Trusts: the rise of a global legal concept

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1. Introduction

Trusts have been a long-time favourite subject of comparative scholarship. As we know them, they arose in the English courts of equity and are an integral part of all legal systems derived from English law. But deep changes in the legal and financial arenas have transformed this situation over the past few decades and turned trusts into a truly global phenomenon. Prompted by the success of the English type of trusts, scholars in civil and Islamic law jurisdictions have

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re-explored fiduciary institutions which show striking similarities though not the overwhelming success enjoyed by trusts in the legal history in common law jurisdictions. Over time trusts of the English type have been received and adopted in civil law systems, such as Scotland, South Africa, Quebec and Louisiana, which are geographically and historically close to common law jurisdictions. In a more deliberate move during the 20th century, some civilian jurisdictions such as Liechtenstein, Panama, Japan and Israel have enacted trust laws of their own. In the course of the past 20 years, numerous offshore, and often insular, financial centres have enacted statutory codifications of trusts to attract investors to their hospitable shores. In the process they have often been very innovative and sometimes separated from some of the traditional fundaments of trust law. In the first decade of the 21st century, Luxembourg has statutorily improved its *fiducie* to better compete with trusts and the People's Republic of China has adopted a comprehensive trust statute while France has made its first step by enacting its own limited avatar of the *fiducie*.

This expanding interest in trusts is largely due to an increased mobility of capital, investors, lawyers and academic scholars over the traditional geographic boundaries of the "trust-proper." The legal and the financial professions have teamed up in promoting trusts (and their own services) beyond their traditional borders. Trusts are now used not only for traditional estate planning purposes, but increasingly and maybe predominantly for commercial and financial transactions such as pension and investment funds, holding and management of security interests, asset-backed securitisation, project financing, and many more.

The increasing significance of cross-border trusts prompted the Hague Conference of Private International Law to develop an international instrument promoting uniform conflict of laws rules. The 1985 Convention on the Law Applicable to Trusts and on Their Recognition is now in force in thirteen States, including trust and non-trust jurisdictions.[1]

While trusts seemed to be the preserve of common law jurisdictions, they have become common grounds for developed and developing legal systems. It is important to recognize that the trust concept is not emerging intact from this success story. It has been transformed by its incorporation in jurisdictions where

1. The Convention has been adopted by Australia, Canada (in respect of eight provinces), China (exclusively in respect of Hong Kong) Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, San Marino, Switzerland, and United Kingdom. The United States has signed, but not (yet) ratified, the Convention. *See* the status of the Convention at www.hcch.net/index_en.php?act=conventions.status&cid=59. All URLs have been last visited on 15 November 2011.

equity is a moral imperative rather than a source of the law and where the distinction between legal title and beneficial ownership was deemed irreconcilable with fundamental legal tenets. The expansion of trusts, some of it over long periods of time, some of it very recent, is forcing legal scholars and practitioners to deepen and change our understanding of the institution. This transformation is not confined to Europe and it would be impossible to restrict the discussion in this chapter to what can be observed within Europe's political or geographical boundaries as the title of this book would require. What happens in Europe is the regional reflection of much broader trends that we need to examine; and these trends in turn have modified and altered the trust concept.

This chapter has three purposes. The first describes the basic notion of a trust as it has developed over centuries in England and other common law jurisdictions. It is written for absolute beginners; it will surely be faulted by many knowledgeable persons as a sin of generalisation, a price to be paid for boiling down to a few pages what takes a few hundred even in the most basic textbooks for the students of trusts. The second section broadens the perspective by looking at the praetorian or legislative reception of the trust in selected legal systems. The choice is not truly representative: it places a stronger focus on Europe—as fitting for this book—at the cost of ignoring significant important developments in other regions (Asia and the Middle East, in particular) and disregarding the sometimes adventurous developments made in offshore financial centres. The third section takes yet a wider angle by examining an international instrument providing uniform conflict of laws rules, the *Hague Convention on the Law Applicable to Trusts and on Their Recognition*. The fourth section concludes that the trust concept has become a global legal concept; but such acceptance comes at the price of losing some of the distinctiveness enjoyed by the common law trust.

2. Trusts in the Narrow Sense: The "Common Law" Trust

In a possibly over-quoted statement, Frederick William Maitland, the 19th century foremost English legal historian, wrote: "If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea."[2]

2. Maitland, The Unincorporate Body, in The Collected Papers of Frederick William Maitland (H.A.L. Fisber ed.), III, Cambridge 1911, 72.

This claim to the uniqueness of the trust idea and institution as the result of the development of English law finds its roots and justification in the development of equity as a set of remedies and underlying principles which were developed under the authority of the Lord Chancellor by courts distinct from the common law courts. In the English legal tradition, the law of trusts is a wide body of rules and remedies applying to a situation where one or more trustees are vested with legal title in certain assets under the equitable obligation[3] to administer and dispose of the same in the exclusive interest of beneficiaries or for a charitable purpose.

This chapter is no place to describe the circumstances under which English courts of equity developed a body of rules and remedies protecting the beneficiaries of trusts. That history begins with the emergence of *uses* in the early 14th century, its evolution from a purely moral obligation to one that can be enforced in the courts of chancery, its partial abolition by Henry VIII in 1535 for fiscal reasons, its re-creation in the guise of trusts in the early 17th century, and its constant development ever since.[4] It is important to note that the concept of trust, as a term of art and as a legal institution distinct from others such as contracts, torts, or unjust enrichment, originated from English legal history and diffused into the legal systems of most of England's former colonies. The word and the notion were later received in other legal systems that did not derive from English law. This is not to say that other jurisdictions have no functional equivalent for trusts. Significant scholarship has been devoted to comparing trusts with such institutions as *fiducie*, *Treuhand*, *waqf*, *fideicommisso*, *foundation*, *Anstalt*, etc.[5] Whether, and where, a line must be

3. While equitable refers here to the historical context in which the obligations of trustees were incrementally developed, close legal analysis and the reception of trusts in legal systems where equity refers neither to special courts or distinct legal rules strongly suggest that the equitable characterisation of trustees' obligations is not a necessity, see particularly Honoré, Trusts: The Inessentials, in Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn, London 2003, 7–20.

4. See Waters, Institution of the Trust in Civil and Common Law, as well as many contributions to Helmholz/Zimmermann (eds.), Itinera Fiduciae: Trust and Treuhand in Historical Perspective, esp. the chapters by Biancalana (Medieval Uses), Helmholz (Trusts in the English Ecclesiastical Courts 1300–1640), Jones (Trusts in England after the Statute of Uses: A View from the 16th Century) and Macnair (The Conceptual Basis of Trusts in the Later 17th and Early 18th Centuries).

5. See, among many other contributions, Lepaulle, Civil law substitutes for trusts, 36 Yale L. J. 1126–1147 (1927); Kötz, Trust und Treuhand: Eine rechtsvergleichende Darstellung des anglo-amerikanischen Trust und funktionsverwandter Institute des deutschen Rechts, Göttingen 1963; de Wulf, The Trust and Corresponding Institutions in the Civil Law; Bruxelles 1965; Fratcher, Trust, in International Encyclopedia of Comparative Law,

drawn between the "trust proper" and structurally or functionally similar institutions is a matter for scholarly debate, and a hot one at that.[6]

For lack of better words, "common law trust" will refer to the legal institution as it was developed by English courts and, from the 19th century, by other courts building on this English heritage. Obviously, the words themselves are a paradox since trusts were born of the jurisdiction of equity administered by the Lord Chancellor and remain a part of equity.

2.1. Notion

There is no generally accepted definition of the common law trust. One of the more often cited was coined by Underhill in his leading treatise on *Trusts and Trustees* in 1878, was quoted by Romer L.J. in *Green v. Russell*,[7] and stands firm—with a few changes—as the first sentence of the treatise's 18th edition:[8]

> "A trust is an equitable obligation, binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*) of whom he may himself be one, and any one of whom may enforce the obligation."

This definition highlights the fact that the trust is a relationship—and, specifically, one subject to the rules of equity—between one (or more) trustee and one (or more) beneficiary in connection with some property. The definition does not capture the alternative type of trusts, where there are no beneficiaries and the trustee holds the property for a specific purpose, usually a charitable one as recognised by the law governing the trust. Since the enforcement of the obligation binding the trustee is a necessary element of any trust

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vol. VI, chp. 11, Tübingen 1974; Cantin Cumyn (ed.), Trust vs Fiducie in a Business Context, Bruxelles 1999.

6. See particularly Lupoi, Trusts: A Comparative Study, Cambridge 2000, and Graziadei/Mattei/Smith (eds.), Commercial Trusts in European Private Law, Cambridge 2005. A good example of such debate may be found in the claim that secret and semi-secret testaments in France, Italy and Spain in the 16th and 17th centuries created trusts even in name (*confidentia*), see Lupoi, The Civil Law Trust, 32 Vand. J. Transnat'l L. 973–975 (1999).

7. [1959] 2 QB 226, [1959] All ER 525 at 531.

8. Underhill and Hayton Law of Trusts and Trustees, by D. Hayton, P. Matthews and C. Mitchell, 18th edn., London, 2010.

and charitable trusts have no beneficiaries capable of enforcing them, some public official, such as an attorney general or a charity commissioner, is typically vested with the authority to enforce charitable trusts.

A second definition may help better understand the common law notion of trusts. It is encapsulated in the first of eight *Principles of European Trust Law* published by a small group of distinguished international experts to better explain "what exactly are the basic elements of the trust, particularly the common law trust."[9]

> "In a trust, a person called the 'trustee' owns assets segregated from his private patrimony and must deal with those assets (the 'trust fund') for the benefit of another person called the 'beneficiary' or for the furtherance of a purpose.
>
> There can be more than one trustee and more than one beneficiary; a trustee may himself be one of the beneficiaries.
>
> The separate existence of the trust fund entails its immunity from claims by the trustee's spouse, heirs and personal creditors.
>
> In respect of the separate trust fund a beneficiary has personal rights and may also have proprietary rights against the trustee and against third parties to whom any part of the fund has been wrongfully transferred."[10]

This second definition is more comprehensive. It explicitly includes purpose trusts, without requiring them to be charitable.[11] It highlights what is probably the foremost effect of trusts, *i.e.* the fact the assets subject to a trust form a pool (the trust fund) that is separate from the personal estate of the trustee and immune from the claims of the trustee's creditors, heirs, and spouse. It also hints, in very broad terms, at the set of rights that the beneficiaries may exercise against the trustee and, possibly, against third parties, to enforce the relationship.

For good reasons, the settlor—the person who creates the trust—is conspicuously absent from both definitions. Most trusts are created by a settlor transferring assets to the trustee for beneficiaries or for a specific purpose. However, this is not an essential feature as the settlor may himself become

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9. Hayton,/Kortmann/Verhagen (eds.), Principles of European Trust Law, Den Haag 1999.

10. Ibidem, 13.

11. While English law is very restrictive in allowing non-charitable purpose trusts, other jurisdictions have taken a more liberal approach, see generally Doyle/Carn, Purpose Trusts, in Hayton (ed.), The International Trust, 3rd ed., Bristol 2011, 213 ff.; Panico, International Trust Laws, Oxford 2010, 527 ff.

the trustee of his own trust. "[I]t may also be possible for a settlor to create a trust by making it clear that he is to be trustee of particular assets of his."[12] Except for these so-called *self-declared trusts*, the settlor retains no further role in its administration, enforcement, or termination once the trust has been settled, unless he has expressly reserved either some benefits[13] or some powers[14] for himself. As a matter of law, the role of the settlor is purely transient even though, as a matter of practice, most settlors do retain some role, and sometimes very significant ones, generally in the guise of "protector" of "their" trust.

2.2. Creating an Express Trust

In most cases, an express trust arises from a valid transfer of some property to a trustee. Depending on the type of property, this transfer may require formalities such as the execution of a deed in respect of land,[15] the endorsement of negotiable instruments to be added to the trust fund, or the registration of the trustee as shareholder. No particular form is required for the expression of the intent to create a trust, but a substantive test applies, which English commentators traditionally refer to as "the three certainties."[16]

The *certainty of intention* requires the settlor to be specific enough in expressing his intention to create a trust. The requirements are not too stringent. For example, the English Court of Appeal may have been benevolent

12. Principles of European Trust Law, *supra* note 9, second sentence of Article II.

13. Such as, for example, a right to the income of the trust fund during his life (life interest).

14. Such as, for example, the power to remove and replace the trustee, the power to appoint new beneficiaries or the power to revoke the trust.

15. See, e.g., section 53(1)(b) of the Law of Property Act 1925 (England). England is not only the cradle of trust law; it is also the most notable trust jurisdiction in Europe. The sprinkle of illustrative cases offered hereafter are all chosen among English case law. This is not to deny the significance and interest, practical and scholarly, of jurisdictions of the Chanel Islands which are particularly notable for their innovative and regularly updated trust statutes, see particularly the Trusts (Jersey) Law, 1984 (last amended on 25 April 2006) and the Trusts (Guernsey) Law, 2007.

16. Penner, The Law of Trusts, 8th ed, Oxford 2012, 181 ff., offers a good explanation of the three certainties for English law students. The law of trusts of the United States—which is not federal law, but a matter for each individual State—does not typically speak of certainties, though similar requirements do apply, as evidenced by sections 401 (relating to subject-matter) and 402 (relating to intention and objects) of the Uniform Trust Code drafted by the National Conference of Commissioners on Uniform State Laws and recommended for adoption by State's legislatures.

when it was satisfied of such an intention to create a trust in a case where Mr. Constance had deposited money into a bank account in his own name after explaining to the bank manager that this bank account was for the use of himself and his unmarried partner.[17]

The *certainty of subject-matter* requires sufficient determination of the assets subject to the trust. When the trust is created by transferring assets to the trustee, this requirement is easily met. Certainty of subject-matter is more critical, however, to self-declared trusts where the settlor become his own trustee by assuming an obligation to hold certain assets in that capacity.

The *certainty of object* requires that the beneficiaries must be ascertainable, either by individual designations or as members of one or more classes (X's grand-children, all present and future employees of Y Corporation, etc.). Beneficiaries may be entitled to a *fixed interest* in the trust fund such as a defined share of its income and/or its capital. In *discretionary trusts,* however, the trustee retains full discretion as to whether, when, and what (or how much) distribution should be made to the beneficiaries whose identity must nonetheless be ascertainable at any time. In a *purpose trust*, the object is the purpose to which the trustee must apply any income and capital from the trust fund. While English law will generally only accept the validity of a charitable purpose,[18] some jurisdictions accept the validity of most any purpose.

2.3. Legal Analysis of the "Common Law" Trust

The legal analysis of trusts in their native jurisdiction is and remains one of the most fascinating debates of legal scholarship. For the most part, it revolves around the characterisation of the beneficiaries' interests in the assets subject to a trust, *i.e.* the legal nature of the rights that beneficiaries can enforce against the trustees and against third parties in connection with these assets.[19]

Trusts arise through the settlor's unilateral disposition of her property. Though most settlors generally discuss with potential trustees their intention and numerous other aspects regarding the administration and disposition

17. *Paul v. Constance*, [1977] 1 All ER 195. The intent of the settlor was subsequently corroborated by declarations such as "this money is as much yours as mine" as well as by his behaviour when using the account.

18. As now defined in Part 1 of the Charities Act of 2006 (United Kingdom).

19. See, e.g., Pettit, Equity and the Law of Trusts, Oxford 2005, 81–83; Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L. J. 625–675 (1995).

regarding the trust fund (including the trustees' remuneration) it is generally accepted that the declaration of a trust and the transfer of property to a trustees are purely unilateral acts of the settlor.[20] A trust is neither a contract between a settlor and a trustee nor a legal entity such as a corporation; it is a legal relationship resulting from a transfer of title to some tangible or intangible property and the determination of beneficiaries or purpose to which the property must be applied.[21]

While trusts are considered a special chapter of the law of property, they are significantly characterised by the obligations incumbent upon the trustee. By accepting her office—which she may decline unless she has previously consented—the trustee assumes a complex and onerous set of obligations and a strict liability for any failure in their discharge. The powers, duties, and liabilities of trustees are the lengthiest chapters of any practical course in the law of trusts. This is also the natural incident of the fact that the law of trusts arose in the English courts of chancellery, which had jurisdiction *in personam*, not *in rem*.

Nonetheless, beneficiaries enjoy rights which attach to the trust property itself and have *erga omnes* effects. This relates to, in particular, two important features: (i) trust property forms a separate fund exclusively applied to the beneficiaries' interests so that it is "ring-fenced" against any claim from the trustee's personal creditors; (ii) when the trustee disposes of trust assets in breach of the terms of the trust or in violation of her duties, the beneficiaries can trace such assets or their proceeds in the hands of the trustee or, if they so choose, they can follow such assets and reclaim them from third, unrelated parties.

The first feature, immunity from the trustee's creditors' claims, is of paramount importance to modern trusts. Unlike personal creditors and successors of the trustee, the interests of the beneficiaries are not exposed to the risk of the trustee's insolvency. Nor, where the trustee is a natural person, are they affected by the claims of the trustee's spouse and heirs. Trust assets form a separate patrimony which is entirely applied to the interest of the beneficiaries or to the furtherance of the trust's purpose. While this feature need not be characterised as proprietary in nature, it distinguishes the claims of beneficiaries from the personal claims of other persons dealing with the trustee.

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20. In line with a long tradition tracing back to Maitland, some recent scholarship has nonetheless underscored a contractual element in trusts, see particularly Langbein, *supra* note 19.

21. For self-declared trusts, there is no transfer of property; the declaration of the settlor creates a trust over the relevant assets.

The ring-fencing of the trust fund, even in the bankruptcy of the trustee as legal owner of the assets, distinguishes rights deriving from trusts from rights deriving from contracts, torts, or unjust enrichment.[22]

This key feature is compounded by unique rights, which beneficiaries enjoy when a trustee wrongfully deals with trust assets. Beneficiaries have a personal claim against the trustee for compensation for the damage suffered by the trust fund or by them personally. They may, in addition, require the trustee and third parties to return the original assets or their proceeds to the trust fund. When a trustee has wrongfully commingled trust assets with her own personal assets, beneficiaries can "trace the assets" in the hands of the trustee and have them restored to the trust fund, without prejudice to the trustee's liability to compensate for the damage suffered. More notably, when a trustee has wrongfully disposed of trust assets, the recipient acquires the assets subject to any interest of the beneficiaries. The beneficiaries can thus "follow the assets" in the hands of the recipient unless the recipient is protected as *bona fide* purchaser for value without actual or constructive notice of the beneficiaries' interest.[23]

The prevailing view is that a trust creates a division between the legal title to the trust assets, which is vested in the trustee, and the equitable interests enjoyed by the beneficiaries, which is often referred to as equitable ownership.[24] As discussed below, the concept of trusts does not require such a splitting of ownership. Legal systems not rooted in common law were able to develop a concept of trust without divided property. However, the prevalent analysis of the common law trust relies on this distinction which, until fairly recently, was deemed in many civil law jurisdictions to be the most significant obstacle to the full recognition of the effects of trusts, not to mention the adoption of some domestic law of trusts.[25]

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22. For a legal analysis of the relationships between creditors, trustees, settlors and beneficiaries in a civil law jurisdiction, see Peyrot A., Le trust de common law et l'exécution forcée en Suisse, Genève, Paris, Montréal, 2011.

23. On the distinction between tracing and following, see Millett L.J. in *Foskett v. Mc Keown and others*, [2001] 1 AC 102, at 127 (House of Lords). For a legal analysis of how a civil law jurisdiction recognizes and enforces tracing rights, see Pannatier-Kessler, Le droit de suite et sa reconnaissance selon la Convention de La Haye sur les trusts—Tracing en droit civil suisse, Genève 2011.

24. See already Carson L.J. in *Baker v. Archer-Shee*, [1927] AC 844 (House of Lords), later confirmed as the *ratio decidendi* in *Garland v. Archer-Shee*, [1931] AC 212 (H.L.).

25. See notably the French, Spanish and Dutch reports in Hayton/Kortmann/Verhagen, *supra* note 9, 131, 59 and 195; Hefti, Trusts and their Treatment in the Civil Law, 5 Am. J. Comp. L. 557 (1956). Likewise the Swiss government, when seeking parliamentary approval to the ratification of the Hague Convention on Trusts, felt compelled to disclaim any notion that a trust creates any division in the property rights over the trust as-

2.4. The Many Uses of Trusts

Trusts first appeared as an instrument for the settlor to gratuitously convey property (including real property) to other persons. They were and are used to transfer real property and other significant assets to loved ones and dependents, often over more than one generation. They typically include elements of tax and estate planning and often provide some benefits for the settlor during his or her lifetime. Trusts were also used to provide for the erection and maintenance of churches, monastic orders, and orphanages and are now used for a great variety of charitable purposes including the furtherance of science and culture. In this traditional context, trusts are unilateral and gratuitous dispositions of the settlor's property offering four appealing features. First, they may extend over a significant period of time and over several generations within the limits set by the applicable law.[26] Second, they allow the creation of partial and successive interests in favour of different beneficiaries, such as a right to income for A during A's lifetime, a right to distribution of some capital for B, and a right to the remainder for C. Third, they are often designed as discretionary trusts so that the trustee retains discretion as to the timing and extent of distributions to the beneficiaries. Finally, and possibly of even more relevance to settlors, using trusts often provides significant tax breaks. These *private trusts*, as they are sometimes referred to, are the specialty of trust and estate specialists and today still account for a significant part of the legal practice, a sizeable portion of the assets held upon trusts, and for most of the trust cases decided by courts all over the world.

Though unilateral by nature, trusts may and are often part of commercial transaction where the settlor obtains a *quid pro quo*. This is the realm of commercial trusts, where most of the recent developments have taken place and which accounts for most of the assets held under trust worldwide.[27]

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sets, see Message concernant l'approbation et l'exécution de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance of 2 December 2005, Feuille fédérale 2006, 571–572, at www.admin.ch/ch/f/ff/2006/561.pdf.

26. English law has traditionally limited the temporal extension of non-charitable trusts by rules such as the rule against perpetuities, the rule against the remoteness of vesting, the rule against excessive accumulation and the rule against inalienability, part of which have recently been reformed by the Perpetuities and Accumulation Act of 2009. Almost half of the U.S. States and most offshore jurisdictions have recently abolished the rule against perpetuities; *see* Schanzenbach/Sitkoff, Perpetuities or Taxes? Explaining the Rise of the Perpetual Trusts, 27 Cardozo Law Review 2465 (2006). See also Sitkoff, The Lurking Rule Against Accumulation of Income, 100 Nw. U. L. Rev. 501 (2006).

27. See generally Hayton, The Use of Trusts in the Commercial Context, in Kaplan (ed.), Trusts in Prime Jurisdiction, 2nd ed., London 2006, 161–168; Thomas/Hudson, The

The largest trusts nowadays certainly are investment funds and pension funds. While the pooling of assets for a large number of investors or employees may use alternative legal devices such as a corporation or a foundation, many such funds are organised as trusts. In mutual funds (also called unit trusts), investors are beneficiaries of the fund income and capital in proportion to their own investment. Pension funds are more complex since they generally involve contributions from both employer and employees while benefits are typically not defined on the basis of contributions only, but may include insurance components in case of death or invalidity.

Trusts are being used for many other commercial transactions. They offer an alternative to corporations for the conduct of a business.[28] Massachusetts trusts became famous for allowing the holding and control of very many corporations, as in the case of Rockfeller's Standard Oil, prompting the adoption of anti-monopoly laws often known as "antitrust" laws. Business trusts have never disappeared and have recently enjoyed a renewed interest in the United States, with the adoption of a *Business Trust Act* by Delaware in 1998 and the *Uniform Statutory Trust Entity Act* by the Uniform Law Commissioners in 2009.[29]

Trusts frequently serve as a security device for syndicates of financial institutions extending credit to the settlor. The borrower transfers sufficient assets to one of the banks or to a third party for the benefit of all creditors pro rata, with the assets to be realised and distributed upon an event of default. Indenture trusts are used in the issuance of bonds where the trustee is empowered to take some actions on behalf of innumerable bond holders. Trusts are broadly used as "special purpose vehicles" or for the purpose of holding them; they make possible complex financial transactions such as asset-based securitisation, *i.e.* the transformation of revenue-generating assets such as credit card, car, or mortgage loans receivables (or non-financial assets such

law of Trusts, 2nd ed, Oxford 2010, chp. 39 ff. (Trusts in Financial Transactions) and 55 ff. (Trusts Used in Commercial Contexts).

28. See Thomas/Hudson, *supra* note 27, chp. 55. Long after early works such as Wilgus, Corporations and Express Trusts as Business Organizations, 13 Mich. L. Rev. 71 (1914), comparative studies of corporations and trusts have regained significance, see particularly Ogus, The Trust as Governance Structure, 36 U. Toronto L. J. 186 (1986); Schwarcz, Commercial Trusts as Business Organization: An Invitation to Comparatists, 13 Duke J. Comp. & Int'l L. 321 (2003); Sitkoff, Trusts as "Uncorporation": A Research Agenda, U. Ill. L. Rev. 31 (2005).

29. See Rutledge/Habbart, The Uniform Trust Statutory Act: A Review, 65 Bus. Lawyer 1055 (2010).

as copyrights or brandy inventories) into securities sold to investors through the capital market.

It is virtually impossible to list all actual and possible uses of trusts in the contemporary world. Blind trusts are used to diminish conflicts of interests to which elected officials may be exposed because of their private wealth. Trust accounts protect clients from the insolvency of their lawyers, though not against fraudulent behaviours. Charitable trusts provide major resources for the development of scientific research and the arts. A complete list, if at all possible, would extend over many more pages than allocated to this chapter.

2.5. Non-Express Trusts

All the above are instances of express trusts where a settlor deliberately creates a trust over certain assets to benefit identified or identifiable persons or to further a legally-recognised purpose. The legal mold of the trust has proved so powerful that it has been extended to a number of situations where the law deems a trust was created although it was not (or was not entirely) covered by the express intent of any settlor. One of the most remarkable chancellors in the history of England, Lord Nottingham, wrote in 1676: "All trusts are either, first, express trusts, which are raised and created by an act of the parties, or implied trusts, which are raised and created by act or construction of law."[30]

Since the times of Lord Nottingham, courts and legal authors have debated over the typology of non-express trusts.[31] For the sake of this chapter, we will distinguish three broad categories.

Resulting (or *returning* or *residual*) *trusts* typically arise where a settlor has created a trust of some property without providing for the distribution of all beneficial interests in that property. This occurred for example in the English county of Kent when, in the wake of a bus accident killing a number of cadets and wounding others, a trust fund was erected to pay for funeral expenses and for providing care to the disabled and could. After all such expenses were

30. *Cook v. Fountain*, 3 Swans 585, 591 (1676).

31. Compare, e.g., Penner, *supra* note 16, chapters 4 & 5; Thomas/Hudson, *supra* note 27, 699–924; A.J. Oakley, Constructive Trusts, 2nd ed, London 1987. For a fine example of a court drawing a line between resulting and constructive trusts in respect of real property whose value profited from the industry of a unmarried partner, see *Pettkus v. Becker*, [1980] 2 S.C.R. 834 (Supreme Court of Canada).

met, the remainder was found to be held on a resulting trust in favour of the donors to whom it should be returned pro rata.[32]

Constructive trusts apply to a much broader set of circumstances. They arise by construction of law—one could also say: by operation of law—whenever someone's property ought to be protected against the unconscionable behaviour of someone else. The trust here does not rely on the intent of the victim whose property is invaded or diverted, but proceeds from the unconscionable behaviour of the other person (the constructive trustee) who deals with or profits from that property. To take one illustrative and hotly debated example for a very large family of cases, when a private or public employee takes bribes in connection with the performance of his duties, the law deems a constructive trust to arise on such bribes and all their proceeds. Where civil law would allow the employer to claim rights based on breach of contract, tort, or unjust enrichment, common law treat this as a non-voluntary trust and allows the employer to enforce proprietary rights in the assets themselves, which provides two significant features. The enforcing person may claim any increase in the value of the subject-matter of the constructive trust.[33] Being proprietary in nature, her claim is immune to the insolvency of the constructive trustee.[34]

Statutory trusts, finally, are statutory applications of trusts rules to situations where it is efficient and expedient to have the property of a deceased (executor), a bankrupt (trustee in bankruptcy), or an incompetent person vested in someone appointed by a court for the benefit of the deceased's heirs, the bankrupt's creditors, or that incompetent person. All legal systems certainly provide for the protection of heirs, creditors, and incompetents. They may do so by granting powers of management and disposition to administrators appointed by the courts. The trust model goes beyond by vesting such

32. *Re Gillingham Bus Disaster: Bowman et al. v. Official Solicitor et al.*, [1958] Ch 300, [1958] 1 All ER 37 (High Court).

33. *Attorney General for Hong Kong v. Reid et al.*, [1994] 1 AC 324 (Privy Council, 1993). In *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Adm.)*, [2011] EWCA Civ 347, the English Court of Appeal did not follow the opinion of the House of Lords sitting as Privy Council in *Reid*. There is at present much uncertainty about the better solution, as evidenced by a flurry of articles and papers on the topic. This uncertainty will only be resolved once the U.K. Supreme Court has decided a similar case.

34. See *X. v. USA*, 5C.169/2001 of 19 Nov. 2001, available at www.bger.ch, where the Swiss Federal Tribunal accepted that the U.S. government, as employer of an agent active in the Irangate affair, was the beneficiary of a constructive trust over the proceeds of the operation and enjoyed a beneficial interest trumping common creditors of the agent, including the agent's lawyer.

administrators with the legal title to the assets, and subjecting them to the onerous duties typical of a trustee.

The imposition of non-express trusts by the courts or by statutes is a living tribute to the strength, robustness, and flexibility of the original institution, the express trust, as it developed over centuries. This is not to say, however, that the idea or the functions of trusts are unique to these legal systems. It is now time to take a broader view and look at other jurisdictions that have embraced and implemented the trust idea in their own way.

3. Trusts in a Broader View

However distinctive the origins and the legal nature of the "common law" trust, the institution itself reaches far beyond the common law world. The trust idea and the word have been received in many other jurisdictions. What can be properly called trusts across the national boundaries remains however quite unclear.

On one hand, the needs that can be served by trusts probably exist in most legal systems. From a functional viewpoint, trusts split the economic benefits of certain assets from their control and administration. The assets can be administered and transferred in an efficient and timely manner because their control and administration is concentrated in the hands of one (or just a few) person, who is very often acting in a professional capacity and with some degree of expertise. The benefits can be allocated among many persons, may vary over time, and be contingent upon highly complex circumstances or subject to the discretion of the trustee. This allows a high degree of "customisation" without incurring the costs, the risks, and the delays associated with the fragmentation of legal ownership. The assets are allocated exclusively to the beneficiaries and are ring-fenced from the personal creditors of the trustee. This set of functions can be used for different purposes such as transferring wealth over generations, creating collective security interests, providing retirement benefits, or transferring the risks and rewards of non-negotiable assets to investors.

The same needs are addressed in different ways by other legal institutions. We have already seen that *corporations* may be used as alternatives to trusts. *Contracts* and *agency relationships*—in which one may include *fiducie* and *Treuhand* in many jurisdictions[35]—are often used to empower someone with

35. See notably Grundmann, Trust and Treuhand at the End of the 20th Century: Key Problems and Shift of Interests, 47 Am. J. Comp. L. 401–428 (1999); Thévenoz, La fi-

the administration of some assets. Testamentary devices such as *fideicomissi*, *heres fiduciari*, substitution, and *exécuteurs testamentaires* have been used long before trusts in the modern sense appeared. Discussion of these alternatives to the use of trusts is not, however, the point of this section.

Our line of enquiry here is to find how the notion of the trust has been or is being embraced, received, and possibly implemented in jurisdictions other than common law jurisdictions and how this is transforming our understanding of the trust institution. For that purpose, we now take a cursory look at a select group of other jurisdictions featuring institutions they themselves call trusts or for which they took significant inspiration from the common law trust. This sample, which is limited by necessity, also reflects different patterns and degrees to which the common law trust idea has been an inspiration, a reference, or a formal source for the development of new legal institutions.[36]

3.1. Mixed Legal Systems: Trusts by Percolation

Geography and history have exposed a number of non-common law jurisdictions to significant common law influence. This has created a phenomenon of diffusion and filtering, a percolation of the trust idea into legal systems which knew and know nothing of equity, do not conceive subjective rights as abstractions from remedies, and entertain their own notion of property. It will be unsurprising to find that these jurisdictions adapted some basic tenets of trust laws to fit them into their own legal tissue.

Scotland is originally a civil law jurisdiction neighbouring England. Both share the same language, the same queen since 1603, and have been politically integrated since the Union of Parliament in 1707. The House of Lords, sitting as Privy Council, was the ultimate court of appeal for Scottish cases. This strong interaction has significantly informed Scots law, which scholars now characterise as a "mixed legal system." The word trust first appeared in a Scottish case decided in 1623, but only reported in 1690. It remains unclear to what extent the English trust was influential in the development of trust law in Scotland.[37] What is certain, however, is that trusts have become a constitu-

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ducie, cendrillon du droit suisse: propositions pour une réforme, in Revue de droit suisse/Zeitschrift für Schweizerisches Recht, II, 1995, 253–363.

36. It would be interesting to examine the trust as a legal transplant along the approach taken by Berkowitz/Daniel/Pistor/Richard, The Transplant Effect, 51 Am. J. Comp. L. 163 (2003).

37. Gretton, Scotland: The Evolution of the Trust in a Semi-Civilian System, in Helmholz/Zimmermann (eds.), Itinera Fiduciae: Trust and Treuhand in Historical Perspective,

ent part of Scots law. It should be noted, however, since equity (in the English law sense) has never been a component of Scots law, there is no division between legal title and equitable interests or ownership in the same trust property. The trustee, as *fiduciarius*, is the legal owner of the trust assets. The beneficiaries enjoy purely personal rights against the trustee; they are nonetheless protected in the trustee's bankruptcy, enjoying a privilege that is "based, not on real right, but on separation of patrimony."[38]

South Africa shows a different reception pattern. As a former Dutch colony, its legal system roots in Roman and Dutch law. After its conquest (1797) and subsequent annexation (1814) by Great Britain, it was exposed to the influence of the common law. Two types of trusts result from this double influence. Under a *bewind*, which originates in Dutch law, a *bewindhebber* manages property that belongs to the beneficiary. By contrast, a South African trustee, like his English homologue, is the owner of property that it manages for the benefit of the beneficiary. Both arrangements are now subsumed in the definition of "trust" in the Trust Property Control Act of 1988.[39] The Act does not purport to codify the law of trusts but addresses a number of problems common to both the ownership-trust and the *bewind*-trust. The ownership-trust, though influenced by English law, was able to develop without the support of equity courts or concept. Beneficiaries enjoy personal claims and administrative remedies against the trustee as well as personal claims based on torts or third parties invading trust property. The trust fund itself does "not form

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Berlin 1998, 511 ("while it must be presumed that English law had some influence . . . , it is hard to prove any substantial degree of English influence before about the middle of the 19th century, by which time the institution had long been established").

38. Reid, National Report for Scotland, in Hayton/Kortmann/Verhagen (eds.), *supra* note 9, 70; see also Ead., Patrimony not Equity: the Trust in Scotland, in Milo/Smits (eds.), Trusts in Mixed Legal Systems, Nijmegen 2001; Wilson/Duncan, Trusts, Trustees and Executors, 2nd ed., Edinburgh 1995, 3–22.

39. According to section 1 of the Act, "'trust' means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed—(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument, but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965".

part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property."[40]

The law of *Quebec* traces its origins to France. Testamentary trusts appeared with the establishment of British citizens in the *Belle Province*, some time before it was recognised by the legislature (1879). Its latest codification, as Articles 1260 *et seq.* of the 1994 *Code civil*, uses the word *fiducie* as the exact equivalent of the word trust, which appears in the English translation. While functionally equivalent to its common law cousin, Quebec's *fiducie* is structurally a very different arrangement. As long as it is not distributed to the beneficiaries, the trust fund has no legal owner.[41] The *fiduciaire* (trustee) merely is vested with the power to administer the *patrimoine fiduciaire* (trust fund). The trust fund is a separate patrimony subject to the trustee's power to administer in the interest of the beneficiaries. As such, the Quebec trust is one instance of a larger class of arrangements, the *administration du bien d'autrui*.[42]

Scotland, South Africa, and Quebec are prime examples of mixed legal systems of civilian descent where trusts appeared as a matter of practice; courts had to accommodate them before they ever got to be sanctioned by the legislature.[43] Trusts had to fit somewhere within legal systems which did not include principles of equity administered by a distinct system of courts. The civil law notion of property does not entertain the distinction between legal title and equitable interests that is generally viewed as one of the most distinctive traits of the common law trust.

A number of scholars have reflected over this and tried to distinguish the essential elements of a trust from the non-essential.[44] Equity as a legal concept is not essential in these three examples, where trusts have developed without its help. The actual legal owner of the trust property also appears not to be critical. It is the trustee in Scotland; it can be either the trustee or the beneficiary under South African law; but there is no legal owner under the recent codification of

40. Section 12 of the Trust Property Control Act of 1988 (South Africa).

41. *Code Civil du Québec,* art. 1261: "The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right."

42. See particularly Beaulne, Droit des fiducies, 2nd ed, Montreal 2005; Cantin Cumyn, L'administration du bien d'autrui, Québec 2000.

43. Louisiana should probably be added to this list, see recently Yannopoulos, Trust and the Civil Law: The Louisiana Experience, in Milo/Smits (eds.), *supra* note 38, esp. 67–70.

44. See particularly Gretton, Trusts Without Equity, 49 Int'l & Comp. L. Q. 599 (2000); Honoré, *supra* note 3.

Quebec. One should infer that the vesting of legal title with the trustee is inconsequential. Necessary to the notion of trust, however, must be the control of the assets by the trustee, the trustee's powers of administration and disposition, the trustee's duties to the beneficiaries, and the availability of adequate remedies to the beneficiaries to enforce their rights against the trustee and, possibly, against third parties interfering with the trust fund. It is interesting that courts and legislatures have reached different solutions regarding who the legal owner of the trust property is, but achieved a notable degree of convergence regarding the essential protection of the trust fund from the personal creditors of the trustee.

3.2. Trusts by Enactment

Unlike the mixed legal systems discussed above, other jurisdictions have adopted trusts in a more deliberate way by a conscientious policy choice made by the legislature. Three more examples out of a great many illustrate this third group of jurisdictions, all of which were deliberately chosen within Europe.

The small Alpine principality of *Liechtenstein* is an early example of the reception of the trust by a statutory instrument. Around the time when a number of South American countries enacted trust statutes under the guise of *fideicomiso,*[45] Liechtenstein took the lead in Europe. The Company Act of 1926 includes a codification of trusts under the German name of *Treuhand*.

> "The *Treuhänder* (Trustee or *Salmann*) within the meaning of this law is the single person, entity or association of persons, to whom or which another person (the *Treugeber*) transfers moveable or immovable property or a right (as *Treugut*), of any kind, with the obligation to administer or utilise it in his own name, as independent legal owner, in favour of one or more persons (*Begünstigter*) and with effects against any third party."[46]

45. See generally Lupoi, *supra* note 6, 269 & 273 ff.; Olivera García, The trust in the Mercosur, in Le trust en droit international privé: Perspectives suisses et étrangères, Zurich 2005, 41.

46. Translated from § 897 of the Personen- und Gesellschaftsrecht (PGR): "Treuhänder (Trustee oder Salmann) im Sinne dieses Gesetzes ist diejenige Einzelperson, Firma oder Verbandsperson, welcher ein anderer (der Treugeber) bewegliches oder unbewegliches Vermögen oder ein Recht (als Treugut), welcher Art auch immer, mit der Verpflichtung zuwendet, dieses als Treugut im eigenen Namen als selbständiger Rechtsträger zu Gunsten eines oder mehrerer Dritter (Begünstigter) mit Wirkung gegen jedermann zu verwalten oder zu verwenden."

The overall result is much closer to a common law trust than to the German *Treuhand* or to the Swiss *fiducie*.[47] The Liechtenstein *Treuhand* is created by a unilateral disposition from the settlor, *inter vivos*, or upon her death. The trust fund is statutorily ring-fenced from the trustee's personal creditors. Besides any legal action beneficiaries may bring against a trustee, courts are empowered to exercise some form of discretionary supervision over the trustee.

Even though Liechtenstein's foundations and establishments (*Stiftungen and Anstalten*) have enjoyed a broader success than its *Treuhand*, the merit of the latter is that it was the first consistent and systematic conceptualisation and codification of trusts within the framework of Roman-Germanic legal concepts.

A British protectorate since 1800 and a part of the British Empire from 1814 until its independence in 1964, *Malta* has not embraced common law as far as private law is concerned. Its statutory adoption of trusts, however, emulates similar enactments in many small and smart offshore financial centres from the Channel Islands to the Caribbean sea. (In this context, offshore does not refer to the enticing beaches of insular Malta, but to the fact that financial services are offered to non-residents so that investors maintain financial assets in a country different from their country of residence.) In 1988, the Maltese parliament created "offshore trusts" available only to foreign residents.[48] Six years later, trusts were extended to Maltese residents and Maltese real property. Building upon the increasing experience of its legal and financial community, the legislature further amended the statutory provisions in 2004 and 2006. The *Trusts and Trustees Act*[49] now reads very much like similar statutes promulgated in similar financial centres. Equity and words derived from it are conspicuously avoided, but the Act literally imposes fiduciary obligations on the trustee, a notion that is not alien to the Roman and civil law roots of Malta.[50]

Luxembourg's private law mostly derives from the French Civil Code of 1804. Notably, unlike the German tradition in which Liechtenstein could find some support, the French legal tradition used to be fundamentally averse to fiduciary transfers of property, which it associated with fraud and sham. In

47. See Thévenoz, *supra* note 35; Grundmann, Der Treuhandvertrag insbesondere die werbende Treuhand, Münich 1997.

48. Offshore Trusts Act, 1988 (Malta).

49. Available at www.justiceservices.gov.mt.

50. For an examination of the Roman roots of fiducia and trust, see Johnston, The Roman Law of Trusts, Oxford 1988, and Dunand, Le transfert fiduciaire: "Donner pour reprendre"—Analyse historique et comparatiste de la fiducie-gestion, Bâle etc. 2000.

1983, a very concise *arrêté grand-ducal* broke new ground by allowing banks to enter into *contrats fiduciaires* with their clients. The most significant feature of the statute was to isolate the property which is the subject-matter of such contract from a potential insolvency of the bank acting as *fiduciaire*. When Luxembourg contemplated the ratification of the *Hague Convention*,[51] it decided to boost its *fiducie* to make it more efficient and more attractive. Unlike Liechtenstein's *Treuhandschaften* or Maltese trusts, the main type of business targeted by Luxembourg's *fiducie* is wholesale financial transactions rather than personal estate planning. The *loi du 27 juillet* 2003[52] contains 15 paragraphs in 6 articles dealing with *contrats fiduciaires*, hardly an extensive regulation. Without purporting to fully implement trusts in a civil law context, Luxembourg's move reflects the fact that civil law jurisdictions eager to better recognise the existence and effects of trusts governed by some foreign law are often keen to offer some dish of their own cooking as an alternative.[53]

France is the most recent European State to follow suite, though more modestly, with its *loi n° 2007–211 instituant la fiducie* passed on 19 February 2007. The French *fiducie* is more narrowly defined than its Luxembourg equivalent. It is limited to 33 years and may only serve for the purpose of administering assets or securing a debt; it may not confer gratuitous benefits. Only legal entities, not natural persons, may create a *fiducie*. Settlors cannot be natural persons and the office of *fiduciaire* is restricted to banks and some other regulated financial intermediaries. Within these narrow confines, the statute does a fair job of distinguishing the *patrimoine fiduciaire* from the personal estates of both the settlor and the trustee. Unlike Liechtenstein and Malta, but similar to Luxembourg, the *fiducie* is a contract, not a unilateral disposition.

This sketchy European panorama begs the question whether the Luxembourg and French *fiducies* are trusts *à la mode du droit civil* (in the civil law-fashion) or whether they are so different that they must be deemed remote

51. See below section 4.

52. Loi du 27 juillet 2003 portant approbation de la Convention de La Haye du 1er juillet 1985 relative à la loi applicable au trust et à sa reconnaissance, portant nouvelle réglementation des contrats fiduciaires, et modifiant la loi du 25 septembre 1905 sur la transcription des droits reels, at www.legilux.public.lu.

53. On the Luxembourg *fiducie*, see Prüm/Witz, La nouvelle fiducie luxembourgeoise, in Prüm/Witz (eds.), Trusts & fiducie: La Convention de La Haye et la nouvelle législation luxembourgeoise, Paris 2005; P. Matthews, Fiducie and The Hague Trusts Convention: The New Luxembourg Law, in Trust Law International 188 (2003); Hoss, La fiducie luxembourgeoise et la Convention de La Haye du 1er juillet 1985 relative à la loi applicable au trust et à sa reconnaissance in Le contrat fiduciaire en droit luxembourgeois, Livre jubilaire de l'association luxembourgeoise des juristes de banque, Bruxelles 2004.

cousins at best, perhaps in the same league as the Swiss and the German *Treuhand*, which have developed out of case law far away from any real trust influence. Without venturing a full answer here, we should note that it depends on whether we focus on the legal structure and features of the operation (unilateral disposition or contract, powers and duties of trustees, tracing and following, access to courts for guidance, etc.), on the purposes they are capable of serving, or on the actual uses they serve. Rather than a heretic departure from the orthodoxy of the common law trust, contracts for the fiduciary transfer of property may be considered as an alternate form of trust competing with the common law trust.[54]

The competition between different trust models might become more acute if some form of European codification of the trust would become the order of the day,[55] a possibility that has been recently explored in different contexts.[56]

4. The International Recognition of Trusts

Two trends have shaped the development of trusts over the past few decades. As discussed in the previous section, one is the reception of the trust institution or some form of it in non-trust jurisdictions. The second is the ever increasing contacts of non-trust jurisdictions with trusts which require their courts to determine the proper law of these trust and their effects in legal systems that have no similar domestic institution. This second trend results from a number of factors. The international mobility of people—including offspring of wealthy families, employees, and retirees of multinational firms—and the liberalisation of capital movements have resulted in increased flows of trust property to resident of non-trust countries. The globalisation of the

54. See Waters, The Future of the Trust from a Worldwide Perspective, in Glasson/Thomas (eds.), *supra* note 11, 863 ff.; Grimaldi/Barrière, Trust and Fiducie, in Hartkamp/Hondius (eds.), Towards a European Civil Code, 3rd ed., Nijmegen etc. 2004. A contract-based trust for Switzerland was also contemplated in Thévenoz, Trusts in Switzerland: Ratification of The Hague Convention on Trusts and Codification of Fiduciary Transfers, Zurich 2001, 304–328.

55. See Mattei, Should Europe Codify Trust?, in Birks/Pretto (eds.), Themes in Comparative Law: In Honour of Bernard Rudden, Oxford 2002, 235–251; Hayton, The Trust in European Commercial Life, in Lowry/ Mistelis (eds.), Commercial Law: Perspectives and Practices, London 2006.

56. See Kortmann et al., Towards an EU Directive of Protected Funds, Deventer 2009, and Book X (Trusts) of the Draft Common Frame of Reference (DCFR), published in vol. 6 of Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Munich 2009.

capital market, including the private banking industry, has produced increasing pools of assets held in trust invested, deposited, or managed in non-trust jurisdictions. The globalisation of the legal practice and the dominance of U.S. and English law firms has promoted the use of trusts in complex transactions including non-trust jurisdictions and fuelled a broader worldwide circulation of Anglo-American legal concepts and instruments, increasing contacts of non-trust jurisdictions with trustees and trust assets.

Courts in non-trust jurisdictions have a long history of dealing with trusts actually or potentially governed by the law of a trust jurisdiction. Most of the reported cases revolve around conflicts between the effects of a particular private trust as established by the settlor and some mandatory provision of the law governing the succession of that settlor, such as indefeasible shares (forced heirship laws) or public policies of the forum. Deciding such cases require courts in non-trust jurisdictions to first characterise a trust which has no strict equivalent in the forum, then to determine the proper law of that trust and its effects under that law, before deciding to which extent those effects should be enforced or curtailed where they conflict with some other provisions the court must apply. The dilemmas faced by European civil law courts are not restricted to family trusts, however.[57] In a noted case of 1936, the Swiss Supreme Court had to characterise the legal position of the Bank for International Settlements acting as trustee in respect of the bonds issued by Germany to restructure its international debt resulting from the reparation payment imposed by the Treaty of Versailles following the First World War.[58]

In 1981, the Hague Conference on Private International Law undertook the task of facilitating the resolution of conflicts of laws involving trusts by developing an international convention providing uniform conflict of law rules. This would fill a significant gap for most non-trust jurisdictions, which typically have no statutory conflict rules specific to trusts. A typical example is Switzerland, which modernised and overhauled its private international law in 1987. The *Bank for International Settlements* case, as well as a 1971 liti-

57. See *inter alia* Bredin, L'évolution du trust dans la jurisprudence française, in Travaux du Comité français de droit international privé 1973 –1975, vol. 36, Paris 1974, 137 ff.; Barrière, La réception du trust au travers de la fiducie, Paris 2004, 115 ff.; H. Dörner, Der Trust im deutschen Internationalen Privatrecht, in Le trust en droit international privé, *supra* note 45, 73–91.

58. Arrêts du Tribunal fédéral (ATF) 62 II 40, French translation in Journal des Tribunaux 1936, I, 552, *Aktiebolaget Obligationsinteressenter c. Banque des règlements internationaux*.

gation about a trust settled by a U.S. citizen without any choice of law,[59] had raised the awareness of the legal community regarding the pitfalls facing trusts in Swiss courts. The drafters of the 1987 codification were aware of the need to clarify conflict of laws and jurisdiction issues in connection with trusts. The explanatory report to the government's bill nonetheless contains the most minimalist suggestion that "some forms of trusts" should enjoy the benefit of the rules of conflict governing corporations and foundations.[60] Belgium may be the only example where a European traditional civil law country without a domestic notion of trust provided topical provisions in its recent *Code de droit international privé*.[61]

It took four years for the Hague Conference to devise the *Convention on the law applicable to trusts and on their recognition*, which was formally signed on 1st July 1985.[62] It is amazingly fast considering that non-trust (mostly civil law) States needed to get persuaded that, provided significant safeguards written into this international instrument, recognising the effects of foreign trusts in their sphere of sovereignty would not jeopardise such important principles as the protection of creditors, spouses, heirs, or other third parties, and would not undermine other public policies deeply embedded in their legal systems. Arguably this convention stands out from all other negotiated under the aegis of the Hague Conference by the number of safeguard clauses written into it.[63]

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59. In *Harrison v. Schweizerischer Kreditanstalt*, ATF 96 II 79, JdT 1971 I 329, the Swiss Supreme Court decided that Swiss law should govern the trust because, absent a choice of law by the settlor, it was the law at the place of residence of the trustee, a Swiss bank. Due to the lack of any substantive provision applicable to trusts, the Court upheld the validity of the trust at the cost of converting it into a legal platypus made of unequal parts of donation, fiduciary transfer of property, contract for third party and fiduciary substitution (*substitution fidéicommissaire*).

60. Feuille fédérale 1983 I, 425.

61. See Articles 122–125 of the loi du 16 juillet 2004 portant le Code de droit international privé which are indeed very much inspired from the Hague Convention discussed in this section.

62. See Hague Conference on Private International Law, Proceedings of the Fifteenth Session, tome II: Trusts – Applicable Law and Recognition (The Hague, 1985). The authentic English and French versions of the convention are accessible at www.hcch.net /index_en.php?act=conventions.text&cid=59.

63. This reflects particularly in Article 13, a unique provision with no equivalent in other similar conventions. At the cost of significant legal uncertainty, it provides that: "No State shall be bound to recognize 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." See also Article 15 of the Convention.

Two aspects are of particular interest here. The first one lies in the scope of application of the convention. Which trusts should enjoy the benefit of the convention? We have noted above that in common law jurisdictions the trust concept is used well beyond its original character of an express disposition of property by the settlor for beneficiaries or for a charitable purpose. So powerful is the concept that it has expanded in areas such as bankruptcy, intestate succession, guardianship, wrongful dispositions, etc. In non-trust jurisdictions, these areas of law are addressed by other rules, including torts, unjust enrichment, and *negotiorum gestio*. Overreaching the scope of the convention would displace many other rules. Article 3 of the Convention therefore restricts its scope to "trusts created voluntarily and evidenced in writing." Contracting States may however elect to widen the scope by declaring that "the provisions of the Convention will be extended to trusts declared by judicial decisions."[64] The distinction between trusts created voluntarily and trusts declared by judicial decisions is not a standard one of trust law,[65] but needed to be created for the purposes of the Convention.

The second important aspect relates to the definition of trusts for the purposes of the Convention. It is obviously a crucial issue. While "contracts for the international sale of goods" may not require an explicit definition in an international instrument creating uniform (substantive) rules,[66] trusts undoubtedly do. Leaving the characterisation of trusts for the law of the forum State would be self-defeating because non-trust jurisdictions would lack any such definition while trust-jurisdictions might have different definitions, causing a lack of uniformity in the application of the Convention by national courts.[67] Alternately, requiring the courts to characterise any trust according to its proper law would require a recursive process—where the proper law should be determined in accordance with the Convention before a particular arrangement is deemed to be a trust under the Convention—without produc-

64. Article 20 of the Convention.

65. Common law trusts are typically classified in categories such as "express", "implied", "resulting", "constructive", "statutory" etc. See section 2.5. above.

66. See the United National Convention on Contracts for the International Sale of Goods concluded in Vienna on 11 April 1980. While the definition of an international sale of goods is not spelled out in the instrument, it can be inferred from various provisions. See however the earlier Hague Convention on the Law Applicable to International Sales of Goods of 15 June 1955, where no such definition can be derived.

67. Interestingly, Art. 60 (3) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters does not provide an autonomous definition of trusts and relies on their characterization *lege fori*.

ing a significantly more uniform application of the Convention. Creating a self-contained ("autonomous") definition of the subject-matter of the Convention was therefore a pre-condition for any successful attempt to harmonise the conflict rules applicable to trusts.

Article 2 supplies such a definition in the following terms:

> "For the purposes of this Convention, the term "trust" refers to the legal relationships created—inter vivos or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.
>
> A trust has the following characteristics—
>
> 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;
> c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law."

The keywords here are "legal relationships," "assets . . . under the control of a trustee," "beneficiaries" or "specified purpose," "separate fund," "power," "duty," and "accountab[ility]." References to equity, equitable obligations, and fiduciary duties are avoided because these concepts and doctrines are particular to some legal systems but would prevent courts in other systems from adequately characterising trusts for the purpose of the convention.

The definition in Article 2 deliberately goes beyond the common law trust and embraces a broader notion of trusts. Luxembourg rightly claims that its *fiducie* qualifies as trust under the Convention.[68] South-Africa's ownership-trust obviously does;[69] and it is likely that its *bewind*-trust does as well: though assets in *bewind* are the beneficiaries' property, they are required to be "un-

68. See Chambre des députés, Session ordinaire 2000–2001, Projet de loi n° 4271, 3–4, reprinted in Prüm/Witz (eds.), *supra* note 53, 154–155.

69. Though South Africa has not signed the Convention, a court of any Contracting State will apply the Convention to a trust governed by the law of South-Africa or by the law of any other non-Contracting State. None of the Contracting States have made a declaration under Article 21 of the Convention, which allows Contracting States to limit the *erga omnes* effects of the Convention by reserving the right not to apply certain provisions of the Convention to trusts which are not governed by the law of a Contracting State.

der the control" of the *bewindhebber*. One might, however, hesitate with Quebec's *fiducie*: the Convention requires that title to the trust assets be in the name of the trustee or another person, while Art. 1261 of the *Civil Code* proclaims that "none of them has any real right."[70] Actually, Canada has ratified the Convention, but not in respect of Quebec. As we can see, increasing legal clarity by way of a treaty does not necessarily mean that all questions are easy to solve.

The 1985 Convention is notable because it shows an evolution of the trust notion in the international legal community. It emphasises "separate fund" and "control" over legal title and ownership. It requires a voluntary act of the settlor, not necessarily a unilateral one, and therefore, does not exclude trusts created by way of a contract. It contemplates the trustee's powers and duties, but does not require that these duties have any equitable or fiduciary quality. Beneficiaries or a "specified purpose" are a necessary part of the definition, but whether the rights of beneficiaries are personal or proprietary remains open.

Private international law as a discipline and the international harmonisation of private law as a method both require a degree of abstraction that goes beyond the parochialism of national legal concepts. By shedding the equitable qualities which distinguished the common law trust and created its uniqueness, the drafters of the Convention opened up the trust concept and focused on its core elements and functions features rather than on its legal characterisation. They extended it to a number of domestic institutions, which may not have been conceived and developed as instances of, or by comparison to, the common law trust.

Switzerland provides a good example of this. Most lawyers would claim that the *fiducie* (*Treuhand*) is the nearest Swiss cousin of the trust. On closer look, even when it is evidenced in writing—not a requirement of Swiss law—it falls short of the Convention because it does not meet the requirement that "the assets constitute a separate fund and are not part of the [*fiduciaire*]'s own estate,"[71] except where a licensed bank or broker-dealer is the *fiduciaire*.[72] On the other hand, investment funds (*fonds de placement, Anlagefonds*)—which are not corporate entities, but collective investments based on contract—do meet the test of Article 2 of the Convention in every respect.

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70. The ratification of the Convention by Canada applies to most provinces, but not to Quebec.

71. Article 2 (2)(a) of the Convention.

72. See Articles 16 and 37d of the Banking Act, at www.admin.ch/ch/f/rs/c952_0.html and Article 36a of the Stock Exchange and Securities Trading Act, at www.admin.ch/ch/f/rs/c954_1.html.

That should not come as a surprise. Preparatory work for the Swiss Investment Fund Act of 1966[73] evidences a close interest in the English and American investment trusts of the time.[74] For tax reasons, the industry had already largely emulated through contracts the type of legal arrangements characteristic of unit trusts. While the actual drafting of the 1966 Act does not rely in any way on trust concepts, it responds to similar needs of the investors, including a clear definition of the powers and duties of the promoter and an adequate ring-fencing of the fund against risk of the promoter's insolvency. The fact that an investment fund relies on a contract between each investor and the fund manager is no obstacle to the application of the Convention.

5. A Global Legal Concept

As Maitland noted, the trust is indeed one of the most distinctive and powerful features of English law and of the common law tradition. Deep cultural roots, a long history of judicial challenges and refinements, statutory improvements and recent codification in some jurisdictions, an extensive corpus of case law and legal thinking have all produced a legal institution which is both highly robust and powerfully flexible. Along with very significant portions of Anglo-American legal thinking and expertise, it is now riding the wave of globalisation and expanding its diffusion to far horizons. Trust as a legal model developed by English courts over centuries and later refined in several jurisdictions based on the same legal tradition has been so successful that it serves both as an inspiration, a brand-name, and a benchmark.

However, it would be wrong to think of the modern trust merely as the global reception of the common law trust. Arguably all mature legal systems have catered in various ways to the same needs that have prompted and informed the development of the common law trust: division between the economic value of assets and their holding and management; complex and flexible allocation of the economic value of assets among different beneficiaries or classes of beneficiaries; customisation of the powers and duties of the managers to suit the purpose of the arrangement; etc. Such needs gave rise to a wide array of legal devices, including trusts, *fiducie* and *Treuhandschaften*,

73. Now replaced by the Collective Investment Schemes Act of 2006, which has not modified the legal characterization of (contractual) investment funds.

74. See the explanatory report of the government of 23 November 1965, Feuille fédérale 1965 III, 264.

bewind, investment and pension funds, *fiedicommissi*, foundations, corporations, and many others. Trustees, *fiduciaires*, fund managers, and corporate directors are all administrators of other peoples' property alike and incur corresponding duties. What distinguishes trusts (in the broader sense suggested in the last two sections) from other legal institutions is the creation of a separate fund without the endowment of legal personality.

In this broader sense the trust concept is not unique to common law and probably never has been. Besides the many occurrences discussed in the previous sections, it is likely that the distinction between legal control and economic enjoyment of discrete pools of assets, which are ring-fenced from the manager's insolvency risk, can be found in some guise in most modern legal systems. Even in France, where the Napoleon Code and legal tradition rejected the very notion of *fiducie* as prête-nom under another name,[75] the legislature implemented this very idea in a number of statutes dealing with investment funds (*fonds communs de placement*), receivable financing (*loi Dailly*), and asset securitisation (*fonds communs de créances*)[76] years before the legislature introduced the *fiducie* into the Civil Code itself.[77]

The 1985 Hague Convention acknowledges and contributes to the globalisation of the trust concept in two ways. It facilitates the international deployment of trust assets and services by increasing legal certainty through uniform conflict of laws rules. At a deeper level, it endorses and promotes a trust concept that is broader than the common law trust, recognising legal arrangements[78] that are not labelled as such and that often have not even been conceived as an emulation of the common law trust. Though the loose definition adopted in the Convention has been noted or criticised for creating a "shapeless trust",[79] this was not only a wise choice in political terms. It was the recognition that the trust has become a global legal institution by outgrowing its common law namesake.

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75. For a broad and deep analysis of the fiducie in French law before recent enactments, see Witz, La fiducie en droit privé français, Paris 1981.

76. Loi n° 79–594 relative aux fonds communs de placement of 13 July 1979; loi n° 81–1 instaurant un régime simplifié de cessions de créances professionnelles of 2 January 1981; loi n° 88–1201 portant création des fonds communs de créance of 23 December 1988.

77. Articles 2011–2030 introduced by the loi n° 2007–211 du 19 février 2007 instituant la fiducie.

78. Paraphrasing Article 11(1) of the Convention, one could add "recognising them as trusts".

79. See Lupoi, The Shapeless Trust, 1(3) Trusts & Estates 15–18 (1995), expanded in Lupoi, *supra* note 6, 331 ff.; discussed by Harris, The Hague Trusts Convention: Scope, Application and Preliminary Issues, Oxford etc. 2002, 111 ff.

Some expected that the international dubbing of the trust would induce non-trust jurisdictions to adopt trust statutes of their own or to enlarge and improve their equivalent institution.[80] This has only been partially the case. Improved international recognition of trusts through rules of conflict may not necessarily result in increased pressure on national lawmakers to enact domestic avatars of the common law trust. Indeed, why should one re-create in a particular legal system a complex legal institution when the genuine thing is already available by a mere choice of the applicable law?[81] In that sense, rather than a reason for adding to the national statutory books, ratifying the Hague Convention on trusts can be seen as a rational, efficient alternative. Resorting to trusts governed by the long-tested trust laws of a reputable trust jurisdiction offers better legal certainty than resorting to a recent duplicate of the same.

This is not to say that the legislative reception of the trust in the (substantive) legal system of civil law jurisdictions is unappealing. The recent (1999) proposal of a European Union Directive on Protected Funds recently made by a group distinguished scholars confirms the perception of the need for a European-wide, harmonised instrument protecting ("ring-fencing") a patrimony for commercial purposes under the control of an administrator and the supervision of a court.[82] Published on that same year, the Draft Common Frame of Reference (DCFR) includes a whole Book X, with no less than 115 sections, devoted to trusts.[83]

Whether or not this increased interest of European scholars for trusts and protected fund will result in legislative activity,[84] it is undisputable that the

80. This is the underlying assumption of efforts such as the one which produced the European Principles of Trust Law, which are not descriptive of a legal institution shared by many European countries but rather a source of inspiration for the reception and implementation of trusts in countries where trusts are not already indigenous.

81. The option of electing a foreign law to create and govern a trust in a non-trust jurisdictions—domestic trusts (*trust interni*) as widely practiced in Italy—may not be available, see Article 13 of the Hague Trusts Convention, which has been consciously discarded by the UK as well as by Switzerland upon ratification of the Convention. On *trust interni*, see Lupoi, The Hague Convention, the Civil Law and the Italian Experience, 21(1) Trust L. Int'l 83–86 (2007); Panico, *supra* note 11, 521–522.

82. Kortmann *et al.*, *supra* note 56, especially 7–42. This is the follow-up work of Hayton *et al.*, *supra* note 9.

83. Study Group on a European Civil Code *et al.,* Book X: Trusts, in Principles, definitions and model rules of European private law: Draft Common Frame of Reference (DCFR).

84. Which is quite doubtful, as noted by Alexandra Braun, The framing of a European law of trusts, in Smith (ed.), The Worlds of the Trust, Cambridge 2013, 277–304.

general awareness about trusts and their increasing use in numerous transactions have largely overcome a conservative scepticism, which was the norm in civil law jurisdictions twenty years ago. Trusts have become part of the international practice of law. The same process which benefits the idea of the trust has produced a dilution of the common law trust. From this process arises a new concept which focuses on core features, leaving aside the non-essential incidents of its English legal roots. It may not always be sold under the original brand name. It is often limited by clumsy, and sometimes nasty, restrictions. It need not rely on the admirably subtle equitable principles from which it developed. Nonetheless, it reflects a profound change of attitude and practices in many jurisdictions.

Trusts now form a much larger family than the original species to which the English word attaches. We can certainly anticipate that this trend will not subside.

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