THE FUTURE OF THE TRUST FROM A WORLDWIDE PERSPECTIVE*

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(1) INTRODUCTION

In the days of Empire, the English trust got off the boat with the intending settlers and, regardless of local law, set up business in the high street, or the local equivalent, as if it were in any English county town. The new arrivals from the home counties, the shires, the west and north country, Ireland or Scotland made wills with trusts of residue and in due time, having got together some wealth and reflected upon mortality, they created *inter vivos* trusts. They very rarely imposed upon the local people their own succession law or family law. Those were sensitive areas, and it was better to have co-operation than resentful compliance. But again, in due time, the trust would find its way into the lives of the local people through trading and a shared life experience. Trust theory was rarely known in detail to anyone on the local scene, but the arrivals had among them one or two who knew from 'the old country' how to draw a trust and roughly how it worked. And that was that. No more was needed, and the locals and the one-time settlers would absorb it into their shared law as they saw it fitting in. Ultimately, the law of the 'new country' would include this thing, the trust. Nobody wrote legal texts or instruction manuals about it all. It just happened and went unmarked.

What is more, the process continues. Within recent years a new creature has made its way from several small islands of what was once that Empire to the mainland common law jurisdictions. And it carries a name that is not unfamiliar even in civil law states, those, that is, that

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have never known the common law in their high streets or anywhere else. The new creature is 'the international trust'. No one appears to have defined it,[2] but practitioners and now writers are using the term with confidence. All of us have 'a fairly good idea', we think, of what it means, and we are prepared to leave it at that.

This article is concerned with the future of the trust idea in terms of what the word 'trust' means and the direction that idea may take in the coming years. My thesis is that, in the common law jurisdictions, we are fast approaching, if we have not already reached, a time of decision. We have to decide whether we want the trust that the last two hundred years has designed and left us, or we wish to be open to a range of possible conceptions about the nature of the trust. Certainly common law lawyers are constantly pushing further out the frontiers of the trust idea. The eventual outcome I see is that, if no decision is made or we throw up our hands about the situation, the common law trust will cease to have any real distinction from other legal 'ideas', and will disappear from usage where its factual elements cross borders between legal systems. My concern is with the trust idea in practice. Functionally, we will say, it is only usable in its common law homelands. That used not to be so.

(2) THE TRUST IDEA IN THE COMMONWEALTH: TRANSITION AND CONTROVERSY

To have spent one's professional life during the last half century with the trust of the common law world has proved for the most part to be a prolonged experience of intermittent backwater stillness and sudden excitements. When I was a law undergraduate in England in the late 1940s and early 1950s, 'equity and trusts' seemed mostly concerned with English legal history and land holding. There was a bit of a lift with 'equity' when we received a visit from Denning J, as he then was, to talk once more about his decision in *High Trees House*.[3] We all learned from him how promissory estoppel would bring down the bastion of

[2] In its International Trusts Act 1995, s 2(1), Barbados, for the purposes of the Act, sets out these requirements: a non-resident settlor and no resident beneficiary when the trust is funded, and no interest in assets with a situs in Barbados. On the other hand, a definition might be expected to point to a trust arising from the intent of the trust creator(s) where there is at least one factor, eg place of the intended administration of the trust, or the situs of the assets, that is located in a state other than the state (or unit within the state) that constitutes the applicable law.

[3] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

consideration in common law contract. But he was an enthusiastic speaker with a twinkle in his eye and an incredible ability to pitch to young university audiences. He could have sold coal to coal miners. For the most part, equity was instead a matter of imbibing time-honoured propositions, and trust law meant making one's way along a well-worn path of express, implied, resulting and constructive trusts. It was almost a catechism; no one questioned that four-part analysis. Student wisdom was to the effect that trust law was 'dry stuff'. In those days the material was exclusively English, and the Trustee Act 1925,[4] its actual contents very rarely discussed, was put across, together with Westminster's property legislation of that year, as having been the dawn of a new epoch. 'Quite revolutionary', the lecturer would say, nodding his head gravely.

If you liked doctrine and had a taste for the inductive thinking of case-law, plus a pre-university attachment to English political and social history, the world of the late 1940s and the 1950s was made for you. Although this path of instruction would leave a glow of gentle and half-remembered things for those who graduated and went on to the Bar and chambers, or perhaps a solicitor's desk, trust law in practice was mostly a matter of drafting deeds or wills for the private client. It involved conveyancing law and regulation and, at the Bar, giving opinions on the construction of private clients' existing real estate and trust documents, themselves often of a remarkable antiquity. Indeed, well into the 1960s this sleepy, summer afternoon environment marked the subject of 'equity'. When a book of mine on the constructive trust was published in 1964, the first review to appear – in a solicitors' practice journal – declared that, although this work had 'nothing for the busy solicitor', there were one or two ideas in it that were of passing interest. Those ideas turned out to be from my introductory explanation of the existing law. My argument was that English constructive trust theory was going nowhere, and that the US restitutionary remedial approach was one that England could valuably adopt. Of this the reviewer made no mention. Evidently the constructive trust itself was academic enough.

Excitements there had been during the 50 or 60 years before the 1940s, but the argument, the sometimes passionate disagreement and the puzzled and puzzling case-law over the effect of the Judicature Act 1873,[5] which brought the administration of law and equity together

[4] 15 & 16 Geo 5, c 19.

[5] Supreme Court of Judicature Act, 36 & 37 Vict, c 66.

in the one High Court, largely came to an end with the occurrence of the much more significant issues that arose out of the First World War. And in chambers and solicitors' offices, the 20 years between the wars were mostly spent trying to come to terms with the new social and economic order that the war had left in its wake. There was the statutory codification of 1925, as I have said, but that had been planned well before 1914. The trusts of the inter-war years were predominantly drawn for the private client, and were still of the fixed and successive interests model that had marked English trust practice since the seventeenth century.

However, the underlying social order of rural England that had produced these trusts and made them popular for over 300 years was now all but gone. To a significant extent this disappearance was hastened by the First World War, but the gradual decline of that world first became apparent with the agricultural depressions of the last quarter of the nineteenth century, and the rapid coincidental growth of huge urban centres focused on industry and trade. An unprecedented growth of mercantile wealth in the Victorian period and of a prosperous urban middle class had also occurred, and the successful merchants' trusts reflected much of the rural landed families' settlements. But John Galsworthy's Forsyte family, which epitomised that urban middle-class success, represented another world that was also savaged by the 1914–18 calamity. House of Lords decisions like *Sinclair v Brougham*[6] and *Nocton v Ashburton*[7] during the war period carried the seeds of many possible developments in the relief that equity might bring. But the opportunity for the exploitation of those seeds did not present itself until half a century later.

The Second World War put private client work very much on hold, and the men and women who returned were not interested in a judge-made equity when the occasion arose. A new world order had emerged, and it was the legislatures everywhere that were expected to put together significant new social and economic structures. Only in the late 1960s and the 1970s did a changed world of equity and trust usage begin to emerge, and only in part did this slow revival of interest in equity come to be reflected in the traditional case-law of trusts. Legislation and regulation and commercial practice led the change. Moreover, the

[6] [1914] AC 398, [1914–15] All ER Rep 622.

[7] [1914] AC 932, [1914–15] All ER Rep 45.

change moved in the 1980s and 1990s at a rate, and in directions, that the pre-1939 age had never known or likely could have imagined.

Reading the future is always a hazardous business because one cannot know the social and economic occurrences that will call on the ingenuity of tomorrow's draftsmen and the response of the courts to litigated issues. With a concept so definitionally amorphous as the trust, there are likely also to be the doctrinal developments that are welcomed in one jurisdiction but rejected as unacceptable in others. Lord Denning's judicial life and the conceptual stimulation he provided are witness to this. Where he considered the merits between the parties called for it, he was ever fashioning new and controversial twists on doctrine. But in his home country surprisingly little has survived those years. It was not so elsewhere in the Commonwealth.

My own career took me to Canada in the mid-1960s, and at that time in Canada it was the plight of the wife on marriage breakdown that for both lawyers and the public was bringing the little-known doctrines of trusts law to the footlights. With the husband as the traditional head of the family, all the property associated with the married life of the average Canadian woman and her husband was held in title in the husband's name. The resulting and constructive trusts that had long ago come to Canada as part of the inheritance of English law became of central litigation importance. Now was the time to put them to a new use. In the absence of legislation from undecided provincial governments and legislatures that would give the non-titled spouse at least some 'equity' when the marriage was dissolved, what relief – cried the populace – would the courts give? From the mid-1960s until the famous dissent of Laskin J in *Murdoch v Murdoch*[8] in 1973, lower courts, especially in Alberta and Saskatchewan as it happened, were leaning over backwards to produce that relief. The consistent fact-finding was of an intent by the married pair in happier times to acquire assets for both members of the marriage. So attention was riveted on the traditional resulting trust. Nevertheless, there was not much doctrinal development here, save for the wrongful supposition on the part of many courts of first instance that some kind of common intent had to be found. When controversy as to any such case arose, these cases proved to be controversial because of the hesitation of the appellate courts to reverse findings of fact.

[8] [1975] 1 SCR 423, (1973) 41 DLR (3d) 367.

So to the constructive trust, and the argument that, where the evidence undeniably showed no intent to create joint tenancy or tenancy in common, or enter into any sharing arrangement, the courts could impose a trust obligation upon the titled spouse to hold the house or other specific assets for the non-titled spouse. Western Canadian courts in particular were persuaded by this argument. Equity – of a kind – was the buzz even of television talk shows.

During this period, several friends in the United Kingdom wrote to me saying they had run into this situation in Canada. They asked what on earth was going on. And when in 1980 *Pettkus v Becker*[9] was decided by the Supreme Court of Canada confirming for common law Canada the validity of the so-called remedial constructive trust, and my name was associated with support for that decision, the number of letters increased from more than one part of the Commonwealth. It is common knowledge, I was reminded, that matrimonial breakdown is not one of the circumstances in which the courts have traditionally held the titled party to be a trustee. Those circumstances are few, and are essentially concerned with the fraudulent acquisition or retention of property. Because the constructive trust is concerned with substantive rights to property, the law possesses in effect a *numerus clausus* of such situations. To depart from that long-accepted approach in favour of bringing about a conceived equitable outcome for *any* perceived unjust enrichment – not merely for property division on marriage breakdown – one of my correspondents suggested, was destructive of the common law. Access to a proprietary remedy, awarding X's property to Y, should not be available on the discretionary say-so of the courts. Such discretion must be granted to the courts by statute. That was a parliamentary entitlement.

Canadians have now lived with unjust enrichment and discretionary remedies, including constructive trust, for over 20 years and, although the flank of the English legal doctrine that previously prevailed in Canada has been turned, I know of no writing or opinion in Canada that has found fault with how the law has worked. There have been criticisms of this lower court decision or the other, but no denunciation along the lines of some of those who, following *Pettkus v Becker*, wrote to me or made a path to my door when I visited England.

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[9] [1980] 2 SCR 834, 117 DLR (3d) 257.

Let me hasten to say, at a time when critical mainland voices are being heard about the last decade's offshore trust developments, that I do not consider my contrary opinion was necessarily correct. Whether there should be a discretionary proprietary remedy, applied as it was in the Supreme Court of Canada decision in *Lac Minerals Ltd v International Corona*[10] in 1989, may depend upon the attitude one has to the obligation/property dichotomy. That analysis holds that a right springs from obligation or from property, a source characterisation that remains with that right from its beginning to its end. In my view remedy supports right, and that right may be breached in a variety of ways. To associate a particular remedy with a particular right deprives remedy of the flexibility it should have in every instance of breach, whatever the nature of that breach. In my opinion the more recent decision of the same Supreme Court in *Soulos v Korkontzilas*[11] is a logical progression from *Pettkus v Becker*. It makes the remedial constructive trust available as remedy not only where unjust enrichment liability has been found, but where there has been a breach of 'good conscience' without any enrichment. However, as I admit, that Canadian view is, shall we say, not persuasive for everyone.

Certainly to this point the remedial constructive trust of US and Canadian law has not been adopted elsewhere. The courts of England and Wales are hostile, the New Zealand courts want to keep their options open, and the Australians have brought about quasi-marital property division with a constructive trust but on the basis of 'unconscionability'. US developments have gone their own way, most often oblivious to what is happening in the Commonwealth jurisdictions. The 1937 Restitution work of Warren Seavey and Austin Scott with 'Quasi-Contract' and Constructive Trust,[12] and the subsequent decision of Scott to exclude from his trusts treatise[13] any discussion of the constructive trust save so far as it gives relief in express trust situations, are now events of an epoch long ago. Among civil law practitioners the resulting and constructive trusts seem to be a

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10 [1989] 2 SCR 574, 61 DLR (4th) 14.

11 [1997] 2 SCR 217, 146 DLR (4th) 214.

12 W Seavey and A Scott *Restatement of the Law, Restitution* (American Law Institute, 1937), Pt I 'Quasi-Contracts', Pt II 'Constructive Trusts'. The latter covers equitable proprietary remedies, ie, claims to a specific asset or fund, to have a lien imposed upon the asset or fund in favour of the claimant, or that the claimant be subrogated to the claim of another to that asset or fund.

13 WF Fratcher (ed) *Scott on Trusts* (Aspen Publishers Inc, 4th ed), as it now is.

totally unknown country. Even scholars are content to say, 'Well, of course, we have no need of that kind of thing'.

The constructive trust saga itself is now yesterday's news. Fairly firm positions have been taken, and it is unlikely that we shall see a significant *rapprochement* in the near future. Of course, it is perceived inadequacy in the response of the law to an also perceived need of action that causes these case-law developments. What happens in the long run is therefore difficult to predict. Have Canadians like Americans before them taken the trust beyond acceptable limits? There are certainly three types of constructive trust thinking. The *corpus* is made up of English thinking with the traditional analysis, Australian thinking turning to unconscionability as the theme of relief, and North American thinking with unjust enrichment in the United States and in Canada 'good conscience' as well as unjust enrichment. And there are those who conceive of unconscionability, unjust enrichment or 'good conscience' as being the basis of 'remedy', and those who mean by the constructive trust remedy proprietary relief to defend proprietary right. That difference of opinion exists both in the United States and in common law Canada. From time to time, not surprisingly, Commonwealth opponents of the remedy analysis deliver salvos on this difference.

So what is wrong here? Even allowing for a perfectly natural difference of opinion, which we can all understand, is it a terminological problem or one that is conceptual? I sometimes wonder whether, for all the impression of uncontroversial doctrine that law undergraduates were given at university in my time, the vital importance throughout common law history of the trust creator's intent has left instead a shifting sand of theory of what it is that constitutes a 'trust'. All the adjectives – express, implied, resulting, and constructive – merely had us chasing the peripheral. Today by contrast the charge of heterodoxy is hard to sustain when there is no undeniable conceptual orthodoxy.

The thought of equity principles themselves as a body of doctrine seems odd in a confidently inductive environment like the common law system. The instruments of equity are the measures of conscience and good faith. Except during Lord Eldon's Chancellorship, the desire of the most well-regarded equity judges has been that equitable doctrines be kept flexible and responsive, without the oppressiveness of procedure and rule as the containment technique and the contrivance of fictions wherewith to escape entrapment. As a result, applying principle to determine the merits on the facts as between the parties, and attempting to keep factual consideration within the realm of principle, equity doctrine has always been certainly more

amorphous than that of law. If there have been unacceptable developments with the constructive trust in Canada, I am inclined to think – perhaps not to your surprise – that it is the type of development that remains within the corners of the broad canvas of established equity and trust law.

Indeed, whether case-law, or statute for that matter, is going too far' and should be rejected or severely narrowed in interpretation and construction may turn ultimately – if not earlier – on the perspective of the speaker, unless of course there is at least the germ of an idea upon which all can agree. My reader's interpretation of developments in the trust idea over the last thirty years – indeed, of what the trust is – may determine for him or her whether my conclusions at the close of this article are worth anything.

I intend to look first at the range of uses of the common law trust now existent, and in the light of that survey go on to examine what in common law jurisdictions at large is meant by a 'trust', conceptually and in practice. The latter leads me to the 'international trust', and to a short analysis of the offshore legislation that has been almost a non-stop occurrence within the last ten years. I intend to proceed to a study of 'fiduciary' relations in the civil law system, and continue with a glance at the common law trust. I then turn to think about the direction of the trust idea worldwide and the issues that confront us. At the close I take a look down the years ahead, and offer some thoughts as to what could be the fate of the common law trust in the next half century.

(3) USES OF THE COMMON LAW TRUST CONCEPT

When in 1837 Thomas Lewin, Esquire, of Lincoln's Inn, London, wrote the first edition of his *Practical Treatise on the Law of Trusts and Trustees*[14] it was essentially a text for conveyancers. Like so many later writers of that century and the next, both in England and the United States, who followed in his footsteps he sought to elucidate for the reader the principles behind the trust idea. It was he who delineated the headings and subheadings by which for organisational and didactic purposes we still live today. The express trust, the implied trust, the resulting trust, and the constructive trust – which, as I say, were the basic fare of my law undergraduate training – were distilled by Lewin from a mass of

[14] Now J Mowbray and others (eds) *Lewin on Trusts* (Sweet & Maxwell, 17th ed, 2000).

undigested case-law, much of it historic. The trends of that case-law might have been read as pointing in more than one possible direction, as the organisational pattern of trusts law might have been different in other hands, but for the courts and the profession thereafter Lewin and his successors set the seal on doctrine.[15]

Lewin and later Underhill[16] were agreed, it is clear, that the trust is an equitable obligation whereby a person (a trustee) receives title to property (the trust property) from a transferor (a settlor or testator), which property the recipient is to hold, or to hold and administer, for the benefit of another, which may be the settlor or others, and of which he – the trustee – may be one. Alternatively, the settlor may declare himself a trustee for another or others of specific property he continues to own after the declaration.

The use of the trust for the holding and disposition of individual wealth within the family, both real estate and securities, cash, jewellery and art, furniture and other assets of value, was practically the sole use – certainly by far the predominant use – until the third quarter of the nineteenth century. The character of such a 'settlement' of land or trust of assets in general had remained much the same since the mediaeval origins of the trust concept. A settlor transferred title to property, a trustee received that legal title together with duties and powers, and the settlor was now out of it – as a settlor at least. The trustee accounted to persons, born and unborn, for the enjoyment yielded by that property. They or their guardians would bring court action against the trustee who did not strictly discharge the 'trusts' that he had undertaken to carry out disinterestedly and faithfully. It was the mid-nineteenth century draftsman who began to use the power of appointment, and court development of the doctrine of powers was in England to become a notable feature of that century's case-law. Although the deed making the appointment would be physically attached to the settlement indenture, the trust 'instrument' itself would not be definitive of those persons who were to enjoy or might enjoy the settlor-transferred property. Typically the power to appoint was retained by the settlor or it was granted to an adult beneficiary, and it was the authority to determine – sometimes long after the creation of the trust – those who should take successive interests in the trust 'fund' after the deaths of the first generation income beneficiaries. Later the

[15] See further DWM Waters 'The Role of the Trust Treatise in the 1990s' (1994) 59 Miss L Rev 121.

[16] Now Underhill and Hayton *Law of Trusts and Trustees* (Butterworths, 16th ed, 2003).

trustee or trustees themselves were given powers of appointment, and so developed the science of mere powers and trust powers, and in the perpetuity context of general and 'fiduciary' powers.

However, the second half of the nineteenth century saw the trust for the first time applied outside the 'private client' field. Trusts of corporate supplied assets to secure the company's debenture holders, and public subscription unit investment trusts, were common in England as the nineteenth century turned into the twentieth, and the management of urban businesses by trustees following the death of the unincorporated successful entrepreneur was not unfamiliar. Most of these businesses would be small, and the presence of the new corporate limited liability would ultimately in England all but eliminate the business trust. But this mode of trust usage did exist and, although today the trust assets are more likely to be incorporated and the trustee-shareholders appoint themselves directors, it continues to exist.

In the present context, the point to be noted is that in each of these nineteenth-century instances the classic elements of the trust were present. A transfer of title by a settlor to trustees, a segregated trust asset or assets, a beneficiary or beneficiaries, and enforcement by way of a required accounting to the beneficiaries by the managing or holding trustees. So it has remained in mainland or onshore jurisdictions (as opposed to the offshore jurisdictions) to the present. Commercial usage of the trust has invariably recognised a clear distinction between agency and trust, as between a personified property management or holding vehicle like a corporation on the one hand and partnership and trust on the other. Unconcerned as is commerce with the successive beneficial interests that dominated for centuries the 'settlement' of land, the trust for sale, and the will trust of the private client, it might have been expected that this would not be so. Business concerns would surely wish to change the emphasis among the elements of the trust concept in order to better further commercial purposes. For instance, the *motive* for creating a trust would rank as more important than the persons who are to benefit as a consequence of the existence of its creation. The motive would then be stepped up to a trust object and appear as the main part of that object, persons being subsidiary. But this has not taken place on the mainland. There are other ways of doing the same thing, and these are ways more familiar to those who will ultimately work with the documentation.

While the trust as a more sketchy and adjustable case-law concept secures flexibility, the corporation created by statute is governed by precise statutory and regulatory rules. The two institutions work well

employed together as complementary property holding and management devices. Indeed, the incorporation concept has its own potential flexibility. The corporate objects may constitute purposes of any kind, and different classes of shares, for example, voting and non-voting, participating and non-participating, for different persons and different family generations can reproduce much of the range of beneficial interests that we traditionally associate with the trust. The trust can add for the private client concerned with shareholding in the family corporation that peculiar ability of the trust concept to confer beneficial interests upon the unascertained and the unborn.

In fact the traditional trust elements have always worked advantageously even within the scope of the commercial deal itself. During the last half century it has been demonstrated that, where it is needed by commerce, the trust, as traditionally conceived, is capable of providing both self-contained solutions and also complementary support. Investment, security provision, lending, and property title holding are the areas in which the trust has been used. Throughout the common law jurisdictions this is uniformly so in my observation. Nevertheless, while manner of usage of the trust is bound to differ between jurisdictions because of differing commercial laws and practices, there has been no suggestion in writing of which I am aware that corporate or commercial counsel have found inadequacies in the long-accepted notion of assets administered by a titled and controlling trustee for the benefit of a person or persons who enforce the trustee obligations. My experience has been that, on those rare occasions where it is advantageous that the object of a transaction be stated as the attainment of a business purpose, incorporation of the property dedicated to that purpose is every North American lawyer's ready response. The trust can there play a complementary role with the holding, or holding and investment, of particular assets for a corporation or a nominee. One of its advantages is that, being a case-law creature, it is easier to create and certainly to terminate than a subsidiary incorporation.

The motto in practice is 'keep it simple'. If in doubt, the wisdom goes, use incorporation. Turn to the trust to secure informal, flexible, independent property holding but keep the central focus of your planning on the corporate *persona*. The more jurisdictions one is working across, the less one should be thinking of formulating new non-beneficiary trust objects. A closer look at the trust in commercial practice as an investment arrangement, as a means for the provision of security, and lastly as a holding device, may bear this out.

In Canada the investment trust in a public setting may take the form of unit (or mutual fund) trusts, including real estate investment trusts, and of trust corporation pooled funds. Investors in the oil and gas business may purchase units in royalty trusts. Corporations and public authorities will set up and operate employee benefit trusts, for the provision of pensions, sickness assistance, profit sharing, and savings schemes. Both for public investment and employment benefit plans, the trust is eminently adaptable to provision for a 'rolling' class of beneficiaries. Given a beneficiary class of 'investors' or 'employees', turnover of such persons as beneficiaries will be experienced in the nature of things. So far as the individual is concerned, where matters are simpler, the Canadian Government offers to the private person tax-sheltered saving schemes, for retirement and the education of family members, and in the past has offered the same facility for first-time home purchasers. Equipment trusts offer the individual the opportunity to take advantage for investment purposes of a fast 'write off' for industrial capital items such as railway box cars and highway trucks.

When the asset is to be held as security for a lender or is to be held by a neutral person for the purposes of a particular administration, the classic trust has proved ideal for the disinterested holding of title to such assets. The trust for debenture holders was mentioned previously as a security-providing vehicle, and another such instance is the mortgage trust where the title to the asset purchased by the borrower (or a registered interest in that asset) is in the trustee prior to completed repayment of the loan. A third instance is the trust proceeds clause. In this instance, where upon transfer of possession to the retailer the trustee holds title to goods, the proceeds clause gives the unpaid wholesaler an immediate absolute equitable interest in the proceeds upon authorised sale of the goods by the retailer. In this way the wholesaler retains his interest as against the floating charge of the retailer's lending bank, and against the retailer's bondholders. The property is never in the retailer. The statutory trust imposed on the head contractor in a substantial project commissioned by a land developer is a model of the classic trust. Legislation has been enacted in all common law provinces to protect the subcontractor as a supplier of labour or materials or both, from wrongful utilisation by the head contractor of moneys paid to him by the developer for work done, and from the claims of the head contractor's bridging loan grantor.

Mainland holding trusts are of particular interest in the present context since so many offshore non-charitable purpose trusts are employed for the holding of company shares. Again the absence of such purpose

trusts in the mainland jurisdictions has not created any difficulty of which I am aware, and as an adviser to a law reform agency examining this subject it was once my task to seek out what consequent difficulties might have been experienced. If any whisper of possible difficulty were to occur, the incorporation alternative was regarded as always available. Canadian practice is fairly typical. Stakeholder trusts over assets in dispute pending resolution between the parties, and trusts of assets offered in settlement to meet class actions by plaintiffs, are familiar. Insurance policies are frequently held in trust, not only in private client estate planning, but in commerce. Buy-sell and stock purchase agreements are evidently in favour of ascertainable beneficiaries. The same is true of trusts of promoters' shares, and stock voting trusts. But in Canada custodian trusts holding the assets of corporate or institutional pension trusts are the most readily found examples of holding trusts. Usually the trust corporation custodian is relieved of all investment responsibilities; it is simply to assume title, hold the assets safe and to ensure that securities are available to the proper calls of the pension trustees' brokers. The beneficiaries of the custodian trust are the beneficiaries of the pension trust.[17]

(4) EMERGENCE OF THE MAINLAND PRIVATE CLIENT TAX-PLANNED TRUST

However, if commercial and business uses of the trust have held to the classic elements of the trust, namely, trustee, trust property, and the enforcing beneficiary, the practice in connection with private client trusts may carry those elements to what would have been unimaginable for those now retired. And I underline that I am speaking of mainland private client practice. I am not suggesting either in what follows everyday practice. I am concerned only with what *can* be done in drafting a trust.

The trust of fixed successive beneficial interests that those practising until the early 1970s would have regarded as typical of all trusts – the number and complexity of the fixed interests would have been the only variant – has in some mainland jurisdictions almost completely disappeared. In those days the only dispositive trustee discretion of

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[17] For further reference see DWM Waters 'Learning the Law: Trusts in Business and Commerce' [1987] 14 *Malaysian and Comparative Law* 1 (a study of the usage in Canada); also JH Langbein 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 Yale LJ 165 (a study of the usage in the United States).

which almost all settlors or testators appeared to approve would have been that which arose if a 'protected' life tenant would otherwise have lost his income interest because he attempted to alienate it or it was about to be seised by a creditor or his trustee in bankruptcy. In such an event the 'protected' beneficiary with a determinable life interest, together with his or her spouse and children, then became the members of a discretionary trust class. The Trustee Acts of Commonwealth countries, save in Canada, carry provision for these trusts still.[18] Trustee powers of encroachment on capital in favour of income beneficiaries, and powers of maintenance or 'support' of minors out of income, were to be found in instruments, but, except for powers of appointment with gifts over in the event of non-exercise, that was it so far as dispositive powers were concerned. Indeed, older practitioners will recall that the conferment of extensive discretion upon trustees was thought inappropriate. It was considered that trustees should be given clear instructions as to the quantum of benefit each beneficiary was to receive – fixed interests – and each management power given should be carefully assessed as to whether the scope conferred was justifiable. Administrative powers also were carefully chosen for the trustee task in hand, and were limited to the performance of that task. Indeed, earlier generations kept trustees on a fairly tight rein.

The last 30 years have been dominated instead by the concern of high- and middle-income individuals with seemingly constant high levels of taxation. Gift tax, estate and inheritance taxes as capital transfer levies, as well as income tax and capital gains taxes, will differ moreover between jurisdictions. The primary desire of the settlor and the testator has been to ensure that, if tax cannot be avoided, every opportunity is taken by the manner of disposition chosen to minimise the amount due or to defer its payment. In every common law jurisdiction of my experience, the tax adviser is the first to have the ear of the client, and the immediate readiness of the client is for a dispositive vehicle that exploits the policy concessions and the exempt situations in the relevant jurisdiction's tax provisions. The consequence has been a total *volte-face* from the settlor values and the legal drafting of earlier times. The testator, as well as the settlor, now wants to create the most 'tax efficient' trust. He wishes to take full advantage of immediate tax saving or deferral opportunities, and to confer upon his trustees for the duration of the trust the maximum flexibility of movement. The trust

[18] See HAJ Ford and WA Lee *Principles of the Law of Trusts* (3rd ed, looseleaf). This is an Australian text updated to the present. For New Zealand, a valuable text is D Breadon and others *Law of Trusts* (Butterworths, looseleaf, 2000).

creator often puts first – over spousal and family circumstances – the ability of the trustees to respond to changes in the state's tax provisions as occasion demands or opportunity offers. In fact the trust instrument that I frequently see is little more than a shell. It is clear that the meaningful content will be added at a later time, or that significant decisions as to what beneficial dispositions are to be made will never appear on the instrument at all. That is, the instrument does not contain the whole of the trust.

Indeed, if we are to speak of the future it is worth examining further what can already be done for the private client, because I believe it has been the backcloth to much of what has been happening in recent years in the offshore jurisdictions. The classic elements of a trust – to flesh it out a little more – are a titled trustee, segregated trust assets, and a beneficiary who can enforce the trustee's obligation to hold the assets, or hold and administer them, for the sole benefit of the beneficiary. The trustee has control of the assets, and deals exclusively with third parties. The beneficiary or beneficiaries throughout the lifetime of the trust, ie until its objects are carried out, will require an accounting from the trustee. Although what is actually done will be dictated by the relevant tax structure – discretionary trusts were popular in the United Kingdom until a few years ago; now they are largely avoided because of serious adverse tax consequences – it is instructive to see not only what can be done, but what today's draftsman in any of our mainland common law jurisdictions can do with *those elements* of a trust.

The trustee may be made removable at the will of a beneficiary, usually someone like the trust creator's spouse who is a beneficiary. Alternatively, the removal and appointment power may be granted to a close non-beneficiary friend named in the instrument for this purpose. The question as to what effect this provision has upon a trustee, in particular one who undertakes trust services because of fees, is commonly met with the response that it has none. It is thought enough that, although the trustee can at any time be removed, albeit immediately under the terms of many instruments and without reason given, that fact is irrelevant to a fiduciary's conduct in the discharge of its duties and the discretionary exercise of its powers. Irrelevant it is, doctrinally.

As to the trust property, and I speak here of an *inter vivos* trust, this may consist of a nominal gold coin or ten dollars. The instrument will provide that further trust property may be added at any time by the settlor, or by another. Sometimes, for tax reasons, the consent of the trustee is required before further property is transferred to him by

another. So it is evident that the actual trust property, as to the nature, amount and time of transfer to the trustee, will never be known to the trust instrument. There will be good reasons also for having only nominal property as the initial assets of a testamentary trust. The timing of the transfers of substantive assets to the trustee can be precisely planned. Then also the purpose of the trust may be to receive the fund of an existing trust that is to be coincidentally terminated or that comes to a close under its own terms as the testamentary trust takes effect. Another reason for the trust being in the will is that the executors may assign their choice of testamentary assets to it within a defined period of time after the death, and thus secure a tax advantage for the trust beneficiary. These are but three instances where nominal funding will be used, despite this being the final disposition of his means by the deceased.

Unless the jurisdiction has chosen to tax it heavily, the type of trust that for 10 or 15 years past has best demonstrated the possibilities for the contemporary draftsman, whether in the case of wills or *inter vivos* dispositions, is the discretionary trust. In my experience in Canada a few successive fixed interest trusts are still drawn, almost always in wills, and there is the occasional *inter vivos* or testamentary dynastic trust, usually created by the founder of a very successful trading or business corporation. The run-of-the-mill trust, however, is discretionary. It provides in the instrument a described list of persons, for example, spouse, children, and grandchildren who take by representation in the event of the parent child's death. According to Canadian practice, two or more named registered charities will usually be added to that list. These are the beneficiaries, and the trustee (or trustees) may dispose of income or capital or both among the beneficiaries as the trustees think fit without regard to whether any one person receives nothing or a much lesser amount than others. In fact the trustees will often make their periodic distribution decisions primarily with tax considerations in mind. No beneficiary is therefore entitled to any of the trust property; he or she is able to require only that the trustees consider his or her name and individual circumstances.

If the person included in the list of eligible persons wishes to assert that the trustees failed to consider his name or were prejudiced against him, he is told that he is fully entitled to make his case that the trustees did not act with good faith towards him. The beneficiary of course has the onus of proof, and he seeks to examine the trustees' papers or the trustees themselves in order to find evidence of his belief. However, he can be refused the papers and the opportunity to examine the trustees

because it is the trustees' right not to reveal the reasons for their discretionary decisions. If he sues the trustees in order to obtain discovery of their files, but without *some* clear evidence of what he alleges, the trustees may successfully object that he is simply engaged in conducting 'a fishing trip'.

Nevertheless, as I say, a person in the list of beneficiaries has at least a right to be considered for distribution of trust property. If the draftsman has also conferred upon the trustees, or another named third party, the right, in furtherance of English case authority, to add further beneficiaries, those in the original list have their chances of being selected accordingly lessened. It is always possible that the appointor of further beneficiaries may have other distribution ends in mind. Most discretionary trust instruments that I have seen, unlike US instruments, give no stated reason for the creation of this kind of trust, either in the recitals or in the body of the provisions, and do not include criteria that the trustees are to have in mind in exercising their discretion. This happens because the settlor or testator, knowing only of the existing tax laws and regulations, wishes in no way to limit the scope of the discretionary authority. After all, especially if more than one taxing jurisdiction is concerned, who knows *what* tax changes may occur 'down the road'. The trustees must be fully armed for any contingency.

The tenuous position of the discretionary trust beneficiary receives the *coup de grâce* in the complementary power, again usually given to the trustees in a mainland trust instrument, that any beneficiary may be removed from the list. As persons may be added, so persons may be deleted. The usually cited authority is again English. And before we turn to the offshore contribution it should be observed that, with a power to add and delete, the settlor or testator on the mainland can bring about a situation where beneficiary status is in effect nothing. As practitioners of my father's generation understood the word, 'beneficiary', there are today in such circumstances no beneficiaries. Each beneficiary is such only so long as that is pleasing to the authorised remover of beneficiaries. This is grace and favour. Yet in trust theory, enforcement of the trustees' task is logically the peculiar right of the beneficiary.

A discretionary trust, being a trust power, allows the beneficiary not only to require he be considered, but to have access to trust documents and an accounting by the trustee. 'Mere' powers of appointment confer upon the stated object or objects of the power, as opposed to those who take in default of appointment, no right other than to be considered for appointment. Although the issue could be argued, the case authority is

clear. Even if the appointors are trustees, such potential appointees have no right to information concerning the trust in which the power is contained. It is evident then that with mere powers existing mainland trust drafting practice can shift the whole emphasis of power and influence within the trust away from ascertained beneficiaries and towards the trustees, while the trustees themselves can be removed at will by one – the settlor or 'protector' – who may or may not *de facto* be accountable to anyone. It is a startling realisation.

To accompany this conception of the relationship of trustee, trust assets, and beneficiary, the settlor is free to employ dispositive and administrative powers of a far-reaching nature. The trustees will normally be given the power to vary any term of the trust instrument, including on occasion dispositive provisions, that in their view requires variation (commonly described as 'amendment'), and as an alternative to variation they will be empowered to terminate the trust at a moment of their choosing. Again this gives flexibility for tax purposes. The trust instrument here is essentially creating a neutral vehicle; it is to be used for later dispositive decisions regarding property and that property is itself to be alienated to the trustees at an opportune future moment. It is therefore also essential that the trustees be given the power to appoint the trust property to new trusts (sub-trusts) or other existing trusts. This is popularly known as a power to 'decant' the original trust. The trust into which the decanting takes place need not be in favour of the same beneficiaries, nor need the dispositive and administrative terms of the new trust be the same. The trust instrument of the original trust will expressly permit this departure from the provisions of the original trust. When the original trustees are creating new trusts, the art is in constituting the new trust with its own perpetuity period. If this cannot be achieved without creating other unwanted elements in the new trust, the opportunity may exist to have the governing law of a jurisdiction that has statutorily abolished the rules regulating perpetuity and accumulations.

The power to change the governing law is frequently seen in contemporary mainland discretionary trusts, and it is usually given to the trustees. That is certainly a feature of the last 10 to 15 years. Prior to that time there was little evidence that the average draftsman had given thought to the issue. The more sophisticated Canadian draftsman may bifurcate the governing law; one law to apply to the validity, construction and effect of the trust, and another to apply to the administration of the trust. The hostility to the severance of validity

and administration issues that is seen in the English case of *Chellaram v Chellaram*[19] is not thought particularly persuasive in North America. Possibly because of US experience with 50 state jurisdictions, American jurisprudence to the contrary has long been more open to this *dépeçage* in appropriate factual circumstances, and Canadians are more drawn to this familiar state of affairs south of the border.

Although they frequently wish things were otherwise, settlors of mainland *inter vivos* trusts hesitate to reserve significant powers to themselves. The risk of attracting taxation to the settlor on the ground that he retains control over the title-transferred assets is too great. Increasingly a third party is being nominated to exercise these powers. Most often this person is a non-beneficiary, as we have seen, but he will likely be acquainted with the settlor and he is often intended to busy himself with the settlor's concerns. So-called 'advisers' can be found in trust instruments of the 1950s, and indeed there are occasional instances going back to the pre-1939 period. This date is interesting because here in North America are the seeds of the 'protector' in the offshore jurisdictions of the 1980s and the 1990s.

We have yet to see any court challenge to the increasing emulation in Canadian-drawn mainland trust instruments of the popular offshore 'protector'. And since for reasons I have noted the settlor avoids appointing himself as 'protector', an onshore challenge is not likely to succeed.

Exculpation is another interesting onshore development. The majority of instruments that I have had reason to see carry an express exculpation clause that makes the individual trustee (there may be two or more trustees) liable solely for the trustee's own acts or omissions, regardless of full delegation authority having been given. And the trustee is made liable for fraud and wilful wrongdoing only. Other instruments may refer to trustee negligence, but expressly state that liability is restricted to gross negligence. As we all know, whether or not the trustee in question is a professional, English case authority has approved the validity of such clauses.

It is not my purpose to appear to criticise the contemporary primary concern with tax issues or accommodating modern drafting practices. Law and practice have always followed current economic and social concerns. They are doing so still. In high tax jurisdictions, the

[19] [1985] Ch 409, [1985] 1 All ER 1043.

individual intent on conserving his wealth, and who wishes to transfer it to his family and the charitable and non-profit purposes he values, would be foolish not to be concerned first and foremost with the tax levies he must face. Subtlety in creating modes of appropriate provision for the family is of limited value if the public treasury is the *de facto* principal beneficiary of the available funds.

Rather it is my point that today, from the perspective of yesterday's understanding of the classic elements of a trust, some mainland trust practice, and to an extent the concept itself in the private client area, has taken on something of a hair-raising character. An earlier generation of practitioners was concerned with the prospective beneficiaries and the soundest provision that could be made for them. Today it seems we are more concerned with the creator of the trust, and the impact of tax upon that person or his or her estate. The professional trustee is concerned with liability in an increasingly litigious climate, and the trust instrument's exculpation and indemnity provisions recognise this.

Two thoughts arise out of these observations. First, that the classic elements of a trust, though formally the accepted thinking, may in fact be giving way in the mind of law professionals to something other. If so, we need to discover what is that other. What is it that draftsmen now consider to be the controlling legal criteria or, if you will, the limits that today fence the trust concept? What can be achieved conceptually and practically with the trust, or – to put the question another way – when should we be using the trust together with other property-management concepts, such as a corporation or a *fondation*, or not using it at all? Secondly, how much further can the limits be pressed without the trust concept, as hitherto it has been classically understood, crumbling instead into a jumble of ideas that has no convincing conceptual shape?

It is with this contemporary mainland experience and those two thoughts at the back of my mind that I turn to the innovations of the offshore jurisdictions.

(5) TURBULENCE IN THE OFFSHORES

The work of the offshore jurisdictions around the world[20] is very different from the will drafting, marriage breakdown settlements, and protective and discretionary trusts of mainland private client common law practice. Mainland lawyers serve an indigenous population with locally situated real estate and portfolio investments, with private companies and local business interests. These people have family members some of whom are living in other jurisdictions, but most of whom are likely to be domiciled with children and careers within the local nation state. Federal countries present jurisdictional problems within the nation state.

The 'offshores' can now in a non-literal sense be said to include Switzerland and New Zealand and other onshore jurisdictions engaged today in a not dissimilar practice. However, the offshores for the most part are small island territories with little land space and a comparatively minute indigenous population whose 'financial centres' constitute much the greater part of the economy. So far as the private client is concerned, these jurisdictions market estate planning to a foreign clientele with intended foreign beneficiaries. The offshore lawyer is engaged in a highly competitive business as between the 45 or more 'offshore financial centres', and this can encourage individual offshores to be anxious to accommodate client wishes. It is a marketing challenge.

Some of these jurisdictions have distinct specialisations in areas such as insurance, securitisation, and security transactions, as well as in institutional and public investment. For these jurisdictions, such commercial and business work is the greater part of their financial activity. But all of the offshores share in private client work. The mainland client who goes offshore has been advised of tax advantages that can be gained. The avoidance of probate and estate administration costs is another attraction. He may also be seeking asset protection, especially if he is a self-employed professional who is apprehensive of the possible size of any damages award that may be given against him in any future negligence action. A client may also wish to put business or personal assets beyond the reach of his spouse on a marriage breakdown, and the claims of family with mandatory succession rights

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[20] For a full discussion of trust theory in these jurisdictions, see M Lupoi *Trusts: A Comparative Study* (Cambridge University Press, 2000), Ch 4 'The international trust model'. Reference should also be made to the English journal, J Goldsworth (ed) *Trusts & Trustees* for articles, case notes, and commentary providing a rare coverage of offshore trust issues.

to his estate on his death. He may prefer in the latter instance to leave his assets among his family members according to his own tailor-made plan, and avoid court awards or the pre-determined shares dictated in his country of domicile or nationality.

It is probable that the client would like to transfer the title to his assets to a trustee – transfer is usually the vital element in obtaining advantage for the client – but retain control of 'his' assets during his lifetime. His question then is whether, while creating a trust, he can reserve the power to veto any exercise by the trustees of their powers, administrative or dispositive, or better still to direct 'his' trustees in any such exercise. He will wish to add or remove beneficiaries as he thinks fit, and to dismiss and appoint trustees as he chooses. If there is no adverse tax consequence in his home jurisdiction, discretionary trusts will be attractive to him, or he may prefer 'mere' powers of appointment. In this latter case, any class of possible appointees, as we have seen, will have no access to trust information.

Over the past 20 years, the offshore jurisdictions in the Atlantic and the Caribbean, in the English Channel, the Irish Sea and the Pacific, by constantly adjusting their legislative provision have kept abreast of these market pressures. Asset protection trusts against future creditors and family claimants whose right of action accrues onshore are familiar. So are powers that secure to the settlor – or the protector he nominates – ultimate control over the investment and management of the trust assets. The technique with debtor protection is to exclude any creditor whose claim arose only after the moment of transfer of assets into the offshore trust, and to limit severely – some offshores allow only one year – the time during which, following transfer of assets to the trust, qualifying creditors may bring action in the offshore. In most offshores to this point, as in most mainland jurisdictions, there is no registration or public record of a trust of movables. Spousal claims to matrimonial property, whether foreign court awarded or community rights, and family mandatory succession rights under the foreign system, are simply not entertained in most – not all – offshores. In the case of retained control, or control given to a protector, control will extend to the power to add or delete beneficiaries as the power holder chooses. Initial nominal trust assets will, of course, voluntarily be added to by the settlor or others with the intended assets of substance, but only at a later stage.

Within the Caribbean, two popular features of this offshore legislation have been the asset protection trust, although this is now mirrored onshore in the legislation of Alaska and Delaware among other

US states, and retained settlor (or protector) control over asset administration and distribution, especially highlighted in the legislation of the Bahamas and the Cayman Islands. Control implies the formal transfer of title, but the retention, whether partly or wholly, of the rights and powers that 'ownership' would involve. Again, US revocable trust theory permits the settlor during his lifetime to retain or grant considerable control, such as directing the trustees in the exercise of their powers and discretions. The offshores now market non-charitable purpose trusts, enforced by a settlor nominee, and the Cayman Islands have gone further to take right of enforcement from the human, capacitated beneficiary who now, being nominated a beneficiary in such a trust, has no right of action of his or her own against the trustee. The central element of the classic trust design – the legal relationship of trustee and beneficiary – in this instance is gone.

Whether the onshore courts will accept asset protection, wherever created, is likely frequently to be an academic issue because the settlor's assets will have been removed from the onshore forum's jurisdiction. Indeed, removal of all the settlor assets from the onshore jurisdiction and any other jurisdiction from which challenge is likely to come is clearly an advisable course for all aggressive asset protection trust creators. It is when this course has not been taken that claimants and nominated beneficiaries have a window of opportunity to press onshore conceptual and policy arguments against the validity of the offshore vehicle. Whether settlor or protector control of asset administration and eventual distribution can be contested offshore is an open issue. In circumstances of an extremely aggressive settlor provision, the attack may succeed if the creditor or family claimant is able to show that the provisions of the trust instrument do not represent the true intentions of the settlor. Although the instrument states that it is irrevocable, he is then shown to have left for himself the option to recover the enjoyment of the trust assets at any time. But these cases of 'sham', as of 'illusory trusts', are likely to be few. 'Sham' trusts do not include those instances where there is a patent demonstration in the instrument that there is an intended settlor (or protector) control of administration and distribution. The question then is whether the degree of retention of control from the trustee transferee in itself violates the trust concept.

The verdict from onshore courts on offshore non-charitable purpose trusts with onshore assets has yet to be heard. This is so whether this trust, including the Cayman STAR trust, seeks to come ashore under the umbrella of the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985, or with the argument that inherently this is a

conceptually sound trust provision. The *Restatement of the Law, Trusts, Third*,[21] is of the opinion that state legislation will likely be needed if this trust is to appear anywhere in the United States. In my opinion, because of the difficulty of determining what is a private *purpose* trust object, as opposed to a reason for creating a resulting trust, the same may be true also for the major Commonwealth common law jurisdictions. Together with the law reform agencies of Manitoba and British Columbia,[22] I do not see any insurmountable conceptual problem in the appointment, obligations and powers of an enforcer of such a trust. Indeed, with a Wyoming statutory trust and a certain modus of incorporation, the non-charitable purpose trust can in fact be simulated in the United States today. But that, one suspects, is another issue.

(6) THE CIVIL LAW AND THE TRUST IDEA[23]

The common law 'trust' became known to civilians during the latter half of the nineteenth century when it began to be more than an English conveyancing device and to be employed in business and commerce for investment and security holding purposes. This was the trust that took its name from the familiar conveyance, 'unto and to the use of [X] in trust for [Y]'. The use had been executed so that the feoffee to uses as 'trustee' held the common law estate and the 'beneficiary' the equitable estate. Civilians knew of the institution as the English or Anglo-Saxon 'trust'. The writing of civilian and common law scholars until the last quarter of the twentieth century very largely followed this usage and civilians spoke frequently of *le trust*. The Hague Conference that met between 1982 and 1984 to draft the Trusts Convention adopted the terms 'trust' and 'analogous institutions' very much in that manner.[24]

In the 1980s, however, civilians and some common law scholars were beginning to see the 'trust' from a structural point of view, and to

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21 Reporters' Notes on para 47 (Vol 2).

22 'Non-Charitable Purpose Trusts', Manitoba Law Reform Commission, September 1992, Report #77, British Columbia Law Reform Commission, November 1992, Report LRC 128.

23 For more extended discussion, see M Lupoi *Trusts: A Comparative Study*, n 20, at p 614, and DWM Waters *The Institution of the Trust in Civil and Common Law* (Academy of International Law, 1995) 'Recueil des cours', vol 252. See also A Dyer and H van Loon *Report on Trusts and Analogous Institutions* Preliminary Document No 1, May 1982, Hague Conference of Private International Law, Proceedings of the Fifteenth Session, 1984, Book II, 'Trusts – applicable law and recognition'.

24 Book II, ibid, contains the text of the Convention, and the von Overbeck Report.

apply the term to appropriate civil law structures as well as the common law institution. In 1988 Professor Johnston published in England his *Roman Law of Trusts*[25] which developed the thesis that Byzantine *fideicommissa* had both a structural and functional similarity to the common law trust. Comparative law scholars of the civil law tradition were commencing at the same time to see the trust in the same vein, and among these Professor Lupoi, a leading Italian comparativist, was to lecture and publish extensively in the 1990s, arguing that the trust is an older (and active) institution in the Roman-based civil system than is the form that that institution came to take in medieval England. He and other civilian scholars and practitioners continue to demonstrate the internationality of the trust idea.[26]

In this article I am primarily concerned with the future and fate of the common law trust, but I seek to assert no common law claim to the word 'trust'. I accept that when we turn from origins, symbols and the traditional usages of language to the analysis of structure, and also in my opinion to an examination of comparative functions, we enter a new era. Trust means simply placing confidence in and reliance upon another. Analysis and functional examination starts there.

The idea of A placing 'trust and confidence' in B, that B will honestly and attentively manage property for the sole benefit of A or C is not, of course, peculiar to any one system of law. As can be seen in Muslim law and the *waqf*, the personal law systems also know the idea. Although the manager does not have ownership of the *waqf* property, the *waqf* provides for the independent administration of that property for both charitable purposes and personal benefit, and this may be for a considerable period of time. Of the two legal systems of Western civilisation, the civil law system is essentially to be found in mainland Europe, Central and South America, and a number of Pacific and African countries. Because of the Reception, which took place between the tenth and sixteenth centuries, it is of an older tradition than the common law system, and is largely a mixture of the received Roman private law and of local customary law, mostly in family and succession law. Obviously, in addition to the influence of local factors, the post-Renaissance nationalism and codification in every civil law jurisdiction have regionalised the laws of the system. Nevertheless, it is

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[25] (Oxford University Press, 1988).

[26] See, op cit, n 20.

evident from the codes that the essential universality of Roman law in surprisingly large part remains.

The civil law therefore knows well the Roman concept of both *fiducia* and *fideicommissum*. Indeed, the Roman law inheritance from the first century BC to Byzantium in the sixth century AD was rich in the concept of *bona fides* (or 'good faith') in the performance of obligation.

The *fiducia* is different from the duty to act in good faith. It is an institution. The Romans knew it as a pact or agreement. It is full ownership with the obligation in described circumstances to restore the asset to the transferor. It was a very early concept in Roman law, and was employed principally to provide security for the repayment of loans. The lender on receiving ownership entered into an enforceable agreement to re-transfer the ownership as agreed, but meanwhile the lender was the full owner and his obligation to deal with the security and also to return it according to the agreement was a personal obligation only. The *fideicommissum*, as modern civil law knows it, was a Byzantine concept of the Corpus Iuris Civilis, and it suggests to a common law lawyer successive interests under a common law trust. In fact it was a fiduciary substitution, ie X owns subject to the condition that on the occurrence of a future date or event he is obligated by force of law to transfer ownership to Y. Such substitution was widely used in Europe after the Reception – it was the support of the *ancien régime* in France – but it was abolished by the 1804 Code Napoléon after the fall of that *régime*. Subsequent civil codes in Latin countries have followed that policy. However, *fideicommissum* survives to this date in the Civil Code of Quebec.[27] Quebec's law prior to its first codification in 1865 was the pre-Revolution customary law of Paris.[28]

Pure civil law jurisdictions, ie those that historically have never been subject to a common law ruler, seem invariably to conceive of the trust as contract or innominate personal obligation. Within civil law doctrine and code organisation it is both logical and sensible that the management of property by A for the exclusive benefit of B should be understood as a contractual joining of parties. Luxembourg's *fiducie* or 'fiduciary contract', adopted by decree in 1983, is part of this tradition,

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[27] SQ 1991, c 64, as amended to 2000, c 53, s 67. Available through Wilson & LaFleur Limitée, Montreal, Quebec, looseleaf, with related statutes and regulations. For *fideicommissum*, see Book IV, Title 5, c 2 'Substitution', arts 1218–1255.

[28] The 1865 Code was named the Civil Code of Lower Canada. This was replaced by the Civil Code of Quebec, ibid, which continued to be rendered both in French and in English. The Civil Code of Quebec came into effect as a Code on 1 January 1994.

and the governmentally proposed ratification of the Hague Trusts Convention that is now before the Luxembourg legislature seeks to 'modify' this contract accordingly.[29] It does so in large part by introducing the conferment upon the fiduciary of ownership of the assets concerned, and in adopting the notion of the separation of the fiduciary's personal patrimony from the trust asset patrimony. Whatever their root in antiquity, these are the two prime features of the common law trust. The Luxembourg *fiducie* remains a banking, investment and insurance contract, but it now acquires these added features of fiduciary ownership and the segregation of fiduciary assets from the personal creditors of the fiduciary.

Contract in the civil law is either bilateral, ie agreement, or unilateral, ie gift. Agreement does not require reciprocal value, and a gift is only complete when the donee accepts the gift. What binds the parties to a contract is obligation; no *in rem* right is created. Remedy therefore is necessarily *in personam*; the successful plaintiff alleging breach obtains damages and, should the defendant be insolvent or bankrupt, takes his place among the unsecured creditors, unless of course as a contracting party he has bargained for the provision of security. The form of the civil law contract may well be that B receives a deposit of property that he is to manage exclusively for the benefit of A. B is now party to a nominate contract of *depositum* and to another of *mandatum* (or 'agency'). A has 'faith' in B that B will faithfully perform his obligations to keep the assets secure and to manage efficiently for A.

Where securities and monetary funds are concerned, persons in pure civil law jurisdictions who are entrusted with administering property for others may be in any one of several legal positions *vis-à-vis* the individual who made the property available for administration, whether for his own benefit or another's. The common law lawyer would be tempted to think of these as fiduciary positions each involving some degree of fiduciary obligation. Speaking generally, civilians would not use the term 'fiduciary'. There are also a number of possible relationships of the administrator with the trust assets. The relationship of the administrator with the funding party may be anything from that of nominee and principal, the nominee taking

[29] Introduced by Government into the Chamber of Deputies on 6 November 2000, as a *Projet de Loi* concerning the trust and its recognition in Luxembourg, fiduciary contracts, and associated statutory amendments and repeals. Accompanying the release by the Minister of Justice is an *Exposé* of the reasons for a change in the law, and the objects intended. Luxembourg has now ratified the Trusts Convention, and adopted the modified fiduciary contract legislation.

instructions on everything he does, to that of an investment manager making decisions of his own. The relationship with the property – the fund assets – may range from administering assets in the funding party's name to having title to the assets as well as comprehensive control powers. It appears that in this last situation the ability of the investor to recover his assets in the event of the manager's bankruptcy depends on whether the manager has invested and administered the individual client's assets separately or clients' assets have been mixed and individualised accounts alone been kept. Which course is taken may turn on business practice. Even if there is a contractual obligation upon the manager to keep separate the contracting party's assets and investment return, it would appear that this is only an obligation. That is, in the event of the manager's breach and bankruptcy only *in personam* remedies are available to the investor.[30]

The common law lawyer will insist that his version of the 'trust' requires a distinction to be drawn between the manner of creation of the trust, and the trust itself. The *trust*, says the Anglo-American, is the relationship expressed in obligation and rights between trustee and beneficiary. The civilian, however, will continue to see the trust only as obligation, and protest that the sole distinction between obligation and its manner of creation is that the creative act may be contractual, delictual, or restitutionary by way of compensation. There can be no other distinction, he will insist, however perceived.

The civil law jurisdictions differ among themselves as to whether there can be such a thing as fiduciary ownership. The scholar may say that ownership in civil law is indivisible; the rights of disposition, use and management are a totality and can only exist in the owner. There can be burdens on the ownership, such as the personal right of *usufruct* and the praedial right of mine to follow a path on land owned by another. But these are rights *over* another's asset, not rights *in* the other's asset. A 'fiduciary owner' would therefore be an owner, but subject to the use or enjoyment being *in* another. The civil law practitioner as opposed to the university scholar will often be less demanding. He will accept fiduciary ownership because he sees a parallel with the Roman fiduciary institute which is obligated to transfer, or condone the legal transference of ownership to the substitute. If an owner can be said to own although his ownership will be terminated as a matter of law by the occurrence of a contingency, namely, the occurrence of a date or an

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[30] B Vischer 'The Fiduciary in Continental Europe' *Trusts & Trustees*, June 1999, at p 13.

event, then ownership by one subject to use (or enjoyment) being enforceably in another is an acceptable proposition.

The core problem for the civilian with the common law trust is that it is a hybrid of undertaking (obligation) and of property. It is a concept that gives rise to both personal and proprietary remedies, according to how the trustee has breached his trust. The Roman private law doctrine of the fundamental distinction between obligation and property is axiomatic in every civil law code, and statutory departures from it in civil law jurisdictions – when they exist at all – are often halting and ill thought through.

Conscious of the trading proximity of the United States and its common law trust, the Spanish speaking civil law jurisdictions of Central and South America since the first such innovation in 1925 have in a number of instances developed in their codes or in statute what is described as a *fideicomiso*.[31] Except in the case of Venezuela where there can be a trust over *legitime* interests, family law and succession law are untouched; this is a vehicle for commercial transactions only. However, the characteristics of this institution differ between the various national jurisdictions. Its essential form is contract. Sometimes the innovation contemplates a fiduciary ownership, and the most advanced jurisdiction today will have enacted a separation of patrimonies. This, however, represents changes made in the 1990s.

In most of the Spanish-speaking Americas, on the other hand, the effect of the insolvency or bankruptcy of the *fideicomisario* is a matter of silence (so that the remedies remain *in personam*). The alternative is often a rather muddled response. This may take the form of what can only be described as *in rem* recovery by the *beneficiario* from the third party when there has been an unlawful transfer by the *fideicomisario*, but no such recovery from the *fideicomisario* himself. The *beneficiario* must then establish actual fraud and, if successful, be content with compensation. The problem arises because the legislature has not thought of, or has thought fit not to embark upon the statutory creation of, a separate 'patrimony' in the name of the *fideicomisario*. Such a 'patrimony', of course, is a fund that is attachable only by creditors making claims that arose in the course of the *fideicomisario*'s discharge of *fideicomiso* duties, or for reimbursement of expenses (possibly also approved fees) incurred by the *fideicomisario* properly acting in carrying out those duties.

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[31] See further M Lupoi *Trusts: A Comparative Study*, op cit, n 20.

Since the received Roman law principle in every civil law jurisdiction is that there must be available to the owner's creditors all of his owned assets, and that he may do nothing to prevent that availability existing *vis-à-vis* any of those assets, the unseen doctrinal ramifications of introducing in any of the laws of the Americas the notion of a segregated fund of assets is obviously a concern not to be taken lightly. However, Venezuela was the earliest to recognise the trading advantages of adopting the segregated fund, and therefore the earliest to exclude the personal creditors of the *fideicomisario* from successfully claiming *fideicomiso* property.

A segregated fund is a crucial element in the common law concept, stemming from property administration, of the relationship between the trustee and the beneficiary. The fund is isolated. Such segregation is not expressed in the Dutch *bewind* (or the German *testamentvolstrecher*) where the property manager has the exclusive right to manage, but the title to the managed property is in the *bewind* beneficiary (or remains in the heirs in the case of the *volstrecher*). The title holder cannot deal with this property because he foregoes all his dispositional and management rights to the manager (the *bewindvoerder*). But in the event of the title holder's personal insolvency or bankruptcy his creditors can claim the managed property. This cannot occur with a common law trust if there was no initial fraud on the trust creator's creditors. Interestingly, the Dutch recognise the *bewind* as agency.

The influence of the common law trust in pure civil law jurisdictions that have a 'trust' is usually readily apparent. The Liechtenstein *treuhanderschaft*, which to some degree draws upon the Germanic *treuhand*, is legislation that was deliberately drafted to reflect the character of the common law trust. In 1926 this was one of the techniques used to attract business from English and American investors.[32] And earlier in 1922, having otherwise adopted in the last years of the nineteenth century the first draft of the German Civil Code, Japan introduced a Trust Law. This legislation was designed as part of a then move to regulate the trust and bank company industry, and was expressly based on the then trust law of California. It remains in force to this day. It has proved an excellent vehicle for transfers by A to T to invest for the benefit of A, but it creates succession law conflict

[32] See K Biedermann *The Trust in Liechtenstein Law* (English translation) (Alvescot Press, 1984). A short but valuable description of the Liechtenstein 'establishment', 'foundation', 'trust enterprise', and the 'trust' (*treuhanderschaft*) will be found in MG Kieber *Companies and Taxes in Liechtenstein* (Liechtenstein Verlag, 7th ed, 1992).

problems of a daunting kind should A transfer to T for the benefit of B. The German Civil Code is simply incompatible with such a concept.

From outside the constant pressure upon the civilian is to give property characteristics to fiduciary contractual management. The ability of the common law beneficiary to trace assets under fiduciary management into the hands of the wrongdoing fiduciary, or of the culpable third party transferee, has not been successful in breaching the contractual ramparts, but, aided by the text of the Hague Trusts Convention, fiduciary ownership and the segregation of fiduciary property are beginning to make significant inroads. Whether the effects of this new approach have been totally calculated – indeed, whether departure from a strictly contractual approach to property management by A for the benefit of B has been justified – are subjects upon which voices from beyond the civil law precincts should probably remain silent.

The so-called mixed jurisdictions are those that at different times in their history have been ruled by Britain and one of Spain, France or Germany, each empire in its turn introducing its laws. These jurisdictions include the offshore islands of Mauritius in the Indian Ocean, Malta in the Mediterranean, and St Lucia in the Caribbean. Each has an adopted trust law, predominantly derivative from English law though it be. However, Scotland is probably the civil law jurisdiction whose private law has longest been intertwined with the common law. In operation and effect its trust so closely follows the classical common law model that the Scottish claim that it has a pre-eighteenth century origin within Scotland's unique civil law history will no doubt always be debatable. The Canadian province of Quebec is one of the best known of the mainland 'mixed' jurisdictions, and the state of Louisiana in the United States is another. Quebec has had a *fiducie* ('trust' in the English text of the Civil Code) since statute first introduced it into the province in 1879. The Louisiana Trust Code was enacted in 1964, its roots in large part going back into the nineteenth century. Its inspiration is the Code Napoléon of 1804, but the draftsmen finally came to adopt the common law element of asset title being in the trustee. The likely costs of differing from the main elements of the trust law of the common law states of the Union were just too prohibitive.

However, perhaps one of the most intriguing mainland mixed jurisdictions is, and has long been, South Africa.[33] The old uncodified Roman–Dutch law was taken by Dutch farming immigrants, the Boers,

[33] T Honoré and E Cameron *Honoré's South African Law of Trusts* (Juta, 4th ed, 1992).

into South Africa in the seventeenth century, and with the occupation of what is now South Africa by the British in the first years of the nineteenth century, Roman–Dutch law and English trust law came to be practised side by side. Intermingling was inevitable, and the trust concept that evolved is totally unique. It later travelled to Rhodesia (now Zimbabwe), and in a weaker form to Ceylon (now Sri Lanka) also. The South African trust is a fascinating study in its own right. In 1988 that country introduced by statute a *bewind trust* as an alternative trust form.[34] The settlor retains ownership of the assets to be managed by the trustee, but assigns to the trustee all his rights of management and possibly of disposition. That assignment is irrevocable for the period of the trust's duration.[35] It is doubtful that The Netherlands will follow this innovation because for the Dutch, as previously mentioned, the *bewind* is agency. Nevertheless, the South African move reveals how close in some civilian thought is the *bewind* to the common law trust. Quebec's 1994 codification that introduced the *patrimoine d'affectation* of trust assets, and the acquisition by the trustee solely of *in personam* management and, where necessary, disposition rights, is not dissimilar thinking, though the South Africans would have had no part in 'unowned patrimony' theorising.

In some form or other, the influence of the common law has been a factor almost everywhere, so far as the trust idea is concerned. 'Analogous institutions' to the trust there may be, as the text of the Hague Convention would declare, but aside from the strong civil law traditions of contractual arrangement and property management through legal *personae* (incorporation for the common law lawyer) all have been touched by the common law trust. Wherever the British went, the trust went with them. Singapore trusts law remains the English law of the pre-European Union period, and in Malaysia it now is integrated with Muslim family law and succession law. The same intertwining of trust, family law and succession law has occurred in the one-time British territories of Nigeria, Kenya and Tanzania, and its contribution can be found in the laws of the Sudan. Egypt reflects both French and British influence. Clear traces remain from the post-1919 mandate period in modern Israeli trust law. In India in the Indian Trusts Act 1882, there was introduced by statute what is still

[34] Trust Property Control Act, Act 57 of 1988.

[35] Ibid, at pp 3–6 and 222–226.

recognised as one of the world's finest trust codes, and that code was largely copied in the Ceylonese (now Sri Lankan) trust code of 1917.[36]

The common law model is always at the elbow, the trust idea is now being introduced into legal systems where the foot of the common law ruler has never trodden. Korea, Taiwan, and mainland China[37] (excepting Hong Kong) are principal instances of this. And in mainland Europe, where the civil law began, the ratification of the Hague Trusts Convention of 1985 by Italy and then by The Netherlands has raised the immediate question of what impact recognition of foreign trusts has had, will have, and can be permitted to have upon the domestic (or internal) law of each of these countries. This is not an academic issue; the answers are being urgently sought even as this page is written. The Convention is in force.

Over the last half century, the eclectic nature of the common law trust – its applicability as a property holding device in private client estate planning and in the business and commercial fields of law – has been one of its most distinguishing features, and this generalised character is of considerable value in the contemporary world of global corporate, commercial and investment activity. Everything from public unit or mutual fund investment and corporate pension plans, to the movement of assets off corporate books into holding arrangements, and the securitisation of debt, has occupied common law trust lawyers. The whirlwind of the offshore private client trust legislation is just another development of the last 15 years. It seems not inexact to say that, while there is much that is conceptually absorbing in the new and original thinking of the mixed jurisdictions and in some of the pure civil law jurisdictions, the thrust of the trust as a worldwide and still developing concept belongs to the common law tradition.

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[36] On the Indian and Sri Lankan codes, see GW Keeton and LA Sheridan *The Comparative Law of Trusts in the Commonwealth and the Irish Republic*, (Barry Rose, 1972), Part Two, Chs III and IV respectively.

[37] The Trust Law of the People's Republic of China was adopted on 28 April 2001, and came into effect on 1 October of that year. For a review of the law, see SM Nelson and DLF Chan 'New Trust Law in China' *Trusts & Trustees*, September 2001, vol 7, issue 9, at p 12. However, whatever motivation the common law world may have provided, it will be recognised that the Trust Law has been heavily influenced by a contractual approach. Although the familiar hallmarks are present, this trust is very much as between trust creator and trustee.

(7) THE COMMON LAW TRUST

The common law tradition that originated in tenth century England has today two clearly distinct modes of expression. The first is that of the Commonwealth. This is made up of England and Wales and one-time constituent parts of the former British Empire, later the British Commonwealth. These are jurisdictions originally settled or occupied by Britain, all of which at the time of settlement or occupation received then English law. The major jurisdictions, like Canada and Australia, became fully independent of the United Kingdom only in the twentieth century. New Zealand and most of the small island territories retain a final court appeal to the Judicial Committee of the Privy Council in London, and almost all the small territories also keep in place constitutional links with the United Kingdom. Although it has declined very considerably in common law in Canada, and is beginning to decline in Australia, the influence and authority of English precedent is therefore elsewhere predominant.

The second mode of expression is that of the United States, all but one of whose 50 states received English common law early through settlement or later adopted. Trusts law everywhere is essentially a case-law supplemented in the Commonwealth by the Trustee Act facultative legislation largely reflecting a policy of settlor autonomy, and in the United States there is different state legislation on discrete matters within the law of trusts. Trust codification, an updated expression of the law, has been adopted in some states.[38] Nevertheless, although since the seventeenth century it has been independently developed and self-contained in the United States, the case-law of the two expressions remains doctrinally similar. This makes the differences of emphasis, where they occur, very evident and there are differences both as to the furtherance of settlor intent and permitted settlor control. The US states are markedly in favour of the first, so that for instance the English decision in *Saunders v Vautier* which overrules the trust creator's intent is followed in only one state. As to the second issue, particularly seen as to revocable living trusts, the latest comment[39] imposes today no limitations as to settlor retained control during his lifetime. US trusts law is also much more procedural in character. Marked and detailed differences in the taxation of trusts obviously impact upon trusts law practice, and very clear distinctions are evident here.

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[38] See *Scott on Trusts*, op cit, n 13, at para 1.10, and annual Supplements.

[39] *Restatement of the Law, Trusts, Third*, at para 25.

Frequently the doctrinal differences between these two expressions of trusts law are overlooked. Commonwealth writers retain an absorption with English appellate case-law to the exclusion of American authority, or else Commonwealth references to US law are slight and in the generalisations they make inclined sometimes to be misleading. With 49 states having separate jurisdiction in trusts law, US authorities hardly ever refer to English case-law. So it is a two-way street. Only the US law school journals will from time to time look across the Atlantic. Perhaps Canadian common law lawyers are particularly conscious of these two solitudes because as UK doctrinal thought – the one-time Canadian concern – is more and more involved with European law, and Canada given its continental position draws closer to US doctrinal emphases, the lack of in-depth awareness of each other, stemming from different world positions, social concerns and economic policies, is readily apparent. Today not only doctrinal material but trends of thought, even in trusts law, seem to go separate ways. I will return to this phenomenon in my close.

(8) THE DIRECTION OF THE TRUST IDEA IN COMING YEARS

(i) Civil law

Save for Italy and The Netherlands,[40] it is difficult to see the opportunities for much further development in the so-called 'analogous institutions' of the pure and mixed civil law jurisdictions. The mixed jurisdictions, by and large, are even less likely than the pure civil law jurisdictions to develop any generalised fiduciary property holding and management concept. Inevitably each such mixed jurisdiction is coming forward with its own peculiar historical, or otherwise locally explained, approach to the trust.

Apart from the civilian inclination to understand trust as contract, and to approximate it with the civil law's purely obligatory relationships, no two civil law jurisdictions can be described with confidence as possessing the same 'trust'. Even the *fideicomiso* of Latin America, a deliberate importation into these Latin codes, has a range of characteristics across Latin America from the entirely *in personam* to the functional (and in some cases theoretical) *in rem*. Nor could one expect otherwise. The trust as common law jurisdictions know it – a hybrid of

[40] To date these are the two civil law states, it will be recalled, that have ratified the Hague Trusts Convention.

undertaking and of property law – is simply not part of civil law thinking. It is largely irrelevant so far as the civilian is concerned; the Civil Codes respond to similar family and commercial circumstances in different ways, notably with the wide scope and applicability of a shared contract theory. Some states like Spain remain at best indifferent to the common lawyers' concept, and others like Germany are hostile to it as a potential cuckoo in the nest. Confronted with its employment, the tax authorities of jurisdictions with this reaction will often analogise at once with local conceptual thinking, however ill-fitting it is and whatever the incidental fall out in level of tax demanded. Caveat taxpayer!

However, there are positive changes on the horizon. First, Italy and The Netherlands are engaged on integrating the trust of the Hague Convention into their domestic laws. Italy is in the process of working out a domestic tax structure for trusts in Italy, and The Netherlands is studying how a segregated fund held by a titled owner can be woven into the Civil Code. Secondly, in its 1994 codification of private law Quebec, a mixed jurisdiction, sought seriously how to weave a trust (a *fiducie*) into the *Code Civil du Québec*. Both scholars and members of the Bar were involved with this issue for a number of years. It was not thought appropriate that the previous Code[41] left in doubt the position of a trustee with title to the trust assets, ie whether he is an owner subject to qualification, an administrator with some ownership powers, or some other type of manager. It was also not enough that the former Code restricted the *fiducie* to private client testamentary and *inter vivos* trusts. The change in the new Civil Code is extensive. Trusts can now be used in every business and commercial situation, and for non-charitable purposes as well as charitable purposes. However, the central conceptual change is to the adoption of a *patrimoine d'affectation*. The segregated trust fund under this Civil Code is owned by no one; the trustee for purposes of management, and the beneficiary for the purpose of acquiring his beneficial interest, have each rights *in personam* only.

The notion of a 'dedicated fund', as I will translate the French term, is not new. It was first coined by the French advocate of the trust, Pierre Lepaulle, whose writings were instrumental in 1932 in Mexico adopting the idea in its Code revision of that year. He saw the trust as an autonomous patrimony with a free destination. By free destination he meant the benefit of any person or persons, or the furtherance of any

[41] The Civil Code has possessed a *fiducie* (translated always as 'trust') since the nineteenth century.

purpose. However, it was widely conceived in Mexico after the 1932 adoption that ownership of this 'dedicated fund' had to be in someone, and ultimately it was accepted by the Mexican courts that the trust property is owned by the trustee. This meant in effect that fiduciary ownership of a segregated fund was approved. The 'dedicated fund' also appeared in 1960 in Professor René David's drafting of a civil law code for Ethiopia. This first draft introduced a *'fidéicommis'* with a *patrimoine d'affectation*. Under the pre-1994 Code provisions on the subject of the *fiducie*, Quebec's courts, and the Supreme Court of Canada in appeals from Quebec, went through the same difficult patterns of thought as to where ownership lay and what kind of owner or agent the *fiduciaire* (the trustee) might be. In 1994[42] Quebec threw common law inspired convention to the winds, and described the *patrimoine d'affectation* in its new Code, as we have seen, as unowned property.

This difference of outcome between Quebec and Mexico (also Panama and Venezuela) suggests why the *patrimoine d'affectation*, however well thought through, will not necessarily be followed by other civil law jurisdictions concerned with the trust. We have confronted a fault line in civil law theory. We have seen it before. Is fiduciary ownership a corrupt hypothesis which must be avoided by the civil law purist, or is it a logical deduction from the fiduciary substitution of the Byzantine sixth century AD? Roman law knew the *hereditas iacens* – the estate of the deceased that was unowned because the heir had not yet made an entry upon it – but it never conceived of a fund whose unowned status would endure over an indefinite period of administration. Despite the careful and informed thought that went into the Quebec Code's new *fiducie* formulation, it is difficult to believe that the unowned fund will be thought by other reformers to be a solution. The *hereditas iacens* itself has been described as 'an incomplete personification',[43] and this is the association one makes with the 'unowned' fund. Why not a *fondation* instead of an unowned fund? The lines are clearer and more understandable for client and practitioner. With Quebec's drafting personnel rejecting fiduciary ownership, was it the continued, if silent, pull of a common law North America that gave weight to the final adoption of the two patrimonies approach?

The contract analysis on the other hand, so fundamental to civil law thinking, will always dominate civilian thought. Moreover, since civil

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[42] *Supra*, n 28.

[43] WW Buckland *A Text-book of Roman Law* (Cambridge University Press, 1927), at p 306. See also the later Peter Stein edition.

law jurisdictions do not need a trust, and recognition of the common law trust in their conflict-of-law rules has no particular attraction for most civil law jurisdictions, there is no point in their modifying this analysis. In any event without code or statute change modification can produce only the characteristics of a common law trust that are *in personam*, ie associated with the promisor's undertaking. Whatever particular Civil Code is under consideration, the civilian may think, why not simply leave the civil law contract for the benefit of the promisee, or of a third party, as it is? Why rename it? The trust problem, as it is seen from the international perspective, is not how to formulate in civil law jurisdictions a domestic trust, but the least damaging manner of recognition by these jurisdictions of the common law trust. In my opinion the Hague Conference in 1985, on the subject of trusts, appreciated this. It is only those jurisdictions that are prepared to make a serious objective effort, either as a unilateral endeavour or through subscription to the international Convention, to fashion sensitive conflict-of-law rules that need to think of the impact of recognition on the recogniser's domestic law. From this point of view it is Italy and The Netherlands with their ratifications of the Hague Trusts Convention, and to some extent Switzerland with its unilateral efforts in recent years to come to terms with the common law trust, that mark the way of the future.[44]

A civil law jurisdiction that is considering whether to come to grips with recognition – and, as most European states have done, it may well choose not to do so – has to commence its task by accepting that the common law trustee/beneficiary relationship is obligatory, while the remedies for breach of that relationship, together with the beneficiary/third party relationship, are proprietary. It would perhaps be wise for that exercise to start with the Dutch publication, *Principles of European Trust Law*,[45] where it is underlined that at bottom there are two essential elements to a trust if it is to reflect both civil law and common law theory. They are: (1) a segregated fund that is not subject to the claims of personal creditors and the family members of the trustee, and that as a distinct fund can be recovered *in specie* from a wrongfully acting trustee or a knowing third party transferee from such a trustee; and (2) honest administration by the trustee. This approach dispenses with talk of relationships, and leaves the civilian, while

[44] For an insight into Swiss thinking about the difficulties presented by the common law trust, see L Thévenoz *Trusts in Switzerland* (English translation) (Schulthess, 2001).

[45] DJ Hayton, SEJJ Kortmann and HLE Verhagen (eds) *Law of Business and Finance* (Kluwer, 1999), vol 1.

content with obligatory standards of trustee conduct, also able to accept that the segregated fund takes him into proprietary considerations. I cannot help thinking that this initial conclusion helps to remove the misapprehensions right at the beginning of any civilian's inquiry.

(ii) Property management structures – a functional analysis

A legal arrangement for the management of property by one person for another, or for the accomplishment of a purpose, can be structured in a number of ways. The object of the administration is the benefit of the other person or of the purpose. Each arrangement reflects the conceptual and organisational fabric of the legal system of which it is part. There is a range or spectrum of possible devices. Obligation may be the *grundnorm* that generates management duties and enjoyment rights. Or the property under management may be the base that gives rise to duties and thus to rights. The duties and rights associated with the property management may be put upon the shoulders of the person undertaking the duties. Alternatively, those duties and rights, together with the property itself, may be personified. The property manager in the personification device is the *persona* itself. The directors of the *persona* will discharge the duties as, and in the name of, the *persona*.

At one end of the spectrum, the arrangement will take the form of personifying the duties of administration and the property (or assets) to be administered. This is the personification model. The objective the party or parties have in mind in creating the administration is a term in the constituting documents of the personification. The benefits emanating from the activities of the legal *persona* are an entitlement of the described person(s) or the purpose. Those persons or the purpose receive benefit in the form of units of value or right of action against the *persona*.

At the other end of the spectrum, the arrangement may be an agreement by the manager to administer according to initial, or continuing, instructions. This is the contractual model. Title to the assets remains in the instructing party or, possibly together with bonding or other security provision, is transferred to the manager. The object intended to benefit is one of the contracting parties, a purpose that is to be furthered, or a third party. A designated person on behalf of the purpose, or the third party, will have right of action on the agreement.

In the middle of the spectrum, between personification and agreement, is an arrangement where the manager administers a segregated fund of assets. This is the property concept. Commonly, but not necessarily, the manager is a transferee of title to those assets, and administrative

duties and powers, together with the distributive duties, are given to him coincidentally with the transfer. The person or purpose that is to be benefited is commonly said to acquire a proprietary interest in the fund, which he may assign on disposition or pledge. He may not only sue the manager for proper administration but also recover specific fund assets from wrongdoers and go ahead of the administrator's personal creditors.

Broadly therefore, looking across the spectrum from one side to the other, three possibilities exist. A personified structure, a proprietary structure, and an agreement structure. The first is monistic, the second is a relationship of manager and beneficiary each with property rights, and the third is purely obligation, ie *in personam*. The third may be expressed as an *in personam* relationship of manager and beneficiary (or enforcer of a purpose), but in the writer's opinion that relationship is a consequence. The primary feature is the obligatory undertaking of the manager. The relationship that is consequent may be between the creator of the device and the manager, or between the manager and the beneficiary (or enforcer). The ongoing relationship between creator and manager will readily pale at some point into contractual agency. Agency may be seen by some as a fourth property management device on the extreme of the agreement end of the spectrum.

The standard of conduct required of the manager is much the same as between all three (or four) structures. There is no conceptual reason for variation. Some management arrangements are seen to be more demanding of fidelity than others, but across the spectrum what is looked for is an honest (vigilant and objective) and careful discharge of duties and exercise of powers.

There are no variations on the first structure (personification); either there is a *persona* or there is not. Although the structuring problem may be approached conceptually from the two patrimonies angle, the *patrimoine d'affectation* – as the writer sees it – is a desperate effort to stay away from personification. But there can be variations on the second (the proprietary structure). These will lean towards the first, personification, such as in connection with the taxation of the structure or with the right of structure creditors to claim against the trust funds. Or they may lean the other way towards the third (the agreement structure). For example, the management creator does not drop out of the picture, but continues to play an active part in the management.

For the civilian there is a sharper line between the second (the property structure) and the third (the agreement structure), because a civil law

right is classified distinctly as one or the other. Although Byzantine Roman law was undecided, the French jurist, Robert Pothier, in the eighteenth century and Latin codification in the nineteenth century[46] that adopted his theories, helped to confirm this dichotomy. The common law has never subscribed to that hard distinction. As a result, oscillation in the common law between the second and third structures is quite possible. Among the pure civil law jurisdictions, personification (the first option) is increasingly employed, but otherwise most management arrangements are contractual and carry no special features for the event of the manager's insolvency or bankruptcy. Leaving title in the creator of the structure, or insuring against management failure, is the usual response to the latter problem. These solutions essentially arise out of the fact that the agreement is contractual, and agency has an obvious appeal. So they are squarely in the third structure at one extreme of the spectrum.

Turning to see what the civil law jurisdictions have done with the three possible structures, we look first at the jurisdictions that belong to the pure civil law tradition. Personification at the other extreme from contract would be the natural civil law alternative to property and obligation. Familiar are the *fondation* of the Latin tradition, the *stiftung* of German origin, and the *stichting* of The Netherlands. From the latter two has developed the private purpose character of the *privatstiftung* of Liechtenstein and Austria. The *Stichting Particulier Fonds* of the Netherlands Antilles is another such legal entity serving private purpose ends. This is a very new introduction. Indeed, it seems that today, seeking simplicity, civil law clients are increasingly preferring the *persona* structure, and that common law estate planners, faced with a highly tax-regulated trust, are also looking at these civil law legal entities as bypassing devices. Panama has recently made a comparable move with a private *fondation*, and it appears that it is having an appeal among North American clients who feel that the common law trust is now tied hand and foot by state tax regulation.

Although it has not been extensively used, the Liechtenstein *treuhanderschaft* is the product of a 1926 statute assertively choosing the second (property) structure. However, the codes of Central and South America in introducing for commercial usage the *fideicomiso* are markedly conscious of the civil law's obligation/property dichotomy. From jurisdiction to jurisdiction, as this paper has stressed, one can see different responses to this phenomenon. Several have apparently

[46] The adoption was first made in the Code Napoléon in 1804.

decided to remain in silence with the third (obligation) structure, or when their *fideicomiso* is compared with the US institution they appear simply not to have seen – perhaps they have been content not to tackle – the insolvency and bankruptcy problem. Code drafting is often in remarkably generalised language, but others seem to align *in personam* remedies with specific restitution (or *in rem*) results. Only two jurisdictions appear now to have taken the firm step of introducing the two patrimonies of the *fideicomisario* (the fiduciary manager). Drawing one's conclusion from the periodic code revisions, it can be said that as a broad proposition the *fideicomiso* appears to move according to the jurisdiction between the third structure (obligation) and the second (property). It is again an oscillation, this time in the civil law system.

Mixed jurisdictions do not really make a choice between property and agreement structures, at least initially. Their present day codes and statutes effectively reflect the very singular conceptual intermixture with which their particular pasts have left them. It is when they codify, or respond statutorily to economic pressures, that choices are made as to what property management arrangements shall be permitted. Some are in the position of St Lucia in the Caribbean, which looks as if it will continue to adhere to the property structure, while Louisiana somewhat reluctantly determined in the 1960s that it had no realistic choice within the US common law trust world but to do the same with its Trust Code. The Louisiana trustee holds title, whether that is legal, equitable or statutory, to the trust assets. On the other hand, as we have seen,[47] Quebec in 1994 chose to retain an existing *fiducie*[48] (translated as 'trust') that was introduced by statute in 1879 to accommodate the English of Montreal, but to change its whole character. Previously I posed this as a question, but I should go further and say that in my interpretation the 'dedicated fund', owned by no one, was a very deliberate effort to attempt to marry civil law theory with North American continental practicalities. It rationalises doctrinally the retention of the second (property) structure.

(iii) Common law

Although common law lawyers look back to Lord Nottingham LC, as the principal architect of the modern trust, and since the early nineteenth century this trust, as the traditional trust theory for the

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[47] Text to nn 27 and 42.

[48] See, n 28.

common law jurisdictions, has been firmly rooted in the second structure (property), the rationalisation of the Anglo-American trust is today more controversial than those who work with it daily appear to realise. In my opinion this controversy is not recognised as it ought to be, even in the literature.

The classic interpretation of the common law trust is that it is a property-based relationship between trustee and beneficiary. The settlor, having created the trust and transferred title in the trust assets to the trustee, has no more to do with the trust. If powers are retained, only a modicum of control remains with the settlor. The trustee may be in a contractual or tortious relationship with a third party as a result of properly carrying out his duties. The 'trust' is but a popular name for an institution that is a relationship, and not a legal person. The trustee holds title to the trust assets, and having such title either holds for another or controls the disposition and acquisition, and also the management, of the trust assets. The trust assets are not subject to the claims of the personal creditors of the trustee, nor the claims of his various family members under matrimonial property law or succession law. The beneficiary, or the Crown in supporting a charitable trust purpose, can recover *in rem* from a wrongfully appropriating trustee or a third party who took title with notice of such wrongdoing.

This classic interpretation is now called into question. In the United States there is a clearly discernible opinion that the 'trust' today should be designated a legal person. It is said that this change in the law would produce the protection for the trustee against personal liability that the limited liability corporation (and its directors) have long had. It is increasingly seen to be unfair (and unrealistic) that the trustee lacks this same protection. Corporation and trust are each property holding and administration devices. Why the difference? And these are widely heard complaints. Why should the properly acting trustee, faced with a third party claim and insufficient assets in the trust fund, be personally liable to the third party for the excess? It should not be a matter of an adequate exculpation clause, and negotiation by the trustee with the other contracting party on entering any contract, that the trustee be exposed to no personal liability. It should be clear in law, as it is with the corporation, that the third party looks to the trust fund as its recourse. The tort exposure in particular with jury-awarded damages can be horrendous. And why should the trustee not be able to borrow from the trust fund and give his own promissory note for repayment? He cannot be enabled to do this now because he cannot borrow from himself! The whole procedural process of the trustee wearing two hats, say the critics

(one hat for his responsibility for the trust affairs, and the other for his personal affairs) is far too complex in today's fast pace economies.

Indeed, as Professor Edward Halbach, the Reporter to the *Restatement of the Law, Trusts, Third* fairly underlines,[49] tax law for many years has deemed the 'trust' a legal person; practitioners frequently refer to, and speak of, the 'trust' as if it were a legal person under existing law. Although he does not foresee the forthcoming Restatement departing from the classic expression of a trust, he does see the distinction made in 'an increasing number of states' between the trustee's personal capacity and his fiduciary or 'representative' capacity – note that adjective – as part of a subtle movement towards recognition of the trust as an entity. *Restatement, Trusts, Third* can be expected to depart from previous Restatements, he says, by 'providing that third parties' suits against trustees normally result in a judgment against the trustee in a representative capacity (that is, [a suit] 'against the trust')'. In the writer's opinion, however, the notion of 'representation' can lead only to agency, which is not intended, or to personification. The fiduciary here 'represents' the *persona*.

Those who favour the personification (or 'entification') of the trust also see legal personification as producing very little change with regard to trust rules. In practical terms it would create little more, it is said, than a ripple. Here I would differ. The whole centre of the concept would change. The relationship between trustee and beneficiary goes. As an entity the trust must ultimately become another statutorily spelt out and regulated *persona*. If limitation of liability to the trust fund, save as to trustee wrongdoing, is indeed a desirable policy, and it may well be, I would much prefer to see trustee liability dealt with as an independent issue while the trust remains in the middle of the spectrum. It seems to me that personification of the trust will leave it indistinguishable in practical terms from any other entity. From it being essentially a relationship between manager and beneficiary as opposed to a *persona* comes in my opinion its uniqueness. From that relationship comes much of the flexibility which all shades of opinion associate with the trust concept. Moreover, if personification is the trust characterisation within the not so far future, I fear it will split North American trust law (including Canadian common law) from the law of the Commonwealth. I discern no enthusiasm for trust personification in the United Kingdom, Australia or New Zealand, nor have I found there any sense of its ultimate inevitability. On the other hand many

[49] (2000) 88 Cal L Rev 1877, at 1882–83.

Canadian practitioners and accountants, like their American counterparts, look upon the 'trust' as if it were already a person, and lawyers not infrequently draft in a manner which leaves this same impression.[50] The word 'trust' is creeping into Canadian legislation, replacing 'trustee', and this phenomenon is something, to be fair, which is observable even in England's Trustee Act 2000. The newly-adopted Uniform Trust Code, now commended to all the states of the United States, refers frequently to 'the trust', and this may be very significant in terms of what can be expected in the future. However, for the moment, as has been noted here, the *Restatement of the Law, Trusts, Third* is holding the line, and the saga of 'entification' is left to tomorrow in state legislation and state courts.

There is today another conception of the trust that also departs from the classic expression. While the *property-based* relationship in the classic interpretation of the trust emphasises the relationship of trustee and beneficiary to the exclusion of the settlor/trustee relationship, the view that the trust is an *agreement-based* relationship swings the emphasis away from trustee and beneficiary (and beneficiary and third party) to settlor and trustee. It has been pointed out to the present writer that in Canada old-timers drafted 'a Trust Indenture'; contemporary drafting lawyers draw 'a Trust Agreement'. But that is not quite the issue we are now considering. The trust instrument does indeed represent an agreement by the trustee to act and to do so on the basis of the duties given to him with the powers conferred upon him. The common law concept does not require a trustee's formal consent to act and to be instructed by the trust terms. This is spelt out from the conduct of the trustee, as when the testamentary trustee comes forward to act on the winding up of the deceased's estate. Although formerly called an indenture, the trust instrument is a two-party instrument that is a convenient medium for setting out the trust terms, which the trustee takes away as its orders.

An agreement-based relationship on the other hand is one where the settlor/trustee agreement remains the nature of the concept throughout the entire duration of the trust. The agreement does not launch the trust – the trustee/beneficiary relationship *is* the trust. This is the third (agreement) structure on the spectrum. The trust is essentially a deal between a trust creator and a trustee, and its main characteristic is settlor autonomy. Although it is a hybrid of undertaking and property

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[50] The Income Tax Act (Canada), RSC 1985, c 1 (5th Supp), as amended, has for many years taxed the 'trust' as an individual.

rules, the common law trust has in fact been explained as a contractual or agreement idea. Professor John Langbein's paper on 'The Contractarian Basis of the Law of Trusts'[51] is a forthright declaration of this position. He does not deny the property aspects of the common law trust, but he argues that the consequences of a tracing action can be simulated in contract law. Only historical accident prevented this from being said in the beginning. By way of contract, security for trustee performance can be supplied, and statute can provide – as it does in insurance legislation – that a fund shall be segregated from the manager's other assets. Because the trust is itself a deal between settlor and trustee, Professor Langbein contemplates enforcement by the settlor of the trustee's duties. And, if there is any contention that testamentary and personal *inter vivos* trusts are not contractual in character, he regards it as unquestionable that business, financial and commercial trusts are contractual in nature.

What is important to keep in mind in the evaluation of this thesis, however, is that the author has a limited purpose in mind. He does not deny that the trust is a hybrid, although he expresses that not as 'undertaking' but as *contract* and property. He sets out to contend that the development and future use of the trust would be easier if we saw things as they really are, namely, that the nature of the common law trust is in essence contract.

What brings the agreement-based relationship structure so much into focus today is the emergence of the private client tax-planned trust, which I discussed previously in this article, and in particular the development of the settlor/trustee relationship by the offshore jurisdictions. In this article I have attempted to show how far the offshores have taken private client trust work into the realm of an ongoing relationship between settlor and trustee at the expense of the relationship between trustee and beneficiary. It is true that the beneficiary may have a discretionary trust interest (which is non-proprietary) or be the object of a 'mere power', and that either is a pretty slight interest. It is also true that this situation has long existed. However, the contemporary move to deny the requesting beneficiary information, in addition to adding names or deleting names from the trust object list without reason given, changes everything. Without information, a beneficiary in place cannot press grievances, and if he can be removed at discretion he is hardly in a position as a practical matter to press anything. That the enforcement right may be removed

[51] (1995) 105 Yale LJ 625.

from him and given to another, as in the Cayman STAR trust, reinforces the picture of a beneficiary who has travelled from a position in Lord Nottingham's England at the centre of the trust to today's position of being a hopeful individual at the fringe of the structure.

Nor can one discount the fact that, although we speak of an agreement-based relationship between settlor and trustee as if they were parties with parity, it is more than likely that the settlor or protector will have a power to dismiss and hire trustees at discretion.

The other development offshore has been the conferment of retained control upon the settlor or his protector. No one argues, of whom I am aware, that all the powers that can be retained or given to a protector, listed as they are in the Bahamas and the Cayman trust legislation, could safely be conferred upon the same settlor or protector. These powers *in toto*, it will be recalled, enable the settlor or protector to control the exercise of all powers given to the trustees, or they confer upon the settlor or protector himself the power to make all the administrative and dispositive decisions. Nevertheless, no one knows how far those lists may be introduced in the one trust without causing a challenge. Several instruments that I have seen are breath-taking. And from whom is challenge realistically to come if the beneficiary is a cap in hand at the door?

Sham trust and illusory trust arguments show to some extent how far retained control can be carried, but essentially it is a question of judgment for the draftsman and his client how far things can be taken before the property management arrangement passes to the extreme of the spectrum, namely, agency.

The legislation of the offshores is not the legislation that is to be found in the mainland common law jurisdictions and, save for the non-charitable purpose trust, the offshore legislation is concerned only with private wealth distribution trusts, not the range of investment, holding and security trusts that are employed in commerce and financial business. Nevertheless, I am beginning to wonder whether, without a clear and shared understanding of what is a trust, the common law world is in danger of seeing its use decline. At some point use of every concept turns into abuse. If, in the absence of authority no one is in a position to say with confidence what a common law trust is, those practising can have no clear picture in their minds of the character of this case-law creature. This poses obvious exposures. A code provides a clear picture to a civilian; common law lawyers in an environment of a shifting and spasmodic case-law read the law as they

may. The only restraint upon 'pushing the envelope' yet further in response to client wishes is the sense of the practising lawyer – and who is to fault him – as to what he can 'get away with' or, to be more polite, achieve for the client.

(9) CONCLUSION

In the circumstances that I have described, different people will draw different conclusions as to where the classic trust in common law jurisdictions is heading. As the horizons of the common law trust's usage and adaptability expand, some will excitedly say – and do say – that its limits seem endless. In my opinion, however, we are fast approaching, if we have not already overtaken, the practical limits. Should the trust be recognised in trusts law as a legal person? I think it will simply be another institution like the corporation, *fondation*, or *stiftung* and, as I have earlier suggested, be soon itself the subject-matter of statute and regulation. If registration as entity comes, can regulation be far behind? Much of the case-law provided flexibility will be gone. If it is taken the other way on the spectrum, to being explained in terms of an agreement between settlor and trustee as to how property shall be administered and distributed during the lifetime of the trust, and the settlor (or his nominated protector) plays a key role in those activities, I see it clearly being characterised as contract but on the edge if not over the edge into agency. At most the trustee is then a custodian.

My emphasis in making these remarks is upon the *practical* limits to what can realistically be done with the trust. I am thinking of the common law practitioner in any part of the common law world dealing with a client whose affairs involve foreign elements, and I particularly have in mind the notary, advocate or tax official in a civil jurisdiction called upon to understand and work with, rather than ride roughshod over, a common law trust.

I would suggest that the long success of the common law trust over the centuries is due to the fact that it stands midway between incorporated property management and property management by way of contract or agency. It remains largely a case-law creature, capable of being kept doctrinally abreast of the times by a judiciary trained in inductive law-making where policy and precedent go in measured step hand in hand. The classic property-based relationship of trustee and beneficiary is known. In my view it has stood the test of time. If we choose instead to push the apparent frontiers of the concept either to legal personality or to agency without any clear idea of what it is we are pushing the

common law trust will not travel beyond common law borders. It will seem to other legal systems to be but a jumble of ideas without focus. Such a legal institution has no reliable utility. The question will always be – what is the neighbouring jurisdiction going to make of this thing? And there is little international conflict-of-law Conventions can do in a situation like this. Meanwhile, the foundation by contrast is conceptually simple to appreciate, and is reliable as to outcome. Who has problems of understanding with legal personification?

We have to face the fact that, much though we would like the common law trust to be an international property management vehicle, civilians have concluded they have no domestic need of this hybrid. That is the first strike against it. Their existing contractual and, as I say, personified management arrangements are enough. For the most part, therefore, the common law trust internationally presents an issue solely about recognition under conflict of law rules. But, if recognition is to be had in any state, that state must know what it is that is being recognised. Article 2 of the Hague Trusts Convention attempts to provide that. And for practical reasons, such as the possible movement of capital in the absence of some local 'trust' provision with the same advantages, the recognising state is ultimately likely to decide that it needs to have some domestic equivalent. This brings us back fully to the problem of the trust as a 'jumble of ideas'. How can the civilian effectively design that equivalent if there is uncertainty where the common law trust idea is to be found on the spectrum?

There is another difficulty. Because of what can be done with powers and changing the identity of intended trust beneficiaries, many civilians continue to think of the common law trust as a ready instrument for perpetrating fraud, both on others and, as civilians define it, on the law. In other words we have to be judicious as to how and when we employ the trust. We of the common law tradition have to accept that our policy decisions may not be those of others. Aggressive asset protection trusts already have a bad press, but although mandatory succession rights in civil law countries are a matter of *ordre publique* in only some such states, these rights have been indigenous to the civil law system since the eleventh century. It is a fact of life, as, since the demise of common law dower, testamentary freedom and a statutory right to judicial discretionary intervention constitute another set of values. Then there is matrimonial property. Is it to interfere in the neighbour's affairs for the 'friendly' foreign jurisdiction to offer the permanent resident of the civil law jurisdiction a sanctuary for assets comprising community property and so allow that resident to defeat spousal rights? With regard to matrimonial

property rights, mainland common law jurisdictions, while otherwise supporting a much more considerable freedom of testation, may also share that sense of frustration.

On a recent occasion, a well-known member of STEP spoke to a conference audience on how in his view we should be handling the trust with our clients. He counselled that in order to forestall 'sham' and illusory trust attacks, the lawyer should explain carefully to the would-be settlor (not 'the client') what the trust can achieve and what it cannot. The settlor's plan of things for the future, said the speaker, should be carefully reviewed with him in a two-way discussion with mutual confidence. Where there are or should be concerns, the value of independent legal advice should be brought to the settlor's attention. The trust instrument when drafted should be read by the settlor, and the draftsman discuss the instrument with the settlor clause by clause. Evidence should be left in being of this process having taken place. And the following is of especial interest in the present context. Beneficiaries' rights should be respected, and the effect of exculpation clauses, the limitation of beneficiaries' rights to information, the power to add and remove beneficiaries, and the restriction of trustees' decisional powers over assets should be carefully considered before such clauses are introduced. Once the trust is in effect, the trustees in the speaker's view *should discuss trust matters* with the beneficiary family. This can create confidence and understanding, and often head off difficulties that left untended would lead to antagonism and *impasse*.

To that excellent advice, I can only add that the overall climate should be one of open, sensitive asset management between trustees and beneficiaries with a frank desire to meet the settlor's measured intentions, intentions that are as set out in the previously considered trust instrument.

By retaining the elements of the classic trust and ensuring that the particular trust is contemplated, planned, drafted, and carried out in this manner, I believe we will do much for the future of the trust concept. It will become a concept whose borders or practical limits are known, while civil law advocates and notaries will regard it as having a respect for the 'foreigner' both in theory and operation.

If on the other hand we of the common law world are prepared to let the trust drift on with its nature and conceptual direction the subject of debate among us, while many an onshore lawyer together with the marketing jurisdictions offshore are pushing its application to ever

further limits, the concept will ultimately fold, I believe, into personification or contract or agency.

Common law codification along the lines of the Uniform Trust Code 2000 will provide some kind of focus for understanding. But that Trust Code is largely an assembly of default rules, and, save for which of those rules constitute the core elements of a trust, this is not the current worldwide problem. The Code does list core elements, and from my perspective that is good. However, we need to know very clearly how far the concept allows settlor autonomy to go, and we need to secure shape for the trust. There is no reason why we should not have in mind the contractarian view when revising trust law, but if we leave things untended so that the doctrinal uncertainties, the debate and the offshore trust continue we will probably end up having to take a route we have hitherto avoided. We will be faced, I sense, with codifying trust law. The code would likely have to be definitive, the only task being interpretation. Scope for the introduction of pre-existing case-law will exist, if at all, only when the code proves to have a *lacuna*. Is that an over-reaction? And – putting aside for the moment the difficulties with multiple national codes, civil law style – how many governments, even advised of the need for action, are going to be prepared to allot cabinet and legislative time to vetting and seeing through a daunting trust code provision? Inevitably one is brought back to locating the common law trust firmly in a place on the spectrum, and that to my mind is at the centre with the property-based trustee/beneficiary relationship structure. However, the first step is to locate the trust on the spectrum, and that can be undertaken by the legal profession now and without government.

So for the future my fear is continued drift; my hope is for a clear concept and an enlightened manner of its application. My plea is that we realise what is happening before, as I see things, it is too late.

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