Under this philosophy, moderation means conducting life according to the Buddhist middle path that is not excessive and not too frugal. In explaining the first concept, the King elaborated "Being moderate does not mean being too strictly frugal; consumption of luxury items is permitted... but should be moderate according to one's means" (King Bhumibol speech on the 4th December 1998, quoted on the Chaipat website, accessed 4th January 2015)". The second tenet of reasonableness means choices are to be made rationally, considering the outcomes and the factors involved. The tenet of self-immunity means risk management, or planning to be resilient against internal and external circumstances such as social, cultural and environmental change. Under the philosophy of sufficiency economy, the three tenets are to be used alongside two further qualities, which one should develop and foster. These are knowledge and virtue. Knowledge means that one should acquire the knowledge and understanding in making one's living and the constant social, cultural and environmental changes, while virtue consists of honesty, patience, perseverance.

The philosophy of sufficiency economy was later adapted to help farmers cope with the East-Asian economic crisis in 1997. It was publicly introduced as the "New Theory" in his annual birthday speech on December 4, 1997. Later, it was incorporated as a central philosophy of the Ninth National Economic and Social Development Plan of 1997-2001 (NESDB 1997). An example of the New Theory can be seen in the suggestions for the segregation of land for personal use by the National Economic and Social Development Board in its introductory paper on the New Theory (NESDB 2005).

The first stage of the New Theory aims to create self-reliance and self-sufficiency at the household level; the so-called self-sustaining agricultural landscapes. For a household with 4-5 members—an average household size in Thailand, it requires the average of 15 rai (2.4 hectares) area of land. The land shall be divided in to 4 parts with a proportion of 30/30/30/10. The first 30% segment of the land, approximately 0.48 hectares, is for rice cultivation, while the next 30% is for field and garden crops. The third 30% is to dig a pond of 4 meters deep, which will have a storage capacity of 19,000 cubic meters. The remaining 10% or 0.32 ha are for housing and other activities (NESDB 2005, p.6).

The New Theory was intended to change the mindset underlying economic development of Thailand in face of the 1997 economic crisis. Instead of aiming to become a "tiger", in reference to the competitive "tiger" nations of that era, the leading philosophy was to focus on economic development from the ground-up. The ideas were based on an earlier speech in 1974 that was later cited by the NESDB "Development of a nation must be carried out in stages, starting with the laying of the foundation by ensuring the majority of the people have their basic necessities" (HM King Bhumibol Royal Speech 1974, p.12 in NEDSB 1997).

Analysis of the reception of the Sufficiency Economy in Thai society.

Contemporary academics and social commentators have shown eager support for a more Buddhist approach to economics and economic development that incorporates core Buddhist philosophies in moderation (Sivaraksa, 1998; Hongladarom, 1998; Ratnapala, 1997). As Essen (2010) notes, "Thais across the county faced mounting debt and mounting disillusionment with neoliberal capitalism, if not financial ruin, the King's philosophical and practical approach to development started to make much more sense" (Essen, 2010, at p.78). Criticism was made of the focus on capitalist consumerism and profiteering leading to disparity in income and society. The new focus was on the moderate, middle-path approach to rectifying the imbalance of the economic development over the past decades (Puntasen, 2008; Piboolsravut, 2004). A more extreme approach called for a move away from the Western model of capitalist economy altogether, as Sivaraksa suggested "Siam can leave behind its blind acceptance of the Western development model. .... Together, we can build Dhammic societies ... serving as an example to our neighbours of an alternative to consumerism" (Sivaraksa, 1998, p.16). Academics suggest that this more extreme interpretation of the philosophy has led to a nationalistic stance where Thailand became more reserved towards foreign investment and allowing foreign ownership of Thai assets and the introduction of foreign capital transfer controls (Crispin, 2007; Matichon, 2007). Crispin (2007) suggests that a more reserved approach based on a stricter interpretation of the self-reliance principles was one of the reasons which lead to an amendment of the Thai Foreign Business Act 1999 (FBA) to cap foreign ownership of Thai businesses at not more than 50% ownership in shares (FBA 1999; s.14).

It is argued here that the philosophies underlying the sufficiency economy may be another cause which influences the Thai mentality of reluctance towards the use of trusts under the TCMT 2007. During the semi-structured interviews, all interviewees answered that they knew of the sufficiency economy. Interviewees agree that the sufficiency economy implies a more reserved, introspectively-focused approach for the Thai economy, however, they do not share the view explicitly that the changes in the law or economic policies were directly linked (IA1, OT9, OT3, OT7, IAR1). An interviewee who is a financial investment consultant expresses "Ever since the economy collapsed, I can see that we are more afraid. I don't honestly think that they would twist the King's words into law though, that would not work for Thailand's investment though" (OT7). Another interviewee, who was involved in the drafting of the TCMT 2007, thought that "It would be absurd to close off foreign investment on that (referring to the sufficiency economy) account." Other interviewees expressed that the sufficiency economy philosophy was relevant on a personal level (OB1, OB2, OT4). Most expressed that a more self-reliant approach to economy suggested that they should not focus on maximizing profit in a capitalist sense. When asked about the philosophy, an interviewee who is a financial brokerage advisor suggested: "It's about farms and stuff... I think. I don't farm, but for me, I feel that sufficiency probably means not aiming for making tons and tons

of money. This makes me feel a little guilty being in the finance sector, really, but what can I say?" (OT4) Similarly, an interviewee who informally invests money on behalf of relatives (OT8) feels that "the sufficiency economy theory says I shouldn't aim for the star. I respect that, it's quite logical... the more money I put in, the more risk there is involved" (OT8).

From the interview data, it does therefore appear that interviewees feel that the Buddhist ideas of moderation are relevant to the interviewee's behavior in their choice to investing funds for profit. Combined with the underlying intention behind the sufficiency economy to remedy the ills that were prevalent in the 1997 East-Asian economic crisis which was perceived to have been caused by Western-style capitalist models, it seems that interviewees see the suggestion to act according to the Buddhist principles of moderation even more so relevant in current socio-economic conditions.

D. Karma.

Extensive theoretical and empirical research has been made into the relationship between karma and Thai legal discourse. Empirical research by Engel and Engel (2013) pointed out a relationship between the Buddhist concept of karma and Thai legal attitude. Their research shows that many Thai interview subjects perceive karma as a natural 'law' that determines the consequences of their everyday life, and some of the subjects interpret law and legality in terms of karma over law and legality. For instance, subjects who have been subject of a legal tort or an accident would often attribute their 'misfortune' to 'bad karma' committed in the past, or at times, a past life. In doing so, such persons would be reluctant to pursue legal redress or compensation in court, as they felt that their suffering had been brought on through 'bad karma' and were thus 'deserved' (Engel and Engel, 2013, p.89).

It is argued in this part of the analysis that one of the many reasons for the lack of trusts under the TCMT 2007 may be due to a general dislike of formalities and court procedure that may be influenced by the Buddhist concept of karma. Briefly put, in Buddhism, karma denotes the deeds that a person commits during their life. According to Buddhist belief, karma can be good or bad. Good karma will attach to the soul and the afterlife, therefore good karma will be beneficial to the next rebirth of a person. Good karma is a path to the attainment of the ultimate goal in Buddhism, which is Nirvana, a state where all good karma negates bad karma and where a person who has successfully accomplished such deeds can transcend beyond the cycle of rebirth (Egge, 2015; Engel and Engle, 2013).

This tendency to blame bad karma was prevalent in the retired High Court judge's account of the difficulties experienced by his wife in her role as administrator of inheritance for a wealthy family (IR10). The wife and another colleague were asked to become administrator of inheritance of a family where her duties would be to dispose of assets according to the terms of the will. A term in the will excluded one of the family members absolutely. Upon the death of the family member, one of the deceased's relatives

pursued to contest the will four times, as well as asking the High Court to issue various orders in attempt to secure a part of the inheritance for themselves up to seven times in the following three-year period. In the past two years, the other colleague who was appointed to become administrator alongside her suffered a stroke, leaving her to bear all of the remaining responsibilities. The interviewee explained that he resented that his wife had to experience such hostility and stress in the course of carrying out her duties, despite the fact that she received no remuneration throughout the entire time. However, the interviewee expressed that the predicament was acceptable because it was merely a consequence of bad karma.

Another interviewee, who is a widow of an inheritance agreement (OB1), told of her father's troubles with a contractor:

> I can tell you the story of one of dad's experiences when he signed a construction agreement. Before the date the additional payment was due, the contractors informed dad that additional work that was unbudgeted for was needed to be done. After completion of the additional work, dad called up to demand payment for the extra work he had completed. Dad was first paid by cheque, only to have it bounced and followed by another cheque that bounced. When dad and that client finally met in person, a representative of the client wrote him another check. The rep then handed it over, and pulled away as dad was leaning over to take it, at which point the rep put a handgun on the table. It was, as he told me "outright extortion and fraud." According to dad, the threat was made in order to ensure that he wouldn't bring the matter to court. (OB1)

When asked whether her father then went on to pursue matters in court, she replied:

> "No... Threat of being shot aside, dad was convinced that it was all due to some sort of karma that his family had done. His father... the family... they were quite the gangsters you see... Dad just had to stay quiet. Mum went to all these different temples and made donations, and eventually the contractors paid up. Not all of it of course, but both mum and dad were relieved." (OB1)

To conclude, this chapter looked into the elements that have been selected based on data from the pilot interviews to be influential to the Thai mentality on trusts in Thai law when thinking about trusts in under the Thai Trusts for Capital Market Transactions Act 2007. The chapter identified three elements which were thought to be of relevance by interviewees. These were Buddhist philosophies on possession and the sufficiency economy model, and the Buddhist philosophy of karma, as well as the identification of the characteristics of the Thai folk hero Sri Thanonchai as being the leading characteristics of a person in the position of a trustee.

Analysis of the semi-structured interview data to gain feedback from the secondary sources of Buddhist teachings therefore suggest that the following is influential to the Thai mentality towards trusts in the Thai legal system. Firstly, the influence of the teachings of the sufficiency economy philosophy, namely, as the underlying objectives of a trust under the TCMT 2007 which was perceived by the interviewees as being to generate superfluous wealth, it is at odds with the Buddhist philosophy on possession and material wealth and the modern adaptation of the teachings of the sufficiency economy.

In terms of the Buddhist philosophy on possession and material wealth, it was found that the core stance of Buddhist teachings invoked a way of thinking based on moderation, or the middle path, and there is an absence of directive to make profit or a surplus of wealth in the vein of Western-style capitalist thinking. Interviewees felt that the goal of gaining a surplus of wealth which they related to being the purpose of a trust did not correspond to the core Buddhist philosophy. Most of the interviewees were of the opinion that the teachings under the sufficiency economy theory propagated by King Bhumibol of Thailand provided a model of living based on those core Buddhist principles adapted to modern economic and social conditions, and this reflected the general view of Thai people towards investing through an instrument such as the trust, i.e. the use of trusts to maximize the income surplus goes against the grain of the Buddhist teaching on moderation in regards to the ownership and attainment of material wealth.

This first component of the Thai mentality (adherence to moderation and sufficiency based on Buddhist teachings and the sufficiency economy philosophy) towards trusts in the Thai legal system also explains why in contrast, the practice of Kongsi which is similar to private familial trusts arrangement was compatible. As Buddhist teachings on possession and wealth also make room for investment for the well-being of family members, it was therefore why engaging in the Kongsi style management of family property was still viewed by interviewees as compatible to the core Buddhist philosophies and were more acceptable for interviewees in comparison to using trusts to gain maximum profit.

Secondly, in terms of karma, legal academics have shown that Thai people attach importance to the philosophy of karma in their world-views on everyday life. It was found that interviewees were accustomed to using the Buddhist beliefs on karma as part of their legal discourse. Interviewees often attributed karma to be the cause of their misfortunes when for example, a legal wrong is committed against them, and in doing so were generally discouraged from seeking formal legal remedies. Data from the interviews showed that there is a tendency from the interviewees to perceive karma as a given state of affairs which often deterred them from pursuing official forms of redress offered by Thai law in court. The given state dictated by karma was also why Thais generally were reluctant to engage in formal arrangements provided for in Thai legislation such as the TCMT 2007 for the management of their personal wealth, as they believed that no good would come out of entering into such a formal arrangement, and a person breaching a trust would probably be punished for his bad deeds in another way under the karma rule.

In terms of folk tales as a source for drawing elements of the Thai mentality, it was found that Thai people attached the characteristics of the folk hero Sri Thanonchai to the ideal successful

businessman. It was generally thought that people who are successful in business possessed the attributes that were well -known as being the characteristics of the Thai folk hero Sri Thanonchai of wit and cunning. It was also found that no sympathy was generally given to victims of the folk hero Sri Thanonchai. Combined with the Thai Buddhist thought on karma and the reluctance to pursue formal courses of legal redress, there appears to be a sense of mistrust of a person in the position of a successful middleman that the interviewees relate to a trustee, due perhaps to a fear of potential abuse of the position of trustee, leading to a reluctance to use trusts as a mechanism for investment in the Thai mentality towards trusts in Thai law.

It is thought that these elements of Buddhist philosophies on possession, the sufficiency economy philosophy, the Buddhist philosophy of karma, and the identification of the characteristics of the Thai folk hero Sri Thanonchai as being the leading characteristics of a person in the position of a trustee, are relevant to the Thai mentality when considering the lack of trusts under the TCMT 2007.

Part IV: Semi-Structured Interview Findings.

Introduction.

In seeking to make sense of the fact why no trusts had been established under Thai Trusts for Capital Market Transactions Act 2007 (TCMT 2007) in the 6 years after it had come into force, the study initially used a theoretical approach using the theory of legal transplants. In doing so, it revealed that this initial approach failed to address certain practices that were trust-like in function as well as a 'micro-system' of trusts created by judges of the Thai Court of Appeal that existed prior to the formal introduction of the trusts via the Thai Trusts Act 2007. The study therefore adopted a second approach with the following set of hypotheses: Firstly, trusts are not used because potential users prefer to use existing legal mechanisms or informal practice, and secondly, those directly involved with the use of trusts have a certain "Thai mentality" towards trusts and trust-like mechanisms that has been influenced by social and cultural attributes formed by political history and religion.

This second approach used consisted of the use a combination of analyses of secondary sources such as Thai case law, academic writing, Thai folk tales and Buddhist teaching and semi-structured interviews. The previous part of the dissertation focused on the secondary sources for this alternative approach. In doing so, it explored in greater depth the micro system of trusts created by the Thai Court of Appeal from court records and other Thai legislative sources and materials. It also analysed the secondary sources of Thai folk tales and Buddhist teaching to provide elements to paint a clearer picture of the Thai mentality towards trusts in Thai law. This current part will present the findings of a series of semi-structured interviews of participants selected for their roles and duties relating to trusts in Thai law. Chapter 9 sets out the findings from semi-structured interviews to look at each interviewees'understanding of trusts according to their roles, duties and responsibilities. Chapter 10 presents interviewees' accounts of trust-like legal devices and mechanisms.

Chapter 9: Interviewees' understanding of trusts according to their roles, duties and responsibilities.

In order to comprehend what interviewees understood to be the core set of rules that govern their personal or professional roles, they were asked questions regarding what duties and responsibilities were attached to their roles and how such duties are imposed. The objective underlying this procedure was firstly, to find out how the interviewees compare their personal roles and those belonging to traditional English trusts-related actors. The actors here refer firstly to trustee-like roles, including those of financial brokers, government officials who work for Government bodies who have trustee-like duties or functions, and inheritance administrators. Regulator-like roles include those performed by state bodies who have the duty of regulatory oversight, law enforcement officials, public prosecutors and judges on the basis of their role of judicial oversight and legislators and policy makers of relevant legal provisions in the Thai legal system. The last two categories of interviewees consist of academics and beneficiaries, the latter to mean interviewees who have been involved as a party whose interests are managed on their behalf, by another.

The interview questions served two purposes. Firstly, the data was used to provide a 'human' narrative to the roles, duties and responsibilities of trusts-related actors. The questions focus on how interviewees understand the scope of the responsibility and accountability that is attached to their personal or professional roles. It reveals how they personally understand the mechanisms, laws and legal institutions that are considered to be 'trust-like' in the context of the English legal system. The second part of this chapter sheds light on the effectiveness and deficiencies of existing trust-like mechanisms, laws and practices, as seen in the eyes of selected individuals. The procedure of analysis involved identification of key words and concepts and subsequently, the triangulation of those key words across all of the responses by other interviewees. Similar or corresponding points expressed by interviewees suggest a shared experience. Points of connection between the use of a given key word were then analysed, having regard to any reasons advanced by interviewees for their roles and attitudes.

9.1 Trustee-like interviewee perspectives on roles and duties.

The first set of data consists of how individual participants who were categorized as having 'trustee-like' professions describe their roles, duties and limits of their responsibilities in their own separate interviews. Participants within this category of interviewees included those with personal or professional roles that are similar or would belong to a trustee in the English legal system. The identities of each interviewee have been explained in the earlier chapter on research design for an alternative approach to the analysis of trusts.[52] This group of interviewees consists typically of 'outsiders', or those who are not involved in the regulation or drafting of the Thai Trusts Act 2007. There are 9 interviewees

[52] See above, chapter 6.

who have trustee-like roles or duties and their identities have been abbreviated as OT1 to OT10. Interviewees who have trustee-like roles or duties working in law-related positions are those whose identities have been abbreviated as OL1 to OL3, and the identities of those who have beneficiary-like roles have been abbreviated to OB1 and OB2.

Interviewees were asked to describe the day-to-day tasks involved in their professional post or the roles and duties of the organisation for which they work. The roles and duties discussed here means firstly, what arrangement or law enables the interviewee to act on behalf of his or her client. The second aspect is the scope of the interviewee's competence, i.e. what he is and is not allowed to do, and the final scope of this initial set of data concerns what mechanism exists to prevent the conduct of trustee-like interviewees in terms of fraud and negligence.

A. Government officials of "Trustee-like" institutions.

In the initial document analysis, the roles and functions of the interviewees who are 'trustee-like' by virtue of the functions of the Government organizations were defined in their founding legislation[53]. Thus, the Government Pensions Fund Act B.E.2539 (1996) clearly sets out the roles and functions of the Government Pensions Fund, whereas the Ratchaphasdu Land Act B.E.2518 (1975) sets out the functions of the Treasury Department's role in the administration of Royally-owned land parcels. The National Anti-Corruption Committee's (NACC) role in the administration of assets owned by Members of the Thai Parliament are, for the purpose of preventing conflict of interests is defined in the Management of Shares and Private Assets of Members of Parliament Act B.E. 2543 (1997). The semi-structured interview procedures were conducted to compare how interviewees working within these Government organisations understood their own roles and duties prescribed for their roles at work.

The interviewee working as a civil servant for the Government Pensions Fund (OT2) described the duties and responsibilities of his role as an analyst as under the authority of "section 5 of the Government Pensions Act B.E.2539 (1996)", stating that "mainly, the founding act designates the general role of the organization and what I do." "Junior analysts go through information about the performance of our designated markets to prepare for a weekly report, from that report, we make a decision, daily, of whether or not to continue holding shares, then we pass it on to contracted traders." In regards to what prescribes the maximum amount may be spent in any one transaction, the interviewee responded: "Numbers of losses… say, the biggest amount I can spend on new shares, and the largest amount I can let it drop to before selling it is based on a daily 'mandate'." The mandate was explained by the interviewee as a policy document specifying the relevant prices and figures on which traders are to base their transactions. The daily mandate is in turn, based on a monthly mandate that is approved by the board of directors of the

[53] The Government Pensions Fund Act B.E.2539; The Ratchaphasdu Land Act for the Treasury Department's role in the administration of Royally-owned land parcels, and the he Management of Shares and Private Assets of Members of Parliament Act B.E. 2543 (1997) defines the 'trustee-like' functions of the National Anti-Corruption Committee

Government Pensions Fund, after the members review economic and financial data provided by analysts. In the case where board members approve of certain transactions that exceed an amount defined by in the Annual Policy, their decision is submitted the Council of Ministers, who would then approve of, or reject the request of the board members.

In the description given by the interviewee, it appears that his daily tasks are similar to those of a trustee in that the individual is managing the funds on behalf of and for the benefit of Thai Civil Servants. This was similar to the roles and duties of the interviewee who worked for the Royal Treasury Department (OT9). The interviewee explained that currently, her personal role was strategic policy planning. In regard to the work of her organization, she described its role as "the guardian, financial manager, economist and archivist of the treasures of Thailand." As for the role of the department, she explained:

> In the larger picture, the department looks after the King's assets. In reality, there this consists of firstly, institutional assets of the King. These are assets that are attached to the monarchial institution as opposed to the King's personal self. After the change in the Thai political system from absolutist monarchy to the constitutional monarchy model, all the assets fell back into state ownership. […] To honour His Majesty the King, we continue to treat all such assets as belonging to him, and the Crown Property Office, that's another department within the Ministry (of Finance) that looks after these artifacts on His Majesty's behalf. […] Often, they are exhibited to the general public at museums, and any revenue usually goes right back into restoration and refurbishment. Anything left over is either left for the department to dispose of, as say… donations to charities, or invested for returns which will then be donated to charitable projects. […] So, we do segregate a fixed amount for the King and this is effectively, His Majesty's personal expenses. (OT9)

Secondly, assets under the care of the department consist of the personal assets. of His Majesty the King. "Money here, comes from the income gained from the first part and belongs to him. Usually, it is put towards charitable purposes, projects and bursaries of the King's founding." When asked who was responsible for the administration of this sum, she replied: "There is a Commission, I think… And a law, you'll have to ask the Lawyer."[54]Upon further inquiry, the law referred to was the Regulation Re: His Majesty's Personal Assets B.E. 2479, which entrusts the task of management to a Committee of four or more selected members from the executives of the Ministry of Finance.[55] The Committee publishes an annual financial report detailing their work and the information is available to the public. The interviewee goes on to describe:

> The third type of assets consists of properties of the Chakri Dynasty. We (The Treasury) are responsible for managing the Royal heirlooms, as it were… These are valuable artifacts such as the Royal Thai Mint, the crown jewels, medals and other valuables offered in the past, to members of the Chakri dynasty as gifts of diplomacy to the head of the state. These are displayed to the Public, in museums, like the first type of Royal Assets. […] Income from these exhibitions

[54] Referring to another interviewee who is the Head of the Legal Department of the Royal Treasury.
[55] section 4, B.E.2479

> are usually used for their maintenance, old, historic buildings, as you may realize, need a lot of repair.[…] So, the difference in this third type and the first is that part of the income from these assets, which is mainly admission fees to historical sites, is invested mainly in government bonds and prize bonds, and income from that is distributed as maintenance to members of the Royal Family, so, for his descendants, as opposed to the King himself. (OT9)

To further elaborate on the roles and duties of her organization, she said:

> In a way, I feel that we are financial managers, not only of the Royal Family's assets, but also we act on behalf of the Public at large. Lately, since Forbes (Magazine) published the King as being the richest monarch in the World, there has been a lot of noise regarding the transparency in the administration of Royal Assets. So, Thai and foreign media have come to knock on our doors and see our books. Of course, we are, by law, under a duty to publish an annual financial report. The second type of assets that I mentioned though, His Majesty's personal fund, are not open to public disclosure. […] I'm sure the Western media will frown upon that, I'm sure. (OT9)

In response to what would happen if she were to mismanage funds, she replied:

I don't think that's even possible. I mean, the office is only allowed to invest in government bonds, after all, so there isn't much of a selection of things to invest in and for us to lose money from. Especially in comparison with the Crown Property Office, not only are they allowed to invest in the Thai Stock Exchange, they have to ensure rent income from royally-owned land parcels. […] Rent collection isn't so hard, though, most of the land is situated right in the city center and generate millions from rent as shopping arcades. […] I'm sure you've heard that the area around Siam Square[56] is all the King's property. But anyway, I've honestly never heard of a case where someone who approves of an investment is later ordered to repay the sums lost. (OT9)

The reference by the interviewee working for the Treasury Department to the Civil Servants legislation regulating personal conduct consists of the Office of the Prime Ministers' Rules on Civil Service Discipline. There is one set of these regulations for each specific department of Government. The Rules were also mentioned by the interviewee who works as an official for the Government Pensions Fund: (OT2) In response to what would happen if he, in performance of his duties at work, were to negligently publish numbers or authorize an incorrect transaction, he replied, "That's highly unlikely. You know Civil Servant work, everything has to go to a superior, then another superior. The docs get checked and re-checked so many times, there's just no room for a mistake" (OT2). In reply to what would happen if a forecast in one of his reports were highly inaccurate, he replied again that it was unlikely. The interviewee stressed that the nature of the task of financial forecasting meant that there was a permissible margin of inaccuracy. "a forecast is a forecast. […] I'm no oracle, no one is! All I would need to prove is that I applied the right formulae and that I looked at reputed sources of information for the report" (OT2).

[56] Siam Square refers to a city-center shopping district in Bangkok.

According to the interviewee, the relevant source of authority for the regulation of someone in the position of civil servant financial investor comprised of criminal law and laws and measures preventing corruption on one end of the spectrum and on the other was disciplinary rules and regulations and the Key Performance Indicator-based performance analysis:

> If you mess up, and by this, I mean inaccurate reports or extremely divergent forecasts, you get a bad performance review by the superiors. Lots of bad reviews could mean that you are not put up for promotion. […] Also, I think I may have heard some guy who was transferred because of poor performance. […] The guy just didn't have the head for finance, so he was moved. Not to a less senior post or anything, just a different department maybe. (OT2)

The use of performance reports was also named as a method to ensure the correctness and accuracy in the performance of the professional duties of interviewees from the financial professionals group. This is detailed as follows.

B. Financial professionals as trustees.

Initial documentary research shows that in the Thai legal system, the roles of stockbrokers, financial investment professionals and others trading in the Stock Exchange of Thailand (SET) are governed by Trading Rules and Orders prescribed by the Thai Security Exchange Commission (SEC). The terms and conditions of each individual transaction are subject to the basic legal principles on contract in the Thai Civil and Commercial Code[57] (CCC), as well as other specific guidelines and legislation that deal with particular types of financial products, for example, the Market for Alternative Investment Rules and Procedures [58] (MAI), the Provident Fund Act B.E. 2530 (1987) and the Derivatives Act B.E. 2546 (2003). Actions and transactions by individuals in certain trustee-like capacity may additionally be subject to the provisions on Agency in the CCC[59] and the Anti-money Laundering Act B.E.2551 (1999). Interviewees selected for data in this category of analysis include a private asset manager (also referred to in this research as an informal broker) (OT8), a financial brokerage advisor (OT4), a financial and investment analyst at a Thai bank (OT10), a currency trader (OT6) licensed brokers (OT5) (OT7) and a personal asset management specialist and fund manager (OT1). Significant data from the interviewees will now be presented.

[57] Book 1, Title III Thai Civil and Commercial Code, 1951
[58] SET Regulation Re: Disclosure of Information and any Act, and Disclosure of Securities Holdings of Directors Management and Auditor of Listed Companies in the Market for Alternative Investment (2011)
[59] Thai Civil and Commercial Code, Chapter XV ss.807-814

i. The informal broker.

The informal broker (OT8) here refers to an interviewee who acted in the capacity of a broker for his close friends and relatives (the informal broker) who described his roles and duties in the following manner:

> I generally do this sort of thing as a favor. You see, I never seek out my so-called clients, they seem to come find me by word of mouth. So, for example, my auntie is one of my 'clients'. She had heard from her son, my cousin, that I was good at stocks. So, one day, she simply drove over to my house and gave me a bunch of her bank books and asked me to make something out of them (OT8).

The bank books described by the interviewee are legal documents given by the bank to an account owner, and may be used as proof of ownership to withdraw and transact funds in the account specified in the bank book. He said that transactions are made either in the name of the account holder specified in the bank book as opposed to his own name, or at times, other clients transfer funds from abroad to a bank account held in his own name, which then means that there is no mention of the real owner of the funds. In terms of comparative analysis, this does not at first glance constitute trusts as defined in the English legal system as transactions are always made in terms of Thai law, by the legal owner. Even though the person holding the account is doing so on the benefit of another, Thai law does not require a declaration to specify the nature of this verbal arrangement. However, the practical implications of such agreements are trust-like in that it involves one person managing on behalf of another. The interviewee then said that such arrangements were truly informal and personal in nature. He was then asked if any legal assurances or measures such as a contract had existed in this arrangement for the purpose to reassure the client that he would not act in a way to defraud her. The interviewee replied "No. Well… I'm family, you see. As a start, she trusts me because I am close family. Moreover, I think, she has seen how much I have made for her own son" (OT8).

ii. Financial and investment professionals.

The account of the informal broker can be contrasted with how another interviewee, a licensed broker who is a manager of several accounts and portfolios of others account manager at an investment arm of a popular Thai banking institution explains his professional roles, duties and responsibilities (OT5): "My daily work involves arranging portfolios for clients who have an account at the bank. These are the clients that want their personal wealth to be invested in the SET or the MAI. They fill out a form, which gives me the authority to transact her funds in my name." Again, the nature of these arrangements is not, *per se* trusts in the English Legal System. What does the interviewee regard as the authoritative source that limits the scope of his actions? What ensures that he does not use the funds entrusted to him by his

client to his own personal needs? According to interviewee OT5, "First, the Bank is sure to allow only qualified traders handle portfolio work." He described a first level of assurance in terms of professional qualification. The set of professional qualification quoted by the highest number of interviewees was the Chartered Financial Analyst (CFA) certificate. The Charter is a recognised professional qualification for financial investors and is granted upon completion of an approximately four-year long course of study and examination. Topics covered include business principles, portfolio management, relevant methods of financial transactions and investment, auditing and practice ethics. Qualification also requires the financial professional to become a member of the CFA Institute, an international association of investment professionals that administers the training and award of a CFA charter. The said body originated as a non-profit organization in the United States. Chartered professionals are also subject to the Investment Performance Standard (GIPS), an internationally recognized, voluntary set of standards for the calculation and presentation of investment performance that is administered by the CFA. While both the CFA qualification and the GIPS standards are voluntary, they are recognized by the Thai Securities Exchange Commission and the Thai Government as well as internationally by other governments and are often a pre-requisite to becoming a licensed trader of financial products such as Provident Funds in Thailand, as well as in other countries[60] (Deltamore-Rodman, 2007).

Another mechanism cited by interviewees as having prescriptive authority for the limits and scope of their actions as trustee-like professionals are internal company or bank policies which govern technical and trade-specific areas such as risk management in trading. For instance, interviewee OT6, a currency trader at a bank explained that as his line of work involved foreign currency, the trading limits were prescribed by internal bank policy. The margin of difference in currency price at which the interviewee was allowed to trade is generally fixed by the bank, by a six-hourly basis and must be set lower than the amount declared in the form of Notifications and Circulars by the Bank of Thailand,[61] which it declares under the authority of the Foreign Exchange Control Act B.E.2485. Another financial investor consultant, OT7 explained that there were SEC Rules requiring all financial advisors to declare any transactions made by themselves to be used as proof against any claim of conflict of interests or involvement in other illegal trading practices such share-price-tipping and insider dealing.[62]

There appears to be a difference in each interviewee's awareness of laws and regulations. While regulatory mechanisms that were codified laws and Regulations received little mention by professionals, they were referred to more times by civil servants of Government bodies that have trustee-like functions. As compared to financial professionals, these interviewees knew more specifically which legal enactment regulated the scope of their duties. As one example, OT8, a civil servant working for the Royal Treasury of Thailand explained that his Government Department "is responsible for administering the personal wealth of the Thai monarchy. In particular, we look after the land that is held in His majesty's name. That's

[60] e.g. China, Australia and Belgium

[61] Exchange Control Act (B.E. 2485) and Ministerial Regulation No. 13 (B.E. 2497)

[62] Interviewee referred to the Rules and Directives issued the Securities Exchange Act (1992) such as Regulation Re: Disclosure of Information of the Company Issuing Depositary Receipts Issued by Approval under the Notification of the Securities and Exchange Commission No. Gor Jor. 30/2546, 2003 and WATCHs (Warning Abnormal Trading & Catching Hostile System) policy (SEC:2012).

Ratchapasdu Land." and that his duties had been set out "according to the Ratchapasdu Land Act 2518." Another official of the National Anti-Corruption Commission (NACC) (IAR4), a body which is responsible for oversight of the anti-corruption measures for MPs was able to recite in full, the statutory provisions. Initially, it was thought that this was due to the legal background of interviewees, as the interviewee from the Treasury Department (OL9), the NACC (IAR4) and 2 others who were able to name specific legislation had had prior legal training (IR10 and IR5). However, in the interview of another participant who works for the Thai Government Pensions Fund and had no prior legal training, specific and accurate references were also given for the legislation granting the duties and powers of his organization: "We act under the authority of section 5 of the Government Pensions Act B.E.2539 (1996)" and "section 11 of the Act tells you that it's not exactly a state authority" (OT2).

Data from the interview showed that the interviewees with trustee-like roles used different references to interpret and communicate their roles and responsibility from those that were analysed in the document research procedure. It was found that interviewees who by profession, transacted on behalf of their clients (trustee-like group of interviewees) only had moderate awareness of the Acts, legal regulations and rules that were found in the document research. Specific details, such as the relevant titles and provisions were recalled mainly by those who had trustee-like duties by virtue of the Government organisations at which they work. It appears that law, in the sense of legislative enactments and Regulations were not central to what they perceived as an authoritative source of regulation of their conduct of the interviewees who were not Government employees.

In comparison to the English context, where common and statutory law are the main mechanisms to regulate and enforce trustee's duties, accountabilities and responsibilities, it was observed that non-Government interviewees paid more importance to professional standards, company (in-house) rules and measures. Data from the section above seems to reveal that interview participants see industry-specific regulation as the most influential regulatory force, as opposed to legal rules and mechanisms. One reflection on these findings is whether professional standards are seen as the only available regulatory standard due to the lack of publicity of existing legal regulation, or whether the reason for their exclusive impression of authority is due to ineffectiveness in other mechanisms. As such, attention was also given to the interviewees' opinions on whether there were any aspects of their personal or professional roles as pseudo-trustees that were not sufficiently dealt with by existing standards, whether professional, ethics or legal. This data is presented in the following section.

9.2 Interviewees views on the effectiveness of trusts mechanisms under the Thai Trusts Act 2007.

A. The rarities in enforcing formal laws and standards.

Having gained insight into what sources of authority lie behind interviewees' personal and professional roles and duties, the study went on to look more specifically at interviewees who played a regulatory role over the exercise of trustee-like duties. Candidates included two interviewees from the regulatory and policy arms of the Security Exchange Commission of Thailand (SEC) (IR2 and 1AR1), the executive from the Bank of Thailand (IAR3), the civil servant from the Department of Special Investigations (DSI) (IR5) and three members of the Economic Department of the Office of the Attorney General whose roles generally involve the prosecution of offenders of crimes relating to financial services (IR6, IR7 and IR8) and an official of the National Anti-Corruption-Commission (NACC) (IAR4). The group of interviewees who were asked for their views regarding the regulation of trustee-like individuals also included those playing a judicial role in actions concerning the exercise of trustee-like duties such a retired judge of the High Court and a judge from the Constitutional Courts of Thailand (IR10 and IR9).

The legal authority to regulate the conduct of persons in trustee-like positions working as financial professionals comes mainly from the same legislative acts, departmental legislation and departmental policy and guidelines which set out the scope of powers and duties of those in trustee-like positions. An illustration of the regulation is presented here through the accounts of a junior civil servant from the Compliance Department of the Security Exchange Commission of Thailand (IR2): a financial brokerage advisor (OT4), and an official from the DSI (IR5). In reference to who played the role of oversight of his duties as a financial brokerage advisor, the advisor explained that in addition to SEC Regulations to declare any personal transactions made by himself on the Stock Exchange of Thailand (SET), the other persons of regulatory authority were:

> The SEC. If it's people who possess regulatory authority you ask about, then it's the Security Exchanges Commission. No, wait…if it's the worker-ant… the foot soldiers, then it's the Compliance people at the SEC. They're the ones that call you up if there are *discrepencies.* […] What I mean by that is either, one… incorrect figures, in which case, are really no big deal. Typos, you know? […] Or two, if say, they find that you sell some stocks at a low price, then those stocks are picked up by someone else from the same banking group who afterwards, suddenly makes an unusually large amount of profit from selling them onwards, you know, really obvious stock price manipulation stuff. If that happens… you and the guy who makes profits gets called over to the SEC for "afternoon tea". What happens then is they would ask you questions… make you sign a declaration that you're innocent and then ask you to submit your account records, I mean *all* of them, monthly statements, you name it… for 12 months. (OT4)

The interviewee from the Compliance Department of the SEC (IR2) explained her role as regulator of trustee-like financial professionals. She explained that the scope of oversight accorded to her department was divided into 'front-line' regulators, who monitor the SET day-to day transactions for

irregularities under the WATCHs policy (Warning Abnormal Trading & Catching Hostile System) (SEC: 2012) and investigative regulators, in which she played part. In her division, her regulatory roles include investigating transactions flagged by the front-line department as well as receiving complaints of losses from abnormal transactions as instigated by private individuals or companies. She explains:

> I have a daily list of cases which I am to assess their priority for investigation. Only the ones with the red flags, by which I refer to very obvious acts of price manipulation… two brokers from the same bank […] almost matching correspondent transactions…, will I schedule for an interview, which is usually the very next afternoon. I don't interview the persons involved myself, of course… as I'm only a junior. My supervisors and three other supervisor-level officials get to sweat them. (IR2)

In response to whether cases of high priority occur often, she replied:

> It's a big… big thing, so not really. Once or twice a month, but that's way more often compared to individual complaints… that happens, like four times a year, maybe. Personally, I feel that the individual complaints are rare because sometimes people aren't aware of the circumstances around their loss of money. I don't think they are oblivious to it, just not knowledgeable enough. Those who do lose a lot of money never seem to kick up a fuss, but then again, it isn't much of a loss for people who have that much money to gamble in the first place. (IR2)

Regarding the rarity of an interview summons, another interviewee, a financial analyst and assistant fund manager at a popular Thai Bank (OT10) expressed that in his experience, "only really, I mean really blatant stuff gets flagged. We're talking a *lot* of money, 50 million and over."

On further research, stock price manipulation is a criminal offence under sections 83 and 86 of the Thai Criminal Code. The component actions for the offence are specified in sections 243 and 244 of the Security Exchanges Act B.E. 2535, such as the definition of *tipping,* in which shares are sold at a low price in s.243, and the creation of a *false market,* or a false volume of sales which is defined in the same section. S.244 then states that the series of transactions in tandem could give rise to an allegation of stock price manipulation, which is then actionable under sections 83 and 86 of the Thai Criminal Code.

The interviewee from the Compliance Department of the SEC (IR2) explained that the summons for interview themselves were a measure introduced through SEC Internal policies. "They aren't like… a court summons or anything, but if you do fail to show up, it makes us more willing to refer the case to the DSI." She explained that the policy gave the decision to the SEC whether to pursue a case of abnormalities in criminal law. In doing so, the investigatory powers would be transferred to the DSI who are a special branch of the Royal Thai Police. The DSI would then have powers under the Act Establishing the Department of Special Investigations B.E. 2547 (2004) to investigate, or interrogate individuals, as well as to freeze and seize accounts. The semi-structured interviews also included as a participant, an officer from the Economic Crimes Department of the DSI (IR5). In his session, he spoke of some cases involving stock price manipulation for which a fine was imposed:

> We had been notified by the SEC compliance people of a referral from the stock watchers at the SET, you see. There was… I think… yes, there was a director, a woman… and a bunch of her friends who were brokers from another company. The brokers were busy buying RICH shares and selling them off to other broker-friends, basically. Of course, they had gone around to do this in their clients' names…. Another broker would buy the shares sold on behalf of their clients, with money in their clients' accounts. It all seemed perfectly legit, of course…. Until you find out that RICH were on the verge of bankruptcy, and the husband of its director was some sort of headmaster at a school that the brokers' children so desperately wanted to get in to. What had happened was that SEC found that out. Purely by word of mouth, they looked into the case… called the director and the brokers up for a chat… found them guilty… slapped them with an initial fine. It was only when the major players, you know… the director and the parent-brokers… didn't cough up that the case was referred to us. I think they believed they could get away with not paying the fine because they personally thought that there was no way the SEC could know, or prove their personal relationship…or you know, m.o.[63] We of course, can actually call witnesses… and so we did. And there it was…proof of underlying interest between the director and the brokers, and motive! (IR5)

The interviewee then went on to clarify the details involved in the procedure and the penalties imposed on the involved individuals:

The director-lady got disqualified from holding her office. That's by the Financial Institutions Act, I think. I want to clarify… the SEC's role in this is to identify the wrongdoing… Their part is to put forward an accusation… to initiate the court proceedings. They invite people over, discuss the accusations…wait for written submissions to admit guilt… or provide a defence, or whatever. Then comes the fine: either for failure to submit statements… but not for the wrongdoing itself. So… since they failed to write back, they were fined, which of course, they ignored. The case was then referred to us. Our part is to get the proof of motive needed for court. It's the court that decides whether they had acted in infringement of the Criminal Code.[64] So… in answer to your questions… disqualification… for the director-lady, disqualification for the brokers… and a hefty fine…I forget the exact numbers… for everyone. No, the money they made wasn't paid back to RICH shareholders. They had to pay back any money used from the account of their clients, of course. The excess goes to the state as proceeds of crime, I think. (IR5)

B. Perspectives on regulation and redress from 'Outsiders'.

In addition to the interview of individuals who had trustee-like, regulatory and judicial roles connected to trusts in Thailand, or 'insiders', this study also looked at the views of 'outsiders'. The latter group consisted of interviewees with a background in law and worked legal advocacy or advisory positions. This consists of a civil servant working for the legal department of the Thai Treasury (OL3), an

[63] *Modus operandi* interviewee clarified at a later phone call that he meant to say "motive"
[64] http://thailandtimes.asia/thailand-news/48mn-baht-fine-for-thai-stock-manipulator/ http://www.manager.co.th/ibizchannel/viewnews.aspx?NewsID=9570000052632

in-house lawyer at a private banking institution (OL2), an in-house lawyer of a company listed on the Stock Exchange of Thailand (OL1), and a practising lawyer at a Multinational Law firm (OL4).

i. A lack of confidence for litigation in cases concerning highly-complex financial transactions.

Similar to the views of interviewees from the 'insiders' group of legal regulators and the judiciary, interviewees belonging to the outsider-legal professionals group expressed awareness of the lag in development of Thai law and court procedures for disputes over complex financial transactions. "For this instant, … I actually think no-one goes into a courtroom for these types of cases knowing what is going to happen. For a dispute over futures trading, for example, I don't think some clients actually know how much he has lost, never mind how in the first place! Oh!... and nor does the judge know or understand, for that matter" (OL4). The consequence of the potential uncertainty and unfamiliarity, according to the in-house lawyer at the private banking institution (OL2) was that "no lawyer would be willing to take on a case if he were unable to determine the chances of success and the amount of compensation available." It therefore appears that another element which was thought to contribute to the lack of confidence in court proceedings as a channel for redress is the lack of awareness of their availability.

The overall low level of confidence accorded to court procedures was illustrated in another context by the interviewee from the National Anti-Corruption Commission (NACC) (IAR4): "The law is great… it's comprehensive… assertive… it contains far-reaching penalties for any departmental minister who wishes to make money out of contracts between Government agencies and third parties. In fact, I believe it was the clever people from your department who played a huge part in designing the mechanisms for oversight, you know, the reporting requirements and things… I am proud to say we have one of the cleverest anti-corruption legislations in the World. Does it get much use?... unfortunately, no… I seriously think that Thai people… citizens…voters, just aren't aware that they can petition an action to investigate Ministers' assets. Shame, really."

ii. Less hesitation in court proceedings for inheritance.

Unlike the overall Thai attitude of aversion to formalistic legal proceedings and non-confrontation, data from the group of insider/regulators indicates a different level of enthusiasm for court proceedings that involve disputes over familial assets. Research into court statistics shows that there had been an increase in court proceedings for rights to family assets over the past two decades.[65] Data from the interview therefore also contradicts the initial presumptions regarding the concept of '*Kren Jai*', a Thai

[65] Court proceeding statistics from the Civil Courts, Bangkok Circuit from 1994-2014 showed an increase of 9% in cases concerning wills and inheritance. Data obtained from unpublished thesis for a Master's degree in psychology at Chulalongkorn University, Akkarasakula, S., 2014

cultural attitude to avoid overburdening others who are older or more respected. In an analysis on managerial culture of directors of listed companies in Thailand (SET), it was thought that being '*kren jai*' would restrain Thai company directors from defrauding[66] (OL2). To elaborate, a participant at the initial pilot interview process had suggested that where directors are well-respected figures, or in the case of directors of smaller, family-run companies, directors will often refrain from acting out of line, as an act of courtesy or "to be too *kren jai* to act fraudulently". Interviewee data suggested otherwise; "They aren't so reluctant to fight anymore." "Thai people aren't so happy to be lenient anymore" (IA4, IR9). With the recent increase in inheritance disputes in court, it will be seen from the beneficiaries' views and experience whether there exists a legal mechanism in Thai law that is capable of providing protection of personal rights of those in beneficiary-like capacity.

C. Views on accountability and redress.

Questions were posed to ascertain how and how well the perceived sources of authority worked to make trustee-like actors accountable in the exercise of their duties. These questions also attempted to ascertain whether interviewees regarded the redress offered by authoritative sources such as laws and Regulations as satisfactory. Interviewees were first asked about the availability of redress for persons in beneficiary-like roles. In this study, the group of interviewees having such roles refer to clients of brokers and financial advisors and heirs of inheritance arrangements. The first account of redress for those who would be in the position of the beneficiary in English trust law are disciplinary measures imposed on government officials.

i. Disciplinary measures for Government officials.

In the section above, trustee-like interviewees working for government organisations mentioned the use of disciplinary rules as a mechanism for regulating the exercise of trustee-like duties. Government employees and civil servant pseudo-trustees said that they had heard of legal procedures in the "Civil Service Act" According to the interviewee working for the Treasury Department, "I think there is a law which makes it possible for a civil servant to have their salary deducted at a sum that is equal to the amount of loss occurred due to recklessness and negligence" (OT9). Upon further documentary research, it was found that the legislation mentioned by interviewees was the Civil Service Act B.E. 2535 (1992). Sections 84-85 of the act combined with the relevant, department-specific Regulation gives rise to a punishment for negligent or reckless acts and an accompanying duty for the offender to account for the losses caused by his or her behaviour to repay the sums lost out of his salary.[67] Where the nature of the

[66] see chapter 11 B ii

[67] E.g. Rule 133 Civil Service Disciplinary Regulations B.E. 2550 applies to civil servants working for any central Government Department. For example, if a civil servant were to recklessly issue a payment to a

culpable act was one of gross negligence or recklessness, the punishment specified in the department-specific Regulations will apply, which, depending on the context could mean dismissal and a separate court action for the payment of lost funds.

Although all of the other interviewees working as civil servants were aware of the existence of such a measure, no data was given as an example of an actual case where this mechanism was used. [68] As a district attorney (IR7) states, "Yes, those laws exist… of course, they're there, but I don't think it amounts to a big deal when it's actually implemented. I mean, to be honest, I've not heard of anyone getting their pay deducted for negligence, and even if they did, it's just a slap on the wrist, wouldn't you agree?" (IR7) Another interviewee, an official of the National Anti-Corruption-Commission (NACC) (IAR4), also expressed doubt over the punitive implications from the mechanism in practice: "There are certainly disciplinary laws to scare off any attempts waste money that belongs to the government. They're a little more than useless, if you ask me, I mean, the incompetent crook is asked to pay it back in *instalments*… the nerve! It's almost like he gets a loan from the state! … At least, in his case, he can't do it if he were to do it more than once, he'd be fired" (IAR4). The interviewee from the NACC also specified that the Thai Criminal Code B.E. 2477 would apply for acts of deliberate theft or embezzlement, the punishment of which would be according to the Penal (Procedures) Code B.E. 2477, and that corruption by those in political posts (elected civil servants) is dealt with by the NACC Organic Act on Counter Corruption B.E.2542 (1999).

From the interviews of financial professionals, it was revealed that dismissal of a negligent trader was also possible. However, there is generally no data that identifies a corresponding mechanism for remedy or recompense for those in beneficiary-like positions, nor were there any company rules or practices for those responsible to personally account for their losses. As interviewee OT7, a licensed broker, states: "It's a risk-related business, and those who participate tend to understand that it is not entirely our fault if the market is stagnant". Other interviewees from the private sector said they "could imagine" a corresponding penal sentence and recompense (OT4, OT10). Overall, interviewees were of the view that there is a systemic inability to retrieve defrauded funds in court.

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third party in duplicate because he had not checked previous records as required by his departmental policy rules. Depending on the amount paid and the circumstances of the case, this could lead to a disciplinary action for negligent misconduct and deduction of salary, or dismissal where the amount is in excess of 10,000 Bht (over the Small Claims Court tier of debt.)

[68] The other interviewees who are working as civil servants who were involved in the interviews who were asked about the Civil Servant Act measures included; OT2 working for the Government Pensions Fund: OL3, a legal personnel for the Treasury Department: IAR1 an executive at the Security Exchange Commission of Thailand (SEC): IR2 a junior at the SET: 3 public prosecutors: (IR6 IR7 IR8) IAR3 a Bank of Thailand executive: IAR4 an official of the National Anti-Corruption-Commission and IR5 at the Department of Special Investigations.

ii. Redress and accountability through courtesy customer refunds.

In the above section, the data gathered from interviews of civil servants working for government organisations that had trust-like functions rendered an overall impression that wrongdoings by pseudo-trustees (traders) were either rare, or non-existent. While interviewees working as financial professionals also expressed a general doubt of the possibility of recouping losses, data from the group this latter group revealed that they had low confidence in the ability of legal measures to seek recourse to remedy or compensation. Most interviewees are of the impression that it was not possible to compel the return of funds. As according to licensed broker (OT7):

> Losses are common… you win some, you lose some. Let's say, you make a profit margin of, say… 5% in one year, 2% in the next, that's fine, no need to apologise to a client for that. If…say however, a client were to lose out over 5% in two, three consecutive years, some would complain. The company wouldn't do anything because… perhaps, the economy is bad. If a client were to lose more than say… 20% in two or three years running, though, and if that client specifically subscribed to a low-risk program of investment […] if the economy was good and everyone else is making a profit, and if the client were to complain, I think the company would probably have to pay some sort of amount back. This isn't written anywhere, of course, and to be honest, I've only known of one client who was able to complain and get some money back, and he'd lost 21% for four years in a row. (OT7)

When asked about the possibility of a refund, two other interviewees who are financial professionals said they had heard of a courtesy refund policy for dissatisfied customers. One assistant fund manager states "Yes, that, I've heard of bigger, mostly foreign companies having some form of refund if things go super-bad. I don't think my Bank has the same policy, however" (OT10). Another interviewee, a licensed broker at a multinational financial services company (OT5) replied "I think I may have actually seen it on a brochure somewhere. Oh, yes… I think it was even written down in the policy people's (customer policy department managers) guidance note thingy." In response to questions whether refunds were actually given out to clients who have experienced large losses, the same interviewee responded: "To be honest, though… I've never actually had to, or heard of a broker having to give money back. That's just awful, you really must have lost an awful lot to give back money?"

Although it cannot be conclusively determined from the second-hand source of information provided by interviewees in the form of interview data, it appears that when a refund policy for major losses exists, such a policy is generally available only in the case of larger, often international financial institutions. Indeed, the specific details as to the number of companies who maintain such a refund scheme and the comparison of such figures to the actual cases of refunds would make for an intriguing and more determinative analysis. However, this present research has yet to be able to collect such data. The reason for this is firstly, the existence of such a refund mechanism was not generally made public, whether it be for commercial or advertising purposes. Additionally, without prior knowledge of such a policy, the research did not set out to specifically ascertain the figures to support such information and therefore, the number of interviewees selected for the present research was not wide sufficiently large

enough to arrive at a conclusive determination of the existence of such measures. However, the interview data did reveal that such a refund policy was also known by one legal professional of financial services company (OL2), as well as by a civil servant of the regulatory arm of the Security Exchange Commission of Thailand (IR2), who states: “Yes, of course, the big, client-centric banks and financial institutions offer some sort of peace-of-mind guarantee, I think. Boy, I don’t know how that works in practice.”

D. Heirs and heiresses.

In the interview procedures, one point of note was the reluctance of interviewees belonging to the pseudo-beneficiaries group of interviewees in revealing the details of their familial property. In particular, interviewees maintained a wary attitude when asked to talk about the management and handling of familial assets. At the start of the study, issues of procedural and substantial ethics were analysed and ethical approval was submitted and granted for conducting semi-structured interviews. The procedure consisted of the assessment of risks and principles of ethics involved in using human participation as a source of research data. Prior to the participation in the semi-structured interviews, potential interviewees were approached and given the details of the format of the semi-structured interviews, as well as the scope of questions to be asked. Only after having restated the intended purposes of the interview did they respond more openly to the questions. It can be said that the first main observation from the interview data of those in the position of beneficiaries of trusts were firstly, the tendency of Thai people to shy away from discussing personal assets. Open questions were used to whether interviewees within this group viewed the regulation and redress of those acting in trustee-like capacity as unsatisfactory, and in what way?

From an analysis of the interview data of interviewees who were heirs and heiresses, it can be seen that two areas are of major concern by interviewees’ opinions on regulation and redress, both of which relate to a change in the shape, size and composition of the Thai society. Firstly, interviewees appear to be wary of an issue arising from the expanding number of the elderly population in Thailand. With advances in the field of medical science, the current population has come to realize that their lives will be extended and as will their desires for livelihood and good living conditions (Phodista, 2011), Before, the Thai family structure was generally characterized as a close-knit unit that was large in size. A family home in the old family structure would consist of two or three generations of the family (Jamnarnwej, 2001). There were fewer problems for elderly family members as they would live within the same family home. Their day-to-day needs would be met by, and they would be cared for by their descendants. Currently however, it is common for an elderly person to become physically and legally incapable of taking care of themselves and their assets, the result being that many are forced into government-run old-age facilities. As Thailand has no inclusive pensions schemes, the availability of such facilities is limited in number and privately-run facilities are very highly priced. Moreover, while commercially-run care for the elderly is available in the form of retirement homes condominiums or institutions, a number of interviewees expressed their negative view towards such options (Jamnarnwej, 2001). The reason behind this was explained by one interviewee (OB1): “I’ve heard of retirement homes where the carers are simply

horrible towards its inhabitants… You hear about nurses mistreating their charge behind your back, just… all the time." According to another interviewee, the lack of satisfactory provision of services for the elderly coupled with the foreseeable was in her view, a very strong justification for why personal trusts should be allowed in Thai law. As she expressed:

> I'm not looking to have children. People ask me all the time "Who will take care of me when I'm old and crippled?" I think trusts would be a perfect solution to this… to their question. … If it were possible, in Thai law, to create a trust of your own assets to be held for the benefit of say… one part to go to whoever you want to leave your money to, …. And the other part for yourself… say… maybe as a retirement fund, I'd have a lot less to worry about wouldn't I? Of course… the Civil and Commercial Code would currently disallow a living will, or a will to such affect, so that will have to be changed. (OB2)

Another area of concern for beneficiary-like interviewees was explained by another academic interviewee (IA1). The interviewee spoke of the absence of a mechanism to ensure the just distribution assets on dissolution of a relationship or the end of a marriage. Her sister had cohabited with her long-term partner who remained legally married to his estranged wife, who was later declared incapacitated by order of court. His sister and her partner had one child and lived together "as though husband and wife for over two decades." The partner later passed away, and legal proceedings were brought against his sister, by the son of the first wife for rights to the inheritance. The court of first instance held in favour of the son of the estranged wife.[69] From the interviewee's experience, it "was apparent that application of the Thai Civil and Commercial Code and the Land Code resulted in a situation where an unmarried woman is left without any legal recognition or recompense, unless proof exists of financial contributions". Her sister was only later able to assert her rights in the family home in another legal proceeding, upon showing that payments for the mortgage came from an account held under her name.

The unfairness resulting from the application of Thai Civil and Commercial Code in the case of women is an issue that has come to receive more attention from the Thai Public in the recent years. The legal academic (IA1) gave as one example, an article in a Thai magazine aimed at women aged 18-25 titled "Yes to No on Marriage?" The article presented a list of pros and cons of marriage based on law and financial implications. In particular, the article points out as a negative implication the possibility of the co-habiting woman "being left without assets" upon termination of a relationship. According to the interviewee, the tone of the article was "somewhat different to how cohabitation was presented" "in her time". Instead of cautioning readers against cohabitation, it appears to give advice on the measures to take to prevent such issues from arising, such as registering a family business as an unlimited partnership and keeping accounts or records of contribution to family expenses. According to another interviewee who is also a legal academic (IA2), awareness of potential issues for Thai women has grown concurrently with the recent changes in traditional Thai family structures where cohabitation by couples without marriage has become more common and more acceptable in Thai society (Jamnarnwej, 2001; Phodista, 2011). However, it remains to be seen whether the two form cause and consequence. Nonetheless, it is observed that despite these changes in attitudes of members of the Thai society and the Thai

[69]Judgment No. 1120/2554 Thai Court of First Instance, (2011)

demographic, little alteration has been made to the text of the Thai Civil and Commercial Code to accommodate the potential issues that could arise in its application.

Chapter 10: Interviewee accounts of trust-like legal devices and mechanisms.

The semi-structured interviews were conducted to gather a human narrative to enable a better understanding of the Thai mentality towards trusts in Thai law. This section of the dissertation presents an overall picture of range of data gathered in the interview sessions. In addition to how selected actors of Thai society perceive and interpret their personal and professional roles, the semi-structured interviews also provide additional insight into trust-like mechanisms and roles that were earlier discussed in the course of documentary analysis that were part of an alternative approach to understanding trusts in Thai law. This chapter discusses the findings from the interview data where interviewees explain and describe mechanisms that are either 'trust-like' in structure or function.

After the initial set of questions designed to gather data on how they interpret their personal roles and duties, each interviewee was given the same, brief explanation of the legal mechanism introduced by the Thai Trusts Act 2007. They were then asked whether they had used, experienced, known or heard of mechanisms or practices, both legal and non-legal, that had a similar effect to where property is held in the name of one person and such person has rights over the property, insofar as is necessary for the benefit of another. Interviewees were also informed that in the given scenario, the person holding property in his or her name need not have done so consciously or intentionally, so as to reflect circumstances of English constructive and resulting trusts. In light of the given criteria, the interviewees mentioned the following mechanisms: Sukuks, the potential of use of trusts for real estate investment, brokers as pseudo-trustees, the *Kongsi*, and the role of the NACC under anti-corruption legislation.

10.1 Use of the Thai Trusts for Capital Transactions Act 2007 for Sukuks.

When asked whether they had used, experienced, known or heard of mechanisms or practices, both legal and non-legal, that had a similar effect to a trust, a number of interviewees consisting of the researcher from the Central Policy Group within the Securities Exchange Commission of Thailand who played part in the legislative process behind the Trusts for Capital Transactions Act 2007 (IAR1), a non-legal professional working in the financial sector (OT4), a Consultant to the Bank of Thailand (IAR3) and a professor of trust law at a Thai university (IA1) mentioned a debt instrument that is similar to a bond and allows for investment that complies with Islamic religious principles of Sharia. According to the legislator from the SEC (IAR1):

> The Sukuk was meant to be… we had planned to use the Trusts Act as a platform…to launch the Sukuk. To enable it, you could say…. In fact, the Trusts Act and the Sukuk Act were pretty much enacted hand-in-hand… There was a huge lobby by the Islamic banking group of Thailand for the Trusts Act to be passed… and it certainly did… and then the Sukuk followed suite. (IAR1)

The Sukuk Act mentioned by IAR1 referred to the Notification of the Security Exchange Commission No. 18/2553 (2010). The effect of its promulgation was to enable Sharia-compliant sales of investment units in the Thai capitals market. It did this by allowing the Islamic Bank of Thailand to apply to become a licensed trustee under the Thai Trusts Act. The interviewee went on to explain:

> The Islamic Bank… as trustee… was supposed to be our first licensed trustee. The way it was supposed to be done was that the Bank would set up a mutual fund, you know, for people to buy into. Then, what that fund does is…it invests in other things… like the Bond market, or even internationally. The people who bought units in the mutual fund would then reap up Sharia-compliant dividends. Which, of course, are from any profits made out of the other things the mutual fund invests in. It's quite straightforward. (IAR1)

The interviewee who is a professor of trust law explains the essential requirements of Sharia compliance according to her understanding as follows: "So, Islamic principles… Sharia Law, forbid the taking of 'interests'. What the Thai Trusts Act does is… it repackages it. So, … instead of calling the payout of dividends "interests", it calls it dividends." (IA1)

It is interesting to note that the interviewees did not express their knowledge of Sukuk in a way which directly equates trusts to a Sukuk. Instead, interviewees refer to trusts as a mechanism introduced by the TCMT 2007 as an indispensable vehicle for the creation of Sukuks. The situation is therefore that there is a legislation which lays down the essential components of trusts, its functions and its regulation, that has yet to be used to create a trust in the Thai Capital Market, as well as a legislation (The Notification of the Security Exchange Commission No. 18/2553) which promotes the use of trusts for the specific purpose of creating a financial investment unit that is compatible with Sharia principles. It seems to appear therefore, that the legislators had every intention for the TCMT 2007 to be used for the creation of investment units in the Thai stock exchange. What then, has happened in pursuant of these enactments? Unfortunately, at the time of interview, it appears that it has not been the case that neither the Thai Trusts Act nor the Sukuk legislation has yet been successful in encouraging the creation of trusts. The interviewee from the central policy group of the SEC stated that after the enactment of the Sukuk Act, "the scheme subsequently did not come to fruition." With the reason behind the lack of trusts being "the Islamic Bank of Thailand unfortunately started facing cash flow difficulties" (IAR1). According to the SEC official, since the lack of trusts, legislators "shifted the focus from Sukuks to using the Trusts Act to accommodate the real estate investment sector instead" (IAR1).

10.2 Using the Thai Trusts for Capital Market Transactions Act 2007 (TCMT) in real estate investment.

According to the interviewees categorised as 'insiders' that consisted of a researcher from the Central Policy Group within the Stock Exchange Commission of Thailand (IAR1), a professor of trust law at a Thai University (IA1) and a civil servant working as a regulatory officer at the Stock Exchange Commission

of Thailand (IR2), another area in which the mechanism of characteristics is similar to that of the English trust is in capital raising for real estate projects. Prior to the promulgation of the 2007 act, the SEC policy group official explained that, "In Thai law, the legal structure commonly used to enable the financing of and investment in real estate is the "mutual fund" (IAR1). A mutual fund is a type of investment vehicle in the form of a listed company set up for raising capital. According to the interviewee, large-scale residential developments in Thailand are legally set up in the following way in order raise the necessary capital. "Usually, a property development firm… I'm sure you'll have heard of some of their names… AP? Ideo? Instigates the project by amassing all the capital" (IAR1).

According to the interviewee (IAR1), projects of such type are usually instigated by a property development company. "Then, another (company) is set up separately, and takes care of the investment arm of the project… finances and such" (IAR1). The investing company is listed on the Stock Exchange of Thailand where it gathers funds primarily through debenture shares, bank loans and offering units of mutual funds for sale to the public. "So how does this all work together? The fund acquires capital. Then it sells units under their own name. Then it hires the property back to the developers to finish construction work… All the construction is done on contract, you see…either a license, or a contract between the listed company and the fund managers… Then the fund unit purchasers get dividends that come from selling or renting out the condos (IAR1).

According to the said group of interviewees with knowledge of the use of mutual funds to raise capital for real estate projects, there are certain limitations to their use. As explained by the professor of trust law, "there are things that a fund… a mutual fund, as such… are not capable of, because of their legal form. They cannot … for example, invest abroad" (IA1). The official from the regulatory department of the SEC added that there are limits on value of loans obtainable as well as on the type of properties in which it could invest (IR2). Another observation was that the legal form of a mutual fund meant that the person who is its manager is typically specialised in capital raising, but not specifically in raising capital for the real estate investment sector. The civil servant from the Central Policy Group explains that it was for the "misalignment" of the mutual fund managers' expertise that the SEC had decided to look into the possibility of using the new trusts structure to accommodate real estate investment as an alternative (IAR1).

In 2012, after a series of public consultations, the SEC publicised their intention to introduce the trust as an alternative for real estate investment financing via an annual policy statement dated 14th November 2011 (SEC:2011). According to the speech, it was intended that the legal structure and mechanism provided in the Thai Trusts Act be made open to prospective applicants from the property financing sector. The interviewee who is a researcher from the Central Policy Group of the Securities Exchange Commission of Thailand (IAR1) explained the characteristics of the intended mechanism:

> REITs (Real Estate Investment Trusts) will consist of a trustee who manages the financial aspects of the venture and … separately, …the property managers. Basically, the property manager people are the ones specialized in the actual condos, so for instance, managing the sinking fund, paying communal electricity bills, contracting out security services… you know,

> building managers… almost. So, what happens when the trusts is used is that the property, you know, the one that is initially owned by a developer gets transferred to a trustee (financial institution). The trustee then assumes the responsibility for financing and raising capital separately from the REIT managers. Then, those managers look after some of the money that's to be used for the construction of the condo and, well, after it's complete… it goes towards the general costs for maintenance of the real estate. Everyone gets to do the job they are supposed to do, quite ingenious, wouldn't you say? (IAR1)

A further explanation of the mechanism was put forward by the academic who is a professor who teaches trusts at a university (IA1): "The fact that legal ownership of the real estate is vested in the trustee means that they are fully able to pledge or sell the property. "The knowledge and experience of the latter… in real estate, I mean, would especially benefit real estate investment projects that derive income from rent of property". As the interviewee further elaborated: "It's quite straightforward, you see… In comparison to the use of listed companies, a real estate project managed by a trustee would be more specialised in maximizing rent income as well as in their ability to look after the people living on the property." (IA1)

. In an attempt to promote the use of trusts enacted by the Thai Trusts Act, the interviewee from the central policy division group of the SEC (IAR1) stated that as of September 2013, the SEC was waiting for legislation to pass through Parliament that will exempt the levy of income tax on any gains arising out of the conversion of existing mutual fund companies to real estate investment trusts. According to the same interviewee, the move is a response to there being "more interest from the public than previous attempts to promote trusts" (IAR1).

10.2 a Post- conclusion findings.

Further development with relevance to the position of interviewees regarding the potential of establishing trusts under the TCMT for use in real estate investments (real estate investment trusts: REITs) has come to light since the interview with the participants. In November 2012, the Securities Exchange Commission enacted Notification no.14/2555 listing the qualifications for approval of a trustee business for real estate investment. This contained details of the start-up capital of an eligible company, reserve funds and shareholding structures and applied specifically to trusts whose assets were to be used to raise capital for real estate businesses. In August 2013, the SEC issued rules on converting existing mutual property funds into trust funds, (SEC Notification No.5/2556) and In November 2013, the SEC decreed that no new mutual property funds were to be listed as of 31 December 2013. The policy was that investments in real estate in the Thai stock market were to be from then on made in the form of real estate investment trusts. (REITs) (SEC Notification No.40/2556). This notification amounted to a moratorium of establishment of mutual funds for the purpose of real estate investment.

Towards the conclusion of this study in November 2018, it was discovered that the first trusts to have been established under the TCMT were in fact, REITs, with only 3 financial asset management

companies obtaining approval for carrying out business as a trustee.[70] As of 17th January 2019, a total number of 7 asset management companies had received licenses to act as trustees, and the total number of trusts established under the TCMT was 22, all of which were REITs. [71] Why, then were the very first trusts under the TCMT established for this purpose? While additional interviews of the trust companies may offer further insight into this matter, it might initially be noted that the gradual enactment of secondary legislation in 2012 and 2013 provided for a more suitable transition to turn existing mutual property funds into trusts for real estate investment. As it will later be seen, some interviewees expressed reservations towards the clarity of the provisions of the TCMT relating to accountability, (OT4, OT5, OT7 at p.192) while others expressed lack of confidence in the institutional mechanism of oversight. (IAR3, OT10 at p.193) However, this gradual enactment of regulations paving way for the establishment of trusts for real estate investment does not explain why trusts were not created for the purpose of Sharia-compliant sales of investment units in the Thai capital market (Sukkuk). The SEC decreed Notification of the Security Exchange Commission No. 18/2553 to allow for the creation of trusts for such purpose, yet to this date (January 2019) no trusts has been set up for that purpose.

Factual data of the number and type of trusts established under the TCMT, combined with the information from the interviewees appears to show that trusts transplanted via the Thai Trusts Act 2007 has developed according to the policy decisions of the SEC. It appears that policy dictates that the SEC adapt the intended use of trusts in response mainly to economic conditions. Conversely, it also appears that economic considerations are influential to the policy decisions surrounding trusts, although the state of the economy itself was not seen by interviewees as the sole determinative factor for the slow uptake of trusts under the TCMT (OT9, OT2, OT4, OT5, OB2, IR6, IR7, IR8 at p.191).

Having the relationship between policy decisions and the development of trusts in mind, it remains to be seen whether trusts will be adapted for use in a way other than to accommodating financial instruments. In particular, at the time of concluding the interview data, it was suggested that another utility which trusts may be developed for use in Thai Law would be to accommodate the management of personal assets, as the government proposed inheritance and gift tax for the first time in modern Thai legal history were revealed in September 2014.[72] The legislation was passed in 2015, (Inheritance Tax Act 2015) and inheritance tax became enforced from 1st February 2016. To update on this suggestion, the Ministry of Finance proposed a draft Act to allow the use of trusts for the management of private assets to the Council of Ministers (Cabinet) in 2018, which the Council of Ministers approved in principle in July 2018. While the text of the draft legislation has not been made public, the rationale behind the proposal according to the Ministry of Finance was "to prevent the moving of funds of high net worth individuals to trusts in other jurisdictions"[73]. Although the rationale given does not directly indicate that it would allow

[70] Data obtained from a representative of the SEC attending a meeting at the Council of State of Thailand for the proposal of a draft trusts for private asset management act, B.E. …. On 7th November 2018.
[71] Information obtained from the SEC database www.sec.or.th retrieved 21 January 2019
[72] "Inheritance and Land Tax- The Government is on the case!" News Article, http://www.manager.co.th/AstvWeekend/ViewNews.aspx?NewsID=9570000108145 The Inheritance Tax Act was formally announced on 5 August 2015. (Thai Inheritance Tax B.E. 2558 (2015))
[73] Ministry of Finance proposal to the Council of Ministers meeting 10 July 2018

the use of trusts for the management of tax to be paid on assets, comments given by representatives of the Fiscal Policy Office, the Ministry of Finance attributed the rationale behind the proposal for trusts for personal assets to "incentivizing Thai people to manage their inheritance in the country, as opposed to setting up trusts in other countries."[74]

The proposed enactment would indeed lift the general ban on the validity of trusts in the Thai Civil and Commercial Code. At the finalization of this study, the draft is currently being amended by the Council of State of Thailand, after which it will be presented to the National Legislative Assembly for voting and finally, for enactment. It remains to be seen whether the general ban of trusts in the Civil and Commercial Code of Thailand is lifted to allow for a mechanism to manage inheritance and gift tax liability. As for now, trusts may be formally used in the Thai legal system as a mechanism for enabling capital market transactions. However, there exist other legal practices and roles that are trust-like in utility and effect. Another one of these can be found in the role and duties of informal investors.

10.3 Identifying informal brokers as pseudo-trustees.

Another instance in which interviewees appear to recognize a similarity in the function and characteristics of the English law trust is in the role played by informal brokers. Interviewees who contributed to this comparison include a retired High Court judge (IR10), one interviewee who is an intended beneficiary of an inheritance arrangement (OB1), an heiress (OB2), a judge of the Administrative Court and a legal academic in the field of Thai contracts and obligations law (IA3).

In response to whether they knew of any practice or mechanism that is similar to the English trust, the interviewee who is an intended beneficiary of an informal inheritance arrangement (OB1) stated that they thought "brokers seem to fit the description." The interviewee went on to explain two common practices that to them, appeared to be trust-like in effect.

> One way to do it is… and this is probably the most common way these things go about, is when a close friend, or family member or a close relative agrees to buy shares on your behalf. This is all very informal of course, nothing is signed. You put money in the broker-person's bank account and he buys stocks. This is all… in his name, by the way… all him. Another way of doing it is by signing an 'open' authorization. This is like… a letter or a note. Usually, for this to be valid, they include a signed copy of their national I.D. card with the document… so that it's all endorsed and such. This is usually done to allow a licensed broker to make transactions in their own name. (OB1)

[74] "Cabinet approves draft law to allow trusts/ Kongsi" https://www.mcot.net/view/5b4481a7e3f8e4f605861b9a?utm_source=TNA&utm_medium=TOPNEWS&utm_campaign=fixtna accessed 1 October 2018

It is interesting to note that the interviewee who is an academic (IA3) explains the procedures for the latter practice in terms of the Law of Agency. She stated that the applicable area of Thai law to regulate the agreement could be found in the Civil and Commercial Code Chapter on Agency and Obligations. "The signed document is basically the appointment of an agent… It effectively establishes a principal-agent relationship."

From the interview data, it appears that interviewees who were chosen for their experience in having been part of an informal broker agreement were generally unsure of their right to seek legal remedy, or doubtful of their ability to do so in court. In response to the question "What would you do if the broker were to act in a way as to confiscate the money he or she was to invest?" one interviewee, an heir to a large inheritance settlement, replied, "I'm not actually sure. I'd have to go to court, I guess" (OB2), while another who is an intended beneficiary replied, "I just don't know what to do" (OB1). According to another interviewee, a retired High Court judge, it is possible for the fraudulent broker to evade responsibility by leaving the country until the end of the prescription period, which in Thai law is limited at five years (IR10). Another interviewee, the official of the National Anti-Corruption Commission of Thailand (IAR4) explained what he has observed during his past career as a criminal court judge to be an "unspoken practice" concerning the ability of the wronged or defrauded parties to claim restitution or damages. He stated that even should the court decide for the wronged pseudo-beneficiary, there is a problem in practice concerning the enforcement orders for compensation. According to the interviewee "It is a well-known practice for police to comply with an order of court to recover lost assets only if the rightful owners offer 30% of the recovered value to the police" (IAR4). This claim is later confirmed by other participants, including an official from the Department of Special Investigations, an intended beneficiary, and the judge of the Constitutional Court (IR5, OB1, IR9).

10.4 Recognising trust-like characteristics in familial asset management and the Kongsi System

A. Early Thai-style familial management of assets

From the interview data, there was thought to have been practices that bear resemblance to the characteristics and function of trust in the area of family law. Contrary to a Western cultural presumption of family roles and traditions (Rigg, 2004; Aimpradit, 1996), where it is generally thought that the male member of the Thai family was the person entrusted with the handling of family incomes, (Yoddumnern, 1992; Aimpradit, 1996) an interviewee who is a professor of law and completed their graduate studies from a university in a country having a common law legal system (IA1) explained that prior to the receipt of Khmer cultural influences, although men were the principle income earners of the family, it was according to Thai cultural practice and customs that women were entrusted with the management of household income and familial assets (IA1). "I recently supervised a graduate student who was doing a

project on historical family structures in Thailand[75]. This may come as a surprise to you… as it certainly did to me… but the woman was the be-all and end-all of money matters." Upon further research of academic literature on Thai society in the early Sukhothai period (Yoddumnern, 1992; Amatyakul, 1984), traditional Thai culture entrusted the duty of family finance-trustee to the woman of the household until the influences of Devaraja-Khmer culture placed more power in the male provider of the family. Another example of trust-like familial arrangements that were later to become popular in the Thai-Chinese community is the *Kongsi* system in the 19th century.

i. The Kongsi System.

The term Kongsi is defined in the Thai Dictionary of the Thai Royal Institute (edition B.E. 2542 (1999)) as "a pool of assets shared between a group of people; a firm; or a company; a company engaged in trading; a business that is public in nature." The Kongsi system provides another example of non-formal, trust-like arrangements. It is a customary system known to be used by Thais of Chinese origin, and it is the Chinese that have been credited by academics as having played a fundamental part in the development of the Thai economy from the period after the signing of the controversial Bowring Treaty in 1855 between Thailand, then Siam, and Britain (Terwiel, 1989; Bualek, 2001). The Treaty itself forced the liberalisation of trade and broke down the monopolised import and export by the Siamese Government and was regarded by Thai historians to be highly detrimental to the Siamese state and governing classes (Chaiyayotha, 2003; Wongsurawat, 1999; Terwiel, 1989; Bualek, 2001). It was regarded that the wealth generated by Chinese-Thai families from within individual Kongsi arrangements were a significant source of capital for the Thai domestic economy (Bualek, 2001). The reason why it is featured as a type of trust-like arrangement in this dissertation is because it is a term which a number of interviewees identified when the features and characteristics of trusts from the common law system were explained to them. As an example of this interpretation, a district attorney (IR8) states:

> What you've just explained… For me… It's like the Chinese Kongsi system. The brothers, sisters, aunts and uncles earn money and then, they all hand it to the father. Father then hands out pocket money to them. They usually all live under one roof and eat together, so no-one apart from the father is footing the bill for food. (IR8)

Interviewees expressed that they perceived similarities in such instances of entrusting a duty to manage communal finances to the roles and duties of a trustee in common law terms. Some interviewees were acquainted with the term Kongsi as denoting a person, as the interviewee who is a civil servant working for the Department of Special Investigations (IR5) the Kongsi is an informal name for the eldest male heir of a Chinese-Thai family who is entrusted with the duty of managing the family's financial affairs. Another interviewee, a professor of law at a Thai university explained:

[75] Findings for unpublished research titled, 'A Historical Picture of the Thai Family' commissioned by the Social Welfare Department of Thailand, Sukhonthapan, (editor), completed 2012 October.

> I can think of another example… are you by any chance, familiar with the term Kongsi? It's a tradition… no, a customary familial arrangement, I guess. It's from Chinese culture. Basically, it's where the eldest son, or the father of a family acts as a trustee for the family assets... He is the Kongsi." (IA2)

Little academic literature exists on this subject, and those in existence talk of a system for the micromanagement of assets within the family unit (Klitiyavanich, 2011; Wang, 1995; Lertpanich, 1981). Historians cite the origin of the system to the Chinese migration of mine workers into Borneo at around 1760 (Wang, 1995). From the late 18th century onwards, Thailand saw a migration of Chinese immigrants, who sought work mainly in the form of manual labour and later came to marry Thai women and settle. (Sorensen, 1993, pp.92-93) From academic literature, it was a form of cultural arrangement within the family, whereby the role of chief financial manager is given first to the father, then generally passed on to the eldest son. Income of all the members of the family would be pooled into a central fund then distributed, usually evenly to each member of the family (Sorensen, 1993; Eowsaweewong, 2002).

Although many small businesses built on the Kongsi model are registered as partnerships or limited companies as they expand, it is not possible to search for such information in the Thai business registration database since such arrangements are informal in nature, and there is no known record of the number of current families under the Kongsi arrangement. However, in the semi-structured interview sessions, all of the interviewees had said they knew of the Kongsi system. Six of the interviewees had said that they knew of people who were currently involved in an arrangement of such nature (OB3, IR5, IA2, IR8, OT10, OL3). The interviewee who is a beneficiary of an informal familial inheritance arrangement (OB3) elaborates on her experience of growing up in a Thai-Chinese household:

> When I was young, all my siblings… that's seven of us, lived in a tiny, tiny place in Silom. It was a shop-house and we sold… all sorts. My father is of Chinese origin… he's an original settler, actually. I was born here in Thailand and am the fourth child. My eldest brother, Yod… he's actually the family's second child was born here too. Father worked as a shopkeeper and mother cooked and cleaned. He passed away when Yod was about eighteen, I think… by then he'd gotten into university. I remember that before he died… father… he had a chronic liver disease, so he had time to teach Yod all the family business side of things. Not that Yod was interested at all… he was learning to become an accountant. It was really Fai, the eldest who helped out with the trade, but anyway, all our assets… the deeds, everything… ended up in Yod's name. It all turned out alright in the end. Fai still did all the work though, but Yod was good enough to sign anything that was needed to be signed when we eventually sold the place about… oh… twelve years ago now? (OB3)

Duties and responsibilities within the Kongsi.

When asked about the source of authority behind such arrangements and how they were enforced, interviewees used a discourse of familial and personal obligations instead of legalistic terms.

For example, when asked how in their view, they knew the Kongsi would not run off with the family funds, the interviewee who is a civil servant from the Treasury Department (OT9) replied "A Kongsi would not cheat their family because… who steals from their own blood and flesh?" In reply to the same question, the interviewee who is a beneficiary of an informal familial inheritance arrangement (OB3) explained:

> If you ask me… I think it's a personal thing, isn't it?... I mean, I know Yod. Fai (the eldest) knows Yod. We're brothers and sisters. We'd never do anything like cheat one another. I believe it's because we are a pretty close family and we get along well. I think… though… I think it's a Chinese settlor trait thing. You know when you all come over on the same boat there's a certain unbreakable bond. You go through a lot together… suffer such hardship together in the early days that you end up never even dream of cheating one another out. (OB3)

Another account of the Kongsi system was from one interviewee who is a fund manager (OT10), whose late uncle was part of such familial arrangement. He explains his knowledge of the arrangement. This interviewee likened the Kongsi system to a company. Referring to his uncle:

> His family worked in the construction industry. The family owned a roof tile production plant that was founded by *Tia* (the father). He wasn't the eldest son, so we weren't pressured to live with the family, but that is what usually happens. Almost all of the money my husband earned went to *Tia,* and out of that contribution he was given back pretty much an even larger sum. It's almost like a company arrangement, really. Any large expenses… we could bill *Tia* for. What we would do is bring him the receipt and he'd pay us back in cash. Family holidays would be a grand affair and they'd usually rent out a couple of villas… sometimes by the seaside. We've even been skiing together." (OT10)

With reference to the general perception of the financial and commercial success of Thai-Chinese entrepreneurs who had followed the Kongsi "Model of business", it was suggested by another interviewee who was a personal asset management specialist and fund manager at a Thai bank (OT1) that the success of the companies that were founded in the Kongsi model was a testament to the non-violable nature of the obligations. "It speaks for itself, really" (OT1). According to an interviewee who is a financial brokerage advisor (OT4), the term Kongsi is used to describe business ventures that are founded on capital pooled together, usually by relatives. "Even though I don't hear of them as much nowadays, I believe Kongsis were like the SME start-ups of the previous century. All the big Thai-Chinese firms you see today… CP, Siam Concrete… you name it. They all came from Kongsi talent" (OT4).

The Kongsi System in modern Thai society and some problems with the changing times and attitudes.

Further research of academic texts on the history of Thai economy showed that in the past decade, the Kongsi is less common in Thai society (Mekharat, 1977; Kanokpongchai, 2007). However, the use of Kongsi as the manager of familial assets or the "Kongsi Business Model" was regarded as the

predecessor in the business models of many powerful and successful corporations in the modern Thai economy. It was thought that many a successful Thai corporation that were founded by Thai-Chinese entrepreneurs had developed from what was once a small family enterprise managed by the male heir (Mekharat, 1977; Kanokpongchai, 2007; Asani, 2010; Phongphaibūn, Wutthiphānit and Chinnakān, 2001).

Many of the interviewees too, have perceived a change in the popularity of Kongsi business arrangements. The interviewee who is a lecturer in intellectual property law at a Thai university (IA2) likened the Kongsi system to a company. In her view, "It's like… pooling all your cash together… every month you get dividends. Although, it's like the company's shares are a constant number, because the usual case is that the dividends are equal, no matter how much you put in. I mean, as the family pool of income gets bigger, the children do get more…. but from all the Kongsis I've heard of, everyone seems to get the same, equal amount. The interviewee's description points out to the first and most perceived problems regarding Kongsi arrangements, i.e., the identical portion of stipend per family member. As another interviewee who is an in-house lawyer for an international financial institution (OL3) describes:

> I have friends who have come to share with me, their problems of Kongsi Life. Mainly this concerns the fact that one lazy family member who refuses to put effort into the family business gets the same monthly pay from the Kongsi as everyone else. (OL3)

The statements above seem to indicate a changing attitude towards the duties and responsibilities that are pivotal to the success of the traditional Kongsi system. It appears that some of the later generations, i.e. the sons and daughters of the Kongsi family have relied on the availability of family funds, but have come to develop a sense of complacency because of its availability. Another point observed from the interview was that there appeared to be a change in the attitude towards property and ownership in the later generations of the Kongsi family that are more attuned towards the more capitalist-driven society. One interviewee, district attorney (IR8) recalls one of their friend's troubles. The friend was the son of Chinese immigrant parents who owned a shop-house pharmacy. According to the interviewee:

> He always complained that being in a Kongsi is like… not being able to own anything yourself… Not being able to be your own person. Sure, there were always cars in the garage and sure… you can take anyone out for a drive… but you can't sell it. Can't put it up as security for a loan. It's not just the legalities that's the issue, I mean… the car was in the elder brother's name… He said it made him feel… a bit complacent in life. He didn't have a career choice… none of the brothers and sisters did. Once he graduated with his engineering degree, which of course, has nothing to do with pharmaceutical goods, he'd have to take the reins and run the business. All that, was because the eldest had a medical degree, and in his father's eyes, only that was good enough a career besides running the shop. (IR8)

In a similar vein, there has also seemed to be a changing attitude towards the sense of ownership when it comes to financial interests. An interviewee who is a lecturer in Thai intellectual property law (IA2) talks of the experiences of a friend of her family. The friend was a daughter whose family owned a Rice milling business. She had come to seek advice from the interviewee on her future business plans to

expand her own personal venture selling baked goods. The capital for the business was from the friend's own savings and her business had taken off. The friend had been considering whether to ask for a loan from the family business to expand. "In the end, we decided it would be best if she avoided taking money from her parents, although I believe that is what is normally done in a girl of her position." In clarification, the interviewee said that she had meant "a person from a traditional Kongsi family". The reason for such conclusion, according to the interviewee was that:

> If she had taken money from the Kongsi, legally speaking, everything would have to have been done in her parents' names. Legal ownership would've fallen to her parents, and although she knew that her parents would allow her to profit fully from the venture and would happily sign anything needed (execute all necessary legalities), she would have felt that would effectively have made her feel that the venture was no longer truly the fruits of her own labour, and that in all sense, she would feel obliged to let most of any income from the venture go to the family pot. Plus, there was always the risk that if the baked goods business took off, some of the extended family (the partners of her siblings) could want a say in the business, which she did not want to happen. (IA2)

Another point arising from the above interviewee's account is the effect of the changing family structure. As the traditional Chinese family expands in number to include persons who are not from a similar Chinese background, coupled with the changing attitude of the later generation members of the family, it appears that management of finances under the Kongsi arrangement becomes less favorable. An interviewee who is a lecturer in Thai Civil and Commercial Code law on contracts and obligations (IA3) explains:

> Nowadays, it appears that the more… the not so merrier. I have heard of many a complaint where an extended family member, usually the husband or wife of a child of the Kongsi founders, have tried either to persuade their partner to leave the Kongsi, or want 'in' on the family pot of gold. (IA3)

From the account of the interviewee whose friend sought advice on funding a baked goods venture (IA2), another element that stands out as an unfavorable feature of the Kongsi is the discrepancy arising due to the existing Thai laws lack of provision for trust-like arrangements whereby the registered owner of a vehicle or land is holding the registered title of a car or land for the benefit of another. Two of such examples may be found from the interview data. According to the interviewee whose late uncle lived under a Kongsi arrangement (OT10), when asked whether in his view, such arrangement posed any problems, the interviewee recalled one aspect.

> My uncle's family would own cars… they'd be either in my uncle's mother's name or *Tia's.* My uncle drove one in *Tia's* name. One day, he accidentally clipped a motorcycle while turning into an intersection and he didn't realise. Some passers-by had caught the licence plate, rang up the police and as the car was in *Tia*'s name, he'd received a summons in court for a hit-and run. Of course, my uncle showed up at the police station and paid a fine. If he hadn't done that, *Tia*

might've gone to court… or even go to jail, well, maybe not so much jail, but he would have had a criminal record. (OT10)

Another example of the disparity between the informal arrangement of land ownership under a Kongsi and modern Thai land and property law may be found in the accounts of the interviewee who is a district attorney (IR6). He was asked to settle a family dispute which arose between a brother and the husband of the sister regarding a house which was built on their family property.

> So… the mother had just passed away. The sister and her husband lived in the bungalow… they had been for years before and apparently everyone had known that the father who… was dead at the point… even before the mother… had given them half the money to build the bungalow for themselves to live in. When mother died…the will left the east side of the plot of land to the brother and the west side to the sister. It said nothing about the bungalow, which was just so unfortunately, about twelve meters over the parting. So… the brother got up and told the sister that she and her husband had to buy the part of land, where…where the house was on… or move. So… as the part of the plot of land that the bungalow was on was in the brother's name… there wasn't much the sister's side could do. Section 146 (of the Thai Civil and Commercial Code) states… let's see, it says "Things temporarily fixed to land or to a building do not become component parts of the land or building". So, all the sister could really do… was ask nicely. In the end the brother backed down and she paid him a little bit of money, and everybody went home happy. (IR6)

There has been academic criticism on the changing structure of society and the compatibility of the Kongsi structure. The Kongsi was, in the beginning, a system based on brotherhood, friendship and equality (Bualek, 2001, at p.11). Many Chinese migrants, usually single men, came from mainland China to live and work together in usually labour- intensive jobs. These men would pool parts of their income together to buy their food and essentials in bulk for a cheaper price. These labour-intensive jobs would often be ones of high-risk such as construction, shipping and even piracy (Wang, 1995). It was thought that such a bond was the reason for why the Kongsi system worked well a system for managing shared finances (Bualek, 2001; Wang, 1995). As time passed, a hierarchy became to develop within each Kongsi, as one member assumes the role of foreman. Added to this were the marital partners and children who became annexed as the lower-ranking members of the Kongsi. It was then that the equality aspect of the relationship of members of the Kongsi came to be unraveled (Bualek, 2001, p.11).

Today, some academics consider the structure of the Kongsi as the model from which Triad clans have developed (Bualek, 2001; Wang, 1995). In their view, the formation of Chinese immigrants into groups of mainly male labourers became larger in number and soon necessitated an established leader. According to Wang (1995), Triads are associated with clanships that are also based on brotherhood, albeit on a more vertical and hierarchical structure, as opposed to the original Kongsi when the structure of the organization was horizontal. The increased members of a group had meant that the less connection between each of the members and a system of pledging allegiance of trust was used, with severe punishments for its breaking.

The development of triad-type allegiances in Thailand was not a welcome affair, as such groups were generally associated with crime, especially with the rise of violence between its members and rival groups (Wongsurawat, 1999; Chaiyayaotha, 2003). The Triad was generally known in Thailand by its *Hokkian* pronunciation: "*An Yi*". Academics have attributed the development of such secret-society style clanships to the smuggling of opium (Lertpanichyakul, 1981; Bualek, 2001; Siriaraya, 2014). Members of Triad clans who were Chinese immigrants had easy access to opium, as a large number were involved in manual labour in the shipping industry. There was a large number of established groups of such Chinese immigrant labourers who were situated mainly in the coastal areas of the country (Lertpanichyakul, 1981; Siriaraya, 2014). There have been several documented incidents of significance in the National Chronicles[76] (Boonnak, 1857) and throughout the reign of King Rama III (1787-1851) involving Triads. These were recorded as incidents of uprising by groups of Chinese immigrants in the provinces of Nakornchaisri and Samutsongkram in 1842-1844, where the military unit of Paknam were went to suppress the riots, resulting in the capture and punishment of ringleaders. The most significant of these incidents took place in and was known as the An Yi Uprising in 1857 in the seaside province of Chachoengsao. Appeals were made by the local inhabitants of the province to the King, regarding the Triad clans demand of protection money. Fighting broke out between them and the local Governing officials and resulted in the death of the Provincial Governor, thereby amounting to an act of rebellion. The King then sent the military to capture and suppress the group, resulting in the capture and execution of around 3000 clan members (Boonnak, 1857; Lertpanichyakul, 1981; Siriaraya, 2014). Some similar incidents of uprisings happened later in the reign of King Rama V (1868-1910) in the provinces of Ranong and Phukhet in 1867 (Wongsurawat, 1999; Siriaraya, 2014). It was because such incidents that in the early 1900s, a standing order was made by the Thai military to provincial Governors and local enforcers to take swift and stern measures against those engaged in criminal and illegal acts as a group (Wongsurawat, 1999; Siriaraya, 2014). The Penal Code of Siam R.S. 127 of 1896 Section 6 (8) was enacted to penalise the concerted acts of two or more persons in the commission of a crime, and later in the Thai Penal Code, Section 209, which now states:

> Any person who is a member of a body of persons whose proceedings are secret and whose aims are to be unlawful, is said to be a member of *An Yi*, shall be punished with imprisonment not exceeding seven years and fined not exceeding fourteen thousand Baht.

A point of observation which might therefore be made is that the secret-society, clanship type organisation of *An Yi* that is closely associated with the Kongsi system through its Chinese cultural origins has the ability to attract negative and illegal connotation by academics and legislators.

To conclude, from the interview data, the Kongsi system is one of the most closely associated with trusts by the interviewees. The word itself was referred to by interviewees to mean a customary familial arrangement. The pool of shared funds was likened to trust assets, and the term used to refer to the person in charge of family finances was likened to a trustee. The nature of the duties and responsibilities are based mainly on personal relationships, as is the structure of ownership within the Kongsi. With the

[76] Boonnak edition, 1857: in Pongpipat, (1984) The Thai Encyclopedia, Royal Institute, at 8681

changing values of society on the concept of ownership and the changes in family structures, the Kongsi arrangement seems to have become less and less compatible. Such changes have also been seen to pose problems of legal ownership arising out of the lack of Thai law that allows for ownership of registered property such as land and cars for the benefit of another. It appears that the ideals and functions of this trust-like mechanism are compatible with traditional Thai-Chinese families. However, as the Thai Trusts Act is not applicable to these particular instances, for the time being, it remains to be seen whether such families regard the Thai Trusts Act as a viable option for the management of finances.

10.5 Recognising trustee-like roles in Thai laws related to politics: The role of the National Anti-Corruption Commission.

The National Anti-Corruption Commission (NACC) is discussed here as the final mechanism in which interviewees perceived similarities in function and utility to those of English Trusts. The suggestion was put forward by an interviewee who is a professor of Thai commercial law on contracts and obligations at a University in Thailand (IA3). The said interviewee then went on to refer to an acquaintance who is a government official from the Policy Department of the NACC for further information (IR4).

Preliminary research was conducted on local laws related to politician's assets. The trustee-like institution of the National Anti-Corruption Commission was set up by virtue of Article 209 of the Constitution of Thailand B.E. 2540. Its functions are set out in the Organic Act Incorporating the Constitution of the Kingdom of Thailand B.E. 2555 (2012). Its purpose was to protect against actual and potential conflict of interests in the electorate and high- level officials of the Thai Government. Under these founding provisions, the NACC Act established a department of oversight to regulate assets of elected representatives serving the Administrative arm of Parliament. Its regulations apply to the Prime Minister and members of the Council of Ministers (the Thai Cabinet) which in total consists of 36 positions for political officials.

According to the interviewee who is a Policy Director of the NACC (IAR4), the Office (NACC) works in two main ways. Firstly, it makes it a requirement for those in positions of state power to declare their assets. That's to say, not just their own, but those of their family members, for up to five years after they leave their office. Secondly, and more onerously, it requires that members of the Council of Ministers hand over their assets as well as "things they could get in trouble for owning when in the position of an elected member of Parliament, or say…any… any person in a position of power and authority" (IAR4).

Data from the documentary research shows that the requirement to declare assets apply as well to the President and vice presidents of the Thai Supreme Court, the Head and vice heads of the Public Prosecutor's Office and the Head of the Auditor General, among others (s.39). For the second part described by the interviewee, the Management of Share Holding and Shares of Members of the Council of Ministers Act B.E. 2543 (1997) prescribes that Members of Parliament serving as a Minister hold no more than 5% of shares in any company (s.4). Upon accepting an official post, Ministers holding more than

5% of shares are required to transfer any assets worth over 5 % in any company, partnership, etc. into the name of a juristic person, under a management contract, within a period of thirty days (s.5(2)). According to the interviewee from the NACC, "the legislation intends to provide a legal separation of a member of the administration from his potential or actual gains and benefits in privately-owned juristic persons". The management contract is then sent to the NACC for scrutiny. Non-compliance results in disqualification of the Minister from their official post (s.265), a five-year ban from running for election (s.367) and potential imprisonment for a term of up to six months (s.119).

In reference to the requirement for a transfer of ownership in personal assets, an interviewee who is a legal academic said. "Although the primary aim of the Act is to prevent a conflict of interest of MPs, I personally think that the contract required to affect the transfer of ownership is pretty much what trusts does, isn't it? I mean, it's almost like the trusts in the Thai Trusts Act, I think" (IA3). According to the interviewee working for the NACC, he perceived the contract as providing a "compulsory legal obligation that in many ways, functions like a trusts instrument" (IAR4). In his view, the juristic person holding the shares on the Minister's behalf acts as a trustee in the safekeeping of the assets of the company, partnership, etc., formerly belonging to the Minister. "In this particular case, the 'duties' of the trustee… who, of course, is the juristic person… is whereby it's required by law to submit financial statements to the us (the NACC) for audit every three months on top of the usual obligations to file tax returns. Of course, this requirement is in place for up to a period of ten years after the Minister has left his or her official administrative post" (IR4).

It appears that from the relevant statutory texts[77], the focal point of the Act Establishing the Juristic Personality is the protection of state interests. There appears to be little by way of regulation and control of the juristic person in their role as the trustee, holding the Minister's assets on trust. The contract required to affect the transfer of ownership itself is a standard-form contract attached to the annex of the act. Its terms do not allow further investment by the juristic person but impose a standard guideline of practice and scope of responsibility for the juristic person which reflects the minimum requirements imposed on directors of companies listed on the Stock Exchange of Thailand, e.g. duty of loyalty, accountability, etc. (Public Companies Act 1990) On the other hand, it could also be said that such a legal institution acts as a trustee holding assets that are subject to potentially conflicting interests for the benefit of the state, as well as the minister, who is by analogy, a involuntary settlor. In which case, it could be said the financial reporting obligations imposed on the juristic personality are a measure of trustee regulation.

According to Government statistics, the NACC are able to subject all ministers to its requirement to transfer assets (NACC Report 2010/2012). However, once these initial requirements have been complied with, there appears to be a lack of enforcement of the NACC provisions following the official transfer. For instance, although a Minister has complied with the obligation to transfer his current legal interests, there is room for evading the prohibition of having conflicting interests by appointing another

[77] Management of Share Holding and Shares of Members of the Council of Ministers Act B.E. 2543; the Organic Act Incorporating the Constitution of the Kingdom of Thailand B.E. 2555.

individual as a nominee shareholder of a new venture and discreetly transferring profits to the Minister. Currently, there has yet to be a proven case of such practice. It is a known fact that in Thai law, legal Nomineeship is legally difficult to prove in Thai courts[78] (Siriaraya, 2008; Potawanich, 2011) and it was noted by the interviewee that another problem was the potential of the public to proactively police interests and assets held by Ministers and highly-ranking officials, despite the fact that they are required by the NACC Act to be made public.

The interviewee equates the voting public to "shareholders of the public and therefore beneficiaries of the pseudo-trustee juristic personality", to whom the latter owes a legal duty of accountability and responsibility. The reason for this lack of pro-activeness, in the view of the interviewee, is "the attitude of Thai people" (IAR4). The interviewee goes on to express:

> I think… really, I believe that Thais have been conditioned by society, culture and political beliefs that they are subjects as opposed to citizens, the difference being that citizens are more like a stakeholder in the state, and corruption is an act against the interests of the stake and therefore should be prevented or punished. Subjects, on the other hand, are controlled by the state and its administrators and are less entitled to scrutinise the latter's acts and decisions. I believe that this social divide is ingrained into the Thai culture and way of thinking. If I were to say so, these ideals were stamped into the Thai psyche through historical and religious influences. In order to change anything, a sense of 'citizenship' needs to be grounded into the Thai psyche, from the bottom up… it needs to be fostered into schoolchildren, via their education and upbringing. Nothing is going to change otherwise. (IAR4)

The views of the interviewee from the NACC point out to the recognition of the similarities between the functions of a Government organization and those of a trust in English law. The interviewee said that he would like to see implemented, the use of constructive trusts in Thai law to help with the NACC's role and powers to police the shareholding activities of elected members of Parliament and to prevent corruption by high-level officials. During the interviews, examples of the wider ranger uses of constructive and resulting trusts were given. These included the use of constructive trusts to apply to the family home in *Lloyds Bank plc v Rosset* [1990] UKHL 14 and *Stack v Dowden* [2007] UKHL 17, and constructive trusts used in the case of *AG Hong Kong v. Reid*. [1993] UKPC 36. The latter case concerned a former Director of Public Prosecutions who had in his post, accepted bribes for obstructing the prosecution of a number of defendants. The proceeds of the bribes were then used to purchase land. The Privy Council held the land on constructive trust for the Hong Kong Government, as the defendant, being a Government official, held a fiduciary duty to the Government and had acted in breach of this fiduciary by accepting bribery. A constructive trust was therefore imposed on the land. It was this last case in which the interviewee expressed keen interest:

[78] Potawanich,(2011) "A complete report on Nominees" Research commissioned by the Ombudsman, Nadtara Siriarya (2008) Birkbeck University Masters' (MRes.) dissertation on the Problem of Nominees in Thai law (unpublished), Supervisor, Professor Amanda Perry-Kessaris.

> That's a great example of trusts. Such a mechanism… the ability to impose such a mechanism, is what I wish Thailand would have in place one day to deal with corruption. There nothing quite like it in Thai law… not that I can recall. I think it sounds exactly what we try to achieve in terms of counter-corruption measures. (IR4)

To conclude, according to the views of the interviewees regarding the comparability of mechanisms in the Thai legal system to those of trusts, it appears that some interviewees recognize the similarities in the functional aspects of English trusts to certain laws and institutions existing in the Thai legal system. This data provides a 'human' narrative that is not otherwise available through a literal examination and analysis of Thai legal statutes and codes of law in the earlier part of this dissertation. Additionally, it reveals how interviewees expressed a positive view over the potential abilities of English trusts and expressed awareness of the potential usefulness of such mechanisms for application in a Thai context. In the next chapter of the dissertation, the data gathered from both the literature review and semi-structured interviews will be thematically analysed to provide a conclusion to the dissertation. It will be seen how the responses and information from both methods paint a picture of the overall Thai mentality towards trusts in Thai law.

Chapter 11: Refining the elements of a Thai mentality towards the transplant of trusts in Thai law.

The aim of this chapter is to present the final analysis of data gathered from the analysis of documents and semi-structured interviews in a way which represents a Thai 'mentality' towards trusts in Thai law which will ultimately help to understand why, years after the enactment and entry into force of the Thai Trusts for Capital Market Transactions Act 2007 (TCMT), no trusts had been established under the legislation. The methods for constructing the semi-structured interviews and the processing of interview data were as follows: a selection was made of certain points of significant data from the earlier analysis of documentary sources such as Thai legislation, legislative guidelines and academic writing, as well as data from pilot interviews. These consisted of points of interest were then integrated into the formulation of interview questions. Such questions were then adapted to provide a general, structural guideline of the type of information that was needed to accompany the analysis of data from semi-structured interviews. There were four such categories: 1. Interviewees' opinion on the Thai Trusts for Capital Market Transactions Act 2007; 2. Interviewees' awareness of trusts in the Thai legal system. 3. Interviewees' understanding of trusts-related roles, and 4. Knowledge of alternative mechanisms and practices in Thai law and tradition. The grouping of questions under these four general areas of investigation was then used as a broad thematic guideline. The responses to the questions were then analysed against the presumptions or hypotheses formed from data gathered in the document analysis. The table below shows the initial presumptions and hypotheses against the main areas of investigation and new information from the interview data.

Area of investigation	Initial presumptions	Interview data
1. Attitude towards trusts	1.a Hostility to trusts	
2. Awareness of trusts in Thai law	2.a Dismissal of existence of trusts due to the ban in the Thai Civil and Commercial Code. 2.b Confusion over terminology.	
3.Opinion of the Thai Trusts Act 2007	3.1 Lack of knowledge of existence of legislation. 3.3 Industry-specific personal opinions on the benefits of the Trusts Act.	3.2 Lack of publicity.
4. Reasons for the lack of trusts in Thai law	4.1 Reason for lack of implementation due to the state of economy, not law. 4.3 Existence of alternative, cultural norms based on familial relationship.	4.2 Historical and legal incompatibility. 4.4 Cultural adversity to formalities. 4.5 Religious influences of karma and the Buddhist notion of sufficiency.
5.Understanding of trusts-related roles	5.a A varied degree of willingness to see the similarities of (personal or professional) roles to functions and characteristics of English law trusts, depending on legal knowledge of interviewee. 5.a.1 The less law-related an interviewee's personal or professional role, the more accepting. 5.a.2 The more law-related an interviewee's role, the less accepting of similarities, with more reserve due to semantic or conceptual differentiation. 5.a.3 Realisation that some domestic trust-like mechanisms and laws lack feature of trustee accountability and facility for beneficiaries to call to accountability and retrieve assets held on trusts.	
6.Knowledge of alternative mechanisms and practices	6.1 No initial presumptions. Hope for interviewee to point to information on trust-like law or practice not revealed by analysis of documents.	

	6.2 Revelation of cultural or religious trust-like concepts and practice not covered in document analysis. 6.3 Reluctance to talk about controversial mechanisms like nominees or Personal familial arrangements that are trust-like.	

Table: Comparison of initial presumptions and interview data.

To ensure that the initial presumptions and hypothesis do not pre-judge findings, each of the interviewees' personal and professional background was used as another factor in the analysis of interview data. Significant Patterns found in responses were grouped into themes based on the groups of people expressing the views. Ideas that are significantly different from those expressed by the rest of the group were also analysed in terms of the reasons for such divergence. For example, one interviewee who is member of the legal academics group may view that trusts are not inherently compatible to Thai legal mechanisms, as that particular interviewee has had experience teaching only the Thai Civil and Commercial Code. This is to contrast with the more accepting views of other interviewees from the same group who have been educated abroad in a country that allows the use of trusts or teaches comparative trust law. The findings will now be discussed.

11.1 An unexpected openness of interviewees to discuss trusts.

The first theme found in the analysis of interview data is the positive attitude and interest in trusts as a legal mechanism. It was initially thought that the question “What comes to mind when I mention the word trusts?” would illicit dismissive or negative emotional responses from interview participants. Overall, this was not the case. There was no automatic dismissal or dismissive outbursts from the interviewees, and the data did not show any emotionally-dismissive response. Most of the interviewees were reluctant to give a definition of trusts according to their knowledge, expressing that they were “sorry if they got it wrong”. It also was noticed that many of the interviewees claimed at the very start of the process, that they “were not sure if they could help because they lacked the technical knowledge that was needed for the topic of research” (OT7, IA2, OT2, OT5, OT6, IR9 and IR10). Responses of this type were made by interviewees belonging to all groups and mostly the pseudo-trustee group that consisted of interviewees working in the Thai financial sector. Instead of the anticipated hostility, responses were uncharacteristically apologetic and modest.

Contrary to the initial expectation for interviewees to respond negatively to an explanation of the concept and functions of trusts in English law, it was found that the interviewees were open to hearing

the details of given English trusts. Two examples of the function of trusts were given to every interviewee. These included the use of trusts to claim proceeds of corruption in *Attorney General for Hong Kong v Reid.* [1994] 1 AC and trusts in the family home *Stack v Dowden* [2007] UKHL 17. After explaining the possibility of using trusts to claim proceeds of corruption in the case of *Attorney General for Hong Kong v Reid.* [1994] 1 AC 324, the senior counselor to the president of the Bank of Thailand (IAR3), the former director of the National-anti corruption Commission (IAR4) and the senior judge of the Thai Constitutional Court (IR9) had responded very favorably towards the ability of such a legal mechanism. Some interviewees expressed that the potential reach of such a legal mechanism is more than welcome and would be of much use if it were to apply to the current ongoing trials of prominent figures in Thai politics (IAR4, IAR3, IR9, IR5). One interviewee, the head of economic crimes of the Thai Department of Special Investigations said that although he liked the idea behind such a mechanism, but he thought that it could be too problematic to apply. His reason for this was that, since Thai law lacked the inability to recognise any interest other than that of the owner of a property, if such mechanism were to be applied, it would be difficult to prove ownership through the evidence procedures required in the Thai court system (IR5).

Another interviewee stated that she very much liked the idea of a legal mechanism such as trusts (IA3). In her view, an official standard of practice for professional trustees licensed under the act should be should be established to allow for trusts to be used for other purposes. In particular, she thought that trusts would be an ideal legal mechanism for retirement savings funds and benevolent or charitable funds. Although a legal mechanism exists for establishing charities in Thailand under the law on charities as contained in Chapters II and III of the Civil and Commercial Code and in the Social Welfare Promotion Act BE 2546 (2003), the interviewee thought that the mechanism laid out by the Thai Trusts Act would be more preferable, since trusts would allow the management of funds in a more professional, transparent and accountable manner (IA3).

A. The appeal of trusts for interviewees.

From the interview data, it was revealed that the most appealing traits of trusts under the TCMT 2007 were structural clarity and the possibility of redress, especially if the trust under the TCMT were to be used as a legal mechanism for charities and retirement funds in Thai law. These were essentially the imposition of a legal obligation upon a trustee to manage funds for a specifically defined purpose, or for the benefit of a specifically-defined group of beneficiaries, together with the possibility of personal responsibility for breach of duties (IA3, IR8, IR6). Interviewees expressed a preference of the duties imposed by the Trusts Act for two significant reasons. Firstly, it was thought by interviewees that in comparison to the existing duties imposed on directors of fund management companies in Thai law, the duties set out in the Thai Trusts Act seem clearer and more structured (IR8, IA3). Legal provisions on directors' duties in Thai law are scattered among the provisions of the Civil and Commercial Code on Company Law and Agency, the Public Companies Act 1990 and the Securities Exchange Commission Practice Guidelines. It was pointed out by the Securities Exchange official (IR2), the interviewee from the

Department of Special Investigations (IR5) and one interviewee from the Office of the Attorney General (IR8) that in practice, there is confusion as to which legal provision to initiate a legal action due to the complexity of the legal structure of financial companies and investment vehicles. Additionally, interviewees expressed that duties imposed by the Trusts Act seem to place more 'moral' or 'personal' impetus on 'those entrusted to deal with money belonging to others' to carry out their duties with care and responsibility (IR8, IA3, OL4).

Some examples of the interviewees' accepting attitude towards trusts are as follows; in response to an explanation of the mechanism provided by the Thai Trusts Act, a district attorney expressed great interest in the investment functions and was committed enough that he then enquired where he was able to buy a unit (IR7). Positive views were also expressed by a retired judge from the High Court (IR10), who said he thought that trusts "should have" been introduced into the Thai legal system at an earlier date, and he was quite surprised that they had not been until recently. A property owner (OB1) also responded that she would be interested in investing in such a venture.

B. Reservations towards the use of trusts in the TCMT 2007.

From the interview data, it was found that there were technical and cultural reservations towards the use of trusts in the TCMT 2007. While it was expected for reasons given by interviewees to be subjective, personal and specific to each individual's preference, out of all of the reasons given for having a reserved view towards trusts, two noticeable themes could be seen from the interviewee's responses. With the largest number of interviewees who were hesitant about the utility of trusts in their line of work, the group of interviewees who had a professional background in finance gave the main reason for their hesitation as one of a technical nature. A currency trader (OT6) said he would be interested if there was a condition that trustees were insured. An informal trader (OT8) said that he would not be interested, simply because it was not suited for his group of clients.

Alternatively, the reason for a more reserved stance towards the use of trusts as a legal mechanism to manage assets on behalf of others that was given by other interviewees draws attention to some characteristics of Thai culture. A number of interviewees believed that trusts would have little use as Thai people were happier to entrust their assets on a person they are acquainted with, or a family member (OB1, OB2, IR8,). This raises some very interesting points, as there appears to be contradicting views from other interviewees who are mainly from academic and judicial backgrounds. The latter group of interviewees instead expressed an awareness of the increasing willingness to engage in court litigation over inheritance and familial property, as recorded in chapter 12.3 B**.** Another informal trustee stated that in his experience, he found that clients had preferred his services to those offered by other professional brokers, as they preferred the lack of formalities. In his view, his clients disliked the over-complexity involved (OT3).

11.2 A general misunderstanding of trusts in Thai law.

The second set of themes observed from the interview data largely concerns the interviewees' knowledge and understanding of trusts. There were three main observations that are of relevance. Firstly, and as a whole, interviewees have limited knowledge of trusts. The second pattern of response observed from the interview data was the general misunderstanding of trust-related terminologies by interviewees, in particular, the way "trusts" are negatively associated with the interviewee's knowledge of trusts as financial mechanisms or institutions that were seen as the cause of the Southeast Asian economic crisis at the end of the 1990s. Finally, there is a tendency for interviewees to conceptualise trusts as something "foreign" to the Thai legal system, especially by interviewees belonging to the legal academics group. These themes will now be discussed in further detail.

A. Limited knowledge of the concept of trusts.

At the start of the semi-structured interviews, questions were asked to gauge interviewees' awareness and knowledge of trusts in Thai law. Interviewees were asked where they had first heard of the term and in what context. As anticipated, and as had been prepared for by way of participant screening procedures, trusts were known only by interviewees who either had legal education abroad (OL1 and IA1) or were working in the legal or financial sectors (IR2, IA3, OT8, OT5). An example of the latter case is the civil servant working at the Thai Stock Exchange Commission (IR2), who said that she would not have heard about trusts if she had not taken an elective course in her undergraduate degree studies on financial law. According to one legal academic (IA3), she observed that students on her general English common law course showed little interest in trusts and that it was by far, the least chosen topic of research. According to one senior judge of the Thai Constitutional Court (IR9) this lack of knowledge may be in part because "the TCCC makes trusts void, and therefore there was no motivation to study about trusts." Nonetheless, he added: "I think the situation has changed nowadays, trusts are more investment-related, and there is money in that and it therefore should attract more academic attention" (IR9).

B. Definition of trusts based on experience and knowledge.

From the interview data, it was found that interviewees showed differing understanding of trusts based mainly on (bad) experiences in the financial sector. Apart from those whose personal backgrounds involve legal education abroad, most interviewees could not give a theoretically accurate definition of trusts. The general pattern observed from the responses is that knowledge of the concept of trusts depends on the interviewee's personal or professional knowledge and experience. One example of this pattern is how interviewees educated in law in Thailand recognized trusts chiefly in the context of wills

and inheritance. Such accounts include an informal trustee (OT8) understanding that trusts were 'a body that administers inheritance that was banned in Thai law.' Others include the views of an official from the Economic Crimes Division of the Thai Department of Special Investigations (IR5), who expressed that he had known trusts as a 'form of inheritance settlement' in the field of family law, while a lecturer in Thai civil and commercial (IR2) law stated that she recognized the term as "some type of clause used in wills".

Some interesting attempts to define trusts came from the group of interviewees consisting of financial professionals. This included the confusion of trusts for credit foncier companies that were referred to as 'trusts institutions'. One interviewee, a financial brokerage advisor (OT4) referred to trusts as "Unit trusts", which in practice refers to financial investment units in mutual funds which are financial institutions regulated by the Bank of Thailand and the Financial Institutions Businesses Act B.E.2551. Interview data reveals that trusts were often confused for other financial institutions that had experienced economic difficulties in the 1997 Southeast-Asian crisis, such as credit fonciers and finance companies, with good reason. Research revealed that three of the fourteen financial institutions that had been bailed out by the government had the word 'trusts' in their names.[79] However, none of the said companies did in fact operate in the same way as trusts under the 2007 act. For example, a credit foncier provides capital loans that are usually secured by title deed to a piece of land.

Another noted use of the term 'trusts' is the 'trusts receipt', which refers to a contractual arrangement used to enable a creditor, usually a bank, to secure rights over goods brought by a debtor, usually an importer or a seller, for which it has provided funds. The arrangement is one of asset-based financing where a bank promises to pay for such goods. While the term trusts receipt is not written in Thai law, a judgment of the Thai Court of Appeal has deemed such a mechanism to be valid as a contractual arrangement creating a real right over property under section 1298 of the Thai Civil and Commercial Code, (Court of Appeal Decision 1848/2505) and is generally used in import and export transactions.

Secondly, in several interviews, interviewees seem to connote negative attributes to the mention of trusts as financial institutions in Thailand. When asked "What do trusts mean to you?" participant IAR3, a senior official of the Bank of Thailand and a lecturer in Thai law, referred to trusts as "the finance institutions that were to be blamed for an economic crisis." With this, the participant also gave an example of "4th April Trusts", which he explained as referring to an event in which laws were enacted to limit the extent of damage from the collapse of the Thai stock market. One of the most significant laws enacted was the Emergency Decree Amending the Banking Act B.E. 2485 (1996). This legislation enabled the Government to render financial assistance to 'rescue' financial institutions which became, or were on the verge of insolvency, through the establishment of the Financial Institutions Development Fund (FIDF). The FIDF became a 'lender of last resort' for ailing businesses, using funds from the Bank of Thailand and from charges levied on deposits held in commercial banks in Thailand, as well as buying promissory notes and shares from troubled Thai commercial banks, credit fonciers and financial institutions, and paying damages to customers of insolvent financial institutions. The main reason for the economic failure is cited

[79] Bank of Thailand, (2003) Report of the Bank of Thailand on the Rescue of Financial Institutions in Distress

to have been corruption and a sub-standard practice of loan approval commonly used by financial institutions in that era (Thaptiumai, 1986; Jomo, 1998).

The 4th of April trusts were seen by academics to be the major cause of the region-wide economic crises, as measures taken to remedy the crisis such as the devaluation of the Thai currency negatively affected a wide group of people and institutions (Rapheephat, 1994; Banpasirichote, 2004). Foreign countries dealing with Thai companies suffered due to insolvency and a subsequent inability to pay debts due by Thai companies (Jomo, 1998). The interview data also suggested that the following the 4th of April Trusts had fostered a negative connotation attached to trusts as an investment vehicle. One interviewee, a financial analyst (OT10) referred to trusts as "those companies that failed the economy", while a currency trader (OT6) stated that, in his opinion, Thai people had been hurt when the economic crisis occurred in 1997 and he thought Thai people were 'still scarred' from the losses suffered during that period. A senior judge at the Constitutional Court (IR9) also thought that the term trusts in itself causes confusion between one type of culpable financial institution and the trusts under the new Trusts Act 2007.

The final set of patterns concerning the knowledge of trusts was captured in the responses of interviewees belonging mostly to the legal academics group. There was the tendency to 'distance' or differentiate trusts from Thai legal concepts. Responses were worded so as to reference their foreign origin. To one legal academic (IA3), trusts were in their knowledge, "a creature of common law origin," while another said trusts were a legal institution related to "Christianity, the crusades and knights" (OL3). A lecturer of a trust law course (IA1) stated that she thought Thai law allows for a "form" of trusts and gave as examples, charities, the Government Pensions Fund and pooling money for investment by a government regulated body. However, she concluded "Of course, it's not trust in the strict common law sense." Another interviewee took the time to explain trusts in terms of the inherent differences between Thai trusts and trusts in common law jurisdictions: There is a distinction between "holding the property in another's name" and "holding property on behalf of another." The latter is like common law, it still acknowledges the rights of ownership the beneficiary. In Thai law, to hold property in another's name in practice means the law sees the property along with all the rights attached to it as belonging no longer to the beneficiary (IA2).

Overall, the data confirms the presumption that there is confusion surrounding the terminology of trusts. It was observed that the definition of trusts given by interviewees with legal education abroad provided a more accurate definition of trusts. Data gathered from the semi-structured interviews validate the use of participant screening criterion. Additionally, the data shows how trusts are actually understood by Thai people. It points out that knowledge of trusts among the interview participants is context-specific in nature, and that in absence of an official definition, trusts are known by interviewees in the context of their professional or educational backgrounds.

11.3 Opinions on the Thai Trusts for Capital Markets Transactions Act 2007.

The third set of patterns found in the interview data concerns the interviewee's opinions on the TCMT 2007. There are two subsets of themes within this pattern. Firstly, there was a general lack of knowledge of the 2007 enactment. Secondly, the data showed interviewees had a tendency to attribute this absence of knowledge to the lack of the act's publicity. These will now be discussed in more detail.

A. Limited knowledge of the Thai Trusts Act.

Lack of knowledge of the legislative enactment that allowed the use of trusts in the Thai financial market was used initially as one of the main factors to narrow the range of potential participants. This was because it was discovered in the initial pilot interviews that very few individuals knew about the legislation and of the concept of trusts itself. Despite selecting individuals who either had legal education abroad, or those whose professions may touch upon the subject of trusts as an investment mechanism, it was still found that the 2007 act itself is relatively unknown.[80] The most prominent example of this lack of knowledge of the Thai Trusts Act is from the senior official to the Bank of Thailand (IAR3). At the start of the interview session, the interviewee insisted that he had never heard of the legislation and asked whether it was still a bill pending enactment procedures. When the interviewee was shown a copy of the legislation, he exclaimed "Oh look! There it is! It actually does exist. That's remarkable!" He expressed that the existence of this act was hitherto unknown to him and he was even surprised about this fact, as it is the role of the Bank of Thailand to oversee a large part of the financial markets. Subsequent research shows that according to the Bank of Thailand (BOT) Act B.E.2485 as amended by the Bank of Thailand (Amendment) Act B.E.2551, designates the task of supervising financial institutions to the Financial Institutions Policy Group and the task of supervision and analysis of performance and financial institution's risk management to the Bank of Thailand's Supervision Group. As the 2007 Trusts Act provides that only established Thai financial and banking institutions must apply for a license to operate as trustee via official channels, it seems at odds with the fact that the government agency responsible for the task of oversight has little awareness of this legislation.

B. Lack of publicity.

The lack of publicity of the Thai Trusts Act was voiced individually by most of the interviewees in the financial professionals group (OT4, OT5, OT6, OT7), and was one of the most commonly expressed themes of the interview procedure itself. Many of the interviewees outside the group of financial investors

[80] Out of a total number of 29 participants, only 4 interviewees stated that they knew about the legislation.

(OL1, OL2, IAR3, IR10) individually suggested that the lack of implementation of trusts in Thailand may be attributable to the general lack of publicity of the act. According to one interviewee, an investment consultant at a Thai banking institution said that he had seen a company circular that discussed some of the details of the legislation, "but nothing more since" (OT7). From the interview data, the lack of implementation of the Trusts Act may have been influenced by the lack of coordination between regulatory agencies. One interviewer, a personal wealth financial advisor stated that as banking institution, she had to wait for the Bank of Thailand to issue Regulations and directives in order to commence the use of trusts, and such directives never came into existence (OT1). This echoed the views of most interviewees who by profession, operated as pseudo-trustees in the Thai financial sector (OT5, OT6, OT7). Interviewees were asked why they thought no trusts have been made since the Thai Trusts Act had been enacted. According to the opinions of one financial analyst, financial institutions are unlikely to participate in the implementation of the Trusts Act because the provisions were not sufficiently clear. (OT10) For him, not only was there no clear intended audience, he was unable to clearly understand who would be made responsible.

When queried about the reasons for the lack of publicity of the Thai Trusts Act, a senior civil servant at the Thai Stock Exchange Committee who was closely involved in the development and enactment of the legislation (IAR1) explained that in her opinion, the general lack of publicity was due to two major factors. The first was that the legislation itself had been enacted during a period of political and parliamentary anomaly. This refers to the period of events after the Military Coup ousting the Prime Minister Thaksin Shinanwatra in September 2006, where an interim civilian Government was appointed. The Thai Trusts Act of 2007 became one of a large number of legislations enacted during that period. A preliminary search of the Government Gazette database shows that over 60 Acts were passed throughout the period of the appointed Government. The second factor for the lack of publicity was suggested by the interviewee to be the constant development surrounding the legislation. Particular reference was made to the shift of policy from the original aim of introducing trusts into Thai law. The objective of the legislation firstly changed to the aim of accommodating Islamic law-compliant investment units called Sukkuk. Following the lack of implementation, legislators instead promoted the use of Thai trusts for the real estate sector (IAR1).

11.4 Perceived benefits of the Thai Trusts Act.

The fourth set of themes seen in the data consist of interviewees' opinions on the relevance and benefit of the Trusts legislation in relation to their current line of work, and if they are not relevant or beneficial, why[81]. Although most of the interviewees expressed doubt over the potential benefit of the Trusts Act to their line of work, different reasons were given for their choices. There were three subset of themes found in the interview data. The first was that interviewees did not perceive the status of the

[81] and whether there was any other area that the Trusts Legislation could have an effect on, or be a positive benefit to.

economy as relevant to the usefulness of the trusts legislation. Secondly, interviewees expressed that the main reason inhibiting their perceived utility of the Trusts Act was their lack of confidence in its system of regulation and guarantees. Finally, many interviewees cited the lack of clarity of its provisions as a reason for not seeing the potential benefits of the trusts legislation.

A. Economy not a determinative factor to the lack of utility of the TCMT 2007.

Based on the status of the global economy that has been heavily affected by recession in the United States and Western Europe, in the past ten years there was an initial presumption that trusts would not be seen as useful because of the lack of investment capital. Interview data contradicts this presumption. Surprisingly, none of the interviewees quoted the status of the Thai Economy as the chief or main reason for non-implementation. Nor was the status of the global economy cited as the main reason why interviewees thought that the Trusts Act was of use.[82] Alternatively, most pseudo-trustees who work for Government agencies with trustee-like functions such as the Royal Treasury Department (OT9), the Thai National Anti-Corruption Commission (IAR4) and the Government Pensions fund (OT2) expressed that the act would not benefit them because the roles and functions of their office were pre-set according to law and regulations.

Another observation surrounding the interviewee's responses regarding the status of the economy as a factor which was influential to the lack of engagement with trusts was that interviewees from all professional and educational backgrounds were not reluctant in engaging with existing mechanisms in the Thai stock exchange in investing their personal assets. Most of the interviewees had made purchases in Long Term Equity Funds (LTFs) and Retirement Mutual Funds (RMFs) as an investment to set-off individual income taxes in accordance with legal tax incentives provided by the Thai Government. Interviewees showed interest in the potential of the Thai Trusts Act, when implemented, to create trusts which would provide for similar forms of investment through the purchase of trusts units to enable them to set-off individual income taxes (OT4, OT5, OB2, IR6, IR7, IR8). Additionally, interview data showed that interviewees view real estate as a commodity for investment more than ever before and would be willing to engage in trusts that provided for the opportunity to profit from real estate-related business ventures (IR6, IR7, IR8).

B. Lack of confidence in existing systems of oversight and guarantees.

Another pattern of response from the interviewees was that confidence in existing legal and regulatory measures was low, which led to the view that trusts were considered not to be of utility. The interviewee who is a senior official of the Bank of Thailand stated that he did not trust the system in place.

[82] As from the analysis of interview data of all participating interviewees.

To elaborate, he thought that even though the act provided that only financial institutions could apply for a license to operate as trustee, the existing protection against bankruptcy in Thai law was provided by the Deposit Protection Agency Act, B.E. 2551 (2008), and legal guarantees under the act provided the very minimal amount that financial institutions had to maintain against bankruptcy (IAR3). Similarly, an investment analyst expressed that he thought trusts under the Thai Trusts Act would not benefit him, as that he did not 'trust' regulators and enforcers (OT10).

However, lack of confidence in existing legal and regulatory measures under other legislation may be contrasted with other interviewees' enthusiasm in the potential guarantees provided by the mechanisms under the Thai Trusts Act itself. Interview data showed that those who were interested in the trust as an investment mechanism which included interviewees from all roles (legal, financial professionals and academics) did not specifically oppose the mechanisms and guarantees under the new trusts legislation itself (IA3, IR8, IR6).

C. Complexity.

Complexity also appeared to be of relevance to the interviewees' perceived utility of the Thai Trusts enactment. For an example, an informal investor said that he would probably not make use of the act as he did not want to deal with the complexity of the structure required for a licensed trustee (OT8). A pseudo-beneficiary and owner of a small plot of land thought that such mechanisms were "not for her" as she was entitled only to a small amount of funds (OB1).

D. Lack of clarity.

Interviewees belonging to the group of investors thought that trusts would not benefit them as the Trusts Act had no clear provisions to sufficiently deal with the accountability or responsibility (OT4, OT5, OT7). For example, when asked whether trusts would be an ideal or favorable choice of investment, participant OT6, a financial analyst and currency trader, replied, "Basically I think… and this is I think why trusts haven't been made yet, is that there really has to be a specific guidance on who gets what if anything happens." Another participant, a personal asset management specialist, said that he would be "greatly interested" in pointing clients in the direction of trusts as a part of their portfolio, if "only the rules were much clearer" (OT1).

11.5 Interviewees' opinions on reasons for the lack of trusts in Thai law.

The last set of themes captured from the interview data to be discussed consists of interviewees' views on why trusts had not previously existed in Thai law. These were drawn partly from the data gathered from the document analysis as well as interview data. In the pilot interviews, participants were asked whether in their opinion, it was possible to give reasons for the lack of implementation of trusts under the act other than those concerned with the status of the Thai economy, and it appeared to be possible. While it was initially hypothesized that the status of the economy may play part in the lack of implementation, this research focuses on the socio-legal justifications of why, years after proclamation, a trust has yet to be established in Thailand. From the interview data, trusts were thought not to be used for four main reasons: Historical and legal incompatibility, existing cultural norms, Buddhist influences and unfamiliarity.

A. Historical and legal incompatibility.

In expressing what she thought to have contributed to the lack of trusts under the Thai Trusts Act, a lecturer pointed to the process of drafting the first Civil and Commercial Code. She explained that the legislators had specifically expressed for trusts to be excluded from the Civil and Commercial Code since there were existing Thai laws that accommodate trusts (IA3). A senior judge of the Constitutional Court, the DSI officer and a Thai legal academic (IR9, IR5, IA1) explained that there is an understanding that the legislators had meant only to exclude the trust as a legal device which administers inheritance and that since such provisions were already regulated by traditional customs and norms, Thai law need not incorporate foreign devices to arrange familial inheritance.

Some other interesting responses include those from another interviewee who suggested that trusts had not been incorporated into the Thai Civil and Commercial Code because "unlike England, Thai law has never imposed contestable tax on inheritance" (OT8). Another interviewee explained that there was an absence in the social and historical conditions that necessitated the invention of trusts by the English Courts of Equity and he concluded that as a result, Thailand had no use for such a mechanism (IR9). While these statements are factually correct and would make for an interesting subject of research, the objective of this dissertation is not to conclusively prove these assumptions, but to gather an overall view of the range of factors that influence and make up the Thai mentality surrounding the advent of introducing trusts as a legal mechanism in the Thai Legal system. Such theories would each require a study into the historical, political sources, as well as analyses to determine how certain psychological factors play part in influencing research participants. As it was discovered from the process of research design, it would not at this time be an ideal topic of study, as there are insufficient candidates who possess the knowledge required.

B. Existing cultural norms.

i. Family values.

Initially, it was presumed that the existence of societal norms that emphasize traditional family values meant that use of trusts was not necessary in the Thai Legal system. Families were traditionally close-knit and would often come to an arrangement whereby the eldest daughter would be the person who looks after the husband's earnings and household expenses (Potter, 1976; Podhisista, 2011). Arrangements of property and inheritance would be made verbally, and contests of familial arrangements were very rare. Interview data showed that the interviewees were divided on this hypothesis. Some interviewees did suggest that there was no need for such a legal mechanism because of the social characteristics and structure of families in Thai history (IA3, OL3, OT9). Others, mainly interviewees with a legal background in their career or education, contradict this initial presumption. Some interviewees talked of a recent change in the close-knit relationship that accompanies the traditional Thai family structure from their professional roles (OT3, IAR4, IR10, IR6). A public prosecutor (IR6) and a retired High Court judge (IR10) revealed that in their experience, there has been an increase of litigation in the area of inheritance arrangements in the past ten years. "People these days would be prepared to fight for generations if the worth of the inheritance at stake is high" (IR6).

ii The Thai attitude of "Kren Jai."

Initially, it was observed from the pilot interviews that there was a possibility for another existing Thai cultural norm to be pivotal to the integrity of a trust or trust-like mechanism. This was the concept of '*Kren Jai*', a Thai cultural attitude in avoiding causing inconvenience or burden to others who are of a higher or more respected position in society. Pilot interviewees expressed that *Kren Jai*, as a cultural attitude worked almost like a moral obligation to refrain a person from taking advantage of their trustee-like roles and duties. Data from the pilot interviews suggested that this cultural attitude of *Kren Jai* would morally prohibit a person from acting fraudulently to take advantage of another in a business context such as that of directors of smaller, close-knit companies (OL2). In the main interview sessions, this hypothesis was disproved. Similar to the views expressed above in the case of family values, interviewees thought that in the current economic and social developments where businesses have become less personal, the cultural attitude of *Kren Jai* was far less likely to be of any relevance for a trustee or a person in the position of a trustee to uphold his duties (IA4, IA9). At the same time however, some interviewees thought that the provisions in the Thai Trusts Act 2007 would help this lack of the *Kren Jai* cultural attitude that has become more prevalent in the current economic and social climate (IA3, IA1, OT10, OB1).

C. Buddhist influences.

i. Karma.

The third possible reason for the lack of trusts suggested by data from the research was the general dislike of formalities and court procedure that may be influenced by the Buddhist concept of karma. Engel and Engel (2015) pointed out a relationship between the Buddhist concept of karma and Thai legal attitude. Their research on the socio-legal attitude of Thai people towards legality showed that many of his Thai interview subjects perceive karma as a natural 'law' that determines the consequences of their everyday life. Moreover, it showed that some of the subjects interpret law and legality in terms of karma over law and legality. Interview data from this research similarly suggests that the one of the reasons behind the general dislike of formalities may be related to a cultural belief influenced by the Buddhist religion. For example, it is often for a victim of incidents of misfortunes such as an accident or a crime to blame karma. In this particular context, karma refers to an act that is a sin in Buddhism which a person committed in the past, or in a past life. For this reason, those who face incidents of misfortune often do not resort to court for compensation due to a perception that they 'deserve' the misfortune for having made bad karma.

This tendency to blame bad karma was prevalent in the retired High Court judge's account of the difficulties experienced by his wife in her role as administrator of inheritance for a wealthy family (IR10). The wife and another colleague were asked to become administrator of inheritance of a family where her duties would be to dispose of assets according to the terms of the will. A term in the will excluded one of the family members absolutely. Upon the death of the family member, one of the deceased's relatives pursued to contest the will four times, as well as asking the High Court to issue various orders in attempt to secure a part of the inheritance for themselves up to seven times in the following three-year period. In the past two years, the other colleague who was appointed to become administrator alongside her suffered a stroke, leaving her to bear all of the remaining responsibilities. The interviewee explained that he resented that his wife had to experience such hostility and stress in the course of carrying out her duties, despite the fact that she received no remuneration throughout the entire time. However, the interviewee expressed that the predicament was acceptable because it was merely a consequence of bad karma.

ii. Sufficiency.

Another Buddhist influence which may be seen as one of the reasons for the reluctance to engage with trusts in Thai law is the Buddhist notion of sufficiency. A legal academic recalled that the traditional practice of her ancestors and those of their generation was influenced by Buddhist moral edicts to adhere to living a modest, non-extravagant life according to the theory of sufficiency (IA1). Such a philosophy and

way of life is by nature, contradictory to entrepreneurship which was in the view of interviewees, the objectives of establishing a trust under the TCMT 2007. Historically, few Thais would aim to amass a personal wealth and fortune (Essen, 2010; Puntasen, 2008; Potter, 1976). An interviewee recalls that it was common practice for her ancestors to prefer burying their valuables in their back yard over depositing items with a bank (OT9). Another suggested that as there was no demand to generate personal wealth, Thai law had never looked to using trusts as a mechanism for such purposes (IA3).

This suggestion that Buddhist teachings which advocated moderation and sufficiency in the management of personal wealth was influential to Thai cultural world views was supported by academic accounts and analyses of Thai economy and social history (Lingat, 1983; Potter, 1976). Historically, Thai society was structured according to social class ranging from the Monks and clergymen at the top of the hierarchy, followed by the monarchy, noblemen, commoners and slaves. The class-based society structure had begun in the historical period prior to the Rattanakosin era and become well-entrenched in the socioeconomic dynamics of Thai society (Eosaweewong, 2002; Huxley, 1996). The societal class system regulated the roles and interactions of people in the Thai society and was similar to that of the Western European Feudalism; Kings have a metaphorical ownership over the entirety of the kingdom, and would assign their rights of ownership to relatives and noblemen. This right of ownership assigned to nobility included ownership and control over commoners and slaves living on the land and in return and as a gesture of allegiance, the nobility made offerings of crops, goods and manpower four or five times per year (Lingat, 1983; Boonchaloemvipas, 2009). According to a Marxist analysis of Thai history, the class-based structure became so entrenched in Thai society that there was little possibility for members of the common and lower class to elevate their social standing (Eosaweewong, 2002, p.2). There was also little incentive to do so, since pledging allegiance to a nobleman would mean that the commoner is allowed to live under the protection provided by the army of the ruling nobility, as well as to benefit from the prosperity of the provincial economy (Eosaweewong, 2001, p.21).

Analysis of secondary sources of Buddhist teachings coupled with data from the semi-structured interview suggest that the following form part of the Thai mentality towards trusts in the Thai legal system. Firstly, that the Buddhist philosophy on possession and material wealth and the modern adaptation of the teachings of the sufficiency economy were somewhat at odds with the underlying objectives of a trust under the TCMT 2007, which was perceived by the interviewees as being to generate superfluous wealth. Secondly, interview data shows that the beliefs based on the Buddhist concept of karma discourages certain interviewees from pursuing formal legal redress in Thai courts in certain matters, as well as making them shy away from using formal arrangements such as those made available under the Thai Trusts Act.

D. Unfamiliarity.

In regard to the lack of trusts introduced by the TCMT 2007, a senior judge of the High Court suggested that the novelty of the mechanism and unfamiliarity felt by the Thai people could have played part in the lack of implementation. He likened the introduction of trusts to Thai law to the introduction of checks by Thai banks. At the time when checks were first introduced, there were no existing laws to accommodate such a facility (IR10). The only relevant laws were the provisions on theft in the Thai Criminal Code. When applied, a 'bounced' check would amount to fraud and would be prosecutable in criminal law and punishable by imprisonment. The result, according to the interviewee was that checks, although accepted by banks, were rarely used as a form of payment. Legislation was subsequently introduced to exempt the application of criminal law (IR10). The interviewee believed on this basis that potential applicants for trusteeship who had not looked at the details of the new trust law would be too reluctant to engage in such a feat. He also thought that the reluctance to apply for a trustee license was aggravated by the complexity of the financial mechanism and the occurrence of the economic disaster that was blamed on non-traditional financial institutions in the early 1980s.and in the economic disaster in 1997 (The 4th April trusts).

Similar views were given by interviewees from the academic group, but much less so by interviewees who are pseudo-beneficiaries (OL3, IA3). This pattern of response suggests that people may be more reluctant to engage themselves with trusts because the trusts introduced by the Trusts Act is significantly different from what they are used to managing their personal property or trading with.

Chapter 12: Conclusion and recommendations.

This study has found two main points of interest to the initial question of why, years after the enactment of the TCMT, no trust has yet been made under the legislation. The first point relates to the method of study and analysis, and the second point offers the analysis of the Thai mentality as an alternative way of understanding the phenomenon that is the lack of trusts under the TCMT 2007 that may be of use to academics, policy makers and legislators both Thai and foreign. Both the alternative method of research and the Thai mentality can be used as factors to consider when drafting future legislation that seeks to import a foreign legal concept into the Thai legal system.

1. Methodology.

At the beginning of the project, the method of research of why there were no trusts under the TCMT 2007 used was based on the theory of legal transplants. This was because there was an initial understanding that the legislation was enacted to introduce the legal mechanism of trusts into the Thai civil law system that had previously and explicitly banned the use of trusts in Thai law in its Civil and Commercial Code for the very first time (s.1686: CCC). The initial approach therefore proceeded to analyse the comparative law theory of legal transplants and apply the theory to the Thai context. Under this initial approach it was found that Thailand has historically experienced an abundance of legal transplants, and the modern Thai legal system has used foreign legal systems that were mainly from civil law traditions, as well as some aspects of common law systems. It was found in the analysis of the literature on legal transplants that the best approach to be adopted in the Thai context was one based on a contextual approach which helps to provide factors to form a structured framework to be taken into account. Analysis of the TCMT under this contextual approach focuses on assessing the potential of the TCMT as a transplanted law and avoids analysing the legislation merely on the terms of whether it has 'failed' or 'succeeded' to transplant the common law concept of trusts into Thai law, which would otherwise be a futile framework for analysis as no trusts have been established under the legislation.

Further analysis of the literature on the Legal transplant theory identified some challenges in the application of the theory to the import of trusts as a common law concept, namely, that there was a paradox in the need to use common law-centered terms in the analysis of trusts which may not account for trust-like mechanisms existing in civil law traditions. The implication of this finding is that it serves as a caution to any comparative law academic wishing to conduct a comparative analysis of common law trusts to similar civil law alternatives to also have regard to the historical and cultural dimensions of the common law trust. The reason for this is that such an approach will ultimately reveal some of the advantages provided by the English Law of Trusts over the equivalent solutions provided in civil law that are especially

relevant to the use of trusts as a mechanism in protecting the interests of parties to highly complex financial transactions.

When the legal transplant theory was applied in the analysis of trusts in Thai law, it was found that 'trusts' existed both prior to and despite the formal prohibition of the trusts under the Thai Civil and Commercial Code, in the form of a micro-system of trusts endorsed by Thai court judgments. This exposed a 'gap' in research, in the way that meant the legal transplant theory could not adequately explain the existence of these trust-like mechanisms existing outside of the legislation that sought to introduce trusts into Thai law for the first time. The study and analysis of these trust-like mechanisms and legislation provide an unprecedented consolidation of Thai laws and cases on the subject of trusts in Thai law.

Based on the earlier literature analysis of the legal transplant theory, the research methodology was then adapted to look further into the cultural aspects of the use of informal trusts and the non-use of formal trusts in Thailand. In order to address this 'gap' in research, another method was used. This first involved the study and analysis of secondary sources, including Thai court cases, legislation, and legislative practice, to provide an in-depth analysis of the trust-like mechanisms existing outside of the TCMT 2007, as well as an analysis of Buddhist teaching and Thai folk tales and empirical interview data accommodating these sources. Secondly, pilot interviews were conducted to look into why Thai people were using these alternative trust-like laws and practices. Based on the results of the pilot interviews, empirical methods were used involving semi-structured interviews of individuals in different roles of formal and informal trusts. The interview data and data from the analyses of secondary sources were then analysed to provide a new explanation as to why formal trusts were not used and informal trust-like practices were preferred. This was the unique "Thai mentality" towards trusts in Thai law. The analysis of the concept of the Thai mentality is also a unique and unprecedented study which reads against the grain of formal academic texts and laws which provides a human narrative to the analysis of trusts in Thai law.

With reference to the initial method of theoretical analysis of the TCMT 2007 and the initial lack of trusts under the said legislation (Chapter 4), it was suggested that there was a paradox in the way the comparative analysis of trusts was conducted mainly with regards to its' uniquely 'English' historical origins, leading to the over-emphasis of the functional aspects of trusts when comparing trusts in different jurisdictions, as many academics would neglect looking into the cultural, sociological and anthropological differences and similarities of trusts in other jurisdictions. It is suggested here, from the findings of the second method of analysis of the TCMT 2007 that there is a lack of attention to the postcolonial dimension to the use of trusts as an investment mechanism. The rationale behind the said legislation was to provide a mechanism for investment in the Thai stock exchange, which is the very same as the use of trusts to expand colonial economy in the late Victorian era through capitalist means. (Bullock, 1999; McKendrick and Newlands, 1999) Analysis of secondary sources of Buddhist teachings coupled with data from the semi-structured interview in Chapter 11 suggests that there is a sense of incompatibility in elements that make up the Thai mentality to the neo-liberal economic capitalism. Embarking on a thorough postcolonial analysis of the Thai mentality towards trusts is beyond the scope of this study as there appears to be a resistance to the narrative of Thailand being 'colonised', (Lysa, 2008; Winichakul, 2014; Reynolds, 2004)

however, it might be noted that the Buddhist philosophy on possession and material wealth and the modern adaptation of the teachings of the sufficiency economy were somewhat at odds with the underlying objectives of a trust under the TCMT 2007. It is suggested therefore that the initial lack of trusts under the TCMT 2007, and the use of trusts-like mechanisms and alternatives point to a postcolonial resistance to the very idea of colonial expansion of capitalist economy through the mechanism of trusts.

The findings on the approach and methodology for this research therefore provides a caution to future academic studies in comparative law when analysing a uniquely common law concept such as trusts. For Thai academics, the research highlights the necessity to look not only at documentary material, but also to empirical data which is vital to revealing the unique traits that is essential in the comparative analysis of Thai and foreign law and legal mechanisms. It is recommended that regard is to be had to the socio-legal dimensions in a comparative study of Thai and foreign laws to accommodate both the similarities and the differences in legal systems, ideology and mechanisms. This is because solely textual or theoretical comparisons are inadequate to account for similar legal mechanisms and concepts already in existence in the Thai socio-legal context.

2. The Thai mentality towards trusts in Thai law.

From the analysis of data gathered in the course of documentary and empirical research, elements of the Thai 'mentality' surrounding the use of trusts under the TCMT 2007 is influenced by an accumulation of the Thai socio-legal discourses on law, the Thai culture, the Buddhist religion and socio-economic considerations. While there is an openness to accepting foreign models of law and legal mechanisms in some cases, other aspects that form the Thai mentality towards the use of trusts include a sense of caution towards complex and unfamiliar mechanisms which provide the ability to handle or manage personal assets due to experiences of 'hurt' caused by economic instability.

Firstly, in terms of the Thai socio-legal discourse on law, empirical research enabled an insight into a selection of individuals' interpretation and understanding of law. A misinterpretation of the term 'trusts', as well as the tendency to distance the concept and mechanism due to its foreign origins were highlighted as some factors which could influence the Thai mentality towards trusts. In addition, empirical research revealed that the frame of reference used by these individuals was not confined to legality. Discourse of religion that emphasizes the Buddhist influence of karma was used to describe their views of law and legal practice. Data from the document analysis and semi-structured interviews conducted in the course of this research suggests some reasons for this reservation, including the conflict between Thai tradition and culture that is heavily influenced by religious ethos of karma and sufficiency and the reluctance to replace traditional practice borne out of cultural norms of Thai family life with a mechanism that is viewed as being of a foreign origin.

With regard to the influence of Thai culture on the Thai mentality towards trusts, it was found that there has also been a shift in societal and cultural attitudes. It was initially hypothesized that two aspects of Thai culture were influential to a lack of demand for formal mechanisms for managing assets such as the trust. These are the cultural attitude of *Kren Jai* and the interpersonal trust within traditional cultural values that are common to close-knit Thai families. However, analysis of the semi-structured interview data showed that in the modern Thai society and economy where families are now not as close-knit as they once were and pools of inheritance have become far larger than before, these two cultural attitudes appear to have become less relevant as a mechanism or tool to prohibit the fraudulent behavior of those in trustee-like positions.

Nonetheless, another cultural attitude still remains despite this change in society and economy. This was a distrust of persons in the position of middlemen and investors. Interview data indicates an attachment to the belief that the most talented investors are those who portray the characteristics of a well-known Thai folk hero, Sri Thanonchai. The said protagonist is well-ingrained in the Thai cultural cognizance as being successful through cunning and wit, as opposed to honour and integrity. Interview data showed that Thais associate those who make a successful living or a thriving business as a middleman often put in as little effort as possible to attain the maximum benefit and are thus reluctant to leave their personal assets in the hands of someone exhibiting such characteristics. This, along with the shift in the cultural attitude surrounding *Kren Jai* and close-knit family values forms some of the aspects of the Thai mentality which is one of caution towards the use of trustees.

The reluctance to incorporate trusts as a mechanism to be used in the area of family law and inheritance administration by legislators sits at odds with the shift away from large family-centric, Buddhist-centric norms to a more materialistic, financially-aware and rights-aware way of life occurring in Thailand. Especially as it was found in interview data that there was a willingness to adopt legal mechanisms with trust-like functions from abroad for purposes of investment and finance, both 'on paper', as enacted into legislation, and in principle. An example of willingness to adopt legal mechanisms with trust-like functions from abroad was also apparent in this research from the interviewees' interest and enthusiasm to learn about the legal mechanism introduced by the Thai Trusts Act.

Other reasons given by interviewees for their reluctance to use trusts were based on their personal experiences. A sense of caution was developed towards legal mechanisms from abroad which dealt with finance, investment, and the management of personal assets. This was due to interviewees' 'hurt' from significant financial losses caused by finance companies labeled as 'trusts' during the 1997 economic crisis. Other reasons for hesitation that are of significance were voiced mainly by professionals in the finance and investment sectors. Most of these related to the lack of publicity and knowledge of the technical aspects of the legal mechanism of trusts provided under the Thai Trusts Act. Namely, interviewees working as financial professionals lacked knowledge, or were unfamiliar with the way the Trusts Act guaranteed the safety of trust assets against bankruptcy (OT4, OT5, OT6, OT7). However, reluctance to engage with trusts under the Thai Trusts Act arising from the lack of knowledge or

unfamiliarity can be differentiated from the initial presumption that there was a reluctance to use trusts because they simply did not believe that the Thai Trusts Act provided the necessary framework to ensure the safety of trust assets from bankruptcy or the recoverability of trust assets. Although some interviewees expressed a distrust of existing safeguards under other legislation such as the Deposit Protection Agency Act, B.E. 2551 (2008) (IAR3, OT10), it appears that other interviewees are reluctant to engage with trusts under the Thai Trusts Act because of the lack of knowledge and clarity. Interview data showed that interviewees simply "did not know" how the trusts under the Thai Trusts Act could guarantee the safety of assets held in trusts, as opposed to interviewees who "did not believe" that the legal guarantees under the Thai Trusts Act could realistically segregate trust assets from the personal assets of trustees. Moreover, interviewees "could not yet see how" trust assets could be traced in the case where trust assets were mishandled and were reluctant to engage with a mechanism that is too unfamiliar or complex (OT4, OT5, OT7).

In light of the revelations from the analysis of the "Thai mentality towards trusts" from documentary and empirical research, another point that could be made as a concluding note is that the informal use of trusts-like mechanisms such as the *Kongsi,* informal use of stock brokers as trustees and floating transfers also presents a picture of an economic 'system' based on informal codes of conduct that is influenced by the Thai mentality that is made up of the Thai interpretation and operation of Buddhist norms and social conventions. The Thai mentality represents a set of cultural patterns that are structured around values and conventions that are at some points compatible with the typical ideals of Western economic rationalism but cannot be equated with those ideals.

While the enactment of the TCMT 2007 was meant to provide a formal, legal framework for investment in the Thai Capital market, it was initially, from a theoretical point of view, difficult to understand why no trusts were established under the said legislation until almost a decade after it was enacted. However, it was gradually revealed that there was a preference to existing informal mechanisms that were built on informal familial and interpersonal relationships that were further strengthened by the Buddhist concept of Karma and the norms of *Kren jai*: Initially, people trusted an informal trustee because they knew or believed that they would not be wronged because a trustee would not act fraudulently because they did not want to cause grievance to a pseudo- beneficiary, (*Kren jai*) or as still relevant in modern times, a trustee would be suffering the ill consequences of bad karma if they were to act fraudulently towards a pseudo-beneficiary. Additionally, the second method of analysis of folklore and interview data showed that Thai mentality such as the reluctance to place trust in a "cunning lawyer" – type protagonist, along with the distrust in the sacredness of law itself to provide a just outcome for all, as shown in Thai folklore means that there is a tension between the beliefs and norms that make up the Thai mentality and the mechanism of trusts provided under the TCMT 2007. The study of the Thai mentality has provided an insight into the source of operative norms, rather than the formal world of law and provides a passing view of a discovery of a Thai economic anthropological system for the management of assets in a trusts-like nature.

Even though no trusts were established under the TCMT 2007 for a period of 6 years after its entry into force, interview data showed that persons who were in the positions of pseudo- trustees and pseudo-

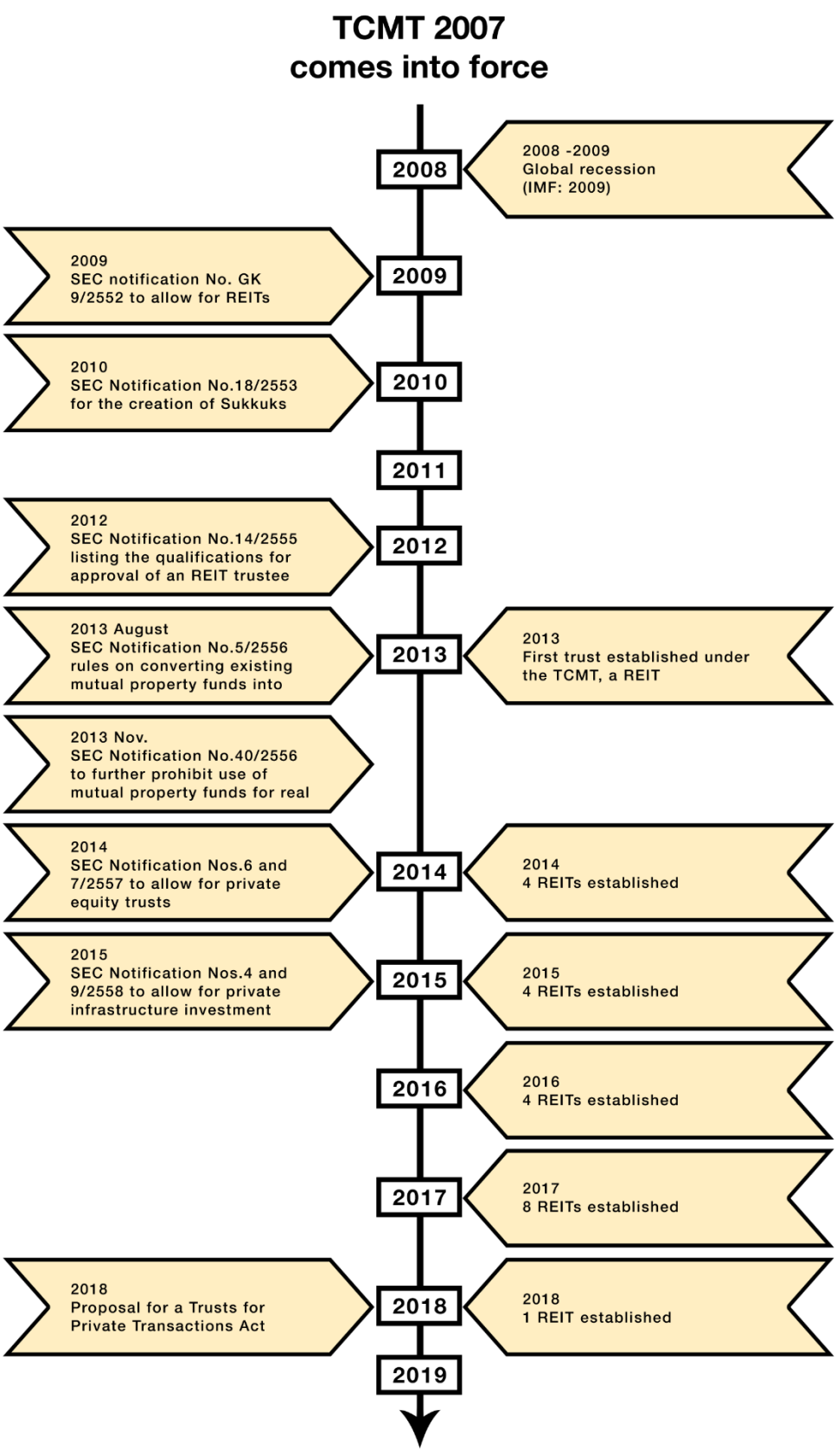
beneficiaries viewed the potential of the trusts as a legal mechanism in Thai law positively. The positive feedback coupled with the eventual proposal of a Trusts for Private Transactions Bill in 2018 shows that there is a place for trusts in Thai Law. However, in light of these findings, it is suggested that effort be made to disseminate the knowledge of trusts, to enable a better understanding of the legal mechanism. Any such literature should provide a clear distinction of the trusts introduced by the TCMT 2007 from financial institutions of the nineties and highlight the similarities to the traditional practices and customs of Thai culture. For the purposes of analyzing trusts in Thai law at a comparative level, caution should be had regarding the definition of the Thai legal system as belonging to the civil law family, as there is room for judicial input to reflect Thai culture and traditions. In a comparative analysis of trust law in Thailand, it is suggested that regard be had to mechanisms and practices beyond the traditional (English) definition of trusts, in particular, attention should be paid to the cultural patterns that are structured around Thai values and conventions that may be compatible with Western economic rationalism but cannot be equated with those ideals. For future imports of legislation, inspiration should be drawn from local practices that serve a similar purpose and the possibility of formally legalising those practices considered instead.

3. Conclusions, updates and suggestions for future trusts for management of private assets in Thailand.

3.1 The eventual establishment of trusts under the TCMT.

Towards the conclusion of the study, it was found that at the end of 2017, a number of trusts had in fact been established under the Thai Trusts Act for Capital Market Transactions 2007 (TCMT). At the time of the completion of the dissertation in January 2019, a total of 22 trusts had been established by virtue of the TCMT 2007.[83] All of these trusts were established for the purpose of real estate investment, i.e. all were REITs. The timeline for the creation of trusts under the TCMT is set out in the diagram below.

[83] Information as of 20th January 2019 obtained from www.sec.or.th database on initial public offerings (IPO)


TCMT 2007
comes into force
2008
2008 -2009
Global recession
(IMF: 2009)
2009
2009
SEC notification No. GK
9/2552 to allow for REITs
2010
2010
SEC Notification No.18/2553
for the creation of Sukkuks
2011
2012
2012
SEC Notification No.14/2555
listing the qualifications for
approval of an REIT trustee
2013
2013 August
SEC Notification No.5/2556
rules on converting existing
mutual property funds into
2013
First trust established under
the TCMT, a REIT
2013 Nov.
SEC Notification No.40/2556
to further prohibit use of
mutual property funds for real
2014
2014
SEC Notification Nos.6 and
7/2557 to allow for private
equity trusts
2014
4 REITs established
2015
2015
SEC Notification Nos.4 and
9/2558 to allow for private
infrastructure investment
2015
4 REITs established
2016
2016
4 REITs established
2017
2017
8 REITs established
2018
2018
Proposal for a Trusts for
Private Transactions Act
2018
1 REIT established
2019

Information from the SEC website database for IPO showed that the first trust under the TCMT 2007 was established in 2013. The trust was an REIT. Additional information gathered from representatives of the SEC on trusts in existence as of January 2019 showed that currently, there are 7 financial asset management companies that have been approved to act as trustees of REITs, the first having obtained approval in 2013. 3 of these financial asset management companies have also been approved to act as trustees for private equity trusts and 3 have obtained approval to act as private equity trusts. As of January 2019, there has yet to be any other types of trusts set up under the TCMT 2007 other than REITs.

The fact that only REIT trusts were eventually established conforms with the opinions gathered from the interviews in this research that it would be within this purpose of real estate investment that trusts may be of utility in the Thai stock exchange. The study suggested that SEC policy was influential to what type of trusts the SEC would expend their resources in promoting, and such policies were set based on economic considerations of the day and age.[84] However, it is noted with a degree of disappointment that the trusts that did eventually come into existence were very similar to mutual property funds, both in their purpose of existence, (raising capital) and regulation of trading, (by the Securities Act B.E. 2535 (1992). Additionally, unlike mutual funds, REITs are subject to VAT, Specific Business Tax and Stamp duty, all of which are and can be excluded by secondary legislation.[85] The main difference from the existing forms of investing through a mutual property fund is that the trust assets pool does not have legal personality and is therefore shielded from debtor claims in the event of bankruptcy. It appears that from the point of view of investors, there is a trade-off between the tax-free nature of investment in a mutual property fund and the secure nature in the event of bankruptcy for REITs.

3.2 Other types of trusts under the TCMT 2007

Information gathered from representatives of the SEC on trusts in existence as of November 2018 showed that there were a total of 22 REITs and only 7 authorised trustees since 2013. Of these 7 financial asset management companies, 3 were also authorised to act as private equity trustees and 3 were also authorised to act as basic infrastructure investment trustees. Search of the SEC database [86]at the time of completion of the dissertation in January 2019 showed that no trusts had been established for private equity or basic infrastructure investment.

The SEC informed that it had set the regulatory policy based on 2 different types of trusts. Firstly, “active trusts” were those offering trust units or certificates for sale, and any such transactions were

[84] Heading 10.2
[85] R.D. Nos 239, 240 and 10 exempting tax on mutual investment funds.
[86] Information as of 20th January 2019 obtained from www.sec.or.th database on initial public offerings (IPO)

regulated by the Securities Act B.E. 2535 (1992).[87] At the conclusion of the study, these types of trusts included REITs and Personal Equity Trusts. Secondly, the SEC expected the future establishment of "passive trusts" for use in managing private pensions funds for personnel of companies, using the trusts structure under the 2007 Act to separate company funds from pensions savings.

At the time of writing in January 2019, no trusts have yet to be established for the purpose of investment in private equity or for the management of pensions funds. However, the SEC had issued regulations to allow for the establishment of 2 types of trusts under the TCMT 2007 besides REITs and Sukkuks, or Shariah- compliant investment trusts. These are private equity trusts and basic infrastructure investment trusts.

3.2.1 Private equity trusts

According to SEC policy document no. 54711, (SEC, 2013 a) private equity trusts are trusts established to gather investment capital in start-up businesses that engaged in "technology and innovation". The trusts mechanism is to enable them to access capital from sources other than banks for the initial period of their founding, prior to the businesses being able to offer shares to an open market via listing on the Thai stock exchange. The SEC issued a regulation to allow for the establishment of private equity trusts in 2014 (SEC Notification no. 6/2557 and notification no.7/2557)

The structure for a private equity trust under the TCMT is as follows: The parties involved are 2 or more investors who pool funds and a trustee who appoints a fund manager who manages the investment of funds of the trust in designated businesses for the benefit of the fund and ultimately, for the benefit of the investors who are beneficiaries of the trust. Trust fund managers are to separate their assets from those under the trust. Dividends are then paid out from the designated businesses into the private equity trust fund as dividends per trust units held, and ultimately to the investors holding trust units. The details of the rights and duties of the parties are drawn up by a trust deed that is a contract under the TCMT 2007, which sets out the rights and duties of the parties involved.

In 2017, the SEC issued a regulation to allow for qualified financial institutions to apply for status of private equity trustee (SEC Notification no.26/2560) and the Bank of Thailand issues regulations to allow private equity trusts to invest in SMEs and start-up companies that engage in Financial technology and innovation businesses. There are currently, as of January 2019, no private equity trusts yet to have been established under the TCMT 2007, however, 3 financial asset management companies have obtained approval to act as trustees for private equity investment.

[87] SEC information verbally given at the Draft Trust for Private Transactions Act commission meeting, November 2018

3.2.2 Basic infrastructure investment trusts

In 2014, the SEC issued Notification no 4/2558 and Notification no 9/2558 to allow for the application to act as trustees for basic infrastructure investment trusts. In its "Public Hearing for Trusts for Foreign Basic Infrastructure Investment" document of April 2014, it stated that the purpose of the particular type of trust was for investment in both Thai and foreign infrastructure using the mechanism of trusts provided by the TCMT 2007. The SEC proposed for the establishment of trusts for Thai basic infrastructure investment with a threshold of over 2 billion Thai Baht and trusts for foreign basic infrastructure investment with a higher threshold of 10 billion Thai Baht.

The structure of a trust for such purposes would be similar to that of a real estate investment trust: A trustee would set up an initial public offering for the sale of trust units. Funds would be pooled into a trust fund via the sale of trust units. A trust deed contract would be drawn up to set out the types of investment to be made by the trust fund managers, and the rights and duties of the parties involved. The trustee would appoint and oversee the trust fund manager. The trust fund manager would have a 'fiduciary' duty to manage the trust fund in accordance with the terms of the contract and for the benefit of investors who are trust unit holders and beneficiaries. At the time of writing in January 2019, 3 financial asset companies have obtained approval to act as trustees for trusts for basic infrastructure investment, but no trusts have yet to be set up.

3.3 SEC policy and enactment of regulations as a factor for the establishment of trusts.

The time period between the issuance of the first regulations by the SEC to allow for the establishment of these additional types of trusts and the eventual regulations that allow for financial asset management companies to apply for status as a trustee raises the question of whether this is the reason why no trusts were set up under the TCMT. In other words, was the delay in the gradual enactment of regulations the reason for why no trusts had been set up under the TCMT 2007?

The first regulation allowing for the establishment of trusts for real estate investment was issued by the SEC in as early as 2009. (SEC notification no. GK 9/2552). The first REIT was however, established in August 2013, after the issuance of the enabling regulation. On the surface, based on the timeline of factual data available, the delay in the issuance of regulations by the SEC seems not to be the sole defining factor for why no trusts had been established under the TCMT 2007, as the first trust was established four years after the first regulation to allow for the establishment of REITs was enacted. Moreover, SEC regulations allowing for trustees to apply to set up shariah-compliant investment trusts (Sukkuk) were also established in 2010 (SEC No.18/2553) and at the time of writing in January 2019, there has yet to be established a shariah- compliant trust (Sukkuk) under the TCMT 2007.

Nonetheless, it appears that may be a relationship between the issuance of policy directives and regulations paving way for further clarity and the rise in the number of trusts established under the TCMT

2007. This rise in number from 2014 onwards coincided with the issuance of regulations by the SEC as follows: In November 2012, the Securities Exchange Commission enacted Notification no.14/2555 listing the qualifications for approval of a trustee business for real estate investment. This was to be followed by SEC issued rules on converting existing mutual property funds into trust funds in August 2013, (SEC Notification No.5/2556). Finally, in November 2013, the SEC decreed that as of 31 December 2013. no new mutual property funds were to be listed. The policy was that investments in real estate in the Thai stock market were to be from then on made in the form of real estate investment trusts. (REITs) (SEC Notification No.40/2556). This notification amounted to a moratorium of establishment of mutual funds for the purpose of real estate investment. Further research revealed that in 2014, 4 REITs were established under the TCMT 2007, in 2015 4 were established, 4 trusts were established in 2016, with the number of REITs established in 2017 being 8.[88]

Year	Number of trusts established
2013	1
2014	4
2015	4
2016	4
2017	8
2018	1

Interview data also supports the influence of SEC policy to the establishment of trusts under the TCMT 2007. Some interviewees expressed reservations towards the clarity of the provisions of the TCMT relating to accountability, (OT4, OT5, OT7 at p.192) while others expressed lack of confidence in the institutional mechanism of oversight. (IAR3, OT10 at p.193) While it might be said that policy of the SEC is highly influential to the establishment of trusts under the TCMT 2007, this is inconclusive and perhaps awaits the establishment of other types of trusts under the new regulations providing for private equity trusts and basic infrastructure investment trusts which were issued in 2015 and 2014.[89]

[88] SEC database on IPO www.sec.or.th accessed 31 January 2019

[89] SEC 2014: SEC Notification no. 6/2557 and notification no.7/2557 to allow for private equity trusts, SEC 2015: Notification no 4/2558 and Notification no 9/2558 to allow for basic infrastructure investment trusts

3.4 Proposal of a Bill for trusts for the management of private assets.

In addition to the development of REITs, in July 2018, the Council of Ministers (the cabinet) also approved in principle of a draft legislation allowing the establishment of trusts for the management of private property.[90] As per the resolution of the Council of Ministers approving the draft legislation, the rationale given for the proposal to allow the establishment of trusts for private property was so that Thailand could offer potential high net-worth individuals the option of managing their wealth within the Thai financial system. The draft text of the legislation is as of 7th November 2018 currently being discussed and amended by the Office of the Council of State of Thailand and after this process, would later need to be voted upon by Parliament or the National Legislative Assembly, as the case may be. The details of the structure of the trusts, legal requirements for the trust instruments and regulation of trustees have not been made public. It could be pointed out that this development also conforms with the opinions gathered in the interview data that in future, trusts could be adapted for use in managing private assets once the Inheritance Act becomes applicable, in which it has been since 1st February 2016.

Although the official rationale for the proposal of private trusts cited managing assets of high net-worth individuals, it might be noted that a headline announcing the passage of the resolution approving legislation cited the word Kongsi. "Cabinet approves draft law to allow trusts/ Kongsi".[91] This shows that perhaps at least in the eyes of the public, the management of inheritance was in mind as a rationale behind the proposal for trusts for the management of private assets. It also shows that the Kongsi model is recognized as a familial arrangement for the management of assets and inheritance to this very day.

3.5 Conclusions and a way forward for trusts for the management of private assets in Thai law.

I suggest that the current rationale for the proposal is flawed to aim trusts only for high net-worth individuals, and that there is a case for trusts for the management of inheritance in the Thai legal system, especially given the changing nature of Thai society and family structures. As the study shows, the position has moved from what was once a society of close-knit large families willing to share assets based on mutual trusting relationships to increased willingness to litigate over family assets and inheritance. Another case which may call for the use of trusts in Thai law is for the management of funds to take care of incapacitated persons, for example mentally incompetent persons who currently rely on their parents to take care of them both physically and financially who are likely to outlive their parents. While the Thai Civil and Commercial Code provides for carers,[92] but the changing nature of Thai society and family

[90] Council of Ministers Resolution of 10 July 2018

[91] "Cabinet approves draft law to allow trusts/ Kongsi" https://www.mcot.net/view/5b4481a7e3f8e4f605861b9a?utm_source=TNA&utm_medium=TOPNEWS&utm_campaign=fixtna accessed 1 October 2018

[92]

structures where the family unit is becoming smaller and less closely-knit means that it could be hard to entrust another family member with the care of such persons, if one should even exist.

Given the aging Thai society, another example for which trusts for the management of personal assets might include people who age without children to take care of them. According to the Foundation of Thai Gerontology Research and Development institute (TGRI), there are currently few retirement home facilities for comprehensive care for the elderly in Thailand, and more people who grow old without children to take care of them. (TGRI 2006, Somanusorn 2014, Sukin 2010) This group of people could benefit from setting up a trust under perhaps a reliable bank or financial institution to take care of them should they later in life, be unable to make sound decisions.

In regards to the drafting of a law to allow for the use of trusts for personal asset management, there is therefore much to be considered regarding existing legal and non-legal practices in the management of personal assets, especially in the management of inheritance. Firstly, drafters of the Bill should take care to look at the existing rules on wills and probate in the Civil and Commercial Code so that trust deeds conform to existing forms and structures for valid wills and testaments.

Secondly, at a policy level, the proposers of the Bill will have to consider the degree of regulation. It must be considered whether there is a real need to regulate asset management at such a private level or whether it would be best left to the principle of the freedom of contract, and who would be best suited to regulate such matters. As trust deeds will conceivably be in contract form, is there need for regulation and oversight of what are essentially arrangements between private parties? On the other hand, regard must be had to the Thai litigation culture, i.e., the willingness to litigate over asset and inheritance management between family members. If there is no reluctance between family members to go to court over such matters then perhaps the only regulation needed may be over the shape and form of the contractual arrangement of the trust deed and the courts can play a role of regulator when needed. Additionally, if banks and financial institutions are involved as providers of a service to manage private assets, perhaps there might be need for another regulator such as the Bank of Thailand.

Thirdly to be considered is the balance to be struck between facilitation of private asset management through the use of trusts and tax avoidance. Finally, taking from the experience of the TCMT 2007, effort must be made to publicise and promote a thorough understanding of the new law and the nature of trusts, as lack of publicity and understanding was one of the main reasons gathered from the interview data for why trusts were not established under the TCMT 2007 in its initial phase.

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