

# 信托多棱镜

Find the Glamor of Trust

熊宇翔/著

作为一种法律校正和司法救济制度，信托机理是一种由社会分工衍化而来的智慧的结晶、文明的芯片，是一种最基本的、最重要的价值观和生产关系，它“足及生活每一天”，这是一个信托的社会。



中国金融出版社

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熊宇翔 著



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谨以此书献给所有

为了信托法理及其实践在中国的命运而思考和奋斗的人们！

This book is dedicated to all of the thinkers and strivers  
who are paying close attention to fate of trust legal principle and practice in China!

# 序

记得与本书作者熊宇翔先生最早的直接接触是在2001年、2002年左右，座谈交流间他对于法律本质的理解和金融实务的认识使我印象深刻。后来经常能够在报纸、相关信托网站及我任主编的中国人民大学学术刊物《信托与基金研究》上看到他的作品，每过一段时间或间隔几期总会有一篇，主题或切中金融实务的发展脉搏，或关注社会生活中的信托现象，行文流畅、思绪缜密、立意高远，显示出他在学问追求方面的韧劲与坚守。最近几年我们的交往更为频繁，在担任信托业协会一些征文比赛评委，或担纲行业年鉴、年度专题研究报告甄选结集的工作中，总能看到他的优异表现和卓越成果。尤其是从2011年初实质启动到2012年12月完成出版的“信托业从业人员培训教材”编纂工作，实际担负的是编写新中国成立以来信托行业首套“课本”和考试参考用书的前无古人的重任，我作为总纂稿人深感任务艰巨，担子沉重。编写团队也是罗致了当时全行业的理论、实务研发骨干，可谓精英尽出，代表了信托业最高的研究能力与写作水平。宇翔负责的是《信托基础》一书第七章《信托业务及其创新》的撰写。“基础”这一本书是最难写的。它的内容涵盖了有关信托的一切方面，又不能与其他三本书（法务、公司经营实务、监管与自律）重复和冲突，这需要高度的概括、总结、萃取、凝练、提纲挈领的能力。我记得讨论决定这本书的体例、架构、章节、分工时争议最大最激烈，过程中编写思路也数次变更、调整，有时甚至是推倒重来，至为艰难。但宇翔始终积极努力、任劳任怨，反复修订、数易其稿，终于圆满地完成了任务，同时他还积极地对整套教材的内容、细节、文风、校对、编排逻辑等问题提出自己的意见建议，得到了积极响应，赢得相关人士的肯定和好评。

回到正题上来。宇翔的这部《信托多棱镜》，文如其名，从文学、历史学、法学、社会学、政治学、经济学等几个维度，全方位、宽基

础、多层面、立体式地阐述了信托这一社会现象的概念、源起、本质、功能和意义等命题，思路是明晰的，角度是独特的，逻辑是严密的，视野是广阔的，驰骋千年，纵横万里，时空交错，叙事宏大，图文并茂，这样一种学科间的交叉运用、驾驭把握、自如收放，足见作者平素涉猎领域之广博、寻幽探秘之无畏、钻研求索之深刻、攻关克难之顽强。他的思想、理路、笔触、文风是信托业界一个奇特而珍贵的存在，值得大家重视。《信托多棱镜》这本书，可以为广大读者观察相关文化现象、思考有关社会问题提供极佳的预备和参照，同时也完全可以作为信托实务从业与理论研究者的参考书、政府监管者的借鉴书、高校法律专业（特别是民商法）和经济金融专业等师生的教辅书，亦完全可作为各种类型的资产管理机构和财富管理机构、律师事务所等中介服务机构进行投资者教育以及对理财客户尤其是高净值、高端客户进行营销推广的信托知识普及书籍和最佳礼品。

熊宇翔先生信托从业二十余年，第一部专著即将付梓，值得祝贺，其亦必为业界增添一抹亮色。

是为序。



2015年9月于北京

# 内容说明

自从巴别塔倒掉之后，这个地球上的人群就不再拥有共同的语言和文字及文学和艺术，失去了畅通无碍的沟通交流方式，在漫长的时间与遥远的距离的阻隔之下发展出了迥异的思维习惯、生活方式、社会习俗、法律体系及政治制度。卢梭说：“人人生而自由，却无往而不在枷锁之中。”我认为，这“枷锁”之一，便是世界上不同国家和地域、不同文化的人们不能自由地沟通和交流、方便顺畅地相互了解、理解的困难。但其实阳光之下，并无新事，大道至简，天下的道理都是一样的和相通的。例如，中国的《论语》就如同西方的《圣经》一般，是对一个民族或一个区域文化的概括和统领。“己所不欲，勿施于人”是孔子经典妙句之一，是儒家文化精华之处，是中华民族根深蒂固的信条，这是我们的先哲对于契约论的朴素理解。对照《福音书》和其他西方谚语，我们可以发现惊人的相似之处：“你们愿意别人怎样待你们，你们也要怎样待人”，“不侵人之自由，乃为自由”，说的都是同一个道理。对这些信条，我们一定不能因其平易而简慢之。正像一个著名学者说过的，从它们中间可以展开“全部人性”。人类各文明曾不约而同地发现过有关伦理的这条“黄金法则”。可见不论远隔万里之遥，还是相差千年之久，代表人类智慧的先哲对于人性本质的洞察可谓殊途同归，并无根本差异。这是因为人性的本质就只有那一个，只要你是在无限追求逼近真理，就可以得到同样的结论。

中国当前的金融信托业正是体现中西方文化结合与碰撞最鲜明的领域。信托在中国被认为是一个“舶来品”，它是英美法系中的一个法律概念，直接起源于中世纪英国的“Use”制度，中国接受信托的观念和制度是从属于信托法律关系在整个大陆法系国家和地区（包括中国、日本、韩国、中国台湾地区）的引进、继受、改造和扩张的过程中的。但这里面有一个问题，就是大陆法系国家（包括中国）在接受和运用

信托观念时，只是看中了它作为一种财产转移和财产管理制度在经济和金融领域的作用，信托的本质被认为是一种附属了经济价值的法律架构，即中国的信托机构被定义为非银行金融机构，是一种独立的、特殊的资产管理机构业态，这与西方主要是律师、商业银行和投资银行在为客户提供各种服务时运用信托法律工具的做法是不尽相同的。而实际上从信托的缘起和法律本源来说，它的内涵和外延要比单纯的财产管理制度广阔深刻得多。我认为它是一种法律校正和司法救济制度，它跟民主、自由、权利这些名词一样，是一种最基本的、普适的价值观。信托在政治领域是代议制民主的思想基础，在经济领域是公司治理（代理人制度）、有限责任等制度的法律基础，它还在土地制度构建、财产传承与保障、金融产品设计、风险管理、公益慈善、基金运作、反腐倡廉等方面都发挥着巨大的作用，产生着深刻的影响。我们生活在一个“信托社会”中，所以本书致力于从各个视角反映、折射、探究、挖掘中国传统社会生活中所固有的朴素的、自发的信托观念（如真诚托付、信守诺言、风险隔离、宣言信托），致力于从古、今、中、外的历史文化现象（当然包括文学作品）和典型案例中搜寻关于“信托”的痕迹与发展道路，进而对信托概念的内涵与外延、其理念的特质本性进行一些阐述和说明，从而做一些信托观念和文化的普及、推广、呼吁的工作。其目的是使读者对信托的本质、信托机理的社会功能与经济效用的实现、信托的法律关系及其在中国实践的命运有一个更接近于真实、更全面、更深刻的认识和理解。



# Abstract

Since the fall of *Babel*, the people on this planet no longer have a universal language or writing, bear no common literatures or arts, and are all longing for the barrier – free communication means. Isolated by the long geographic distance, and spanned over long time, people living in different parts of the world formed their own ways of thinking, life styles, social customs, law systems and political regimes. “*Man was born free, and everywhere he is in chains,*” Rousseau wrote in 1762. One of these chains, I think, is the very confinement that the peoples of different countries and civilizations are not able to communicate and exchange freely or to learn and understand each other conveniently. However, *there is nothing new under the sun*. The laws of world are simple, universal and common in nature. For instance, the Chinese *Analects of Confucius* and the Western world’s *Bible* both are the summary and guidance of the culture of their own region. “*Do not impose upon others what you do not desire yourself*” is one of the most famous says of Confucius, and it is also the essence of Confucian culture. As a deep – rooted motto of Chinese people, it can be interpreted as the ancient Chinese people’s basic version of *Du Contrat Social*. In the Western literatures, we find the equivalent sayings which are surprisingly similar to those in the *Analects of Confucius*. For example, the *Gospels of Matthew* says, “*Therefore all things whatsoever ye would that men should do to you, do ye even so to them,*” and there is an old English proverb which says, “*No infringing the freedom of other person is the freedom in essence.*” We shall not ignore such mottos just because they are simple in forms. Just as a famous scholar says, “all human natures” can be unfolded from these mottos, and all human civilizations discovered, though during different stages of history, such “golden rule” of ethic. All our ancestors had common insights into the essence of human nature and these insights bear no fundamental differences in spite of isolation of peoples by long distance and time. The reason behind is that the essence of human nature is only one in common. So long as you are

chasing after truth, by time, people can draw the same conclusion.

Currently, the trust industry of China is a typical area that best reflects the merges and conflicts of Chinese and Western cultures. In China, “*trust*” is recognized as one of the “imported goods” and a law conception from the Anglo – American Legal System, as it directly originated from the “*Use*” system of the medieval Britain. The adoption of concept and system of the trust in China is part of the historic course of introducing, succeeding, restructuring and expanding the trust legal relations in all civil law countries and regions ( including China, Japan, Republic of Korea and Taiwan Province of China) . However, during the accepting and using of the trust in civil law countries ( including China) , only those functions of property transfer and management in the economic and financial fields have been best applied. The essence of trust is deemed by these countries as a legal framework with certain economic value. The Chinese trust institutions are classified into non – banking financial institutions and serve as independent and special assets management entities. The nature of these institutions and their business is different from the practice of using trust law instruments in providing services to the customers by the Western lawyers, commercial banks and investment banks. In fact, when the very origin and essence of laws of trust is concerned, its connotation and denotation are much wider and more profound than pure property management business. To my understanding, it is a legal correction and judicial remedy system. Just like democracy, freedom and rights, trust is a very primary, universal and ubiquitous kind of value. Trust is the legal foundation of representative democracy in the political field, in the field of economy it is the legal foundation of corporate governance ( the agent system) and limited liability principle, and it also plays an indispensable role in setting up land institutions, the property inheritance and protection, the design of financial production, risk management, charity, foundation and anti – corruption, etc. We are living in a “*Trust Society*” already. That is the reason why I try to reflect, identify and present in this book those inherent, simple and spontaneous trust concepts and practices in Chinese traditional social life ( such as good faith, keeping a promise, risk isolation and declarative trust) from every angle. I was looking for the trace of “trust” among the cultural phenomena and cases in both the ancient and

contemporary China as well as in foreign cultures (including their literature of course), thus elaborating and explaining to my dear readers the connotation and denotation of the trust concept as well as the nature of its idea. The book aims to popularize, promote and appeal to the public the concept and culture of the trust, so that the readers will have a more accurate, more comprehensive, and more profound understanding of the nature of trust, the fulfillment of its social and economic functions, its legal relations and the trust practice in China.

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