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THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE

THE TRUST IN CONTINENTAL EUROPE: A BRIEF COMMENT FROM A U.S. OBSERVER

*Thomas P. Gallanis**

Frederic William Maitland, the renowned historian of English law, called the trust “the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence.”¹ The trust is certainly a great achievement. It is a “remarkably flexible tool used for a variety of purposes, both commercial and non-commercial.”² And as a mechanism for the gratuitous transfer of wealth, the trust is at the very “core of modern estate planning practice”³ in the United States and other common-law countries.⁴ Yet is the trust distinctive? Much ink has been spilled on the question.⁵ On the one hand, “trust-like”⁶ devices appear in other legal systems—for example, the Roman *fideicommissum*,⁷ the German *Treuhand*,⁸ and the Islamic *waqf*.⁹ On the other hand, none of these trust-like devices is precisely the same as the common-law trust.

This special issue of the Columbia Journal of European Law is part of an ongoing dialogue about the potential role of the trust in countries outside the common-law tradition. In

* N. William Hines Chair in Law, University of Iowa (USA); Associate Reporter, RESTATEMENT (THIRD) OF TRUSTS, VOLUME 4; Associate Executive Director, Uniform Law Commission Joint Editorial Board for Uniform Trust and Estate Acts. In this commentary, I am speaking in my personal capacity only.

¹ F.W. Maitland, *The Unincorporate Body*, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 272 (H.A.L. Fisher ed. 1911).

² THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS AND FUTURE INTERESTS 391 (5th ed. 2011).

³ *Id.*

⁴ See D. Waters, *The Distinctive Characteristics of the Anglo-Saxon Trust*, in TRUST & FIDUCIE: CONCURRENENTS OU COMPLÉMENTS 27 (2007) (“[T]he common law trust is no longer geographically Anglo-Saxon except in its beginnings. It is now applied worldwide from Hong Kong to Malaysia, Singapore and India to Abu Dhabi, England and Wales to Canada and the multi-jurisdictions of the United States, Bermuda to the Caribbean and the South Pacific, and New Zealand to Australia.”).

⁵ For citations from the recent literature, see footnote 4 in T.P. Gallanis, *The Contribution of Fiduciary Law*, in THE WORLDS OF THE TRUST (L. Smith ed., forthcoming from Cambridge University Press).

⁶ On this term, see W.F. Fratcher, *Trust*, in 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 11-101. See also VERTROUWD MET DE TRUST: TRUST AND TRUST-LIKE ARRANGEMENTS (D. Hayton et al. eds. 1996); TRUSTS AND TRUST-LIKE DEVICES (W.A. Wilson ed. 1981).

⁷ See generally DAVID JOHNSTON, THE ROMAN LAW OF TRUSTS (1988).

⁸ See generally ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE (R. Helmholz & R. Zimmerman eds. 1998).

⁹ See generally D. Powers, *The Islamic Family Endowment (Waqf)*, 32 VAND. J. TRANS. L. 1167 (1999); J.A. Schoenblum, *The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust*, 32 VAND. J. TRANS. L. 1191 (1999).

1999, for example, the International Working Group on European Trust Law, in connection with the Business and Law Research Centre in Nijmegen, published *Principles of European Trust Law*, with the stated purpose of “assist[ing] those who wish to discover and study the core ideas of the trust,”¹⁰ but also with the caveat that the authors did not “advocate the adoption by civil law jurisdictions of any trust concept....”¹¹ Ten years later, in 2009, the same Centre and an enlarged Working Group published *Towards an EU Directive on Protected Funds*.¹² The year 2009 also saw the publication of Book X (on “Trusts”) of the Draft Common Frame of Reference.¹³ In Canada, the Quebec Research Centre of Private and Comparative Law¹⁴ has hosted workshops and conferences on comparative trust law.¹⁵

The country reports in this special issue of the Columbia Journal of European Law testify to the continuing international interest in the trust and also to some of the theoretical and practical hurdles facing civilian countries that consider adopting the trust or aspects of it.

In this brief commentary, let me offer the following four observations.

First, it is striking that the Continental European countries are interested in the trust primarily for commercial reasons¹⁶ whereas the focus of U.S. law is on the trust as a mechanism for family wealth transmission.¹⁷ In reality, trusts are valuable devices for commercial and donative purposes.¹⁸ The European discussions and developments serve as a welcome reminder that we in the U.S. cannot afford to ignore the commercial uses of trusts.¹⁹ And the reminder runs in the other direction, too. European jurisdictions interested in the commercial benefits of the trust would do well to consider also its many advantages as a vehicle for intergenerational wealth management and transfer.²⁰

Second, the Continental European interest in the trust provides an occasion for us to return to first principles: What is (and is not) a trust? What demarcates the trust from a trust-like

¹⁰ PRINCIPLES OF EUROPEAN TRUST LAW 11 (D.J. Hayton et al. eds. 1999).

¹¹ *Id.*

¹² TOWARDS AN EU DIRECTIVE ON PROTECTED FUNDS (S.C.J.J. Kortmann et al. eds. 2009). For an assessment, see B. Macfarlane, Book Review, 16 EDINBURGH L. REV. 130, 130-32 (2012).

¹³ PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), VOL. 6 (C. von Bar & E. Clive eds. 2009). For an analysis and critique of Book X, see A. Braun, *Trusts in the Draft Common Frame of Reference: The “Best Solution” for Europe?*, 70 CAMB. L. J. 327 (2011).

¹⁴ The Centre is now called the Paul-André Crépeau Centre for Private and Comparative Law.

¹⁵ See the essays in RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW (L. Smith ed. 2012) and in THE WORLDS OF THE TRUST, *supra* note 5.

¹⁶ See PRINCIPLES OF EUROPEAN TRUST LAW, *supra* note 10, at 5 (“The idea of this book sprung from a very particular source. In business and the financing of commerce[,] globalization has given rise to a renewed interest in civil law quarters in common law trust doctrine and the purposes to which that trust form can be put.”).

¹⁷ See RESTATEMENT (THIRD) OF TRUSTS ch. 1, intro. note (2003) (excluding business trusts from the coverage of the project and focusing instead on “the trust as a device for flexible, long-term settlement of family property”).

¹⁸ On the commercial uses of trusts, see D. Hayton, *English Trusts and Their Commercial Counterparts in Continental Europe*, in EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS (D. Hayton ed. 2002); D. Hayton, *The Uses of Trusts in the Commercial Context*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW (D. Hayton ed. 1999); J.H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L. J. 165 (1997).

¹⁹ U.S. law schools could usefully note that the Cambridge University LL.M. program includes a course on commercial equity.

²⁰ See generally Gallanis, *supra* note 5. By way of example, the extension of the French *fiducie* to enable its use for family wealth transfer is being urged by some French lawyers. See J. Saiac & D. Gutmann, *The French “Fiducie”: A Missed Opportunity or a Work in Progress?*, EUROPEAN TAXATION 149 (April 2010).

device? What differentiates the law of trusts from other bodies of law, such as the law of contract? These questions remain to be fully answered, and the answers will likely vary among jurisdictions. Even between England and the U.S., one can see different approaches.²¹

Third, it is fascinating to observe the different routes by which aspects of the common-law trust can be introduced into a modern civilian jurisdiction. The typical route is the enactment of legislation, such as the Luxembourg law of July 27, 2003,²² or the French statute of February 19, 2007.²³ But legislation is not the only route. In Italy, Professor Lupoi has argued²⁴ successfully²⁵ that the country's ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition²⁶ enables Italian settlors to establish trusts of Italian property managed by Italian trustees—the trust *interno*.²⁷

Fourth and last, European attention is concentrated on the express trust, but it is worth remembering that the law of trusts in Anglo-American jurisdictions is broader—extending also to trusts imposed by law such as resulting and constructive trusts.²⁸ The constructive trust, in particular, has the potential to serve as a broad and flexible remedy.²⁹ It remains to be seen whether the European countries attracted to features of the express trust will consider adopting some of these other offspring of Anglo-American equity.

This symposium issue of the Columbia Journal of European Law is a welcome addition to the ongoing dialogue about the role of trusts or trust-like devices in civilian jurisdictions—and indeed about the role of the trust worldwide. Justice Brandeis of the U.S. Supreme Court famously spoke of the American federal system as a “laboratory” enabling states to “remould,

²¹ For discussion, see T.P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215 (2011). See also RESTATEMENT (THIRD) OF TRUSTS ch. 21 intro. note (2012) (discussing the U.S.'s distinctive approach to trustee liability to third parties and the emerging entitization of the trust).

²² For discussion, see T. Partsch & J. Houet, *Country Report: Luxembourg*, 18 COLUM. J. EUR. L. ON. 55. The authors observe that this law replaced a Grand-Ducal Decree of December 2, 1979, which had addressed some aspects of *fiducie* transactions. *Id.*

²³ Law No. 2007-211 of 19 February 2007. For discussion, see J-P. Béraudo, *La Loi du 19 Février Créant une Fiducie Française*, in TRUST & FIDUCIE: CONCURRENTS OU COMPLÉMENTS (2008).

²⁴ See, e.g., MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 351 (2000); M. Lupoi, *The Development of Protected Trust Structures in Italy*, in EXTENDING THE BOUNDARIES, *supra* note 18, at 92.

²⁵ For discussion, see COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW 416-19 (M. Graziadei et al. eds. 2005); M. Lupoi, *Country Report: Italy*, 18 COLUM. J. EUR. L. ON. 4.

²⁶ The Convention is currently in force in Australia, Canada (but not Ontario or Québec), Hong Kong, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, San Marino, Switzerland, and the United Kingdom. See Status Table, Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.status&cid=59 (last visited May 8, 2012).

²⁷ See *supra* notes 24-25.

²⁸ See generally GRAHAM VIRGO, THE PRINCIPLES OF EQUITY AND TRUSTS (2012). But see SCOTT & ASCHER ON TRUSTS §2.1.1 (5th ed. 2006) (observing that these categories of trusts “have more differences than similarities”).

²⁹ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §55(1) (2011) (“If a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant’s rights, the defendant may be declared a constructive trustee, for the benefit of the claimant, of the property in question and its traceable product.”); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §4.1 cmt. f (observing that a constructive trust may be available in a case of “wrongdoing or mistake” if a revocatory act is performed on a document other than the will).

through experimentation, ... economic practices and institutions to meet changing social and economic needs.”³⁰ Countries within and without the common-law tradition are now experimenting.³¹ We are witnessing the trust in a global laboratory.

³⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting).

³¹ For a thoughtful set of reflections, see D.M. Waters, *The Future of the Trust from a Worldwide Perspective*, in *THE INTERNATIONAL TRUST* (J. Glasson & G. Thomas eds., 2d ed. 2006).



THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE

PREFACE: PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COLUMBIA LAW SCHOOL

*Lance Liebman**

More than 75 years ago, the Parker School was founded to honor Judge Edwin W. Parker and to accomplish his goal of encouraging teaching and research about comparative and international law. Over the years, in close collaboration with Columbia Law School, the Parker School has sponsored and published important work that describes, analyzes, and encourages legal understanding across national boundaries and even evolution toward cross-border legal convergence.

This "volume" of The Columbia Journal of European Law Online is exactly what was anticipated in Judge Parker's will and exactly what was pursued by the scholars who implemented his donation in the first half-century of the Parker School's existence. The division between law and equity was an achievement of late medieval English law. A major equitable accomplishment was the use, later called trust, that enforced a separation between possessor and beneficiary, crucial if known and unknown widows, born and unborn children, and intended charitable recipients were to receive their entitlements. The importance of the trust was demonstrated when it overcame Henry VIII's Statute of Uses and sprang back to life. For the United States, the reliance on trusts is high on the list of legal inheritances from the days of English colonialism.

Meanwhile, law in post-Napoleonic Europe progressed very differently following legal principles that accomplished similar goals with different institutional arrangements. So it is a perfect subject for the Journal of European Law to take up, pulling together the different national European stories, analyzing them, and making the information available to Americans and Europeans who will learn and perhaps even influence what happens next.

Comparative law, once a small part of the curriculum and research agenda of American law schools, is now of great importance. This project is exactly the kind of scholarly work that can be valuable as well as interesting.

Professor Lance Liebman, March 2012.



THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE

EDITORIAL: SPECIAL ISSUE ON TRUST LAW

The choice to dedicate a special issue of the Columbia Journal of European Law Online to the changing role of trust law in Europe was almost spontaneous for the many board, staff and faculty members interested in the common law trust and surprised at its undocumented role in the Columbia Journal of European Law. In fact, US law reviews and journals have traditionally played a prominent role in the rich and productive dialogue between civil and common law scholars on the trust and the equivalent fiduciary instruments in European civil law. The Columbia Journal of European Law Online hopes to add to this history of excellence with a special issue focusing on the most recent developments in the field.

The timing for the issue seems particularly appropriate given the exceptional activity of legislators, practitioners and academics in envisaging and proposing innovative conceptions of the trust. As traditional orthodoxy has been questioned by the leading judgments of the Supreme Court of the United Kingdom, the enactment of the trust (or an equivalent civil law device) has been successfully pursued in several continental jurisdictions traditionally hostile to the trust.

Another reason to rejoice has been the increasing importance of the Hague Convention on the Recognition and Enforcement of Foreign Trusts. Twenty years after its enactment in Australia, Canada, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, San Marino, Switzerland and the United Kingdom, more countries are considering adhesion and ratification. The growing importance of the trust as an instrument of international finance has awakened the interest of jurisdictions which would otherwise find little attraction in the trust as an instrument of traditional estate transfer and wealth planning.

The Columbia Journal of European Law seeks to document some of these important developments with country reports from Cyprus, Germany, Italy, Luxembourg, the Netherlands, San Marino, Spain and Switzerland.

Jacopo Crivellaro
Supplement Editor, Columbia Journal of European Law Online



THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE

COUNTRY REPORT: ITALY

*Maurizio Lupoi**

I. INTRODUCTION

The Hague Convention of 1st July 1985 on the law applicable to trusts and their recognition was ratified by the Republic of Italy in 1989 and came into force in 1992.¹

The general consensus at that time was that the Convention concerned “foreign” trusts. “Foreign” was a very vague notion, for no article of the Convention refers to “foreign trusts”. However, the Convention had been conceived in the domain of private international law conventions (the Hague Conference on Private International Law) and it made sense to hold that its purpose was to have a trust “recognized” in legal systems other than the one to which it belonged: for instance, if the trustee of a New York trust intended to purchase an apartment in Venice, the Convention would ensure that he would be recognized as a trustee and that the notary in charge of the purchase would not raise objections on the basis that trusts were not known in the Italian legal system.

However, it soon appeared that if a “foreign” trust was to be “recognized” in Venice as a consequence of the purchase of an apartment by a foreign trustee all obstacles placed by the Italian legal system against trusts had to disappear automatically and in principle. Take the time-honored civilian misunderstanding that trusts involve two “real” rights or rights *in rem*, neither of which is recognized by the civil law; how would it be possible that a New York trustee acquired one of those unknown rights over the apartment in Venice and the trust’s beneficiary the other while the Italian owners of other apartments in the same building could not? Limitations concerning real property must concern either everybody (*lex loci*) or nobody.

Time has shown that legal structures that mirror the respective positions of trustees and beneficiaries did and at times do exist in the civil law and that trusts in their proper sense can live without a Chancellor and without an equity jurisdiction². The civilian misunderstanding rooted in

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¹ The Convention is currently in force in the following states: Australia, Canada (most provinces), China (Hong Kong), Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, San Marino, Switzerland, United Kingdom (and Crown Dependencies).

² L. D. Smith, *Trust and Patrimony*, 38 REV. GÉN. DE DROIT 379 (2008); G. L. Gretton, *Trusts Without Equity*, 49 INT’L & COMP. L. Q. 599 (2000).

the alleged existence of two “real” rights or rights *in rem*, however, still lingers on. It might then be useful to explain that its reason rests, as is the case in many other domains of trust law, on an English terminology that is liable to deceive lawyers belonging to different legal systems. By way of example, let us consider tracing. Tracing has often been described as a method to recover trust property. That is of course right, but once it is coupled with the notion that the beneficiary is the equitable owner of the trust fund the irresistible inference for a civil lawyer is that beneficiaries can “sue in tracing” and recover the trust fund. A nonsense for sure but a logical assumption as well, given the terms that civil lawyers find in English-language literature. “Equitable ownership” is equally troublesome for a civil lawyer, for he is told that a legal ownership to trust assets exists side by side with an equitable ownership. Hence the basic misunderstanding to which I referred above - two “real” rights or rights *in rem*, neither of which is known in the civil law. One should never surmise the meaning of foreign legal terms, as every student of comparative law knows well, but on the other hand why should a civil lawyer suspect that the meaning of “ownership” in “legal ownership” is different from the meaning of “ownership” in “equitable ownership”? Indeed it is, for “equitable ownership” is no more than a figurative expression employed by English Chancellors at a loss to find a specific expression to define the entitlements of beneficiaries under the early trusts.

Most civil law countries, including Italy, have a highly-formalized land registration system. Hence, an additional difficulty to accommodate trusts within their respective territories unless the two meanings of “ownership” are disentangled. That is what occurred in Italy quite soon after the ratification of the Hague Convention. Land registrars objected to registering trustees’ titles. It took six judgments from as many Italian courts to clarify this issue and, as a consequence, nowadays trustees regularly register their title as trustees. That does not conform with English practice, that has always shied away from registration of trustees’ titles, be they on land or on company shares, but is a necessary ingredient in Italian law to protect the trust assets and the interests of the beneficiaries.

The latest trend in Italy, supported by a 2011 decision of the Turin court, is to register title in the name of the trust.³ Civilians tend to see legal entities whenever they have a chance, but that is not the case. If you focus on the trust assets and look at trusts that perform functions very close to the traditional civilian foundation (for instance, trusts that own a university or a hospital or a museum) the drive towards equating them with a juridical person would be well-founded. The assets take precedence, so to speak, over the board of trustees. In addition, tax rules in many countries look at trust income as income of “the trust”. The latter view prevails in Italy where, since 2007, tax provisions exist that tax the income of the trust assets as if the trust were an entity. That explains why land registration may be in the name of the trust. After all, the trust is a taxpayer.

³ All Italian cases in trust matters are reported in the journal TRUSTS & ATTIVITÀ FIDUCIARIE.

Those were the basic acclimatization issues, yet not the only ones.

First and foremost was the notion of trust “interno”. I propounded this notion in 1994 in order to describe a trust formed and operating in Italy with an Italian settlor and Italian beneficiaries and usually with an Italian trustee. The only foreign element of a trust “interno” would be the law by which it is governed, by necessity a foreign law. The Hague Convention would thus be applicable to a trust “interno”, just as it is applicable to “foreign” trusts.

The academic reaction was mostly negative, and strongly so.

One has to accept that the experts who drafted the Hague Convention on trusts had not considered trusts “interni” as a possible outcome of the Convention and certainly had no intention to allow trusts to become a permanent fixture of civil law systems. On the other hand, practitioners took rapidly to the trust “interno” and, what matters most, courts did likewise, thereby planting the seeds of a widespread acceptance in spite of the many operating difficulties that beleaguer trusts in a civil law context. For instance, it cannot be denied that in no civilian country can there be an efficient trust administration unless the courts are willing to step in as they would in the traditional trust countries. The inherent jurisdiction in trust matters is given for granted by, say, English or American lawyers and is never seen as a topic for discussion when trusts in civil law countries are discussed. That is one of the very many comparative law shortcomings that affect the present day debate on trusts.

Italian courts have understood this need and have gone so far as to replace trustees (English law was applied in a Milan case), to appoint a new trustee when the trust instrument had no applicable rule for the appointment of a trustee after the death of the initial trustee (Jersey law was applied in a Genoa case) and to approve a variation of the trust instrument where there was a beneficiary under tutorship (English law was applied in a Florence case). It has now become frequent to have court orders sanctioning trusts agreed to by the spouses in a divorce suit or for the administration of assets belonging to the parents of a handicapped child or to support the segregation of assets in favor of the creditors of a company in the context of bankruptcy proceedings. Almost 200 orders or judgments have been handed down by Italian courts (including tax courts) in trust matters over the last ten years.

The sheer number of judicial rulings shows how widespread the use of trusts “interni” is in Italy. One is bound to enquire into the causes of this.

The fundamental cause is that trusts provide answers to many shortcomings of Italian law. If an American client sends money to his Italian attorney in order to have the money ready should a purchase of shares of an Italian company be finalized, he believes that the attorney will place the money in a clients’ account. If an American client sends money to his Italian attorney in order to

show to the other party of an Italian deal that he has the financial resources to complete the deal, he believes that the attorney will place the money in an escrow account. In other words, in both instances the American client is certain that his money is protected and that his attorney's creditors shall never be able to reach it. That is not so under Italian law. It takes a trust "interno" to achieve the American client's intended effects.

Italian law conceives of no legal relationship that efficiently goes beyond the life of the parties. One may appoint a testamentary executor to carry out his wishes but an executor must surrender the deceased's estate in its entirety to the heirs of the deceased within one year (exceptionally, within two years) so that there is very little he can usefully do past that period. Under a recent addition to the Italian civil code (article 2645-*ter*), one may segregate land or registered personal property for a beneficiary but that is no more than a restriction on how that asset may be disposed of and is not coupled with a management structure, certainly not with a management structure that can go beyond the life of the manager.

The notion of "dedicated patrimony", that is, assets devoted to the furtherance of an objective, is foreign to current Italian law other than through the formation of an entity, such as a foundation or a company, or through the creation of limitations on the use of the assets in question that act much in the same way as an easement would: they concern the thing, not the obligations of its owner towards those who are intended to benefit.

In this connection, it must be pointed out that also the notion of fiduciary obligation is foreign to current Italian law. Again, words may play dangerous tricks: we have "fiduciary agreements" but they have nothing to do with trusts. The concept of "fiduciary agreement" goes back to the German doctrine of the late XIX century ("fiduziarische Geschäft") and is no more than a mandate coupled with the transfer of assets to the fiduciary. He has to deal with the assets as provided for in the fiduciary agreement but third parties are not bound by that agreement, so that those assets are seen by the law as owned by the fiduciary and are available to his creditors. Moreover, the fiduciary has a duty to the party who appointed him, not to the beneficiaries (the latter being a notion that is foreign to the theory of fiduciary agreements under Italian law). Beneficiaries may well not exist at all and, if they do, they can at most be seen as the recipients of a contract in favor of third parties. That does not create any fiduciary obligation of the fiduciary towards them.

We also have "fiduciary companies" but they are not trust companies, they simply perform the role of a fiduciary under a fiduciary agreement and are subject to State supervision. The advantage of contracting with a fiduciary company is that the assets they receive are considered not to belong to them. That is so because the assets still belong in the eyes of the law to the party who entered into the fiduciary agreement. Not a shade of trusts can be detected in these arrangements.

The lack of the notion of “fiduciary obligation”, as understood in the common law, is crucial. Trusts are but one of the relationships that are worthy of protection because of their fiduciary nature. A still not totally explored domain exists in the common law⁴ and most of its components stem from “confidence”, a notion that left Europe’s *ius commune* or common law in the XV-XVI centuries to become embedded in English law, while on the Continent it progressively lost significance.⁵ “Confidence”, according to many, is at the root of fiduciary obligations. The semantic area of “confidence” is both very wide and subject to change over time. Hence, its prowess to encompass varying situations as they come to the attention of the courts and to provide a protection that a stricter conceptual system would be unable to achieve. It may be that the growing civilian familiarity with trusts shall bring “confidence” back to its original lands.

There are signs that it is more than a mere possibility. trusts “interni” could have been used by Italians as a means to hide their assets and to defeat their creditors, let alone those of their family members who are entitled by law to a share of the decedent’s estate. That has not occurred. Nor have trusts been devoted primarily to the management of wealthy estates. One the peculiarities of trusts “interni” is that they care primarily for everyday occurrences, in respect of which the shortcomings of Italian law are easily apparent. The fact situations I shall now summarily refer to correspond to the most common occurrences of trusts in Italy and cannot be efficiently dealt with in Italian law other than by means of a trust.

Separation or divorce agreements where assets of one of the spouses are to be put by in order to become owned by the children of the marriage at a given date or upon a certain occurrence – in the meanwhile those assets must be segregated and properly managed either by one of the spouses in a fiduciary capacity or by a third party.

The fate of a handicapped child after the death of his parents – he would probably own no assets in his own right and his future livelihood and personal care will thus depend on the assets that his parents will have devoted for that purpose without actually transferring them to him. Of course, there can be a tutor appointed by the court to look over those assets, but a tutor does not have to take care of the personal needs of his pupil (which in the case of a handicapped person may be of paramount importance) and, further, the deceased parents of the pupil cannot give binding instructions to a tutor. The insufficiency of the tutorship is shown by the fact that some civil law countries, such as the Spanish region of Cataluña, have enacted specific statutes to cope with

⁴ A. Scott, *The Fiduciary Principle*, 37 CAL. L.R. 539 (1949); L. S. Sealy, *Some Principles of Fiduciary Obligation* [1963] CAMBRIDGE L.J. 119; E. J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975); P. D. FINN, *Fiduciary Obligations*, (Cambridge University Press, 1977); T. Frankel, *Fiduciary Law*, 71 CAL. L.R. 795 (1983); R. Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285 (1989); P. Birks, *The Content of Fiduciary Obligation*, 34 Israel L.R. 3 (2000).

⁵ M. Lupoi, *Trust and Confidence*, 125 L.Q.R. 253 (2009).

those situations (Spain had enacted a national law in 2003 on this same subject matter but it was felt that it had not gone far enough to insulate the assets devoted to the handicapped person).

Setting aside an asset to assure that certain conditions relating to a transaction will be fulfilled – a pledge over a movable asset would take that asset away from its owner, while a hypothec would require a cumbersome procedure to be created, to be enforced and, if need be, extinguished. On the other hand, once the asset in question becomes subject to a trust, the interests of the parties involved are properly protected.

Skipping one generation in business matters – that is a common occurrence in the United States but it meets the obstacle of the reserved shares of family members in most civil law jurisdictions. The majority of Italian businesses are family-owned and it is not unlikely that no child of the owner of the business is apt to take over from him. A sale of the business is usually ruled out, the hope of the owner being that the second generation of his descendants will succeed where the first generation has failed. The first generation will receive the income of the business in the meanwhile.

Skipping one generation in family matters – that concerns families where the head of the family owns non-business assets and has little confidence that his children shall keep them within the family (at times, some of the assets have been owned by that family for centuries). There may be unmarried children without any obligation to keep a significant part of their assets within the family, divorced children, spendthrift children, and so on. The first-generation descendants will not only enjoy the income produced by the assets but also hold powers to direct the trustee as to their management and their disposition. Their position will thus be very close to the position of an owner, but they will never receive any part of the capital.

Some of the structures I have just outlined conflict with Italian succession law in that they deprive one or more family members of their respective entitlements. The legal consequence of transferring assets to a trustee rather than, by gift or will, to the family members in whose favor the law reserves a share of the estate of the decedent is not, however, that the transfers are void. They are and remain perfectly valid, without prejudice to the claim of a family member to have them set aside to the extent that that is necessary to make him receive the reserved share provided by the law. In spite of the many occurrences of trusts “interni” that would come within this rule, there has not been until now a single instance of a claim by a prejudiced family member. That shows the strength of family ties in Italian society and the respect paid to the wishes of a deceased parent. It probably also shows that the provisions of the trust instruments in question were reasonable and did not unduly prejudice the first-generation descendants.

Trust instruments creating trusts “interni” are of course drafted in Italian in spite of their being subject to a foreign law. Hence, two sets of problems.

Some English terms cannot be translated; therefore, “trust” and “trustee”, just as “charitable trust” and “willful default” are kept in English. The translation of other terms is possible but may be misleading; therefore, “power of advancement” or “protective trust” are translated into Italian but the corresponding English terms are added in parenthesis. Other terms can be translated without difficulty; for instance, “protector” or “enforcer” are translated as “guardiano”.

The acclimatization of trusts calls for the insertion into trust instruments of provisions that find no counterpart in foreign models, for trusts, just like any legal institution, cannot be transplanted into a foreign legal system without heeding the reactions of the receiving system. It is not a matter of adapting trusts. That cannot happen because the theory of trusts “interni” subjects any trust “interno” to a specific foreign law and as a consequence a trust “interno” has to abide by that law. It is a matter of modifying the working of trusts to make them conform to the applicable principles and rules of Italian law without in any way impinging on the foreign trust law by which they are governed. A good instance of this mechanism concerns the acts performed by a trustee. Italian trust instruments require the trustee to hold himself out as a trustee whenever he enters into a contract or registers title to land. That is not required by any foreign law and yet does not contradict any foreign law. At the same time, it follows Italian law rules relating to acts the consequences of which do not affect the personal assets of the person who performs the act. Here, as in many other domains, rules of procedure and of evidence interact with rules of substance. A defendant before an English court may prove by his own testimony as well as by the testimony of other people that a bank account he has opened in his own name is a trust account and that the money deposited into that account is not his own money. That would be most difficult before an Italian court, if not outright impossible, and explains why Italian trustees are bound to hold themselves out as trustees in every possible circumstance and to label every asset, including a bank account, as a trust asset (actually, as an asset included in the fund of a specific trust).

Acclimatization issues do not stop here.

The traditional English trust deed did not usually recite what the intention of the settlor and the purpose for which the trust was formed were; indeed, it recited that property had been transferred to A. e B. and then it set out the terms of the trust. Such a structure does not sit easily with many a civil law context, where property cannot be conveyed without showing a cause and, additionally, where the choice of a foreign law to govern a relationship that would otherwise be governed by the local law calls for an explanation when, as is the case with trusts, it allows the parties to achieve objectives that could not be achieved under the local law. Italian trust instruments regularly recite the intention of the settlor and the purpose of the trust. Once again, let us be cautious with words. Every trust has a purpose even when it is a trust for beneficiaries and there is nothing wrong in setting out that purpose in the trust instrument.

One might object that it is obvious that trustees must act in the interest of the beneficiaries, what other purpose could there be? This matter, however, is not so easily disposed of, for “the interest

of the beneficiaries” in only a catch-sentence does not catch the actual structure of modern trust instruments. They usually allow the trustees to consider the interests of one or more beneficiaries, disregarding the interests of all other beneficiaries. The commonly-held view that a trustee does not have to provide any explanation as to how he has exercised his discretion is a compounded factor to the effect that “the interest of the beneficiaries” has little, if any, meaning left.

Another acclimatization issue concerns the structure of trust instruments as unilateral acts. It is a basic tenet of trust law that trusts are not contracts.⁶ That does not imply that trust instruments might be seen as “contrats” in French law, just as the French *fiducie* is a “contrat”. The same could be said with reference to “contratti” under Italian law. Here we have a simple comparative law issue, since it is well known that common law contracts do not correspond to “contrats” or “contratti”, but the question remains open: are trusts “contrats” or “contratti” in spite of their not being contracts? It is equally well known that the word “trust”, just as the expression “fiduciary obligation”,⁷ encompasses nowadays a wide array of legal arrangements, so that one might query whether it should be appropriate to devise new terms in order to identify as many categories of trusts. Trusts for purposes, for instance, have very little in common with trusts for beneficiaries. The same could be said of trusts for creditors compared with trusts for family members. It could be argued that some trust types are contract, while other are not. Even so, the comparative law issue would remain unsolved.

I would submit that under Italian law trusts must be seen as “accordi” (agreements) and kept outside the area to which “contratti” belong, basically because “contratti” entail an action for breach that terminates the contract. That would be a mischief and it would deny the very essence of trusts. A trust must go on in spite of a breach by its trustee and that is what occurs in trust law. Fiduciary law rules ensure that fiduciaries do not proffer compensation and keep illegal profits⁸. Should it be any different, we would be facing a different legal institution.

The interplay between foreign trust law and Italian law is as complex as the interplay between foreign established practices and the developing Italian practice. At the same time, issues that foreign lawyers have seldom canvassed in depth have come to the fore. Trusts “interni” are a living comparative law laboratory.

⁶ Cf. J. H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

⁷ Birks, *supra* note 4.

⁸ J. Getzler, “*As if.*” *Accountability and Counterfactual Trust*, 91 B.U.L.R. 973 (2011).



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COUNTRY REPORT: CYPRUS

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I. INTRODUCTION

The Cyprus legal order reflects the cosmopolitan nature of the island and the diversity of influences on its history. Elements of Ottoman law and continental European law can still be found, particularly in its succession and constitutional law. However, the predominant influence on the Cyprus legal system is British: prior to independence in 1960 Cyprus was a British colony, and much of its law, including its trust law, reflects the British influence. Although many of the laws in place at the time of independence have since been repealed and replaced, or at least significantly amended, and new laws have been introduced, there is still a substantial volume of law which would be familiar to the English practitioner of the mid-twentieth century, including the Trustee Law of 1955 (Cap.193), which closely follows the English Trustee Act 1925 and continues to regulate domestic trusts.

When Cyprus became independent the Constitution provided that the existing laws should remain in force in the Republic until repealed or amended by its own laws. The English doctrines of equity were formally introduced into the post-independence legal order by section 29 of the Courts of Justice Law (14 of 1960), which requires the courts to follow English common law and equitable principles unless there are other provisions to the contrary under Cyprus law or such adherence would be inconsistent with the Constitution. However, very few trust issues have come before the Cyprus courts and domestic case law is limited.

In the early 1990s, as a step on the road to establishing itself as an international financial centre, Cyprus enacted the International Trusts Law, Law 69 of 1992 (“the International Trusts Law”), which provides a framework for the establishment of trusts in Cyprus by non-residents.

It should be noted in passing that there is also a law allowing the establishment of foundations (the Associations and Foundations Law of 1972) but it is outdated and has fallen out of use due to the high degree of bureaucracy involved.

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Cyprus trust law follows familiar common law and equitable principles. Trusts are divided into two main types, namely private trusts, the object of which is to benefit private individuals, on the one hand and charitable trusts, with a charitable purpose (such as the relief of poverty or the promotion of education, religion or welfare) and a public benefit. Non-charitable purpose trusts (for example for the maintenance of family tombs), are permitted. Private trusts are enforceable at the instance of the beneficiaries. Charitable trusts are generally enforced at the suit of the Attorney General acting on behalf of the state.

Trusts may also be fixed or discretionary: a fixed trust is one in which the share or interest of the beneficiaries is specified in the trust instrument; a discretionary trust is one in which the trustees hold the trust property on trust for such member or members of a class of beneficiaries as they shall in their absolute discretion determine.

Rather than reiterating the general principles of common law and equity which Cyprus trust law follows (and which are readily available in any general textbook on trust law) this article will focus on the International Trusts Law of 1992, the considerable tax-planning and asset protection potential of trusts established under the International Trusts Law, and current proposals for amendment which will further increase its benefits.

II. THE CYPRUS INTERNATIONAL TRUST

It should be noted at the outset that the International Trusts Law is not a self-contained statute, but rather a law built on the existing statutory base (particularly the Trustee Law of 1955). The general principles of trust law continue to apply unless and to the extent that they are overridden by a specific provision of the International Trusts Law.

An international trust must satisfy all the following requirements, set out in section 2 of the International Trusts Law:

- the settlor may not be a permanent resident of Cyprus;
- no beneficiary (other than a charity) may be a permanent resident of Cyprus;
- the trust property may not include any real property situated in Cyprus;
- at least one trustee must be resident in Cyprus at all times.

At the time the International Trusts Law was enacted Cyprus had a separate tax regime for "offshore" enterprises, with no activities in Cyprus. Section 2 contains a proviso that an offshore enterprise may act as trustee, and that an offshore company or partnership can be the settlor or

beneficiary of an International Trust. Although the separate taxation regime has been abolished, these provisions remain effective.

Section 5 of the International Trusts Law provides that an international trust may remain in force for up to 100 years notwithstanding any statutory provision of Cyprus or any other country to the contrary. Charitable trusts and purpose trusts, which are defined in section 7 of the International Trusts Law, may continue indefinitely. The income of an international trust can be accumulated for the entire duration of the trust (*section 6*).

The International Trusts Law does not limit the trustees' investment powers in any way, but merely requires that they be exercised in accordance with the trust instrument and with the diligence and the prudence which a reasonable person would be expected to exercise when he makes investments (*section 8*).

If the terms of the trust so provide, the applicable law of an international trust may be changed from or to Cyprus, provided that the law of the other jurisdiction involved recognises the validity of the trust and the respective interests of the beneficiaries, and the change of jurisdiction (*section 9*). The Cyprus courts have powers to vary the terms of an international trust along the lines of the English Variation of Trusts Act 1958. They may amend or cancel the terms of an international trust or the powers of the trustees to manage the trust if they are satisfied that the proposed arrangement will be in the interest of the person on whose behalf the application is made and no substantial prejudice is caused to the interests of any other party concerned (*section 10*).

There is a fixed stamp duty of €427 payable on the creation of an international trust, but there is no requirement for the trust to be registered. Section 11 of the International Trusts Law provides that no-one may disclose information regarding the trust to third parties except under an order of a Cyprus court.

In summary, in terms of establishment and maintenance, the Cyprus international trust provides convenience, security, simplicity, flexibility and confidentiality, based on a well-established legal framework. However, the Cyprus international trust has a number of important tax advantages and asset-protection features that set it apart.

III. TAX ADVANTAGES OF THE CYPRUS INTERNATIONAL TRUST

Cyprus international trusts enjoy a number of tax exemptions, providing significant tax planning possibilities:

- Income arising outside Cyprus is exempt from Cyprus tax.

- Dividends, interest and other income are exempt from tax and withholding tax, irrespective of source.
- Gains on the disposal of assets are not taxable in Cyprus.

Cyprus international trusts may also benefit from the application of the provisions of Cyprus's wide network of double tax treaties, particularly in the area of capital gains.

There are no succession taxes in Cyprus.

IV. ASSET PROTECTION FEATURES OF THE CYPRUS INTERNATIONAL TRUST

The purpose of an asset protection trust is to establish a firewall around the settlor's assets to protect them from claims that may subsequently arise. Asset protection trusts are popular with professionals, particularly medical professionals, to provide additional protection over and above professional indemnity insurance (and limited liability in certain professions). Limitation periods may be long, and medical conditions may not become apparent for many years, meaning that claims may emerge long after the event, perhaps even after the individual has ceased to practise and insurance has lapsed. The prudent practitioner may therefore add another bulwark to his defences in the form of an asset protection trust. In personal life, in the light of the substantial awards that courts in certain jurisdictions are making, an asset protection trust may be used to provide added reassurance against claims on breakdown of marriage or civil partnership. Certain countries have forced heirship provisions in their succession law, reserving a specified portion of the deceased's estate for relatives, and an asset protection trust provides a means of regaining freedom of testation.

By their nature, all trusts provide an element of asset protection, by separating the assets held in trust from the settlor's general assets, which would be available to satisfy his debts or, if the worst came to the worst, pass to his trustee in bankruptcy. However, the Cyprus international trust has four additional advantages.

The first is that the International Trusts Law contains a very strong presumption against avoidance of a Cyprus international trust. Section 3(2) provides that notwithstanding the provisions of any bankruptcy or liquidation laws in Cyprus or in any other country, and notwithstanding the fact that the trust is voluntary and without consideration, and notwithstanding the fact that it is made for the benefit of the settlor or his family members, the trust will not be void or voidable unless it is proved to the court that the trust was made with intent to defraud persons who were creditors of the settlor at the time when the payment or transfer of assets was made to the trust. The burden of proof of the settlor's intent to defraud lies with the person who is seeking to annul the transfer. Section 3(3) requires any action for avoidance of the trust to be instituted within two years from the date of transfer or disposal of the assets to the trust.

These provisions, particularly the requirement to prove intent to defraud on the part of the settlor, set the bar very high for the claimant trying to set aside a transfer to a Cyprus international trust. While the standard of proof is the civil standard of "more likely than not" rather than the criminal standard of "beyond reasonable doubt", it is extremely difficult to meet in practice and the burden of proving fraud is higher than is usual for civil cases. In practice, the claimant would need to adduce strong evidence to demonstrate that the settlor intended to defraud his creditors.

The person challenging the trust must establish that he was a creditor of the settlor at the time the assets were transferred to the trust. The International Trusts Law does not elaborate on the definition of creditor, and it is not clear whether a contingent or prospective creditor would qualify and, if so, what likelihood of the claim crystallising would be required. The introductory commentary to the International Trusts Law says that its asset protection features are intended to offer "a legitimate protection to persons who may be engaged in high risk professional activities, such as surgeons, architects or members of Lloyds where very substantial damage awards made against them at some future time could result in the financial ruin of their families" and not a means for settlors to cheat their existing creditors. Almost twenty years have passed and the provisions have not yet been tested in a Cyprus court but it is not unreasonable to expect the courts to follow that guidance.

In 1976, Cyprus enacted a law to ratify the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, under which judgments obtained in courts of countries which are signatories to the Convention may be enforced in Cyprus provided that certain criteria are met. Article 1 of the Convention makes it clear that the provisions of the Convention do not apply to decisions about the capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses, maintenance obligations, questions of succession and questions of bankruptcy, including those relating to the validity of acts of a debtor. In view of the above, together with the contents of section 3(b) of the International Trusts Law, the possible enforcement of a foreign decree of bankruptcy in Cyprus, as well as the enforcement of any other foreign judgment obtained in respect of the settlor's property, is effectively ruled out, and an aggrieved party may obtain relief only by bringing an action against the trustees within the two year period and would have to discharge the onerous burden of proving intention to defraud. A plaintiff domiciled outside the European Union would be required to provide security for costs under Order 60 of the Civil Procedure Rules.

For British settlors Cyprus has a distinct advantage over many other competing jurisdictions, including most Commonwealth countries, particularly the Caribbean islands and Bermuda, in that it is not a party to the arrangements established by section 426 of the Insolvency Act 1986, which commit British courts and the courts of certain other jurisdictions to co-operate in insolvency cases.

Finally, the Statute of Elizabeth 1571, which invalidates arrangements made to hide assets from future creditors and remains in its original or modified form on the statute books of many offshore trust jurisdictions, including the BVI, Gibraltar, Hong Kong, the Bahamas, Bermuda, the Cayman Islands and Turks & Caicos, is expressly negated in Cyprus.

In terms of freedom of testation, the International Trusts Law explicitly states that a Cyprus court will not enforce the inheritance rules of any country so as to upset the validity of a Cyprus international trust.

In summary, therefore, within Cyprus the asset protection defences of the International Trusts Law are likely to stand firm as long as the trust is properly constituted and is established to provide prudent protection against potential claims rather than as an attempt to fraudulently deprive existing creditors of their legitimate rights.

Antipathy in the large Western economies towards offshore jurisdictions and legitimate tax mitigation and wealth preservation techniques has intensified in recent years, particularly with the collapse of tax revenues in some of the developed economies. As a result, attacks on offshore structures are likely to attract popular sympathy and judges in those countries are likely to be ever more eager to set aside trusts. However, in the words of Munby J in the English case *A v A (St George Trustees Ltd and others, interveners)* [2007] EWHC 99 (Fam), while courts are entitled to adopt a “robust, questioning and where appropriate, sceptical approach” to offshore structures, they cannot “simply ride roughshod over established principle”.

V. PROPOSALS FOR AMENDMENT OF THE INTERNATIONAL TRUSTS LAW OF 1992

The Cyprus International Trust has proved very popular, especially with settlors from Russia and Central and Eastern Europe. The world has changed considerably since it was introduced and the laws of leading jurisdictions have undergone a transformation. There is general consensus that the International Trusts Law requires modernisation and a proposed amendment has been published for consultation.

The main proposed changes are in the following areas:

- the definition of a Cyprus international trust
- exclusion of overseas law
- reserved powers
- abolition of restrictions on duration of trusts
- redefinition of charitable purposes
- extension of trustees' investment powers
- variation of trusts

- confidentiality
- directions hearings
- choice of law rules
- jurisdiction
- foreign law trusts.

They are analysed in the paragraphs below.

1. Definition of a Cyprus International trust

When the 1992 law was drafted, the availability of international trusts was restricted to non-resident settlors in order to prevent tax avoidance by Cyprus residents. Uncertainty over whether settlors could relocate to Cyprus after establishing a Cyprus International Trust has undoubtedly discouraged many of them from doing so. The first of the proposed amendments requires the settlor to be a non-resident at the time the trust is created. It removes the prohibition on resident beneficiaries and on ownership of immovable property in Cyprus, thus avoiding difficulties that might otherwise arise if the settlor or any beneficiary were subsequently to take up residence in Cyprus.

2. Exclusion of overseas law

The proposed amendment further reinforces the asset protection features of Cyprus International Trusts by inserting a new section 3(1)(A) providing that any question relating to the validity or administration of an international trust or a disposition to an international trust will be determined by the laws of Cyprus without reference to the law of any other jurisdiction, and that the law of relating to inheritance or succession in force in Cyprus or any other country will not in any way affect the validity of the international trust or any transfer or disposition of property to it. Section 3(1)(E) makes it clear that the trustees' fiduciary powers and duties of trustees and the powers and duties of any protectors of the trusts are governed exclusively by Cyprus law.

A proposed new section 3(4) provides further explicit protection against the application of foreign law, as follows:

- 3(4) No international trust, and no disposition of property to or upon such a trust, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any settlor, trustee, enforcer, protector or beneficiary to be questioned, nor is any settlor, trustee, enforcer, protector, beneficiary or third party to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that:
- (a) the laws of any other jurisdiction prohibit or do not recognise the concept of a trust, or
 - (b) the trust or disposition

- (i) avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person -
 - (A) by reason of a personal relationship to a settlor or any beneficiary, or object of a discretionary trust or power of any nature, or
 - (B) by way of heirship rights, or
- (ii) contravenes or potentially contravenes any rule of law or any judicial or administrative judgment, order or action of any other jurisdiction intended to recognise, protect, enforce or give effect to any such rights, claims, interests, obligations or liabilities, whether by seeking to invalidate the trust or disposition or by imposing on a settlor, trustee, enforcer, protector, beneficiary or third party any obligation or liability or otherwise.

3. Reserved powers

A new Section 4(A) is proposed, similar to article 9A of the Trusts (Jersey) Law 1984, as amended and section 15, Trusts (Guernsey) Law 2007, permitting the settlor to reserve powers to himself, to retain a beneficial interest in trust property, or to act as the protector or enforcer (the equivalent role for a non-charitable purpose trust).

- 4(A)(1) Notwithstanding any other legal provision or rule of law, the reservation or grant by a settlor of a trust of –
 - (a) any beneficial interest in the trust property; or
 - (b) any of the powers mentioned in paragraph (2), whether reserved to the settlor or conferred on him in the capacity as protector or enforcer of the trust,

shall not in any way affect the validity of the trust nor delay the trust taking effect.
- (2) The powers are –
 - (a) to revoke, vary or amend the terms of a trust or any trusts or powers arising wholly or partly under it;
 - (b) to advance, appoint, pay or apply income or capital of the trust property or to give directions for the making of such advancement, appointment, payment or application;
 - (c) to act as, or give binding directions as to the appointment or removal of, a director or officer of any corporation wholly or partly owned by the trust;
 - (d) to give binding directions to the trustee in connection with the purchase, retention, sale, management, lending, borrowing, pledging or charging of the trust property or the exercise of any powers or rights arising from such property;
 - (e) to appoint or remove any trustee, enforcer, protector or beneficiary;
 - (f) to appoint or remove an investment manager or investment adviser;

- (g) to change the proper law of the trust;
 - (h) to restrict the exercise of any powers or discretions of a trustee by requiring that they shall only be exercisable with the consent of the settlor or any other person specified in the terms of the trust.
- (3) Where a power listed in paragraph (2) has been reserved or granted by the settlor, or in his capacity as protector or enforcer of the trust, a trustee who acts in accordance with the exercise of the power is not acting in breach of trust.
 - (4) Where a power listed in paragraph (2) has been reserved to the settlor, or conferred on him in the capacity as protector or enforcer of the trust, no intention to defraud may be imputed to the settlor for the purposes of section 3(2).

4. Abolition of restrictions on duration of trusts

Section 5(1) of the 1992 law restricts the maximum life of an international trust to 100 years from the date on which it came into existence. Subsection 5(2) provides an exception for charitable trusts and non-charitable purpose trusts, which can exist in perpetuity. This was norm at that time, but in the intervening period many competing jurisdictions, including Jersey and Guernsey, have provided for perpetual trusts, unlimited in duration, removing a perceived disadvantage of trusts vis à vis foundations.

The proposed amendment provides that from the date the amendment takes effect and subject to the terms of the trust, there will be no limit on the period for which a trust may continue to be valid and enforceable, and no rule against perpetuities or remoteness of vesting or any analogous rule will apply to a trust or to any advancement, appointment, payment or application of property from a trust. Except where the terms of a trust expressly provide to the contrary, no advancement, appointment, payment or application of income or capital from the trust to another trust is invalidated solely by reason of that other trust continuing to be valid and enforceable beyond the date on which the first trust must terminate. Section 6 of the 1992 law, which provides that income can be accumulated for the duration of the trust, remains in effect.

5. Redefinition of charitable purposes

The definition of charitable purposes in section 7 of the Law is based on English law at the time the Law was enacted. The proposed amendment will align the definition of charitable purposes with the definition set out in the Charities Act 2006 (England & Wales):

Subject to the provisions of the Constitution of the Republic and notwithstanding the existence of any contrary legal provision of the law of the Republic or any other country an international trust shall be deemed to be charitable where the trust has as its main purpose the achievement of one or more of the following:

- (a) the prevention or relief of poverty;
- (b) the advancement of education;

- (c) the advancement of religion;
- (d) the advancement of health or the saving of lives;
- (e) the advancement of citizenship or community development;
- (f) the advancement of the arts, culture, heritage or science;
- (g) the advancement of amateur sport;
- (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- (i) the advancement of environmental protection or improvement;
- (j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (k) the advancement of animal welfare;
- (l) the promotion of the efficiency of the armed forces of the Republic, or of the efficiency of the police, fire and rescue services or ambulance services;
- (m) other purposes beneficial to the public in general; or which may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) - (l) above.

The amendment also provides that an international trust established for one or more of these objects will be deemed to be charitable, notwithstanding that:

- (a) the object or purposes are not of a public nature or for the benefit of the public, but may benefit a section of the public, or that it may also benefit privately one or more persons or objects or persons within a class of persons; or
- (b) the international trust is liable to be amended or to be terminated whether by the exercise of a power of appointment or disposition of assets; or
- (c) the trustee has the power to defer the distribution of the benefits to any charity of the trust for a period not exceeding the period of the trust; or
- (d) the international trust is or is deemed to be in the class of discretionary trusts.

6. Extension of trustees' investment powers

As noted earlier, the existing Law does not limit the trustees' investment powers, but merely requires that they be exercised in accordance with the trust instrument and with the diligence and the prudence which a reasonable person would be expected to exercise when he makes investments. The proposed amendment gives trustees the same investment powers as those of an absolute owner, allowing them to invest in a broader range of investments for the best interests of the beneficiaries. This brings the trustee's investment powers into line with those of a trustee in

England and Wales, and other trust jurisdictions which have followed the English Trustee Act 2000, including Malta.

The proposed amendment also removes any doubt regarding trustees' ability to invest in Cyprus by including a new section 8(3):

For the avoidance of doubt, the trustee may hold, retain or invest in movable property in the Republic and overseas (including shares in companies incorporated in the Republic); and immovable property located in the Republic and overseas.

The abolition of the prohibition on investment in Cyprus will remove an obstacle to inward investment and provide a boost to the real estate market, which has stagnated since onset of the global economic crisis.

7. Variation of trusts

The existing Law makes provision in section 10(1) for the court to approve the variation of international trusts on behalf of certain specified persons who cannot freely consent for themselves (such as the unborn and persons lacking legal capacity). A new section 10(1)(e) is proposed, based on section 57(1)(e) of the Trusts (Guernsey) Law 2007, allowing the court to approve a variation on behalf of any other person, with leave of the court. A further amendment to section 10 expressly states that any power to vary contained in the trust instruments is also valid, bringing the Law into line with the Trusts (Jersey) Law 1984.

8. Confidentiality

Section 11 of the existing Law imposes a duty of confidentiality on "the trustee or any other person, including government officials and officers of the Central Bank of Cyprus." The reason for the inclusion of government and Central Bank officials was to reassure settlors that confidence would be respected, when the Central Bank of Cyprus was responsible for investment promotion. The proposed amendment removes specific reference to these persons and adds the enforcer and protector to the list of persons specifically named.

The amended section 11 reads as follows:

Subject to the terms of the instrument creating an international trust and where the Court has not issued an order for disclosure in accordance with the provisions of subsection (2), the trustee, protector, enforcer or any other person shall not provide any documents or information:

- (a) which disclose the name of the settlor or any of the beneficiaries;

- (b) which disclose the trustee's deliberations as to the manner in which a power or discretion was exercised or a duty conferred or imposed by law or by the terms of the international trust was performed;
- (c) which disclose the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason had been or might have been based;
- (d) which relate to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty;
- (e) which relate to or form part of the accounts of the international trust:

provided that where a request is submitted by a beneficiary to the trustee for the disclosure of the accounts of an international trust or any documents or information relating to receipts and payments of trustees which form part of those accounts, the trustee shall have the power to disclose those accounts, documents or information to the beneficiary. The trustee may only make disclosure to the beneficiary if, in the opinion of the trustee, such disclosure is necessary and in the best interests of the trust.

In order to avoid uncertainty the amended section goes on to specify the documents that may be disclosed as “the accounts of an international trust or any documents or information relating to receipts and payments of trustees which form part of those accounts”. This restriction of disclosure to the accounts and documents and information concerning receipts and payments is in line with English principles established in *Clarke v the Earl of Ormonde (1821)* Jacob 108, 117 and endorsed by the Privy Council in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26; [2003] 2 AC 709.

Under the existing law trustees are obliged to disclose accounts and accounting information to beneficiaries, regardless of the reason for the request, reflecting the accepted position in English law at the time the Law was enacted that those with proprietary rights were entitled to disclosure. The Privy Council’s decision in *Schmidt v Rosewood* introduced discretion for trustees to decline disclosure if it would be harmful, and the proposed amendment allows trustees to exercise their discretion in this regard.

9. Directions hearings

A new section 11A is proposed, giving the trustee and others power to apply to the court and empowering the court to make a wide range of orders, based on the corresponding provisions in the Trusts (Jersey) Law 1984 as amended:

- 11A(1) A trustee may apply to the court for directions concerning the manner in which the trustee may or should act in connection with any matter concerning an international trust and the court may make such order, if any, as it thinks fit. An application for directions must be made to a President of the District Court.

- (2) The court may, if it thinks fit –
- (a) make an order concerning –
 - (i) the execution or the administration of any trust,
 - (ii) the trustee or protector of any international trust, including an order relating to the exercise of any power, discretion or duty of the trustee or protector, the appointment or removal of a trustee or protector, the remuneration of a trustee or protector, the submission of accounts, the conduct of the trustee or protector and payments, whether payments into court or otherwise;
 - (iii) a beneficiary or any person having a connection with the trust, or
 - (iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;
 - (b) make a declaration as to the validity or the enforceability of a trust;
 - (c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration.
- (3)(a) An application to the court for an order or declaration under paragraph (2) may be made by the trustee, a beneficiary; a protector; and with leave of the court, by any other person.
- (3)(b) In the case of a purpose trust, an application to the court for an order or declaration under paragraph (2) may be made by the trustee, the settlor or his personal representatives or by the enforcer of the trust; and with leave of the court, by any other person.
- (4) Where the court makes an order for the appointment of a trustee it may impose such conditions as it thinks fit, including conditions as to the vesting of trust property.
- (5) Subject to any order of the court, a trustee, protector or enforcer appointed under this section shall have the same powers, discretions and duties and may act as if the trustee, protector or enforcer had been originally appointed as a trustee, protector or enforcer.

10. Choice of law rules

The existing choice of law rules for trusts in Cyprus are based on common law. Numerous jurisdictions, including England and Malta have now placed their choice of law rules on a statutory footing, so providing clarity and predictability, and the proposed amendment introduces similar choice of law rules in a new section 12A, based on Articles 6 and 7 of the Hague Convention on the Law Applicable to Trusts and on their Recognition.

These rules make clear that a choice of the law of Cyprus to govern an international trust is valid and effective. They also establish rules for identifying the governing law of the trust in the absence of choice; and make it clear that where the law of closest connection to the trust in the absence of choice is the law of Cyprus, the application of the law of Cyprus is entirely effective.

11. Jurisdiction

Many competing jurisdictions, including Malta, Guernsey and Jersey, have developed statutory rules of jurisdiction for trusts which confer jurisdiction on their courts as of right. It is proposed to insert a new section 12B into the Law to expressly give the Cyprus courts jurisdiction in matters relating to an international trust governed by the law of Cyprus; and to allow them to assert jurisdiction over trusts governed by a foreign law but which might be administered there, have one or more Cyprus-resident trustees, or contain assets located in Cyprus; or to take jurisdiction if there was a jurisdiction clause in favour of the courts of Cyprus in the trust instrument or if the parties submitted to the courts of Cyprus.

12. Foreign law trusts

Most trust jurisdictions now have statutory rules regarding the degree of recognition in the jurisdiction of trusts governed by a foreign law. Cyprus has not hitherto had such rules and it is proposed to insert a new section 12C in order to remedy this deficiency. Under the proposed amendment, a foreign trust is governed by, and is to be interpreted in accordance with, its proper law. A foreign trust is unenforceable in Cyprus to the extent that it purports to do anything contrary to the law of Cyprus, or confers or imposes any right or function the exercise or discharge of which would be contrary to the law of Cyprus or to the extent the court declares it to be contrary to public policy.

VI. CONCLUSION

As a country whose legal system is based principally on Anglo-Saxon foundations Cyprus has a well-established body of trust law. The enactment of the International Trust Law, just at the time the economies of the former Soviet Union were being transformed into market economies, combined with a common Orthodox religious and cultural heritage, made Cyprus a popular jurisdiction for trusts for wealthy Eastern Europeans, and helped put Cyprus on the road to becoming the major international financial centre it is today.

The International Trusts Law provides settlors with an effective asset-protection and tax planning vehicle in a reliable and transparent jurisdiction.

Over the twenty years since it was enacted, particularly as competing jurisdictions have updated their trust laws, a number of minor ambiguities and missed opportunities have become apparent. These are now to be addressed by the proposed amendments to the Law. Once they are in effect, Cyprus will have one of the world's most beneficial trust regimes in a low-tax, highly reliable, EU jurisdiction.



COUNTRY REPORT: SWITZERLAND

*David Wallace Wilson and Caroline López Nagai**

I. INTRODUCTION

The Anglo-saxon trust has not (yet) found its way into the Swiss legislation: there is currently no Swiss substantial law on trust. To date, a trust can only be established according to the foreign law the settlor chooses as governing law. However, despite the lack of substantial trust provisions, Swiss courts have been dealing with trusts since 1874 and the Swiss government authorized the settling of foreign business trusts since 1957¹, so as to enable Swiss companies to transfer their assets abroad in case of war or invasion.²

Until recently, Switzerland was one of the largest trust administration centers in the world which did not recognize the existence of trusts. The trust as unknown foreign structure was partly attributed to contractual law and partly to corporate law.³ This led to several issues, among others conflict of law, segregation of trust assets from the trustee's patrimony and taxation of trusts. With globalization of the financial markets and the demand for a reliable assessment of trusts administered in the country, Switzerland eventually ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1st of July 1985 (the "Hague Trust Convention") which eliminated those issues and led to the recognition of the trust as a legal structure *sui generis*.

The present article provides a summary overview of the substantive Swiss provisions applicable to trusts that, although trust-specific, need to be complied with. A selection of recent Swiss case law regarding trust-related issues follows, with an outlook on possible future developments in Switzerland regarding trusts.

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¹ Cour de Justice [Geneva Commercial Court], Jan. 22, 1874, Pugh and Weathers v. Receiver of Schlesinger's bankrupt estate (not published).

² Arrêt du Conseil fédéral protégeant par des mesures conservatoires les personnes morales, sociétés de personnes et raisons individuelles [The Swiss Federal Council's decree protecting Swiss corporations, partnerships and one-man businesses by conservatory measure], April 12, 1975, RS 531.54, constitutes a remnant of the Cold War.

³ LUC THÉVENOZ, TRUSTS IN SWITZERLAND – RATIFICATION OF THE HAGUE CONVENTION ON TRUSTS AND CODIFICATION OF FIDUCIARY TRANSFERS, 178 et seq. (Schulthess 2011); STEPHAN WOLF/NADINE JORDI, *Trust und schweizerisches Zivilrecht – insbesondere Ehegüter-, Erb- und Immobiliarsachenrecht*, in DER TRUST – EINFÜHRUNG UND RECHTSLAGE IN DER SCHWEIZ NACH DEM INKRAFTTRETEN DES HAAGER TRUST-ÜBEREINKOMMENS, 29 et seq, p. 37 (2008).

II. CURRENT LEGISLATION IN SWITZERLAND AFFECTING TRUST RELATIONSHIPS

Switzerland underwent a change of paradigm in recent years which peaked with its recognition of the trust as a legal structure *sui generis*. After the Hague Conference implemented the Hague Trust Convention, Switzerland ratified this Convention with effect as of 1st of July 2007, pursuant to the Swiss Federal Council's Bill of 20th of December 2006⁴. Although it is still impossible to settle a "Swiss trust", a definition of trusts was introduced providing Swiss authorities and courts a useful tool in dealing with foreign trusts. However, it should be noted that the Hague Trust Convention does not deal with taxation issues.⁵

Further, the implementation of the Hague Trust Convention led to the introduction of new provisions in the Swiss Private International Law Act ("**SPILA**")⁶ and in the Swiss Debt Collection and Bankruptcy Act ("**SDCBA**")⁷. In the latter legislation, a new provision specifies that trust assets constitute a separate fund independent from the Trustee's own patrimony.⁸ It did not trigger any changes of the Swiss Civil Code and Swiss Code of Obligations, notably no substantial provisions dedicated to trusts were introduced.

Moreover, there is no duty for professional trustees to register with a specific supervisory authority in order to operate in Switzerland unlike in some other countries.⁹ The private industry moved fast to establish an adequate regulatory framework. In 2007, some key Swiss trust companies founded the Swiss Association of Trust Companies ("**SATC**"), the purpose of which is furthering and developing trustees' activities in Switzerland as well as promoting the adherence to certain professional and ethical standards. The association SATC published minimum standards of professional credentials and a code of ethics to provide security to clients and to ensure that Switzerland remains a highly-professional jurisdiction for trust business.¹⁰

In addition to such ethical standards established by the private industry, Switzerland has implemented various financial regulations which are also applicable to trusts, namely to trusteeships provided they fall within the respective scope of application. As Switzerland has no interest in serving as a haven for the proceeds of crime, it has enacted comprehensive legislation for preventing unwanted proceeds from entering the Swiss financial system by adapting among

⁴ Bundesbeschluss über die Genehmigung und Umsetzung des Übereinkommens für die Schweiz [Federal Bill on the acceptance and recognition of the Convention for Switzerland], Dec. 20, 2006. .

⁵ For this purpose and given the different practice of the 26 Swiss Cantons, the Swiss Tax Conference issued a circular N° 30 on the taxation of trusts for cantonal/communal income tax purposes in August 2007 giving some sort of uniform view of the taxation and serving to date as a guideline for tax authorities.

⁶ Loi fédérale sur le droit international privé (LDIP) [Federal Act on Swiss Private International Law], Dec. 18, 1987, RS 291.

⁷ Loi fédérale sur la poursuite pour dettes et la faillite (LP) [Swiss Debt Collection and Bankruptcy Act], April 11, 1889, RS 281.1.

⁸ See also for further detail: AUDE PEYROT, LE TRUSTS DE COMMON LAW ET L'EXÉCUTION FORCE EN SUISSE (Schulthess 2011).

⁹ Federal Council, Explanatory Report, December 2, 2005, FF 561 (2006), p. 588.

¹⁰ <http://www.satc.ch>.

others the Federal Act on Anti-Money Laundering ("AML").¹¹ Since 1998, AMLA provisions also apply to Swiss resident trustees if they qualify as financial intermediaries. Are deemed financial intermediaries all persons, whether legal entities or individuals, who on a professional basis accept, keep on deposit or help to invest or transfer assets belonging to third parties. The Swiss Financial Market Supervisory Authority¹² ("FINMA")'s practice states that trustees are deemed financial intermediaries, because the assets in trust are separate from their own personal patrimony.¹³ Trustees falling under the AMLA's scope need to comply with due diligence duties, such as verifying the contracting partner's identity, establishing the beneficial owner's identity, clarifying the economic background and purpose of any *prima facie* unusual transaction, keeping track of every transaction, implementing adequate organizational measures to fulfill their duties etc. These due diligence duties are further completed by minimum standards enacted by the Swiss Banking Association, the so called **Swiss Bank's Code of Conducts**¹⁴ that compels Swiss banks to identify clients and beneficial owners. Specifically, in the case of trusts, Swiss banks must secure a specific written declaration from the trustee that varies depending on the nature of the trust considered: In case of revocable trusts, the trustee must identify the person entitled to revoke (not nominee) as the beneficial owner; for irrevocable discretionary trusts, he must provide a written declaration identifying the effective settlor (not nominee), listing the persons entitled to give instructions to the trustee, the persons likely to become beneficiaries by categories as well as any curator or protector.¹⁵ The AMLA further imposes reporting duties on trustees: if circumstantial evidence gives rise to a suspicion that the financial assets they hold stem from a crime, trustees must inform the competent authority, they must also clarify the background and purpose of a *prima facie* suspicious transaction, and if doubts remain, they need to inform without delay the Swiss Money Laundering Reporting Office and freeze the suspicious assets for up to five business days without informing the client.¹⁶

Protectors may also fall under the AMLA's scope of application if they are deemed financial intermediaries. This depends on the extent of their powers under the trust: they are not subject to due diligence duties if their sole function is to appoint and dismiss the trustee. Should they,

¹¹ Loi fédérale concernant la lutte contre le blanchiment d'argent et le financement du terrorisme dans le secteur financier (LBA) [The Swiss Federal Act regarding the Fight Against Money Laundering in the Financial Sector, AMLA], Oct. 10, 1997, RS. 955.0; see also Code Pénale Suisse [Criminal Code], Dec. 21, 1937, RS 311.0, art. 305bis and 305ter, Ordonnance sur l'activité d'intermédiaire financier exercée à titre professionnel (OIF) [The Swiss Federal Ordinance on the professional practice of financial intermediation], Nov. 18, 2009, RS 955.071; Ordonnance de l'Autorité fédérale de surveillance des marchés financiers du 8 décembre 2010 sur la prévention du blanchiment d'argent et du financement du terrorisme (OBA-FINMA) [FINMA Ordinance on the Prevention of Money Laundering], Dec. 8, 2010, RS 955.033.0.

¹² Replaced the former Swiss Federal Banking Commission.

¹³ The FINMA-Circular 2011/1 regarding the Financial Intermediation under AMLA - Additional information on the Ordinance on the Professional Practice of Financial Intermediation, Oct. 20, 2010.

¹⁴ Agreement on the Swiss Bank's Code of Conduct with Regard to the Exercise of Due Diligence ("Swiss Banks' Code of Conduct"), April 7, 2008.

¹⁵ Refer to Swiss Banks' Code of Conduct, art. 4 §44 and 43 ; DAVID WALLACE WILSON, *Le Trust, janus de la réglementation bancaire: Formulaire A ou formulaire T*, in: LES ENJEUX JURIDIQUES DU SECRET BANCAIRE, ACTES DU COLLOQUE DE L'ILCE, 125 et seq. (Schulthess, 2011)

¹⁶ Refer to Criminal Code, art. 306ter; DINA BALLEYGUIER & AZUCENA SORROSAL, *Trust-Übereinkommen und Finanzplatz Schweiz*, in DAS HAAGER TRUST-ÜBEREINKOMMEN UND DIE SCHWEIZ, 165 et seq. (Schulthess, 2003).

however, be entitled to make financial decisions, by themselves or together with the trustee, they are deemed financial intermediaries and must thus comply with the above-mentioned duties.¹⁷ The power to distribute trust assets to beneficiaries and the power to select the beneficiaries are considered as financial decisions.

In addition to the AMLA, trustees may be subject to the Swiss Federal Act on Stock Exchange and Securities Trading (“SESTA”).¹⁸ Indeed, trustees who act as broker-dealers, underwriters or derivative houses and who are not expressly exempted from this legislation are required to obtain a business license from the FINMA and must comply with specific regulatory duties.¹⁹

Finally, trustees, protectors and banks operating in Switzerland have a general duty to uphold the privacy of a client’s personal data. The settlor’s or client’s privacy is indeed protected under the general provisions of the Swiss Civil Code relating to protection of the individual as well as under data protection legislation, notwithstanding more specific provisions such as banking secrecy or attorney-client privilege.²⁰

III. APPLICATION OF THE TRUST CONCEPT– A SELECTION OF RECENT SWISS CASES

According to the Hague Trust Convention, a trust is defined as “*the legal relationship 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*” (art. 2 par. 1). Further, the trust enjoys the following characteristics: the assets constitute a separate fund of the trustee's own estate (art. 2 par. 2 lit. a), the trustee acquires ownership of the trust funds (art. 2 par. 2 lit. b) and the trustee has to manage the trust fund in accordance with the trust terms (art. 2 par. 2 lit. c). In contrast, the civil-law fiduciary agreement which some try to equate to the trust as an asset management vehicle, and specifically the fiduciary contract developed under Swiss law is based on a contractual relationship between the original owner of the assets and the fiduciary, whereby the assets become part of the fiduciary’s patrimony and are as such administered for the original owner's benefit (and not for a third party).

¹⁷ The Federal Money Laundering Control Authority’s consolidated practice note, Jan. 12, 2005.

¹⁸ Loi fédérale sur les bourses et le commerce des valeurs mobilières (LBVM) [Federal Act on Stock Exchanges and Securities Trading, SESTA], March 22, 1995, RS 954.1; Ordonnance sur les bourses et le commerce des valeurs mobilières (OBVSM) [Edict on Stock Exchanges and Securities Trading, SESTA Edict], Dec. 2, 1996, RS 954.11, Ordonnance de l’Autorité fédérale de surveillance des marchés financiers sur les bourses et le commerce (OBVM-FINMA) [Swiss Federal Banking Commission’s Edict on Stock Exchanges and Securities Trading], Oct. 25, 2008, RS 954.193.

¹⁹ Refer to art. 2 lit. d SESTA and art. 2 to 3 SESTA Edict. Further, also refer to art. 2 lit. a SESTA which defines securities as negotiable instruments that are “*standardized and susceptible to mass trading*” and derivative instruments. Such negotiable instruments are deemed standardized and susceptible to mass trading if they have the same structure and denomination, if they are publicly offered or placed with more than 20 clients and if they are not specially created for individual counterparts.

²⁰ Code Civil Suisse [Civil Code], Dec. 10, 1907, RS 210, art. 27 et seq.; Loi fédérale sur la protection des données (LDP) [Federal Act on Data Protection], June 19, 1992, RS 235.1

The following selection of Swiss case law shows that, despite differences in civil-law and common-law understanding, Swiss courts apply common law principles and understand the trust concept by rendering judgments that have correctly implemented the trust in the Swiss legal landscape since 1874. Case law was particularly rich in recent years in the area of international mutual assistance, as triggered by American requests for information on Swiss bank accounts held by US persons. Further, trusts are also used to hold property in Switzerland and Swiss administrative courts have thus rendered decisions in this matter. Finally, some cases dealing with procedural aspects of trust-related disputes shall be summarized.

1. International mutual assistance

The Swiss Federal Administrative Court has been most active in the past years, dealing with trust-related matters in connection with the Agreement concluded between Switzerland and the USA regarding the transfer of information of US clients holding an UBS account.²¹ However, the cooperation of these two countries in tax related requests for mutual assistance reaches further back: Already in 1996, Switzerland and the USA had concluded a Double Tax Treaty agreeing to exchange information, "*which is necessary for carrying out the provisions of their double tax treaty of for the prevention of tax fraud of the like in relation to the taxes covered by this double tax treaty*".²² In 2003 then, Switzerland and the USA further specified what "tax fraud or the like" meant and issued a series of examples. On 19th of August 2009, Switzerland then concluded the said Agreement regarding information to be provided by the Bank UBS AG compelling Swiss authorities to hand over certain data of US clients holding an UBS account. An additional Protocol was concluded on 31st of March 2010 that included tax evasion as well within the scope of application of the above agreements. Related to those agreements, the Swiss Federal Administrative Court rendered several decisions developing a substantial body of trust precedents.

In a leading case dated 18th of March 2011,²³ the Swiss Federal Administrative Court ruled that the concept of "beneficially owned" must be construed autonomously and that it differed from the term "effective beneficiary" ("*bénéficiaire effectif*") provided by the 1996 Double Tax Treaty and the OECD Model Treaty. The Court held that the notion of "beneficially owned" is used in a different manner and for different purposes than in the 2009 Agreement. However, it considered that in all three conventions, the term served to describe the intensity of the relation between the tax subject (beneficial owner) and the tax object (trust assets) from an economic point of view.²⁴ The Court further pointed out that recent scholars assert that this term needs to be determined by

²¹ Agreement between the United States of America and The Swiss Confederation on the request for information from the Internal Revenue Service of the United States of America regarding UBS AG, a corporation established under the laws of the Swiss Confederation of 19th of August 2009 ("Agreement").

²² Convention between the United States of America and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income ("Double Tax Treaty"), signed at Washington, Oct. 2, 1996, art. 26 §1, RS 0.672.933.61; refer also to the Edict regarding the Double Tax Treaty, RS 0.672.933.61.

²³ Refer also to Federal Administrative Court, Jan. 11, 2011, A-6053/2010.

²⁴ Federal Administrative Court, March 18, 2011, A-7013/2010.

a "substance over form" approach, which takes into consideration the economic reality of things rather than a purely legal perspective based on civil law considerations. Accordingly, the Court denied the US request for international assistance by holding that the beneficiary of an irrevocable discretionary trust cannot be considered as the beneficial owner of the trust's bank account. In this case, the appellant (who was named as beneficial owner in the UBS bank documents) succeeded to refute the presumption of beneficial ownership by showing that he had from an economic perspective no means to access or dispose of the trust assets held on the UBS account which was opened in the name of the trustee, the latter having discretionary power to distribute the assets. The Court recalled on this occasion that beneficiaries of an irrevocable discretionary trust only acquired an equitable ownership as opposed to a full legal title, and that such equitable ownership could be compared to a future interest but did not entitle its beneficiaries to dispose of the trust assets according to their needs.

These considerations were confirmed by subsequent judgments rendered by the Swiss Federal Administrative Court, in which it repeatedly affirmed its "substance over form" approach for all types of offshore companies and vehicles. In situations where an offshore company was only established for tax evasion purposes or solely serves to avoid one's obligation to declare one's assets, the term "beneficially owned" must be understood as the person having effective dispositive power of the offshore entity's assets. In this respect, the Court specified that any entity – regardless whether it equates a corporate structure provided by Swiss or US law – that can enter into financial relations with a bank and that can hold assets through such financial institution may be qualified as an offshore entity for the purposes of the Agreement.²⁵

In another case, the Swiss Federal Administrative Court denied that assets held in trust were "beneficially owned" by the appealing individual taxpayer: the Swiss tax authority had argued that, even if the appellant's mother was named as beneficial owner in the relevant bank documents, the appellant was apparently disposing in fact of the assets. Specifically, it claimed that the appellant was entitled to make investment decisions concerning the trust assets. However, the Court held that a mere power to make investment decisions does not meet the standard of proof necessary to qualify a person as beneficial owner of the trust's assets. In fact, the evidence submitted by the bank showed that the appellant enjoyed such investment power, but that such power required the mother's previous consent. Thus, the Court again denied the US request for international assistance by applying its "substance over form" approach to the appellant, who could not be deemed beneficial owner as his discretionary powers over the asset in trust were only limited to investment decisions, that were moreover subject to a third party's prior consent.²⁶

In a further case, the same Court again denied the US request for international administrative assistance where a Swiss resident settlor had settled two revocable trusts for the benefit of her two children both of them being US persons. These trusts held four underlying offshore companies, which each held bank accounts at UBS. The Court held that the beneficiaries did not enjoy any right to administer or dispose of the trust assets, because beneficiaries of a revocable trust were

²⁵ See further recent cases of the Federal Administrative Court: March 21, 2001, A-7012/2010; March 31, 2011, A-6455/2010; April 4, 2011, A-7661/2010.

²⁶ Federal Administrative Court, May 5, 2011, A-6871/2010.

not entitled to any distributions and because the settlor has not divested herself of such assets when settling the revocable trusts.²⁷

On 1st of July 2011, the Swiss Federal Administrative Court rendered another judgment deciding that potential future beneficiaries mentioned in a letter of wishes of a revocable trust (whose settlor was also its lifetime beneficiary) were innocent third parties and thus ordered the redacting of their names before the international administrative assistance was granted to the USA.²⁸

Besides the Swiss Federal Administrative Court, the Swiss Federal Supreme Court has also rendered judgments in the area of international mutual assistance. In a recent case, it confirmed that the trustee, as holder of the bank account affected by a request for mutual assistance in criminal matters, had standing to challenge the FINMA's decision – rather than the settlor, the beneficiary or the account's ultimate beneficial owner. This decision highlights the importance for banks (and other professionals in the trust industry) to avoid use of the term 'client' when dealing with beneficiaries of trusts, because this term 'leaves little doubt on the effective role of the trust beneficiary in managing the trust'.²⁹

2. Swiss real estate law

Since 2002, EU nationals residing in Switzerland can freely acquire Swiss property. They no longer require a so called "Lex Koller"³⁰ authorization, contrary to non-resident foreigners who are still submitted to a preliminary administrative authorization in order to become owners of a Swiss property. (Incidentally, EU nationals are also entitled to obtain a Swiss residence permit without gainful activity, provided they have a health insurance and sufficient financial means.) Further, since 2007, it is also possible to hold Swiss property in trust. However, in such case, the owner of the Swiss property will usually be the trustee.³¹

In a case concerning a French national, the Swiss authority had authorized him to purchase property in Saanen, in the Canton of Bern. The French national was also settlor of a trust and wished to transfer the title of such property into the trust, which was administered by a Swiss national trustee. The authority held that the title transfer of a property held by a foreign resident to a Swiss national could take place without authorization and, thus, exempted the title transfer in trust from the Lex Koller. The authority also specified that such authorization did not entitle the

²⁷ Federal Administrative Court, June 28, 2011, A-535/2011, A-539/2011, A-544/2011 and A-547/2011.

²⁸ Federal Administrative Court, July 1, 2011, A-6925/2010.

²⁹ Federal Court, Aug. 9, 2006, 2A.703/2005.

³⁰ Loi fédérale sur l'acquisition d'immeubles par des personnes à l'étranger (LFAIE) [Federal Law on the Acquisition of Immovable Properties by Persons Domiciled Abroad], Dec. 16, 1983, RS 211.412.41, also called Lex Koller (RS 211.412.41)

³¹ Refer also to the guidelines rendered by the Federal Office for Land Registry and Real Estate of 28th of June 2007 regarding the treatment of matters related to Trusts. Note as well that currently there is an ongoing revision of the regulation regarding provisions on immovable property law and land registry. The new version would contain some provision dealing with real estate that belong or are dedicated to trust. On one hand it will deal with the conveyances over trust property providing a more user-friendly salutation. On the other hand, new provisions will deal with the annotation of a trust encumbrance in the land register as provided by art. 149d SPILA. These new provisions would replace the said guidelines of the Federal Office for Land Registry and Real Estate.

French national settlor and former owner of the Swiss property to take up domicile in Switzerland and/or remain in Switzerland.³²

In another case, the Land Register Commission of the Canton of Vaud, however, specified that the Lex Koller prohibits in general the "fiduciary acquisition" of Swiss property. An American couple, co-owners of a Swiss property in Canton of Vaud, had requested to secure an annotation as "belonging to a trustee" over their property in the Swiss land register. Despite making reference to the Hague Trust Convention, the Commission held that a trust represented something between a fiduciary agreement and a foundation, that the settlement of a trust transferred assets to one or several trustee(s) with the duty to administer them and use them in a pre-defined purpose, and that trustees were holding the assets "on a fiduciary basis" (i.e. the trustee acquired full fiduciary ownership, although the trust assets were ring-fenced from his own assets). However, the Lex Koller generally excludes fiduciary acquisition of property in Switzerland. Thus, the Commission denied the request on the basis that Swiss property could only be held directly and not by way of "fiduciary acquisition", thus denying the possibility of having a reference to a trust annotated in a Swiss land register.³³ The American couple rightly appealed this surprising decision. Unfortunately, as the appellant did not advance the court fees within the prescribed timeframe, their appeal was dismissed – rather sadly as it fared very good chances further to Switzerland's ratification of the Hague Trust Convention.

3. Procedural aspects – Standing to sue

Apart from the above substantial issues surrounding trusts, Swiss courts also have dealt with several procedural aspects involving trusts and their stakeholders.

In *A. v the Federal Prosecutor Office*³⁴, the Swiss Federal Supreme Court had to decide on the standing to sue in trust matters.³⁵ In this case the Swiss federal prosecutor had frozen funds deposited in Switzerland with a Bahamian bank that related to an independent fund manager who was suspected of having administered assets belonging to a Spanish drug lord. These funds represented management fees and commissions that the manager had received for his professional services. However, they were deposited on the Swiss bank account which was held by an irrevocable trust settled by the manager, of which he was also the beneficiary. The Swiss Federal Supreme Court first recalled that the right to sue under Swiss law or the right to raise a specific claim in a judicial procedure is in principle granted to any holder of such claim. Established Swiss case law further states that only the direct owner of funds, e.g. the account holder, is entitled to challenge a freezing order.³⁶ The Court then noted that the settling of a trust resulted in the split of ownership rights between the trustee (who enjoys legal title over the trust assets) and

³² Regierungsstatthalteramt of Saanen, Dec. 5, 2008, decision regarding the confirmation of the exemption of authorization according to the Federal Act on Acquisition of Property by Persons Domiciled Abroad of 16th of December 1981, RS 211.412.41.

³³ Commission foncière vaudoise [Land register commission of the Canton of Vaud], Feb. 8, 2008, in re X.

³⁴ Federal Court, March 25, 2010, 1B_21/2010.

³⁵ For a detailed analysis of the case, also refer to DAVID WILSON & GRÉGOIRE WUEST, *Standing to sue? The Swiss perspective on trust cases* in TRUSTS & ESTATES LAW & TAX JOURNAL, vol. 121, 26-28. (2011)

³⁶ Federal Court, Feb. 26, 2009, 4A_408/2008.

the beneficiaries (who held an equitable interest over such assets). However from the Swiss perspective, the latter could only be deemed an 'economic ownership', which did not equal to direct ownership necessary to have standing for challenging a freezing order. The Swiss Federal Supreme Court thus concluded that the wealth manager did not have standing to sue, as he was solely beneficiary of the trust, whose trustee was the sole account holder.

In another case, the Swiss Supreme Court found that a protector of a trust established by the deceased settlor – who had also been appointed as executor of the decedent's will – has standing to sue, although not based on his role as protector, based upon his role as executor.³⁷

IV. HEADING TOWARDS A SWISS TRUST LAW?

Given the above developments, where are trusts in Switzerland heading to?

Recently, international discussions in various forums on abusive tax shelters led to numerous reforms in European legislation. Countries around Switzerland are anxious to re-enforce their legislation in order to prevent assets to be distraught from taxation. Further, Switzerland has experienced a lot of foreign pressure to terminate its banking secrecy. These pressures have affected the political agenda in Switzerland and, on various occasions, the question was asked whether Switzerland needs to implement its own substantial trust law, notably in order to compete on a level playing field with other international financial centers. Indeed, among the 10 global financial centers (including China and Japan), Switzerland is the only country without its own trust legislation.³⁸

Already in 2009, Swiss parliamentarians complained about the lack of clear international regulations in order to determine the "beneficial owners" of foreign discretionary trusts, the lack of which may ultimately result in being able to shield assets from taxation. Asked whether new internal legislation was intended and whether international standards would follow, the Swiss Federal Council replied that there were no plans to introduce the "trust" as a proper legal institute into the Swiss Civil Code; thus, trusts can only be settled under foreign law and not Swiss law. On the international front, the Council added that the OECD regularly gathers information on each country's regulations regarding beneficiaries' and settlors' identification, but that the OECD had no projects to do the same with regard to beneficial owner identification, although the Financial Action Task Force (FATF) had adopted standards regarding the identification of beneficial owners of trusts. The Federal Council moreover specified that it would take the necessary measures for enhancing the transparency within the Swiss financial markets, even if these were not provided by the OECD. Further, it pointed out that, with already more than 70 double tax treaties, Switzerland had strongly engaged itself to combat tax fraud as such

³⁷ Federal Court, Oct. 5, 2006, 4C.263/2005.

³⁸ DAVID WALLACE WILSON, *La Suisse doit préparer son propre droit des trusts*, LE TEMPS, Sept. 15, 2010.

cooperation encompassed the disclosure of information concerning beneficiaries of discretionary trusts who might be involved in a criminal tax procedure.³⁹

The problematic of trusts has been also raised in connection with Swiss banking secrecy. Several Swiss parliamentarians believe that foreign structures, such as the Anglo-Saxon trust has the same effect as banking secrecy, namely not to disclose the effective beneficial owner's identity; thus, as long as such structures are legally allowed and protected, Swiss banking secrecy should not be terminated either. While emphasizing its preoccupations for protecting each client's privacy and ensuring a competitive environment for the Swiss financial market, the Swiss Federal Council does not see any necessity to re-enforce internal regulation by introducing a Swiss trust law and considers the country to be at arm's length with its contracting partners worldwide, including the USA as well as the UK and its offshore dominions.⁴⁰ In general, Swiss parliamentarians seem keen to require the availability of similar financial means and structures than those at disposal in foreign financial centers in order to maintain Switzerland's competitiveness.⁴¹ This demand was taken up again in 2010 in relation with the Federal Council's report on "Strategic Directions for the Swiss financial market policy" of 16th December 2009, which calls among others for the creation of a Swiss trust law – the latter "having to be examined in minute detail" according to the Federal Council.⁴²

Despite the Swiss Parliament's pressure for introducing a proper Swiss trust law or at least implementing some additional provisions on trusts, the Federal Council has left the question open to date. Thus, in the scope of the current revision of the Swiss foundation law, the Council held that the introduction of a Swiss trust law should be examined at a later stage⁴³.

V. CONCLUSION

Positive developments have taking place in Switzerland with regard to trusts, especially since the ratification of the Hague Trust Convention. Further integration may be expected so as to enable Switzerland to maintain a leading position in the global financial market. Thus, it may only be a matter of (Swiss) time before the country introduces its own internal trust law.

³⁹ Interpellation 09.3211, March 19, 2009, submitted by U. Schwaller regarding banking secrecy and asset manage by way of trusts.

⁴⁰ Motion 09.3147, March 18, 2009, submitted by the section CVP/EVP regarding banking secrecy and being arms' length with contracting states.

⁴¹ Motion 09.3402, April 29, 2009, submitted by the Section "Schweizerische Volkspartei" regarding tax amnesties and further enforcement measures for the Swiss financial market.

⁴² Federal Council, Strategic directions for Switzerland's financial market policy, Report in response to the Graber postulate (09.3209), Dec. 12, 2009, namely p. 23.

⁴³ Postulate 10.3332, March 19, 2010, submitted by I. Moret.



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COUNTRY REPORT: SPAIN

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I. INTRODUCTION

In his article *The institution of the Trust in Civil and Common law*¹ Donovan M.W. Waters highlighted the non-comprehension and consequent apprehension of Spanish lawyers faced with foreign trusts. Nobody could deny that at that moment, the assertion was true. Spanish lawyers were reluctant to utilize an institution traditionally associated with fraud. The trust was also considered incompatible with the civil law foundations of the Spanish legal system and unnecessary to fulfil goals already achieved by civil law alternatives.

Despite this adverse scenario, many encouraging signs of the trust's reception in the Spanish legal system have occurred in the past ten years. The change in the doctrinal standpoint is evidenced by the approval of two important laws in the context of wealth and estate planning implementing the notion of a separate patrimony in favor of disabled people. Furthermore, the increasing frequency with which tax rulings and judicial decisions concerning foreign trusts are decided reveals how Spain is no longer facing an unknown institution.

However, despite these changes, Spain is still among those countries which have not signed the Hague Convention on the Law Applicable to Trusts and on their Recognition (1985) ("Hague Convention.") Ratifying the Hague Convention is effectively a landing card for foreign trusts and would be the first step towards the possibility of enacting national trust legislation.²

II. STATE OF TRUST LAW IN SPAIN UNTIL 2000

Spain has never been a trust-friendly country. Disinterest for the trust was traditionally rooted in the little exposure and absence of interaction of the Spanish legal system with foreign trusts. This persuaded the legislature to not adhere to the Hague Convention in the early 90s, and has prevented the enactment of a Spanish choice of law rule until the present day. Paradoxically, while Spanish procedural rules have always recognized the *jurisdiction* of Spanish tribunals to

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¹ *Recueil des Cours de l'Académie de Droit International de la Haye*, (1995) v. 252, 420.

² For example, in Italy: Corte Suprema di Cassazione, Sezione VI Penale, Dec. 18, 2004 and Tribunale di Bologna, Oct. 1, 2003. Both judgements are available at <http://www.trusts.it/>.

consider trusts³ it is still unclear how the trust would be qualified by the tribunal or land registrar authorities if invited to consider it.

Besides the difficulties of choosing to not enact the Hague Convention, non-ratification has also meant that the "effects" typically associated with Hague Convention trusts cannot be recognized under the Spanish legal framework. In fact, ratifying the Hague Convention would entail the recognition of the effects listed in arts.11 and 12. Regardless of the exact breadth of the definition of "trust instrument" in art.2, Spain's ratification would unquestionably result in the recognition of the Anglo-American trust in Spain. This was objected to insofar as full recognition of the common law trust would conflict with basic principles of Spanish civil law such as the unitary conception of ownership, the existence of a *numerus clausus* of rights *in rem* that may be registered, the unity of the patrimony and the impossibility to transfer ownership based on a *causa fiduciae*.⁴

Furthermore, proposals to enact a Spanish trust statute or develop a new domestic legal concept akin to the trust have been repeatedly rejected. In addition to the classical doctrinal objections, scholars referred to the difficulty of introducing the trust in a civil law country with extensive legal restrictions and restraints on the freedom to bequeath and donate property. For example, scholars highlighted the *legítima*⁵, the temporal limits on fideicommissary substitutions,⁶ and the

³ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Official Journal C 027, 26/01/1998 P. 0001 – 0027 (sect.17). Now, superseded by the Council Regulation (EC) No 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Bruxelles I) *Official Journal L 012*, 16/01/2001 P. 0001 – 0023. (arts.5.6, 23.4, 60.3) and Council Decision 2007/712/EC of 15 Oct. 2007 on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *Official Journal L 339*, 21/12/2007 P. 0001 – 0002 (art.5.6)

⁴ P. CLARET y MARTÍ, *DE LA FIDUCIA Y DEL TRUST*, (Barcelona, 1946) 82; M.A ASÍN CABRERA, *La ley aplicable al Trust en el sistema de Derecho internacional privado español*, REVISTA GENERAL DEL DERECHO, Apr. 1990 núm. 547, 2117-18; J. GARRIGUES, *NEGOCIOS FIDUCIARIOS EN EL DERECHO MERCANTIL*, (Madrid, 1981) 93 et. seq; E. MIÑANA, *Los trusts. Breves consideraciones acerca de los medios de su implantación en España*, REVISTA GENERAL DE LEGISLACIÓN Y JURISPRUDENCIA, Jan.-Jun. t.158, 1931, 615 and I. ARROYO, *Trust y ley civil*, REVISTA JURÍDICA DE CATALUÑA, n°1, año LXXXII, 1983, 107 alleged the need of a previous legal reform of Spanish law to implement the trust.

⁵ Art. 806 of the Spanish Civil Code: "Legítima" is the portion of property which the testator cannot dispose of because the law has reserved it to certain heirs. In general, Spanish inheritance law privileges linear relatives and substantially restricts the decedent's testamentary freedom. If the decedent dies intestate, his issue will inherit the decedent's share in the community property and any separate property (Articles 930–934 Spanish Civil Code). If the decedent dies childless, the decedent's parents or their ascendants will take equally (Articles 935–942 Spanish Civil Code). The surviving spouse only inherits full ownership over the decedent's assets if there are no surviving descendants or ascendants (Article 944 Spanish Civil Code). Even though the decedent dies with a valid will and his wish is to provide mainly for the surviving spouse, his or her children (biological or adopted, born within or without a marriage) cannot be completely disinherited. Issues are entitled to two-thirds of the decedent's assets: at least one-third (*legítima*) has to be divided in equal shares between them, and the other third (*mejora*) will be divided according to the decedent's preferences (Article 808 Spanish Civil Code). The decedent has complete freedom of disposition only over the last third of his assets. Spanish law considers the forced share of the surviving spouse to be the life time usufruct of one share of the assets. This means the surviving spouse has the right to use and enjoy the property, as well as the right to receive profits from the assets on which he/she has the usufruct of. Ascendants or descendants cannot dispose of these assets until the death of the

impossibility of permitting a third party to appoint, in its discretion, an heir or legatee in its discretion as well as to designate the portions in which these were to succeed, as insurmountable obstacles for the introduction of the trust.⁷

Others felt that contract and property law instruments were already available in Spanish law and accomplished the purposes a trust would ordinarily fulfill⁸. The management of property, for example could be provided through a fiduciary contract (*fiducia cum amico*) or a mandate contract. Furthermore, the delay which results from the belated vesting of title after the death of the testator could be provided for by means of a fideicommissary substitution. The protection of an improvident relative from his creditors could be pursued with a life support contract, a usufruct contract or a transfer subject to an inalienability clause. Charitable purposes can be accomplished by charitable foundations. While it is true that the foundation cannot be used within the family context under the Spanish civil code this is not the case for those regions which have kept their own inheritance laws. Navarra, for example, permits the use of the *fiducia continuada*, an instrument which is structurally similar to the trust.⁹ The *fiducia cum creditore* and the mortgage or the deposit contract are other examples of instruments known and used by Spanish practitioners to ensure the administration and enforcement of security rights.

In addition, the perceived advantageous tax treatment of some offshore trusts contributed to cloud the institution's reputation and dissuade practitioners from supporting it.

III. DEVELOPMENTS OF TRUST LAW DURING THE LAST DECADE

1. Law 41/2003, protecting the assets of the disabled and modifying the Civil Code, the Civil Proceedings Act and the tax regulations in this respect.

surviving spouse. A properly drafted will can increase this share of the surviving spouse, if the third which the testator can freely dispose is assigned for the specific purpose.

An English version of the Spanish Civil Code is available in <http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>.

⁶ Article 781 Spanish Civil Code: "Fiduciary substitutions pursuant to which the heir is charged to preserve and transfer all or part of the estate to a third party shall be valid and effective provided that they do not go beyond the second degree of kinship, or are made in favour of persons who were alive at the time of the testator's death".

⁷ Article 670 Spanish Civil Code: "Making a will is a strictly personal act: it may not be left, in whole or in part, to the discretion of a third party, nor may it be made by means of an attorney or proxy. The subsistence of the appointment of heirs or legatees may also not be left at the discretion of a third party, and neither may the designation of the portions in which they are to succeed, when they should have been called by name".

⁸ M.A ASÍN CABRERA, *La ley aplicable al Trust en el sistema de Derecho internacional privado español*, REVISTA GENERAL DEL DERECHO, Apr. 1990 núm. 547, 2117-18; J. GARRIGUES, NEGOCIOS FIDUCIARIOS EN EL DERECHO MERCANTIL, (Madrid, 1981) 95, 97.

⁹ S. CAMARA LAPUENTE, LA FIDUCIA SUCESORIA SECRETA, (Madrid, 1996) 1292-1359.

In 2003, the enactment of Law 41/2003, protecting the assets of the disabled and modifying the Civil Code, the Civil Proceedings Act and the tax regulations in this respect¹⁰ greatly attracted the attention of Spanish scholars on trusts. The law made important changes to Spanish private law including a major reform of the rules on successions. The statute permitted the creation of a fideicommissary substitution to favor a person declared judicially incompetent through the creation of a “burden” on his siblings’ forced heirship rights. The law also permitted a surviving partner to assume the duty to distribute a portion of the assets among the common children or descendents of the testator. Furthermore, the statute modernized preexisting instruments (such as the life support contract) and introduced several institutions not previously regulated in the Spanish legal system. One of these - the Protected Estate for disabled people - will be addressed shortly, while another - the self-guardianship - will not be considered given its limited relation to the trust.

Law 41/2003 allows any individual with sufficient capacity and a legitimate interest to create inter vivos or mortis causa a Protected Estate; a special estate used to satisfy the needs of a disabled person. For the purposes of the law, the beneficiary of this estate must be affected by a psychological incapacity of at least 33 percent, or a physical or sensorial incapacity of at least 65 percent (art.2.2). Disability has to be certified by the competent administrative body¹¹ or by a judicial decision (art.2.3).

The contributions to the estate (whether in assets or cash), and the resulting income and gains may only be used to provide for the beneficiary’s support or to maintain the productivity of the fund (art.5.4). A Protected Estate may only be created by notarized public document which must include an inventory of the assets and a statement of the administrative and enforcement rules (art.3.3). Subsequent contributions to the estate must also be notarized and recorded in a public document. The Protected Estate may be settled by a court order when the parents or the guardians of the beneficiary are unjustifiably opposing its creation (art.3.2).

The Protected Estate is administered by the settlor (usually a relative of the beneficiary) or by the person or fiduciary entity whom the settlor appointed ‘manager’ in accordance with his instructions and certain specific statutory provisions. In all cases in which the settlor is not the disabled beneficiary and the beneficiary has insufficient capacity to act, judicial authorization is necessary (for administrative acts) in the same cases as it would be necessary for a guardian who was ordinarily administering the property of an incapacitated person. (art.5.1 & 2). A Protected

¹⁰ Ley 41/2003, de 18 de noviembre, *de protección patrimonial de las personas con discapacidad y de modificación del Código Civil, de la Ley de Enjuiciamiento Civil y de la Normativa Tributaria con esta finalidad* (BOE Nov. 19, 2003).

¹¹ The procedure is established by RD 197171999, of Dec. 23, related to the recognition, declaration and classification of the degree of disability, as amended by RD 1856/2009, of Dec. 4.

Estate cannot be managed by individuals who would not be eligible for appointment as guardians. (art.5.3).

The fund administered in the Protected Estate is subject to the supervision of the prosecution service of the Ministerio Fiscal. The prosecution service has the authority to require the corresponding judge to act on the incapable person's behalf (art.7). A Commission for the Protection of Disabled Persons' Estates - operating within the general framework of the Ministry of Education, Social Policy and Sport (art.7.3) - was also established to provide external support and advice to the prosecution service. The Commission's composition, administration and powers are specified in RD. 177/2004, of January 30th as amended by RD 2270/2004, of December 3rd.

According to the amendment made to Law 41/2003 by Law 1/2009, of March 25th¹² notaries must promptly communicate by means of electronic signature to the prosecutor of the district corresponding to the domicile of the disabled person the creation and content of the Protected Estates notarized by them, as well as all subsequent deeds which settle further contributions to the Estate (art.3.3).

The settlor may specify how the remainder assets shall be distributed after the beneficiary's death. (art. 4.3) If no express provision is made, the Protected Estate will be deemed to be part of the beneficiary's legacy. The fund will be dissolved where the beneficiary ceases to be a disabled person according to the legal requirements. In this case as well, the beneficiary remains the owner of the assets present in the estate as determined by the provisions of the Civil Code (art.6.2).

The Law includes a number of measures regulating notice of the fund in public registers (the Civil Register and the corresponding Property Registers concerning those goods which may be registered). Notice requirements were introduced to grant greater legal certainty to the beneficiary and the Protected Estate. The statute also provides favourable personal income and corporate tax treatment for the estate. (Chapter III).

While the Protected Estate is considerably less flexible than its Anglo-Saxon counterpart¹³, the similarity with the trust as utilized in the context of disabled beneficiaries is apparent. In fact, the

¹² Ley 1/2009, de 25 de marzo, de reforma de la Ley de 8 de junio de 1957, sobre el Registro Civil, en materia de incapacitaciones, cargos tutelares y administradores de patrimonios protegidos, y de la Ley 41/2003, de 18 de noviembre, sobre protección patrimonial de las personas con discapacidad y de modificación del Código Civil, de la Ley de Enjuiciamiento Civil de la normativa tributaria con esta finalidad (BOE Mar. 26, 2009)

¹³ For example the creation of the Protected Estate and any subsequent contribution has to be notarized and established in a public document; the device can only be used to benefit a single beneficiary; the assets'

Spanish legislator expressly manifested how ‘the immediate purpose of this Law is to regulate a Protected Estate, especially the Protected Estate of persons with a disability, which remains immediately and directly subject to the satisfaction of the disabled’s vital needs.’¹⁴ As such, despite the fact that full legal title is vested in the beneficiary (this is necessary because Spanish jurisprudence does not recognize legal and equitable titles because of its derivation from the Napoleonic codes and the unitary conception of ownership), the Protected Estate is managed by the settlor or the person chosen by the settlor, according to the settlor’s instructions just like the trust. Either solution will provide for adequate property management.

However, the same Statement of Purpose is also inconsistent insofar as it provides ‘the existence of this Estate and the special administration to which it is subject, do not modify the general rules of the Civil Code...’¹⁵ According to one of these general rules of the Civil Code, ‘all the debtor’s present and future assets are subject to the fulfilment of his obligations’ (art.1911 Spanish Civil Code). Thus, if the general principle were to be applicable, the Protected Estate, despite its name, would provide no asset protection. The assets would be subject (as all the other assets of the disabled beneficiary) to all liabilities the beneficiary may incur, regardless of whether the origin of the debt was to provide for his vital needs or for other purposes. Essentially, this means that the beneficiary of a Protected Estate will have two estates but each with interconnected liability¹⁶.

The failure of the Law to address this statement was extensively criticized. In fact, given the influence of the trust on the Protected Estate, it was not an aspect which should have been silently overlooked; it should have been expressly addressed by the legislator¹⁷.

administration may be subject to some mandatory provisions; and the Protected Estate cannot be revoked once created.

¹⁴ Statement of Purpose section II.

¹⁵ Section III of Law 41/2003.

¹⁶ During the parliamentary process, the Socialist parliamentary group proposed to amend Article 5.4 of the Law adding that “the assets and rights that form the Protected Estate are only subject to the obligations of his owner or representatives for the direct satisfaction of the purposes for which it was created as a separate estate”. Similarly, the Catalan parliamentary group proposed the addition of a new paragraph to Article 1911 of the Spanish Civil Code, under which “The Protected Estate of disabled people subject to guardianship is only liable for the obligations incurred by the administrator of the estate”. It was understood that in the absence of this exception “the estate could be completely unprotected (see amendments num. 20 & 58 that were rejected, in BOCG. Congress of Deputies VII Legislature, Series A: Bills 10 of Sept. 2003. Núm.154-5 and núm.10 & 33. BOCG. Senate. VII Legislature, Series II: Bills 13 of Oct. 2003. Núm.152 d). These proposals were not incorporated into the final text.

¹⁷ S. MARTIN SANTISTEBAN, *El patrimonio de destino de la Ley de protección patrimonial de las personas con discapacidad: “Un acercamiento al trust?”*, ACTUALIDAD JURÍDICA ARANZADI, Año XIV, nº 612, Feb. 19, 2004 1-7; M.C. PASTOR ÁLVAREZ, *Una nueva estrategia legal ante la discapacidad: la protección patrimonial del las personas discapacitadas*, ARANZADI CIVIL núm 20/2004 (BIB 2005\378), (Pamplona, 2005) 11-13; B. SÁNCHEZ CALERO ARRIBAS, *LA INTERVENCIÓN JUDICIAL EN LA GESTIÓN DEL PATRIMONIO DE MENORES E INCAPACITADOS*, (Valencia, 2006) 316-317 and *La administración y la supervisión del patrimonio protegido creado por la ley 41/2003, de 18 de noviembre, de protección*

The enactment of Law 41/2003 reinvigorated the debate on the feasibility of introducing separate estates with support purposes in Spanish Law. These estates are, essentially, estates in which the fund's title to property is separated from the rest of the owner-beneficiary's personal estate. In this regard, Law 41/2003 accomplished the separation of estates with regards to the management of the assets but did not create a separate estate insofar as liability is concerned. Scholars criticized this position, and their critique has been influential in the enactment of Law 25/2010 in Catalonia.

2. Law 25/2010, from the Second Book of the Civil Code of Catalonia, dealing with the person and the family.

Within the Spanish State of Autonomies, Catalonia is one of the regions that retains its own private law rules according to the process of preservation, modification and development of the "*derechos forales*"¹⁸. The Catalan Parliament has previously made use of its powers to enact a Catalan Civil Code made up of six Books¹⁹. Chapter VII of Title II of the Second Book²⁰ provides for the patrimonial protection of disabled and dependent individuals and includes the regulation of the Protected Estate. In fact, according to the Preliminary Exposition of Law 25/2010, "Chapter VII incorporates in Catalan Law the figure of the Protected Estate. It is an instrument which regulates the allocation of assets to satisfy the vital needs of a person affected by a mental or physical disability of a certain degree or by an equally severe situation of dependency. The law

patrimonial de las personas con discapacidad, in F.J. SÁNCHEZ CALERO Y R. GARCÍA PÉREZ (eds.) PROTECCIÓN DEL PATRIMONIO FAMILIAR, (Valencia, 2006) 201-204; J.A. MESSÍA DE LA CERDA BALLESTEROS, *Naturaleza jurídica del patrimonio especial de las personas con discapacidad*, in J.P. DE VARGAS MUÑOZ (eds.), PROTECCIÓN JURÍDICA PATRIMONIAL DE LAS PERSONAS CON DISCAPACIDAD, (Madrid, 2007) 650-661; A. GARCÍA PONS, LAS PERSONAS CON DISCAPACIDAD EN EL ORDENAMIENTO JURÍDICO ESPAÑOL. LA CONVENCION INTERNACIONAL DE 13 DE DICIEMBRE DE 2006, (Madrid, 2008) 80-92; A. LUNA SERRANO, *El patrimonio protegido del discapacitado*, in I. SERRANO GARCÍA (eds.), LA PROTECCIÓN JURÍDICA DEL DISCAPACITADO. II CONGRESO REGIONAL, (Valencia, 2007) 129; I. VIVAS TESÓN, LA DIGNIDAD JURÍDICA DE LAS PERSONAS CON DISCAPACIDAD: LOGROS Y RETOS JURÍDICOS, (Madrid, 2010) 129 et. seq.

¹⁸ The other regions with "*derechos forales*" are Aragón, Galicia, the Balearic Islands, Navarre and the Basque Country. According to the constitutional right enshrined in Article 149.1.8 of the Spanish Constitution, "The State shall have exclusive competence over Civil legislation, without prejudice to the preservation, modification and development by the Self-governing Communities of their civil law, foral or special, whenever these exist, and traditional charts".

¹⁹ Article 14 of the Catalan Civil Code provides that the application of the Civil Code or territorial law is determined by the regional citizenship ("*vecindad civil*"). The regional citizenship may be determined by several facts: - *Jure sanguinis*, that is, the child acquires the regional citizenship of his parents, wherever the birth took place. - *Jure soli*: regardless of the parents citizenship, the child's citizenship is determined by the place of birth. Regional citizenship can also be acquired by: 1. Two years of continuous residence, provided that the concerned person expresses that this is her will. 2. Ten years of continuous residence, without a declaration to the contrary during that period. Article 111-3 provides that Catalan civil law has territorial effect, that is, it will be applied regardless of the subject's regional citizenship if at the time of the occurrence of the facts, he is located in Catalonia "without prejudice to the exceptions that may be established in each area."

²⁰ drafted by Law 25/2010, from the Second Book of the Civil Code of Catalonia, dealing with the person and the family Ley 25/2010, de 29 de julio, del Libro segundo del Código Civil de Cataluña, relativo a la persona y la familia (BOE Aug. 21, 2010).

regulates transfers without consideration made by the settlor into the estate, as well as into the fund's investments and surrogates".²¹

A) The background of the Catalan regulation

The interest of the Catalan legislator in a trust-like device is not surprising. The Catalan Parliament, inspired by influential Catalan scholars of trust law, was the only Parliament in Spain to promote the proposals of trust bills. Furthermore, Catalonia is also one of the regions whose historical law of succession already recognizes instruments which are structurally similar to the testamentary trust.

i) The doctrine's support and the Catalan bills

The Catalan doctrine has been exceptionally active in studying and promoting the trust. Between 2003 and 2006, four symposiums on the trust were organised in Catalonia²² and one in the Balearic Islands²³. This is a remarkable number considering the general disinterest for the trust in the rest of Spain. Furthermore, among Spanish trust law scholarship, a great number of publications have been produced by Catalan scholars²⁴. For these reasons, it is not surprising to find in Catalonia the ripe environment for trust regulation.

²¹ (III. Structure and Content).

²²EL TRUST Y LA SEVA RECEPCIÓ A ESPANYA, organized by the Academia de Legislación y Jurisprudencia de Cataluña, in the Barcelona Bar Association, Mar. 10-13, 2003; THIRD CONFERENCE ON CATALAN CIVIL LAW:the Fiduciary Patrimonies and the Trust", organised by the Catalan Notaries Association, in Tarragona, October, 20-21th 2005; "Trust and Fiduciary Patrimonies", round table coordinated by notary E. Brancós Núñez, during the Conference on Foundations, organized by the Catalan Notaries Association in Barcelona, Mar. 7-8, 2006; PER QUÈ EL TRUST A CATALUNYA? organized by the Catalan Property Registers Association and the Catalan Notaries Association in Barcelona, Jun. 16, 2006.

²³ CONFERENCE ON THE TRUST FIGURE AND THE FIDUCIARY PATRIMONIES, organized by the University of the Balearic Islands, May 8-9, 2006.

²⁴C. GONZÁLEZ BEILFUSS, EL TRUST. LA INSTITUCIÓN ANGLOAMERICANA Y EL DERECHO INTERNACIONAL PRIVADO ESPAÑOL, (Barcelona, 1997); M. GARRIDO MELERO y J.M. FUGARDO ESTIVILL (eds.) EL PATRIMONIO FAMILIAR, PROFESIONAL Y EMPRESARIAL. SUS PROTOCOLOS, vol. 3, (Barcelona, 2005); M. GARRIDO MELERO y S. NASARRE AZNAR (eds.), LOS PATRIMONIOS FIDUCIARIOS Y EL TRUST, (Barcelona, 2006); E. ARROYO I AMAYUELAS, LA REGULACIÓN QUEBEQUESA DEL TRUST, PRIMER CONGRÈS DE DRET CIVIL CATALÀ: EL DRET PATRIMONIAL EN EL FUTUR CODI CIVIL DE CATALUNYA, Tarragona, Nov. 6-8, 2001, vol. II, published by the Catalan Notaires Association, 11-12, 91-119; E. ARROYO I AMAYUELAS, *Dos principios básicos para la incorporación del trust en España: el patrimonio de destino y la limitación de la responsabilidad*, in M. GARRIDO MELERO y J.M. FUGARDO ESTIVILL (coords) EL PATRIMONIO FAMILIAR, PROFESIONAL Y EMPRESARIAL. SUS PROTOCOLOS, vol. III, (Barcelona, 2005) 601-650; E. ARROYO I AMAYUELAS, E. *¿Por qué el trust en Catalunya?*, in S. NASARRE AZNAR y M. GARRIDO MELERO (eds.), LOS PATRIMONIOS FIDUCIARIOS Y EL TRUST, (Barcelona, 2006) 525-594; ARROYO I AMAYUELAS (dir.), EL TRUST EN EL DERECHO CIVIL, (Barcelona, 2007). Other important publications published outside Catalonia include: M. CHECA MARTÍNEZ, EL TRUST ANGLOAMERICANO EN EL DERECHO ESPAÑOL, (Madrid, 1998); J. DE ARESPACOHAGA, EL TRUST, LA FIDUCIA Y FIGURAS AFINES, (Barcelona, 2000); S. CAMARA LAPUENTE, *Operaciones fiduciarias o trusts en Derecho español*, REVISTA CRÍTICA DE DERECHO INMOBILIARIO, 1999, n°654, 1757-1865; S. CAMARA LAPUENTE, *El trust y la fiducia: posibilidades para una armonización europea*, in S. CÁMARA LAPUENTE (eds.), DERECHO PRIVADO EUROPEO, (Madrid, 2003) 1099-1172; S. CAMARA LAPUENTE, *Elementos*

Before the enactment of Law 25/2010, there have been two previous proposals to regulate trusts in Catalonia. The first one was made in 2001 by the Patrimonial Law Division of the Private Law Observatory of Catalonia. It aimed to regulate fiduciary estates within the framework of the Fifth Book of the Catalonia Civil Code on Property Rights²⁵. The bill was not approved because of parliamentary opposition. When a new draft was submitted in 2006, the proposal encountered the same refusal.²⁶

In both cases the proposed regulation was inspired by the structure of the Quebecoise *patrimoine d'affectation* rather than by the Anglo-American trust. The Catalan Fiduciary Estate was conceived as an entity without a separate legal personality and without a legal or equitable owner. Unlike the Anglo-American trust which is an independent entity whose legal title is held by the trustee, nobody owned the property transferred to the Catalan Fiduciary Estate. While the assets would have been administered by a manager appointed by the settlor, the manager would have had no title over them. On the other hand, the two main features of the trust were present: the fund constituting the Fiduciary Estate was kept segregated from the beneficiary's property as far as both administration and liability were concerned, and the assets were assigned to benefit the beneficiaries of the Fiduciary Estate, that is, to accomplish a lawful purpose.

ii) The Catalan historical law

As noted above, the Catalan legislator had an advantage over the national legislator since the trust structure was previously known in Catalonia. In fact, both Catalan civil law and other regions which maintained their historical private law knew of legal instruments which fulfilled purposes

para una regulaci3n del trust, in M. GARRIDO MELERO Y J.M. FUGARDO ESTIVILL (eds.) EL PATRIMONIO FAMILIAR, PROFESIONAL Y EMPRESARIAL. SUS PROTOCOLOS, vol. III, (Barcelona, 2005) 523-564; S. CAMARA LAPUENTE, *Breve compendio geo-conceptual sobre trusts*, in NASARRE-GARRIDO (eds.), LOS PATRIMONIOS FIDUCIARIOS Y EL TRUST, (Barcelona, 2006) 25-52; S. MARTIN SANTISTEBAN, *El patrimonio de destino de la Ley de protecci3n patrimonial de las personas con discapacidad: "Un acercamiento al trust?"*, ACTUALIDAD JURIDICA ARANZADI, Ano XIV, no 612, Feb. 19, 2004, 1-7; S. MARTIN SANTISTEBAN, EL INSTITUTO DEL TRUST EN LOS SISTEMAS LEGALES CONTINENTALES Y SU COMPATIBILIDAD CON LOS PRINCIPIOS DE CIVIL LAW, (Thomson, The Global Law Collection, 2005); S. MARTIN SANTISTEBAN, *Trusts in American law and some of their substitutes in Spanish law: Introduction and Part I*, TRUSTS & TRUSTEES, 13(6), 2007, 210-220; *Trusts in American law and some of their substitutes in Spanish law: Part.II*, TRUSTS & TRUSTEES, 13(7) 2007, 242-251; S. MARTIN SANTISTEBAN, *Los trusts como instrumento de transmisi3n de la riqueza familiar en el derecho europeo continental*, in ARRANZ DE ANDRES C. Y SERNA VALLEJO M., (eds.), ESTUDIOS DE DERECHO ESPANOL Y EUROPEO. LIBRO CONMEMORATIVO DE LOS PRIMEROS 25 ANOS DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD DE CANTABRIA, 2009, 583-605; S. MARTIN SANTISTEBAN. *La regulaci3n de la figura del trust en Europa*, REVISTA DE DERECHO PATRIMONIAL, 2010(2), no25, 133-151; M. VIRGOS SORIANO, EL TRUST Y EL DERECHO ESPANOL, (Cizur Menor, 2006); M.I. FELIU REY, *Landing Trust (o la "Cuesti3n del Trust")*, DERECHO DE LOS NEGOCIOS, Ano 17, no188, May. 2006; E. CASTELLANOS RUIZ, *El trust en el derecho sucesorio espanol*, REVISTA CRITICA DE DERECHO INMOBILIARIO, 704, 2429 *et. seq.*

²⁵ The draft was published by the Department of Justice of the Catalan government, *Treballs preparatoris del Libre cinquè del codi civil de Catalunya*. ELS DRETS REALS, (Lerida, 2003) 31-44.

²⁶ The text is available in E ARROYO I AMAYUELAS, E., *Y si universalizamos el trust, tambien en Catalunya?* EL TRUST EN EL DERECHO CIVIL, (Bosch, Barcelona, 2007) 467-502.

similar to the testamentary trust. These are instruments which become operative at the death of the settlor. One of these figures is the “herencia de confianza” (arts.424-11 to 424-15 Fourth Book of the Catalan Civil Code²⁷), another is the “designación de herederos por fiduciario” (arts.424-1 to 424-10 Fourth Book of the Catalan Civil Code). Both these legal devices also exist in Navarra and Aragon.

The Catalan “herencia de confianza” permits the testator to institute or designate as a “confidence heir”, an individual to ensure that the assets are disposed in accordance with the testator’s instructions. The testator may impart instructions to the confidence heir or legatee orally or in writing. (art.424-11). Confidence heirs and legatees are presumed by law to operate as heirs or legatees and are entitled to make dispositive *inter vivos* acts insofar as they fulfill the limitations required by the testamentary document. However confidence heirs or legatees are not the final recipients of the assets of the inheritance, the legacy or the subrogated assets. These assets are fully separated from their own personal estate (art.424-14) and therefore, confidence heirs and legatees are liable for the debts of the inheritance “*intra vires hereditatis*” only to the extent of the administered property. If a confidence heir or legatee were to die before completing his obligations, his own heirs will have no rights to the assets²⁸.

Catalan law also permits the appointment of heirs with fiduciary obligations, thereby satisfying another important feature of the trust. The testator may appoint as heir for this purpose his surviving partner and a number of other relatives established by law. The fiduciary heir will be given discretionary powers to select the final heir among the common children he had with the decedent and the descendants of these children²⁹. Otherwise, the testator may permit the fiduciary to exercise his own discretion in the appointment of heirs (arts.424-1 & 424-5). In this case, the fiduciary heir does not distribute the assets in accordance with the confidential instructions he received from the testator but will determine the final recipient of the assets and/or their portion of the assets in the estate among the circle of relatives previously indicated by the testator.

Unlike the trust, this device can only be used to distribute assets among the children and the descendants of the testator. The appointment of the fiduciary heir is limited to the spouse and a number of other relatives established by law³⁰. Another difference with the common law trust is that the fiduciary heir is not deemed the legal owner of the assets. The inheritance is considered

²⁷ This Book has been approved by Law 10/2008 of July 10, from the Fourth Book of the Catalan Civil Code, related to Successions.

²⁸ With regards to the “confianza” see also Audiencia Provincial de Barcelona, Mar. 28, 2006. A similar testamentary confidence also exists in Navarre (arts.289-295 of Law 1/1973, of March 1). Navarre’s instrument resembles the trust more closely since unlike the Catalan testamentary confidence, in Navarre, a legal person (and not just physical) may be appointed as confident heir: Tribunal Superior de Justicia de Navarra, Oct. 30, 1944.

²⁹ A similar possibility has been introduced in the Spanish Civil Code (Article 831) by Law 41/2003 although it is limited to the surviving spouse or partner.

³⁰ The possibility to appoint the final heirs by a fiduciary heir also exists in Navarre (Articles 281 to 288 of Law 1/1973, of Mar. 1) and Aragon (articles 439 to 463 of DL. 1/2011, Mar. 22) although these regimes enjoy a more flexible regulation.

an autonomous patrimony that is administered by the fiduciary heir, unless the inheritance is deferred or the testator has appointed another person in the fiduciary's stead³¹. The fiduciary heir is entitled to administer the assets freely and has full powers of disposition in order to make investments, cover the needs of the inheritance, attend to his own personal subsistence and that of the children and descendants, as well as to pay debts, encumbrances and forced heirship rights, with the limitations and restrictions established by the testator. The assets acquired through investments and the revenues that are not spent for the permitted purposes are incorporated in the inheritance fund (art.424-4.2 & 424-10.2).

In conclusion, regardless of where the property title is vested (in the name of the heir or legatee in the case of the "herencia de confianza" or nowhere, in the case of the fiduciary heir), the testator's assets constitute a separate estate administered in favor of the final heirs by a person who holds the highest powers of disposition. At the same time, those assets are not part of the administrator's personal estate and may not be attached by the administrator's personal creditors.

iii) Catalan Law

The 2001-2006 legislative proposals were reintroduced in 2009 by the Catalan government in the bill for the regulation of the Second Book dealing with the Person and the Family³². The segregated estate was defined a "Protected Estate" and its scope was limited to the "protection of disabled or dependent people".

The law was ultimately approved and came into effect on January 1, 2011.³³ The Law aims to further the protection of disabled people and like National Law 41/2003, it addresses individuals with a mental disability at or above 33% or those individuals who suffer physical or sensorial disability equal to or greater than 65%. Disability has to be certified by the competent administrative body³⁴ or by a judicial decision. Unlike the national law, the Catalan statute encompasses situations of dependence of grade II (severe dependence) and grade III (heavy dependence), in accordance with the applicable law.³⁵

³¹ The situation can be compared to that of an inheritance in abeyance.

³² *Avantprojecte de Llei del Llibre segon del Codi civil de Catalunya, relatiu a la persona i la família*, Sept. 28, 2006.

³³ *Ley 25/2010, de 29 de julio, del Libro segundo del Código Civil de Cataluña, relativo a la persona y la familia* (BOE Aug. 21, 2010).

³⁴ The procedure is established by RD 197171999, of Dec. 23, related to the recognition, declaration and classification of the degree of disability, as amended by RD 1856/2009, of Dec. 4.

³⁵ Art.227-2 Catalan Civil Code. The applicable law in this context is Law 39/2006, of December 14th of the Promotion of Personal Autonomy and Care for dependent persons whose article 27 and Final Disposition number 5 makes reference to the official scale Unit currently recognized by RD 174/2011. *L. 39/2006, de 14 de diciembre, de Promoción de la Autonomía Personal y Atención a las personas en situación de dependencia* (BOE Dec. 15, 2006).

Catalan Law is more extensive than national legislation insofar as it covers both disabled and dependent people. These are not mutually exclusive categories. Indeed, while disability (the impossibility for an individual to perform a particular activity)³⁶ is almost invariably an inseparable attribute of dependence of any degree,³⁷ the case may arise where a disabled person is not a dependent individual or a dependent individual may suffer from a disability inferior to the 33% benchmark. In general however, the two categories of potential beneficiaries of the Protected Estate will overlap.

Law 25/2010 allows any individual (including the beneficiary) to create a Protected Estate insofar as the beneficiary, or where appropriate, the legal representative accepts the institution. (art. 227-3 Cat. CC.). Constitution requires a deed and the transfer of a minimum initial contribution to the Protected Estate. Future additional contributions are possible, but must be settled in a deed. Deeds to constitute the Protected Estate must specify the identity of the settlor, the beneficiaries and persons entitled to administer and supervise the administration of the Protected Estate. The deed must also include the name of the Protected Estate, as we are to “[create] an autonomous estate, without legal personality, on which the settlor, the administrator and the beneficiary have no ownership or legal right” (art. 227-2 Cat. CC.).

In conclusion, unlike the national legislation which confers title to the assets of the Protected Estate to the beneficiary (notwithstanding its separation from the beneficiary’s other remaining estate) Catalan Law adopts the notion of an autonomous estate; an instrument without a legal title holder but with administrative duties vested in individuals other than the beneficiaries (art.227-3.2Cat.CC.). This autonomous-and-separated estate is inspired by the Catalan “albaceazgo” (art.429-9 Cat. CC) or, outside the Spanish borders, by the Quebecoise “patrimoine d’affectation” (arts.1260-1298CC. of Québec). Furthermore, Catalan Law requires the estate to serve a specific purpose: (the satisfaction of the beneficiary’s vital needs art.227-2.1), to be subject to the principle of real subrogation (art.227-2.1) and requires the estate to be bound by the obligations incurred by the administrator when meeting the vital needs of the beneficiary.³⁸ This estate is protected because it “(...) is not liable for the obligations of the beneficiary, nor those of the settlor or donator as well as the administrator”³⁹. It follows that

³⁶According to Article 1.2 of the United Nations Convention on the Rights of Persons with Disabilities, adopted on Dec 13, 2006, “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

³⁷ Article 2.2 of the Spanish Law 39/2006 on Personal Autonomy and Dependent Care defines Dependency as “the permanent status of people who, because of their age, illness or disability and for reasons linked to the lack or loss of physical, mental, intellectual or sensorial impairment, require the attention of another or other persons or significant help to perform basic activities of the everyday life or in the case of people with intellectual disabilities or mental illness, other support for their personal autonomy.”

³⁸ Preliminary Exposition. III. Structure and Content.

³⁹ Article 227-2.2 Catalan Civil Code.

Catalan law ensures the segregation of the estate as proclaimed by the Statement of Purposes of Law 41/2003 with the exception that unlike Law 41/2003 the Catalan regime is not restricted exclusively to the administration and supervision of the estate.

In fact, Catalan Law has privileged the notion of a segregated estate. A segregated estate exists with regards to the liability for debts where no harm results to the creditors or the forced heirs of transferees who contributed to the Protected Estate. As stated in art.227-2.2, "(...) the contributions made to a Protected Estate after the date of the fact or the act giving rise to the creditor's right do not harm the creditors of the transferee, in case of lack of other resources to collect the creditor's right. Neither do they harm the forced heirs".

The management of the Protected Estate may be assigned to a natural or a legal person but not to the disabled beneficiary since "the persons designated to administer the estate cannot be the protected beneficiaries" (art.227-3.2Cat. CC.)⁴⁰. In fact, once the Estate is constituted, the overlap of any of the three traditional functions of settlor, administrator or beneficiary in a single individual carries with it the suspicion of fraud. On the other hand, it is worth noting how the Catalan Civil Code could have chosen a middle road, for example, permitting a disabled beneficiary to administer the Protected Estate insofar as there was at least one disabled beneficiary in the Estate who was not also an administrator.

Catalan law is also more flexible than its national counterpart with regards to the Protected Estate's administration. Regardless of who settled the Protected Estate (whether it is the disabled person or a third party), the administrator can be exempted from seeking court approval in the cases where a guardian would require it when administering the property. (art. 227-3.3 227-4.5 Cat. CC). Authorization instead is required when nothing is mentioned in this regard (art. 227-4.5Cat CC). Catalan law also applies to define the grounds for removal and the justifications for breach of duty of the administration with reference to the guardian's duty. In this way, the law does not clearly distinguish between the role of the administrator of the Protected Estate and the role of the guardian. We shall remember that the law provides that the beneficiary of the Protected Estate may not be a minor or an incapacitated person and a manager is not required to be a guardian. In fact, where a guardian is also the administrator of the Protected Estate, then he will both protect the ward and manage the assets with the exception of those assets which are included in the Protected Estate but are held under a different management regime.

⁴⁰ This implies a difference with Law 41/2003, which allows the settlor to be the manager of the assets when the position of the settlor(s) is held by the disabled person (in this case, provided he has enough capacity to act) or his parents.

According to Catalan Law, the control and supervision of the protected assets remains within the private sphere unless the beneficiary is a minor or incapacitated person. In this case the judge may decree the remedies he deems appropriate. (art.227-5.1 Cat. CC.). Articles 227-5 & 6 provide that the settlor may appoint individuals and issue instructions to oversee and supervise the management of the estate. Furthermore, the administrator must report annually to the beneficiary or his legal representatives, as well as to other individuals designated to oversee the management. This designation is specified in the deed of the Protected Estate, and it may include the settlor or his heirs.

The Protected Estate can terminate because of a change in the circumstances which led to its creation (death or declaration of death of the beneficiary, loss of the disability status or dependency status, waiver of all the beneficiaries), or because of the estate's expiration (expiry of the time period set in the constituting instrument), or because of the beneficiary's ingratitude towards the settlor as adjudged by a tribunal, or any other circumstance established in the deed. In these cases, the administrator should report to the beneficiary or his legal representatives (as well as to other individuals designated to oversee the administration of the Estate) his management and ensure the correct liquidation of the assets (art.227-7 Cat. CC.).

The settlor may establish how the assets are to be distributed upon termination of the Protected Estate. In case the settlor does not so provide, or if it is impossible to fulfil the settlor's will, "(...) the remainder must revert to the settlor or his testamentary legal heirs" (art.227-8.2 Cat. CC.). As such, the statute reverses the default rule established in Law 41/2003. According to the national legislation, after the termination of the Protected Estate, contributions made by third parties will be deemed part of the disabled's legacy (if the Protected Estate is extinguished because of the disabled's death) or part of his personal estate (if the termination was due to the disappearance of the disability), unless the transferor (and not necessarily the settlor) had provided differently. The solution adopted by the national legislator is logical if we take into consideration that the ownership of the protected assets is vested in the beneficiary, even though the management and administration of the assets is not. By contrast, in the case of the Catalan Protected Estate the assets are considered an autonomous estate with no legal owner. As a consequence, if the constituting deed does not provide for the disposition of assets this is essentially a private estate reversion of the property to the settlor or his heir appears to be conceptually correct.

The Catalan Law also addresses requirements of notice for the Protected Estate⁴¹. The law provides for a Register of Protected Estates where the deed creating the Protected Estate as well

⁴¹ Indeed, according to Article 8 of the Spanish Land Register regulation (Decreto de 14 de Febrero de 1947 por el que se aprueba el Reglamento Hipotecario. BOE Apr. 16, 1947), "The acts and contracts that

as information concerning contributions to the Estate and the identity of the administrator and other administrative provisions must be recorded. (First additional provision of Law 25/2010). The exact operation of the Register is to be determined in future regulations which are still to be enacted. Currently, art.227-9 Cat. CC. provide that “the assets of the Protected Estate may be registered in the Land Register or in other Public Records, identifying the assets held by the Estate under the same name that appears in the deed for the creation of the Protected Estate (...)”. This registration should also “(...)state the powers granted to the administrator, the grounds for termination of the Protected Estate and the goals set for the remaining assets”.

In short, the Catalan legislator has reaped the benefit of the experience gained since the enactment of the national law in 2003. Some of the aspects of Law 41/2003 have been improved. For example, Catalan law favours the notion of an independent/segregated Protected Estate which is not subject to the personal debts of the beneficiary. It also provides for greater flexibility in the managerial/administrative rules, and restricts the role played by the public prosecutor in supervising the Protected Estate or the regulation of notice. On the other hand, certain features of the law are regrettable, such as the impossibility for the disabled beneficiary (an individual who may not necessarily be a minor or an incapacitated person) to personally administer those assets which were transferred to satisfy his vital needs, as well as the unsatisfactory distinction between the role played by the guardian and the administrator of the Protected Estate.

In conclusion, the recent Catalan statute is a positive improvement insofar as it introduces the figure of the estate-assigned-to-a-specific-purpose in the Spanish legal framework. While the specific purpose in this case is the protection of the disabled or dependent beneficiary, the Law could possibly allow the endorsement of estates with equally meritorious purposes in the future. For example, the law could include transfers of assets made to ensure the payment of alimony and child support, to ensure the preservation of family wealth for the next generations or to create new types of securities. With Law 25/2010, the Catalan legislator has granted a certificate of naturalization to the trust. Hopefully, the national legislator will follow the same path.

IV. CASE LAW

As previously mentioned, the absence of Spanish case law dealing with the trusts has been one of the reasons used to justify Spain’s decision to not join the Hague Convention. It is true that Spanish tribunals have rarely addressed the trust institution – one can scarcely find twenty

are known under different names in the provinces subject to special *fueros* and that produce any of the effects mentioned in the preceding article regarding real property or real rights shall also be subject to registration. To register such acts and contracts, it is necessary to submit to the Register the documents required by the provisions of the *derechos forales*, and where appropriate, also those proving that the procedures required by the subsidiary law have been followed.”

judicial decisions in the last ten years. Nevertheless, the reason for this is not necessarily the absence of interaction between foreign trusts and the Spanish jurisdiction but the trust's disguise under different legal forms.

A. The trust as a limited liability company

To avoid the risk of non-recognition by Spanish tribunals and Land register authorities, a trustee of a foreign trust who wishes to invest in Spanish real property will seek to establish a limited liability company into which the trust assets are then transferred. Thus, the management of the assets is in the hands of the trustee who is also the main shareholder of the company and/or holds the position of legal representative for the company. This permits the registration of the assets in the name of the company and ensures a separated treatment insofar as liability is concerned.

This very same arrangement was recently considered by the Spanish Supreme Court in the cases of July 6th, 2006⁴² and April 11th, 2007⁴³. In both cases the dispute concerned the title of assets located in Spain that belonged to a trust domiciled abroad but whose beneficiaries were Spanish citizens. In both cases, the trust holding the Spanish real property was controlled by trustee entities domiciled in England and the Isle of Man. In both cases the trust claimed to be the formal owner of the assets with the LLC as fiduciary company and the Spanish beneficiaries as the shareholders. . Operating in this manner, the trust tried to obtain the Spanish tax exemption reserved for entities whose shareholders live in Spain⁴⁴. The Spanish Supreme Court rejected this approach. The Court held that “the nature of the beneficiaries’ rights has to be requalified under Spanish law because according to Spanish Private International Law, possession, ownership and other rights over immovable property are subject to the law of the place where they are located” (art.10 Spanish Civil Code)⁴⁵. In order to qualify the rights of the beneficiaries, the Court used the analogy method and applied the Spanish Law of December 15th 1998 on Time share⁴⁶. This Law specifies how “these rights cannot be bound to an undivided share of ownership or be defined as “multipropiedad” or in some other way that includes the word property” (art.1.4). In this way, the Supreme Court refused to consider the beneficiaries of the time share as the legal owners, and,

⁴² Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 2), July 5, 2006, RJ 2006/7205.

⁴³ Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 2), April 11, 2007, RJ 2007/4101.

⁴⁴ Indeed, under Spanish law, entities not resident in Spain that hold real estate located in Spain or real rights on real estate located in Spain are subject to a special tax whose purpose is to avoid fraud and tax evasion. According to the law in force when the facts of both cases took place (Law 18/1991, June 6, 1991 on Income Tax of Individuals), entities that showed the origin of the funds invested in Spain and the identity of the direct or indirect holders of the capital enjoyed an exemption. This would incentivize transparency in realty investments in Spain. To take advantage of the exemption, a taxpayer had to prove the owner or the assets were either Spanish or subject to a Double Taxation convention with exchange clause.

⁴⁵ Spanish Supreme Court, July 5, 2006.

⁴⁶ Ley 42/1998, de 15 de diciembre, sobre derechos de aprovechamiento por turno de bienes inmuebles de uso turístico y normas tributarias (BOE Dec. 16, 1998).

without any consideration of who held the direct or indirect ownership over these assets, the Court denied the tax exemption to the trustees.

Another case exposing Spanish courts to the trust disguised by means of a limited liability was the Spanish Supreme Court's judgment on November 14th, 1997⁴⁷. The issue at stake was the procedural legitimacy for a Liechtenstein trust (Trust Reg Intersubcontract) to seek the termination of a sale contract concluded with a Spanish company. The Spanish company did not meet the contractual obligations to pay for the Spanish realty. For this reason Trust Reg Intersubcontract sought the termination of the contract. The Spanish Supreme Court recognized the procedural legitimacy of the trust: "(...) the personality and legitimization for concluding the contract have been recognized, therefore, if we recognize the existence of a valid contract, one cannot deny standing to request termination for failure". The trust was a mercantile society and thus had the possibility to register the property under its own title in the Land Register. The Court concluded by recognizing Intersubcontract Trust Reg. as a valid legal entity, and thereby acknowledging the procedural legitimacy of the trust's request to terminate the contract for breach.

B. The attitude of the Spanish tribunals faced to a foreign trust

The use of a corporate form for trusts which interact with the Spanish legal framework is appealing considering the likelihood that Spanish tribunals will not recognize the trust. An illustrative example of this is the Court of Appeals of Girona judgment on October 17th, 2002⁴⁸. In this case, the Court did not recognize the legal title of a trustee of a North-American trust over real property located in Spain. The Court rejected the trustee's request to register legal title because he provided insufficient information. The Court expressly held that "the request of the applicants is based upon a legal institution of Anglo-Saxon law (the Trust), completely alien, so far, to Spanish law. (...). Whether the applicant may be right with regards to the essential elements of this case, is a question which cannot be investigated at this moment, as it would require complete proof of the nature and content of the trust so as to clarify and supplement the question as to whether the applicants are acting as the alleged owners of the property because of legal relationship of the trust, as representatives of the trust, as co-holders or in any other quality".

The same conclusion, namely not recognizing a foreign trust as it did not provide sufficient information on the nature and content of the instrument, can be seen in the Spanish Supreme Court ruling of April 30th, 2008⁴⁹. In this case, a US citizen died with real estate located in Spain. The surviving spouse and daughter were in dispute regarding the ownership of one of the Spanish assets. The estate consisted in part of a revocable living trust and a pour over will. The will was not explicit in determining who was entitled to the asset after the decedent's death. However, the

⁴⁷ Tribunal Supremo (Sección 1^a), Nov. 14, 1997, Iustel, § 312378.

⁴⁸ Audiencia Provincial Girona (Sección 2), Oct. 17, 2002, JUR 2003/23652.

⁴⁹ Tribunal Supremo (Sección 1^a), Apr. 30, 2008 (RJ 2008\2685)

Court recognized the potential applicability of Arizona's law to the succession as this was the law of the deceased individual (art.9.8 Spanish Civil Code) while the purpose of the trust was considered to be the organization of the decedent's succession. The Court concluded finding that the appellant had not sufficiently proved the content of the applicable foreign law. As a consequence, under traditional Spanish jurisdiction, the court applied Spanish law as the default legal regime. The tribunal disregarded the revocable living trust, since it is unknown in Spanish law and considered only the pour-over will. In fact, the Court held that "since the legal concept of trust is neither recognized nor compatible with our laws on succession, (the judge) is limited to applying the provisions of the deceased as stated in his will, as long as they are valid and conform to our law".

In conclusion, although the law governing the case may be that of a country which formally recognizes the trust (something which happens frequently considering how Spain is a country where the objective connecting factor for testate and intestate successions is the national law of the decedent), Spanish tribunals may conclude that the application of the deceased's law has not been proved sufficiently. In this way the courts will apply Spanish law and disregard the trust. Alternatively, Spanish courts could choose to transpose the trust figure into one of the instruments already known to Spanish law and which fulfill a similar function (a donation, a mandate, a fiduciary contract, a fideicomissary substitution, etc... depending on the function of the trust which is under consideration). This option carries its drawbacks insofar as the trust figure differs structurally from them. These are the risks which settlors and trustees seek to avoid. For this reason trustees prefer to use intermediate legal figures recognized in Spain to prevent the Court's absolute discretion. Far from excusing Spain's disinterest in the Hague Convention, this reality highlights the need for its adoption. The increasing number of Spanish judicial decisions and tax rulings⁵⁰ which directly or indirectly concern foreign trusts and the uncertainty of how the figure will be treated by the Spanish legal system mandates the adherence to the treaty. The Convention would also be useful in clarifying the consequences of a foreign trust's recognition in Spain, as well as regulating the applicable law for the trust.

V. CONCLUSION

The recent contributions of Spanish doctrine have evidenced that there are no legal-dogmatic reasons which prevent Spanish law from accommodating the trust institution. The enactment of Catalan Law 25/2010 confirms this view with regards to a regime (Catalan law) which is based on the same legal principles as Spanish law. Catalan Law is also indicative of the utility of the trust in the context of family law and estate planning. The Catalan Estate (by the institution of an autonomous independent legal entity with no legal owner of the property) differs from the Anglo-American notion of the trust despite the fact that the trust's core elements can still be traced in the Protected Estate. Furthermore, the Catalan Protected Estate satisfies the criteria for the trust in Article 2 of the Hague Convention and is effectively introducing in Spain a figure which is

⁵⁰For example, the decisions issued by the *Subdirección General de Impuestos Patrimoniales, Tasas y Precios Públicos* núm. V1991-08, Oct. 30, 2008 and núm V0010-10, Jan. 14, 2010.

structurally and not only functionally analogous to the trust. One can hope that this will persuade the Spanish legislator to sign and ratify the Hague Convention and adopt the measures necessary to implement the recognition of trusts in Spain. This would do away with the present uncertainty on the legal status foreign trusts in Spain and could eventually be the landing step for the regulation of a national Protected Estate.



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COUNTRY REPORT: LUXEMBOURG

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I. INTRODUCTION

Luxembourg adopted the French Civil Code of 1804 and has thus for a long time been a civil law jurisdiction, in which Anglo-Saxon trusts are not readily understood. As has already been pointed out¹, it has traditionally been held that establishing a trust in France (or Luxembourg) would be impossible. The civil law system does not generally distinguish legal and equitable ownership; establishing trust arrangements in such a system would require property rights to be dismembered in a way which is not established by the Civil code and hence not valid under French, and Luxembourg, law². The protection of the settlor would also require the segregation of trust assets from other assets held by the trustee, and this would be incompatible with the classic French conception of the *patrimoine*, which implies that (i) each person has a *patrimoine*, (ii) every *patrimoine* belongs to someone and (iii) everyone has just one *patrimoine*³.

The civil law system though did not ignore *fiducie* arrangements from its inception. This was especially the case in Rome⁴, where a distinction was drawn between the *fiducia cum amico*, which allowed those threatened with confiscation, especially in times of political turmoil, to put away their property by transferring them to trusted friends, and the *fiducia cum creditor*, the transfer of estate for security purposes⁵. These institutions were discarded during the lower Roman Empire and then by the Civil Code of 1804, mainly out of the fear that they might give rise to prohibitions of assignment of assets, which had been made illicit in order to bring about fragmentation of family properties after the French Revolution⁶. In the meantime, the German

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¹ See VALERIO FORTI, *Comparing American Trust and French Fiducie*, 17 COLUM. J. EUR. L. ONLINE 28 (2011), available at, http://www.cjel.net/online/17_2-forti/ (last visited January 9, 2012).

² See HENRI MOLUTSKY, *De l'impossibilité de constituer un trust anglo-saxon sous l'empire de la loi française*, 37 REV. CRIT. D.I.P. 451 (1948).

³ See FORTI *supra* n 1 at 32 and its references.

⁴ See FRANÇOIS BARRIÈRE, *LA RÉCEPTION DU TRUST AU TRAVERS DE LA FIDUCIE*, (Litec, Paris, 2004); HELMUT COING, *DIE TREUHAND KRAFT PRIVATEN RECHTSGESCHÄFTES*, 25 (Beck 1973, München); HERMANN ROTH, *DER TRUST IN SEINEM ENTWICKLUNGSGANG VON FEOFFE TO USES ZUR AMERIKANISCHEN TRUST COMPANY*, 10 (Marburg, 1928); SELIM JAHEL, *Le trust et la fiducie dans les systèmes arabo-musulmans*, in *LE TRUST ET LA FIDUCIE, IMPLICATIONS PRATIQUES*, 261 (Bruylant, Bruxelles 1997).

⁵ See PHILIPPE MALAURIE, *ANTHOLOGIE DE LA PENSÉE JURIDIQUE*, 27 (Cujas, Paris 1996); and BARRIÈRE, *supra* n 3 at 33.

⁶ PHILIPPE HOSS, *Le contrat fiduciaire des établissements de crédit*, in *DROIT BANCAIRE ET FINANCIER AU GRAND-DUCHÉ DE LUXEMBOURG*, 1079 (Larcier, Volume II, 1994) ; CLAUDE WITZ, *LA FIDUCIE EN DROIT PRIVE FRANÇAIS*, 25 (Thèse Paris I, 1981).

doctrine of the late nineteenth century rediscovered the ancient roman *fiducia* and prompted courts to accept the validity of *fiducie* transactions. This explains why German and Swiss Courts recognized these arrangements while the Liechtenstein parliament adopted a specific law on *Treuhand* which was inspired by the American business Trust⁷.

As a financial centre, Luxembourg could not ignore *fiducie* institutions. Some effects of trust arrangements were recognized by a Grand-Ducal Decree of December 2, 1972 relating to the *fiducie* representation⁸, to ensure that trustees acting in the context of bond issuances could act on behalf of bondholders. Luxembourg authorities later decided to give more legal certainty to the use of *fiducie* arrangements by financial institutions, which led to the adoption of the Grand-Ducal decree of July 19, 1983 relating to *fiducie* agreements of credit institutions⁹. This decree generally allowed *fiducie* to be established while granting *fiducies* entered into by credit institutions typical effects of trust arrangements. The Luxembourg Parliament took the opportunity of the law of July 27, 2003¹⁰ ratifying the Hague Convention of 1985 on the recognition of trusts,¹¹ to replace the Grand-Ducal decree of 19 July 1983 on the *fiducie* contract, and to strengthen the *fiducie* for it to withstand competition from trusts on the condition that the trustee (the *fiduciaire*) be a financial institution subject to supervision. This article discusses the main characteristics of the formation of the *fiducie* under the 2003 Law (I), its effects (II), its various applications in Luxembourg (III) including the ratification of the Hague Convention by Luxembourg (IV)¹².

I. FORMATION OF THE FIDUCIE

1. The Fiducie is an agreement

The Luxembourg *fiducie* is a contract whereby a person, the principal (or *fiduciant*) agrees with another person, the *fiducie* (the agent or *fiduciaire*), that, subject to the obligations set forth by the

⁷ HOSS, *supra* n 6 at 1081.

⁸ Mémorial A of Dec. 29, 1972, p. 2113.

⁹ Mémorial A, n° 59 of July 29, 1983, pp. 1334 and 1335, hereinafter referred to as the “1983 Decree”.

¹⁰ Hereinafter referred to as the “2003 Law”, Memorial 03/09/2003.

¹¹ Hereinafter referred to as the “Hague Convention”.

¹² Note that this article does not discuss the tax and accounting aspects of the *fiducie*. For developments on the subject, see for instance, JEAN SCHNAFFER, GENERAL PRINCIPLES OF LUXEMBOURG TAXATION, 88 (Allen & Overy, 2010); JEAN SCHNAFFER, *Trust et fiducie en droit fiscal luxembourgeois*, in DROIT FISCAL LUXEMBOURGEOIS : LIVRE JUBILAIRE DE L'IFA LUXEMBOURG, (2008) ; ALAIN STEICHEN, *Droit comptable et fiscal du Trust et de la fiducie luxembourgeoise*, in TRUST & FIDUCIE : LA CONVENTION DE LA HAYE ET LA NOUVELLE LEGISLATION LUXEMBOURGEOISE, 97-120 (Montchrestien, 2005); ISABELLE LUX, LOI DU 27 JUILLET 2003 RELATIVE AU TRUST ET AUX CONVENTIONS FIDUCIAIRES : APERÇU DU TRAITEMENT FISCAL DE LA FIDUCIE, (Oct. 2010); ANDRE ELVINGER, *Taxation of fiducie relationships (and related structures)*, EUROPEAN TAXATION, (April 1997) ; JEAN PIERRE WINANDY, *Aspects fiscaux des opérations fiduciaires en droit luxembourgeois*, REVUE JURIDIQUE ET POLITIQUE, (1990) 182-199 ; ANDRE ELVINGER, *La fiducie en droit luxembourgeois et son traitement fiscal*, BULLETIN DROIT ET BANQUE, (Association Luxembourgeoise des Juristes de Banque, 1986).

parties, the *fiducie* becomes the owner of assets which shall form a *fiducie* estate¹³. As an agreement, the *fiducie* will be subject to all conditions generally required for the validity of an agreement under Luxembourg law. The *fiducie* contract and the *fiducie* transfer of assets, including receivables, are effective *vis-à-vis* third parties as from the moment the agreement is entered into. The debtor is however validly discharged from its payment obligations by payment to the agent as long as it is not aware of the transfer. No other specific requirement is necessary to make the agreement or the transfer of the underlying assets enforceable as against third parties, except if such transfer of assets, which are the subject-matter of the *fiducie*, has to be made public in a certain form¹⁴.

A first major difference with the trust is that, from a civil law standpoint, the *fiduciaire* becomes the full owner of the assets that have been assigned which it operates in its own name under the *fiducie* contract.¹⁵ No division between legal and equitable ownership is thus created and, subject to the personal recourses which are developed below, the *fiduciaire* will have full power of management, use and divestment which, as a rule, are recognized to owners under article 544 of the Civil code. The second major difference consists of the *fiducie* not being established unilaterally, without the agent's approval. As will be explained below, the Luxembourg position and its concepts included in the 2003 Law are nonetheless quite similar to trusts¹⁶ which will allow the *fiducie* to be recognized as a similar instrument to the trust for the purpose of the Hague Convention.

2. The Fiduciaire must be a financial institution

The introduction of the *fiducie* did not aim at fundamentally changing the Luxembourg legal system but merely at securing its functioning by ensuring a segregation of assets when used by financial institutions subject to regulation. This was seen in Luxembourg as the condition for the efficiency of the protection of the *fiduciant*¹⁷. It was reaffirmed during the enactment of the 2003 Law that it would protect the interest of principals and beneficiaries¹⁸. The law on *fiducie* thus limits its application to a limited number of entities so that an individual cannot proceed as agent under the 2003 law, contrary to trusts¹⁹.

¹³ Article 5 of the 2003 Law.

¹⁴ Article 12 of the 2003 Law.

¹⁵ See PAOLO PANICO, *LUXEMBOURG: A NEW TRUST JURISDICTION*, 48 (London, Key Haven Publications, 2004).

¹⁶ See CLAUDE WITZ, *Trust et fiducie, une distinction estompée par la Convention de la Haye relative à la loi applicable au trust et à sa reconnaissance*, MELANGES CLAUDE REYMOND, LIBER AMICORUM – AUTOUR DE L'ARBITRAGE, (Paris, Litec, 2004).

¹⁷ See ANDRE PRÜM, *Trust et Fiducie au Luxembourg*, in *LE TRUST EN DROIT INTERNATIONAL PRIVE*, 63 (Institut Suisse de Droit Comparé, Lausanne, 2005).

¹⁸ Report *Commission juridique*, Doc. Parl. N° 4721, 4.

¹⁹ DAVID HAYTON David, *The distinctive characteristics of the Trust in Anglo-Saxon law*, in *TRUST & FIDUCIE : LA CONVENTION DE LA HAYE ET LA NOUVELLE LÉGISLATION LUXEMBOURGEOISE*, 17

While the 1983 Decree only governed *fiducie* agreements entered into by Luxembourg credit institutions acting as agents²⁰, the 2003 Law extended the scope to cover most of the regulated entities of the financial sector in Luxembourg. It identifies *fiducie* involving a credit institution, an investment firm, an investment company with variable or fixed share capital, a securitisation company, a *fiducie* representative acting in the context of a securitisation transaction, a management company of common funds or of securitisation funds, a pension fund, an insurance or reinsurance undertaking or a national or international public body operating in the financial sector²¹. The 2003 Law also recognizes the possibility for an agent to be a foreign entity subject to regulatory supervision and located in the European Union or the European Economic Area, without the need for this foreign entity to operate out of *via* a permanent establishment or place of business in Luxembourg²².

(Montchrestien, 2005); who questions “why would any individual wish to take on the onerous responsibilities of trusteeship and why would any settlor wish to put his beneficiaries at risk of the conduct of trustees who are individuals”, to further complete that “the days of the amateur unpaid family trustee seem numbered [...] the paternalistic trend these days being to protect people from themselves.”

²⁰ See ANDRE PRÜM, *Une fiducie pour les banques*, [1] REVUE DE DROIT BANCAIRE ET FINANCIER, 3 (2004).

²¹ Article 4 of the 2003 Law, and see PANICO, *supra* n 15 at 30.

²² See ANDRE PRÜM & CLAUDE WITZ, *La nouvelle fiducie luxembourgeoise*, in TRUST & FIDUCIE : LA CONVENTION DE LA HAYE ET LA NOUVELLE LEGISLATION LUXEMBOURGEOISE, 65-97. The Luxembourg authorities have decided there was no need for a regulation of *fiducies* entered into by other entities than credit institutions. It has been specifically set forth in the parliamentary documents (Doc. Parl. Session ordinaire 1982-1983, No. 2641, p. 3) that these other trusts would not enjoy the specific rules established for *fiducies* entered into with credit institutions. *Fiducie* agreements are also employed in situations going beyond the scope of the 2003 Law, for instance if the agent is an individual. The legal examination of such contracts is *a priori* the same as under the 2003 Law. In a ruling dated 28 January 1997, the Luxembourg Court of Appeal considered that the rules of agency, with the exception of those relating to opposability, apply to relations between the principal and his/her agent, under an *ad hoc fiducie* agreement made for management (Court of Appeal, 28 Jan. 1997). In spite of the decision of the Court, it must be emphasised that the creditors of the principal do not benefit from the same protection as that guaranteed by the 2003 Law, for example if the agent becomes insolvent. This applies principally to domiciliation companies, which will thus act outside the scope of 2003 Law. Indeed, the 2003 Law has not included these entities in the list of institutions that may act as agents, though Luxembourg banking law also deals with professionals of the financial sector domiciliating and managing companies on behalf of their clients. Nonetheless, a *fiducie* may be used to set up a Luxembourg company. The principal transfers the share capital to the agent, who must contribute this money to the company to be incorporated. The agent will also act as incorporator of this company at the meeting before notary, to be held on such purpose in Luxembourg. The shares of the company may therefore be converted into bearer shares to be assigned back to the principal by the agent after the notarial meeting. The agent and its clients, who operate in the incorporated company, do not enjoy the protection of the 2003 Law if the agent turns bankrupt. The provisions of the 2003 Law on the *fiducie* estate derogate from general law, especially Articles 2092 and following of the Civil Code, where the estate is the common pledge of all creditors. As a result, under *ad hoc fiducie* agreements, personal creditors of the agent should be able to seize the assets transferred by the principal to the agent.

3. The Proof

The *fiducie* contract must be evidenced in writing²³. This principle, which relates to the proof of the contract rather than to its validity, is provided for even for people who generally are not subject to this requirement, such as tradesmen. The written document is to provide evidence of the transfer of ownership, the responsibilities of the agent, as well as the requisites of termination of the relation.

II. EFFECTS OF THE FIDUCIE

1. Creation of a Fiducie Estate

The *fiducie* entails the creation of a *fiducie* estate (a *patrimoine fiduciaire*), the features of which are set out in Article 6 of the 2003 Law. The *fiducie* estate is separated from the personal estate of the *fiducie*, as well as from any other *fiducie* estate managed by the *fiducie*. It implies, on the one hand, that its assets may only be seized by creditors whose rights have arisen in connection with this separate *fiducie* estate. On the other hand, in case of liquidation or bankruptcy of the *fiducie*, or in any other situation of the *fiducie* generally affecting the rights of its personal creditors, the assets comprising the *fiducie* estate are not affected by these procedures.

In the absence of any official publication of the *fiducie*, it is possible that third parties having recourse on the *fiduciant* acting on its own behalf or on behalf of other *fiducie* estates seize assets which form part of a *fiducie* estate other than the one on the occasion of which their claim arose. In such case, it will be possible to obtain the release of the seizure by injunction²⁴.

From an accounting point of view, the agent has the obligation to keep a separate accounting of its personal estate and each of the other *fiducie* estates. This is essential for the *fiduciants*, which are all regulated entities, some of which are subject to capital adequacy rules which would have potentially damaging consequences if they took into account the assets and liabilities attached to the *fiducie* estates.

2. Duties of the Fiduciaire towards the Fiduciant²⁵

Article 7 of the 2003 Law provides that, absent derogation by agreement between the *fiduciant* and the *fiduciaire*, or a provision of the 2003 Law, the rules of the mandate agreement, which are established under Articles 1984 to 2010 of the Civil Code, are applicable to the *fiducie*

²³ Article 9 paragraph 1 of the 2003 Law.

²⁴ See PHILIPPE HOSS & PATRICK SANTER, *Le contrat fiduciaire en droit luxembourgeois*, in DROIT BANCAIRE ET FINANCIER AU LUXEMBOURG, 797 (Volume II, 2004).

²⁵ See MARTINE ELVINGER, *Les défenses en matière d'acquisition de sociétés*, in DROIT BANCAIRE ET FINANCIER AU GRAND-DUCHE DE LUXEMBOURG, 1001-1021 (Larcier, Volume II, 1994).

agreement. The second paragraph of Article 7 provides for a major carve-out, by excluding any rule thereof which relates to the representation by the agent. In other words, the *fiducie* may not represent – and create obligations – on behalf of the *fiduciant*. In case the *fiducie* contemplates representing the *fiduciant* in any other transaction, it is assumed that they will do it on the basis of other contractual arrangements since there is no reason that the *fiducie* should mix the capacities in which he acts²⁶. This implies that neither the *fiduciant* nor the third party contractor may invoke the existence of a direct contractual relationship between themselves²⁷.

The 2003 Law also sets aside two general principles of the mandate agreement. On the one hand, Article 7 (4) of the 2003 Law explicitly provides that the *fiduciant* may surrender his right to instruct the *fiducie*. The right to instruct is indeed inherent to the mandate rules, and could not, in a mandate agreement, be waived. In the context of a *fiducie* operation where either a third party beneficiary is designated, or the *fiducie* acts in the context of a guarantee agreement, it would not be logical that the *fiduciant* be able to further direct the action of the *fiduciaire*. On the other hand, while a mandate agreement is inherently revocable at any time, Article 7(5) of the 2003 explicitly provides that in a *fiducie* agreement that has been established for a determined period, and except when otherwise provided for by the agreement, no party may terminate the *fiducie* before the agreed term. Should the *fiducie* be established for an undetermined period, though, each party may terminate the agreement at any time, in accordance with the general principles of civil law.

Other principles of the mandate agreement will remain applicable. For example, the *fiducie* will be rendered gratuitously should no specific provision set forth the right to compensation. Under Article 1986 of the Civil Code, the mandate is indeed assumed to be granted on gratuitous terms. Should any compensation be envisaged, the *fiducie* will be liable for mere negligence²⁸. The *fiducie* will be under an obligation to inform the *fiduciant* (or the third party beneficiary) of the fulfilment of its duties at the latest at the end of the agreement.

3. Effects towards third parties

As indicated above, the *fiducie* agreement has in principle effect towards third parties by its mere execution; with the only exceptions indicated above. The extent and measure of this effect can however give rise to subtle distinctions²⁹. Article 7(3) of the 2003 Law sets forth that restrictions on the powers of the agent under the *fiducie* agreement are only binding upon third parties who are aware of them. A third party unaware that assets are the subject matter of a *fiducie*

²⁶ ANDRE PRÜM & CLAUDE WITZ, *supra* n 22.

²⁷ Article 7(2) of the 2003 Law.

²⁸ Article 1992 of the Code civil.

²⁹ PANICO, *supra* n 15 at 41.

arrangement would thus not be bound by the terms of it, while other parties made aware of the terms of the *fiducie* agreement would be subject to its limitation. A question may of course arise as to whether mere awareness that assets are the subject matter of a *fiducie* arrangement would be sufficient to impose the limitations of the *fiducie* on the third parties. This may, in our view, be imposed on the basis of the general principles of law under which a party may not participate in the infringement of a contract by another party if he knew or should have known that he helped in the infringement of a contract. In the case of a *fiducie* arrangement, a third party aware of the fact that the assets are the subject of a *fiducie* agreement could be under the obligation to request a copy of the *fiducie* arrangement to ensure that they do not participate in its infringement.

4. Judicial Review

Under the 2003 Law, the *fiduciant*, the *fiduciaire* or the third party beneficiary may request the courts, on serious grounds, to grant temporary or definitive replacement of the *fiduciaire* or early termination of the *fiducie*³⁰. In addition to the courts' general powers, these specific powers are to review the validity of the *fiducie* agreement or enforce the obligations of the *fiducie* agreement. In view of the extraordinary nature of these powers, and the absence of any significant case-law in this respect in Luxembourg, clarification may only come from the explanations emerging from parliamentary discussions which preceded the adoption of the text.

The judge has two options in his hands to solve major crisis situations, either by replacing temporarily or permanently the agent, or by ruling on early extinction of the *fiducie* agreement. The measures taken by the judge are subject to the existence of serious grounds. If the contract itself provides for other methods of settlement, or for specific solutions in case of events jeopardizing the *fiducie*, the contractual provisions will have priority. The following grounds have been advanced in the course of the parliamentary discussions to justify one of the two measures:

- (i) Confusion of the *fiducie* estates with the *fiduciaire*'s estate or other *fiducie* estates. This case, which is a breach of law, would justify a termination for cause of the *fiducie* relationship; but may as well have adverse consequences on the *fiduciant*'s situation – who may have an interest in obtaining the restitution of the assets only after a certain period of time – or on the creditors of the *fiduciaire* estate;
- (ii) Serious violation of a financial legislation applicable to the *fiduciaire*. This may be the case of any violation which would, for example, justify the removal of the license of the *fiduciaire*, which would render the *fiduciaire* unable to fulfil its missions;
- (iii) Serious misunderstanding between the *fiduciant* and the *fiduciaire* because of the constant interference in the management by the *fiduciant*;

³⁰ Article 7 (6) of the 2003 Law.

- (iv) Impossibility for the *fiduciaire* to further fulfil its mission, irrespective of the grounds for it.

Some authors have suggested that this possibility of intervention may only be explained by the fact that this power could be used in case of material modification of economic conditions³¹. They have however stressed that this would not be an appropriate power and subjected the court's power to the following conditions: (i) the existence of a serious cause which implies that the fulfilment of the contract be irremediably impossible; (ii) the absence of any provision in this respect in the agreement; (iii) the absence of any generally available mechanism; (iv) that the cause may not be triggered by the claimant's behaviour; and (v) that the legitimate interests of all parties, including the *fiduciaire*, the *fiduciant* and the third party beneficiar(y)(ies) be taken into consideration³².

III. THE TYPES OF FIDUCIE USED IN THE PRACTICE

Without establishing a comprehensive report of the various practices of the *fiducie*, this section intends to successively present different applications of this operation, focusing on progress and challenges in each operation:

- a) *The fiducie-gestion*. Under the *fiducie*-management, the principal transfers its capital or assigns its assets to the agent, so that the latter manages them for a definite period of time. The agent will deposit cash in appropriate currencies, purchase and sale securities, take stakes in companies, exercise all the rights attached to the assets. The agent will respect the instructions of the principal, which are written down in the *fiducie* agreement. As a consequence, the transactions are carried out at the risk of the principal. At the end of the agreed period, the assets entrusted to the management from the agent are returned to the principal or the person selected by him. The use of this type of *fiducie* is for the principals who wish to have all or part of their fortune efficiently managed, by using the services of qualified intermediaries who are vested with broad powers to organize this in an efficient way, especially if the principal intends to remain anonymous, for instance in the case of an acquisition of shares of a competitive company.
- b) *The fiducie-sûreté*³³. Under the *fiducie* guarantee, the principal assigns the legal title of various assets to the agent in order to secure an obligation it has towards the agent. Once all the obligations are fulfilled, the agent will transfer back the assets to the principal. At

³¹ See HOSS & SANTER HOSS, *supra* n 24 at 833.

³² It is important to note that article 14 paragraph 4 of the Law of 5 August 2005 on financial collateral arrangements, authorises the possibility to contractually exclude paragraph 7, in the operations of *fiducie-sécurité* governed by the 2003 Law.

³³ See FELIHO GORGON & CHRISTINE FORINA, *Du cautionnement réel; une sûreté hybride entre cautionnement et sûreté réelle?*, BULLETIN DROIT ET BANQUE, 7 (Association Luxembourgeoise des Juristes de Banque, Mar. 2007); HOSS & SANTER HOSS, *supra* n 24 at 781-856; PANICO, *supra* n 15 at 59.

the maturity of the guaranteed obligation, if the principal is in default, the agent will sell these assets. Economically the *fiducie* guarantee substitutes the pledge and has, as advantage, that it does not entail necessarily the dispossession of the debtor. This specific type of *fiducie* is expressly mentioned in article 8 of the 2003 Law, which states that any excess funds forming the guarantee not needed to cover the guaranteed obligation have to be remitted to the principal³⁴.

- c) *The fiducie-libéralité*. By *fiducie* liberality, is designated the agreement under which the principal makes the agent the holder of the assets and the responsible of the management of these assets for a certain period of time, for instance generally in the case of a testament or a donation³⁵. Then, on a specified date or when an event determined by the parties occurs, the agent transfers it to a third party. Such contract may obviously provide for different arrangements regarding both the management of *fiducie* assets and the distribution of the income resulting from such assets. Thus, during the *fiducie*, the income generated by assets can be capitalized or transferred either to the principal, or to a third party. On termination the agent will provide the assets to the final beneficiary: if there is a multiplicity of recipients, the agent will organize the allocation to each of them under the conditions determined in advance in the contract. For the principal, the *fiducie* liberality may constitute the means to protect the beneficiary against his/her prodigality and his/her inexperience, or to transfer an income to an incapable while entrusting the management of the assets to a qualified professional and not to the guardian. The mechanism of the *fiducie* liberality allows the principal to reward a person while ensuring that for a determined period, the returns generated by the assets will be paid to him/her, or even to others third parties. One may assume that a sequence of people can then benefit from this instrument. Similarly, the principal may have an interest that certain properties or assets located in one country are shared after his death or incapacity by a competent person which remains outside the allotment of the rest of his/her fortune. It must however be noted that in many countries governed by civil law, spouses and family relatives are assured a fixed percentage of the assets of the deceased. These inheritance rules are normally of public order, and as a consequence, the mechanism described above is prohibited if it contravenes such rules.
- d) *The fiducie-crédit*³⁶. On the basis of the deposit of funds transferred to the agent (a bank) by the principal, the latter instructs the agent to lend the amount deposited, under terms and conditions agreed, to a person or entity purposely chosen, or to grant these funds as a loan at a remunerative rate to a debtor proposed or even selected by the agent, or finally to deposit these funds, on behalf of the bank, to another bank designated by the principal or selected by the agent. During the *fiducie*, or at the termination of the *fiducie*, the agent

³⁴ Article 8 paragraph 2 of the 2003 Law.

³⁵ See COSITA DELVAUX, *La fiducie comme instrument de la transmission d'entreprises d'une génération à l'autre*, BULLETIN DROIT ET BANQUE, (Association Luxembourgeoise des Juristes de Banque, Apr. 2001).

³⁶ PAUL MOUSEL& FRANZ FAYOT, *LA CIRCULATION DES TITRES*, 1320-1376 (Editions Larcier, 2004).

will transfer back the principal and the accrued interests of the loan that it was refunded, less the costs for its action. The agent operates as lender *vis-à-vis* third parties, but the economic risk of the transaction is borne by the principal. Under this mechanism the principal may seek to remain anonymous towards the borrower and third parties, in order to enter markets traditionally reserved to banking institutions, or to obtain a supplementary income from another investment against the acceptance of greater risk. *Fiducie* credit agreements also allow the principal to discharge technical and administrative tasks on experts. The *fiducie* may finally constitute a mechanism to place important loans that banks have arranged, with entities which lack the knowledge to implement and manage such funds, but which are willing to bear the direct economic risk on individual borrowers against an higher income than traditional banking investment.

IV. PRIVATE INTERNATIONAL TRUSTS IN LUXEMBOURG

The three first articles of the 2003 Law are dedicated to some effects of the ratification of the Hague Convention by Luxembourg. Such ratification does not transpose under Luxembourg law the institution of the trust as such, but acknowledges the trust in its own right. As *per* article 11 of the Hague Convention, the trust is recognised in Luxembourg, and not as a *fiducie*, a mandate or an agency arrangement³⁷. The recognition of foreign trusts under the Hague Convention is not limited to situations where the trustee is one of the companies allowed to operate as agent under article 4 of the 2003 Law for the *fiducie*, but also applies to any entity and individual acting as trustees under the applicable law.

The obligations of the trustee will be governed under the law elected by the parties, unless such rules conflict with provisions of the Luxembourg forum law or mandatory provisions applicable by virtue of Luxembourg conflicts rules. Article 2 of the 2003 Law facilitates the application of article 11 paragraph 2 of the Hague Convention³⁸, by guaranteeing that a trustee, in his/her external relations, can operate in Luxembourg as he/she does in a trust country³⁹. It provides that the position of the trustee is determined by reference to that of an owner. It also ensures that the trust estate is not confounded with the trustee's personal estate⁴⁰. It further provides for the

³⁷ See LUC THEVENOZ, *Les enjeux de la ratification de la Convention de la Haye pour les pays de droit civil*, in TRUST & FIDUCIE : LA CONVENTION DE LA HAYE ET LA NOUVELLE LEGISLATION LUXEMBOURGEOISE, 35-52 (Montchrestien, 2005).

³⁸ Article 11 paragraph 2 of the Hague Convention states that : "Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity."

³⁹ The *Exposé des motifs, commentaire des articles* mentions for instance the exercise of the voting rights attached to shares held by him in a trustee capacity, and which otherwise might be deemed to belong to the original shareholders.

⁴⁰ The explanatory Memorandum emphasises that this article is limited to giving useful effect to the implementation of the Hague Convention and nothing more.

immunity of the trust under the applicable law from claims of the trustee's personal creditor. Title III of the 2003 Law warrants the opposability of the effects of the trust towards third parties⁴¹. Registration of the trust quality of the assets is mandatory, but identification of the trustee and the beneficiaries is not necessarily divulged.

As for declaration and reserves⁴², Luxembourg made use of article 13 of the Hague Convention⁴³ which authorises the non-recognition of the trust in a domestic context where such institution would not be present. On the other hand, it must also be stressed out that Luxembourg decided not to apply article 16 paragraph 2 of the Hague Convention, which would be a factor of important ambiguity by allowing the application of the *lois de police* of a State having a close connection with the situation but not being the forum. It has also extended the Hague Convention to trusts created by judicial decision. Finally, Luxembourg did not make use of the reserves of articles 21 and 22 of the Hague Convention.

In a decision of 12 December 2008, the District Court of Luxembourg went even further in its recognition of the institution and the characteristics of the trust in general. It recognized a trust established in the United States on assets based in Luxembourg, notwithstanding the fact that the United States of America had not ratified yet the Hague Convention⁴⁴.

A last remark must be made on the recognition of the Luxembourg *fiducie* in other State Parties to the Hague Convention⁴⁵. The Luxembourg *fiducie* meets the criteria for recognition under the Hague Convention, so that its effects shall be recognized in other jurisdictions which have ratified the Hague Convention. One might suspect that a different application will be made by State Parties to the Hague Convention that use the institution of the trust⁴⁶, and on the other hand, State Parties that use another regime⁴⁷. If trust jurisdictions adhere to the rule that foreign law is similar to their national law, with no need for expert evidence from foreign law, the Luxembourg *fiducie* will be given full effect in such a trust jurisdiction. In some cases, a beneficiary may even benefit

⁴¹ In respect of immovable property located in, or industrial property rights, aircrafts and ships registered in Luxembourg.

⁴² See PRÜM *supra* n 17 at 63.

⁴³ Article 13 of the Hague Convention states that: "No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved."

⁴⁴ District Court, Dec. 12, 2008.

⁴⁵ See HANS VAN LOOS, *The Hague Convention of 1st July 1985 on the law applicable to trusts and on their recognition*, in TRUST & FIDUCIE : LA CONVENTION DE LA HAYE ET LA NOUVELLE LÉGISLATION LUXEMBOURGEOISE, 19-34 (Montchrestien, 2005).

⁴⁶ Such as Australia, Canada, Hong Kong, Malta and the United Kingdom.

⁴⁷ Such as Italy, the Netherlands and Switzerland.

from better safeguards than in Luxembourg, since his/her rights will be scrutinised under the principles of equity.

V. CONCLUSION

The Luxembourg *fiducie* finds its sources in the requirements of the financial sector in Luxembourg and this has crafted the institution to be limited in this sector. At the same time, Luxembourg has recognized very broadly the trusts established under foreign law, so that foreign investors often have recourse to their own laws. The 2003 Law allows a "customization" of the institution which confers a reliable and remarkably effective status and explains that the Luxembourg institution has been an inspiration to other civil law countries⁴⁸.

⁴⁸ See ANDRE PRÜM & CLAUDE WITZ, *L'essor de la fiducie hors de l'Hexagone : les récentes réformes luxembourgeoise et libanaise*, in MELANGES OFFERTS A DOMINIQUE SCHMIDT, (Joly éditions, 2005).



THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE

COUNTRY REPORT: THE NETHERLANDS

J.M. Milo *

I. INTRODUCTION

Property, also in The Netherlands, is quite often held by somebody in the interest of somebody else, or for a specific goal. Trusts are known in this functional sense. But while there is no overall regulation on trusts, there is an all-encompassing codified framework of property law in the civilian tradition. Common law trusts with their foundation in equity are conceptually difficult to accommodate. Yet The Netherlands has obliged itself in 1996 to recognize the rights and duties under an express trust under the Convention on the Recognition of Trusts (the Convention).¹ Mandatory principles and rules of property law such as numerus clausus, ownership and unity of patrimony determine the positions of trustee, beneficiary and trust-property. Once depicted as traditional obstacles in receiving the trust, they show themselves to be more flexible. Also, civil law jurisdictions had and still have quite flexible functional alternatives to the common law trust available, sometimes even using trust-terminology.² Within the Kingdom of The Netherlands, the Dutch Antilles in the Caribbean have just introduced a trust in their civil code. The Netherlands may decide likewise.

The Convention demands trusts to be recognized (2), mandatory principles and rules of property seem to provide barriers (3), which, however, have shown enough flexibility to make recognition possible (4). The developments over time of the ownership concept, particularly in the acceptance of the fiduciary transfer (5) as well as the acceptance of separate patrimonies (6) accompany the first recognitions of foreign trusts, in the area of taxation law (7). A civil law trust in The Netherlands is within legislative reach (8).

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¹ See: http://www.hcch.net/index_en.php. Dutch literature on this subject in English is relatively abundant; D.J. HAYTON, *Developing the use of trusts in The Netherlands*, W. P. N. R. 6281 (1997), 542-545; D.J. HAYTON, *Can the Dutch tame the Trust?* (inaugural lecture, Nijmegen 1996); D.J. HAYTON, S.C.J.J. KORTMANN AND H.L.E. VERHAGEN (EDS.), *PRINCIPLES OF EUROPEAN TRUST LAW*, (Kluwer, 1999); J.M. MILO AND J.M. SMITS, *Trusts in Mixed Legal Systems* (Ars Aequi Libri, Nijmegen, 2001). MICHELE GRAZIADEI, UGO MATTEI AND LIONEL SMITH, *COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW* (Cambridge University Press, 2005).

² V. BOLGÁR, *Why no Trusts in Civil Law*, 2 AM. J. OF COMP. L. 2008, 210: quotes three obstacles: the ownership concept, the numerus clausus and the availability of alternatives.

II. THE RECEPTION OF THE CONVENTION IN THE NETHERLANDS

The Convention³ was ratified and enacted after positive reports from practice and academia,⁴ and entered into force on February 1, 1996, accompanied by an additional conflict of laws regulation (*Wet Conflictenrecht Trusts*, WCT). Since January 1, 2012 the WCT has been incorporated in the Dutch civil code, with no substantive changes.⁵

The Convention defines a trust (art. 2 and 3) as an express trust, in which the trustee has title to the property, which is held in a fund, separated from the trustee's own property. It is governed by the law chosen by the settlor (art. 6). The recognition *shall imply* as a minimum (art. 11) that the trust property constitutes a separate fund. In so far as the applicable law allows, trust property will not be part of the matrimonial property of the trustee, cannot be attached by the creditors of the trustee in his personal capacity, and will not be affected by the trustee's insolvency. However, article 15 of the Convention potentially takes back a lot. Mandatory national provisions concerning the transfer of title to property, security interests and insolvency law may prevail. Article 13 makes possible not to recognize a trust if its significant elements are more closely connected to a jurisdiction which does not know the institution of the trust. The stance taken is very liberal, as article 4 WCT, now artikel 10:144 BW, requires that priority be given to the recognition of article 11 Convention over its article 15.⁶ Fiscal powers (art. 19) are left untouched.

Why not simply introduce a trust? After all, trusts were known: the common law trusts in scholarly writing;⁷ trust-like constructions involving fiduciary transfers of ownership were accepted in 1929; a civilian trust has been proposed by the legislator, in 1899 and in 1954.⁸

³ On the Convention see: KOPPENOL-LAFORCE, M.E., *HET HAAGSE TRUSTVERDRAG*, (Kluwer, Deventer 1997); the convention entered into force in the civil jurisdictions of Italy (1992), Malta (1996), Luxembourg (2004), Liechtenstein and San Marino (both in 2006), Switzerland (2007) and Monaco (2008). It is in force in the United Kingdom, Canada and Australia as well.

⁴ Kamerstukken II 1992/93, 23027, no. 3, p. 1 (*MvT*, Explanatory memorandum by the legislator).

⁵ Stb. (*Staatsblad*, Official Journal). 1995, 508 and Stb. 1996, 18; Stb 2011, 340.

⁶ Art. 10:144 BW Provisions of Dutch law regarding transfers, security rights or the protection of creditors in the case of insolvency do not encroach upon the implications concerning the recognition of a trust as described in article 11.

⁷ C.J.H. JANSEN, *DE NEGENTIENDE EEUWSE WORTELS VAN HET MODERNE ZEKERHEDENRECHT*, 25-32 (W.E.J. Tjeenk Willink, Deventer 1999); R.P.J. KOTTENHAGEN, *De trust in de Nederlandse rechtsliteratuur* W. P. N. R. 6281 (1997), 572-575.

⁸ E.M. Meijers explicitly mentioned the *bewind-trust* (ownership of trust-property in the beneficiary, control in the trustee) as a necessary arrangement, referring to the influence of English trust-law. E.M. MEIJERS, *ONTWERP VOOR EEN NIEUW BURGERLIJK WETBOEK. TOELICHTING. EERSTE GEDEELTE (BOEK 1-4)* (Staatsdrukkerij. 1954), p. 241. In 1899 in a proposal for a new civil code in art 422 of Book 2.

Nevertheless, in the last quarter of the 20th century this question was answered in the negative.⁹ Why? The reasons given were the dogmatic difficulties, availability of alternatives, the potential misuse of the trust, the existing unclear nature and complexities of the Anglo-American trust itself and the need to know the effects on Dutch law.¹⁰ But this stance has rightfully met growing opposition: Dutch law does not provide a real alternative; unavailability of a trust results in inequality;¹¹ trusts have been introduced or proposed in other civil law jurisdictions;¹² trusts have been the object of comparative research,¹³ and have been incorporated in the draft common frame of reference.¹⁴ The strongest argument in contemporary Dutch context is economic: without having a trust, the international financial market will not use Dutch law.¹⁵ Recognition and a possible introduction of a trust needs to be embedded in the Dutch system of property law. Is this such a difficult combination?

III. PROPERTY LAW AND ITS PRINCIPLES IN THE DUTCH TRADITION

1. The Dutch Tradition

Dutch law stands in the civil tradition, as its law – in the Dutch Republic, (1581-1795) - was an amalgam of local and provincial statutory law, canon law, customary law, feudal law, but first and foremost: Roman law. The latter provided form and substance in the systematization of private law by Dutch scholars like Grotius¹⁶ and Voet.¹⁷ This Dutch tradition of civilian law was continued particularly in South Africa, with a civilian trust shaped in the 20th century.¹⁸ The first Dutch civil law codification of 1809 stood in its property law in the Roman-Dutch tradition, even under the French constitutional umbrella (1795-1813).¹⁹ The French code came into force in 1811

⁹ First in the 80's while discussing the originally planned *bewind* construction (where trustee has power to control the beneficiaries property: Kamerstukken II 1984/85, 17496, no. 10 (*MvA*, Explanatory memorandum to the first chamber of parliament), p. 35 ff. Later in the 90's discussing the Convention. Kamerstukken II 1992/93, 23027, no. 3, p. 1 (*MvT*).

¹⁰ Kamerstukken II 1992/93, 23027, no. 3, p. 3 (*MvT*).

¹¹ D.W. AERTSEN, *DE TRUST. BESCHOUWINGEN OVER DE INVOERING VAN DE TRUST IN HET NEDERLANDSE RECHT*, 103-106 (Kluwer. Deventer 2004). R.D. VRIESENDORP, *HET NEDERLANDS GOEDERENRECHT EN HET HAAGSE TRUSTVERDRAG*, 54-56 (Vermande Lelystad 1994); HAYTON, *Developing the use of trusts in The Netherlands*, *supra* n 1 at 545.

¹² Liechtenstein, Luxembourg, Italy (*fiducia*) and France (*la fiducie*) have introduced the civil law concept of a trust. On the – then - proposal of trust in the Dutch Antilles *see* AERTSEN, *supra* n 11 at 301-317.

¹³ MICHELE GRAZIADEI, UGO MATTEI AND LIONEL SMITH, *supra* n 1; ESTHER ARROYO I AMAYUELAS (ed.), *EL TRUST EN EL DERECHO CIVIL* (Barcelona, Bosch 2007).

¹⁴ C. VON BAR, E.M. CLIVE, (eds.) *PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR)*, book 10.

¹⁵ J.W.A. BIEMANS, *Tijd voor de trust*, N. T. B. R. 2011/71.

¹⁶ GROTIUS, *INLEIDINGE TOT DE HOLLANDSE RECHTS-GELEERDHEID* (1631 – 1636 - 1954)

¹⁷ JOHANNES VOET, *COMMENTARIUS AD PANDECTAS* (1698-1702).

¹⁸ M.J. DE WAAL, *The Uniformity of Ownership, Numerus Clausus and the Reception of the Trust into South-African Law*, [3] *EUROPEAN REVIEW OF PRIVATE LAW* (2000) 439-452.

¹⁹ The *Wetboek Napoleon ingerigt voor het Koninkrijk Holland*, which had no real effect in legal practice. On this see J.H.A. LOKIN, J.M. MILO, C.H. VAN RHEE (eds.), *TWEEHONDERD JAREN CODIFICATIE VAN HET PRIVAATRECHT IN NEDERLAND* (Chimaera, 2010).

and was only replaced in 1838 by a Dutch *Burgerlijk Wetboek* (BW). For a large part a translation of the French Code Civil, its property law has notable differences. The 1992 – codification stands in the constitutional context of the European Union and the European Convention of Human Rights. The Kingdom of The Netherlands encompasses also the Dutch Antilles,²⁰ sharing the highest court (Hoge Raad), but with their own civil code, quite similar and interpreted as much as possible in line with the Dutch code (the ‘concordance’ principle).

Legal reasoning in The Netherlands changed around 1800 through the influence of codifications and prevailing positivistic conceptions.²¹ The old *ius commune Europeum* was formally abandoned and caused law to be developed along national and contemporary lines. Valid arguments in the nineteenth century hinge on text and system of the legislation. History is of little importance in legal argument, according to the two leading lawyers in the second half of the 19th century. The codified law has to be always interpreted on its own texts, in its systematic arrangement, argued Opzoomer, while Diephuis provided a place for legislative history in order to determine the aim of the legislator.²² Case law, remarked Diephuis, is not a source of law.²³ The turn of the 19th to the 20th century shows a reaction towards sociological jurisprudence, accepting caselaw as a source of law, and by including the *telos* of the legislative provisions, in their contemporary contexts as a valid argument. This has continued to this day. The new civil code uses open norms to be applied by judges;²⁴ judicial decisions show a leniency towards text and system of property law today. European law and human rights have appeared on the stage of reasoning in private law, even in property law.²⁵ The position of civil law has become far less autonomous than it used to be in the first century after the first codification. Furthermore, theory follows creatively (international) commercial practice. It may very well be, as Nils Jansen remarked, that the parochial state of national laws is more an intellectual than a practical problem.²⁶

²⁰ The Caribbean islands of Aruba, Bonaire, Curacao, St Maarten, St. Eustatius and Saba. Their precise constitutional position in the Kingdom is rather complicated. Aruba, Curacao and St Maarten are separate countries, while the other islands have the status of municipalities.

²¹ J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY, 311-315 (Oxford, Clarendon Press 1992).

²² C.W. OPZOOMER, AANTEEKENING OP DE WET, HOUDENDE ALGEMEENE BEPALINGEN 210-217 (1884); G. DIEPHUIS, HET NEDERLANDSCH BURGERLIJK REGT I, 110(1885).

²³ In his leading treatise on the Civil code: DIEPHUIS, *supra* n 22 at 119.

²⁴ Reasonableness and fairness (e.g. in artt. 3:13, 5:78, 5:97, 6:248 BW); good faith (e.g. artt. 3:36, 3:86 and 3:88 BW); common opinion (e.g. art. 3:4, 5:14 BW).

²⁵ On the increasing influence of fundamental rights in private law see G. BRÜGGEMEIER, A. CIACCHI AND G. COMANDÉ, FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION (Cambridge University Press, 2010) vol I and II.

²⁶ NILS JANSEN, THE MAKING OF LEGAL AUTHORITY, 66 (Oxford University Press, 2010).

2. Dutch property law: its system, principles, and concepts in their development

Grotius' treatise still includes feudal law in property law.²⁷ Thus the duplex dominium concept of feudal law provides us with a striking parallel to the equity and common law divide in common law trusts.²⁸ Private property rights are all derived from ownership, *which entitles a man to do with a thing and for his advantage anything he pleases which is not forbidden by law.*²⁹ It is exclusive ownership, absolute and unitary, just as we know today (art. 5:1 BW). Exclusivity of ownership meant particularly to protect the individuals' private autonomy against public authority. Property rights are limiting ownership, limited real rights – incomplete ownership in Grotius' words - just like today.³⁰ Principles as publicity and specificity appear in their application,³¹ nowadays they are made more explicit.³² These stances found their way, via the French intermezzo, through the codification of 1838 to this day.

But property law in the 1838 civil code was more demarcated from the law of obligations, then under French law: consensus does not suffice to transfer, but delivery is needed; the principles of specificity and publicity were explicitly put forward by the legislator as cornerstones to the property law framework. Exclusive individual ownership developed as a dogma in private relations.³³ The unity of patrimony developed³⁴ and a *numerus clausus* slowly came to be adhered to.³⁵ The latter came to full stature particularly in the case of *Blaaiboer v Berlips*.

3. *Blaaiboer v Berlips* sets the standard for the *numerus clausus*³⁶

Berlips sold and transferred a parcel of land to *Blaaiboer*, agreeing also on *Berlips*' obligation to construct and maintain a road to the use of *Blaaiboer* on his adjacent land.³⁷ The road had not

²⁷ GROTIUS, *THE JURISPRUDENCE OF HOLLAND*, 2,41.

²⁸ Dirk Heirbaut has made the comparison: DIRK HEIRBAUT, *Feudal Law, the Real Ius Commune of Property Law in Europe, or: Should we Reintroduce Duplex Dominium*, [3] *EUROPEAN REVIEW OF PRIVATE LAW* 301-320 (2003).

²⁹ GROTIUS, *THE JURISPRUDENCE OF HOLLAND II*, 3.10. translation by R.W. LEE (Scientia Verlag Aalen 1977).

³⁰ GROTIUS, *supra* n 29 at 3.10; ASSER-MIJNSSEN-DE HAAN-VAN DAM, *GOEDERENRECHT, ALGEMEEN GOEDERENRECHT (3-I)*, (Deventer: Kluwer 2006); PITLO/REEHUIS, *HEISTERKAMP, GOEDERENRECHT*, (Deventer: Kluwer 2006).

³¹ Publicity e.g. in the requirement of delivery for transfer, GROTIUS, *supra* n 29 at 5.2.; specificity in the definition of things as tangible objects: perceivable with one's senses: this house, this book. *Id.*, at 1.10.

³² The principle of specificity not very precisely formulated in article 3:84 section 2; the requirement of delivery in article 3:84 section 1, which also holds true for the creation of limited property rights.

³³ E.g. JAMES GORDLEY, *Myths of the French Civil Code*, *AM. J. OF COMP. L.* 1994, 459-505, 462-468.

³⁴ A creditor can have recourse to all the property of his debtor (art. 3:276).

³⁵ R. FEENSTRA, *Real rights and their classification in the 17th century: the role of Heinrich Hahn and Gerhard Feltmann*, *JURIDICAL REVIEW* 1982, 106-120.

³⁶ HR 3 March 1903, W. 1905, 8191 (*Blaaiboer v Berlips*).

³⁷ Delivery of land requires registration of a notarial deed in the public registers, back then and now.

been built, when Berlips transferred his plot of land. Blaauboer claimed damages from Berlips. Berlips argued that the right to have the road constructed, maintained and used was a right *in the land* (a property right), and *not* a right against him (Berlips) *in personam*. Blaauboer should therefore claim from the new owner of the land. District court as well as the court of appeal denied the claim in conformity with the law as it stood at that time. Obligations concerning land did run with the land.³⁸ The Hoge Raad came to a different position, which still stands to this day. Blaauboer's right was not a property right. Why was it not so? The Dutch civil code contains a sharp distinction between personal and property rights, and property rights are explicitly enumerated in the code; Dutch property law recognises a *numerus clausus*; furthermore, property rights require publicity, a requirement which has not been met (sufficiently) in this case. It is still good law to this day.³⁹

4. Numerus Clausus 1992

There is thus a closed number, a *numerus clausus*, of property rights.⁴⁰ But since 1992 the principle is also embodied in a peculiar clause which prohibits fiduciary transfers.⁴¹ Why? The reason is mainly a dogmatic one, as it is meant as a tool to safeguard the *numerus clausus*. Either limited property rights or personal obligations should fragment the powers of ownership. As alternatives, the *fiducia cum creditore* should be replaced by the use of a security right, while the *fiducia cum amico* was meant to be replaced by the provision on exclusive mandate.⁴² There is no provision in the Dutch code which has been the subject of more critique: sound in theory, yet extremely unpractical.⁴³ This prohibition, however, is deliberately absent in the civil code of the Dutch Antilles. What is more, one of the Antilles, Curaçao, has introduced on January 1, 2012, also a trust in its civil code.⁴⁴ As we will see, there is room for flexibility in the Dutch civilian

³⁸ On the basis of old Dutch and French law, explicitly referred to in the decision, Voet as well as Pothier, both used to interpret article 1354 BW (1838).

³⁹ A similar case: HR 17 May 1985, NJ 1986, 760 (Eilandgebied Curaçao/Boyé). Asser-Mijnssen-De Haan, *Goederenrecht*, no. 39. HR 3 november 2006, NJ 2007, 155 (Nebula) denied the transfer of economic ownership proprietary force.

⁴⁰ In article 3:81 section 2. On the *numerus clausus* in Dutch law: T.H.D. STRUYCKEN, *DE NUMERUS CLAUSUS IN HET GOEDERENRECHT* (Deventer, Kluwer 2007); also in a comparative perspective BRAM AKKERMANS, *THE PRINCIPLE OF NUMERUS CLAUSUS IN EUROPEAN PROPERTY LAW* (Intersentia, Antwerpen 2008).

⁴¹ Art. 3:84 –3. A legal act which is intended to transfer property for purposes of security or which does not have the purpose to bring the property into the patrimony of the acquirer, after transfer, does not constitute a valid transfer of that property. See ASSER-MIJNSSEN-DE HAAN-VAN DAM (3-I) (2006), nr. 474.

⁴² Security rights in the 1992 code were originally envisaged by the author, E.M. Meijers, to be publicly registered – contrary to the fiduciary transfer. This requirement was lost in the legislative process, but the prohibition on *fiducia* remained. ASSER-MIJNSSEN-DE HAAN-VAN DAM, *GOEDERENRECHT*, nr. 472-477.

⁴³ ASSER-MIJNSSEN-DE HAAN-VAN DAM, *GOEDERENRECHT*, nrs. 472-473; W.A.K. RANK, *DE (ON)HANTEERBAARHEID VAN HET NEDERLANDSE RECHT VOOR DE MODERNE FINANCIËLE PRAKTIJK*, (Deventer, 1998).

⁴⁴ Published in: Landsverordening Trust (15 December 2011), Publicatieblad 2011, nr. 67. On the trust in the Dutch Antilles see: S. ALTENA, *DE (ON) MOGELIJKHEDEN VAN DE CURACAOSSE TRUST*, IN: *TIJDSCRIFT VOOR ANTILLIAANS RECHT (TAR-Justicia)*, 2010, 3-4.

tradition. In the course of the 20th century, even after the new codification of private law in 1992, case law has proved itself not to be too dependent on the wording and systematics of the legislative provisions. Trusts can be accommodated.

IV. THE FLEXIBILITY OF DUTCH PROPERTY LAW AND THE ALTERNATIVE CONSTRUCTIONS

1. Interpretation of legislative provisions

Analysis of property law involves application of the text of the applicable provisions in their systematic context. Legislative history is of interpretative importance as well, while legal history hardly fulfils a function in interpretation. As we have seen, a teleological, utilitarian interpretation is quite often applied, as can be seen, for instance, in the acceptance of fiduciary transfers in the 1920s, and, again, in 1995.⁴⁵ It is guided however by legislation in its systematic framework. If legislation does not cover the facts, a solution may be argued analogous to existing legislation, if it fits in the system of the law.⁴⁶ This teleological approach is also apparent in the case of the recognition of foreign legal concepts –like trusts, which uses reasoning by analogy.⁴⁷ This flexibility in recognition is also necessary in order to meet the economic and human rights standards of the European Union and the European Convention of Human Rights.⁴⁸

Contract law is of importance. Contracts, legislation, custom and, ultimately, reasonableness and fairness give content to the mutual obligations in Dutch law.⁴⁹ Property transactions have their foundation in the autonomy of the owner, and consequently the owner's intention shapes form and content of the property right created or transferred. Mandatory property law sets the standard where third party interests are at stake. But there is some room for party autonomy.

2. Pragmatic principles

In this methodological context the objections against the trust as embodied in principles and provisions are less sturdy. The *numerus clausus* principle is less strongly adhered to than it seems to be at first sight. It contains two aspects: firstly, that only recognized real rights may be created;

⁴⁵ HR 19 May 1995, *NJ* 1996, 119 (Sogelease).

⁴⁶ HR 30 January 1959, *NJ* 1959, 548 (Quint/Te Poel)

⁴⁷ Another example is the recognition of foreign floating charges as Dutch non-possessory pledges (HR 14 December 2001, *NJ* 2001, 241).

⁴⁸ In the case of recognition of foreign security rights: E.-M. KIENINGER, *Securities in Movable Property within the Common Market*, *EUROPEAN REVIEW OF PRIVATE LAW* 1996, 41-66.

⁴⁹ Article 6:248 BW.

secondly, that the content of the real right should remain within its boundaries.⁵⁰ Yet the *legislature* (Dutch or European) may abolish or add new real rights to the catalogue of acknowledged real rights. The latter has been done by the European legislator, who has introduced a new functional security right for financial institutions.⁵¹ Whether *courts* are permitted to create new property rights is less easily argued, but examples – fiduciary transfers and separate patrimony – at least show a flexible approach.⁵² The concept of ownership is less unitary, as the development of fiduciary transfers shows; patrimonies may be separate;⁵³ publicity principle as well as the specificity principle is less stringent.⁵⁴ Transfers of movables are accomplished solo consensu, using constructive delivery; assignments of claims require no notification of the debtor; creating security over movables or claims require no publication at all. The principle of specificity is in case of movables and claims replaced by a criterion of determinability. Land law remains as the core area where principled property law still holds its chair. The legislator explicitly addressed the ‘inventiveness and creativity’ of the Dutch courts in recognizing foreign trusts.⁵⁵ He even proceeded again on the track to introduce a legislation, so far without any publicly visible result. Does all this flexibility offer enough room to provide for sufficient recognition?

3. Civilian trusts and alternative constructions

Numerus clausus, unity of patrimony, publicity, specificity, and ownership do not bar at all constructions which – like the common law trust – provide a vehicle to hold property in somebody else’s interest. The mixed jurisdictions of Scotland, South Africa, Quebec and

⁵⁰ *Typenzwang* and *Typenfixierung*, in German literature. Baur/Sturmer, *Sachenrecht* (2009) § 1, no. 7; S.E. BARTELS AND J.M. MILO, *Contents of Real Rights: Personal or Proprietary. A Principled History*, in S.E. BARTELS AND J.M. MILO, (eds.) *CONTENTS OF REAL RIGHTS* (WLP, Nijmegen 2004), 5-23.

⁵¹ Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, which has been transposed in article 7:51 BW ff. Another example is the protection of the buyer of immovable property against his seller’s insolvency by registering his contract of sale in the public registers. Likewise the legislator argued the introduction of the Anglo-American trust by legislation to be a possibility. See Kamerstukken II 1992/93, 23027, no. 3, p. 2 (MvT).

⁵² This power of the judiciary is also argued for Belgian law by M.E. STORME, *Van trust gespeend? Trusts en fiduciaire figuren in het Belgisch privaatrecht*, TIJDSCHRIFT VOOR PRIVAATRECHT 1998/3, 709-819; in South Africa the numerus clausus principle is not very strictly adhered to, if at all. See M.J. DE WAAL, *The Uniformity of Ownership, Numerus Clausus and the Reception of the Trust into South-African Law*, EUROPEAN REVIEW OF PRIVATE LAW 2000/3, 439-452.

⁵³ Separate patrimonies are recognized by legislative provisions or in case law in various instances, e.g. the insolvent patrimony (art. 20 Insolvency Act, *Faillissementswet*); testamentary *administration* (art. 4:175 BW); common property (*gemeenschap*, art. 3:192 BW); the recognized separate patrimony in HR 2 February 1984, *NJ* 1984, 752 and (curtailed) in HR 13 June 2003, *NJ* 2004, 196; furthermore Art. 25 Public Notary Act; see below in § 5.

⁵⁴ As is visible in the requirements for transfer. The transfer of movables requires (art. 3:90 BW) the transfer of possession, but this may be accomplished by agreement (art. 3:115 BW). The transfer of claims required a deed and a notice to the debtor, but (since 2004) the notice requirement is now no longer a necessity for the transfer (art. 3:94 BW).

⁵⁵ Kamerstukken II 1992/93, 23027, no. 3, p. 2 (MvT).

Louisiana all have a trust available which meets standards set in the civilian tradition.⁵⁶ It is perfectly possible, as mixed jurisdictions show, to have ownership either in trustee, in beneficiary or in the trust itself, have powers of control over the trust-property arranged in accordance with the aim of the trust, have the trust property protected against insolvency of trustee or beneficiary in their personal capacity, have the trust property protected against breach of trust. In other civil law jurisdictions trusts have been introduced either by legislation or by case law.⁵⁷ The Draft Common Frame of Reference as well as the Draft Directive on Protective Funds know a trust.⁵⁸ The Dutch legislator has the introduction of the trust on its agenda.⁵⁹ The recent Curacao trust follows the construction where ownership and control is in the trustee. The trust property forms a separate patrimony.⁶⁰ The Netherlands has not – yet - arrived on the stage of civilian trusts.

Dutch law offers alternatives to the trust, which may be used in an analogous application in recognition.⁶¹ These civil law alternatives may follow the law of juristic persons. The settlor then needs to create one of the available juristic persons, e.g. a foundation.⁶² The alternative may follow the law of obligations, which then entails a contract, and (exclusive) mandate constructions.⁶³ Administration of property may be constructed in specific situations as *bewind*.⁶⁴ Limited property rights may be created, e.g. in the context of a transfer also a security right in favour of the transferor.⁶⁵ The existing alternatives to the trust, however, are not regarded highly:

⁵⁶ K.G.C. REID, *Patrimony Not Equity. The Trust in Scotland*; M.J. DE WAAL, *The Uniformity of Ownership, Numerus Clausus and the Reception of the Trust into South-African Law*; A.N. YIANNPOULOS, *Trust and the Civil Law: The Louisiana Experience*; M. CANTIN CUMYN, *The Quebec Trust: A Civilian Institution with English Law Roots*, all in: J.M. MILO AND J.M. SMITS, *TRUSTS IN MIXED LEGAL SYSTEMS* (Ars Aequi Libri, Nijmegen, 2001).

⁵⁷ Rather recently in Italy and France. Germany knew the *Treuhand*, which was carved out in case law.

⁵⁸ The trust in the DCFR has been reviewed rather positive by MCFARLANE: *An English Perspective: Two Cheers for Book X*, *EDINBURGH LAW REVIEW* 2011, 471-474. Less positive: ALEXANDRA BRAUN, *Trusts in the draft Common Frame of Reference: the "best solution" for Europe?* *CAMBRIDGE LAW JOURNAL* 2011, 327-352. For the DDPF see: KORTMANN ET AL (eds.) *TOWARDS AN EU DIRECTIVE ON PROTECTED FUNDS* (Kluwer, 2009).

⁵⁹ But not yet made public.

⁶⁰ Incorporated in the civil code, in article 3:126-161. It contains quite detailed rules, concerning creation (notarial deed), content of the trust instrument (sufficient descriptions of trustee, beneficiaries and trust property), powers and duties of trustee and beneficiaries; on the trust property and the end of the trust.

⁶¹ See Kamerstukken II 1992/93, 23027, no. 3, p. 5-6 (MvT); Asser-Mijnssen-De Haan (3-I) (2006), no. 475; D.W. AERTSEN, *De trust*, 109-140; H.L.E. VERHAGEN, *Trusts in the Civil Law*, 477-498; S.C.J.J. KORTMANN AND H.L.E. VERHAGEN, *National Report for The Netherlands*, in: D.J. HAYTON ET AL. (eds.), *Principles of European Trust Law*, (Deventer 1999) 195-215.

⁶² Art. 2:285-304 BW.

⁶³ Art. 7:423 BW.

⁶⁴ There is the option of a *bewind* in certain specific situations (*bewind* in the case of mental or physical incapacities, art. 1:386 and art. 1:431 BW; parents or guardians have *bewind* over the patrimony of minors, art. 1: 253i and 1:337 BW; testamentary *bewind*, art. 4:153 BW; *bewind* in the case of usufruct, art. 3:221 BW. For commercial cases, the use of *bewind* seems to be limited; one exception might be the use of *bewind* without a statutory basis in the case of a bond issue (*obligatielening*), an option explicitly made possible in the parliamentary debate Kamerstukken II 1992/93, 23027, no. 3, p. 5, under c (MvT).

⁶⁵ E.g. in the case of the certification of shares the security right is created *ex lege* (art. 3:259 BW).

complicated, unclear or unpractical,⁶⁶ *clumsy and only partially effective and compare poorly to the elegant common law construct*, Sparkes remarks.⁶⁷ For the sake of recognition, the clumsy Dutch vehicles may suffice. Fiduciary transfers (5), separate patrimonies (6), and the recognition of foreign trusts (7) shows this to be correct.

V. FIDUCIARY TRANSFERS

Fiduciary transfers were acknowledged in Dutch case law in 1929, following a practice and lower case law which originated in the early 19th century. The 1838 Dutch civil code contained only a possessory pledge, in line with the previous French Civil code, but departing from Roman-Dutch law and the first Dutch codification. Though security transfers were looked at with suspicion, so-called special and general hypothecs provided at least a preferential position.⁶⁸ The 1929-cases⁶⁹ followed practice and German law. What happened?

Heineken brewery advanced a loan to Bos. Security was provided by the sale and transfer of Bos' furniture and inventory to Heineken, accompanied by Bos' right to use furniture and inventory; the right to use would end in case of Bos' insolvency. Which happened, and Heineken revindicated the goods as his. The curator in Bos' insolvency did not comply. The transfer for security reasons constitutes a valid legal ground for transferring property, the Hoge Raad held. Why? Because ownership is transferred, it does not infringe on the provisions on security rights or the equality of creditors. Ownership is in the patrimony of the creditor. The publicity principle is less important, then to require transfer of possession. Reasonableness and fairness can be seen applied in later case law curtailing the powers of the fiduciary owner.⁷⁰ Also the *fiducia cum amico* was held to be acceptable in 1929. The Hoge Raad even used explicit trust terminology. Claims originating from copyrights were transferred in order to be controlled by a specific organization (Buma – *Bureau voor Muziekauteursrecht* (Bureau for Musical Copyright)). The Hoge Raad determined that the construction, in which the Buma held the claims as the trustee for the copyright holders, was acceptable.⁷¹ Both fiduciary transfers were used extensively in practice.

⁶⁶ E.g. in case of a fiduciary transfer, the beneficiary has personal rights, which in the trustee's insolvency may not suffice; bewind does offer this insolvency protection, but its applications are limited.

⁶⁷ PETER SPARKES, *LAND LAW* (Oxford, Portland, Hart 2007), 501.

⁶⁸ W.J. ZWALVE, *A labyrinth of creditors: a short introduction to the history of security interests in goods*, in: E.M. KIENINGER, *SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW* (2004), 38-53.

⁶⁹ Hoge Raad 25 January 1929, *NJ* 1929, p. 616 (beer brewery) and HR 14 June 1929, *NJ* 1929, 1434 m. nt. P.S. (Buma).

⁷⁰ Ownership of the (security) trustee was treated similar to a pledgee. See HR 6 March 1970, *NJ* 1970, 433 (Van Wessem/Traffic); S.E. Bartels and J.M. Milo, *Open normen*, p. 10.

⁷¹ ASSER-MIJNSSEN-DE HAAN-VAN DAM, *GOEDERENRECHT*, nr. 474.

The change came in 1992, with the introduction of the new civil code, especially with the prohibition of fiduciary transfers. Practice, however, hardly acted in conformity with the new legislative provisions. Sale and lease-back transactions were widely used. Would they meet the dogmatic criterion of article 3:84? De Zaaikers contracted on the sale and lease back of a printing press with Mahez and the financier Sogelease. The press is sold and transferred to De Zaaikers, and sold and transferred to Sogelease, leased back by De Zaaikers. De Zaaikers went insolvent. Is the latter transfer to the financier a transfer *for purposes of security*?⁷² In that case the transaction would be void, and the press would be in the insolvent patrimony.⁷³ The Hoge Raad argued that this was intended as a true transfer, thereby valid. The Hoge Raad interpreted article 3:84 section 3 within the systematic context of the availability of non-possessory security rights, the availability of ownership as security in a retention of title context⁷⁴, the aid of parliamentary history⁷⁵ and particularly in line with the needs of commercial practice. A true transfer of ownership is valid.⁷⁶ This will also hold true for other fiduciary transfers.⁷⁷

At the same time, however: the transferor who trusts that the transferee will act in accordance with the underlying contract only has a personal claim in this Dutch construction, which might be a problem if there is a conflict with one of the trustee's other creditors or when he becomes insolvent. This would be different if the trust property would be considered to be separate patrimony.

VI. SEPARATE PATRIMONY

The debtor is liable with all its property under Dutch law. The option of a separate patrimony, as would be the case when giving effect to a trust, is restricted to legislative exceptions,⁷⁸ e.g. the creation of a legal person, or the creation of an accepted separate patrimony. An important example of a separate patrimony is codified in art. 25 of the Public Notary Act.⁷⁹ This was due to

⁷² ASSER-MIJNSSEN-DE HAAN-VAN DAM, GOEDERENRECHT, nr. 241 and 473.

⁷³ HR 19 May 1995, *NJ* 1996, 119 (Sogelease). On this case see H. SIGMAN, *Keereweer v. Sogelease seen from an American perspective*, in W. P. N. R. 6214 (1995), 167-170. A recent case confirmed the Sogelease case: HR 18 November 2005, *NJ* 2006, 151 (BTL lease).

⁷⁴ Article 3:92 section 2 BW.

⁷⁵ PG book 3, p. 319.

⁷⁶ Sigman points to the fundamental difference with the approach of article 9 UCC, which would treat such transactions (not as a true lease, but) as secured transactions, with all the protection mechanisms for debtors and creditors being applicable. Under Dutch law he criticises that creditors obtain far too much with ownership.

⁷⁷ ASSER-MIJNSSEN-DE HAAN 3-I (2006), nr. 473.

⁷⁸ As a factual preference would result, which circumvents the public order of having a mandatory order of preference: art. 3:277 BW. Except for the grounds for preference recognised by law...creditors have (...) an equal right to be paid (...) in proportion to their claims.

⁷⁹ Art. 25 Public Notary Act -1. The notary is obliged (...) to hold one or more special accounts in his name and specifying his quality as a notary, exclusively meant to receive money the notary holds in the interest

legislative intervention following a case from 1984 which introduced a separate patrimony, to which the beneficiaries are entitled in common.⁸⁰

Van Hese sold and transferred immovable property to Rijs. The price (fl. 3,125,000) was - as is usual - paid into the notarial bank account of the notary Slis-Stroom. The notary was declared insolvent, the money never paid. The notarial bank account contained only fl. 125,000. Could the money be claimed as the seller's? The Hoge Raad denied the claim, while delivering an important *obiter dictum*, which opened up the possibility for separate patrimony: though the starting point is the unity of patrimony, this may be different if the money is paid into a specific account, in which the money is explicitly received on behalf of the seller. How was practice going to make use of this option and how would the judiciary decide? Only in cases involving specific parties with a special public fiduciary position, or is there a more general, also commercial availability? The first limited option, it so turned out in a case involving commercial factoring.⁸¹ There needs to be a special public fiduciary position: the option of creating a separate patrimony by a nominee account as offered in the decision in *Slis-Stroom* should not be extended too far, particularly considering the text and the system of the legislation as well as the legislative history of the notarial nominee account. The acceptance of separate patrimonies in case law should be restricted to parties holding a special public fiduciary position such as notaries, bailiffs, lawyers and accountants; a general availability would encroach upon legal certainty and the interests of other creditors. But the option of a separate patrimony is not completely closed: an analogous application of the separate patrimonies of notaries and bailiffs is only acceptable if a separate patrimony in the case at hand would fit in with the system of the law and would also be closely connected to cases for which a separate patrimony has been created in legislation.⁸²

Incidentally a (constructive) trust-like position has been concluded on the basis of a payment by mistake.⁸³ In a later procedure aiming at curtailing this option the Hoge Raad has further clarified under which circumstances mistaken payment would give rise to preferential treatment, but explicitly denied to curtail it.⁸⁴ It illustrates how Dutch law provides room for arguments less connected to text and system, even when it comes to implied trusts. Even though broad

of third parties. (...) -2. The notary has the exclusive power to control and dispose of the account. (...) -3. The claim resulting from the account is held in common by the creditors in common.

⁸⁰ HR 3 February 1984, *NJ* 1984, 754 (Slis-Stroom), particularly section 3.2.

⁸¹ HR 13 June 2003, *NJ* 2004, 196 (Beatrixziekenhuis/ProCall factuureerdiensten). On this case see: E.C.M. WOLFERT, *Van Slis-Stroom (1984) tot Coöperatie Beatrixziekenhuis/ProCall (2003): het einde van en tijdperk?*, W. N. P. R. 6541 (2003), 559-563.

⁸² HR 13 June 2003, *NJ* 2004, 196 (Beatrixziekenhuis/ProCall factuureerdiensten), section 3.2.

⁸³ HR 5 September 1997, *NJ* 1998, 437 (Ontvanger/Hamm); see the comments on the case in European review of private Law 2000/3, p. 507-521; it bears resemblance to the mistaken payment leading to a (remedial) constructive trust in the case of *Chase Manhattan Bank v Israel British bank* (London) 1981 Ch 105; H.L.E. VERHAGEN AND N.E.D. FABER, *A Trace of Chase Manhattan in the Netherlands*, 1998 3 RESTITUTION LAW REVIEW 165.

⁸⁴ HR 8 June 2007, *NJ* 2007, 419 (Van der werff qq./BLG).

possibilities for separate patrimonies in a strict national setting were curtailed, in the taxation cases dealing with the recognition of foreign trusts the separate patrimony has been of valuable assistance.

VII. THE RECOGNITION OF TRUSTS IN DUTCH CASE LAW

All trust-cases dealt with taxation issues.⁸⁵ Four of these cases were decided by the Dutch Hoge Raad already in 1998.⁸⁶ Express trusts (irrevocable discretionary trusts) were created by Dutch settlors (residing in The Netherlands and France) according to the law of Jersey and the law of the Cayman Islands. In one of these cases –which were quite similar- the Dutch settlor had stipulated in the trust deed that the trustee had to administer the trust property for the benefit of the beneficiaries, spouse and children. The issue was whether the transfer of trust property from the settlor to the trust had to be seen as a taxable gift to the beneficiaries or to the trust itself. The Hoge Raad held the latter, as it found that the beneficiaries under the trust deed had no (taxable) right to the property, since the deed (party autonomy!) formulated the powers of the trustee rather broadly. It could do so since it qualified the trust at hand as a specific separate patrimony according to Dutch law. The cases show that the Dutch judiciary is ready to accommodate foreign trusts, even though the trusts in question were very closely connected to Dutch (and French) jurisdiction. In the advice preceding the decision by the Hoge Raad, the Advocate-General argued for the non-recognition of the trust on the basis of art. 13 Convention, precisely for this reason.⁸⁷ The Hoge Raad explicitly denied this option. Even though article 19 prevents the Convention from precluding the national powers regarding taxation, this does not mean that the trust should therefore not be recognized on the basis of article 13. This non-recognition would, according to the Hoge Raad, impede the aim of the treaty to advance the recognition of trusts,⁸⁸ and it suffices if Dutch fiscal legislation will be applied effectively to the recognized trust.⁸⁹ But the question of what would be the decision if there are conflicting claims with other Dutch creditors of the (Dutch) settlor or beneficiary still remains.

⁸⁵ Next to the mentioned cases also: HR 24 November 1954, *BNB (Beslissingen in belastingzaken)* 1955, 7; HR 18 September 1991, *BNB* 1992, 177 and HR 18 September 1991, *BNB* 1992, 286.

⁸⁶ HR 18 November 1998, *BNB* 1999, 35-37, nrs. 31.756-31.759. See R.D. VRIESENDORP AND J.W. ZWEMMER, *De Trustarresten*, *ARS AEQUI* 2000/3, 173-180. From a taxation law perspective see: F. SONNEVELDT, *DE PRIVATE EXPRESS TRUST IN DE NEDERLANDSE SUCCESSIEWET 1956* (2000), 102-114. R.M. FREUDENTHAL, *(T)rust op het front?*, *W. P. N. R.* 2008, 6765.

⁸⁷ *Conclusie Advocaat-Generaal* onder HR 18 November 1998, *BNB (Beslissingen in belastingzaken)* 1999, 37, nr. 31.759, § 2.4.

⁸⁸ HR 18 November 1998, *BNB (Beslissingen in belastingzaken)* 1999, 37, nr. 31.759, § 3.4.

⁸⁹ Other cases have been decided since then, not altering the path taken: HR 14 June 2006, *BNB* 2007/18 and 19; HR 26 October 2007, *BNB*2008/122.

VIII. CONCLUSION

Before 1996 Dutch law in its civilian tradition has shown itself to be receptive to trusts. Since then Dutch law has a formal duty to recognize trusts under the Trust Convention. This obligation can be given significant effect.

The Dutch civil law system of property law, with a unitary concept of ownership, a *numerus clausus*, the principle of publicity, the principle of unity of patrimony and a prohibition on fiduciary transfers are interpreted with pragmatic flexibility by the Dutch judiciary. Fiduciary transfers are possible, but, after a recent decision, judicially-created separate patrimonies are only possible if the fiduciary occupies a public trustworthy position. The separate patrimony has been accepted in cases dealing with the recognition of trusts. But results in the past do not provide a guarantee for the future.

The fragmented approach of legislative alternatives, the curtailing of separate patrimonies, and the consequent uncertainty as to their application in the reception of trusts certainly leaves open arguments for the legislative introduction of the trust in Dutch law. As we have seen, calls for intervention have been made. The Dutch legislator will probably go for the introduction of a civil law trust. A small jurisdiction which aims to play an important role in financial services cannot lag behind, certainly not if other European civil law jurisdictions have already introduced general trust concepts.



THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE

COUNTRY REPORTS: SAN MARINO

*Andrea Vicari**

I. TRUSTS IN THE IUS COMMUNE

San Marino is a civil law country, probably one of the purest remaining: no civil code has ever been enacted and *ius commune* is still at the basis of its legal system. *Ius commune* is the common law that prevailed throughout Europe before the codes. In San Marino's law, save when a specific matter is governed by statute, *ius commune* applies.

The European *ius commune* is rooted in Roman law but did not coincide with Roman law: on the one hand, because of the enactment of local legislation and, on the other, because of customary as well as doctrinal developments supported by the most important courts throughout the continent.

An institution that was named "*fideicommissum confidentiale*" or "*fideicommissum fiduciarium*" was one important of the several development of the *ius commune*¹.

Roman law entitled the heir or the legatee charged with a *fideicommissum* to retain one fourth of the assets before handing them over: this was the "*quarta*", also called "*Falcidia*" or "*Trebellianica*"².

The *fideicommissum* known to Roman law was not a trust in structural terms because the "*quarta*" cannot be derogated by the will of the settlor. This entitlement cannot be removed³.

Throughout continental Europe the Roman law rule was applied whenever an ordinary *fideicommissum* was concerned, not when the legal relationship was a *fideicommissum fiduciarium* or *confidentiale*. It followed that one of the fundamental differences between the Roman-style *fideicommissum* and the medieval *fideicommissum fiduciarium* or *confidentiale* was that in the latter the fiduciary had to hand over to the beneficiary everything he had received. The same rule applied to executors, similarly to English law where executors are deemed trustees.

"*Haeres fiduciarius*" was the pivotal role in a *fideicommissum fiduciarium* or *confidentiale*, like the trustee in a trust" and, like a trustee, he could not retain any *commodum* that is to say, any advantage from the *fideicommissum*. He was not entitled to the "*Quarta*" or "*Trebellianica*"⁴.

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¹ See M. LUPOI, The new law of San Marino on the "*affidamento fiduciario*", TRUST LAW INTERNATIONAL, 2011.

² The references are to the lex Falcidia of 40 BC and to a *senatus consultum* of 56 AD.

³ Although Roman law did not recognize a 'trust' in the same sense as it is used in common law today, it did develop a device — the *fideicommissum* — which achieved very similar ends

However, the fiduciary who received property was properly a “*heres*”, an heir.

Here we find the basic structure of trusts: full legal title in the name of the trustee and, at the same time, no personal advantages in his favour.

Thus, a European *ius commune* institution existed – “*fideicommissum confidentiale*” or “*fideicommissum fiduciarium*” – under which the party who received something, to be managed for a purpose or to benefit another party, had no beneficial claims to the assets he received and had to turn them over at the prescribed time or upon the occurrence of a specified condition. Hence, he was not only the title holder, but also a “*custos*”.

“*Confidentia*” was at the root of this institution.

Maurizio Lupoi showed that the English expression “trust and confidence” derived directly from European *ius commune* and that the European notion of “*confidentia*” was at the root of the development of trusts in England⁵.

Therefore, similarities with the trust are evident both from the structural and on the linguistic point of view.

However, the fundamental idea lying on the basis of the *fideicommissum*, was different from that lying on the basis of the trust.

The *fideicommissum* was not a gift over time to beneficiaries, but a tool to allow the settlor to exercise the dead-hand, a tool intended to set an appropriation programme for the assets transferred under the *fideicommissum*, a programme that could not be derogated by beneficiaries, who were bound by it, a programme aimed to restrain their rights, not to enrich them.

II. THE TRUST LAW IN SAN MARINO: A BRIDGE BETWEEN THE COMMON LAW TRUST AND THE TRUST-LIKE INSTITUTION OF THE ROMAN LAW TRADITION.

It was on this historical foundation that San Marino built its statute of 1st March 2010 No. 43 on the contract of “*Affidamento fiduciario*”⁶ and its statute of 1st March 2010, No 42 on trusts (hereinafter “the Trust Law”).

The contract of *Affidamento fiduciario* is a contract mixing up the basic functioning structure of *fideicommissum* with the main features of the trust. Its analysis is beyond the scope of this article, devoted exclusively to the analysis of the Trust Law and its theoretical implications.

⁴ Inst., 2.23.1: “*fideicommissa appellata sunt, quia nullo vinculo iuris, sed tantum pudore eorum qui rogabantur continebantur*”.

⁵ M. LUPOI, “Trust and Confidence”, 125 L.Q.R. 253 (2009).

⁶ See M. Lupoi, *supra*, note 1. Maurizio Lupoi was the drafter of the law on “Affidamento Fiduciario”.

The Trust law is a brand new law, totally revising the trust law previously in force (17th March 2005, n. 37)⁷, enacted after the ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1st of July 1985 (the "Hague Trust Convention"), occurred with Decree of 20th September 2004, n. 119 which produced relevant effects in the San Marino legal system⁸.

While the *ius commune* had the trust-like institution of the *fideicommissum fiduciarius* or *confidentiale*, but not a concept called trust, the Trust Law introduced such a concept, making clear that "a trust exists when a person owns assets for the benefit of one or more beneficiaries, or for a particular purpose within the meaning of this Law". The Trust law, in its article 2, makes clear that "the fact that the settlor also holds the office of trustee, or reserves some rights or powers to himself, is not inconsistent with the existence of a trust", that "the settlor and the trustee may be beneficiaries of the trust, but the trustee cannot be the only beneficiary of the trust", and finally, that "the same trust instrument may create beneficiary trusts and purpose trusts".

A trust may be created by written instrument, inter vivos or by will. The deed will have further requirements of form varying according to the place where it is executed. If it is executed in San Marino, the trust deed has to be executed before a public notary.

The trust deed shall contain the standard requirements of a common law trust deed:

- a) the intention of the of settlor to create the trust;
- b) the identification of the trustee;
- c) the identification of the trust assets, or the criteria which enable them to be identified.

As already mentioned, both purpose trusts and beneficiary trusts are allowed. Purpose trust are allowed without any limitations.

In the case of purpose trusts, the trust deed shall contain:

- a) the identification of a particular purpose, achievable and not contrary to mandatory laws, public order or good morals;
- b) the identification of a protector with the duty to ensure that the provisions contained in the trust instrument are observed, or the criteria which enable him to be identified;

In the case of beneficiary trusts, the trust deed shall contain:

⁷ See A. VICARI, San Marino, in D. BROWNBILL & AL, INTERNATIONAL TRUST LAWS; P. PANICO, San Marino, TRUSTS & TRUSTEES (2007), 500-502.

⁸ After the ratification of the Hague Convention, there has been no case law recognizing foreign trusts, because there was no litigation on this point, but several foreign trust were inscribed in public registries in San Marino, on the ground of the provisions of the Hague Convention.

- a) the identification of the beneficiaries, or the criteria which enable them to be identified, or the identification of the person who has the power to appoint them;
- b) the rules which ensure that there is a protector, empowered to take the claim against the trustee in case of breach if for any reason there are no beneficiaries in existence, and in the other cases provided for by law.

The rule under b) above is a peculiarity of San Marino trust law, unknown to the trust laws in force in most of the common law jurisdictions.

It applies both when beneficiaries are appointed in the trust deed but they are not in existence (i.e. “the children of Paul”, where Paul has no children at the time of the trust settlement) and when no beneficiaries are appointed at all in the trust deed (i.e. “the beneficiaries are to be appointed by Paul before the end of the trust period”), but a power of appointment is granted in the trust deed.

By this provision, two very relevant effects are produced.

First of all, this rule ensures that trustee’s duties are enforced during the life of trust, even if no beneficiaries are born yet. Delayed enforcement, often, means no recovery. Under San Marino, law in this case, an enforcer will ensure timely enforcement.

Secondly, by this rule, the new Trust Law creates a new type of trust for beneficiaries, unknown to any other common law trust law in the world.

A valid trust for beneficiaries, being it fixed or discretionary, can be created even if no certain or ascertainable person is intended to be benefited by the trust at the time of its creation.

In this manner, individuation, appointment, identification of any type of beneficiaries can be postponed, even in trust for beneficiaries, up to the end of the trust period.

Trust assets are segregated and the trustee is under a duty to manage them in order to preserve and increase them, and to distribute them to beneficiaries when they will be appointed. The enforcer, meanwhile, will ensure that trustee’s duties are properly performed.

This is an unique solution.

Under English Law and the laws of jurisdictions influenced by it, any trust has to have appointed, identified or identifiable beneficiaries, unless it is aimed to create a purpose trust⁹, or, from another perspective, the persons or objects intended to be benefited must be certain or ascertainable¹⁰. In fact, “there must be someone in whose favour court can decree performance”¹¹.

Under the new San Marino Trust Law, this requirement is not required.

⁹ See *Re Wood* [1949] Ch 498.

¹⁰ See *Knight v. Knight* (1840 3 Beav. 148)

¹¹ See *Morice v. Bishop of Durham* (1804 9 Ves 399 at 405)

A trust is valid and trusts assets are segregated, without any resulting trust arising in favour of the settlor, even if no person is a certain or ascertainable beneficiary and even if the trust is not a purpose trust. Trustee's duties, as long as beneficiaries are absent, are enforced by the enforcer.

This is the first of several indicia making clear that, under the San Marino law, a new model of trust is born.

III. TRUST AS AN APPROPRIATION PROGRAMME V. TRUST AS A GIFT OVER TIME

Under the new San Marino Trust Law, the trust is considered a pure instrument to imprint trust assets with a destination, dropping the standard common law idea of the trust as a gift over time to beneficiaries.

Bernard Rudden made clear that the common law trust is a form of gift over time to beneficiaries, even if this is not always clearly recognized by common lawyers: "it may be suggested that the learning on "the three certainties" and on resulting trusts in courses on Equity is made difficult by failure to stress that the normal private trust is essentially a gift, projected on the plane of time and so subjected to a management regime".

Recently, John Langbein subscribed this view¹² and it became widely shared, in the common law world, the idea that the trust "is a donative transfer to the beneficiaries, structured to permit the management of wealth"¹³.

In fact, even under a discretionary trust, one can notice the "gift over time" idea underlying common law trusts, especially under English Law. In fact, in these cases, "you treat all the people put together as though they formed one person, for whose benefit the trustees were directed to apply the whole of a particular fund"¹⁴. As Paul Matthews put it, under the English model of trust, "whatever subject matter of the trust, it no longer belongs to the settlor or (obviously) the testator, and the decision whether to enjoy it or destroy it is no longer for him. Instead, it is ultimately a decision for those who benefit from the trust"¹⁵. That's why they are enriched by the creation of the trust.

If, as above described, under San Marino law, a trust can be created without appointment of beneficiaries, there can be settlement of assets into trust, segregation of them, trustee's

¹² J. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997-1998).

¹³ Thomas P. Gallanis, *New Direction of American Trust Law*, 97 IOWA L. REV. 218, 218 (2011-2012).

¹⁴ J. Romer. In *Re Smith* [1928] Ch. 915.

¹⁵ P. Matthews, *The Comparative Importance of the rule in Sounders v. Vautier*, L.Q.R. (2006) 266, 274.

management duties but no “gift” to anyone. No beneficiaries need to be enriched, none of them needs to receive any right or action to create a valid trust.

In this manner, the trust deed cannot be considered a form of “gift over time”, but an asset protection instrument, containing the programme for the management of the assets transferred to the trustee, that can, but not necessarily has to, immediately allocate entitlement on certain assets and the advantages deriving from them to one or more beneficiaries. One might speak of “appropriation programme”, whose advantages in favor of beneficiaries can be set immediately but the beneficiaries can be individuated and appointed later.

Further elements in the new Trust Law allow a characterization of the trust, under San Marino law, as an “appropriation programme”, instead of a gift over time.

However, in order to appreciate how emblematic these elements are, one should realize which features of the common law trusts originate the perception of the trust as a gift over time.

IV. COMMON LAW TRUST AS A “GIFT OVER TIME” TO BENEFICIARIES

Even with some nuances¹⁶, American Law and English Law treat the beneficiaries as enriched by the trust and treat them as if they received some property rights under a gift.

Several rules confirm the idea that, in common law, a trust is perceived as a form of gift over time to beneficiaries.

First of all, relevant to this idea are the rules, applicable under English law, which considers restraints on the alienation of a beneficiary’s vested entitlement invalid. In other words, the beneficiary position, once vested and not contingent, is a beneficiary’s property and, as for any property in which the beneficiary has full title, alienation cannot be restrained by the settlor¹⁷. This is because the beneficiary is considered as having received a “gift” of property which enriched him and, in trusts as in gifts, once a property is gifted it becomes the donee’s property and his ownership cannot be restrained.

In the United States, spendthrift clauses restraining the beneficiaries’ right of alienation, (invalid under English Law), are instead valid¹⁸. However, “the current position on spendthrift clauses is

¹⁶ Gallanis, *supra* note 10, at 237 (“American trust law will not become as proprietary as the English trust law from which it descends. But the rebalancing of the desires of the settlor with the interests and rights of the trust’s beneficiaries is both appropriate and welcome”).

¹⁷ See *Brandon v. Robinson* 18 Vesey Jun. 429, 433-34, 34 Eng. Rep. 379, 381 (L.C.)

¹⁸ See RESTATEMENT (THIRD) OF TRUSTS Â§ 58 cmt. a (2003) (“Spendthrift restraints are not permitted under English law . . .”). For a superb treatment of the American history, see Gregory S.

increasingly nuanced, recognizing more circumstances in which the beneficiaries must bear all the consequences as if they had ownership”¹⁹. Therefore, even if on this point the two legal system departed from two opposite points of view, now they are getting closer and closer in considering the beneficiary as automatically enriched by the trust.

Further elements confirm that the trust is seen in common law systems²⁰, as an instrument to “give over time” to beneficiaries²¹, instead of an appropriation of assets according to the settlor’s programme²² are:

- i) the rule in *Saunders. v. Vautier*. Beneficiaries are the beneficial owners of the trust property and they can terminate the trust, if they all agree, before the time set by the settlor, even against the settlor’s will.²³
- ii) the rule allowing beneficiaries, under a discretionary trust, to agree about the manner in which trust property shall be divided among them and to obtain it, even if the settlor gave the trustee the power to decide it²⁴;
- iii) the rule under which beneficiaries can instruct the trustee to transfer to a third party the trust property they are entitled to²⁵;
- iv) the rules under which beneficiaries may obtain a variation of trust when they are all adult and capable, and they all agree, as well as those rules under which they may request, and the judge may consent, to a variation of trust when they can show that it is in their best interest, even if they are not all adult and of full capacity²⁶.

V. SAN MARINO TRUST AS AN “APPROPRIATION PROGRAMME”

Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

¹⁹ Gallanis, *supra* note 10, at 222 – 223.

²⁰ An excellent comparative analysis, can be found in P. PANICO, *INTERNATIONAL TRUST LAWS* (2010).

²¹ Under English law, the trust can be seen, in my opinion, as a gift over time to beneficiaries, even in case of discretionary trust. The class of object of powers can be represented as a whole, as the donee. Beneficiaries, under a trust, are often considered, by English lawyers, as having a proprietary interest in the trust. They have a proprietary interest because, as a result of the gift under the trust by settlor, they are considered enriched by it. The fact that they may be entitled to receive possession of the trust assets later in respect of the settlement, explains the “over time” perspective of the gift embodied in the trust.

²² Even under English law, one may view the trust as a management and wealth holding tool, but of a wealth that is, in substance, considered already beneficiaries’ wealth, even if they are not the owners of the trust property yet. That’s why, before being a management tool, the common law trust is to be seen as a “gift over time”.

²³ See *Saunders. v. Vautier* (1841) 4 Beavan 115, 49 Eng. Rep. 282 (M.R.), *aff’d*, Cr. & Ph. 240, 41 Eng. Rep. 482 (L.C.); Trust (Jersey) Law 1984, art. 43(3).

²⁴ See *In re Smith*, [1928] Ch. 915.

²⁵ See *Grey v. I.R.C.*, [1959] 3 All E.R. 603 (H.L.).

²⁶ See Variation of Trusts Act 1958; Trust (Jersey) Law 1984, art. 47 (1).

All the rules confirming the idea that, in common law systems, the trust is treated as a gift over time to beneficiaries are reversed under San Marino Trust Law.

This was done with the clear purpose to abandon the idea of the trust as a gift over time to beneficiaries and embrace the idea that the trust is an appropriation programme set by the settlor for the management of segregated assets; that the trust is an asset partitioning tool for assets to be managed according to the settlor's will set out in the trust deed.

According to article 50.2 of the Trust Law, only if the trust instrument does not provide otherwise, a beneficiary may require in writing the trustee to postpone the transfer of trust assets to him or to make the transfer to a third party nominated by him. Therefore, the Trust Law placed in the settlor's hands the decision whether beneficiaries can direct the distribution of the trust assets differently from the settlor's directions contained in the trust deed, with regard to time or persons. This confirms the view that beneficiaries are not considered enriched with the trust property, until they actually receive it, upon distribution. Until that moment, they cannot deal with it at all, if the settlor so establishes.

According to article 50.3 of the Trust Law, only if the trust instrument does not provide otherwise, all the beneficiaries with fixed interests in the trust fund or, if there are none, all the beneficiaries may require the trustee to terminate the trust and transfer the trust assets to themselves or as they direct. Therefore it is in the settlor's hands to decide whether beneficiaries can terminate in advance the trust. They are not considered automatically enriched by the creation of the trust. Trust assets are managed by the trustee under the settlor's programme. The beneficiary's collective will cannot interfere with it in any manner.

Confirmation that, under the San Marino Trust Law, the trust is not considered as a gift over time to beneficiaries, who are not enriched by the creation of the trust, but an appropriation of segregated assets according to the settlor's programme, can be also found in the rule under article 51.2 providing that only if the trust instrument does not otherwise provide, a beneficiary may alienate, charge or otherwise dispose, in whole or in part, of his beneficial interest by instrument or instruments taking effect as against the trustee when he becomes aware of it or them, or, in the case of a beneficiary with a fixed interest not limited to his life, by will. Beneficiaries are not, therefore, enriched by the trust, if the settlor does not wishes so and if he restrains their rights. Their entitlement under a trust cannot be disposed as they wish, if the settlor otherwise provided for in the trust deed. They can enjoy the entitlement, but this is not necessarily a property that they can realize by selling it.

The idea that, under San Marino Trust Law, the trust is not a gift over time to beneficiaries, that they are not the beneficial owners of the trust assets, that they are not enriched by the trust, if the settlor does not want so, emerges also from the rules about variation of trusts. The trust deed contains the programme for the appropriation of trusts assets set by the settlor. If beneficiaries can vary it, this means that assets are at the beneficiaries' disposal, that they are enriched by them. Under San Marino law, the settlor can grant the power to vary the trust deed to beneficiaries. He can decide to enrich them. According to article 13.1, a trust instrument may provide that the

provisions contained in it or the governing law may be amended in the interest of the beneficiaries or to promote the purpose of the trust, and this power of amendment can be granted to the person chosen by the settlor. The settlor can decide not to grant such a power to beneficiaries and therefore he can decide not to enrich them. In this case, they cannot vary the trust, not even with the help of the judge. In fact, according to article 53.4, only the trustee may apply to the judge in order to be duly authorized to make those changes to the trust instrument which have become necessary or desirable. Beneficiaries are not entitled to appear before a judge attempting to obtain by him a variation of the trust deed, and so implicitly overruling the settlor's wish, having the latter explicitly chosen not to grant them such amending power.

Under English law, for a long time the beneficiary's right of information was decided according to the "gift over time" idea of trust. A beneficiary was entitled to inspect the trust documents and obtain information from them because, in some sense, they were his. He was considered the beneficial owner of the trust documents as well as of the trust assets. Nowadays, the information duty is not, in rhetorical terms, based on the beneficiaries' ownership of trust assets, but the scope of application of the rule is wider than before. All beneficiaries can get information about the management of the trust. This is because the trust is considered a gift over time to all beneficiaries, regardless that they received a fixed interest in the trust property or not²⁷.

San Marino Trust Law parted with this idea very clearly. Since the trust is not a gift over time to the beneficiaries, but an appropriation programme of segregated assets to be managed and disposed according to the settlor's programme, the beneficiaries do not have a right of information if the settlor does not grant it to them. According to article 49.1 of the Trust Law, only if the trust instrument does not provide otherwise, every beneficiary with a fixed interest shall have the right to inspect and take copies of the instruments and documents concerning his own rights. Similarly, under article 27.2 only if the trust instrument does not otherwise provide, the trustee of a beneficiary trust is bound to give to every beneficiary having a fixed interest: a) notice of the existence of the trust, of its name and of the address of the trustee, and of the provisions of the trust instrument which confer such interest; b) notice of all instruments or matters which amend or extinguish such interest; c) at the request of such a beneficiary, within an adequate period of time, an inventory limited to those trust assets in respect of which the beneficiary claims his interest, and an estimate of their market value comparable to the value claimed by the beneficiary.

A further element indicates that San Marino Trust Law did not embrace the English idea of trust as a gift over time to beneficiaries, but an appropriation of segregated assets to be managed, under fiduciary duties, by the trustee: the regulation of the breach of trust. Under the traditional English or international trust law, where trusts are viewed as a gift to beneficiaries, these latter are always entitled to take legal action against the trustee in case of breach. They are the beneficial owners of the trust property because the settlor, creating the trust, wished to enrich them. Therefore, they shall be entitled to enforce the trustee's fiduciary duties in case of breach. Under San Marino law,

²⁷ As well know to all readers, this position was abandoned in *Schmidt v. Rosewood Trust Limited* [2003] 2 A.C 709.

it is the settlor that, in the trust deed, can attribute or remove the entitlement of a beneficiary to take legal action against the trustee. In fact, according to article 42, only in absence of a contrary provision in the trust instrument, a trustee committing a breach of his own duty shall be bound at the request of a beneficiary or of the protector to restore the loss caused to the trust fund, or to the beneficiary who makes the claim. Of course, a trust deed cannot deprive at the same time all the beneficiaries and the protector of the right to take legal actions against the trustee. This entitlement has to be vested in at least one person.

In fact, the settlor can exclude the entitlement of any beneficiary to take legal action against the trustee.

A last, but not least, argument can be put forward to make clear the independency of the structure of the San Marino Trust Law from the ‘trust as a gift’ idea.

Under the traditional idea of the trust as gift over time to beneficiaries, the judge is urged to find a donee (that is to say a trust beneficiary under such a gift over time) in every case he can. Therefore, the tendency is to find a trust beneficiary even when the settlor did not want to have one. For example, under English law, if the settlor attempted to create a purpose trust, where no beneficiary entitlement is expected to arise according to the settlor’s will, but the implementation of the purpose does benefit individuals, the judge shall characterize the trust as a beneficiary trust and attribute to these individuals all the rights of a beneficiary²⁸.

Under San Marino law, article 48.5, makes clear that persons who receive or may receive assets or benefits from a purpose trust shall not be considered beneficiaries. Therefore, the settlor can characterize the trust as a purpose trust, depriving all individuals that can benefit from it of the beneficiaries’ rights. No risk of re-characterization may arise.

In substance, since no gift over time idea is embodied in the new San Marino Trust Law, the settlor can fully shape the legal position of beneficiaries, because the trust is seen, under such a law, as an appropriation of segregated assets, to be managed under the settlor’s programme indicated in the trust deed.

VI. SAN MARINO TRUST V. COMMON LAW TRUST: AUTONOMY OF TRUST PROPERTY V. SEGREGATION OF TRUST PROPERTY

A further characteristic of the San Marino trust takes distance from the existing common law trust law.

²⁸ See *Re Bowes*, [1896] 1 Ch 507.

In a common law trust, trust assets are considered as a fund²⁹. The fund is composed only by assets, not liabilities. As article 2 of the Hague Convention makes clear:

- (a) the assets constitute a separate fund and are not a part of the trustee's own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee.

In this manner, trust assets are not part of the trustee's own estate, but trust liabilities can be.

Both under the international trust model³⁰ and under the English trust model³¹, the trustee can be bound by all obligations he entered as a trustee, even if the extent of his liability can vary.

With the extent varying from one legal system to the other, the trustee can limit his liability if the counterparty accepts a clause with this effect or if he is aware that the trustee is acting as such. In any case, the trustee is liable toward third parties in tort for damages created by the trust assets (In U.S, see *Maine Shipyard v. Lilley* 2000 ME 9)³².

Under common law systems, the trust can be considered as an asset partitioning tool³³, not a liability partitioning tool. Trust assets are intangible by trustee's creditors, but trustee's assets are not always insulated against "trust liabilities" toward third party creditors.

Under San Marino law, the trust fund is composed by trust assets and liabilities, following the civil law idea of patrimony (See art. 1, lett. j). This fund composed by assets and liability transfers as such, all together, in all cases where trustees are substituted (see art.40.1). In this manner it avoids the standard problems arising in common law systems when the trustee leaves the office, transfers the assets, but remains bound by all the liabilities. In this manner, trust assets and trustee's obligation are transferred all together to the new trustee, who will be substituted, as debtor, in all the obligations entered, but not fully executed, by the former trustee. As a consequence, the former trustee is automatically substituted by the new one in all legal proceedings (see art. 40.4). At the termination of the trust, liabilities are transferred to beneficiaries, according to the share of assets they are entitled to receive (see art. 16.4). Assets and liabilities are a fund, which is transferred as such, in all cases where assets are transferred.

Furthermore, this fund is totally independent from the trustee's own estate, not simply segregated from it. Under article 47.1 of the Trust Law, any person, not being a trustee, a beneficiary or a protector, having rights against a trustee as a result of obligations undertaken or acts carried out manifestly as trustee or from acts or facts nevertheless related that capacity, may satisfy his claim

²⁹ B. Rudden, *Things as Thing and Things as Wealth*, OXFORD J. LEG. STUDIES (1994), 81-97.

³⁰ See article 32, Trust (Jersey) Law 1984.

³¹ See *Muir v. City of Glasgow Bank*, (1879 4 App. Cas 337, 368.

³² See P. PANICO, *INTERNATIONAL TRUST LAWS* (2010).

³³ Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998).

only out of the trust fund. In this manner, any liability incurred by the trustee (“related that capacity”) is to be satisfied by the trust assets, never by the trustee’s own assets, regardless the fact that the third party knew that the trustee was acting as such or had a claim in tort arising from the trust assets. In this way, a complete autonomy is created between the trust fund and the trustee’s own estate, not a simple separation or segregation.

VII. CONCLUSIONS

The San Marino Trust Law created a brand new model of trust. It is not simply a new trust law, with inspiration to the several international trust laws enacted in recent years.

This model of trust leaves to the settlor the power to completely decide the programme of appropriation of the trusts assets he wishes, without being bound by any rule deriving from the traditional common law idea that the trust is a gift over time to beneficiaries.

This idea is purely a civilian one. Civilian settlors are not at odd with trusts, but they are with the ‘gift over time’ idea embodied in the common law trusts. They are able to appreciate the value of segregation for their assets and are able to appreciate the value of drafting an appropriation programme for these assets, but they do not want to immediately enrich the beneficiaries. They want to “dominate” the beneficiaries’ will and not be “dominated” by the beneficiaries’ will. Their attitude is produced by centuries of experience with the *fideicommissum*, which embodied the dead-hand idea. Over the centuries, civilians set up *fideicommissa* to set an appropriation programme for the management of family assets over time, to bind the beneficiaries’ will regardless of their desires not to be bound by it. English trust law did not embody such an idea, on the contrary it adopted the ‘gift over time’ idea, and the will of beneficiaries has prevailed over the settlor’s will expressed in the trust deed. That’s, in my view, the reason why civilians are not always enthusiastic for the trust and they prefer foundations. Foundations still embody the idea of an appropriation tool of segregated assets, segregated because of the foundations’ legal personality, to be managed under the settlor’s programme, able to dominate the beneficiaries’ will.

San Marino’s Trust Law got inspiration from the basic principles under *fideicommissa* and from its fundamental idea, created a trust working on this basis³⁴.

³⁴ Other trust jurisdictions has attempted to adopt Foundations to satisfy this needs and to attract civilian clientele, without realizing that the problem with the trust does not lay in the absence of legal personality, in its fundamental structure based on the ‘gift over time’ idea. These attempts are destined to fail because they often created nothing but an incorporated trust, see A. Binnigton, *Jersey foundations: the birth of the incorporated trust?*, TRUSTS & TRUSTEES 133-139 (2009).



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COUNTRY REPORT: GERMANY

Johannes Rehahn and Alexander Grimm *

I. INTRODUCTION

In 1984 the German Federal Court of Justice (*Bundesgerichtshof*) declared the legal concept of trusts as it is known in common law states inconsistent with the doctrinal framework of German law.¹ As it will be shown, German law is neither able to produce exactly the same effects as a trust in common law nor has it one specific concept that works as a trust. However, even though German law does not know a trust as it exists in common law states, there are legal concepts in Germany that work differently but produce comparable results as a fiduciary relationship or are based on a similar idea.

The article consists of two main chapters. In the first one (II.), we will provide an overview of the German law with its restrictions and opportunities with regard to fiduciary concepts. These main features of German law are the underlying principles behind the specific legal concepts we will consider in the second chapter (III.).

II. GENERAL GERMAN LEGAL FRAMEWORK

In this first main chapter, we will discuss the legal restrictions that must be borne in mind when reflecting the German law concerning trust related concepts as well as the broad dogmatic lines behind the specific statutory law rules.

A. *Legal restrictions*

German property law is characterized, inter alia, by the numerus clausus principle (*Typenzwang*) and the fixation principle (*Typenfixierung*). The former means that the parties cannot create property rights which are not provided by law. The latter bans the parties from modifying essential elements of the established property rights. Both principles entail restrictions on the freedom of contract.² The justification for this is that property rights are designed for having erga omnes effects and hence must be respected by everyone. Therefore the definiteness of their

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¹ Federal Court of Justice (*Bundesgerichtshof*), *Praxis des Internationalen Privat- und Verfahrensrechts* 1985, 221, 223.

² Jürgen F. Baur/Rolf Stürner, *Sachenrecht*, § 1 n 7 (Munich, Verlag C H Beck, 18th ed 2009).

content is required.³ As a consequence, the parties are limited to the forms of property which are known by the German Civil Code (*Bürgerliches Gesetzbuch*), in particular sole ownership (*Alleineigentum*), joint ownership (*Gesamthandseigentum*)⁴ and co-ownership (*Miteigentum*).⁵ While joint property is owned by a community of owners in which an individual owner may not dispose of the joint object in its entirety or even of his own share individually,⁶ co-owners need consensus in order to dispose of the joint object but may control their own share.⁷ The result is a horizontal split of property between several beneficiaries. In contrast, property under German law is vertically indivisible. Thus, there cannot be different kinds of property with effects on third parties, e.g. a senior property and a lower property.⁸ This likewise entails the outcome that German law does not know a differentiation between legal ownership and equity ownership. Nonetheless, it also aims to provide equitable legal results. That can be seen for instance in § 242 German Civil Code. But as the wording of this provision shows, it only refers to obligations and not to rights in rem.⁹ The German law distinctly separates obligations and rights in rem. Restrictions in rem can only be imposed by statute law whereas a party may oblige another person merely as an obligation inter partes without effect towards third persons.¹⁰

B. Broad dogmatic lines concerning fiduciary relations

Despite of the mentioned restrictions, the German law has some specific legal concepts, some of which will be presented below, which produce results that are comparable but not identical to those of the common law trust. But due to the fact that the German law does not know a homogeneous concept of a trust, it is difficult to find common lines between these legal figures. However, some of these structures should be discussed briefly so that the reader may have a better idea about their concept and functioning.

Even if German property law is not based on a distinction between a legal and an equitable property, there is nonetheless the possibility that the patrimony of a person is split up. A person can have more than just one patrimony. The separation of the assets is thus rather determined by the notion of patrimony than that of property. The separated patrimony is called *Sondervermögen*.

³ Jürgen F. Baur/Rolf Stürner, loc. cit. at § 1 n 10.

⁴ Cf. §§ 719(1), 718 German Civil Code; §§ 105(3), 161(2) German Commercial Code (*Handelsgesetzbuch*) in connection with §§ 719(1), 718 German Civil Code; §§ 1419(1), 1416, 1485 German Civil Code; §§ 2033(2), 2032 German Civil Code.

⁵ Cf. §§ 741-758, 1008-1011 German Civil Code.

⁶ §§ 719(1), 1419(1), 1487(1), 2033(2) German Civil Code.

⁷ § 747 German Civil Code.

⁸ HANSPETER DARAGAN, *Trusts und gespaltenes Eigentum*, Zeitschrift für Erbrecht und Vermögensnachfolge 2007, 204; MARTIN WOLFF/LUDWIG RAISER, *Sachenrecht*, 176 (Tübingen, Mohr Siebeck, 10th ed 1957).

⁹ § 242 German Civil Code states: “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”

¹⁰ Cf. § 137 German Civil Code.

The reason for the split is that the separated patrimony serves specific functions¹¹ such as providing liable patrimony for specific creditors¹², a particular administration of that patrimony¹³ or the protection of certain persons¹⁴. The creation of a *Sondervermögen* is only possible within the limits of statutory law. An example can be found in the law of succession that enables the heirs, although being the legal owners of the decedent's property, to restrict their liability for the obligations of the descendant's estate to these assets and hereby to form two distinct patrimonies.¹⁵ Other examples are mutual funds. They have to separate the assets held for the account of the investors from their own assets.¹⁶ A result of the *Sondervermögen* is that the creditors of the person who has more than one patrimony are limited to the patrimony that is dedicated to them or respectively the person who is supposed to be protected by or has a legitimate interest in the *Sondervermögen* can intervene if the creditors try to enforce their claims against these separated assets.¹⁷

The concentration on the patrimony and not on the right in rem has also its consequences concerning the question who holds the legal title of the assets. On the one hand the person who is in charge to administer the separated assets may be the legal owner.¹⁸ On the other hand it is also possible that not the administrator but another person holds the legal title so that the former is only authorized by statute law to dispose of the assets.¹⁹ He may also be allowed to dispose of and administer the assets due to an authorization by the legal owner.²⁰ However, in this case, there is no separation of assets, merely the power to dispose of the property has doubled so that one more person can now e.g. transfer the property to a third party.²¹

These two distinct situations also lead to different outcomes with regard to the legal power of the person concerned. The German law clearly distinguishes between rights in rem and mere obligations (rights in personam). If the person is the legal owner he has the full right in rem and can therefore avail himself of the full legal power. This means that he can dispose of the property although there is a restrictive obligation towards the person who has a legitimate interest in the *Sondervermögen*.²² If the legal owner violates these obligations, the other party may have a damages claim against him. But the disposition of the property in favor of a third party is valid.

¹¹ KARL LARENZ/MANFRED WOLF, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS, § 21, n 32-41 (Munich, Verlag C H Beck, 9th ed 2004).

¹² E.g. with regard to the assets listed in the refinancing register, *infra* III. 6.

¹³ See *infra* III 1. b. for the *Testamentsvollstreckung* or III. 2. for the *Treuhand*.

¹⁴ Read *infra* III. 1. a. for the *Vor-* and *Nacherbe*.

¹⁵ § 1975 German Civil Code. For the other examples read *infra* III.

¹⁶ § 30(1) Investment Act (*Investmentgesetz*).

¹⁷ Cf. *infra* III. 2. particularly for the *Sicherungseigentum*.

¹⁸ See *infra* III. 2. for the *Treuhand*.

¹⁹ Read *infra* III. 1. b. for the *Testamentsvollstrecker*

²⁰ For the *Ermächtigungstreuhand* *infra* III. 2.

²¹ Cf. § 185 German Civil Code.

²² Concerning § 137 German Civil Code see *supra* II. 1.

Hence, the person with the legitimate interest in the separated property has no tracing right or right to follow the asset and claim it back from the transferee. This result is compulsory in German law because there is no legal connection between the beneficiary and the assets and thus he cannot have a right against third persons. There is, however, an exception: If the transferor of the property, by violating his obligations towards the beneficiary, and the transferee work together to harm the beneficiary, the latter has a claim against the acquirer to retransfer the property, whereas the mere acquirer's knowledge of a violation of the trustee's obligations is not sufficient.²³ This exception is thus narrowly construed.

One can summarize that the trustee has more power to dispose of the assets with regard to third persons (*Außenverhältnis*) than he is allowed to use due to his obligations towards the beneficiary (*Innenverhältnis*). This distinction of German law serves the interest of legal certainty and the facilitation of commerce. However, statute law may provide restrictions even for the legal owner in order to protect a specific person.²⁴ Another exception is that in some cases the beneficiary who has not the full right in rem can nonetheless avail himself of rights that are comparable with those that arise out of the legal title. It is stated that under certain circumstances the beneficiary deserves more protection because although he is not the legal owner the assets belong to him when seen from an economic point of view.²⁵ The existence of rights in favor of a person who is not the legal owner illustrates the fact that the legal ownership is considered as being sometimes too formal to provide equitable results.

In the opposite situation where the trustee is merely authorized to administer the assets but does not have the full right in rem, he is empowered to dispose of the assets only as far as the authorization has been given. However, there is an exception to that rule when the acquirer of the asset is in good faith.²⁶ In this situation, the transfer of the property is valid, but the asset can be demanded back if it was received through a gratuitous disposition.²⁷ If the disposition by the trustee is not valid, the legal owner has, of course, a right to follow the asset and claim it back. But if the statute law sets up the authority of the trustee to dispose of the assets, the legal owner may be deprived of his right to administer the assets.²⁸ The reason is again that the interests of third persons (especially creditors) should be protected.

If the trustee disposes of the assets and gains something back in return, the question appears whether these new assets are also subject to the fiduciary relationship. The German property law always focuses on a specific object (*Spezialitätsgrundsatz*). If the trustee receives a new object in return for a transferred asset that belonged to the trust relationship, it is therefore the general rule

²³ § 138 or § 826 German Civil Code; Supreme Court of the German Reich (*Reichsgericht*), RGZ 153, 366, 370-371; Federal Court of Justice (*Bundesgerichtshof*), *Neue Juristische Wochenschrift Rechtsprechungsreport* 1993, 367, 368.

²⁴ For the *Vorerbe*, see *infra* III. 1. a.

²⁵ Regarding the “economic ownership”, read *infra* III. 2.

²⁶ Cf. §§ 932-935 German Civil Code.

²⁷ § 816(1) German Civil Code.

²⁸ That is the case e.g. with regard to the devisee if there is an administrator (*Testamentsvollstrecker*), *infra* III. 1. b.

that he will become the legal owner of the new object and legal restrictions in rem on the transferred asset do normally not continue to exist with regard to the newly received object. It is thus said that there is no “real subrogation” principle.²⁹ Given that the German law only knows legal ownership, the new asset is normally not considered to be subject to the fiduciary relationship.³⁰ However, the German statute law provides some exceptions.³¹ There are also exceptions acknowledged by the doctrine to come to reasonable results.³² At least regarding rights in personam due to a contractual relationship between the beneficiary and the trustee, it is quite feasible to state that the trustee is bound by the fiduciary obligations also with regard to the newly received asset.³³

III. SPECIFIC GERMAN LEGAL CONCEPTS COMPARABLE WITH A “TRUST”

We will now discuss specific legal concepts that may have a trust element or that could be seen as trust-like devices.

A. *Law of Succession*

Like the common law the German law also knows legal concepts that serve the aim of the decedent to manage his assets even after his death. These are often cases in which the heirs or devisees do not have full control over the inherited assets because the decedent intended to retain his influence on the management of the assets and was not willing to leave this task to his successors.

1. Vor- and Nacherbe

A common law trust can be used by the decedent to set forth an order of succession. Also German law provides such a possibility. The testator has the opportunity to set out that there should be a prior devisee (*Vorerbe*) who will be followed by another specified subsequent devisee (*Nacherbe*).³⁴ Whilst the general rule is that the subsequent devisee inherits the property when the first devisee dies, the testator can also decide another event at which the assets will pass on to the subsequent devisee.³⁵ As it is the general rule in succession law, the prior devisee will receive all of the assets (including the debts) of the decedent as a bulk (*Universalsukzession*).³⁶ This devisee is thus the legal owner of the assets at the moment of death of the testator. Here it is where the

²⁹ Supreme Court of the German Reich (*Reichsgericht*), RGZ 94, 305, 308.

³⁰ To the *Unmittelbarkeitsprinzip* read e.g. Federal Court of Justice (*Bundesgerichtshof*), Neue Juristische Wochenschrift Rechtsprechungsreport 1993, 301.

³¹ Cf. §§ 1418(2) n 3, 1638(2), 2111(1) German Civil Code; § 30(2) Investment Act (*Investmentgesetz*).

³² E.g. concerning the *Anderkonto* (*infra* III. 2.) Federal Court of Justice (*Bundesgerichtshof*), Neue Juristische Wochenschrift 1959, 1223, 1225.

³³ Cf. GERHARD WALTER, *Das Unmittelbarkeitsprinzip bei der fiduziarischen Treuhand*, 113-147 (Tübingen, Mohr Siebeck, 1974); HELMUT COING, *Die Treuhand kraft privaten Rechtsgeschäfts*, 117-118 (Munich, Verlag C H Beck, 1973).

³⁴ § 2100 German Civil Code.

³⁵ § 2106(1) German Civil Code.

³⁶ § 1922 German Civil Code.

separation of patrimony occurs.³⁷ The assets which have been acquired due to the death of the testator are segregated from the other assets of the prior devisee.³⁸ He has therefore two different sets of patrimony. Under the general legal principles he could dispose of the assets which come from the decedent arbitrarily, because he has the legal title. However, the statute law aims to protect the reasonable expectations of the subsequent devisee (*Nacherbe*) by limiting the power of the *Vorerbe*.³⁹ In particular he can neither dispose of real property nor donate property,⁴⁰ unless the subsequent devisee gives his consent.⁴¹ Dispositions that violate these restrictions are at first effective but become invalid when the subsequent devisee inherits the property.⁴² The *Nacherbe* is also protected by a substitution provision so that assets acquired on the basis of assets that were attached to the property of the decedent belong to the inheritance.⁴³ The testator can release the prior devisee (*Vorerbe*) from specific restrictions.⁴⁴ If the prior devisee violates the obligations of a proper management of the assets⁴⁵ and the restrictions of the power of disposition set out by statute law do not suffice to protect the subsequent devisee, the latter may have a damages claim against the *Vorerbe*.⁴⁶

As far as the prior devisee is restricted in his power of disposition, he may be compared to a trustee.⁴⁷ Like the trustee, the prior devisee is the legal owner of the assets and he should take into account the interests of the beneficiary or here the subsequent devisee. However, already at this last point there is a difference to the trustee. The prior devisee is a full heir so that he does not only dispose of the assets in the interest of the subsequent devisee but also in his own interest. He is the person who is entitled to the emoluments that arise out of the assets.⁴⁸ Nonetheless, there are restrictions in the power of the prior devisee as has been shown above. The subsequent devisee holds no legal title but has a remainder or expectant right (*Anwartschaftsrecht*) he can

³⁷ For a general discussion of this see *supra* II. 2.

³⁸ HEINRICH LANGE/KURT KUCHINKE, *Erbrecht*, 581 (Munich, Verlag C.H. Beck, 5th ed 2001).

³⁹ §§ 2112-2115 German Civil Code.

⁴⁰ § 2113(1), (2) German Civil Code.

⁴¹ Cf. § 2120 German Civil Code where the subsequent devisee is obliged to give his consent if that is needed for the proper management of the assets.

⁴² See e.g. Thomas Wachter, in STEPHAN SCHERER (ed), *Münchener Anwaltshandbuch Erbrecht*, § 17 *Vor- und Nacherbschaft*, n 56 (Munich, Verlag C.H. Beck, 3rd ed 2010).

⁴³ § 2111(1) German Civil Code.

⁴⁴ § 2136 German Civil Code.

⁴⁵ Cf. § 2130(1) German Civil Code; see also KNUT WERNER LANGE, *Erbrecht*, § 45, n 112 (Munich, Verlag C.H. Beck, 2011).

⁴⁶ Karlheinz Muscheler, *Erbrecht*, n 2503 (Volume II, Tübingen, Mohr Siebeck, 2010).

⁴⁷ For a comparison with the German trustee (with which will be dealt *infra* III. 2.) see Dietmar Weidlich, in Palandt, *Bürgerliches Gesetzbuch*, § 2100, n 11 (Munich, Verlag C H Beck, 71st ed 2012); Wolfgang Grunsky, in *Münchener Kommentar, Bürgerliches Gesetzbuch*, § 2100, n 3 (Volume IX, Munich, Verlag C.H. Beck, 5th ed 2010).

⁴⁸ Federal Court of Justice (*Bundesgerichtshof*), BGHZ 78, 177, 188 = *Neue Juristische Wochenschrift* 1981, 115, 117.

sell.⁴⁹ In the end, the relationship between *Vorerbe* and *Nacherbe* is difficult to compare with the correlation between trustee and beneficiary or between beneficiary and remainder.⁵⁰

2. Testamentsvollstrecker

In German law there is a *Testamentsvollstrecker*, or executor/administrator of the will. The functions of that institution are comparable but not identical with the personal representative in common law. The *Testamentsvollstrecker* has the task to execute the decedent's will, especially to distribute the assets to the devisees.⁵¹ What is at most comparable with a trustee is the *Dauertestamentsvollstrecker*,⁵² who also administers the assets of the decedent over a long period of time.⁵³ It should not lead to confusion that in one point the German law comes to the somehow opposite result compared to the common law: In Germany, the *Testamentsvollstrecker* does not hold the legal title of the assets, rather the devisees are the legal owners.⁵⁴ At the end, this difference is somewhat formal if compared to the legal power of the *Testamentsvollstrecker* and his relationship to the devisees. The latter cannot dispose of the assets, only the *Testamentsvollstrecker* is capable of doing so.⁵⁵ He can take the possession of the assets and transfer the property to a third party.⁵⁶ The devisees are only protected against violations of the obligations of the *Testamentsvollstrecker*, if the transferee knows or should have known that the *Testamentsvollstrecker* violates his duties.⁵⁷ Otherwise the transfer of the property is valid and the devisees may only have damages claims against the *Testamentsvollstrecker*.⁵⁸ But the decedent may curb the power of the executor by a statement in his testament.⁵⁹ Moreover, even if the devisees are the legal owners of the assets, their creditors cannot enforce their claims into these assets.⁶⁰ The German law further strengthens the devisees by providing that assets which have been acquired by using administered property are submitted to the devisees again under

⁴⁹ Federal Court of Justice (*Bundesgerichtshof*), BGHZ 37, 319, 326 = Neue Juristische Wochenschrift 1962, 1910, 1912; Hans Brox/Wolf-Dietrich Walker, *Erbrecht*, n 356-360 (Munich, Verlag Franz Vahlen, 24th ed 2010).

⁵⁰ Manfred J. Klein, *Testamentary Trust nach Common Law und funktionsverwandte deutsche Zivilrechtsinstitute - ein Rechtsvergleich*, 101 *Zeitschrift für vergleichende Rechtswissenschaft* 175, 195-196 (2002).

⁵¹ §§ 2203, 2204 German Civil Code.

⁵² HEIN KÖTZ, *Trust und Treuhand*, 98 (Göttingen, Vandenhoeck & Ruprecht, 1963).

⁵³ §§ 2209, 2210 German Civil Code.

⁵⁴ § 1922 German Civil Code; Reinhard Kössinger, in Heinrich Nieder/Reinhard Kössinger, *Handbuch der Testamentsgestaltung, § 15 Einflussnahme des Erblassers über seinen Tod hinaus*, n 3 (Munich, Verlag C.H. Beck, 4th ed 2011).

⁵⁵ § 2211 German Civil Code.

⁵⁶ § 2205 German Civil Code with restrictions concerning gratuitous dispositions.

⁵⁷ Bernhard Schaub/Hans-Hermann Klumpp, in Manfred Bengel/Wolfgang Reimann (eds), *Handbuch der Testamentvollstreckung, Rechtsfragen und Probleme bei der Durchführung einer Testamentvollstreckung im Normalfall*, n 130 (Munich, Verlag C.H. Beck, 4th ed 2010).

⁵⁸ § 2219 German Civil Code.

⁵⁹ §§ 2208, 2216 German Civil Code; Federal Court of Justice (*Bundesgerichtshof*), *Neue Juristische Wochenschrift* 1984, 2464.

⁶⁰ § 2214 German Civil Code.

administration by the *Testamentsvollstrecker*.⁶¹ It can be concluded that the *Testamentsvollstrecker*, due to his fiduciary position with regard to the devisees, is a comparable concept to the testamentary trust notwithstanding the different legal structures.⁶²

3. Conclusion

German law does not know the legal concept of a testamentary trust. Apart from different legal structures, it is possible to come to comparable results like the common law. The beneficiary in German law can be seen as a devisee whose inherited assets are under the administration of a *Testamentsvollstrecker* (administrator). If remainder and beneficiary are not one and the same person, the latter can be declared to be a *Vorerbe* (prior devisee) and the former to be a *Nacherbe* (subsequent devisee) while the inheritance is under the administration of a *Testamentsvollstrecker*.⁶³

B. “German trust”

German law has a legal concept that is normally translated with “trust” (*Treuhand*). But in order to prevent misunderstandings it will hereinafter be called “German trust”. Since the German statute law does not set up specific provisions for the *Treuhand*, although some mention it, several dogmatic difficulties arise how this legal concept should and can be structured.⁶⁴

The prime example of a fiduciary relationship in German law is the *fiduziarische Treuhand*, or fiduciary trust. Already the name is a doubling. This is a construction by which a person transfers the full right in rem to another person who is obliged by a contract to deal with the assets in a specific manner.⁶⁵ As has already been stated above, this means that the trustee as the legal owner can transfer the legal title to a third person, whereas the settlor has only damages claims against the trustee in case he violates the contractual obligations.⁶⁶

There are several possibilities to curb this power of the trustee.⁶⁷ One way is to create an *Ermächtigungstreuhand*, or trust by authorization. In this case the settlor does not transfer the full right in rem to the trustee but merely authorizes him to manage or dispose of the assets in a specific manner.⁶⁸ If the trustee exceeds his authorization the disposal of the assets is not valid,

⁶¹ Federal Court of Justice (*Bundesgerichtshof*), *Neue Juristische Wochenschrift* 1991, 842; Rolf Stürner, in Othmar Jauernig (ed), *Bürgerliches Gesetzbuch*, § 2205, n 8 (Munich, Verlag C.H. Beck, 14th ed 2011).

⁶² Manfred J. Klein, *supra* n 50 at 191-194.

⁶³ Manfred J. Klein, *supra* n 50 at 196-197.

⁶⁴ Cf. as an overview Martin Henssler, *Treuhandgeschäft - Dogmatik und Wirklichkeit*, 196 *Archiv für die civilistische Praxis* 37 (1996).

⁶⁵ Joachim Gernhuber, *Die fiduziarische Treuhand*, *JURISTISCHE SCHULUNG* 1988, 355, 355-356.

⁶⁶ *Supra* II. 2.

⁶⁷ Cf. Hans Würdinger, *The German Trust*, 33 *J. Comp. Legis. & Int'l L.* 31, 38-39 (1951).

⁶⁸ § 185(1) German Civil Code.

unless the transferee acts in good faith. As already discussed above,⁶⁹ no real separation of property takes place⁷⁰ and the protection of the settlor is of minor importance because he is still the legal owner with all of its power. Therefore, it is said that this is not properly a case of *Treuhand* but rather only a comparable concept to a “German trust”.⁷¹ Another measure to mitigate the power of the trustee is to transfer the full right in rem under a resolutive condition⁷² so that the trustee loses the legal title when he violates the obligations towards the settlor. There are other ways to lessen the power of the trustee but with which should not be dealt here.⁷³

One of the main examples for a *fiduziarische Treuhand* is the *Sicherungseigentum*, or collateral ownership. This means that a person, who normally stays in possession of the asset, transfers the legal title to his creditor in order to secure the claim. Hence, the legal owner as the trustee holds the title for his own interest. It is thus a *eigennützige Treuhand*.⁷⁴ The legal title serves a specific aim, i.e. securing the claim. Therefore, the settlor of the “German trust” who possesses the asset is protected by the law. Pursuant to the general rule, the trustee is the legal owner with all its powers.⁷⁵ Nonetheless, the trustor has a right to impede legal actions taken by creditors of the legal owner with regard to that property as long as he as the debtor fulfills his obligations towards the title holder.⁷⁶ If the latter goes bankrupt, the settlor has a right under the insolvency statute (*Insolvenzordnung*) to separate the object from the insolvency estate although he is not the legal owner.⁷⁷ In contrast to that outcome, if the trustor goes bankrupt the legal owner is merely entitled to separate satisfaction in respect of his claim, so he is treated like a pledgee although he is the legal owner of the asset concerned.⁷⁸

This at first sight somehow curious result is justified by the idea that the trustor and possessor of the asset has not the legal title but holds something like an “economic ownership”.⁷⁹ Here it can be seen that the law protects the settlor of the “German trust” against the legal owner with powers which are normally reserved for the holder of the legal title. Due to the non-existence of specific

⁶⁹ *Supra* II. 2.

⁷⁰ Matthias Lehmann, in Esther Arroyo i Amayuelas (ed), *El Trust en el Derecho Civil, El Trust y el Derecho Alemán: ¿Historia de Amor o Choque de Culturas?*, 39, 45 (Barcelona, Bosch, 2007); other opinion Helmut Coing, *supra* n 33 at 96.

⁷¹ Martin Henssler, *supra* n 64 at 42.

⁷² § 158(2) German Civil Code.

⁷³ Cf. § 399 German Civil Code concerning the assignment of a claim; § 883 German Civil Code concerning disposals of real property.

⁷⁴ See e.g. Jörg Stefan Greving, *Der Treuhandgedanke bei Sicherungsübertragungen im italienischen und deutschen Recht*, 49 (Baden-Baden, Nomos, 2002).

⁷⁵ Hans Gerhard Ganter, in Herbert Schimansky/Hermann-Josef Bunte/Hans-Jürgen Lwowski (ed), *Bankrechts-Handbuch, § 95 Sicherungsübereignung*, n 58 (Munich, Verlag C H Beck, 4th ed 2011).

⁷⁶ § 771 Code of Civil Procedure; cf. Federal Court of Justice (*Bundesgerichtshof*), BGHZ 72, 141 = *Neue Juristische Wochenschrift* 1978, 1859.

⁷⁷ § 47 Insolvency Statute; cf. Dirk Andres, in Jörg Nerlich/Volker Römermann (eds), *Insolvenzordnung, § 47*, n 40 (Munich, Verlag C H Beck, 22nd ed 2012).

⁷⁸ §§ 50(1), 51 nr 1 Insolvency Statute; cf. Rolf Serick, *Eigentumsvorbehalt und Sicherungsübertragung*, 65 (Heidelberg, Verlag Recht und Wirtschaft, 2nd ed 1993).

⁷⁹ Supreme Court of the German Reich (*Reichsgericht*), RGZ 45, 80, 85; Federal Court of Justice (*Bundesgerichtshof*), *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 1993, 213, 214; Jürgen F. Bauer/Rolf Stürner, *supra* n 2, § 3, n 34.

“German trust” provisions, the German doctrine grapples with a classification of the relationship between the trustee and the settlor.⁸⁰ Anyway, the particular situation of the settlor of the “German trust” does not mean that there are two kinds of property in German law. At the utmost, the trustee lacks a part of his power as the legal owner and the trustor can avail himself of that part to the detriment of the former.⁸¹

The same rules apply more or less for a *fremdnützige Treuhand*, or “German trust” for the interests of another party, although the position of the trustee is mitigated.⁸² An example for that is the *Anderkonto*, a trust account that is managed by an advocate for his client.⁸³

C. Foundation

A legal concept that fulfills comparable functions like a charitable trust is the *Stiftung*, or foundation.⁸⁴ In order to devote assets or patrimony to specific aims, a person can create a new legal entity, the *Stiftung*. The founder must declare such an intention in writing or by will (testamentary foundation), the *Stiftungsgeschäft* or endowment transaction.⁸⁵ Additionally, he needs the permission of the *Bundesland*, or federal state, where the entity will have its seat.⁸⁶ The founder will transfer the patrimony to the new legal entity. He can set up rules how the foundation must administer the assets in the endowment transaction. The legal supervision of the *Stiftung* is fulfilled by the *Bundesland* where the foundation is seated and which must secure that the organs of the *Stiftung* respect the founder's intention.⁸⁷ The aims of the foundation are normally to provide a public good, in this case with advantages in taxation, although it is also possible to restrict the beneficiaries to specific persons.⁸⁸

Apart from the creation of a new legal entity, the trustor can also transfer the property to an already existing person with the declaration that the transferee must separate these assets from his own property and has to administer them on a continuing basis as the trustor has set it up.⁸⁹ This is a *Stiftungstreuhand* or *unselbständige Stiftung* (foundation trust or dependent foundation). That situation is a good example of a *Sondervermögen* that has been created with the effect that

⁸⁰ Cf. e.g. Martin Löhnig, *Treuhand*, 71-86 (Tübingen, Mohr Siebeck, 2006).

⁸¹ Rolf Serick, *supra* n 78 at 49-51, 148; Joachim Gernhuber, *supra* n 65 at 359; critical Martin Hensler, *supra* n 64 at 51-54.

⁸² Hans Gerhard Ganter, in *Münchener Kommentar zur Insolvenzordnung*, § 47, n 369, 371 (Volume I, Munich, Verlag C H Beck, 2nd ed 2007); Rolf Lackmann, in Hans-Joachim Musielak, *ZPO*, § 771, n 21 (Munich, Verlag Franz Vahlen, 9th ed 2012).

⁸³ Helmut Coing, *supra* n 33 at 60-62.

⁸⁴ Hein Kötz, *supra* n 52 at 114-120.

⁸⁵ §§ 81, 83 German Civil Code.

⁸⁶ § 80 German Civil Code.

⁸⁷ Cf. e.g. §§ 2, 10(1) Foundation Act of Saxony-Anhalt (*Stiftungsgesetz Sachsen-Anhalt*).

⁸⁸ Lothar Pues/Walter Scheerbarth, *Gemeinnützige Stiftungen im Zivil- und Steuerrecht*, 4-5 (Munich, Verlag C H Beck, 2nd ed 2004).

⁸⁹ Achim Westebbe, *Die Stiftungstreuhand*, 33-40 (Baden-Baden, Nomos, 1993).

creditors of the trustee cannot take legal actions with regard to that separated property because the founder or the beneficiaries can impede these actions.⁹⁰

D. Contractual Trust Arrangements

Since the mid-1990s Contractual Trust Arrangements (CTAs) have been increasingly used both by DAX-30-companies and small and medium-sized companies in Germany. CTAs are agreements which enable a company to improve its balance sheet ratios and creditworthiness in accordance with the International Financial Reporting Standards (IFRS), the United States Generally Accepted Accounting Principles (US-GAAP) and German accounting rules pursuant to the German Commercial Code by removing both the pension obligations towards its employees and the covering assets from the balance sheet (balance sheet contraction). Although the employer remains legally obliged to settle the pension claims of its employees, due payments will be done or reimbursed by another legal entity endowed by the employer. That is done, as we will discuss now, by the creation of a two-way trust (*doppelseitige Treuhand*) between the three involved parties.

From an economic point of view, a CTA leads to an outsourcing of the obligations to a third person. The second purpose of the agreement is to protect the covering assets against the access of the creditors in the event of insolvency of the sponsoring undertaking and hereby to ensure the settlement of the employees' pension claims.⁹¹ In balance sheet terms, the assets are offsettable if they are qualified as plan assets. This is the case if three requirements are met: the assets are held by a legally independent entity, they can be used only to settle employees' claims and they are not available to the employer's own creditors.⁹²

In practice, the first condition is usually met by establishing a registered association (*eingetragener Verein*)⁹³ whose object is to manage the plan assets and to make payments if the requirements laid down in the articles of association are satisfied.⁹⁴ Apart from that, the articles should on the one hand include provisions which ensure an appropriate level of influence of the

⁹⁰ See *supra* 2. for the *Treuhand*. See also Hagen Hof, in Werner Seifart/Axel Freiherr von Campenhausen (eds), *Stiftungsrechts-Handbuch*, § 36 *Unselbständige Stiftung*, n 163 (Munich, Verlag C H Beck, 3rd ed 2009); more restrictive Achim Westebbe, loc. cit., 144-150.

⁹¹ For a detailed explanation see Karlheinz Küting/Marco Keßler, in Peter A Doetsch/Peter Küpper (ed), *Betriebliche Altersversorgung und Recht, Auslagerung von Pensionsverpflichtungen mittels eines CTA - Das Zusammenspiel von Arbeits-, Insolvenz-, Steuer- und Bilanzrecht*, 145, 147-148, 151-157 (Munich, Verlag C H Beck, 2011). With regard to certain assets arising from an employment relationship the employer is even legally obliged to ensure their protection against insolvency, cf. § 7e Social Security Code IV and § 8a Semi-retirement Act.

⁹² Cf. IAS 19.7, SFAS 87.19, § 246(2) German Commercial Code.

⁹³ Cf. §§ 21-79 German Civil Code. In contrast to a limited liability company (*Gesellschaft mit beschränkter Haftung*), the choice of the legal form of an association has particularly the advantage that the members of an association do not have pecuniary rights such as the right to participate in profits, cf. Christoph Küppers/Christoph Louven, *Outsourcing und Insolvenzversicherung von Pensionsverpflichtungen durch Contractual 'Trust' Arrangements (CTA's)*, *Betriebs-Berater* 2004, 337, 338; Nicolas Rößler, *Contractual Trust Arrangements - eine rechtliche Bestandsaufnahme*, *Betriebs-Berater* 2010, 1405, 1406.

⁹⁴ Christoph Küppers/Christoph Louven, loc. cit. at 338-339; Nicolas Rößler, loc. cit. at 1406.

sponsoring undertaking but on the other hand should not unduly restrict the decision-making by the members of the association because otherwise the rejection of the application for registration has to be expected.⁹⁵ Subsequently, the sponsoring undertaking and the association will conclude a “trust” agreement which is qualified as a contract for the management of the affairs of another in terms of § 675(1) German Civil Code and serves as a framework contract for the transfer of the plan assets and, inter alia, obliges the trustee to manage the assets in its own name but for the account of the trustor, to follow the instructions given by the latter, to settle the claims of the employees directly or to make a compensatory payments and to re-transfer the assets in narrowly defined cases. On the basis of this administrative “trust” (*Verwaltungstreuhand*) the property will be transferred to the association by separate legal transactions.⁹⁶

The last requirement, namely to make these assets inaccessible to the creditors of the employer, is more difficult to fulfill because in the event of the opening of insolvency proceedings regarding the assets of the sponsoring undertaking, the trust agreement shall expire⁹⁷ which would normally establish a duty of the association to return the property to the insolvency administrator.⁹⁸ That is so because there is no coherent trust concept in German law and the mentioned trust is seen as being in the prime interest of the trustor, i.e. the employer. The most practical way to solve this issue is to set up another trust: Simultaneously with the conclusion of the administrative “trust” agreement, the sponsoring undertaking and the association will enter into a second “trust” agreement in order to secure the claims of the employees (*Sicherungstreuhand*). The contractual partners will agree to grant the employees independent payment entitlements against the trustee subject to the default of the employer.⁹⁹ Such default will not touch the security “trust” agreement because in this relationship the trustee manages the affairs of the employees, not those of the insolvent employer. Therefore, the trustee may demand separate satisfaction in the insolvency procedure on the basis of the employees’ claims.¹⁰⁰ Due to the fact that the trustee ensures the interests of both the sponsoring undertaking (based on the administrative “trust” agreement) and

⁹⁵ For examples of classical provisions see Christoph Küppers/Christoph Louven, *supra* n 93 at 338. For model articles see Maximilian von Rom, *Insolvenzversicherung und Jahresabschlussgestaltung durch doppelseitige Treuhandkonstruktionen - Rechtsprobleme sogenannter Contractual Trust Arrangements*, 293-298 (Baden-Baden, Nomos 2010).

⁹⁶ Christoph Küppers/Christoph Louven, *supra* n 93 at 340; Christoph Küppers/Christoph Louven/Jan Schröder, *Contractual Trust Arrangements - Insolvenzversicherung und Bilanzverkürzung*, Betriebs-Berater 2005, 763; Karlheinz Küting/Marco Keßler, *supra* n 91 at 149-150.

⁹⁷ Cf. §§ 115(1), 116 Insolvency Statute.

⁹⁸ Cf. §§ 667, 675(1) German Civil Code.

⁹⁹ This agreement is qualified as a contract for the benefit of third parties in terms of § 328(1) German Civil Code; Christoph Küppers/Christoph Louven, *supra* n 93 at 342; Karlheinz Küting/Marco Keßler, *supra* n 91 at 150-151; Christian Rolfs/Achim Schmid, *Sicherung von Betriebsrenten durch Contractual Trust Arrangements*, Zeitschrift für Wirtschaftsrecht 2010, 701, 705; Nicolas Rößler, *supra* n 93 at 1408.

¹⁰⁰ Cf. §§ 50(1), 51 n 1, 166-173 Insolvency Statute; Elke Bäuerle, in Eberhard Braun (ed), *Insolvenzordnung, § 51 Sonstige Absonderungsberechtigte*, n 40 (Munich, Verlag C H Beck, 5rd ed 2012); Stefan Birkel/Thomas Obenberger, *Die Sicherung von Anrechten der betrieblichen Altersversorgung über ein Contractual Trust Arrangement im Insolvenzverfahren - Folgen der Insolvenz für ein CTA und dessen Verhältnis zum PSVaG*, Betriebs-Berater 2011, 2051, 2052; Christoph Küppers/Christoph Louven/Jan Schröder, *supra* n 96 at 764-765; Nicolas Rößler, *supra* n 93 at 1412; Schirin Rüger, *Die Doppeltruhand zur Insolvenzversicherung von Arbeitnehmeransprüchen*, 273-275 (Baden-Baden, Nomos, 2010).

its employees (based on the security “trust” agreement), the second approach is called two-way “trust” (*doppelseitige Treuhand*).¹⁰¹

In conclusion, Contractual Trust Arrangements provide a way to ensure the settlement of liabilities to a certain group of persons and to protect the covering assets from any access by other creditors.

E. German Real Estate Investment Trust Stock Corporations

Another legal term which shows a conceptual similarity to the trust is the German Real Estate Investment Trust. In 2007, the German legislator passed the REIT Act.¹⁰² It was inspired by various foreign paradigms, especially from the US, and aimed to attract foreign investors with listed real estate investment vehicles that are exempted from corporation and trade tax (Real Estate Investment Trust Stock Corporations, also abbreviated as REIT-AG).¹⁰³ Originally, the favored solution was to keep the real estate assets separate from the assets of the corporation by holding the assets as a kind of *Sondervermögen*¹⁰⁴ for the account of the shareholders (*Trustvermögensmodell*).¹⁰⁵ However, the final approach abandoned this trust concept but anyhow bears some resemblance to the foreign models.

A REIT-AG is a stock corporation that has to comply with the requirements of the REIT Act in order to be granted tax exemption.¹⁰⁶ With regard to issues not covered by this act, the company is governed by the Stock Corporation Act.¹⁰⁷ Unlike a normal stock corporation, a REIT-AG must have share capital of at least € 15 million¹⁰⁸ and has to restrict its purpose of enterprise mainly to the acquisition, holding, management and disposal of real properties other than existing rental

¹⁰¹ Christoph Küppers/Christoph Louven, *supra* n 93 at 342-343; Christoph Küppers/Christoph Louven/Jan Schröder, *supra* n 96 at 763-764. For a model contract see Maximilian von Rom, *supra* n 96 at 277-291.

¹⁰² Art. 1 of the *Gesetz zur Schaffung deutscher Immobilien-Aktiengesellschaften mit börsennotierten Anteilen*, Federal Law Gazette (*Bundesgesetzblatt*) 2007, ch. I, 914.

¹⁰³ Government Draft, BR-Drucks. 779/06, 17-18. For a summary of the reasons for the introduction of REITs see Guido Quass/Roman A Becker, *Die REIT-AG nach dem Gesetz über deutsche Immobilien-Aktiengesellschaften mit börsennotierten Anteilen*, *Die Aktiengesellschaft* 2007, 421, 421-422; Uwe Wewel, in Marcus Helios/Uwe Wewel/Michael R Wiesbrock (eds), *REIT-Gesetz, A. Einleitung zum REITG-Kommentar*, n 16 (Munich, Verlag C H Beck, 2008).

¹⁰⁴ For details on the *Sondervermögen* see *supra* II. 2.

¹⁰⁵ Jörg Böhmer, *Börsennotierte Immobilienaktiengesellschaften (REITs) in Deutschland - Einführung und Umsetzung nach dem REIT-Gesetz*, 38 (Berlin, Duncker & Humblot, 2010); Sorika Pluskat/Matthias Rogall, *Steuerbegünstigte Immobilienaktiengesellschaften (REITs) in Deutschland - Umsetzungsvorschläge für das Trustvermögensmodell*, Wertpapiermitteilungen 2006, 889, 890-891; Uwe Wewel, *supra* n 103 at n 17.

¹⁰⁶ Cf. § 16(1) REIT Act.

¹⁰⁷ § 1(3) REIT Act.

¹⁰⁸ § 4 REIT Act. According to § 7 Stock Corporation Act, the share capital of a normal stock corporation must be at least € 50000.

properties.¹⁰⁹ In addition, at least 75 percent of the total assets must consist of immovable assets and at least 75 percent of the revenue must result from these assets.¹¹⁰ The registered office and the management of the REIT-AG must be located in Germany.¹¹¹ Its shares are required to be admitted to trading on an organized market, e.g. on the regulated market of a stock exchange, in a Member State of the European Union or in a State of the European Economic Area.¹¹² The principal purpose of this condition is to give a broad range of investors the chance to invest in real estate in an indirect way.¹¹³ In order to ensure that this investment opportunity is permanently available also for small shareholders, provisions concerning the shareholder structure were introduced as well.¹¹⁴ At the time of listing at least 25 percent of the shares must be held in free float. Afterwards, this minimum quota decreases to 15 percent.¹¹⁵ Furthermore, no investor may hold ten percent or more of the shares or have ten percent or more of the voting rights.¹¹⁶ Once the requirements for a REIT-AG are met, the company name has to include the add-on “REIT-Aktiengesellschaft” or “REIT-AG” and has to be filed for entry in the commercial register.¹¹⁷ This new kind of corporation is yet to prove its practical importance.¹¹⁸

There is still a fiduciary element within the REIT-AG. That can be seen in § 13(1) REIT Act. In simple terms, this provision requires the REIT-AG to distribute at least 90 percent of its annual profits to the shareholders as a dividend.¹¹⁹ The distribution requirement is the counterpart to the tax exemption at the corporate level and intends to ensure the taxation of the activities of the

¹⁰⁹ § 1(1) n 1 REIT Act. However, the corporation may not engage in property dealing in terms of § 14 REIT Act. Pursuant to § 23(3) n 2 Stock Corporation Act, the founders of a normal stock corporation are free to choose almost any purpose of enterprise in the articles.

¹¹⁰ § 12(2), (3) REIT Act.

¹¹¹ § 9 REIT Act. The compatibility of this requirement with Art. 49 and Art. 63(1) of the Treaty of the Functioning of the European Union (TFEU) is sometimes questioned; see Sebastian Franck, *REIT-Aktiengesellschaften - Voraussetzungen und Rechtsfolgen*, Mitteilungen des Bayerischen Notarvereins, der Notarkasse und der Landesnotarkammer Bayern 2007, 173, 175; Gerhard Kraft/Jan F Bron, *Das REIT-Gesetz im europarechtlichen Fadenkreuz - Grundfreiheitsliche Problematiken und Verbesserungsbedarf im Gesetz zur Schaffung deutscher Immobilien-Aktiengesellschaften mit börsennotierten Anteilen*, Internationales Steuerrecht 2007, 377, 377-378.

¹¹² § 10(1) REIT Act. Some authors consider this requirement an infringement of Art. 63(1) TFEU; see Gerhard Kraft/Jan F Bron, *supra* n 111 at 378.

¹¹³ Government Draft, *supra* n 103 at 32.

¹¹⁴ Government Draft, *supra* n 103 at 33.

¹¹⁵ § 11(1) REIT Act.

¹¹⁶ § 11(4) REIT Act. Again, the compatibility of this provision with Art. 63(1) TFEU is sometimes doubted; see Jan F Bron, *Das Gesetz zur Schaffung deutscher Immobilien-Aktiengesellschaften mit börsennotierten Anteilen - Das Gesetz über deutsche Real Estate Investment Trusts unter Berücksichtigung der wesentlichen Änderungen gegenüber dem Regierungsentwurf*, Betriebs-Berater-Special 7/2007, 2, 5; Gerhard Kraft/Jan F Bron, *supra* n 111 at 378-379.

¹¹⁷ §§ 6, 8 REIT Act.

¹¹⁸ Heiko Gemmel/Sascha Kaiser, *Aktuelles zum deutschen REIT - Chancen und Risiken der Finanzkrise*, Deutsches Steuerrecht 2009, 1346; Hans Volkert Volckens, *Feilen am deutschen Reit*, Frankfurter Allgemeine Zeitung of November 26, 2010, 41.

¹¹⁹ The shareholders of a normal stock corporation may demand the distribution of a dividend only if the Shareholders' Meeting adopts a corresponding resolution regarding the distribution of profits; see §§ 58(4), 174 Stock Corporation Act.

REIT-AG at the level of the shareholders.¹²⁰ In other words, only 10 percent of the profits are available for investments. The distribution requirement is a hint that the legislator regards the shareholders as the true economic beneficiaries of the company's activities. They, however, may not intervene against the access of other creditors to the assets of the company and will only receive a dividend if any surplus is left. Therefore, the fiduciary relationship between the shareholders and the company is existent but limited. Admittedly, it is not a classical trust concept. Yet, the shareholders stand in the focus of the REIT-AG, more than in a common limited company by shares, so that it is possible to see in that structure the justification why it is already called an investment trust.

In sum, the REIT-AG as provided by the REIT Act is a long way off from the common law trust and the originally favored *Trustvermögensmodell*. Although a fiduciary element is still visible it is very weak.

F. Refinancing register

Since 2005, the German Banking Act (*Gesetz über das Kreditwesen*) provides that certain creditors of a refinancing company may claim the separation of the assets of the debtor which are duly registered in the refinancing register from the insolvency estate if the debtor files for insolvency.¹²¹ Through this, these creditors get a legal position that is protected from insolvency although a transfer of the assets has not taken place.¹²² This is where the fiduciary element appears. In order to better understand the concept, we will briefly describe the refinancing register.

The objective of its introduction was to facilitate the financing and refinancing for German companies, in particular with a view to Asset-Backed Securities (ABS).¹²³ In highly simplified terms, an ABS transaction normally is structured as follows:¹²⁴ In order to generate liquid funds, an originator, for example a bank, sells and transfers its illiquid assets such as secured loan receivables to a special purpose vehicle (SPV). The SPV refinances itself through the issuance of

¹²⁰ Government Draft, *supra* n 103 at 36; Jörg Böhmer, *supra* n 105 at 95; Jan F Bron, *supra* n 116 at 16; Sebastian Franck, *supra* n 111 at 177.

¹²¹ Cf. § 22j(1) German Banking Act in connection with § 47 Insolvency Statute.

¹²² Finance Committee of the German *Bundestag*, BT-Drucks. 15/5852, 16.

¹²³ Finance Committee, *loc. cit.* at 15-16.

¹²⁴ For a more detailed explanation see Roland Arlt, *True Sale Securitisation unter besonderer Berücksichtigung der Rechtslage in Deutschland und Italien*, 70-72, 124-285 (Berlin, Duncker & Humblot, 2010); Martin Geiger, in Mathias Habersack/Peter O Mülbart/Michael Schlitt (eds), *Unternehmensfinanzierung am Kapitalmarkt, § 18 Asset-Backed Securities* (Cologne, Verlag Dr Otto Schmidt, 2nd ed 2008); Uwe Jahn, in Herbert Schimansky/Hermann-Josef Bunte/Hans-Jürgen Lwowski (eds), *Bankrechts-Handbuch, Volume II, § 114a Verbriefung von Forderungen - Asset Backed Securities ("ABS")* (Munich, Verlag C H Beck, 4rd ed 2011); Matthias Lehmann, *Finanzinstrumente - Vom Wertpapier- und Sachenrecht zum Recht der unkörperlichen Vermögensgegenstände*, 125-128 (Tübingen, Mohr Siebeck, 2008).

financial instruments which are backed by the acquired assets.¹²⁵ If the assigned receivables are secured by mortgages, the financial instruments are called Mortgage-Backed Securities.¹²⁶

Since investors are not prepared to bear the risk of insolvency of the originator, the issuance will only be successful if the SPV is in a legal position to demand the separation of the assets in the event of insolvency.¹²⁷ As a basic rule, only the proprietor of a right in rem is entitled to exercise the right to separation.¹²⁸ This means that a “trust” agreement between the originator and the SPV which does not lead to a transfer of assets will normally not withstand insolvency.¹²⁹

However, the transfer of the ownership which, inter alia, would grant the SPV such a right in rem is cumbersome, takes a long time and is associated with large costs if the claim is secured by a registered mortgage or a registered land charge because their transfer requires an amendment of the land register.¹³⁰ In order to overcome this difficulties, the German Banking Act provides an insolvency-proof fiduciary relationship between a bank or another refinancing company and certain creditors, in particular SPVs, who are entitled to the transfer of a claim or related security mentioned in that act. The refinancing company must be the owner of the assets that have to be listed in the refinancing register.

A refinancing company is defined as a company that sells for refinancing purposes its assets or claims to SPVs, refinancing intermediaries or banks.¹³¹ If the refinancing company is a bank, it shall normally maintain the refinancing register itself. Most of the other refinancing companies may outsource the management of the register to a bank or to the *Kreditanstalt für Wiederaufbau*, a development bank owned by the Federal Republic of Germany and the federal states.¹³² The register must include a lot of specific information about the corresponding security etc.¹³³ The register management is publicly monitored and supervised.¹³⁴

¹²⁵ Martin Geiger, supra n 124 at n 2-3; Uwe Jahn, supra n 124 at n 4; Matthias Lehmann, supra n 124 at 125-126.

¹²⁶ Uwe Jahn, supra n 124 at n 6; Matthias Lehmann, supra n 124 at 128.

¹²⁷ Matthias Lehmann, in Katja Langenbacher/Dirk Bliesener/Gerald Spindler (eds), *Bankrechts-Kommentar, Vorbemerkung zu §§ 22a-22o KWG*, n 2 (Munich, Verlag C H Beck, forthcoming); Claus Tollmann, *Die Sicherstellung der Insolvenzfähigkeit bei der Asset Backed Securitization nach dem neuen Refinanzierungsregister gemäß §§ 22a ff. KWG*, Wertpapiermitteilungen 2005, 2017, 2018; Id., in Karl-Heinz Boos/Reinfrid Fischer/Hermann Schulte-Mattler (eds), *Kreditwesengesetz, § 22j KWG*, n 4 (Munich, Verlag C H Beck, 4th ed 2012).

¹²⁸ Rolf Leithaus, in Dirk Andres/Rolf Leithaus/Michael Dahl (eds), *Insolvenzordnung, § 47*, n 9 (Munich, Verlag C H Beck, 2nd ed 2011).

¹²⁹ Cf. supra III. 4. For a description of the relevant case-law see Klaus Pannen/Patrick Wolff, *ABS-Transaktionen in der Insolvenz des Originators - das Doppeltreuhandmodell und die neuen Refinanzierungsregister*, Zeitschrift für Wirtschaftsrecht 2006, 52, 54; Claus Tollmann, supra n 127 at 2019-2020; Id., supra n 127 at 7-9.

¹³⁰ See § 873(1) German Civil Code. For a description of the difficulties in practice see Manfred Obermüller, *Das Refinanzierungsregister*, Zeitschrift für das gesamte Insolvenzrecht 2005, 1079, 1080-1081.

¹³¹ For details read § 1(24) German Banking Act.

¹³² § 22b(1), (2) German Banking Act.

¹³³ For details see § 22d(2) German Banking Act.

¹³⁴ §§ 22e(1), (2), 22g(1), (2) German Banking Act.

The effects of the proper entry in the refinancing register are laid down in § 22j German Banking Act: If insolvency proceedings are opened against the assets of the refinancing company under German law, the beneficiary, i.e. one of the creditors of the refinancing company mentioned above, may request the segregation and the delivery of duly registered assets.¹³⁵ Moreover, the beneficiary is authorized to take action against measures of compulsory enforcement or seizure with a view to the registered assets even outside the state of insolvency.¹³⁶ As a consequence, the legal position of the beneficiary is close to the legal position of a property owner.¹³⁷ Thus, this concept leads to a fiduciary relationship through which the refinancing company is the legal owner whilst the beneficiary of the registered assets is favored by statute law to have rights partially comparable to those of the legal owner. However, since the beneficiary has not acquired ownership, the registration will not protect him against dispositions of the assets tackled by the refinancing company contrary to the terms of the contract. In such a case, the beneficiary may only demand damages.¹³⁸

Summarizing the above, it can be said that the refinancing register led to a privilege under German civil procedure and insolvency law for financing and refinancing transactions. The assets which are duly registered in the refinancing register are reserved for certain creditors in order to satisfy their claims from the financing or refinancing contract. This describes an example for a very specific case in which the legislator leaves the general principles of German civil aside and provides for a specific fiduciary relationship governed by narrow-constructed statute law.

IV. CONCLUSION

The discussed concepts in the different branches of German law share the same idea like a common law trust, i.e. the fiduciary relationship. However, the legal structures are different. That German law only knows one kind of property with no distinction between a legal and an equitable one is a reason why the common law trust cannot exactly be mirrored. However, statute law and contract practice fill a lot of equity gaps. In German law, there is no coherent legal concept of a trust. Hence, even if there are general and common lines, the statute law tends to provide very specific provisions. This can be seen, for instance, in the law of succession that knows the concept of a *Vorerbe* and a *Nacherbe*, according to which the legal powers of the former are limited in favor of the latter although the *Vorerbe* is the legal owner of the assets. In contrast to that, the *Testamentsvollstrecker* is equipped with strong legal powers although he does not hold

¹³⁵ § 22j(1) German Banking Act in connection with § 47 Insolvency Statute. For details see Matthias Lehmann, *supra* n 127, § 22j KWG, n 5-6.

¹³⁶ § 22j(1) s 3 German Banking Act in connection with § 771 Code of Civil Procedure.

¹³⁷ Claus Tollmann, *Die Bedeutung des neuen Refinanzierungsregisters für Asset Backed Securities*, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 169 (2005), 594, 615; *Id.*, *supra* n 127 at n 23a.

¹³⁸ Jens Rinze/Renata Noglik, in Andreas Schwennicke/Dirk Auerbach (eds), *Kreditwesengesetz, § 22j*, n 2 (Munich, Verlag C H Beck, 2009); Dirk Schmalenbach/Peter Sester, *Voraussetzungen und Rechtsfolgen der Eintragung in das neu geschaffene Refinanzierungsregister*, *Wertpapiermitteilungen* 2025, 2031. See also Finance Committee, *supra* n 122 at 23.

the legal title. Likewise, a beneficiary of a “German trust” can avail himself of an “economic ownership” even to the detriment of the trustee’s creditors despite the fact that the trustee is the legal owner. A partial departure from the formality and indivisibility of property ownership can also be seen in the refinancing register whose purpose is to give certain creditors the power to act like a legal owner in order to protect the assets that belong to the refinancing company. However, statute law may also set forth rules that are labeled as dealing with a trust although there are at the utmost weak fiduciary elements, as can be seen in the REIT Act. Besides these statutory provisions, the parties may also hammer out contractual trust-like concepts that are acknowledged by the doctrine, e.g. contractual trust arrangements or the *Sondervermögen*.

