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**TRUSTS IN COMMON LAW AND CIVIL LAW**

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***Abstract***

*This paper deals with common law trusts and their adoption in civil law jurisdictions. It analyses whether common law trusts in fact have a Roman origin and why the trust concept, understood as a matter of property law, conflicts with major civilian property law principles. However, from a civil lawyer's perspective, trusts can be explained as a special estate in the trustee's patrimony.*

***Word length***

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 6,796 words.*

***Subjects and Topics***

Trusts;

Roman *fideicommissum*;

Civilian property law principles;

Concept of "special patrimony".

## *I Introduction*

According to the preamble to the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition<sup>1</sup>, “the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution”. It is generally held that common law trusts, in spite of their great importance in Anglo-American legal systems<sup>2</sup>, cannot and do not exist in civil law jurisdictions as they arise from a unique historical development in English law and conflict with major civilian property law principles.<sup>3</sup> Comparative lawyers face the dilemma that the classic comparative approach “compare function rather than form” is inapplicable to trusts<sup>4</sup>: The trust is a general concept which fulfils numerous functions<sup>5</sup> whereas civil law jurisdictions use different devices for different circumstances.<sup>6</sup> The objective of the paper is to provide an overview of the law of trusts in common law and to show whether and how the trust concept can be explained in terms of legal categories provided by civil law. In a first step, I will briefly examine the origins and core elements of common law trusts (II) in order to compare them to the major property law principles and in civil law countries (III). In this context, a closer look at the Roman law, predecessor of the civil law jurisdictions, allows to examine whether the common law trust, in fact, has a civil law origin. In the fourth part, I will present an alternative concept on how trusts might be seen through the eyes of a civil lawyer (“special patrimony”) with a special focus on German law (IV). Some civil law countries have signed the Hague Trust Convention which obliges the signatory states to acknowledge trusts which are governed by a foreign law (V). This analysis leads me to the conclusion that trust can and do exist in civil law jurisdictions if one abandons the idea that trusts are a matter of property law (VI).

## *II Common Law Trusts*

### *A Historical Origins*

The “use”, predecessor of the common law trust, was invented in England at the time of the Crusades during the twelfth and thirteenth century by the Court of Chancery. Knights who left England to fight in the Crusades transferred their estate in land to a friend to

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<sup>1</sup> Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=59>.

<sup>2</sup> DJ Hayton *The Law of Trusts* (4th ed, Sweet & Maxwell, London, 2003) at 1-2.

<sup>3</sup> M Lupoi *Trusts: A Comparative Study* (Cambridge University Press, Cambridge, 2000) at 267.

<sup>4</sup> GL Gretton “Trusts without Equity” (2000) 49 ICLQ 599 at 599.

<sup>5</sup> Lupoi, above n 3, at 6: “polymorphic nature”.

<sup>6</sup> P Matthews “The Place of the Trust in English Law and in English Life” (2013) 19 *Trust & Trustee* 242 at 245.

hold it to the use of the knight and his family for the time of their absence or to the use of the eldest son in case of death.<sup>7</sup> However, some entrusted friends refused to recover the estate upon the knight's return. The common law courts would not admit the Crusaders claims, as the friends held the full legal title.<sup>8</sup> Hence, the knights petitioned the King to enforce their rights where the law courts would not give remedy. The Lord Chancellor, on behalf of the Crown, developed a parallel justice system in the Court of Chancery based on conscience, called "Equity".<sup>9</sup> He considered it "unconscionable" that the friend could deny the knight's true ownership and, therefore, granted the right to recover the estate.<sup>10</sup>

By the sixteenth century, the use had become an instrument of fraud and abuse in order to bypass legal requirements such as feudal duties, creditor's rights, the Statutes of Mortmain<sup>11</sup> or limitations imposed by inheritance law.<sup>12</sup> In consequence, the English Parliament in 1535 passed the Statute of Uses<sup>13</sup> which aimed at abolishing all equitable uses by eliminating the trustee and vesting the full legal title to the property in the beneficiary.<sup>14</sup> However, due to the Statutes simple language and its interpretation adopted by the common law courts, some equitable interests were not transferred into legal interests and, as such, recognised and enforced as "trusts" by the Court of Chancery, which form the basis of the modern trust law.<sup>15</sup> Today, the separation between common law courts and the Court of Chancery has been abolished and both legal and equitable rights can be judicially enforced in the same court.<sup>16</sup>

### *B Definition*

There is no generally accepted definition of common law trusts. Due to the variety of possible trusts, the attempts to cover all sorts in one phrasing are rather wide and vague – an illustration "that with an inductive legal system history can produce legal notions that

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<sup>7</sup> Hayton, above n 2, at 10.

<sup>8</sup> At 11; see also GG Bogert *Handbook of the Law of Trusts* (St Paul Mixx West Publishing Company, 1921) at 9.

<sup>9</sup> Bogert, above n 8, at 9-10.

<sup>10</sup> Hayton, above n 2, at 11.

<sup>11</sup> The Statutes of Mortmain, enacted in 1279 and 1290 by King Edward I of England, prohibited donations of land to the Church in order to ensure the Kingdom's revenue.

<sup>12</sup> Bogert, above n 8, at 6; A Avini "Comment: The Origins of the Modern English Trust Revisited" (1996) 70 Tul L Rev 1139 at 1145-1146.

<sup>13</sup> 27 Hen 8 c 10.

<sup>14</sup> Bogert, above n 8, at 10-12; Avini, above n 12, at 1146-1147.

<sup>15</sup> Bogert, above n 8, at 12; Avini, above n 12, at 1147.

<sup>16</sup> Bogert, above n 8, at 5.

are totally understandable to those who grew up in the society whose history this is, but which defy ease of definition for the stranger”.<sup>17</sup>

LA Sheridan and GW Keeton propose the following definition:<sup>18</sup>

A trust is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

This definition takes into account that the trustee might be one of several beneficiaries, that property of any kind can be the object of the trust, and that the benefit does not necessarily have to be for a specific individual but may be for a purpose (eg charitable trust).<sup>19</sup>

### *C Core Elements*

Despite the variety of conceivable trusts, some core elements can be identified.

#### *1 Creation*

To create an (express) trust, the settlor has to put property into the trustee’s name or into the name of a nominee on behalf of the trustee (unless the settlor retains the property and declares himself/herself to be the trustee).<sup>20</sup> An exception is made for so-called “implied trusts”: Implied trusts do not have a settlor, but are created by law in order to take account of the parties presumed intent that they shall exist or to accomplish justice.<sup>21</sup> The creation is a unilateral act, not a contract: Acceptance or refusal (by a reluctant trustee) have no effect on the creation of a trust.<sup>22</sup>

In principle, there are no formal requirements to create a trust.<sup>23</sup> It can be oral or written. This informality allows for the establishment of secret or half-secret trusts.<sup>24</sup> In the first case, the creation of a trust as such is kept secret whereas in the second case, only the terms of the trust are undisclosed. Any formal requirements result from the nature of the

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<sup>17</sup> DWM Waters “The Institution of the Trust in Civil and Common Law“ in Académie de Droit International (ed) (1995) 252 Recueil des Cours (Martinus Nijhoff, Dordrecht/Boston/London) 113 at 126.

<sup>18</sup> LA Sheridan and GW Keeton *The Law of Trusts* (11th ed, Barry Rose, Chichester, 1983) at 2.

<sup>19</sup> Waters, above n 17, at 125.

<sup>20</sup> *Milroy v Lord* [1862] 4 De GF & J 264.

<sup>21</sup> Bogert, above n 8, at 4 and 43.

<sup>22</sup> Lupoi, above n 3, at 96-97.

<sup>23</sup> Hayton, above n 2, at 16; Lupoi, above n 3, at 14-15.

<sup>24</sup> Lupoi, above n 3, at 110-116; Hayton, above n 2, at 57-58.

trust property (eg land), not from the creation of the trust itself.<sup>25</sup> The only requirement (“three certainties”) is that the settlor’s declaration of an express trust must clearly reveal the intention to create a trust, the subject matter (trust res) and the object (beneficiary or purpose) of the trust.<sup>26</sup>

Once the trust is effectively established, the trustee’s death or his/her incapacity to act as such do not affect its continuance. A new trustee will be appointed either in accordance with the terms and conditions set up by the settlor or, in absence of such a provision, by the court.<sup>27</sup>

## 2 *Split of ownership*

As the settlor’s rights to the trust property, in principle, cease with the creation of the trust, the essential legal relationship in a trust is between the trustee and the beneficiary.<sup>28</sup> According to the common law position, the trust creates not a mere personal relationship between trustee and beneficiary but includes a property dimension. The beneficiary is not confined to a personal action against the faithless trustee for breach of his/her fiduciary duties, but has a legally protected *in rem* interest in the trust property itself. The characteristic feature of common law trusts is the separation of control and benefit (“dual” or “split ownership”)<sup>29</sup>: The trustee holds the legal title which enables him/her to control and distribute the trust property and act as an owner in relation to third parties (legal ownership), whereas the beneficiary has an equitable right to the actual or possible benefit of the trust property under the conditions set out by the settlor (beneficiary or equitable ownership).<sup>30</sup> The Privy Council has stated that this “distinction between the legal and the equitable estate is of the essence of the trust”.<sup>31</sup> This “property dimension” of trusts has two important consequences:

The trust property is separated from the trustee’s personal property<sup>32</sup>, so that the trustee’s creditors cannot seize the trust property in case of the trustee’s insolvency or bankruptcy (insolvency effect).<sup>33</sup> The trust property is available only for the beneficiaries or the

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<sup>25</sup> Lupoi, above n 3, at 97.

<sup>26</sup> *Morice v Bishop of Durham* [1805] EWHC Ch J80; *Paul v Constance* [1976] EWCA Civ 2.

<sup>27</sup> L Smith “Trust and Patrimony” (2009) 28 Estates, Trusts and Pensions Journal 332 at 337.

<sup>28</sup> Waters, above n 17, at 130.

<sup>29</sup> P Jaffey Explaining the Trust“ (2015) 131 LQR 377 at 386-387.

<sup>30</sup> At 377; J Garrigues “Law of Trusts” (1953) 2 Am J Comp L 25 at 27; Matthews, above n 6, at 246; WW Buckland and AD McNair *Roman Law and Common Law* (2nd ed, Cambridge University Press, 2008) at 176-177.

<sup>31</sup> *Abdul Hameed Sitti Kadija v De Saram* [1946] AC 208, PC with reference to RW Lee *Introduction to Roman-Dutch Law* (3rd ed, Clarendon Press, Oxford, 1931) at 372.

<sup>32</sup> Buckland and McNair, above n 30, at 176.

<sup>33</sup> *Heritable Reversionary Co Ltd v Millar* [1892] 19 R (HL) 43 per Herschell: “I cannot think (...) that it [= the property of the debtor] includes, or was ever intended to include, estates of which the bankrupt was a

purpose of the trust, not for the trustee's personal creditors.<sup>34</sup> Moreover, the beneficiaries equitable interest manifests itself in an equitable property claim: Beneficiaries have a right to recover *in rem* from third-party recipients who have not given value (eg donee) or *in rem* or *in personam* from purchasers who gave true value but had actual, constructive or imputed notice of the trust when acquiring the trust property.<sup>35</sup> Only bona fide purchasers for true value without notice are protected against beneficiary's claims.<sup>36</sup>

### *III Trusts and Civil Law*

The split between law and equity, as outlined above, is a special product of the common law tradition.<sup>37</sup> Today's civil law jurisdictions, however, derive from Roman law which is alien to the idea of a shared ownership.

#### *A Roman Law*

##### *1 The Roman fideicommissum*

In England, trusts as a fiduciary institution arose from the distinction between law and equity. Although this distinction of norms was unknown to Roman law, similar effects were achieved by the distinction between *judicia stricti juris* and *judicia bonae fidei*.<sup>38</sup> The concept of *fiducia* (good faith), unlike the strict, legally enforceable law, refers to a relationship of confidence where one person relies upon another in good faith to do what the other promised to do.<sup>39</sup> The Roman institution closest to the English law trust is the so-called *fideicommissum*.<sup>40</sup> It was used by testators to transfer property to their heirs by way of will and imposed upon the heir (the *fiduciarius*) the obligation to transfer that property to somebody else (the *fideicommissarius*), either at once ("vulgar substitution") or after the heir's death ("fiduciary substitution").<sup>41</sup> Like trusts, *fideicommissa* could be established orally.<sup>42</sup> Any property, movable or immovable, could be the object of a

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bare trustee, and in which he had no beneficial interest."; Waters, above n 17, at 127; Jaffey, above n 29, at 379.

<sup>34</sup> Hayton, above n 2, at 4.

<sup>35</sup> Waters, above n 17, at 127.

<sup>36</sup> *Re Diplock's Estate* [1948] Ch 465, [1948] 2 All ER 318, [1948] WN 304; Buckland and McNair, above n 30, at 176.

<sup>37</sup> Gretton, above n 4, at 600.

<sup>38</sup> Garrigues, above n 30, at 27.

<sup>39</sup> Waters, above n 17, at 134.

<sup>40</sup> D Johnston *The Roman Law of Trusts* (Clarendon Express, Oxford, 1988) at 283.

<sup>41</sup> Waters, above n 17, at 137; P Matthews "The Compatibility of the Trust with the Civil Law Notion of Property" in L Smith (ed) *The World of Trusts* (Cambridge University Press, Cambridge, 2013) 313 at 332.

<sup>42</sup> Buckland and McNair, above n 30, at 163; Waters, above n 17, at 155.



*fideicommissum*. It could take effect over the testator's whole inheritance or one single asset.<sup>43</sup>

The *fideicommissum* arose out of the endeavour to bypass the restrictions imposed on legacies by the regular law of succession. Under the narrow and rigid *ius civile*, certain people (eg non Roman citizens, unborn or not yet conceived children, unmarried persons) were excluded from being a person's testamentary heir.<sup>44</sup> The *fideicommissum* allowed for the transfer of property to a legally incompetent beneficiary through an intermediary legatee who, according to the law, himself/herself was capable of being an heir.<sup>45</sup> Comparable to a charitable trust, it also permitted a transfer of property to carry out a certain purpose.<sup>46</sup> Moreover, the *fideicommissum* in its early stage was used to avoid the restrictions of the *lex Falcidia* according to which the statutory heirs were entitled of one quarter of the estate, the so-called Falcidian quarter.<sup>47</sup>

## 2 Roman law as inspiration for the emergence of common law trusts?

Representatives of the Roman theory believe that the Roman *fideicommissum* has influenced the emergence of the common law trust in England.<sup>48</sup> It is assumed that the clerks in the Court of Chancery who drew the writs and had studied canon law were aware of the Roman law which served as a basis for canon law.<sup>49</sup> Although "*fideicommissum*" is often translated by "trust"<sup>50</sup>, it is not a trust in the common law sense.

### (a) No split of ownership

Unlike a trustee, the *fiduciarius* was the full legal owner of the property<sup>51</sup> and, therefore, could enjoy the benefits of the asset himself/herself before transferring it to the *fideicommissarius*.<sup>52</sup> There was no distinction between legal and equitable estate or, in

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<sup>43</sup> Waters, above n 17, at 143.

<sup>44</sup> At 140-141; Bogert, above n 8, at 7; Buckland and McNair, above n 30, at 173.

<sup>45</sup> Avini, above n 12, at 1147; Johnston, above n 40, at 9.

<sup>46</sup> Waters, above n 17, at 141.

<sup>47</sup> At 140; Buckland and McNair, above n 30, at 168.

<sup>48</sup> Avini, above n 12, at 1148.

<sup>49</sup> Waters, above n 17, at 156; Avini, above n 12, at 1148-1149; R Zimmermann "Europa und das Römische Recht" (2002) 202 AcP 243 at 280; Johnston, above n 40, at 285.

<sup>50</sup> Johnston, above n 40, at 1.

<sup>51</sup> Buckland and McNair, above n 30, at 94; Matthews, above n 41, at 333. Later, an edict provided by Justinian vested ownership in the *fideicommissarius* so that the *fiduciarius* had no right into the trust property at all and, therefore, could not infringe the *fideicommissarius*' interest by transferring the property to someone else (Waters, above n 17, at 147).

<sup>52</sup> M Lupoi "Trusts in the Civil Law – An Introduction" (1996) 2 Trusts & Trustees 20 at 21; Waters, above n 17, at 138; Buckland and McNair, above n 30, at 177.

other words, no split of legal and equitable ownership.<sup>53</sup> According to Roman law, all ownership rights (disposition, management and enjoyment) had to be combined in one person.<sup>54</sup>

(b) Rights to the trust property

*Fideicommissum* and common law trust also differ with regard to the beneficiary's rights to the trust property. At the beginning, the *fideicommissarius* had no legal remedy whatsoever to force the *fiduciarius* to carry out the testator's will.<sup>55</sup> Both the testator and the *fideicommissarius* had to rely upon the *fiduciarius*' good will to act according to his/her promise. It was not until the reign of Augustus that the *fideicommissum* became legally enforceable.<sup>56</sup> Like the beneficiary of a common law trust, the *fideicommissarius* could take personal action against the *fiduciarius* for breach of duty.<sup>57</sup> It is also proven that the *fideicommissarius* had an *in rem* action, called *missio in rem* or *missio in possessionem*, against third-party recipients who were not a bona fide purchaser for true value without notice.<sup>58</sup> However, latter was clearly based upon the third party's own wrongful conduct and, therefore, designed to enforce a personal liability<sup>59</sup>, not expression of an equitable property right. This is an important difference to the trustee of the common law trust who, according to the prevailing understanding in English law, has an *in rem* action vis-à-vis third party recipients resulting from his/her position of an equitable owner. Unlike the English trust law, the Roman law did not provide for any procedures or remedies of tracing<sup>60</sup>, meaning that the *fideicommissarius* could not recover the trust property from fourth or fifth party recipients who had acquired it from a third party.<sup>61</sup>

(c) No *fideicommissum inter vivos*

Moreover, the Roman *fideicommissum* was a "substitution concept"<sup>62</sup>, "an extension of testamentary power"<sup>63</sup>, in order to pass an asset from one person to another on either the *fiduciarius*' death or any other event prescribed by the testator. It could take effect on the transferor's death only.<sup>64</sup> There was no need for a *fideicommissum inter vivos* as the

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<sup>53</sup> Waters, above n 17, at 137.

<sup>54</sup> Hayton, above n 2, at 8; Waters, above n 17, at 138.

<sup>55</sup> Garrigues, above n 30, at 26.

<sup>56</sup> Waters, above n 17, at 139.

<sup>57</sup> At 145.

<sup>58</sup> At 146.

<sup>59</sup> At 147.

<sup>60</sup> See Lupoi, above n 3, at 58-65.

<sup>61</sup> Waters, above n 17, at 145.

<sup>62</sup> At 156.

<sup>63</sup> Matthews, above n 41, at 333.

<sup>64</sup> Waters, above n 17, at 144; Bogert, above n 8, at 7; Johnston, above n 40, at 283.

power of donations *inter vivos* was less restricted.<sup>65</sup> The English model trust, on the contrary, in its original form was a concept *inter vivos*.<sup>66</sup> Today's trusts may arise by will, but are not exclusively a matter of inheritance law.

(d) Coincidence instead of influence

Although both institutions, the Roman *fideicommissum* and the common law trust, may have developed outside the established legal order and may be born for a similar purpose, to bypass or fill gaps in the existing legal order, there is no evidence of mutual influence. Due to the disparities mentioned before, it is rather unlikely that the Roman law has inspired the emergence of common law trusts.<sup>67</sup> It is more likely that, as a kind of coincidence, similar historical circumstances have “attributed to independent, yet parallel, developments emerging out of equitable responses to the rigidity of the positive law”.<sup>68</sup>

*B Clash with Major Property Law Principles*

Most of today's civil law jurisdictions, offshoots of the Roman law, do not contain the concept of a trust as it is supposed to violate major property law principles. This applies, in particular, to those civil law countries which have been affected by the revolutionary changes in France and took over the unitary conception of ownership established by the *Code Napoléon*.<sup>69</sup>

*1 Absolute ownership and numerous *clausus* of property rights*

Civil law jurisdictions do not know the dualism of law and equity and, therefore, no split of ownership into a legal and an equitable part.<sup>70</sup> It is this separation of the property's legal ownership and control from its equitable ownership and benefits that is inconsistent with the civilian unitary conception of ownership.<sup>71</sup> Unlike contractual rights that can be freely agreed by the parties in exercise of their freedom of contract (*Vertragsfreiheit*), the *numerus clausus* of property rights does not permit new forms of property rights apart from those provided by the law.<sup>72</sup> The beneficiary's equitable ownership characteristic of

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<sup>65</sup> Matthews, above n 41, at 333.

<sup>66</sup> At 332.

<sup>67</sup> Avini, above n 12, at 1152-1162 claims that it was the Islamic *waqf* which has in fact influenced the development of the English use.

<sup>68</sup> At 1141; see also Matthews, above n 6, at 243.

<sup>69</sup> V Bolgár “Why No Trusts in the Civil Law?” (1953) 2 Am J Comp L 204 at 209-210.

<sup>70</sup> Gretton, above n 4, at 600.

<sup>71</sup> Garrigues, above n 30, at 33 with regard to Spanish law.

<sup>72</sup> S Banakas “Understanding Trusts: A Comparative View of Property Rights in Europe” (2006) 1 Revista Para El Analisis Del Derecho 1 at 5.

the common law trust does not fit into one of those categories.<sup>73</sup> Civilian property law is based on the idea of an absolute, all-embracing legal ownership as the unlimited power to manage (*usus*), enjoy (*fructus*) and dispense (*abusus*) freely of the property.<sup>74</sup> For example, § 903 of the German Civil Code entitled “powers of the owner”, which derives from Art 544 of the *Code Napoléon*, provides that “the owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from any interference”. This all-embracing legal ownership can only be restricted by limited property rights, such as servitudes, mortgages and usufructus, not by another unlimited beneficial ownership.<sup>75</sup> In the case of co-ownership, the ownership is shared between more than one owner, but each owner has full ownership rights with regard to his/her ownership share, meaning that each of them can manage, enjoy and dispense freely of his/her share.

Against this backdrop, it is not surprising that the Court of Justice of the European Union in its judgment in *Webb v Webb*<sup>76</sup> did not apply Art 16(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters (1968)<sup>77</sup> to a trust set up under English law, considering the beneficiary’s right as a right *in personam*, not as a right *in rem*. Trust-like institutions in civil law systems lack the property dimension of trusts.<sup>78</sup> The split of ownership into a legal and an equitable part is the product of a special historical development in English law unknown to civil law countries. Therefore, contracts for the benefit of a third party, which are permitted under civil law (see, for example, § 328 of the German Civil Code), can be enforced by the beneficiary, but only *in personam*, not by a trust-like property right.<sup>79</sup>

## 2 *Principle of publicity*

Moreover, the informality of common law trusts conflicts with the principle of publicity of property rights which prohibits oral or secret trusts.<sup>80</sup> It is presumed that the legal ownership belongs to the person who holds a movable or is registered as owner of an immovable. Basically, creditors can access all of their debtor’s assets. According to the English law of trusts, however, the trust property is separated from the trustee’s personal property although the trustee is the full legal owner. The trust’s insolvency effect, as mentioned above, makes the trust property unavailable for the trustee’s personal

<sup>73</sup> D Clarry “Fiduciary Ownership and Trusts in a Comparative Perspective” (2014) 63 ICLQ 901 at 908; Matthews, above n 41, at 321; R Zhang “A Comparative Study of the Introduction of Trusts into Civil Law and its Ownership of Trust Property” (2015) 21 Trust & Trustees 902 at 904.

<sup>74</sup> Clarry, above n 73, at 907; Matthews, above n 41, at 318-321; Zhang, above n 73, at 903.

<sup>75</sup> Hayton, above n 2, at 8; see also Bolgár, above n 69, at 210; Matthews, above n 6, at 246.

<sup>76</sup> Case C-294/92 *Webb v Webb* [1994] ECR I-1717: see Lupoi, above n 3, at 193-195.

<sup>77</sup> OJ L299/32.

<sup>78</sup> Jaffey, above n 29, at 394.

<sup>79</sup> Hayton, above n 2, at 9-10.

<sup>80</sup> Banakas, above n 72, at 6.

creditors. This (invisible) separation of personal and trust property is contrary to the civilian principle of publicity, as the trustee may erroneously appear as absolute owner to the outside world.<sup>81</sup>

### 3 *Principle of specificity*

Finally, the traditional conception of trusts may violate the principle of specificity underlying civilian property law. Real rights in terms of civil law can only exist in respect of specific items, not with respect to assets in general whose individual components might change while the entity as such continues to exist. The beneficiary's equitable interest, however, may be a general right to the financial benefits from the trust property without any reference to a special asset.<sup>82</sup>

## IV *Alternative Concepts*

V Bolgár proposes to overcome civilian property law obstacles to trusts by, inter alia, abolishing the *numerus clausus* rule and expanding the list of real rights to include trusts with *in rem* effect.<sup>83</sup> I consider such a profound change to civilian property law to be unnecessary. The traditional explanation of trusts as contemporaneous ownership<sup>84</sup> “provides only a historical and not a rational account of the trust”.<sup>85</sup> A closer look at common law trusts from a civil lawyer's perspective reveals that trusts presuppose neither equity nor a split of ownership.<sup>86</sup> The strict distinction between the law of (personal) obligations and the law of property established by Justinian in the *Corpus Iuris Civile* and adopted by today's civil law jurisdictions is unknown to English law.<sup>87</sup> If one banishes the idea that trust is a matter of a property law and the beneficiary's right to the trust property a right *in rem* in the civilian sense<sup>88</sup>, the trust might, in fact, fit into legal categories provided by civil law. Especially those civil law jurisdictions, which remained unaffected by the French Revolution and the changes in property law introduced by the *Code Napoléon*, have adopted the trust concept.<sup>89</sup> For example, Scottish law has successfully integrated trusts in its civilian property law system by vesting the legal

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<sup>81</sup> At 6-7.

<sup>82</sup> Gretton, above n 4, at 606.

<sup>83</sup> Bolgár, above n 69, at 214.

<sup>84</sup> See MS Amos “The Common Law and the Civil Law in the British Commonwealth of Nations” (1937) 50 Harv L Rev 1249 at 1264.

<sup>85</sup> B Rudden “Things as Thing and Things as Wealth” (1994) 14 Oxford Journal of Legal Studies 81 at 89.

<sup>86</sup> Gretton, above n 4, at 601; Smith, above n 27, at 333.

<sup>87</sup> Matthews, above n 6, at 243-244.

<sup>88</sup> Gretton, above n 4, at 608: “(...) the term right *in rem* as used by lawyers in the common law tradition does not precisely correspond to the civilian conception of a real right.”; see also M Lupoi “The Civil Law Trust” (1999) 32 Vanderbilt Journal of Transnational Law 967 at 977.

<sup>89</sup> Bolgár, above n 69, at 208-209.

(fiduciary) ownership of the trust property in the trustee and classifying the beneficiary's right as a mere personal right.<sup>90</sup> And also Québec, Louisiana, Mexico, Panama, Liechtenstein and Luxembourg have incorporated the trust concept into national legislation whereby the legal technique to protect the beneficiary's interests differ.<sup>91</sup> This fact alone shows that trusts are not per se incompatible with civil law systems. As M Lupoi rightly says:<sup>92</sup>

If trusts contradicted basic assumptions of the civil law systems, as the prevailing view asserts, the civil law systems all ought to react in the same way, that is, by rejecting trusts. (...) this is not the case.<sup>93</sup>

### A Contractual Approach

Although some might say that trusts have a contractual dimension<sup>94</sup>, the concept of a trust cannot be entirely explained in terms of the law of obligations.<sup>95</sup> Civil law jurisdictions are familiar with the idea that one person transfers the ownership of an asset to another person so that the latter, by virtue of a contractual obligation, is bound to manage the asset in the prescribed manner.<sup>96</sup> The Roman *fiducia cum amico* was an early form of mandate where a person transferred property to a friend with the understanding and trust that the friend would administer that property in a certain manner.<sup>97</sup> The friend obtained the full legal title to the property so that the transferor's legal remedies were limited to a personal right of action for damages (*action fiducia*). In the case of the German *fiduziarische Treuhand*, the *Treuhänder* (fiduciary) is bound by a fiduciary contract (*Treuhandvertrag*) to manage a certain asset for the benefit of another person. The *Treuhänder* obtains full legal ownership of the *Treugut* (trust property).<sup>98</sup> *Treuhänder* who violate their fiduciary obligations are subject to damage claims<sup>99</sup>, but the *Treugeber*

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<sup>90</sup> Gretton, above n 4, at 619; Smith, above n 27, at 352; Zimmermann, above n 49, at 283-284; Clarry, above n 73, at 910-911; for a detailed analysis of the Scottish trust law see Lupoi, above n 3, at 292-296; Zhang, above n 73, at 913-919.

<sup>91</sup> Zimmermann, above n 49, at 284-285; for further examples see Zhang, above n 73, at 907-908.

<sup>92</sup> Lupoi, above n 88, at 969.

<sup>93</sup> For examples, see Lupoi, above n 88, at 971-973.

<sup>94</sup> JH Langbein "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale L J 625; for the obligational theory see Jaffey, above n 29, at 378-385.

<sup>95</sup> Gretton, above n 4, at 601-603.

<sup>96</sup> At 601.

<sup>97</sup> At 601; Waters, above n 17, at 135.

<sup>98</sup> On the contrary, in case of the so-called *Ermächtigungstreuhand*, the *Treugeber* stays the legal owner but authorises the *Treuhänder* to dispose of the *Treugut* (§ 185 German Civil Code).

<sup>99</sup> I Gvelesiani "German 'Treuhand' vis-à-vis Austrian 'Treuhand' (Terminological Study)" (2015) Special Edition April European Scientific Journal 133 at 134.

(settlor/beneficiary) has no property claim to recover the *Treugut* or its traceables. The *Treugeber's* remedies are merely contractual.<sup>100</sup>

The objection that the formation of a trust is not a contract in terms of the common law rules of contract, may be overcome by the fact that it is nevertheless, in principle, based on the trustee's consent to act as such.<sup>101</sup> Nor do the beneficiary's rights vis-à-vis third-party recipients as mentioned above, which are generally invoked to establish the beneficiary's right *in rem* in the trust property<sup>102</sup>, from the outset preclude any contractual attempt at explanation. The law of obligations, too, grants protection against wrongful interference in the performance of an obligation by third parties.<sup>103</sup> However, a contractual understanding of the law of trusts cannot explain the beneficiary's right in relation to the trustee's creditors<sup>104</sup>: If the trust is a contract, there is no apparent reason why a beneficiary's merely personal right against the trustee to hold the trust property in accordance with the terms and conditions set up by the settlor should prevail over the rights of other creditors.<sup>105</sup>

### *B Trusts as Special Patrimony*

Yet, from a civilian perspective, trusts can be explained as a separate estate in the trustee's patrimony.<sup>106</sup> A person's patrimony ("estate", "fund") comprises "the totality of a person's assets", that is all of his/her rights and obligations.<sup>107</sup> Although each person, in principle, only has one single patrimony ("unity of patrimony")<sup>108</sup>, civil law jurisdictions acknowledge special patrimonies (*Sondervermögen*) which are separated from a person's general patrimony.<sup>109</sup> For example, in case of the German *Testamentsvollstreckung*

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<sup>100</sup> M Raczynska "Parallels between the Civilian Separate Patrimony, Real Subrogation and the Idea of Property in a Trust Fund" in L Smith (ed) *The World of Trusts* (Cambridge University Press, Cambridge, 2013) 454 at 463.

<sup>101</sup> Jaffey, above n 29, at 378; Gretton, above n 4, at 601-602; according to Lupoi, above n 88, at 976, "common law scholars underrate the agreement component of trusts".

<sup>102</sup> Jaffey, above n 29, at 379-385.

<sup>103</sup> Gretton, above n 4, at 602; Smith, above n 27, at 343.

<sup>104</sup> Zhang, above n 73, at 905.

<sup>105</sup> Gretton, above n 4, at 602-603.

<sup>106</sup> At 608-615; Zhang, above n 73, at 906; Raczynska, above n 100, at 456-460; critical Matthews, above n 41, at 327-329; Smith, above n 27, at 337-342. P Lepaulle *Traité Théorique et Pratique des Trusts en Droit Interne, en Droit Fiscal et en Droit International* (Rousseau et Cie, Paris, 1932) tried to explain the common law trust as a patrimony independent of any natural or legal person dedicated to a certain purpose (critical Smith, above n 27, at 336: "There is no such thing as a common law trust without a trustee.")

<sup>107</sup> Gretton, above n 4, at 608; Matthews, above n 41, at 324-325; Zhang, above n 73, at 904.

<sup>108</sup> Zhang, above n 73, at 904; Smith, above n 27, at 336.

<sup>109</sup> Eg the Roman *peculium* (see Buckland and McNair, above n 30, at 178), the Roman *dos* ("dowry"; see Buckland and McNair, above n 30, at 82) or the French *patrimoine d'affectation* (Zhang, above n 73, at 906).

(execution of a will), the decedent's estate constitutes a special patrimony separated from the heir's general patrimony.<sup>110</sup> Translated into trust law, such understanding leads to the following conclusion: The trustee obtains full legal ownership of the trust property which forms a special patrimony separated from the trustee's other assets. In terms of civilian property law, he has all the rights of a full legal owner (*usus, fructus, abusus*), but is bound by the trust to use these rights for the benefit of the beneficiary.<sup>111</sup> The beneficiary has a personal right against the trustee, enforceable against the special patrimony held by the trustee.<sup>112</sup> Other creditor's personal rights cannot be enforced in the trust patrimony, but only in the trustee's general patrimony.<sup>113</sup> This, for example, is the approach followed by the Liechtenstein trust law (*Die Treuhänderschaften*) enacted in 1926. According to Art 897 of the Liechtenstein Person and Company law, the trustee holds the trust property in his own name as an independent legal owner ("*im eigenen Namen als selbständiger Rechtsträger*"). The trustee is the full legal owner, meaning that his right of ownership has effect towards all the world ("*mit Wirkung gegen jedermann*"), but he/she is bound by obligations vis-à-vis the beneficiary ("*Verpflichtung ... zu Gunsten eines oder mehrerer Dritter (Begünstigter)*").<sup>114</sup> As provided by Art 915(1) of the Liechtenstein Person and Company Law, "the trust estate is to be treated as a separate patrimony and the creditors of the trustee have no claim on it". And also the French *fiducie* requires that fiduciaries keep the trust property separate from their own personal patrimony ("*les tenants séparés de leur patrimoine propre*").<sup>115</sup>

Thus, the recourse to a split of ownership granting the beneficiary a semi-real right, which was essential to explain the insolvency effect of trusts, becomes superfluous. The split of ownership is substitute by a split of patrimony.<sup>116</sup> Moreover, this approach allows for the individual components of the trust property to change<sup>117</sup> – a fact that, from the civilian perspective with regard to the principle of specificity (see above), cannot be explained on the assumption that the beneficiary has a right *in rem* to the trust property.<sup>118</sup> It also explains why the trust does not fail for want of a trustee, eg if the trustee dies or if the designated trustee is legally incapable to act as such.<sup>119</sup>

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<sup>110</sup> BGH 1.6.1976, II ZR 150/06, BGHZ 48, 214.

<sup>111</sup> Gretton, above n 4, at 616.

<sup>112</sup> At 612.

<sup>113</sup> Zhang, above n 73, at 906-907.

<sup>114</sup> See Lupoi, above n 88, at 971-972; Lupoi, above n 3, at 304.

<sup>115</sup> Art 2011 of the French Code Civil. For further examples see Lupoi, above n 3, at 308-310.

<sup>116</sup> Gretton, above n 4, at 613.

<sup>117</sup> See Lupoi, above n 52, at 22.

<sup>118</sup> Gretton, above n 4, at 613; Raczynska, above n 100, at 465-470: real subrogation.

<sup>119</sup> Gretton, above n 4, at 613; Zhang, above n 73, at 906.



The idea of a special patrimony comes close to the legal institution called “foundation”. The German *Stiftung* can be created to devote assets or patrimony to specific aims and is similar to a charitable trust.<sup>120</sup> However, unlike trusts<sup>121</sup>, a foundation has its own legal personality. The foundation assets are not a mere special patrimony within an individual’s general patrimony, but a *Zweckvermögen* owned by a legal person.<sup>122</sup>

### *V Recognition under the Hague Trust Convention*

The common law trust is no longer a national phenomenon, but has become an important legal device in international trade and commerce. It is used for various commercial purposes in trans-border transactions.<sup>123</sup> It is particularly interesting to examine how civil law countries deal with this reality. As mentioned before, some civil law or mixed countries, such as Liechtenstein, Scotland, South Africa, Québec or Curaçao, have adopted trusts as part of their own legal order.<sup>124</sup> Alternatively or additionally, some civil law countries, like Italy, Luxembourg, Liechtenstein, Malta, Monaco, Switzerland or the Netherlands, recognise trusts under the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (“the Convention”)<sup>125</sup>. Those signatory states are not obliged to carry over the concept of trust into domestic legislation, but must, in principle<sup>126</sup>, recognise trusts governed by a foreign law as a matter of private international law as long as the designated law is not inconsistent with mandatory rules of the law applicable by the conflict rules of the forum regarding, inter alia, succession, transfer of title of property, insolvency or the protection of third parties acting in good faith (see Art 15 of the Convention).<sup>127</sup> The applicable law is either the law chosen by the settlor or, in absence of such a choice, the law with which the trust is most closely connected (see Arts 6 and 7 of the Convention). It is interesting to note that Art 2 defining the characteristics of a trust for the purpose of the Convention does not make any reference to beneficiary’s right in the trust property, but describes the trust in a system-neutral manner.<sup>128</sup> According to Art 2(a) of the Convention, “the [trust] assets constitute a separate fund and are not part of the trustee’s own estate”. The Convention, thereby, adopts the concept of a “special patrimony” as outlined above<sup>129</sup> in order to

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<sup>120</sup> Gvelesiani, above n 99, at 134.

<sup>121</sup> Smith, above n 27, at 333-334.

<sup>122</sup> Gretton, above n 4, at 616.

<sup>123</sup> Zhang, above n 73, at 905.

<sup>124</sup> See in detail Lupoi, above n 3, at 267-326.

<sup>125</sup> Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=59>.

<sup>126</sup> Exception: optional recognition under Art 13 of the Convention.

<sup>127</sup> Hayton, above n 2, at 15; DJ Hayton “The Developing European Dimension of Trust Law” (1999) 10 K L J 48 at 49.

<sup>128</sup> Zhang, above n 73, at 908; for a critical analysis see M Lupoi “Effects of the Hague Convention in a Civil Law Country” (1998) 4 Trust & Trustees 15 and Lupoi, above n 3, at 327-367.

<sup>129</sup> Raczynska, above n 100, at 454-455.

avoid a split of ownership into a legal and an equitable part which has been shown to be incompatible with basic property law principles in civil law jurisdictions.

## *VI Conclusion*

As an institution characteristic for the common law, the trust is a good example to show fundamental differences between civil and common law jurisdictions. It allows comparisons of both legal systems in relation to their origin as well as to their concept of “ownership”. The division of law and equity, from which the law of trusts traditionally arose, is unknown to civil law jurisdictions, offshoots of the Roman law. However, both legal systems are not that far apart as it might appear at first glance. Although the emergence of the common law trust probably was not directly influenced by the Roman *fideicommissum*, both legal institutions nonetheless show conceptual similarities, a common fiduciary nature. Civil law jurisdictions, too, are familiar with the idea of *fiducia* and acknowledge legal arrangements where one person holds and manages a certain asset for the benefit of another person. Some civil law countries have even incorporated the trust concept into their own national legislation. A comparative analysis of trusts requires banishing the idea that the beneficiary’s equitable interest in the trust property is a real right in terms of civil law. This disentanglement from property law allows to associate trusts with another civilian legal category, that is the concept of a special patrimony. Thus, from a civilian perspective, trusts can be explained as a special estate (*Sondervermögen*) in the trustee’s patrimony, as, for example, laid down in Art 915(1) of the Liechtenstein Person and Company Law. The idea of a separate patrimony has also been adopted by the Hague Trust Convention which requires the signatory states to recognise trusts governed by a foreign law.

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